

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 MOTION TO EXCLUDE EVIDENCE
PURSUANT TO 37 C.F.R. § 42.64**

TABLE OF CONTENTS

I. INTRODUCTION	1
II. IDENTIFICATION OF EVIDENCE AND OBJECTIONS.....	3
III. OLOFSSON DECLARATION (EX1008)	5
A. Olofsson’s Declaration is Inadmissible Under FRE 802	5
B. Olofsson’s Declaration is Inadmissible Under FRE 602	5
IV. LONNEMANN DECLARATION (EX1013)	6
A. Lonnemann’s English Declaration is Inadmissible Because it is Not a Certified Translation	6
B. Lonnemann’s Declaration is Inadmissible Under FRE 602	7
C. Objections Under 37 C.F.R. § 42.61, 35 U.S.C. § 311(b), and FRE 401/403	8
V. WINKEL DECLARATIONS (EX1004 and EX1079)	9
A. Winkel is Not Qualified as a POSITA under Patent Owner’s Definition	9
B. Winkel Offers Opinions Outside the Scope of His Understanding and Expertise in Violation of FRE 702 and FRE 403	10
VI. PUCK AND SUNDSTROM DECLARATIONS (EX1099-1101).....	12
A. Puck and Sundstrom Declarations Contain Inadmissible Opinion Testimony From Lay Witnesses	12
B. Objections Under 37 C.F.R. § 42.61, 35 U.S.C. § 311(b), and FRE 402/403	14
C. Sundstrom’s Statements About Lindstrom’s Boat Are Inadmissible Under FRE 602 and 402/403	15
VII. CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
1. Statutes	
35 U.S.C. § 102(a)(1).....	4, 5
35 U.S.C. § 311(b)	3, 4, 8, 14
2. Other Authorities	
37 C.F.R. 42.6(e), I	18
37 C.F.R. § 1.69	3, 6
37 C.F.R. § 1.69(b)	7
37 C.F.R. § 42.6(a)(2)(ii)	17
37 C.F.R. § 42.6(a)(2)(iii).....	17
37 C.F.R. § 42.24(a)(1)(v)	17
37 C.F.R. § 42.61	8, 14
37 C.F.R. §42.61(a).....	4, 8, 14
37 C.F.R. § 42.63(b)	3, 7
37 C.F.R. § 42.64(c).....	1
37 CFR § 42.64	3
FRE 401, 402, 403, 702, 703	4
FRE 401/403	8
FRE 402	4
FRE 402/403	14, 15
FRE 602	<i>passim</i>
FRE 602 and 402/403	15

FRE 701	4
FRE 701 and 702.....	3, 14
FRE 702	4, 10
FRE 702 and 403.....	10, 12
FRE 802	3, 5

LIST OF PATENT OWNER’S EXHIBITS

<i>Exhibit #</i>	<i>Description</i>
2001	Petitioner’s <i>Ex Parte</i> 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 (“Nuhn Lagoon Crawler YouTube Video Screenshots”)
2007	Screenshots from Petitioner’s YouTube Channel of Accused Product, retrieved on 10-2-23 from https://www.youtube.com/watch?v=3y3bSJJUOps (“Bazooka Wolverine YouTube Video Screenshots”)
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 (“Progressive Dairyman YouTube Video Screenshots”)
2009	’708 Patent from Google Patents (with Patent Classification List, retrieved on January 23 2024 from https://patents.google.com/patent/US11541708B2/en?q=11%2c541%2c708+ (“’708 Patent on Google Patents”)
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) (“MU Guide for Anaerobic Manure Lagoons”)

