

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC,

Petitioner,

v.

NUHN INDUSTRIES LTD.,

Patent Owner.

Case No. IPR2024-00098
U.S. Patent No. 11,541,708

**PATENT OWNER'S OBJECTION TO EVIDENCE
UNDER 37 C.F.R. § 42.64**

Patent Owner Nuhn Industries Ltd. (“Nuhn”) objects under 37 C.F.R. § 42.64(b)(1) and the Federal Rules of Evidence (“FRE”) to the admissibility of the following documents submitted by Petitioner Bazooka-Farmstar, LLC (“Bazooka”) in its Petition for *Inter Partes* Review of U.S. Patent No. 11,541,708 (Paper No. 10): the Expert Declaration of Eric S. Winkel, Ph.D., P.E. in Support of Petition for *Inter Partes* Review of U.S. Patent No. 11,491,835 (EX1004, the “Winkel Declaration”); the Curriculum Vitae (“CV”) of Eric S. Winkel, Ph.D., P.E., CFEI, CVFI, Senior Managing Consultant (EX1003, the “Winkel CV”); the Melnikov Translation (EX1028); Melnikov (EX 1027); the Declaration of Ansgar Lonneman (EX1013); the Declaration of Rediar Olofsson (EX1008); and the Declaration of Jan David Arnoldsson (EX1007).

The Board entered a Decision Granting Institution of *Inter Partes* Review on May 23, 2024 (Paper No. 10). Patent Owner’s objections herein are timely under 37 C.F.R. § 42.64(b)(1). Patent Owner serves Petitioner with these Objections to provide notice that Patent Owner will move to exclude the above- and below-identified exhibits as improper evidence.

I. PETITIONER'S EVIDENCE

A. Winkel Declaration (EX1004)

Patent Owner objects to the admissibility of the Winkel Declaration under FRE 401, 402, 403 702, 703 and/or 705. The Winkel Declaration shall be excluded for at least one of the following reasons:

1. The Winkel Declaration, in whole or in part, is not relevant evidence under FRE 401 and, therefore, is irrelevant and not admissible pursuant to FRE 402;
2. To the extent the Winkel Declaration, in whole or in part, is relevant, it is not admissible under FRE 403 because its probative value is outweighed by a danger of prejudice, confusing the issues, or risk misleading the Board;
3. In view of Dr. Winkel's averments in the Winkel Declaration (EX1004) and Dr. Winkels' averments in the Winkel CV (EX1003), Dr. Winkel is not qualified to opine as a person having ordinary skill in the art ("POSITA") and, therefore, the Winkel Declaration and Dr. Winkels' opinions are inadmissible under FRE 702(a);
4. In view of Dr. Winkel's averments in the Winkel Declaration (EX1004) and Dr. Winkels' averments in the Winkel CV (EX1003),

Dr. Winkel opines on facts or data that he has not personally observed and does not have personal working knowledge of or education in livestock manure handling, livestock manure and/or fluid pumps and, therefore, the Winkel Declaration is inadmissible under FRE 703; and,

5. In view of Dr. Winkel's averments in the Winkel Declaration (EX1004), Dr. Winkel opines with conclusory averments based on underlying facts or data that have not been disclosed or are not in evidence and, therefore, the Winkel Declaration is inadmissible under FRE 705.

Objections Under FRE 401, 402, 403, 702, and/or 703

Dr. Winkel opines that a POSITA “would have had a bachelor’s degree in mechanical engineering or similar field, and two years of professional experience in marine and off-road vehicles. A POSA would have had a working knowledge of livestock manure handling, fluid pumps, **and** selecting pumps for various applications, including livestock manure. Lack of work experience can be remedied by additional education, and vice versa.” EX1004, ¶62 (with emphasis). Notably, in the Decision Granting Institution of *Inter Partes* Review, the Board opines that “Petitioner’s definition allows for ‘those most familiar with manure agitation equipment – livestock farmers and the manure applications business’ through the definition’s statement that one of ordinary skill in the art would have

‘had a working knowledge of fluid pumps and livestock manure’ and that ‘[l]ack of work experience can be remedied by additional education, and vice versa.’” Paper 10, 9-10.

The Winkel CV (EX1003), however, states:

Dr. Eric Winkel has more than 15 years of experience as a forensic consultant specializing in maritime matters. He has expertise in marine accident investigation and reconstruction, vessel and component design analysis, intellectual property matters, and has worked with a variety of other automotive and recreational products. Dr. Winkel has performed hundreds of accident investigations and accident reconstructions involving watercraft ranging from personal watercraft to large commercial vessels. He has extensive experience designing and executing experimental research to evaluate full-vehicle/vessel, system-level, and component-level performance on everything from watercraft to motorcycles to passenger vehicles.

Dr. Winkel also has expertise and experience in fluid mechanics, acoustics, dynamics and vibrations, structural analysis, and fracture mechanics along with other mechanical and marine engineering disciplines. He is a NAFI-certified fire investigator and has conducted numerous investigations of fire and explosion events.

