UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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BAZOOKA-FARMSTAR, LLC,

Petitioner,

v.

NUHN INDUSTRIES LTD.,

Patent Owner.

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

PATENT OWNER'S REPLY TO PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64

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TABLE OF AUTHORITIES

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Cases

B/E Aerospace, Inc. v. MAG Aerospace Indus., LLC,
IPR2014-01511, Paper 104 (PTAB Mar. 18, 2016) 2, 3

Other Authorities

37 C.F.R. § 1.69(b) 5

37 C.F.R. § 42.63(b) 5

FRE 602 ..... 3, 5

PATENT OWNER'S EXHIBIT LIST

Exhibit #	*Description*
2001	Petitioner's *Ex Parte* Reexamination Requests for U.S. Patent No. 11,358,425 and U.S. Patent No. 10,974,557
2002	Decision Granting Patent Owner's Petition for an Unintentionally Delayed Priority Claim in U.S. Patent. No. 10,124,638
2003	U.S. Patent No. 4,594,006 to Depeault ("Depeault")
2004	Expert Declaration of Douglas S. Prairie
2005	Curriculum Vitae of Douglas S. Prairie and Case List
2006	Screenshots from Patent Owner's YouTube Channel of Patented Product, retrieved on 10-2-23 from https://www.youtube.com/watch?v=fEgvvq9HZkk
2007	Screenshots from Petitioner's YouTube Channel of Accused Product, retrieved on 10-2-23 from https://www.youtube.com/watch?v=3y3bSJJUOps
2008	Screenshots from Progressive Dairyman YouTube Channel of 2014 Manure Lagoon Agitation Boat Demonstration, published on 7-9-14 by Progressive Dairy, retrieved on 10-2-23 from https://www.youtube.com/watch?v=FXRS-9Ip1pE
2009	Patent Classification List for U.S. Patent No. 11,358,425, retrieved on 10-4-23 from https://patents.google.com/patent/US11358425B1/en?oq=US11358425
2010	U.S. Patent No. 4,406,413 to Houle ("Houle")
2011	U.S. Patent No. 7,833,071 to Gaither ("Gaither")
2012	U.S. Patent No. 5,176,098 to Royle ("Royle")
2013	U.S. Patent No. 9,462,741 to Puck ("Puck-II")
2014	U.S. Patent No. 9,572,297 to Puck ("Puck-III")
2015	DE2364962 to Kronseder ("Kronseder")
2016	DE3431345 to Lüllmann ("Lüllmann")
2017	CA2002619 to Depeault ("Depeault-II")
2018	U.S. Patent No. 10,118,138 to Tews ("Tews")
2019	DANIEL L. PFOST ET AL., UNIV. OF MO. EXTENSION, ANAEROBIC LAGOONS FOR STORAGE/TREATMENT OF LIVESTOCK MANURE (Oct. 2000)
2020	Screenshots from 2023 North American Manure Expo Website, retrieved on 10-2-23 from https://www.manureexpo.ca/
2021	Dictionary Definitions of "Dredging" and "Agitation", retrieved on 9-30-23 from https://en.wikipedia.org/wiki/Dredging, https://www.merriam-

