

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC

Petitioner,

- vs. -

NUHN INDUSTRIES LTD.,

Patent Owner.

**OPPOSITION TO PATENT OWNER'S
MOTION TO EXCLUDE EVIDENCE**

Case No.: IPR2024-00004
U.S. Patent No. 11,491,835

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¹ The video size exceeds 25MB, the maximum size permitted for uploading by the P-TACTS system. A full copy of the video was later updated to Youtube.com and is available at the following link:

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Petitioner Bazooka-Farmstar, LLC (“Bazooka”) respectfully opposes Patent Owner Nuhn Industries, Ltd.’s (“Nuhn”) motion to exclude the declarations of Reidar Olofsson (EX1008), Ansgar Lonnemann (EX1013), and Dr. Eric Winkel (EX1004, EX1110, EX1111, and EX1174). Nuhn waived its objections to the declarations of Messrs. Olofsson and Lonnemann, and with respect to Dr. Winkel, its POSA definition is irrelevant and overly restrictive. Even if the Board considers Nuhn’s substantive arguments, they go to the weight of the evidence rather than admissibility. Messrs. Olofsson and Lonnemann had the requisite personal knowledge to understand and attest to the statements in their declarations, and Dr. Winkel’s declarations are admissible under Rules 403 and 702 because he is qualified in the pertinent art. Nuhn’s motion fails and should be denied.

I. MR. OLOFSSON’S AND MR. LONNEMANN’S DECLARATIONS ARE ADMISSIBLE

A. Nuhn Failed to Timely Object to the Declarations, Thereby Waiving its Objections.

Petitioner submitted EX1008 and EX1013 as part of its petition. Pursuant to 37 C.F.R. § 47.64(b)(1), objections to such evidence must be filed within ten business days of institution of trial. The only objections Nuhn filed within that timeframe were directed toward Dr. Winkel’s declaration and CV. Paper 14. Nuhn therefore waived its objections to all other evidence submitted as part of the petition, including the declarations of Messrs. Olofsson and Lonnemann.

Nuhn's other filings do not cure this clear deficiency. First, Nuhn identifies objections made in Paper 38. In Paper 38, Nuhn only objected to evidence that was submitted by Bazooka in Papers 34-37. Paper 38 at 1. EX1008 and EX1013 were submitted nearly a year earlier and are not mentioned anywhere in Paper 38. Nuhn appears to believe that these objections to the *deposition transcripts* of Messrs. Olofsson and Lonnemann somehow can be transformed into objections to their *declarations*. Nuhn identifies the transcripts by name, uses their exhibit numbers (EX1131 and EX1132), and makes objections specific to deposition transcripts. Paper 38 at 6. Nuhn's objections to the form and procedure of the depositions and deposition transcripts (37 C.F.R. §§ 42.53(a), (e), (f)(5), (f)(6)(vii)) bear no relation to Nuhn's current motion challenging the declarations. There is no plausible way to read Paper 38 as preserving the objections Nuhn is now making.

Second, even if the Board construed Paper 38 as an objection to the declarations, those objections would not be timely because they were not filed within ten business days of institution. 37 C.F.R. § 42.64(b)(1). Indeed, they are not timely even with respect to the deposition transcripts, which must be made during the deposition. 37 C.F.R. § 42.64(a). Nuhn argues that it could not have previously objected to the declarations because its "objections were discovered during deposition." Paper 54 at 3. But the PTAB already rejected this exact argument, stating that: "37 C.F.R. § 42.64(b)(1) does not provide for new objections to

evidence based on the date of related evidence.” *Qualcomm Inc. v. UNM Rainforest Innovations*, IPR2021-00377, Paper 66 at 8, 10 (PTAB July 15, 2022) (rejecting the patent owner’s argument that it timely filed its objections to a declaration after it learned of evidentiary issues during the declarant’s deposition). Even if Paper 38 contained an objection to the declarations *and* that those objections could be made within ten days of the depositions, neither of which is correct, Nuhn waited over a month after the depositions to object, well outside the ten-day window. Paper 38.

Finally, Nuhn did not object to the admissibility of the Lonnemann declaration in its POPR. Paper 9 at 64-71. Instead, Nuhn merely argued the *merits* of public availability of a related prior art reference. *Id.*

Nuhn’s failure to make timely objections prejudiced Bazooka. Because Nuhn strategically chose to withhold its objections, Bazooka only had the five business days (rather than ten business days) between Nuhn’s Motion to Exclude filing and the due date for this Response to evaluate the objections and attempt to gather new supplemental evidence. *See* 37 C.F.R. § 42.64(b)(2) (providing ten business days for serving supplemental evidence in response to an objection). For this reason alone, Nuhn’s Motion to Exclude should be denied.

