

Nos. 2022-1710, 2022-1711

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

JAGER PRO, INC.,
Appellant

v.

W-W MANUFACTURING CO., INC.,
Appellee.

Appeals from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in Nos. IPR2020-01470, IPR2020-01471.

**JAGER PRO, INC.'S COMBINED PETITION FOR
REHEARING *EN BANC* AND PANEL REHEARING**

Jonathon A. Talcott
BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
(602) 798-5485
talcottj@ballardspahr.com

Benjamin N. Simler
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500
simlerb@ballardspahr.com

Richard W. Miller
D. Alan White
BALLARD SPAHR LLP
999 Peachtree Street Suite 1600
Atlanta, GA 30309
(678) 420-9300
millerrw@ballardspahr.com
whiteda@ballardspahr.com

Counsel for Appellant Jager Pro, Inc.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2022-1710, 2022-1711

Short Case Caption Jager Pro, Inc. v. W-W Manufacturing Co., Inc.

Filing Party/Entity Jager Pro, Inc.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 12/20/2023

Signature: /s/Richard W. Miller

Name: Richard W. Miller

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
<p>Jager Pro, Inc.</p>		

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

Joseph P. Anderson	Stephanie M. Johnson	

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

Jager Pro Inc. v. Tusk Innovations Inc., No. 4:19-cv-00108 (E.D. Ark.)	Jager Pro Inc. v. Backwoods Sols., LLC, No. 1:20-cv-00017 (N.D. Miss.)	
Jager Pro Inc. v. Bull Creek Welding and Fabrication Inc., No. 4:19-cv-00107 (E.D. Ark.)	Jager Pro Inc. v. W-W Mfg. Co., No. 5:20-cv-00095 (W.D. Okla.)	

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

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STATEMENT OF COUNSEL—FEDERAL CIRCUIT RULE 35(b)(1)

Based on my professional judgment, I believe the panel’s decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this Court:

- *Polaris Industries, Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056 (Fed. Cir. 2018);
- *ClassCo, Inc. v. Apple, Inc.*, 838 F.3d 1214 (Fed. Cir. 2016);
- *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317 (Fed. Cir. 2016);
- *PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, 815 F.3d 734 (Fed. Cir. 2016); and
- *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387 (Fed. Cir. 1988).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

- What is required for a patent owner to be accorded the presumption of nexus between a commercial product and challenged patent claims.

Dated: December 20, 2023

/s/ Richard W. Miller
Richard W. Miller
Counsel for Appellant Jager Pro, Inc.

I. INTRODUCTION AND STATEMENT OF THE CASE

Pursuant to Fed. R. App. P. 35 and 40, Appellant Jager Pro, Inc. (“Jager Pro”) files this combined petition for panel rehearing or rehearing *en banc*, because the Panel’s decision below ignored this Court’s established precedent regarding a patent owner’s burden for establishing a presumption of nexus between a claimed invention and objective evidence of nonobviousness. Simply put, the Panel’s decision affirms the Board’s erroneous conclusion that a patent holder’s expert testimony that a commercial product embodies and is coextensive with challenged patent claims is not sufficient to establish presumption of nexus. In so ruling, the Panel disregarded this Court’s longstanding precedent regarding the presumption of nexus, and in so doing gave no weight to extensive, un rebutted objective evidence of nonobviousness.

The Supreme Court has long held that the examination of objective evidence of nonobviousness is relevant to the question of obviousness. *See KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966). In applying these precedents, this Court has repeatedly held that such evidence “must be considered *before* a conclusion on obviousness is reached.” *See Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1380 (Fed. Cir. 1986) (emphasis in original); *see also Stratoflex v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983) (objective evidence of

nonobviousness “must always when present be considered en route to a determination of obviousness”). Objective evidence of nonobviousness “may often be the most probative and cogent evidence in the record,” and can “often establish that an invention appearing to have been obvious in light of the prior art was not.” *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc.*, 699 F.3d 1340, 1349 (Fed. Cir. 2012). Crucially, the consideration of objective evidence provides a necessary guard against the improper reliance on hindsight when determining obviousness. *See, e.g., Graham*, 383 U.S. at 36; *Mintz v. Dietz & Watson, Inc.*, 679 F.3d 1372, 1378–79 (Fed. Cir. 2012); *Crocs, Inc. v. ITC*, 598 F.3d 1294, 1310 (Fed. Cir. 2010).