	webster.com/dictionary/dredging#dictionary-entry-1, https://www.merriam-webster.com/dictionary/agitation, and https://www.lagoonpumping.com/articles-resources/agriculture-articles/manure-articles/
2022	ENVTL. PROT. AGENCY, PRIMER FOR MUNICIPAL WASTEWATER TREATMENT SYSTEMS (Sept. 2004)
2023	U.S. DEP'T AGRIC., *Agricultural Waste Management Systems*, *in* AGRICULTURAL WASTE MANAGEMENT FIELD HANDBOOK ch. 9 (Dec. 2011)
2024	Screenshot of 2023 Commercial Manure Applicator Certification, retrieved on 10-3-23 from https://elearning-dnr.iowa.gov/course/index.php?categoryid=2
2025	JOSEPH AKYEAMPONG ET AL., *Evaluation of hydraulic excavator Human-Machine Interface concepts using NASA TLX*, 44 INT'L J. OF INDUS. ERGONOMICS 374, 374–82 (2014)
2026	Screenshots of 2023 Truxor Website, retrieved on 10-1-23 from https://truxor.com/en/catalog/node/products and https://truxor.com/en/catalog/node/products-truxor-machines
2027	Screenshots of 2023 Berky (formerly SenwaTec) Website, retrieved on 10-4-23 from https://www.berky.de/en/berky-nereus-240-amphi/
2028	CHRISTIAN HAAS ET AL., *Practical Evaluation of a Control Concept for a Remote Controlled 1.8T Excavator Using a 3D Input Device*, BATH/ASME 2022 Symposium on Fluid Power and Motion Control, ISBN: 978-0-7918-8633-5, FPMC2022-88959, V001T01A012-1 thru V001T01A012-7 (2022)
2030	K. Smith et al., *Natural Crusting Of Slurry Storage As An Abatement Measure For Ammonia Emissions On Dairy Farms*, 97 Biosystems Engineering 464 (2007)
2031	Printout of Bazooka's webpage for its Wolverine Agitation Boat at: https://www.bazookafarmstar.com/equipment/wolverine-agitation-boat/
2032	Bazooka's brochure for the Bazooka Wolverine Agitation Boat from: https://www.bazookafarmstar.com/wp-content/uploads/2023/01/Cutsheet-Wolverine-1.pdf.
2033	H. Landry et al., *Physical and Rheological Properties of Manure Products*, APPLIED ENGINEERING IN AGRICULTURE, at 278 (2004)
2034	*Hydrostatic Pto's Run in Reverse*, FARM SHOW, Vol. 1 No. 5, 1977
2035	Brochure for MY2017 of Nuhn's Gen 1 Lagoon Crawler
2036	Operator's/Safety Manual for the MY2017 of Nuhn's Gen 1 Lagoon Crawler

2037	Parts Catalog for Nuhn's Gen 1 Lagoon Crawler
2038	Brochure for Nuhn's Gen 1 Lagoon Crawler
2039	Brochure for MY2018 of Nuhn's Gen 2 Lagoon Crawler
2040	Operator's/Safety Manual for the MY2019 of Nuhn's Gen 2 Lagoon Crawler
2041	Parts Book for the MY2018 of Nuhn's Gen 2 Lagoon Crawler
2042	Brochure for Gen 2 Lagoon Crawler
2043	Brochure for MY2022 of Nuhn's Gen 3 Lagoon Crawler
2044	Operator's/Safety Manual for the MY2020 of Nuhn's Gen 3 Lagoon Crawler
2045	Parts catalog for the MY2021 of Nuhn's Gen 3 Lagoon Crawler
2046	Brochure for Nuhn's Crawler X
2047	Parts Catalog for the MY2022 of Nuhn's Crawler X
2048	U.S. Provisional Patent Application No. 63/040,562 filed June 18, 2020
2049	U.S. Provisional Patent Application No. 63/104,887 filed October 23, 2020
2050	U.S. Patent Application Publication US 2021/0394571 published December 23, 2021
2051	Notice of Allowance in U.S. Application No. 17,590,125, Mailed April 22, 2022.
2052	Notice of Intent to Issue Ex Parte Reexamination Certificate, Control No. 90/019,107, Mailed November 2, 2022.
2053	Print No. 1 of Nuhn YouTube Video - "Nuhn Lagoon Crawler Unrivaled Lagoon Agitation!", accessed at https://www.youtube.com/watch?v=fEgvvq9HZk
2054	Lagoon Crawler Prototype Brochure, Aggressive Agitation
2055 **(Under Seal)**	Lagoon Crawler Sales Report - Consolidated Totals
2056 **(Under Seal)**	Lagoon Crawler Sales Report - 2014-2017.5
2057 **(Under Seal)**	Lagoon Crawler Sales Report - 2018-2019
2058 **(Under Seal)**	Lagoon Crawler Sales Report - 2020-2023

