

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC

Petitioner,

- vs. -

NUHN INDUSTRIES LTD.,

Patent Owner.

**MOTION TO EXCLUDE EVIDENCE SUBMITTED BY PATENT OWNER
UNDER 37 C.F.R. § 42.64**

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

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Petitioner Bazooka-Farmstar, LLC (“Bazooka”) moves to exclude the declarations of Mr. Prairie (EX2004, EX2029, EX2099) and Mr. Nuhn (EX2083), submitted and relied upon by Patent Owner Nuhn Industries Ltd. (“Nuhn”) in its Patent Owner’s Response and Motion to Amend. *See* Papers 27 and 40.

The declarations of Mr. Prairie (EX2004, EX2029, EX2099) relied upon in Nuhn’s Patent Owner Response and Motion to Amend should be excluded because Mr. Prairie is not a POSA. Mr. Prairie has no professional experience with marine vehicles (*see* Paper 12 at 8-9), which is a central focus of the ’425 Patent. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For these reasons, the PTAB should exclude Mr. Prairie’s statements related to marine vehicle design, fluid pumps, and livestock manure, including at least the following: paragraphs 34, 70, 82-84, 105 of EX2004, paragraphs 68-112, 121-125, 137-144, 146-150, 160, 184-192, 242-250, 538-539, and 542 of EX2029, and paragraphs 17-34, 59-109, 236-244 of EX2099 (discussing fluid pumps/liquid manure); and paragraphs 201-203 of EX2004, paragraphs 157-165, 168, 170, 180, 182, 207-208, 220-224, 235-240, 267, 274-280, 291-295, 312-317, 320, 365-370, 373 of EX2029, and paragraphs 110-115, 155-178, 187-231, 257-272, 288-304, 316-317, 331-335, 350-355, 356-368 of EX2099 (discussing marine vehicle design

concepts). Nuhn relies on these statements at Paper 27 at 7, 9, 15-16, 17, 19-21, 25-28, 35, 46-48, 52-53, 56, 61, and 67 and Paper 40 at 1, and 4-12.

[REDACTED]

[REDACTED]

[REDACTED] Mr. Nuhn's declaration introduces inadmissible hearsay in at least paragraphs 13, 25, 27, 29, 32, 34, 37, 39-40, 42-44, 53-59, and 70-71. EX2083. Nuhn relies on these statements at Paper 27 at 33, 34, 42-44.

Bazooka originally filed its objections on April 9, 2024. *See* Paper 24. For at least the reasons detailed below, the PTAB should exclude each of the above noted paragraphs of EX2004, EX2029, EX2083, and EX2099.

I. Mr. Prairie Is Not a POSA and His Opinions Should Be Excluded.

Mr. Prairie's opinions and testimony should be excluded because Mr. Prairie is not a POSA. Mr. Prairie lacks any professional experience in marine vehicles, and as shown in his deposition, he lacks a working knowledge of (or feigns ignorance regarding) fluid pumps and agitation equipment.

As recognized by the PTAB, "the Federal Circuit has made clear that, to offer expert testimony from the perspective of a skilled artisan in a patent case—like for claim construction, validity, or infringement—a witness must at least have ordinary skill in the art." *Nespresso USA, Inc. v. K-Fee Sys. Gmhb*, IPR2022-01574, Paper 29

at 21 (PTAB Apr. 10, 2024) (quoting *Kyocera Senco Indus. Tools Inc. v. Int’l Trade Comm’n*, 22 F.4th 1369, 1376-77 (Fed. Cir. 2022)) (cleaned up). Opinions from experts that lack such skill are “neither relevant nor reliable.” *Id.* (quoting *Kyocera*, 22 F.4th at 1377). Admitting such testimony “serves only to cause mischief and confuse the factfinder.” *Id.* (quoting *Kyocera*, 22 F.4th at 1377). Thus, admission of expert testimony where the expert fails to qualify as a POSA constitutes an abuse of discretion. *Kyocera*, 22 F.4th at 1376.