To be accorded substantial weight, there must be a nexus between the merits of the claimed invention and the objective evidence of nonobviousness. *See, e.g., In re GPAC Inc.*, 57 F.3d 1573, 1580 (Fed. Cir. 1995); *Stratoflex*, 713 F.2d at 1539. This Court has long held that “if the marketed product embodies the claimed features, and is coextensive with them, then a nexus is *presumed* and the burden shifts to the party asserting obviousness to present evidence to rebut the presumed nexus.” *Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1130 (Fed. Cir. 2000) (emphasis added); *see also Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392–93 (Fed. Cir. 1988). To establish this presumption of nexus, a patent owner must present evidence that the

commercial products at issue “are embodiments of the invention as claimed in the asserted claims.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1329 (Fed. Cir. 2016). As this Court has further held, the patent owner is not required to undertake a limitation-by-limitation analysis using the exact wording of the claims to establish the presumption of nexus. *See, e.g., Polaris Industries, Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1072–73 & n. 7 (Fed. Cir. 2018); *ClassCo, Inc. v. Apple, Inc.*, 838 F.3d 1214, 1220–22 (Fed. Cir. 2016).

The Panel upends these precedents by concluding that a patent owner’s submission of expert testimony that a commercial product embodies and is coextensive with challenged patent claims is not sufficient to establish the presumption of nexus. (Add. 6–7.) The Panel’s decision elevates the patent owner’s burden for establishing the presumption of nexus well beyond what is dictated by this Court’s prior decisions. As such, rehearing of this appeal is justified so that this Court can correct the Panel’s inconsistency with established precedent, and provide guidance with respect to what a patent owner must show to be accorded the presumption of nexus between a commercial product and challenged patent claims.

II. POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL

Pursuant to Federal Circuit Rules 35(e)(1)(F) and 40(a)(5), Jager Pro provides this statement of points of law or fact that were overlooked or misapprehended by the court in its panel decision.

1. The Panel overlooked or misapprehended this Court's decisions regarding a patent holder's burden for establishing a presumption of nexus between a commercial product and challenged patent claims in *Polaris Industries, Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056 (Fed. Cir. 2018); *ClassCo Inc. v. Apple, Inc.*, 838 F.3d 1214 (Fed. Cir. 2016); *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317 (Fed. Cir. 2016); *PPC Broadband, Inc. v. Corning Optical Commc'ns RF, LLC*, 815 F.3d 734 (Fed. Cir. 2016); and *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387 (Fed. Cir. 1988).

III. STATEMENT OF RELEVANT FACTS

A. Jager Pro's Patented Animal Trap

This case involves a simple mechanical device—an animal trap. Jager Pro's founder, Rod Pinkston, recognized the need for a more effective solution to address the unchecked growth of feral hog populations. (Appx3063-3064; Appx4229.) To solve the problem, Mr. Pinkston created a better hog trap—the M.I.N.E. Trapping System (the "M.I.N.E. Trap"). (Appx726–738; Appx4229–

4231.) The first-of-its-kind M.I.N.E. Trap featured camera detection and wireless communication capabilities that detected the presence of feral hogs inside an enclosure, notified the user, and allowed the user to remotely spring the trap. Mr. Pinkston obtained a number of patents on his trap, including the two patents at issue in this matter: U.S. Patent Nos. 9,814,228 (the “’228 Patent”) and 10,098,339 (the “’339 Patent”) (collectively, the “Jager Pro Patents”).

The industry immediately responded to Mr. Pinkston’s groundbreaking trap. Even though it cost more than five times as much as existing traps, its novel features led to immediate consumer success. (Appx3113–3114; Appx5297–5313; Appx5348.) Indeed, the M.I.N.E. trap was praised by industry insiders and competitors alike. The Federal Government, the U.S.D.A., Appellee’s real party in interest in this case, and even the challenger’s expert witness praised Jager Pro’s revolutionary trap. (*See, e.g.*, Appx3558–3562; Appx4226–4235; Appx4712–4713; Appx4765–4766 (M.I.N.E. Trap shown in Fig. 9.2(a)); Appx4809 (same).)