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/ (“‘Dredging’ and ‘Agitation’ Dictionary Definition”)
2022	ENVTL. PROT. AGENCY, PRIMER FOR MUNICIPAL WASTEWATER TREATMENT SYSTEMS (Sept. 2004) (“EPA Municipal Lagoon Primer”)
2023	U.S. DEP’T AGRIC., <i>Agricultural Waste Management Systems</i> , 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 (“Commercial Manure Applicator Certification”)
2025	JOSEPH AKYEAMPONG ET AL., <i>Evaluation of hydraulic excavator Human-Machine Interface concepts using NASA TLX</i> , 44 INT’L J. OF INDUS. ERGONOMICS 374, 374–82 (2014) (“Excavator Human-Machine Interface Concepts”)
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., <i>Practical Evaluation of a Control Concept for a Remote Controlled 1.8T Excavator Using a 3D Input Device</i> , BATH/ASME 2022 Symposium on Fluid Power and Motion Control, ISBN: 978-0-7918-8633-5, FPMC2022-88959, V001T01A012-1 thru V001T01A012-7 (2022) (“Practical Evaluation of a Control Concept”)
2029	Timeline Showing Bazooka’s Post-Grant Challenges
2030	January 18, 2023 District Court Order Granting Motion to Lift Stay
2031	Reexamination History of U.S. Patent No. 11,358,425
2032	Screenshots from YouTube of SenwaTec video, retrieved on January 15, 2024 from https://www.youtube.com/watch?v=ecnlfMf7CH4&t=1s (“SenwaTec YouTube Video Screenshots”)
2033	Reexamination History of U.S. Patent No. 10,974,557

2034	McCaslin, Drive Sprockets and Track Drives, TexasFinalDrive.com, https://info.texasfinaldrive.com/shop-talk-blog/drive-sprockets-and-track-drives (last accessed Feb. 25, 2024) (“Drive Sprockets and Track Drives”)
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	Lagoon Crawler Sales Report - 2020-2023

(Under Seal)	
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 Beacon Herald (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 expansion grand opening, 100th lagoon crawler unveiling, St. Marys Independent (Aug. 7, 2015)
2070	B. Reid, Agitator has reclaimed manure lagoons around the world, Ontario Farmer (Aug. 18, 2015)
2071	L. Cudworth, Nuhn marks major milestone, The London Free Press (Aug. 11, 2015)
2072	L. Cudworth, Marking a major milestone, The Stratford Beacon Herald (Aug. 7, 2015)
2073	J. Algie, Made-in-Sebringville lagoon crawler to be featured on Discovery 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
2083 (Under Seal)	Declaration of Ian Nuhn
2084	US20100144220A1 to Bailey
2085-2086	Intentionally omitted
2087	Curriculum Vitae of Douglas S. Prairie and Case List – updated April 2, 2024
2088	Patent Owner's Proposed Protective Order - Redline
2089	Patent Owner's Proposed Protective Order - Clean
2090	Intentionally omitted
2091	Dredge Yard Auger Dredger ECO200-A8-brochure
2092	Hydraulic Dredgers – Dredge Brokers LLC
2093-2096	Intentionally omitted
2097	H. Landry et al., <i>Physical and Rheological Properties of Manure Products</i> , Applied Engineering in Agriculture, at 278 (2004)
2098	Intentionally omitted
2099	Declaration of Douglas S. Prairie in Support of Patent Owner's Response
2100	US 5,267,830 to Wickoren
2101	US 8,944,758 to Nuhn
2102	K. Smith et al., <i>Natural Crusting Of Slurry Storage As An Abatement Measure For Ammonia Emissions On Dairy Farms</i> , 97 Biosystems Engineering 464 (2007)
2103	Printout of Bazooka's webpage for its Wolverine Agitation Boat at: https://www.bazookafarmstar.com/equipment/wolverine-agitation-boat/

2104	Bazooka's brochure for the Bazooka Wolverine Agitation Boat from: https://www.bazookafarmstar.com/wp-content/uploads/2023/01/Cutsheet-Wolverine-1.pdf .
2105	Cornell Redi-Prime Pump Brochure

I. INTRODUCTION

Patent Owner Nuhn Industries Ltd. (“Patent Owner”) respectfully moves under 37 C.F.R. § 42.64(c) to exclude (i) the declaration of Reidar Olofsson (EX1008); (ii) the declaration of Ansgar Lonnemann (EX1013); (iii) the declarations of Petitioner’s expert, Dr. Eric Winkel (EX1004 and EX1079); and the declarations of Benny D. Puck and Ernie Sundstrom (EX1099-1101).

