

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC,
Petitioner,

v.

NUHN INDUSTRIES LTD.,
Patent Owner.

Case IPR2023-01161
U.S. Patent No. 11,358,425

PETITIONER'S SUBMISSION OF TRANSCRIPT

Pursuant to the Board's email of April 18, 2024, Petitioner submits the following transcript from the April 4, 2024 call regarding Petitioner's Motion for Supplemental Information under 42.123(b).

Respectfully submitted,

MERCHANT & GOULD P.C.

Date: April 25, 2024

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CERTIFICATION OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e), that service was made on Counsel for Patent Owner as detailed below.

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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC,
Petitioner,

- vs -

IPR2023-01161
Patent 11,358,425 C1

NUHN INDUSTRIES LTD.,
Patent Owner.

TELEPHONIC PROCEEDINGS BEFORE
BRENT M. DOUGAL, MATTHEW S. MEYERS, MEREDITH PETRAVICK
Administrative Patent Judges
12:00 p.m. to 12:32 p.m.
April 4, 2024

Job No. 6631515

REPORTED BY: Rhonda D. Tuck, RPR, CRR

1 Telephonic proceedings before Brent M. Dougal,
2 Matthew S. Myers, and Meredith Petravick,
3 Administrative Patent Judges, reported by Rhonda D.
4 Tuck, RPR, CRR, Notary Public in and for the
5 Commonwealth of Virginia at large, commencing at
6 12:00 p.m., April 4, 2024.

7
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1 (12:00 p.m., April 4, 2024)

2
3 P R O C E E D I N G S
4

5 JUDGE DOUGAL: This is a call for
6 IPR2023-01161. I am Judge Dougal. I have with
7 me Judge Petravick and Judge Meyers.

8 Who do we have for Petitioner today?

9 MR. LEACH: Good morning. This is Tom
10 Leach, with Merchant & Gould, for Petitioner,
11 and with me is Taylor Stemler, also for
12 Petitioner.

13 JUDGE DOUGAL: Thank you.

14 And who do we have for Patent Owner?

15 MR. YACKEY: Good morning. This is Scott
16 Yackey, on behalf of the Patent Owner, and
17 that's Y-A-C-K-E-Y.

18 JUDGE DOUGAL: Great. Thank you.

19 So we are here today on a request from
20 Petitioner to file a motion for supplemental
21 information pursuant to 37 CFR 42.123(b).

22 Before I kind of let either party discuss
23 in detail, just a few quick questions for
24 Petitioner. First of all, just to confirm,
25 this is still an open request, correct?

1 MR. LEACH: Correct.

2 JUDGE DOUGAL: Have you already provided a
3 copy of the declaration to Patent Owner, or is
4 that depending on this motion?

5 MR. LEACH: Nope. We provided a copy of
6 the declaration as soon as we got it signed --

7 JUDGE DOUGAL: Okay.

8 MR. LEACH: -- which would have been on --
9 I think it was on March 12th we sent it to
10 them, and that wasn't exactly when it was
11 signed.

12 It was signed on the 10th, but we had to
13 get it translated from German to English. As
14 soon as we received the translation, we sent it
15 to them.

16 JUDGE DOUGAL: Thank you. And then my
17 final question before we go into a more
18 detailed discussion is: With Mr. Funck being
19 in Germany and the difficulty you had getting
20 everything worked out, would Mr. Funck be
21 available for a deposition, a cross-examination
22 by Patent Owner, if Patent Owner desired that?

23 MR. LEACH: I don't know the answer to
24 that. I could try to find out.

25 JUDGE DOUGAL: All right. Those were my

1 preliminary questions, just to see where we
2 were at.

3 Also, one preliminary question for Patent
4 Owner would be in the email, Patent Owner, you
5 said you were opposed to this. And just to
6 confirm, Patent Owner, are you still opposed to
7 this motion?