B. The IPR Proceedings, Board’s Final Written Decisions, And Panel Decision

Following the market success of Jager Pro’s M.I.N.E. trap, Appellee launched its own remote controlled pig trap, the Boarbuster. Jager Pro sued Appellee for infringing the ’228 and ’339 Patents, and Appellee filed petitions for *inter partes* review (“IPR”) against both patents at issue (IPR2020-01470 and IPR2020-01471).

During the IPRs, Jager Pro introduced extensive, unrebutted objective evidence of non-obviousness. This evidence was analyzed and presented through the testimony of Jager Pro's expert, Dr. Steven Nesbit. Dr. Nesbit also opined—after reviewing product manuals and video of the M.I.N.E. trap in use—that the M.I.N.E. Trap embodied and was coextensive with the claims of Jager Pro's '228 and '339 Patents.¹

The Board gave no weight to Jager Pro's objective evidence of nonobviousness. Instead, the Board found that because Dr. Nesbit had not used the exact language of a single claim element when comparing that element to the features embodied by the M.I.N.E. Trap, Jager Pro was not entitled to a presumption of nexus between the M.I.N.E. Trap and the challenged claims. (Appx127–133; Appx262–269.) As such, rather than properly reviewing and

¹ See Appx3064 (“Jager Pro’s M.I.N.E. Trapping System is the commercial embodiment of the system, which is also reflected in the claims of the ’228 Patent.”); Appx3100–3105 (“As the screenshots below demonstrate, along with my analysis, the M.I.N.E. System was, and still is, coextensive with the claims of the ’228 Patent”); Appx3105 (“the M.I.N.E. System is used to practice a trapping method that is essentially the same as the method recited by the challenged claims of the ’228 Patent. It both embodies the claims of the ’228 patent and is coextensive with them.”); Appx3130 (“Jager Pro’s M.I.N.E. Trapping System is the commercial embodiment of the system, which is also reflected in the claims of the ’339 Patent.”); Appx3167–3172 (“As the screenshots below demonstrate, along with my analysis, the M.I.N.E. System was, and still is, coextensive with the claims of the ’339 Patent”); Appx3172–3173 (“the M.I.N.E. System is a trap used to practice a trapping method that is essentially the same as the trap and trapping methods recited by the challenged claims of the ’339 Patent. It both embodies the claims of the ’339 patent and is coextensive with them.”)

weighing Jager Pro’s objective evidence of nonobviousness—as it was required to do—the Board viewed it as an afterthought that could be summarily disregarded. (Appx132–134; Appx269–271.) Ultimately, the Board issued Final Written Decisions holding all claims of the ’228 and ’339 Patent unpatentable for obviousness. (Appx1–136; Appx137–273.)

Jager Pro appealed the Board’s decisions and argued, *inter alia*, that the Board erred in finding that Jager Pro was not entitled to a presumption of nexus between the M.I.N.E. Trap and the challenged claims, and refusing to properly consider Jager Pro’s abundant objective evidence of nonobviousness. The Panel affirmed the Board’s decisions, and ruled that the Board’s refusal to accord the presumption of nexus was justified because Jager Pro’s expert testimony was insufficient to show that the M.I.N.E. Trap embodied each element of the challenged claims. (Add. 6–7.)

IV. ARGUMENT

The Panel’s decision reflects a lack of clarity in this Court’s precedent as to what is needed for a patent owner to establish a presumption of nexus, and what is required to rebut that presumption. On the one hand are cases that hold a limitation-by-limitation analysis is not required to establish the presumption. *See Polaris*, 882 F.3d at 1073 & n. 7 (expressly stating that a “limitation-by-limitation analysis” is not required), *ClassCo*, 838 F.3d at 1220–22 (comparison to

“representative claims” sufficient to establish objective evidence is reasonably commensurate with multiple challenged patent claims). There are others—including the Panel’s decision here—that do seem to approve of such a detailed analysis. *See* Add. 6–7 (affirming Board’s refusal to accord the presumption because Jager Pro’s expert testimony was insufficient to show that the M.I.N.E. Trap embodied a single element of the challenged claims); *Bos. Sci. SciMed, Inc. v. Iancu*, 811 F. App’x 618, 627–28 (Fed. Cir. 2020) (affirming no presumption of nexus because substantial evidence supported Board’s finding that patent owner’s expert testimony failed to establish commercial product satisfied two limitations of challenged patent claim). The Court should take this matter up *en banc* to provide clarity on this issue, which has become a crucial one for patent owners (and in particular, small inventors such as Mr. Pinkston), who are seeing their patents invalidated by the PTAB at an alarming rate, with all but the rarest nods to objective evidence of nonobviousness.