Olofsson’s declaration (EX1008) discusses the Truxor vehicle and associated publications (EX1006, 1009, 1024-1026) and pertains to Grounds 2 and 6 of the Petition. Olofsson testified during his deposition that he signed a declaration (EX1008) that was drafted by a different witness – Jan David Arnoldsson (Olofsson’s boss at the time) – and that the declaration includes information that Olofsson does not have personal knowledge of. Olofsson’s declaration (EX1008) is therefore improper and should be excluded because the statements contained in his declaration are not his own, they are Arnoldsson’s, and Olofsson lacks personal knowledge of the subject matter discussed in his declaration as revealed by his deposition testimony.

Lonnemann’s declaration (EX1013) discusses the SenwaTec vehicle and associated publications (EX1012, 1029-1031) and pertains to Grounds 3 and 7 of the Petition. Lonnemann testified during his deposition that he originally drafted his declaration in German and then used software translation tools and the help of a

colleague to translate his declaration into English. Lonnemann required a translator during his deposition, testified to his limited understanding of the English language, and therefore was not qualified to translate his German declaration into English. Lonnemann's declaration (EX1013) is therefore defective and should be excluded because it was not translated by a qualified German to English translator. This is not just a technicality because Lonnemann's declaration uses the word "manure" and it is clear from Lonnemann's deposition testimony that he did not understand that this term refers to livestock waste as opposed to human waste. EX1131, 180:6-183:2.

Winkel's declarations (EX1004 and EX1079) are cited throughout Petitioner's filings and pertain to Grounds 1-8 of the Petition. Winkel does not have the qualifications necessary to be considered an expert because he has no experience with manure agitation equipment. Further, Winkel offers opinions on the properties of liquid manure and the capabilities of liquid manure pumps, which he has no experience with or expertise in. Thus, he is not qualified to offer opinions related to these matters. Winkel's declarations (EX1004 and EX1079) are improper and should be excluded because he is not a POSITA under Patent Owner's definition and because he offers opinions and testimony that falls outside the scope of his qualifications as an expert.

Finally, the fact witness declarations of Puck and Sunstrom, which Petitioner

filed to support its Reply (Paper 29) to Patent Owner's Response, contain expert opinions that cannot be advanced by lay witnesses and should therefore be excluded under FRE 701 and 702.

II. IDENTIFICATION OF EVIDENCE AND OBJECTIONS

In accordance with 37 CFR § 42.64 and the Patent Trial and Appeal Board Consolidated Trial Practice Guide 79 (Nov. 2019), the Patent Owner identifies each objection to the evidence and the basis for the objection in the chart below.

<u>Exhibit</u>	<u>Objection Made</u>	<u>Basis for Objection</u>
EX1008 Olofsson Declaration Cited in Petition (Paper 1)	Patent Owner's Objection to Evidence (Paper 12)	FRE 602 FRE 802 Lack of personal knowledge and hearsay
EX1013 Lonnemann Declaration Cited in Petition (Paper 1)	Patent Owner's Objection to Evidence (Paper 12)	37 C.F.R. § 1.69 37 C.F.R. § 42.63(b) 35 U.S.C. § 311(b) FRE 602 FRE 802 Improper translation, lack of personal knowledge, and hearsay
EX1004 and Winkel Declaration, Dated November 3, 2023 Cited in Petition (Paper 1) EX1079 Winkel Declaration, Dated November 6, 2024 Cited in Petitioner's Reply to Patent Owner's Response	Patent Owner's Objection to Evidence (Paper 12) Patent Owner's Objection to Evidence (Paper 31)	37 C.F.R. §42.61(a), FRE 401, 402, 403, 702, 703 and/or 705 Dr. Winkel is not qualified to opine as a POSITA and Dr. Winkel offers opinions on facts and data that he has not personally observed, lack personal knowledge about, and that is outside the scope of his expertise