8 MR. YACKEY: Yes, we are.

9 JUDGE DOUGAL: Okay. With that,
10 Petitioner, why don't you go ahead and explain
11 a little bit of the situation here, why you
12 want this request for late supplemental
13 information. Our rule requires that it be --
14 consideration would be in the interest of
15 justice.

16 You can address that a little bit.
17 Explain why it's relevant. Just provide us a
18 little bit background and your thoughts on this
19 motion.

20 MR. LEACH: Sure. Thank you, Judges.

21 Under 42.123, there's basically two issues
22 to submit late supplemental information. It
23 needs to show or we need to show that it
24 reasonably could not have been obtained earlier
25 and that it would be in the interest of justice

1 to provide the information.

2 So on the first point, that it couldn't
3 reasonably have been found earlier, we have
4 been digging, digging, digging, looking for
5 prior art, and in terms of Mr. Funck, we
6 started -- obviously we found the SenwaTec
7 company and the prior art. We were able to
8 locate the video and some newspaper articles,
9 and we were trying to get more information
10 about that.

11 UD-Umwelt, we reached out to them and were
12 unsuccessful. We then went back to our
13 SenwaTec contact and tried to see if they had
14 any avenue into UD-Umwelt, trying to get ahold
15 at somebody at UD-Umwelt that would have more
16 knowledge about use of the SenwaTec video or
17 how it was publicly disclosed and published,
18 and so --

19 JUDGE DOUGAL: I'm sorry. If I may
20 interrupt --

21 MR. LEACH: Yep.

22 JUDGE DOUGAL: -- just briefly. This work
23 that you're trying to find out, in your email,
24 I believe you said this started as early as
25 November 2023. Is that --

1 MR. LEACH: November 11th, 2023 would be
2 when we reached out to SenwaTec trying to
3 figure out how to get in touch with UD-Umwelt.

4 So maybe backing up a little bit more,
5 this Mr. Funck, we couldn't find him on any
6 social media pages. We tried tracking him down
7 that way, and so we went back and looked at all
8 of our records.

9 Between November 11th, 2023 and when we
10 provided the signed English declaration to
11 Nuhn, which was on March 12th, 2024, we had
12 about 40 communications back and forth with
13 people trying to get in touch with Mr. Funck or
14 somebody at UD-Umwelt.

15 And then once we located him, I think it
16 was through someone at UD-Umwelt, part of the
17 problem there was under German law, we would
18 get in touch with someone at -- or to get in
19 touch with someone at UD-Umwelt, to get their
20 contact information, our contact, whoever we
21 were talking to, would have to get permission
22 from them first for that person to provide
23 their contact information, if they had it.

24 And so there was a daisy chain of that
25 where we would talk to someone at SenwaTec, and

1 then they would have to get permission from
2 someone at UD-Umwelt, who would then have to
3 get permission from this Mr. Funck. So there
4 was just a lot of back and forth there.

5 And then we had obviously the time change
6 difference. We had the language barriers. We
7 had to get translators to communicate with some
8 of the people. And we're talking about an
9 operator of one of these vehicles that just
10 doesn't have a dog in this fight. You know,
11 something that happened over in the U.S. And
12 so that is I think a large part of why -- or
13 showing the diligence that we had in trying to
14 get this information and why it took so long to
15 do it.

16 I think also UD-Umwelt may have gone
17 through a reorganization or a bankruptcy, and
18 I'm not exactly sure on that point, but there
19 were some difficulties getting in touch with
20 them, as well, and so that kind of hits on the
21 diligence. I mean, between November 11th and
22 March of 2024, about 40 back-and-forth
23 communications trying to get in touch with this
24 person, and then obviously it takes time to
25 interview them, to draft up a declaration, to

1 exchange that, reinterview, and then work to
2 get it translated, signed, retranslated. So I
3 think that goes to the diligence.

4 The other thing I think that's important,
5 and this kind of goes to the interest of
6 justice, in October of 2023, in Patent Owner's
7 preliminary response, they challenged whether
8 the video or the screenshots of the video were
9 publicly available, whether they were
10 authentic. They went after the Lonnemann
11 declaration.

