Filed on Behalf of: Bazooka-Farmstar, LLC

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC

Petitioner,

- vs. -

NUHN INDUSTRIES LTD.,

Patent Owner

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO SEAL AND FOR ENTRY OF PROTECTIVE ORDER

Case No.: IPR2023-01161
U.S. Patent No. 11,358,425

I. INTRODUCTION

Pursuant to Section (g) of Appendix B to the November 2019 Consolidated Trial Practice Guide, Bazooka files its opposition to Nuhn's Amended Motion to Seal and for Entry of Protective Order (Paper 37).

Bazooka does not oppose Nuhn sealing its Exhibits 2055–2059, 2075–2078, and 2083. Nor does Bazooka oppose Nuhn sealing its Patent Owner's Response (Paper 20) or Corrected Patent Owner's Response (Paper 27). Rather, Bazooka opposes Nuhn's Proposed Amended Protective Order, as reflected in EX2089 ("Nuhn's PO"), which does not track the agreement previously reached between the Parties.

Nuhn's PO is a self-contradictory attempt to circumvent Nuhn's discovery obligations in the ongoing litigation and permit it to submit inconsistent information in connection with IPR2024-00004 and IPR2024-00098. Bazooka's Amended Proposed Protective Order (EX1135) ("Bazooka's PO") tracks the parties' prior agreement and avoids these issues present in Nuhn's PO.

II. BACKGROUND

In *Nuhn Industries Ltd. v. Bazooka Farmstar, LLC*, Case No. 3:22-cv-00015 (S. D. Iowa) ("the '015 Litigation"), Bazooka served discovery requests on Nuhn, seeking production of all documents filed in conjunction with IPR2023-01161, IPR2024-00004 and IPR2024-00098 (the "Co-Pending IPRs") under the Parties'

already-negotiated litigation protective order. Rather than simply producing the documents, Nuhn objected to this request and proposed filing a modified protective order in the IPRs to allow Bazooka's litigation counsel to use the documents in the '015 Litigation. Bazooka conditionally agreed, so long as the modified protective order permitted Bazooka's litigation counsel to use the protected material in the '015 Litigation. *See* EX1133, 3–4 (transcript of meet-and-confer between Bazooka's and Nuhn's litigation counsel); EX1134, 2 (correspondence to Nuhn's litigation counsel regarding Nuhn's PO).

However, Nuhn did not provide Bazooka with a draft of Nuhn's PO. Instead, Nuhn simply filed Nuhn's PO, which, as described below, is self-contradictory and fails to honor the Parties' prior agreement.

III. NUHN'S PO IS SELF-CONTRADICTORY, IS CONTRARY TO THE PARTIES' AGREEMENT, AND PERMITS GAMESMANSHIP

Nuhn's PO purports to embody the parties' agreement to "include[] an exception that Petitioner's and Patent Owner's use of material designated under the Amended Protective Order in the ['015 Litigation] is not a violation of the Amended Protective Order." Paper 37 at 6. But on its face, Nuhn's PO does not even permit Petitioner and Patent Owner to access the confidential material. *See* EX2088, ¶2(A) (striking the "Parties" as those permitted access to confidential information). Furthermore, pursuant to Paragraphs 2 and 3, litigation counsel must execute an unmodified acknowledgement form that prohibits them from using the confidential

material in the litigation, notwithstanding the purported carveout. *See id* at 8 ("I will use the confidential information only in connection with this proceeding and for no other purpose[.]"). Litigation counsel who are not also party representatives in the IPR proceeding cannot access the confidential material without party consent or an order by the PTAB. *See id.*, ¶¶2(B) and 3. There is no provision extending access to district court personnel, and it is unclear which provision, if any, applies to experts retained for the litigation.

Per the Parties' agreement, Bazooka's PO includes a carve out for use of the confidential information in the '015 Litigation ***that is also reflected in the associated acknowledgement form*** (EX1135, 8), clarifies who can access the confidential materials in connection with the '015 Litigation (persons permitted to access the confidential materials under the litigation protective order) (*id.*, 5), and specifies the scope of the permitted use (uses permitted by the litigation protective order) (*id.*). Thus, Bazooka's PO properly memorializes and effectuates the Parties' agreement.

Further, Bazooka's PO includes an analogous exception for the Co-Pending IPRs. *Id.* Petitioner needs to be able to use the confidential materials in the Co-Pending IPRs in the event that Patent Owner submits contradictory statements or takes inconsistent positions regarding the confidential material in the Co-Pending IPRs. *See, e.g.*, Paper 41 at 12 (identifying Nuhn's inconsistent positions regarding its secondary considerations offered in IPR2024-00004). Patent Owner has already

submitted the same confidential materials in one of the Co-Pending IPRs. Petitioner should be permitted to address potential inconsistencies in the Co-Pending IPRs without relying on the PTAB to identify them *sua sponte*.

This modification is consistent with Section (h) of Appendix B to the November 2019 Consolidated Trial Practice Guide. The Co-Pending IPRs involve the same parties with the same party representatives of record as this proceeding. Use of the confidential materials in the Co-Pending IPRs does not require disclosure of the confidential materials to additional persons and does not "untether[]" the confidential materials from the PTAB's control. *See One World Techs., Inc. v. Chervon (HK) Ltd.*, IPR2020-00884, Paper No. 35 at 11 (PTAB Apr. 22, 2021).

IV. CONCLUSION

The PTAB should adopt Bazooka's PO in order to effectuate the parties' agreement regarding use of the confidential materials in the '015 Litigation and to permit Petitioner to use the confidential materials in the Co-Pending IPRs involving the same parties.

Respectfully submitted,

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Bazooka-Farmstar, LLC Petitioner	§ § § § §	Petitioner's Opposition to Patent Owner's Motion to Seal and for Entry of Protective Order U.S. Patent No. 11,358,425

CERTIFICATE OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. §§42.105 and 42.6, that service was made on the Patent Owner as detailed below.

Date of service	August 9, 2024
Manner of service	Electronic mail addressed to: bluchsinger@harnessip.com syackey@harnessip.com mcutler@harnessip.com
Documents served	Petitioner's Opposition to Patent Owner's Motion to Seal and for Entry of Protective Order
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