(Paper 29)		
EX1099 Declaration of Benny D. Puck, Dated July 31, 2024 Cited in Petitioner's Reply to Patent Owner's Response (Paper 29)	Patent Owner's Objection to Evidence (Paper 31)	37 C.F.R. § 42.61(a), 37 C.F.R. § 42.62(a) and FRE 701, declarations include opinion testimony from a lay witness that is based on scientific, technical, or other specialized knowledge within the scope of FRE 702.
EX1100 Declaration of Ernie Sundstrom, Dated August 1, 2024 Cited in Petitioner's Reply to Patent Owner's Response (Paper 29)		37 C.F.R. §42.61(a), 37 C.F.R. §42.62, 37 C.F.R. §42.104(b)(2), 35 U.S.C. § 311(b) and FRE 402 or 403, declarations are being used as evidence of prior public use or sale of a product, which is irrelevant and prejudicial.
EX1101 Declaration of Benny D. Puck, Dated August 28, 2024 Cited in Petitioner's Reply to Patent Owner's Response (Paper 29)		37 C.F.R. § 42.61(a), 37 C.F.R. § 42.62(a) and FRE 602, statements made in the declarations are without personal knowledge.

Petitioner filed the Olofsson declaration (EX1008), the Lonnemann declaration (EX1013), and the first Winkel declaration (EX1004) with the Petition (Paper 1). Petitioner relies on Olofsson's declaration to support the statement "All these publications are prior art under at least 35 U.S.C. § 102(a)(1) because they published and were publicly accessible before the effective filing date of the '835 Patent" with respect to the DM5000 product of Truxor. Paper 1, 36. Petitioner

relies on Lonnemann’s declaration to support the statement “SenwaTec is prior art under at least 35 U.S.C. § 102(a)(1) because SenwaTec published and was publicly accessible before the effective filing date of the ‘835 Patent.” Paper 1, 37. Petitioner filed the second Winkel declaration (EX1079), the two Puck declarations (EX1099 and EX1101), and the Sundstrom declaration (EX1100) in support of statements throughout Petitioner’s Reply to Patent Owner Response (Paper 29, 30) arguing that the combination of Puck with Bryham and/or Manure-Manager (Grounds 4-5 and 8) was obvious.

III. OLOFSSON DECLARATION (EX1008)

A. Olofsson’s Declaration is Inadmissible Under FRE 802

Olofsson testified in his deposition that he simply signed a declaration that was prepared by Arnoldsson, who was Olofsson’s boss at the time. EX1110, 211:5-17. Olofsson further admitted that he did not collect or prepare the exhibits to his declaration because Arnoldsson did that too. EX1110, 211:21-22. Because EX1008 contains the statements of Arnoldsson rather than Olofsson, it should be excluded as inadmissible hearsay under FRE 802.

B. Olofsson’s Declaration is Inadmissible Under FRE 602

Olofsson’s declaration (EX1008) is also inadmissible under FRE 602 because Olofsson lacks personal knowledge of the material included therein. Olofsson states in his declaration that “Truxor’s DM 5000 and DM 4700

amphibious vehicle products and their associated dredging capabilities were the subject of news publications prior to August 19, 2013” (EX1008, ¶5) and cites to Exhibit C (EX1008, 36-41). However, when asked about Exhibit C during his deposition, Olofsson admitted that the first time he saw this document was “when Mr. Arnoldson [Truxor’s CEO] come with this document to me.” EX1110, 216:14-23. When asked during his deposition if he had “any facts to support that [news publications] increased traffic to Truxor’s website,” Olofsson testified “Facts, no, I -- nope. I haven’t done a search searching about that.” EX1110, 218:9-14.