B. Nuhn Improperly Attempts to Exclude Declarations Based on Arguments on the Merits Regarding Public Availability.

Nuhn’s attempt to base its current motion on a POPR argument on the merits demonstrates a second reason why its motion is improper. Nuhn concedes that

Bazooka offers the declarations of Messrs. Olofsson and Lonnemann to establish the public availability of the Truxor and SenwaTec publications. Paper 54 at 4. Nuhn's motion challenges the public availability of the documents relied upon. But a "motion to exclude is the wrong vehicle to challenge public availability, which is a substantive issue that goes to the sufficiency of the evidence, not to admissibility." *Arista Networks, Inc. v. Cisco Sys., Inc.*, IPR2016-00303, Paper 53 at 9-10 (PTAB May 25, 2017). Nuhn's attempt to undercut the public availability of the Truxor and SenwaTec references is clearly improper. Nuhn's remaining arguments go to the weight of the evidence, not its admissibility.

C. Mr. Olofsson's Declaration Is Not Hearsay and Is Based on Personal Knowledge.

Nuhn's argument that Mr. Olofsson's declaration is inadmissible because it was drafted by another is meritless. There is no requirement that a declarant also be the draftsman. *B/E Aerospace, Inc. v. MAG Aerospace Indus., LLC*, IPR2014-01511, Paper 104 at 9 (PTAB Mar. 18, 2016) (refusing to exclude declaration admittedly drafted by another). Federal Rule of Evidence 802 does not say otherwise.

Indeed, the BPAI, the predecessor body of the PTAB, stated that "it does not matter how a declaration for direct testimony is prepared, who suggested what, what changes were made, how drafts and the final declaration were transmitted to a witness for [s]ignature, etc." *Pevarello v. Lan*, Patent Interference 105,394, 2007

Pat. App. LEXIS 28, 85 U.S.P.Q.2D (BNA) 1771, 1779 (BPAI Jan. 12, 2007). Declarations are frequently prepared by another and later adopted by the witness. *See id.* (holding that “[w]e have no problem whatsoever with th[is] process.”) “If a witness signed a declaration, a good starting point is to presume that the witness agrees with the content of the declaration apart from who wrote it and how many changes were made or why they were made.” *Id.*

Here, Mr. Olofsson testified that he reviewed and agreed with the statements and the exhibits in his declaration. EX1132, 211:18-20, 233:25-234:7. Mr. Olofsson signed the declaration, thereby adopting it as his direct testimony. Mr. Olofsson’s declaration is not hearsay. Nuhn’s Rule 802 argument is meritless.

Nuhn’s argument that Mr. Olofsson lacks personal knowledge is also meritless. Nuhn’s motion cherry picks statements to suggest that Mr. Olofsson has no knowledge of the relevant facts of the Truxor publication. Nothing could be further from the truth. Mr. Olofsson testified that Truxor (EX1006) was freely available for download on Truxor’s website before the priority date. EX1008, ¶¶9-12. Nuhn has done nothing to disprove this statement.

While Nuhn attempts to discredit Mr. Olofsson’s statements related to other materials, Nuhn’s arguments are wrong. Mr. Olofsson testified that he was aware that the Truxor DM5000 was the subject of news publications before 2013. EX1132,

139:1-18. This is fully consistent with what he stated in his declaration—regardless of when he saw certain news publications. EX1008, ¶5.

Nuhn also mischaracterizes Mr. Olofsson's testimony related generally to news publications driving internet traffic to Truxor's website. Paper 54 at 6. But Nuhn never asked Mr. Olofsson about this. Instead, Nuhn limited its questioning to the traffic resulting from the specific news publication of Exhibit C. EX1132, 217:1-218:14. Once again, Mr. Olofsson's answers on this point were fully consistent with his declaration. Compare *id.*, with EX1008, ¶5. And regardless, Mr. Olofsson was not required to provide *quantifiable* facts and search results to substantiate that he *qualitatively* understood that such news publications helped to increase internet traffic to Truxor's website. EX1008, ¶5. Nuhn's exclusion arguments fall flat. At best, they go simply to the weight to be given to Mr. Olofsson's testimony, not its admissibility. And on weight, Mr. Olofsson worked at Truxor for 30 years (EX1132, 193:9-12), he was the person who researched, designed, tested, and supported the Truxor DM 5000 product and was familiar with its documentation and sales. *Id.*, 11:15-12:22, 17:4-19, 196:21-197:5.