2059 **(Under Seal)**	Lagoon Crawler Sales Report - X Models
2060	Print No. 2 of Nuhn YouTube Video - "Nuhn Lagoon Crawler Unrivaled Lagoon Agitation!", accessed at https://www.youtube.com/watch?v=fEgvvq9HZk
2061	New Lagoon Crawler Demos Will Satisfy Curiosity, Canada's Outdoor Farm Show Official Show Guide for September 9-11, 2014 in Woodstock, Ontario
2062	H.Rivers, Farm show opens with a splash, The Beacon Herald(Sept. 10, 2014)
2063	B.Shypula, Transforming farming, The London Free Press (Sept.9, 2013))
2064	B.Shypula, Crawler makes manure almost sexy, The BeaconHerald (Sept. 6, 2013)
2065	30th Annual AMC Engineering Conference Brochure for May 5-7, 2015 in Waterloo, Iowa
2066	Certificate of Services Awarded to Ian Nuhn
2067	M.Beitz, Crawler is turning heads, The Beacon Herald at A2(Jan. 30, 2014)
2068	C.Elmore, Innovative Uses of Horsepower – A real crapshoot,Diesel Progress North American Edition (Dec. 2014)
2069	D.Rankin, Nuhn Industries celebrates employees at expansiongrand opening, 100th lagoon crawler unveiling, St. MarysIndependent (Aug. 7, 2015)
2070	B.Reid, Agitator has reclaimed manure lagoons around theworld, Ontario Farmer (Aug. 18, 2015)
2071	L.Cudworth, Nuhn marks major milestone, The London FreePress (Aug. 11, 2015)
2072	L.Cudworth, Marking a major milestone, The Stratford BeaconHerald (Aug. 7, 2015)
2073	J.Algie, Made-in-Sebringville lagoon crawler to be featured onDiscovery Channel, Betterfarming.com (Sept. 2, 2015)
2074	B.Reid, Self-propelled, Western Dairy Farmer (Oct. 2015)
2075 **(Under Seal)**	March 21, 2022 Email to Nuhn re: Licensing Lagoon Crawler Technology
2076	Nuhn Invoice to Eldon C. Stutsman, Inc. (Sept. 9, 2015)

(Under Seal)	
2077 **(Under Seal)**	Nuhn Invoice to Eldon C. Stutsman, Inc. (June 20, 2020)
2078 **(Under Seal)**	Nuhn Invoice to Eldon C. Stutsman, Inc. (Sept. 28, 2020)
2079	Print of Bazooka's YouTube Video - "Meet the Wolverine Agitation Boat," accessed at https://www.youtube.com/watch?v=ehAHKL442as
2080	Discovery Channel's Lagoon Crawler Feature (Sept. 3, 2015)
2081	U.S. Provisional Application No. 61/867,598 (filed August 19, 2013).
2082	US3384047 to Royle
2084	US20100144220A1 to Bailey
2087	Curriculum Vitae of Douglas S. Prairie and Case List – updated April 2, 2024 (cited here for completeness)
2088	Redline of the Amended Proposed Protective Order
2089	Amended Proposed Protective Order
2090	Intentionally omitted
2091	Dredge Yard Auger Dredger ECO200-A8-brochure
2092	Hydraulic Dredgers – Dredge Brokers LLC
2093-2098	Intentionally omitted
2099	Expert Douglas Prairie Declaration Regarding Motion to Amend (cited here for completeness)
2100	US 5,267,830 to Wickoren
2101	US 8,944,758 to Nuhn
2102	Transcript of Reidar Olofsson Deposition held on September 5, 2024
2103	Transcript of Ansgar Lonnemann Deposition held on September 6, 2024

I. INTRODUCTION

Petitioner's Opposition to Patent Owner's Motion to Exclude Evidence is not persuasive and Patent Owner's Motion to Exclude the declarations of Reidar Olofsson (EX1008) and Ansgar Lonnemann (EX1013) should be granted.