IV. LONNEMANN DECLARATION (EX1013)

A. Lonnemann’s English Declaration is Inadmissible Because it is Not a Certified Translation

Lonnemann required a German to English translator at his deposition. EX1109, 6:11-12. During his deposition, Lonnemann testified that he initially wrote his declaration (EX1013) in German, which he describes as his main language, and later translated it into English using software translation tools (Google Translate and DeepL) and the help of a colleague. EX1109, 9:14-25, 125:7-22, and 143:11-144:2. Lonnemann used these software translation tools and the help of a colleague because he does not have a full grasp of the English language, which he admitted to during his deposition. *Id.* These facts trigger 37 C.F.R. § 1.69, which explains that if the declarant “cannot understand English, the

oath or declaration must be in a language that such individual can understand.” Because of Lonnemann’s shortcomings with the English language and the informal efforts used to translate his declaration, EX1013 must be excluded under 37 C.F.R. § 42.63(b) and 37 C.F.R. § 1.69(b). Failure to comply with translation rules has real consequences in this IPR due to Lonnemann’s apparent misunderstandings between the words “manure” and “human waste,” as discussed below.

B. Lonnemann’s Declaration is Inadmissible Under FRE 602

It is clear from Lonnemann’s deposition testimony that he was not familiar with the English word “manure” and has no personal knowledge to accurately make the statements contained in his declaration. For example, when asked in his deposition “What’s your -- what’s your basis for the statement that Amphi-King was used for pumping manure?” Lonnemann responded by stating Mr. Funck had been using the SenwaTec vehicle in “floating fecal matter” or “Scheisse” – the German word for human waste. EX1109, 152:21-154:6. Upon further questioning, Lonnemann was asked “what’s the German word for manure?” EX1109, 180:6-7. After a lengthy back and forth between the questioning attorney, the witness, and the translator, the answer was “dung,” “jauche” (slurry), or “mist” (manure mixed with straw). EX1109, 180:6-182:5. After that clarification, Lonnemann was asked “So have you -- have you ever seen the [SenwaTec] Amphi-King in -- in dung or mist?” and he responded “No, not in life, no.” EX1109, 182:7-9. Then after

referencing the video [EX1028] attached as Exhibit B to his declaration, he was asked “I’m asking -- I’m trying to focus on animal excrement, you know, manure ... Have you ever seen [SenwaTec] pump that?” and Lonnemann’s response was again “No.” EX1109, 182:21-183:2. Lonnemann’s declaration is therefore inadmissible under FRE 602 because he did not understand the English meaning of the term “manure” at the time he translated his declaration and he lacked personal knowledge for his statements that the SenwaTec vehicle was used in manure.

C. Objections Under 37 C.F.R. § 42.61, 35 U.S.C. § 311(b), and FRE 401/403

Petitioner inappropriately utilizes Mr. Lonnemann’s declaration to make invalidity arguments based on evidence of prior public use, which is ineligible for consideration in an IPR proceeding under 35 U.S.C. § 311(b). For example, Mr. Lonnemann states in his Declaration that “UD Umweltdienste used the Amphi-King for pumping manure and agitating manure lagoons” (EX1013, ¶5) and cites a series of screenshots allegedly from a video made by UD Umweltdienste, which are attached to his declaration as Exhibit B. EX1013, ¶ 15; EX1028. But the UD Umweltdienste video (EX1028) has not been asserted as prior art in this IPR proceeding so Mr. Lonnemann’s statements about prior public use are irrelevant and/or prejudicial and should be excluded under 37 C.F.R. § 42.61(a), 35 U.S.C. § 311(b), and FRE 401/403.

V. WINKEL DECLARATIONS (EX1004 and EX1079)

Petitioner relies on Winkel's declarations (EX1004 and EX1079) to support its invalidity challenges to the '708 Patent. Winkel's declarations are deficient and should be excluded because Winkel is not a qualified as a POSITA under Patent Owner's definition and/or because Winkel offers opinions and testimony that are outside the scope of his qualifications, experience, and expertise.

