

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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SALVACION USA, INC.  
Petitioner

v.

TRUTEK CORP.  
Patent Owner

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U.S. Patent No. 8,163,802  
Issued: April 24, 2012

Title: ELECTROSTATICALLY CHARGED MULTI-ACTING NASAL  
APPLICATION, PRODUCT, AND METHOD

*Inter Partes* Review No. IPR-2024-00711

**PATENT OWNER'S RESPONSE IN OPPOSITION TO  
PETITIONER'S OBJECTIONS TO  
PATENT OWNER'S EVIDENCE**

On July 15, 2025, Petitioner submitted its objections to certain of Patent Owner's evidence. Specifically, Petitioner objected to admission of Patent Owner's submission of Exhibits 2003-2007 based on 37 CFR § 42.23(b). As no petition has yet been submitted, the objections citing this regulation are premature. However, the issue of commercial success was raised in Patent Owner's preliminary response and Patent Owner's reply to the petition<sup>1</sup>. The '802 Patent's number is clearly marked on the rear of the product packaging. This establishes the nexus between the patent and sales of the NasalGuard<sup>®</sup> product. Petitioner raised the issue of commercial success in its response to Patent Owner's reply. Patent Owner's sur-reply did not raise any new issue. The Exhibits 2003-2007 merely clarified Patent Owner's previous position.

**Objections to Exhibit 2003:**

In addition, Petitioner objected to Ashok Wahi's declaration (Exhibit 2003), claiming that it was inadmissible hearsay under Fed. R. Evid. 801 and 802. Rule 801 defines "hearsay" as, "a statement other than one made by the declarant either testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

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<sup>1</sup> See Patent Owner's Preliminary Response, Page 22 and its Reply to Petition Page 21.

IPR trial procedure does not permit live testimony before the PTAB Tribunal. Instead, testimony is given under oath in a declaration. Petitioner's own expert provided his testimony under oath in a declaration. Those declarations constitute testimony as though given at trial or in a hearing. As such, neither Dr. Park's nor Mr. Wahi's declaration is hearsay.

Ashok Wahi is the President of Trutek Corp. (the Patent Owner). It is apparent that Mr. Wahi's declaration does not contain Wahi's personal testimony. Instead, Mr. Wahi is acting as a representative of Trutek Corp., *i.e.*, Petitioner's adversary party. According to Rule 801(d)(2), Mr. Wahi's declaration is not hearsay because it is an admission by a party opponent that is (A) his own statement in a representative capacity; (B) that Wahi asserted is true under oath; and (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

Petitioner further objected to Mr. Wahi's declaration under Fed. R. Evid. 403, stating that "its probative value is substantially outweighed by the danger of unfair prejudice, as Petitioner did not have an opportunity to cross-examine the declarant." First, Mr. Wahi

is available to be cross-examined by the Petitioner should it wish to do so. Second, the declaration merely supplements the issue (*i.e.*, commercial success) that was presented in Patent Owner's preliminary response and in its reply and sur-reply. Third, the United States Supreme Court stated that the issue of commercial success should be considered when evaluating whether a claimed invention is obvious under 35 U.S.C. § 103. *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

Finally, Petitioner objected to Mr. Wahi's declaration under Fed. R. Evid. 401 and 402. Rules 401 and 402 concern admissibility of relevant evidence. Wahi's declaration relates to the commercial success of Trutek's products protected by the '802 Patent. The declaration is relevant because the Supreme Court in *Graham* held that it should be considered during a determination of obviousness. Petitioner stated that Wahi's statements are "such as those regarding the sales and media recognition are unsupported by underlying evidence." Petitioner's allegation fails to render Mr. Wahi's declaration irrelevant. Moreover, Petitioner may additionally inquire of Mr. Wahi to satisfy its desire for underlying evidence.

**Objections to Exhibit 2004:**

Exhibit 2004 is a series of photographs showing front and back sides of the packaging of various NasalGuard<sup>®</sup> products sold by Patent Owner. Visible on the rear of the NasalGuard<sup>®</sup> products on the first page, the '802 Patent number is clearly marked thereon. The exhibit is relevant to show the nexus of the sales of the products to the '802 Patent. The exhibit shows a clearer image of the product packaging presented on page 21 of Patent Owner's reply to the petition.