12 And so much of this is really just
13 responding to the evidence that Patent Owner
14 had said was insufficient, and so we're just
15 providing them the evidence.

16 So it's a little bit I think disingenuous
17 to say, oh, there's no corroboration, and you
18 haven't proved that that video was publicly
19 accessible, or Lonnemann doesn't have firsthand
20 knowledge. And then when we provide that
21 evidence, as soon as he received it, they then
22 object to using the evidence that they
23 complained was missing.

24 So I think for the interest of justice,
25 that I think is a big fairness point for why

1 this evidence should be allowed in.

2 Also, I think just in the interest of
3 justice we want the Board to have all the
4 information that's relevant to whether this
5 patent is valid or not, and I think that goes
6 directly to the interest of justice. And then
7 finally, I think given that Patent Owner has
8 now moved to amend, it's going to be relevant
9 for that as well.

10 So I think we can clearly show that it
11 could not have been obtained earlier. As soon
12 as we got the signed declaration, and it was
13 translated within two days, we provided the
14 English version to them, they had it, and that
15 was back March 12th of this year. And then in
16 the interest of justice, again, they're the
17 ones that put a lot of this at issue and
18 challenged this.

19 So for them to try to pick apart the
20 evidence that we did provide and argue that
21 there's not corroboration and that it wasn't
22 publicly available, and then when the evidence
23 comes in and we have evidence that shows that
24 it certainly was, that they shouldn't be heard
25 to complain that it shouldn't come in.

1 JUDGE DOUGAL: Okay. I've got a couple
2 more questions before I move to Patent Owner.
3 One is what impact this will have on the
4 schedule. And, kind of related to that,
5 whether this request is necessary or whether
6 this evidence could be submitted with the
7 Petitioner reply or opposition to motion to
8 amend.

9 I guess I'll ask that question first, and
10 then I'll go to the next question.

11 MR. LEACH: I'm sorry. Was that question
12 directed to Petitioner or Patent Owner?

13 JUDGE DOUGAL: Yes. Petitioner.

14 MR. LEACH: Oh, okay. So I don't think it
15 will have any impact on the schedule. They've
16 already addressed the video, and they could
17 address it further in the surreply.

18 I think you're correct in that we plan to
19 use this evidence in our reply and in our
20 response to the motion to amend, but out of
21 fairness, we wanted to give it to them as soon
22 as we could, to give everyone the amount of
23 time they need to evaluate it and make their
24 arguments accordingly.

25 JUDGE DOUGAL: And then on the -- onto the

1 I guess burdens -- filing supplemental late
2 information, kind of limited to the point of
3 whether this information could not have been
4 obtained earlier, is -- one of the points you
5 made in your email was that Mr. Funck would be
6 able to testify about the capability of the
7 dredging pumps, the SenwaTec pumps or devices.

8 I guess my question is, is it necessary to
9 get Mr. Funck's testimony on that? I mean,
10 don't you have declaration testimony from your
11 expert kind of on those types of issues
12 already? I guess, why is this necessary?

13 MR. LEACH: Well, I think it's necessary
14 in part because, if I'm recalling correctly, I
15 think the Board requested additional evidence
16 on some of these points, and so that's -- I
17 think that was in the institution decision. So
18 we're trying to provide some of that, and I
19 think that's with respect to liquid manure
20 maybe and some of the pumping aspects.

21 It certainly does provide background
22 evidence on these issues, for example, the
23 capability of a dredging pump and those sort of
24 things, but certainly the testimony I think is
25 relevant on those points. Not to mention, it

1 corroborates the public availability of the
2 video, and it helps to show what a person of
3 ordinary skill in the art would have understood
4 at that time, kind of on some background
5 information that a person would have
6 understood.