A. Winkel is Not Qualified as a POSITA under Patent Owner's Definition

Patent Owner's definition of a POSITA is proper because, unlike Petitioner's definition, it is tied to liquid manure agitation/pumping equipment. The claims of the '708 Patent recite a "liquid manure mover" and a "liquid manure pump" as limitations and therefore are not directed to general purpose amphibious vehicles. A POSITA is therefore properly defined as "a livestock farmer or a 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." EX2004, ¶64.

Winkel is an engineer with general experience in fluid mechanics, acoustics, and dynamics and vibrations. EX1004 ¶3. During his professional career, Winkel was a product engineer, worked as consultant, and designed non-agricultural vehicles. EX1004 ¶¶5-10. Notably, none of Winkel's education or work experience

is related to livestock farming, agricultural equipment, or liquid manure agitation/pumping equipment. Winkel therefore lacks “at least two years of experience designing agricultural equipment and knowledge of manure agitation equipment” as Patent Owner’s definition requires, so he is not qualified as a POSITA and cannot offer expert testimony under FRE 702.

B. Winkel Offers Opinions Outside the Scope of His Understanding and Expertise in Violation of FRE 702 and FRE 403

If a POSITA is defined to encompass individuals who lack experience with liquid manure agitation/pumping equipment, such that Winkel qualifies as a POSITA, then his opinions on the properties of liquid manure and the characteristics and capabilities of liquid manure pumps should still be excluded because they are outside the scope of his experience and expertise. Given his background, Winkel cannot offer opinions concerning liquid manure or liquid manure pumps from personal experience. He can only regurgitate information found in Petitioner’s Exhibits. In other words, he is not suited to add anything on these subjects over and above what is already discussed in the Exhibits due to his lack of experience. As a result, his opinions on the characteristics of liquid manure and liquid manure pumps should be excluded under FRE 702 and 403.

In his declarations, Winkel opines that liquid manure has the same consistency as water with a percent total solids of less than five percent (5%).

EX1004, ¶¶68-85; EX1079, ¶¶19, 59. But Winkel is not an expert on liquid manure, so his opinions on the consistency of liquid manure are outside the scope of his expertise and experience. There is no evidence that Winkel had any experience with liquid manure prior to his work on this case. Any testimony regarding the consistency, solid particulate sizes, and viscosity of liquid manure cannot be based on anything other than what is already found in the Exhibits. Winkel's characterizations and additions to this record evidence, as found in (EX1004, ¶¶68-85; EX1079, ¶¶19, 59), are improper and should be excluded because they are outside the scope of his experience and expertise.

Similarly, Winkel has no experience with liquid manure pumps, yet he provides opinions in his declarations as if he has expertise in liquid manure handling equipment and liquid manure pumps. EX1004, ¶¶68-85; EX1079, ¶¶19, 59. There is no evidence that Winkel had any experience with liquid manure pumps or liquid manure handling equipment prior to his work on this case. He only familiarized himself with the documents filed by Petitioner for this matter. Any testimony regarding the characteristics and capabilities of liquid manure pumps cannot be based on anything other than what is already found in the Exhibits. Winkel's characterizations and additions to this record evidence, as found in (EX1004, ¶¶68-85; EX1079, ¶¶19, 59), are improper and should also be excluded as outside the scope of his experience and expertise.

Winkel's declarations (EX1004 and EX1079) should be excluded in their entirety because he is not a POSITA. However, if a POSITA is not required to have experience with liquid manure agitation/pumping equipment, such that Winkel qualifies as a POSITA, the portions of Winkel's declarations opining on the characteristics of liquid manure and liquid manure pumps (EX1004, ¶¶68-85; EX1079, ¶¶19, 59) should be excluded because they are outside the scope of his experience and expertise under FRE 702 and 403.