A. The Panel’s Decision Abandons This Court’s Longstanding, Burden-Shifting Framework For Determination of Nexus

The Board and the Panel here disregard this Court’s well established burden-shifting framework for determining whether there is a nexus between the challenged patent claims and a commercial product that provides objective evidence of nonobviousness. In *In Demaco*, this Court held that “the patentee in the first instance bears the burden of coming forward with evidence sufficient to

constitute a prima facie case of the requisite nexus.” 851 F.2d at 1392. The patentee does this by showing that the objective evidence of nonobviousness relates to “the thing (product or method) that . . . is the invention disclosed and claimed in the patent.” *Id.* “When the patentee has presented [sufficient evidence for a presumption] of nexus, the burden of coming forward with evidence in rebuttal shifts to the challenger, as in any civil litigation.” *Id.*²

In subsequent cases, this Court further elucidated what is necessary to establish a prima facie case (i.e. a presumption) of nexus, such that the burden shifted to the patent challenger to provide evidence to rebut the presumption under the *Demaco* framework. For example, in *WBIP*, the Court explained that a patent owner’s evidence that “specific products are embodiments of the claimed invention and that the proffered objective evidence relates to these products—is sufficient to establish the presumption of nexus for the objective considerations.” 829 F.3d at 1329–30; *see also Rambus Inc. v. Rea*, 731 F.3d 1248, 1257 (Fed. Cir. 2013) (quoting *In re Huai-Hung Kao*, 639 F.3d 1057, 1068 (Fed. Cir. 2011) (“objective evidence of nonobviousness need only be ‘reasonably commensurate with the

² In *Demaco*, the Court addressed the presumption of nexus with respect to objective evidence involving a product or method’s commercial success. This Court later held the *Demaco* framework applied to the consideration of other types of objective evidence. *See WBIP*, 829 F.3d at 1330, n. 4 (Fed. Cir. 2016).

scope of the claims,’ and we do not require a patentee to produce objective evidence of nonobviousness for every potential embodiment of the claim.”)

B. This Court’s Precedents Have Held That A Limitation-By-Limitation Analysis Is Not Required To Establish The Presumption of Nexus

Of particular relevance, this Court has consistently held that a patent owner is not required to provide a limitation-by-limitation analysis of a commercial product that exactly tracks the language of each challenged claim for the presumption of nexus to apply. The Court was emphatic on this point in *Polaris*, stating “[w]e reject the implication that either a ‘limitation-by-limitation analysis’ or ‘documentary evidence’ is required” for the presumption of nexus to apply, and “find[] no support for such a principle in our precedent.” 882 F.3d at 1073 & n. 7. In so holding, the *Polaris* Court echoes other decisions where this Court held a patent owner had established a presumption of nexus with respect to multiple challenged claims—and even multiple patents—by comparing a commercial product only to representative claims. *See Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1377 (Fed. Cir. 2019) (citing cases where this Court found that “multiple patents can share a presumption of nexus with the same product, [where] the claims of each of the patents covered essentially the same invention”); *ClassCo*, 838 F.3d at 1220–22 (finding that comparison of patented product with “representative claims 2 and 14” of the challenged patent sufficient to establish the

objective evidence was commensurate with the scope of multiple challenged patent claims).