A. Mr. Prairie Lacks Any Professional Marine Vehicle Experience.

As the PTAB determined in the institution decision, the proper definition of a POSA requires “professional experience in marine and off-road vehicles.” Paper 12 at 7-9. Knowledge of marine vehicles is crucial given the ’425 Patent’s emphasis on how the locations of various components on the vehicle are “selected to provide a desired location of a center of gravity” and to “improve handling characteristics of the vehicle while floating.” EX1001, 4:15-18. “Weight distribution and center of gravity location is an important consideration when designing a floating vehicle because off-centered weight distribution may cause a vessel to list and/or adversely affect its stability.” EX1109, ¶103. Indeed, many of the claims in the ’425 Patent (and the substitute claims in the motion to amend) focus on marine propulsion mechanisms and the specific arrangement of weighty components on the floating

vehicle for providing a desired center of gravity. *See, e.g.*, EX1001 (claims 7, 9, 11, 19, 21); Paper 18 (substitute claims 22, 27, 28, 30, 32, 40, 42).

In his declarations, Mr. Prairie offers extensive testimony about the stability of prior art amphibious vehicles and adequacy of various marine propulsion mechanisms as the basis for his opinions on the obviousness of the '425 Patent claims over the prior art. *See, e.g.*, EX2029, ¶¶157-165, 168, 170, 180, 182, 207-208, 220-224, 235-240, 267, 274-280, 291-295, 312-317, 320, 365-370, 373; EX2099, ¶¶110-115, 155-178, 187-231, 257-272, 288-304, 316-317, 331-335, 350-355, 356-368. Mr. Prairie relies on his own experience to support his assertions. EX2029, ¶13.

However, neither Mr. Prairie's C.V. nor any of his declarations discuss Mr. Prairie having **any** professional marine vehicle experience—let alone two years' worth. EX2005; EX2087. There is simply no evidence of record indicating that Mr. Prairie has any professional experience with marine vehicles. *See, e.g., Unified Patents, LLC v. AK Meeting IP LLC*, IPR2022-01142, Paper 20 at 20 (PTAB Jan. 5, 2024) (“[Patent Owner's expert] appears to have neither the requisite education . . . nor experience [Thus], we give no weight to the testimony[.]”). Because Mr. Prairie lacks any professional experience with marine vehicles, his declaration should be excluded.

B. Mr. Prairie Lacks Familiarity with Fluid Pumps and Liquid Manure.

[REDACTED]

[REDACTED]

[REDACTED]

Nuhn continues to advance its rejected and overbroad POSA definition. Paper 27 at 12-13. Nuhn’s POSA definition is wrong and the difference in the parties’ definitions is material. Paper 41 at 4. But Mr. Prairie is not a POSA under *either* party’s POSA definition. Petitioner’s definition requires a “working knowledge of fluid pumps and livestock manure.” Paper 12 at 8. Similarly, Patent Owner’s definition requires “familiar[ity] with” or “knowledge of manure agitation equipment.” *Id.* [REDACTED]

[REDACTED]

[REDACTED]

First, Mr. Prairie offers opinions regarding the construction of the term “fluid pump for pumping liquid manure” and the application thereof, including but not limited to EX2029 at ¶¶96-112, 146-149, 184-190, and 242-247. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Second, Mr. Prairie offers opinions regarding the construction of the term “liquid manure” and the application thereof, including but not limited to EX2029 at paragraphs 68-95, 121, 125, 539, and 542. “Liquid manure” is a well-understood term in the industry. [REDACTED]

[REDACTED]

[REDACTED]

“Liquid” is a state of matter with an associated set of physical characteristics, so defining “liquid manure” based on location is absurd on its face. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ Eggs and flour are not dough before they are mixed. Sand is a component of river water when it is suspended but not when it is deposited at the bottom of a riverbed. Likewise, solid crust is not *liquid* manure until it is mixed into a liquid as a component of a suspension.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. Mr. Nuhn’s Declaration Relies on Unreliable Hearsay and Should Be Excluded.

Pursuant to 37 C.F.R. § 42.62 and Federal Rule of Evidence 802, the PTAB should exclude the hearsay statements contained with Mr. Nuhn’s declaration. Mr. Nuhn is a fact witness relying on hearsay to prove the truth of the matters asserted. This testimony is inadmissible. *See* Fed. R. Evid. 802; *The Data Co. Techs. Inc. v. Bright Data Ltd.*, IPR2022-00135, Paper 51 at 82 (PTAB May 31, 2023) (excluding hearsay offered in support of alleged secondary considerations).