D. Mr. Lonnemann Understood the Contents of His Declaration, Which Was Based on Personal Knowledge.

Similarly, Nuhn's arguments fail to show that Mr. Lonnemann's declaration is inadmissible. Again, at best, Nuhn's arguments simply go to the weight of the evidence, not its admissibility.

First, Nuhn portrays Mr. Lonnemann as an English novice incapable of understanding the English language. This is wrong. Mr. Lonnemann spent most of his six-hour deposition speaking and responding to questions in English *without assistance of an interpreter*. Mr. Lonnemann explained, *in English*:

So I can speak English very well with my own words. But if I have to look in this situation, there are six people in my screen, I'm first time in America, first [deposition], so it was very hard for me to understand it.

. . . [Y]ou have a little bit of dialect. So if you're the main speaker, and so it's very difficult for me to understand it. I'm very happy to hear the translation.

EX1131, 204:22-205:5; *see also Int'l Turbine Servs., LLC v. Puerto Quetzal Power, LLC*, No. 1:21-cv-1154-DAE, 2024 U.S. Dist. LEXIS 109007, at *6 (W.D. Tex. June 20, 2024) (“[I]t is common for people to want a translator in their dominant language present during depositions because of their binding impact in lawsuits.” (internal citation omitted)).

Mr. Lonnemann testified multiple times that he understands his declaration, as it is written in English. EX1131, 24:7-19, 205:22-206:22. Mr. Lonnemann further explained that he understood the importance of his statements, read his English-language declaration, and merely used supplemental translation tools to double check his English reading of the document. *Id.*, 206:7-22, 125:7-25. Specifically,

Mr. Lonnemann testified that he used DeepL² to check the translation of words that he was unsure about. *Id.*, 143:13-23. Nuhn’s suggestions that Mr. Lonnemann does not understand English because a translator was on the call are false, and frankly, offensive. *See, e.g., Int’l Turbine Servs., LLC*, 2024 U.S. Dist. LEXIS 109007 at *6-7 (“To suggest that Quinonez using a translator creates doubt that he understood the declaration he signed is ‘offensive, ignorant, and fundamentally unacceptable in civilized society.’”). Bazooka provided a translator to alleviate any dispute over the testimony. Mr. Lonnemann’s English-language skills were sufficient to read, understand, execute, and testify to his declaration. Nuhn’s argument to the contrary is baseless.

Nuhn highlights an alleged misunderstanding of the word “manure.” The precise meaning of “manure” is contested in this proceeding. Nuhn’s contention that Mr. Lonnemann did not understand the word “manure” is false. He understood it to mean “shit:”

Q. What’s your—what’s your basis for the statement that the Amphi-King was used for pumping manure?”

A. Because I saw it—because I saw the vehicle in our company. And quite frankly speaking, it was covered in shit from top to bottom.”

² DeepL is the same translation tool that the interpreter used during the deposition to check her interpretation of various words. EX1131, 156:13-158:9, 181:15-21.

EX1131, 152:21-153:3 (objection omitted). The common understanding of an average English-speaking American would show that the words “manure” and “shit” are used synonymously. Nuhn points to some purported confusion around the words: “manure,” “dung,” and the German words for “slurry” and “manure mixed with straw.” Paper 54 at 8. But none of this word salad undermines the fact that Mr. Lonnemann understood that the SenwaTec vehicles worked in manure lagoons. Indeed, there is no evidence to suggest that Nuhn’s semantic games matter at all as there is no evidence to suggest that the SenwaTec Amphi-King could not pump any of the purported alternatives Nuhn’s counsel asked Mr. Lonnemann about.

Furthermore, with this Opposition, Bazooka provides Mr. Lonnemann’s supplemental declaration, written in German and executed on September 23, 2024. EX1179. A comparison of the certified English translation (EX1180) of Mr. Lonnemann’s supplemental declaration (EX1179) with Mr. Lonnemann’s original declaration (EX1013) shows that these two declarations are the same. To the extent Nuhn has any question regarding Mr. Lonnemann’s understanding of his original English declaration (*id.*), Mr. Lonnemann’s supplemental declaration (EX1179) moots this issue.