C. In The IPRs, Jager Pro Provided Ample Evidence To Establish A Presumption Of Nexus Between Jager Pro’s M.I.N.E. Trap And The Challenged Claims

In view of the precedent summarized above, Jager Pro introduced more than sufficient evidence to establish a presumption of nexus between the challenged claims of Jager Pro’s ’228 and ’339 Patents, and Jager Pro’s M.I.N.E. Trap that is the commercial embodiment of those claims. *See supra*, note 1. This un rebutted evidence included the testimony of Jager Pro’s expert, who reviewed M.I.N.E. Trap product manuals and a Jager Pro video showing the M.I.N.E. Trap being used to capture feral hogs, and concluded that the M.I.N.E. Trap embodied and was coextensive with the claims of Jager Pro’s ’228 and ’339 Patents. *See id.* Under *Demaco*, this was enough to establish a presumption of nexus, making it Appellee’s burden to come forward with evidence to show that there was no nexus between the M.I.N.E. Trap and the challenged claims.³ *See Demaco*, 851 F.2d at 1393 (“When the patentee has presented a prima facie case of nexus, the burden of

³ Indeed, Jager Pro’s expert went beyond what is required under the *Demaco* and *Polaris* decisions, and provided a chart that specifically identified the components and functionalities of the M.I.N.E. Trap that corresponded to each limitation of a representative independent claim, using screenshots from the video and—where additional detail was necessary—images taken from the M.I.N.E. trap’s user manual. (*See Appx3100–3105; Appx3167–3173.*)

coming forward with evidence in rebuttal shifts to the challenger, as in any civil litigation.”).

Appellee did not even attempt to satisfy this burden. Appellee did not introduce any contradictory evidence or expert testimony to show that Jager Pro’s M.I.N.E. Trap did not embody, or was not coextensive with, the challenged claims, or that the M.I.N.E. Trap did not function as Jager Pro’s expert had testified. Instead, Appellee offered unsupported attorney argument that criticized Jager Pro’s expert for not comparing Jager Pro’s M.I.N.E. Trap to the challenged claims using the exact language of the claims themselves. (*See* Appx 5863–5866, Appx6444–6447.) As this Court has repeatedly held, attorney argument is not evidence.⁴ As such, Jager Pro’s evidence of nexus between the M.I.N.E. Trap and the challenged claims was—and remains—unrebutted. *See WBIP*, 829 F.3d at 1329 (citing *Brown & Williamson Tobacco*, 229 F.3d at 1130; *Demaco*, 851 F.2d at 1393) (“[A] patent challenger cannot successfully rebut the presumption [of nexus] with argument alone—it must present evidence.”).

⁴ *See, e.g., Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009) (“[U]nsworn attorney argument . . . is not evidence and cannot rebut . . . admitted evidence.”); *Invitrogen Corp. v. Clontech Labs., Inc.*, 429 F.3d 1052, 1068 (Fed. Cir. 2005) (“Unsubstantiated attorney argument regarding the meaning of technical evidence is no substitute for competent, substantiated expert testimony.”).

In its Final Written Decisions, the Board adopted Appellee’s attorney’s argument that Jager Pro had failed to establish the rebuttable presumption of nexus because Jager Pro’s expert did not compare the M.I.N.E. trap to the challenged claims using the exact language of the challenged claims. (*See generally* Appx5863–5866.) In fact, the Board’s Final Written Decisions adopted those arguments almost verbatim. (*Compare* Appx5865–5866, Appx6446–6447 (Petitioner’s arguments), *with* Appx129–130,⁵ Appx265–267 (Board’s Final Written Decisions).) This was error, because this Court’s precedent, as established in decisions like *Polaris* and *ClassCo*, clearly show that a patent owner is not required to undertake a limitation-by-limitation analysis to establish a presumption of nexus between challenged patent claims and a commercial embodiment.⁶ *See, e.g., Polaris*, 882 F.3d at 1073 (reversing Board’s finding of no nexus “where the proffered evidence is not rebutted and the technology is relatively simple”).

⁵ Both faulting Jager Pro’s nexus arguments because they “do not track the language of” this limitation.

⁶ The Board’s decision was also error because attorney argument is not evidence. *See Gemtron*, 572 F.3d at 1380; *Invitrogen*, 429 F. 3d at 1068.

D. The Panel Disregarded This Court’s Precedents In Affirming The Board’s Conclusion That Jager Pro Was Not Entitled To A Presumption Of Nexus Between Jager Pro’s M.I.N.E. Trap And The Challenged Claims

By affirming the Board’s erroneous determination that Jager Pro had failed to establish a rebuttable presumption of nexus, the Panel jettisoned the longstanding, burden-shifting analysis of *Demaco*. Under the Panel’s decision, it is not necessary for a patent challenger to come forward with actual evidence to rebut a patent owner’s nexus evidence. Instead, the challenger can simply offer its attorney’s argument that the patent owner was never entitled to a presumption of nexus in the first place. This is not what is envisioned by *Demaco*.