A. Mr. Nuhn’s “Market Research” is Based on Speculation.

Paragraph 27 of Mr. Nuhn’s declaration (EX2083) should be excluded because it contains unreliable “market research” estimates of market share based on hearsay and speculation rather than reliable data. For example, Mr. Nuhn states that

Puck occupied “about 95%” of the market before Nuhn entered the market. EX2083, ¶27. Mr. Nuhn also “estimate[s]” that Puck’s market share dropped to 10% by December 2023. *Id.* Mr. Nuhn’s statements regarding his market share data should be excluded because: (1) he is not an expert qualified to provide such opinions; (2) these statements lack any corroborating evidence; and (3) these statements are based on hearsay and speculation.

Expert opinions that do not disclose the underlying facts or data on which the opinion is based upon are afforded no weight. 37 C.F.R. § 42.65; *Cont’l Auto. Sys., Inc. v. Intell. Ventures II, LLC*, IPR2022-00972, Paper 49 at 33 (PTAB Dec. 5, 2023). Here, Mr. Nuhn does not purport to be qualified to give an opinion on market share, as he is not a financial expert. Nor does Mr. Nuhn provide any information on the methodology for computing his market share conclusions. His unsupported lay opinion is unreliable.

Mr. Nuhn does not cite any corroborating evidence on the face of his declaration. The inherently self-interested declaration of an inventor, without support from objective corroborating evidence, should be given no weight. *Ex parte Finney*, Appeal No. 2020-004914 at 10 (PTAB Oct. 13, 2021); *Ex parte Frantz*, Appeal No. 2015-005384 at 14 (PTAB Mar. 30, 2017).

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Nuhn's market share evidence should be excluded because it is based on hearsay and speculation, and his improper reliance on hearsay highlights his inability to

reliably evaluate market share based solely on his personal knowledge. *See Club Champion LLC v. True Spec Golf LLC*, IPR2019-01148, Paper 87 at 17 (PTAB Dec. 2, 2020) (disregarding market share declaration testimony based on hearsay).

B. Mr. Nuhn Relies on Hearsay Statements of “Skepticism.”

Paragraphs 53-59 of Mr. Nuhn’s declaration (EX2083) should be excluded because they introduce hearsay statements. Specifically, Mr. Nuhn reports hearsay statements made by Mr. Nuhn’s father, Dennis Nuhn and unidentified “others” to Mr. Nuhn, purporting to express skepticism regarding the Lagoon Crawler. EX2083, ¶¶53-59. Mr. Nuhn offers the hearsay statements for the truth of the matter asserted: Nuhn relies on hearsay “skeptical feedback” to demonstrate that the Lagoon Crawler “went against conventional wisdom.” *Id.*, ¶¶55-56; Paper 27 at 43-44 (citing EX2083, ¶¶52-59).

These hearsay statements are inadmissible and should be excluded. *The Data Co. Techs Inc.*, IPR2022-00135, Paper 51 at 80-83. Nearly all of Mr. Nuhn’s identified “skepticism” stems from “others in the industry,” “others at these tradeshow,” and “skeptical customers.” EX2083, ¶¶53, 55-56, 58. However, because these “others” are all unidentified, Bazooka is unable to cross-examine them to determine whether they were skeptical of the Lagoon Crawler, why there were skeptical, or if they are even members of the relevant industry. *See US Endodontics*,

LLC v. Gold Standard Instruments, LLC, IPR2015-00632, Paper 78 at 33-34 (PTAB Aug. 1, 2016) (disregarding alleged skepticism of unidentified colleagues).

The only individuals Mr. Nuhn identifies as being skeptical are Dennis Nuhn and Mr. Koscamp. However, Mr. Nuhn’s declaration relies on hearsay statements from both individuals for the truth of the matter asserted—that Dennis Nuhn believed that Ian Nuhn “should be focusing [his] attention on more important matters” and that Mr. Koscamp “need[ed] to be sold on this” because he “never thought it could be done.” EX2083, ¶¶54, 59. Secondary considerations based on hearsay regarding an individual’s views of a product is inadmissible. *Ingenico Inc., v. Ioengine, LLC*, IPR2019-00929, Paper 53 at 99-101 (PTAB, Sept. 21, 2020).