7 JUDGE DOUGAL: Okay. Do you want to make
8 any other comments before I turn it over to
9 Patent Owner?

10 MR. LEACH: No. I think that's all at
11 this point.

12 JUDGE DOUGAL: All right. Patent Owner,
13 I'll open it up to you. Obviously we've asked
14 a bunch of questions, and the Petitioner has
15 provided a lot of stuff, reasoning on why this
16 should be allowed. Can you let us know why you
17 oppose and why you don't think it's proper for
18 the Petitioners to submit this supplemental
19 information?

20 MR. YACKEY: Yes. I'll take the first
21 part, about not being able to be obtained
22 earlier.

23 Petitioner indicates that they started
24 searching for this additional information on
25 November 11th, 2023. However, I'll point out

1 that the Lonnemann declaration, Exhibit 1013 in
2 this IPR, was executed on June 15th, and on
3 Page 9 of that paper, included a newspaper
4 article showing a picture of Eckhard Funck in
5 the SenwaTec vehicle.

6 So Petitioner was aware of and had
7 Mr. Funck's name at least as early as June 15th
8 of 2023. Why they waited another five months,
9 until November of 2023, to begin to reach out
10 to him I think shows that there was delay on
11 the part of Petitioner and severely undercuts
12 their argument that he could not be -- you
13 know, this information could not be reasonably
14 obtained earlier.

15 Their timeline of they searched for him
16 starting in November and they got his
17 declaration in March, you know, that was only
18 four months. They waited five months to get
19 started. So I think Petitioner does not have a
20 good argument on why this could not have been
21 reasonably obtained earlier. So that's to
22 point one.

23 JUDGE DOUGAL: Are you saying that they're
24 showing the filing of the petition was
25 insufficient about the date of the video and

1 Mr. Lonnemann saying that they had a copy of
2 the document in their business records? Was
3 there something there that you think was
4 insufficient that showed they should have done
5 more at the start than when you guys first kind
6 of raised the issue or raised an argument about
7 it?

8 MR. YACKEY: So my argument is a little
9 bit different. Petitioner was outlining the
10 steps they took to try to get ahold of someone
11 to provide a declaration to support their
12 arguments about SenwaTec. And in March of
13 2024, they provided the declaration of
14 Mr. Eckhard Funck, you know, saying that they
15 could not get ahold of anyone or couldn't
16 identify him previously.

17 What I'm trying to point out is that in
18 the Lonnemann declaration that they filed as an
19 exhibit to their IPR petition, the Lonnemann
20 declaration was executed on June 15th, 2023,
21 and attached to it was a newspaper article, and
22 in that newspaper article it includes a
23 photograph of Eckhard Funck, and the caption to
24 that photograph identifies him by name.

25 So what I'm trying to argue is that

1 Petitioner was aware of and had the name of
2 Eckhard Funck all the way back in June of 2023.
3 So it seems a little disingenuous that they
4 waited from June of 2023, when they had
5 Mr. Funck's name in hand, to November of 2023,
6 to really start in earnest trying to get
7 information from him.

8 Hopefully that cleared it up.

9 JUDGE DOUGAL: Yes. That makes sense.

10 MR. YACKEY: I think, again, that shows
11 that they could have attempted or could have
12 obtained this information much earlier than
13 they did.

14 And then as far as, you know, in the
15 interest of justice, I think again what they're
16 trying to do is go far beyond the scope of the
17 four corners of SenwaTec. And to the question
18 that you raised before, why can't they rely on
19 the testimony of their expert as to the
20 capabilities of SenwaTec, you know, if they
21 absolutely need the declaration of Mr. Funck,
22 it kind of seems to show that SenwaTec on its
23 face failed to disclosed what a POSITA would
24 have known at the time.

25 So I think Mr. Funck's declaration adds

1 nothing that's not already in the record. It
2 still fails to show the use of a SenwaTec
3 vehicle or Truxor vehicle in an agricultural
4 manure lagoon and pumping agricultural manure
5 or animal manure. It only talks about sewage
6 lagoons, which are vastly different.