To the extent Appellee disagreed with Jager Pro’s expert’s testimony regarding the nexus between the M.I.N.E. Trap and the challenged claims, it was free to challenge that argument by submitting its own evidence. *See Demaco*, 851 F.2d at 1393; *see also PPC Broadband*, 815 F.3d at 747 (explaining that the presumption of nexus applies “in contested proceedings such as IPRs,” where the challenger “has the means to rebut the patentee’s evidence”). Instead, Appellee merely offered its attorney’s argument that the presumption of nexus never existed in the first place. The Board erred in crediting that argument, and the Panel compounded that error by affirming the Board’s decision.

This case involves patents directed to a simple mechanical device—an animal trap. This Court has long held that proper consideration of objective

evidence is particularly important to ensure hindsight reasoning does not infect the obviousness analysis for such inventions. *See, e.g., Mintz*, 679 F.3d at 1379 (“where the invention is less technologically complex,” consideration of objective evidence “can be important to ward against falling into the forbidden use of hindsight”). The Panel’s decision ignores the longstanding *Demaco* framework, and improperly heightens the Patent Owner’s burden for establishing a presumption of nexus such that objective evidence of nonobviousness can even be considered. Instead, the Panel’s decision essentially places the burden on the patent owner—and not the patent challenger—to prove that challenged claims are not obvious.

V. CONCLUSION

For the foregoing reasons, Jager Pro requests the Court grant rehearing *en banc* or a panel rehearing of this case, vacate the panel opinion, and rehear this appeal.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2022-1710, 2022-1711

Short Case Caption: Jager Pro, Inc. v. W-W Manufacturing Co., Inc.

Instructions: When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

- the filing has been prepared using a proportionally-spaced typeface and includes 3432 words.
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Date: 12/20/2023

Signature: /s/Richard W. Miller

Name: Richard W. Miller

ADDENDUM

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

JAGER PRO, INC.,
Appellant

v.

W-W MANUFACTURING CO., INC.,
Appellee

2022-1710, 2022-1711

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2020-01470, IPR2020-01471.

Decided: November 20, 2023

JONATHON A. TALCOTT, Ballard Spahr LLP, Phoenix, AZ, argued for appellant. Also represented by RICHARD WILLIAM MILLER, DENNIS ALAN WHITE, JR., Atlanta, GA; BENJAMIN NICHOLS SIMLER, Philadelphia, PA.

SCOTT W. CUMMINGS, Bryan Cave Leighton Paisner LLP, Washington, DC, argued for appellee. Also represented by NAH EUN KIM, Atlanta, GA.

Before LOURIE, REYNA, and CHEN, *Circuit Judges*.

CHEN, *Circuit Judge*.

Appellant Jager Pro, Inc. (Jager Pro) appeals two decisions by the Patent Trial and Appeal Board (Board) finding all challenged claims of U.S. Patent Nos. 9,814,228 ('228 patent) and 10,098,339 ('339 patent) unpatentable as obvious. *W-W Mfg. Co., Inc. v. Jager Pro, Inc.*, No. IPR2020-01470, 2022 WL 499520 (P.T.A.B. Feb. 16, 2022) ('228 *Decision*); *W-W Mfg. Co., Inc. v. Jager Pro, Inc.*, No. IPR2020-01471, 2022 WL 495334 (P.T.A.B. Feb. 16, 2022) ('339 *Decision*).¹ Because the Board's findings are supported by substantial evidence, we *affirm*.