The averments by Dr. Winkel in the Winkel CV do not suggest that Dr. Winkel has any experience that would have provided him with a “working knowledge of livestock manure handling, fluid pumps” or relevant education in livestock manure handling or fluid pumps. *See e.g.*, EX1004 and EX1003.

The Winkel CV does not recite the words “livestock” or “pump(s),” let alone reference or suggest Dr. Winkel as having any experience that would provide him with a working knowledge of “livestock manure handling,” “livestock,”

“agriculture,” or “farm/farming.” Based on the averments of the Winkel

Declaration (EX1004) defining a POSITA in view of the Winkel CV (EX1003), Dr. Winkel excludes himself as a POSITA.

For at least the reasons set forth above, Dr. Winkel does not satisfy the Patent Owner’s definition of a POSITA either. *See* Paper 7, 22-23 (defining a POSITA as a “livestock farmer or commercial manure applicator familiar with manure agitation equipment or *an engineer with at least 2 years of experience designing agricultural equipment and knowledge of manure agitation equipment*”).

Dr. Winkel does not have the requisite background to qualify him as a POSITA under either parties’ definition. Dr. Winkel’s Declaration must therefore be excluded from the record entirely or, at a minimum, any opinion of Dr. Winkel relative to what a POSITA would have understood or known at the time of invention should be excluded from the record. *Kyocera Senco Indus. Tools Inc. v. Int’l Trade Comm’n*, 22 F.4th 1369, 1377 (Fed. Cir. 2022) (“And to be qualified to offer expert testimony on issues from the vantage point of an ordinarily skilled artisan in a patent case, an expert must at a minimum possess ordinary skill in the art.”).

Objections Under FRE 401, 402, 403, 602, 703 and/or 705

In the Winkel Declaration, Dr. Winkel opines on matters such as Manure Management (*see e.g.*, EX1004, ¶¶65-67) and Manure Characteristics and Physical

Properties (*see e.g.*, EX1004, ¶¶68-77), but according to the Winkel CV, Dr.

Winkel has no working or personal knowledge relative to manure management, manure care, or manure generally. In the Winkel Declaration, Dr. Winkel opines on matters such as Manure Agitation and Pumping (*see e.g.*, EX1004, ¶¶78-94) and Hazards and Safety Aspects of *Manure Management Systems* (*see e.g.*, EX1004, ¶¶95-102), but according to the Winkel CV, Dr. Winkel has no working or personal knowledge relative to manure agitation and pumping or hazards and safety aspects of *manure management systems*.

For at least these reasons, Dr. Winkel's Declaration should be excluded from the record entirely or, at a minimum, any opinion of Dr. Winkel relative to Manure Management, Manure Characteristics and Physical Properties, Manure Agitation and Pumping, and Hazards and Safety Aspects of Manure Management Systems should be excluded. Dr. Winkel does not have the requisite personal knowledge and/or does not disclose the underlying facts and information forming his opinions.

B. Winkel CV, EX1003

The Winkel CV shall be excluded from the record for the same reasons as set forth above.

C. Melnikov Translation (EX1028), Melnikov (EX 1027), Declaration of Ansgar Lonneman (EX1013), Declaration of Rediar Olofsson (EX1008), and Declaration of Jan David Arnoldsson (EX1007)

Patent Owner objects to the admissibility of Melnikov Translation (EX1028), Melnikov (EX 1027), Declaration of Ansgar Lonneman (EX1013), Declaration of Rediar Olofsson (EX1008), and Declaration of Jan David Arnoldsson (EX1007) (“the Exhibits”) pursuant to:

- (1) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.62(a), and FRE 1002, None of the Exhibits are originals;
- (2) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.62(a), and FRE 1003, the Exhibits are not true and accurate copies of the original;
- (3) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.62(a), and FRE 403, the Exhibits are duplicative and/or likely to confuse the issues at trial;
- (4) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.62(a) and FRE 802, because the Exhibits are hearsay evidence;
- (5) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.62(a), and FRE 803(6)(d), FRE 902(12), because the Exhibits do not contain a proper oath;
- (6) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.63(b) and FRE 701, because the averments by the declarants in the Exhibits require specialized knowledge within the scope of FRE 702;

- (7) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.63(b) and FRE 702 because the Exhibits contain expert opinions, without proper qualification of the declarant as an expert;
- (8) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.63(b) and FRE 703 because the Exhibits do not identify the facts, data or information relied on in making the purported declaration;
- (9) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.62(a) and FRE 603 because the Declarations do not contain the oath required under FRE 902(12); and/or,
- (10) 37 C.F.R. § 42.61(a), 37 C.F.R. § 42.62(a), and FRE 901, the Exhibits are produced without any admissible evidence establishing each respective Exhibit is what it purports to be.

Dated: June 5, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. 42.6(e), I certify that on this 5th day of June 2024, a true and correct copy of the foregoing **PATENT OWNER'S OBJECTION TO EVIDENCE UNDER 37 C.F.R. § 42.64** was served by electronic mail on Petitioner's lead and backup counsel at the following addresses:

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