VI. PUCK AND SUNDSTROM DECLARATIONS (EX1099-1101)

A. Puck and Sundstrom Declarations Contain Inadmissible Opinion Testimony From Lay Witnesses

The Puck and Sundstrom declarations (EX1099-1101) should be excluded because they contain expert opinions masquerading as fact testimony by lay witnesses. Puck improperly advances opinions regarding the capabilities of firefighting pumps ("High pressure / high volume pumps available in 2012 for pumping water from lakes and streams for firefighting are ... capable of pumping liquid manure (mixtures of water and animal waste with a total solid content of less than about 5%). Such pumps could also pump mixtures of water and animal waste with even higher solid contents." EX1099, ¶6) and the capabilities of irrigation pumps ("Agricultural irrigation pumps are also capable of pumping liquids with suspended solids, especially liquids with a total solid content of less than 5%."

EX1099, ¶7). Puck also provides opinion testimony on the benefits of arranging components at specification locations on the vehicle (“This arrangement of the engine, pump, and nozzle was beneficial as it caused these components to be positioned such that the weight of the engine and the pump could be more evenly distributed along the length of the vehicle” EX1101, ¶¶12-13) and (“Positioning the inlet in this location was beneficial and efficient because it allowed for the pump to suck liquid manure supernatant from underneath the vehicle.” EX1101, ¶14). Similarly, Sundstrom improperly advances opinions regarding the pumpability of liquid manure compared to human sewage (“Because the two types of waste are similar in terms of pumpability, the same pumps can be used to pump both fluids.” EX1100, ¶14), the interchangeability between mechanical and hydraulic drive systems (“a mechanical drive system could have easily been replaced with a hydraulic drive system as the two are easily interchangeable.” EX1100, ¶19), and the obviousness of certain modifications (“it was obvious to me that the Sundstrom Boat should be remote controlled to remove the operator from being on the boat while operating in the manure lagoon,” “It was obvious to me that the Sundstrom Boat should have wheels because wheels would increase the ease of moving it around a farm,” “the Nuhn Lagoon Crawler agitation boat performed as expected given it is basically the Puck boat with powered wheels” EX1100, ¶¶24, 26, 51). The opinions advanced by Puck and Sundstrom are

inadmissible lay witness testimony under FRE 701 and 702 because Petitioner has not shown that Puck or Sundstrom qualify as a POSITA under either Party's definition and their opinions are unsupported by sufficient facts or data.

B. Objections Under 37 C.F.R. § 42.61, 35 U.S.C. § 311(b), and FRE 402/403

Both Puck and Sundstrom make statements about prior public uses and/or sales of certain products/vehicles, which are ineligible for consideration in an IPR proceeding under 35 U.S.C. § 311(b). For example, Puck states in his Declaration that “In 2012, I was employed by Puck and involved in new product development, including the design, development, production, public use, public display, and marketing efforts of the Puck agitation boat (“Puck Agitation Boat”), which was designed and built in 2011” (EX1101, ¶4) and cites to a series of videos filed at EX1102-1106. Similarly, Sundstrom states in his declaration that “The Sundstrom Boat was offered for sale, publicly displayed and demonstrated at various trade shows in the United States, sold, and publicly used from about 2006 through 2014” (EX1100, ¶8) and cites to a series of videos filed at EX1114-1115. These statements about the public use of the Puck and Sundstrom agitation boats and the exhibits depicting those vehicles are irrelevant and/or prejudicial and should be excluded under 37 C.F.R. § 42.61(a), 35 U.S.C. § 311(b), and FRE 402/403.