II. PATENT OWNER'S OBJECTIONS ARE PROPER

Patent Owner's objections to Mr. Olofsson's declaration (EX1008) and to Mr. Lonnemann's declaration (EX1013) are proper. The deficiencies of the declarations (EX1008 and EX1013) were not discovered until the week before the September 10, 2024 deadline for cross-examination to be used in a Motion to Exclude. These objections could not have been included in any documents prior to the Motion to Exclude as the information was unknown before their depositions. Thus, Patent Owner's Motion to Exclude (Paper 55) is timely.

Petitioner argues that "Nuhn waived its arguments by failing to make the arguments in its Patent Owner's Response." (Paper 59, 3). Petitioner is incorrect. Beginning on page 61 of Patent Owner's Response (Paper 20), Patent Owner reiterates the deficiencies of Mr. Lonnemann's declaration.

Petitioner makes a blanket assertion on page 4 of its Opposition to Patent Owner's Motion to Exclude Evidence (Paper 59) that Patent Owner's objections were not made with particularity. However, Patent Owner identified specific portions of Mr. Lonnemann's declaration that are deficient and provided lengthy

discussion of each objection in Patent Owner's response and Patent Owner's Preliminary Response. (Paper 20, 61-67; Paper 6, 65-75).

III. PUBLIC AVAILABILITY

Petitioner alleges that Nuhn conceded that Bazooka has offered Mr. Olofsson's declaration (EX1008) and Mr. Lonnemann's declaration (EX1013) to establish the public availability of the Truxor publication and the SenwaTec publication. (Paper 59, 1-2). Patent Owner never conceded this point. The Olofsson and Lonnemann Declarations go far beyond testimony on the topic of public availability, as they purport to describe the characteristics and/or uses of the Truxor and SenwaTec vehicles. Patent Owner provided citations to Paper 1 simply to identify where Petitioner cited to Mr. Olofsson's statements and Mr. Lonnemann's Statements, as required for a Motion to Exclude. (Paper 55, 3).

IV. OLOFSSON DECLARATION (EX1008)

Petitioner does not dispute the fact that Mr. Olofsson's declaration (EX1008) was drafted by Mr. Arnoldsson without any input from Mr. Olofsson himself. Petitioner argues that there is no requirement that a declarant be the draftsman of the disputed declaration. (Paper 59, 5). But the case Petitioner cites is distinguishable because Mr. Olofsson did not work with someone else (e.g., an attorney) to draft his declaration – he had no part in drafting or preparing his declaration. *See B/E Aerospace, Inc. v. MAG Aerospace Indus., LLC*, IPR2014-01511, Paper 104 at 14

(PTAB Mar. 18, 2016) (Declarant was involved in "discussions with counsel, reviewing materials, preparing notes, and several iterations of reviewing and editing those notes to produce a product, that in turn was used by another to prepare the Declaration."). Patent Owner is not arguing that Mr. Olofsson was required to draft his own declaration, but rather that his declaration is improper because the words in his declaration are Mr. Arnoldsson's and the declaration contains many statements that the witnesses does not have personal knowledge of.

Patent Owner did not cherry pick statements from Mr. Olofsson's deposition as Petitioner alleges. (Paper 59, 6). Mr. Olofsson was an engineer at Truxor. (EX1008, ¶1). He was not responsible for any aspect of Truxor's website in 2013 let alone any other period during his employment (EX2102, 213:15-25) and lacks personal knowledge of many of the facts within his declaration. (Paper 55, 5-7).