As with Mr. Olofsson, Nuhn’s motion attempts to cherry pick statements to suggest that Mr. Lonnemann has no knowledge of the Amphi-King operating in manure. This is entirely inaccurate. “Personal knowledge can include reasonable

inferences drawn from a witness’s observations and firsthand experiences.” *United States v. Proano*, 912 F.3d 431, 441 (7th Cir. 2019). Mr. Lonnemann has personal knowledge sufficient to conclude that the Amphi-King was used in manure.

Mr. Lonnemann testified that following Amphi-King’s use in a “shit” lagoon, he saw it in a warehouse, smelled the manure, saw the manure on the vehicle, and knew what the vehicle was sent out to do in connection with UD Umwelt-Dienste’s business. EX1131, 36:16-37:2, 152:21-153:3, 154:20-155:8. Mr. Lonnemann also testified that he knew that the SenwaTec pump could pump mixtures of up to 25% solids—much greater than the commonly understood solids range of “liquid manure.” *Id.*, 200:11-201:9. Only when Nuhn’s counsel redefined “manure” as “animal excrement” and asked if Mr. Lonnemann ever watched the Amphi-King pump animal excrement did Mr. Lonnemann confirm he had not. *Id.*, 182:21-22 (“I’m trying to focus on animal excrement, you know, manure.”). Mr. Lonnemann’s testimony establishes that he had personal knowledge of the uses and capabilities of the SenwaTec Amphi-King to pump manure.

Nuhn improperly tries to exclude Mr. Lonnemann’s declaration testimony regarding the SenwaTec Amphi-King’s public uses, arguing they have no basis in IPRs, which are limited to patents and printed publication prior art. Paper 54 at 10-11. Nuhn is wrong—the Board has already held that the Lonnemann Declaration may properly be used as “supporting evidence.” Paper 12 at 42-43.

Furthermore, Nuhn’s pending motion to amend makes public uses and sales relevant. The Board has a long-standing practice to treat substitute claims akin to application claims in original prosecution, and, in doing so, considers all patentability provisions including prior public uses outlined under Section 102 and contemplated under Section 103. Indeed, the Federal Circuit confirmed this. *Uniloc 2017 LLC v. Hulu, LLC*, 966 F.3d 1295, 1304 (Fed. Cir. 2020) (“The PTAB correctly concluded that it is not limited by § 311(b) in its review of proposed substitute claims in an IPR The determination is supported by the text, structure, and history of the IPR Statutes, which indicate Congress’s unambiguous intent to permit the PTAB to review proposed substitute claims more broadly than those bases provided in § 311(b).”). Nuhn’s argument under 37 C.F.R. § 42.61 and 35 U.S.C. § 311(b) is contrary to law. Mr. Lonnemann’s testimony makes clear that the substitute claims are unpatentable in view of the public use of the SenwaTec Amphi-King. Mr. Lonnemann testified that the prior art video was provided to him and SenwaTec by UD Umwelt-Dienste before the 2013 critical date. The video confirms the Amphi-King prior art public use. The substitute claims are unpatentable.

II. DR. WINKEL’S DECLARATION IS ADMISSIBLE

Nuhn argues that Dr. Winkel’s testimony should be excluded because he is not a POSA, and “in the alternative” that his testimony should be excluded under Rule 702. Both arguments are wrong.

A. Nuhn's POSA Definition Is Wrong.

Because Nuhn argues that Dr. Winkel is not a POSA under Nuhn's improper POSA definition only (Paper 54 at 11-12), the inapplicability of Nuhn's definition is an independent and sufficient reason to deny Nuhn's motion.

Nuhn's definition requires "at least two years of experience designing agricultural equipment and knowledge of manure agitation equipment." Paper 54 at 12. Nuhn's definition "attempt[s] to constrict the 'pertinent art,' i.e., the pertinent technology, to a particular subset of individuals who use the pertinent technology, rather than the pertinent technology itself." *CaptionCall, LLC v. Ultratec, Inc.*, IPR2013-00549, Paper 71 at 11 (PTAB Mar. 3, 2015). The '835 Patent title and abstract do not even mention manure, but instead focus on the pumping and propulsion features of the "Amphibious Pumping Vehicle." EX1001, 1. The pertinent art for the '835 Patent is marine and amphibious vehicles, fluid pumps, and other fluid mechanics systems, because "anything in the [fluid mechanics] technology field would be pertinent to the inventors when considering their problem." *CaptionCall*, IPR2013-00549, Paper 71 at 12.