[REDACTED]

[REDACTED]

[REDACTED]

C. Mr. Nuhn Relies on Hearsay Statements from an Unidentified Service Mechanic [REDACTED].

In Paragraphs 60-61 of Mr. Nuhn’s declaration (EX2083), Mr. Nuhn cites an email from [REDACTED] as proof that [REDACTED] sought to license the ’425 Patent. Later, in paragraphs 70-71, Mr. Nuhn discusses “conversations [he had] with a service mechanic.” EX2083, ¶70. Paragraphs 60-61 and 70-71 should be excluded because they introduce hearsay statements from [REDACTED] and an unidentified mechanic, neither of whom have submitted declarations in this case.

Regarding the email from [REDACTED], Mr. Nuhn relies on this email for the truth of the matter asserted, stating that it indicates “[REDACTED] wanted to license Nuhn’s Lagoon Crawler technology....” *Id.*, ¶62. Similarly, Mr. Nuhn reports that the unidentified mechanic told him that “he was uncomfortable with the Wolverine” because it “began more and more to mimic the Lagoon Crawler.” *Id.*, ¶71; *see also* Paper 27 at 36. These hearsay statements are offered for the truth of the matter asserted and do not fall within any hearsay exception.

Furthermore, the last sentence of Paragraph 71 should specifically be excluded because Mr. Nuhn is offering opinion evidence regarding the unsworn declarant’s mental state in violations of Federal Rules of Evidence 701 and 702. Mr. Nuhn provides an opinion that “[t]he only conclusion [he] can draw from the Stutsman mechanic’s explanation is that he understood Bazooka was copying Nuhn’s patented Lagoon Crawler.” EX2083, ¶71. Even if the mechanic’s statements were admissible—which they are not, it is up to the factfinder to draw conclusions from them.

D. Mr. Nuhn Relies on Media Publications in a Hearsay Form.

Paragraphs 34, 37, 39-40, and 42-44 of Mr. Nuhn’s declaration (EX2083) should be excluded because they contain hearsay statements. In Paragraphs 33-51, Mr. Nuhn purports to authenticate a series of media publications. EX2083, ¶¶33-51. In paragraphs 34, 37, 39-40, and 42-44, Mr. Nuhn goes further, characterizing the

media publications as “accurate[] reporting.” *See, e.g., id.*, ¶34. For example, after purporting to authenticate EX2061, Mr. Nuhn further states that the declarant of EX2061 “accurately reports that . . . [farmers’] expectations have been exceeded.” *Id.*, ¶40. Mr. Nuhn is either relying on the media publications as hearsay or is attempting to confusingly bootstrap his personal knowledge to statements made by the media.

Mr. Nuhn is not the declarant for any of the quoted statements in paragraphs 34, 37, 39-40, and 42-44. By describing the media publications as factually “accurate,” Mr. Nuhn is representing that the media publications can be relied on for the truth of the matters asserted therein. These statements do not fall within any hearsay exception and should be excluded.

Furthermore, paragraphs 34, 37, 39-40, and 42-44 should be excluded because they are confusing and misleading and/or not based on personal knowledge. Mr. Nuhn’s declaration is confusing and misleading because it appears to present journalist statements as objectively accurate statements without providing a basis for doing so. Mr. Nuhn should not be permitted to bootstrap his unsubstantiated personal knowledge to hearsay media statements to give the media publications an air of reliability. *See Cerro Wire, Inc. v. Southwire Co.*, Appeal No. 2016-006081 at 18 (PTAB July 13, 2016) (“[D]eclarations themselves offer only opinion evidence

which has little value without factual support.” (quoting *In re Beattie*, 974 F.2d 1309, 1313 (Fed. Cir. 1992))).

III. Conclusion

For the reasons provided above, Bazooka asks that the PTAB exclude EX2004, EX2029, EX2083, and EX2099.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e), that service was made on Counsel for Patent Owner as detailed below.

<i>Date of service</i>	September 17, 2024
<i>Manner of service</i>	Electronic mail addressed to: bluchsinger@harnessip.com syackey@harnessip.com mcutler@harnessip.com
<i>Documents served</i>	Petitioner's Motion to Exclude Evidence Submitted by Patent Owner Under 37 C.F.R. § 42.64
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