C. Sundstrom's Statements About Lindstrom's Boat Are Inadmissible Under FRE 602 and 402/403

Continuing with the theme of making overreaching statements, Sundstrom states in his declaration that “As another example of a manure agitation boat publicly used at least by May 2013, Christopher Lindstrom designed a manure agitation boat with a hydraulically powered pump that was similar to the Sundstrom Boat.” EX1100, ¶47. Nothing in Sundstrom's declaration indicates that Sundstrom has personal knowledge of how the Lindstrom boat was constructed. Sundstrom's statements that Lindstrom's boat had “a hydraulically powered pump” and “was similar” to his own boat are improper lay witness testimony under FRE 602 because they appear to be based solely on a YouTube video that Sundstrom did not create and are therefore not based on Sundstrom's own personal knowledge of the Lindstrom boat. Furthermore, the Lindstrom boat is not asserted as prior art in this proceeding, so unsupported testimony about that vehicle should also be excluded under FRE 402/403.

VII. CONCLUSION

For the foregoing reasons, it is respectfully requested that this motion to exclude evidence be granted in all respects.

Dated: January 29, 2025

Respectfully submitted,

By: /James B. Luchsinger/
James B. Luchsinger, Reg. No. 73,705

HARNESS DICKY & PIERCE, P.L.C.
5445 Corporate Drive, Suite 200
Troy, MI 48098
Phone: 248-641-1600
Fax: 248-641-0270
bluchsinger@harnessip.com

Matthew L. Cutler, Reg. No. 43,574
HARNESS DICKY & PIERCE, P.L.C.
7700 Bonhomme Ave., Suite 400
St. Louis, MO 63105
Phone: 314-726-7500
Fax: 314-726-7501
mcutler@harnessip.com

Attorneys for Nuhn Industries Ltd.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type volume limitations of 37 C.F.R. § 42.24(a)(1)(v), and that the Motion to Exclude Evidence is 15 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: January 29, 2025

Respectfully submitted,

By: /James B. Luchsinger/
James B. Luchsinger, Reg. No. 73,705
HARNESS DICKY & PIERCE, P.L.C.
5445 Corporate Drive, Suite 200
Troy, MI 48098
Phone: 248-641-1600
Fax: 248-641-0270
bluchsinger@harnessip.com

Matthew L. Cutler, Reg. No. 43,574
HARNESS DICKY & PIERCE, P.L.C.
7700 Bonhomme Ave., Suite 400
St. Louis, MO 63105
Phone: 314-726-7500
Fax: 314-726-7501
mcutler@harnessip.com

Attorneys for Nuhn Industries Ltd.

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. 42.6(e), I certify that on this 29th day of January, 2025, a true and correct copy of the foregoing **Patent Owner's Motion to Exclude Evidence** was served by electronic mail on Petitioner's lead and backup counsel at the following addresses:

Lead Counsel

Thomas J. Leach
MERCHANT & GOULD P.C.
150 South Fifth Street, Suite 2200
Minneapolis, MN 55402
Phone: 612-336-4665
Fax: 612-332-9081
tleach@merchantgould.com
USPTO Reg. No. 53,188

Back-up Counsel

Robert A. Kalinsky
MERCHANT & GOULD P.C.
150 South Fifth Street, Suite 2200
Minneapolis, MN 55402
Phone: 612-336-4771
Fax: 612-332-9081
rkalinsky@merchantgould.com
USPTO Reg. No. 50,471

Jeffrey D. Blake
MERCHANT & GOULD P.C.
191 Peachtree Street NE, Suite 3800
Atlanta, GA 30303
Phone: 404-954-5040
Fax: 612-332-9081
jblake@merchantgould.com
USPTO Reg. No. 58,884

Michael A. Erbele
(*pro hac vice*)
MERCHANT & GOULD P.C.
150 South Fifth Street, Suite 2200
Minneapolis, MN 55402
Phone: 612-336-4670
Fax: 612-332-9081
merbele@merchantgould.com

Taylor R. Stemler
MERCHANT & GOULD P.C.
150 South Fifth Street, Suite 2200
Minneapolis, MN 55402
Phone: 612-371-5215
Fax: 612-332-9081
tstemler@merchantgould.com
USPTO Reg. No. 79,777

/James B. Luchsinger/
JAMES B. LUCHSINGER
HARNESS DICKY & PIERCE, P.L.C.

63531261.1