7 So I think, again, this doesn't tip it on
8 the scales towards being in the interest of
9 justice.

10 JUDGE DOUGAL: Okay.

11 MR. LEACH: May I respond to that? This
12 is Tom Leach.

13 JUDGE DOUGAL: Just one second.

14 Patent Owner, what would be your reply if
15 Petitioner were to submit this evidence with
16 their Petitioner reply or their opposition to
17 the motion to amend?

18 MR. YACKEY: I'm sorry. Can you say that
19 again? You kind of broke up for a second.

20 JUDGE DOUGAL: Sure. Is there a problem
21 with Petitioner filing this declaration with
22 Petitioner's reply or their opposition to the
23 motion to amend?

24 MR. YACKEY: I think we would still be
25 opposed to it. You know, it's pretty late in

1 the game for them to provide this now. As I
2 said, I don't think it addresses the issues
3 that we've raised before, but I guess if
4 they're permitted to file it, we will of course
5 respond accordingly.

6 JUDGE DOUGAL: And Petitioner --

7 MR. YACKEY: I think --

8 JUDGE DOUGAL: Go ahead.

9 MR. YACKEY: I was just going to add on,
10 at the beginning of the call you asked if he
11 would be available to sit for a deposition, and
12 I think Patent Owner would certainly push to
13 have his deposition taken in the United States.

14 Petitioner's inability at this point to
15 tell whether the declarant would be even
16 available for a deposition I think is another
17 reason why this should not be admitted at this
18 point.

19 JUDGE DOUGAL: Okay. Petitioner?

20 MR. LEACH: Sure. I'll just take them in
21 turn.

22 So on the point that in June of '23, we
23 had the newspaper article with a name, this
24 Eckhard Funck, yes, we had that newspaper
25 article. And I think in hindsight, it's really

1 easy to look back and say, oh, you should have
2 done this, you should have done that. But we
3 were looking for avenues to get more
4 information about UD-Umwelt and trying to get
5 more information.

6 I can tell that you Mr. Funck doesn't have
7 a social media page. The ones that we found
8 that had his name or a name similar we weren't
9 able to get any responses or any contact with.

10 So I don't think it's an accurate
11 statement to say, oh, not until November did we
12 start trying. We were trying all kinds of
13 avenues, along with other prior art. There's
14 other vehicles like this out there, such as I
15 think the Conver that we were trying to track
16 down.

17 So it's not like this is the only thing
18 that was sitting there on our plate to do. We
19 obviously were trying to find prior art, trying
20 to get more information prior to November 11th,
21 2023, and so I don't think it's a fair point to
22 say we just sat around for five months. During
23 that time we were also preparing a number of
24 reexams, and we prepared two more IPRs.

25 One of the points is we were trying to

1 file the 425 IPR as soon as we could too. So
2 there was some of that -- there was a lot going
3 on, obviously, during that time, but we were
4 focused on obtaining prior art and trying to
5 get more information about the prior art that
6 we had.

7 And I think what's really important, and
8 the Board mentioned this, in their Patent Owner
9 preliminary response, they attacked all this
10 evidence, right? They said, there's no
11 corroboration, that Lonnemann can't
12 authenticate it. They really put this issue
13 into focus.

14 And then I think again in their motion to
15 amend, I mean, that makes it entirely relevant,
16 because you can use more than what is in the
17 original petition, if their motion to amend is
18 granted, or to look at their claims. These are
19 new claims that they're proposing, new
20 limitations, and the Funck declaration is
21 directly relevant to that.

22 And so I think that's -- they will have a
23 chance in their surreply to respond to it.
24 They will have a reply I believe to the motion
25 to amend.

1 I think this falls in the camp of maybe no
2 good deed goes unpunished. We didn't wait
3 until the response to motion to amend. We
4 didn't wait until our surreply to try to get
5 this in. We tried to -- all the evidence that
6 we have, we were trying to get it up front,
7 give it to them as soon as possible so all
8 parties have it and can make a good decision.