BACKGROUND

The '228 and '339 patents are directed to methods and apparatuses to remotely trap wild pigs. Claim 1 of the '228 patent reads:

1. A method for capturing a plurality of feral pigs, comprising:

[a] moving at least one portion of an enclosure from an open position that permits passage of a plurality of feral pigs into the enclosure to a closed position that restricts passage of the plurality of feral pigs out of the enclosure, [b] wherein in the closed position, the enclosure cooperates with a ground surface to define an enclosure area in which the plurality of feral pigs are trapped, [c] and wherein the ground surface extends continuously from

¹ Jager Pro does not appear to make any argument specific to either the '228 *Decision* or '339 *Decision* or their respective patents. For simplicity, we reference the '228 *Decision* and the '228 patent in resolving both appeals.

within the enclosure area to areas surrounding the enclosure,

[d] wherein the enclosure comprises a release mechanism that effects movement of the at least one portion of the enclosure from the open position to the closed position,

[e] wherein the release mechanism effects movement of the at least one portion of the enclosure from the open position to the closed position upon receipt of a release signal from a control mechanism that is in communication with a display device, [f] wherein the display device is in communication with a camera assembly and configured to:

receive a wireless detection signal from the camera assembly; and

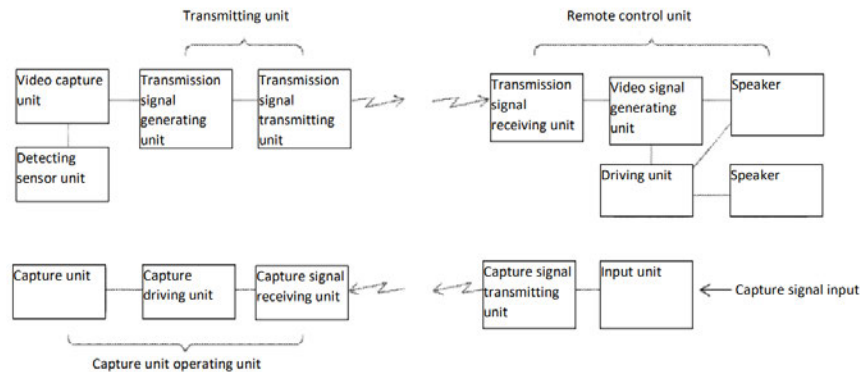
[g] transmit a wireless control signal upon receipt of the wireless detection signal from the camera assembly, wherein the wireless control signal corresponds to an instruction to the control mechanism to generate the release signal, and

[h] wherein, upon detection of a presence of the plurality of feral pigs within the enclosure by the camera assembly, the camera assembly transmits the wireless detection signal to the display device.

'228 patent at claim 1.²

² The bracketed lettering follows the naming conventions adopted by the Board for each limitation of claim 1. See *'228 Decision*, 2022 WL 499520, at *4.

The Board found the combination of TexasBoars³ and Jeong⁴ taught or suggested the subject matter of claim 1 of the '228 patent. *'228 Decision*, 2022 WL 499520, at *2. The Board found TexasBoars taught or suggested the mechanical aspects of the claimed enclosure, i.e., the preamble, Limitations 1[a]–1[d], and the “release mechanism” function of Limitation 1[e], and Jeong taught or suggested the remaining limitations, including the wireless transmission of signals from a camera assembly to a display device as well as from the display device to a control mechanism according to Figure 1:



J.A. 578, FIG. 1. The Board also considered Jager Pro’s evidence of objective indicia of nonobviousness but did not give it substantial weight because Jager Pro had not shown

³ The Board recorded this reference as “Archived copy of a page from TexasBoars’s website (<https://texasboars.com/>)” for TB1 and “Copy of presentation from TexasBoars’s website” for TB2. *'228 Decision*, 2022 WL 499520, at *2 nn.4–5. This website no longer exists, but the Joint Appendix includes printed versions of both references at J.A. 520–21 (TB1) and J.A. 522–72 (TB2). This opinion collectively refers to both references as “TexasBoars.”

⁴ Korean Patent Registration No. 10-0688243.

it was entitled to a presumption of nexus and made no other argument for why nexus existed. *'228 Decision*, 2022 WL 499520, at *54–57.

Jager Pro appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(4)(A).