Petitioner argues that Mr. Olofsson was not required "to have been the individual who actually posted the Truxor reference online, so long as he had personal knowledge that *it was posted there*," (Paper 59, 7) but this witnesses' testimony demonstrates that he has no foundation / personal knowledge to represent what was or wasn't posted on Truxor's website in 2013 because Mr. Olofsson admits that he had no responsibility over Truxor's website (EX2102 213:9-19) or Aquaclear Water Management's website (EX2102, 221:1-13). Mr. Olofsson's lack of personal knowledge is fatal and his declaration must be excluded under FRE 602.

V. LONNEMANN DECLARATION (EX1013)

It is undisputed that Mr. Lonnemann required a German to English translator at his deposition (EX2103, 6:11-12) and that he initially prepared his declaration in German and then used software translation tools and the help of a friend to translate it into English. (EX2103, 9:14-25, 125:7-22, and 143:11-144:2). And relevant to a critical issue in this IPR, it is clear from Mr. Lonnemann's deposition testimony that he lacked a sufficient grasp of the English language to appreciate the distinction between the term "manure" (i.e., livestock waste) and human waste without the assistance of his translator. In particular, when asked "what's the German word for manure?" (EX2103, 180:6-7) there was a lengthy discussion between the questioning attorney, the witness, and the translator, which resulted in *the translator* determining that the answer was "dung," "jauche" (slurry), or "mist" (manure mixed with straw). (EX2103, 180:6-182:5).

As discussed in Patent Owner's Preliminary Response and Patent Owner's Response, the SenwaTec article (EX1027) indicates that the fecal matter that was in the sewage pond was human waste and thus the SenwaTec machine was not used in a manure lagoon. (Paper 6, 67-68; Paper 20, 63). Mr. Lonnemann's declaration statements that "UD Umweltdienste used the Amphi-King for pumping manure and agitating manure lagoons" and that "SenwaTec's amphibious vehicle products and their associated manure pumping capabilities were the subject of news publications

prior to August 19, 2013. See e.g., Exhibit A [EX1027]" (EX1013, ¶¶5-6) appear to be the result of Mr. Lonnemann's limited understanding of the English language and his informal translation efforts. This also emphasizes Mr. Lonnemann's lack of personal knowledge of the statements within his declaration related to manure, as he simply testified that vehicle appeared to be covered in "shit." (EX2103, 152:21-153:3). Mr. Lonnemann's declaration should therefore be excluded for failing to comply with 37 C.F.R. § 1.69(b) and 37 C.F.R. § 42.63(b) and FRE 602.

Petitioner submitted EX1138, Mr. Lonnemann's German Declaration, and EX1139, a translation of EX1138 with a certification from Doris Molitor that EX1138 is "a true, full and accurate German to English translation" of EX1138. However, it is too late for Petitioner to remedy the failures of Mr. Lonnemann's declaration and given his deposition testimony, the supplemental is futile.

Petitioner also alleges that Patent Owner's "pending motion to amend makes public uses and sales relevant." Paper 59. But Mr. Lonnemann's declaration was submitted in support of Petitioner's Petition for *Inter Partes* Review (Paper 1), not Patent Owner's Motion to Amend, so this argument misses the mark.

VI. CONCLUSION

For the foregoing reasons, it is respectfully requested that Patent Owner's motion to exclude evidence (Paper 55) be granted in all respects.

Dated: October 1, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type volume limitations of 37 C.F.R. § 42.24(c)(2), and that Patent Owner's Reply to Petitioner's Opposition to Patent Owner's Motion to Exclude Evidence is 5 pages or less.

The undersigned further certifies this brief complies with the typeface requirements of 37 C.F.R. § 42.6(a)(2)(ii) and typestyle requirements of 37 C.F.R. § 42.6(a)(2)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in Times New Roman 14-point font.

Dated: October 1, 2024

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. 42.6(e), I certify that on this 1st day of October, 2024, a true and correct copy of the foregoing **Patent Owner's Reply to Petitioner's Opposition to Patent Owner's Motion to Exclude Evidence** was served by electronic mail on Petitioner's lead and backup counsel at the following addresses:

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