9 And I think that goes directly to the
10 interest of justice here. Are these patents
11 valid or are they not. Are the amended claims
12 proper or not.

13 In terms of them wanting to take
14 Mr. Funck's declaration, I mean, we do not
15 control this man. He is a person who was
16 operating the vehicle for UD-Umwelt in
17 different farms, and he was providing the
18 service of using this machine in different
19 lagoons.

20 And so, you know, we can definitely check.
21 But I would note that they have not asked for
22 any discovery. They haven't asked to take
23 Mr. Lonnemann's deposition. While I appreciate
24 the Board raising this issue, they have not
25 asked for any depositions, not even the

1 deposition of our own expert. And so I think
2 it's kind of telling that they're not
3 interested in these depositions. This is
4 obviously evidence that we want.

5 But the IPR process allows the record to
6 go forward on declarations. So even if he is
7 not available or wouldn't agree to a
8 deposition, he provided a sworn statement that
9 I think is appropriate to use here.

10 JUDGE DOUGAL: Okay. So I understand the
11 comment that you said earlier -- this is going
12 to a different question -- about trying to be
13 up front, trying to provide this to Patent
14 Owner as soon as it became available.

15 But I'd still like maybe a clarification
16 or an additional statement from you,
17 Petitioner, on why we should -- you want to
18 move forward I guess with this motion, as
19 opposed to simply filing with your Petitioner
20 reply or opposition to amend or opposition to
21 the amended claims.

22 MR. LEACH: Are you asking if we want to
23 move forward with this motion?

24 JUDGE DOUGAL: Yeah.

25 MR. LEACH: Yeah. We'd be fine with that,

1 as well, but we think that we meet the -- we
2 were diligent, and we meet the good cause, and
3 we're just trying to get the information that I
4 think puts everyone in a position to make a
5 good decision here put before the Board.

6 JUDGE DOUGAL: Okay.

7 Petitioner or Patent Owner, any final
8 thoughts?

9 MR. YACKEY: Again, I just would reiterate
10 that it appears that Petitioner knew about this
11 gentleman for months. They sat on it. They
12 indicated to us and to the Board that they
13 didn't start looking for him until November, so
14 I think it just shows unreasonable delay on
15 their point.

16 Again, if it's allowed to come in, I think
17 we'll be pushing to get his deposition in the
18 United States. That's all I have to add at
19 this point.

20 JUDGE DOUGAL: Give me just one second.

21 Okay. We appreciate your input and your
22 obviously preparation for this call.

23 We're going to take everyone's comments on
24 advisement, and we will issue an order after we
25 receive a copy of the transcript. So unless

1 there are any further questions or other
2 issues, we will adjourn.

3 (Hearing adjourned at 12:32 p.m.)

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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2
3 I, Rhonda D. Tuck, RPR, CRR, Notary Public in and
4 for the Commonwealth of Virginia at Large, and whose
5 commission expires May 31, 2024, do certify that I was
6 the certified stenographic reporter at the
7 aforementioned proceedings and that the foregoing is a
8 true, correct, and full transcript of the proceedings
9 herein.

10 I further certify that I am neither related to
11 nor associated with any counsel or party to this
12 proceeding, nor otherwise interested in the event
13 thereof.

14 Given under my hand and notarial seal at
15 Charlottesville, Virginia, this April 12, 2024.

16
17
18 

19
20 Rhonda D. Tuck, RPR, CRR, Notary Public
21 Commonwealth of Virginia at Large
22 Notary No. 224847
23
24
25

&	332-5300 2:13	addressed 12:16	appeal 1:2
& 2:10 3:3 4:10	37 4:21	addresses 19:2	appearances 2:8 3:1
1	4	adds 17:25	appears 24:10
1013 15:1	4 1:16 2:6 4:1	adjourn 25:2	appreciate 22:23 24:21
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