DISCUSSION

We review the Board’s factual findings for substantial evidence and its ultimate conclusion of obviousness *de novo*. *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1372 (Fed. Cir. 2019). Evidence of objective indicia of nonobviousness is only accorded substantial weight when such evidence has a nexus with the claims, and the patent owner bears the burden of showing such nexus exists. *Id.* at 1373. The patent owner is entitled to a rebuttable presumption of nexus when the evidence is tied to a specific product and that product embodies and is coextensive with the claimed features. *Id.*

Jager Pro argues a number of the Board’s findings are not supported by substantial evidence, but we disagree with each. Jager Pro argues the Board never articulated a motivation to combine TexasBoars and Jeong with a reasonable expectation of success—it only found a lack of evidence of teaching away. Appellant’s Reply Br. 15–16. Jager Pro mischaracterizes the Board’s analysis. The Board found the combination of TexasBoars with Jeong involved a simple substitution of “an animal-instigated closure (e.g., by use of a trip wire) [with] a human-instigated closure (e.g., by receiving images of animals in an enclosure and pushing a button to send a signal to close the gate)” motivated by the advantages realized when these references are combined. *'228 Decision*, 2022 WL 499520, at *17, *24; *see KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). The Board also found a skilled artisan would understand the remote operability suggested by the combination would give the operator more control and increase the

trap’s chance of success. *’228 Decision*, 2022 WL 499520, at *17. Substantial evidence supports the Board’s findings.

Jager Pro argues Jeong at most teaches or suggests detection of an animal approaching a trap, not detection of an animal within a trap as in limitation 1[h]. Appellant’s Reply Br. 2–7. But this attacks Jeong alone and not the combination of Jeong and TexasBoars. As the Board found, “Petitioner d[id] not rely on Jeong as teaching the enclosure recited by claim 1” but rather argued the limitation is taught or suggested by Jeong’s system added to TexasBoars’s corral trap. *’228 Decision*, 2022 WL 499520, at *39. Thus, Jager Pro’s argument misses the point by focusing on one reference’s disclosure instead of explaining why the stated combination fails to teach or suggest the limitation. We agree with the Board that the combination would have resulted in a camera assembly positioned in a manner to detect pigs located within the corral.

Jager Pro argues Jeong does not teach or suggest wireless signals because Jeong never expressly refers to any signal as “wireless.” Appellant’s Br. 30–34; Appellant’s Reply Br. 9–10. The Board disagreed, observing that Jeong’s Figure 1 shows certain elements connected by solid lines and other elements connected by broken lines and finding that—when read in light of Jeong’s description of a “remote control unit” for the disclosed trap—the solid lines suggest a wired connection while the broken lines suggest a wireless connection. *’228 Decision*, 2022 WL 499520, at *19–20. On these facts, the Board’s finding with respect to Jeong is supported by substantial evidence.

Jager Pro argues the Board’s finding of no presumption of nexus was not supported by substantial evidence.⁵

⁵ Jager Pro only argued for a presumption of nexus—as opposed to also arguing nexus absent the

Appellant’s Br. 52–57. The Board found Jager Pro was not entitled to this presumption based on testimony from Jager Pro’s expert who explained Jager Pro’s commercial product’s display device transmits a wireless signal *directly* to the release mechanism, which then releases the gate. ’228 *Decision*, 2022 WL 499520, at *54–55. The Board correctly observed this is not what the claim requires—it instead requires a wireless signal sent from a display device to a control mechanism, which in turn then sends another signal to a release mechanism to release the gate. *Id.* The Board also considered Jager Pro’s arguments that its product manual’s depiction of a “control box” supports a finding of nexus because the control box receives wireless signals from a display device. *Id.* at *55. However, the Board reasonably found the manual to be inconclusive because it provides no explanation of the control box receiving wireless signals in the manner required by limitation 1[e]. *Id.* The Board’s finding regarding nexus is supported by substantial evidence.

CONCLUSION

We have considered Jager Pro’s remaining arguments and find them unpersuasive. For the foregoing reasons, the Board’s decisions are affirmed.

AFFIRMED

presumption—to the Board. *See* ’228 *Decision*, 2022 WL 499520, at *56.

CERTIFICATE OF SERVICE

As counsel for Appellant, I hereby certify that I caused a true and correct copy of the foregoing **JAGER PRO, INC.’S COMBINED PETITION FOR REHEARING *EN BANC* AND PANEL REHEARING** to be served on this date on all counsel of record by filing the document with the United States Court of Appeals for the Federal Circuit using the CM/ECF system.

Dated: December 20, 2023

Respectfully submitted,

/s/ Richard W. Miller

Richard W. Miller

BALLARD SPAHR LLP

999 Peachtree Street Suite 1600

Atlanta, GA 30309

(678) 420-9300

millerrw@ballardspahr.com

Counsel for Appellant Jager Pro, Inc.