The pertinent art cited on the face of the '835 Patent includes marine and amphibious vehicles used outside of agricultural contexts, such as US Patent Nos. 3,384,047 (Remley), 5,176,098 (Royle), 7,833,071 (Gaither), 7,478,817 (Carrier); and US Patent App. Nos. 2010/0144220 (Bailey) and 2012/0185129 (Carrier-II),

2014/0288763 (Bennett), and 2015/0258868 (Visscher). EX1001, 1. Indeed, the PTAB already rejected Nuhn’s definition for this reason. Paper 12 at 11 (“[W]e adopt Petitioner’s level of skill as most closely aligning with the problems and solutions in the ’835 patent and prior art of record. For example, contrary to Patent Owner’s argument, the claims are not limited to livestock farmer or commercial manure applicators.”).

The problems and solutions for the circulation and mixing of fluids, and the use of marine and amphibious vehicles to access a worksite, are found in many fluid mechanics systems fields beyond agricultural equipment, as demonstrated by the prior art of record. Nuhn’s definition is wrong because it improperly restricts the field of pertinent art, and there is no reason to exclude Dr. Winkel’s testimony based on Nuhn’s erroneous POSA definition.

B. Dr. Winkel is Qualified in the Pertinent Art.

There is also no reason to exclude Dr. Winkel’s testimony under Federal Rule of Evidence 702. Dr. Winkel’s testimony meets the Rule 702 standard because he is “qualified in the pertinent art.” *See M&P Golf, LLC v. GolfTEC Enters., LLC*, IPR2016-00785, Paper 43 at 13 (PTAB Aug. 30, 2017). Dr. Winkel is a licensed professional engineer with extensive experience in marine vehicles and fluid mechanics. EX1003. Dr. Winkel has several publications and presentations in the fluid mechanics field, including “turbulence profiles,” “high shear turbulent pipe

flow,” and “drag reduction.” *Id.* Dr. Winkel has experience with “pumping applications, pump selection processes, and motors and controllers for pumping systems.” EX1004, ¶3. “Patent Owner’s argument is, essentially, that [Dr. Winkel] is not qualified sufficiently in this field because he has insufficient experience with a particular intended end use[] of the claimed invention.... [T]he same technology is used in other contexts, ... and [Dr. Winkel] has experience in those contexts.” *CaptionCall*, IPR2013-00549, Paper 71 at 13-14. To the extent Dr. Winkel is more familiar with general fluid pump and amphibious vehicle technology, and less familiar with the application of that technology in agricultural contexts, the nature of Dr. Winkel’s expertise in the pertinent art goes to the weight of the evidence, not its admissibility. *See id.*

Indeed, Dr. Winkel’s qualifications are also sufficient to meet Nuhn’s improper and irrelevant POSA definition. Dr. Winkel has two years of experience designing and testing amphibious vehicles (EX1004, ¶7), remote control systems in watercraft (*id.*, ¶8), and hydraulics systems (*id.*, ¶9). The same systems are used in agricultural equipment. *See, e.g.*, EX1014, EX1120. Furthermore, Dr. Winkel has knowledge of manure agitation equipment through studying the prior art of record.

Nuhn suggests that Dr. Winkel’s “characterizations and additions to th[e] record evidence” are improper. Paper 54 at 14. But that is precisely the purpose of an expert. An expert is not expected to know every factual detail about a case prior

to their engagement. Instead, an expert is supposed to use their expertise to explain how a POSA would understand the prior art of record. Dr. Winkel's background in fluid mechanics provides valuable insight into how a person with ordinary skill in fluid mechanics would evaluate and apply the information presented in the record.

Nuhn's argument based on Rule 403 fails for the same reason. Dr. Winkel has sufficient experience in fluid mechanics to provide testimony whose probative value outweighs any risk of prejudice. To the extent Dr. Winkel lacks experience directed at a particular application of fluid mechanics, that goes to the weight of the testimony rather than its admissibility.

III. CONCLUSION

Nuhn improperly moves to exclude evidence directed at public availability based on objections that they failed to preserve, and improperly moves to exclude expert declarations based on an incorrect reading of Rule 702. For the foregoing reasons, Nuhn's motion should be denied.

Respectfully submitted,

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CERTIFICATE 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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