Petitioner objects to Exhibit 2004 for lack of authentication under Fed. R. Evid. 901. However, under Rule 901(b)(4), the exhibit has distinctive characteristics such as "appearance, contents, substance, internal patterns, and other distinctive characteristics, taken in conjunction with circumstances." Thus, Exhibit 2004 does not require further authentication. Moreover, under Fed. R. Evid. 902(7), the exhibit is self-authenticating because it comprises trade inscriptions and labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

Petitioner also objects to this exhibit under Fed. R. Evid. 403, claiming that the danger of unfair prejudice outweighs its probative

value. But, in *Graham v. John Deere Co.*, the United States Supreme Court stated that the issue of commercial success should be considered when evaluating whether a claimed invention is obvious under 35 U.S.C. § 103. Any evidence presented by the Patent Owner is likely to be prejudicial to the Petitioner. However, the probative value outweighs any danger of undue prejudice. Finally, Petitioner objects to this exhibit claiming it to be hearsay evidence under Rules 801 and 802. Here, this exhibit is not a statement. It is a photograph from which relevant information can be derived by the trier of fact. Further, it is non hearsay because it is an admission by an adversary party under Rule 801(d)(2).

**Objections to Exhibit 2005:**

Exhibit 2005 shows a portion of Patent Owner's website, *www.nasalguard.com*, illustrating how the NasalGuard® product is used. Petitioner objects to this exhibit claiming lack of authentication under Fed. R. Evid. 901 and 902. Petitioner also objects to the exhibit under Rule 403 claiming undue prejudice. Finally, it objects to the exhibit as inadmissible hearsay under Rules 801 and 802.

However, Exhibit 2005 is self-authenticating under the same reasoning as for Exhibit 2004. The probative value of Exhibit 2005

outweighs the danger of undue prejudice under the same reasoning as for Exhibit 2004. Finally, the exhibit is not hearsay under the same reasoning as for Exhibit 2004.

**Objections to Exhibit 2006:**

Exhibit 2006 is a report on the safety and efficacy of the NasalGuard<sup>®</sup> product<sup>2</sup> dated March 7, 2012, just prior to the issue date of the '802 Patent. It is thirteen years old, but not yet old enough to be considered ancient. Based on its age, the document is impossible to authenticate. However, the study was conducted at Trutek's request to establish the safety and efficacy of the product for public consumption. Thus, the document can not be presented here to show that the product was effective against cold and flu viruses under Fed. R. Civ. P. 801 or 802. However, it can be presented to show the state of mind of Trutek executives, which is a hearsay exception under Rule 802(2). As such, the fact that this study was authorized by Trutek executives may be authenticated by Ashok Wahi, the President of Trutek, who may be cross-examined by Petitioner.

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<sup>2</sup> Before the '802 Patent issued, Trutek personnel referred to the prospective product as "MAPB" to designate it as a Multi-Acting Particle Blocker.

### **Objections to Exhibit 2007:**

Exhibit 2007 is entitled " '802 Patent Commercialization Links." It is a list of websites where NasalGuard® products are sold online. The websites are listed in a PDF file as hyperlinks that when activated bring the reader to the associated websites. As such, Exhibit 2007 represents a summary (or table of contents), which are admissible under Fed. R. Evid. 1006. Its contents are also admissible under Rule 1007 as an admission by Patent Owner evidencing sales outlets for its product protected by the '802 Patent.

Petitioner objects to admission of Exhibit 2007, claiming that it has not been authenticated under Fed. R. Evid. 901. Further, under Fed. R. Evid. 902(7), the websites themselves are self-authenticating because they comprise trade inscriptions and labels purporting to have been affixed in the course of business and indicating ownership, control, or origin. Under Rule 1006, such a summary does not require authentication as long as the items themselves are available to Petitioner. As a written admission by the Patent Owner, the document is admissible under Rule 1007.

Petitioner further objects to this exhibit as hearsay under Rule 801. But it is not hearsay because it is not a statement presented to

prove the truth of the matter asserted. In addition, it is an admission by Patent Owner, which is non-hearsay under Rule 801(d)(2). Finally, the danger of unfair prejudice is not outweighed by the probative value of the exhibit because the Supreme Court held in *Graham v. John Deere Co.* that commercial success should be considered in a determination of obviousness of a claimed invention.

Date: July 21, 2025

Respectfully submitted,

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## CERTIFICATION OF SERVICE

The undersigned hereby certifies that the above-captioned "Patent Owner's Response In Opposition To Petitioner's Objections To Patent Owner's Evidence," regarding IPR2024-00711 was served on July 21, 2025, upon the following via email:

**VORYS, SATER, SEYMOUR AND PEASE LLP**

|                        |                                                                |
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As well as a courtesy copy to the patent owner's litigation counsel, by email:

|                 |                                                                  |
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