

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.: IPR2024-00004
U.S. Patent No. 11,491,835

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¹ The video size exceeds 25MB, the maximum size permitted for uploading by the P-TACTS system. A full copy of the video was later updated to Youtube.com and is available at the following link:

<https://www.youtube.com/watch?v=ecnlfMf7CH4&t=1s>.

The original copy of the video was served on Respondent on October 13, 2023.

Petitioner will provide the original copy of the video to the PTAB upon request.

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Petitioner Bazooka-Farmstar, LLC (“Bazooka”) moves to exclude the declarations of Mr. Prairie (EX2004, EX2094, EX2099, EX2106) and Mr. Nuhn (EX2083) as well as the written description support chart (EX2108) and provisional application comparisons (EX2109-EX2115), submitted and relied upon by Patent Owner Nuhn Industries Ltd. (“Nuhn”) in its Patent Owner’s Response and Revised Motion to Amend. *See* Papers 23, 42, and 50.

The declarations of Mr. Prairie (EX2004, EX2094, EX2099, EX2106), relied upon in Nuhn’s Patent Owner Response and Revised 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 10-11), which is a central focus of the ’835 Patent. As demonstrated in his deposition, Mr. Prairie lacks a working knowledge of fluid pumps and livestock manure, and he is unable to consider and apply the teachings of the prior art. 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, which Nuhn relies on at Paper 23 at 2-3, 5, 10, 15-18, 20, 25, 31, 34-36, 42-45, 47-53, 55-56, 58-59, 65, 71-72, 74; Paper 42 at 11, 16-25; and Paper 50 at 1, 3-4, 5-7, and 9-10:

Exhibit	Statements Related to Fluid Pumps and Liquid Manure	Statements Related to Marine Vehicle Design
EX2004	¶¶19-23, 33-35, 80-87, 90-96, 107-110, 114-122, and 144-150	¶¶124-141, 152-165, 174, 189-198, 207-209, and 224-234
EX2094	¶¶19-23, 33-35, 82-124, 127-133, 141-147, 151-155, 162-172, 195-203, 331-334, and 378-379	¶¶174-191, 205-218, 228, 243-252, 265-267, 282-292, 367-369, 375, 381-383, 387, 392, and 400-412
EX2099	¶¶43-49, 60-66, and 92-93	¶¶79-83, 89, 95-97, 103, 108-113, and 118-137
EX2106	¶¶47-65 and 77-83	¶¶41-45, 114-117, and ¶¶141-151

Mr. Nuhn's declaration (EX2083) should also be excluded because, as confirmed in his deposition, Mr. Nuhn's declaration is based on numerous hearsay statements and purportedly offered to prove the truth of the matters asserted. Mr. Nuhn's declaration introduces inadmissible hearsay in at least paragraphs 13, 25, 27, 29, 32, 35, 38, 40-41, 43-45, 54-60, and 74-75. EX2083. Nuhn relies on these statements at Paper 23 at 30, 32, 34, 38, and 40.

Finally, Nuhn's written description support chart (EX2108) and provisional application comparisons (EX2109-EX2115) should be excluded because they are filed in violation of 37 C.F.R. §§ 42.121(b), which requires the support for substitute claims filed in connection with a motion to amend to be filed in a motion itself—not in an exhibit to the Patent Owner's reply brief. Nuhn relies on these exhibits at Paper 50 at 12.

Bazooka filed objections on April 30, July 16, and November 19, 2024, and January 14, 2025. *See* Papers 15, 26, 43, and 51. For at least the reasons detailed below, the PTAB should exclude each of the above-noted paragraphs of EX2004, EX2083, EX2094, EX2099, and EX2106.

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, “[t]he 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 1376-77.

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 10-11. Knowledge of marine vehicles is crucial given the ’835 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, 4:15-20. “Weight distribution and center of gravity location are important considerations when designing a floating vehicle because off-centered weight distribution may cause a vessel to list and/or adversely affect its stability.” EX1174, ¶48. Indeed, many of the claims in the ’835 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 8, 24); Paper 42 (substitute claims 41, 48, 57, 64, 79, 80).

In his declarations, Mr. Prairie offers extensive testimony about the stability of prior art amphibious vehicles, the motivations for arranging weighty components on amphibious vehicles, and the feasibility of remotely controlling an amphibious vehicle as the basis for his opinions on the obviousness of the ’835 Patent claims over the prior art. *See, e.g.*, EX2004, ¶¶124-141, 152-165, 174, 189-198, 207-209, 224-234; EX2094, ¶¶174-191, 205-218, 228, 243-252, 265-267, 282-292, 367-369,

375, 381-383, 387, 392, 400-412; EX2099, ¶¶79-83, 89, 95-97, 103, 108-113, 118-137; EX2106, ¶¶41-45, 73-74, 114-117. Mr. Prairie relies on his own experience to support his assertions. EX2004, ¶14; EX2094, ¶14; EX2099, ¶15; EX2106, ¶15.

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 Pats., 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.

Mr. Prairie’s declaration should also be excluded because, as shown through his deposition testimony, he lacks the requisite knowledge of or familiarity with fluid pumps and liquid manure.

Nuhn continues to advance its rejected and overbroad POSA definition. Paper 23 at 7-11; Paper 42 at 10-11. Nuhn’s POSA definition is wrong and the difference in the parties’ definitions is material. Paper 34 at 3-4. 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 11. Similarly, Patent Owner’s definition requires “familiar[ity] with” or “knowledge of manure agitation equipment.” *Id.* As demonstrated by his deposition testimony, Mr. Prairie lacks knowledge and familiarity with pumps, manure, and manure agitation equipment, as he was wholly unequipped to testify about the subjects.

First, Mr. Prairie offers opinions regarding the construction of the term “liquid manure pump” and the application thereof. *See, e.g.*, EX2004, ¶¶87, 106-110, 113-119, 143-147; EX2094, ¶¶81-84, 122-124, 150-155, 161-169, 194-200; EX2106, ¶¶47-65. However, Mr. Prairie is unable to identify any common or definitional structural features in a “liquid manure pump” (EX1117, 15:22-30:3) or a pump capable of pumping liquids containing suspended solids (*id.*, 53:9-71:23). He is unable to identify any structural features of a centrifugal pump (*id.*, 47:12-52:23), and is unable to definitively state whether *any* centrifugal pumps meet his definition of a “liquid manure pump” (*id.*, 34:18-37:19).

And despite requesting pictures of such pumps before identifying their features (*id.*, 49:13-52:23, 77:14-81:15), when presented with one, Mr. Prairie remained unable or unwilling to identify any associated features (*id.*, 274:21-278:17). When asked which pump structure is required to pump liquid with suspended solids, Mr. Prairie engaged in the same wasteful, evasive tactics. *Id.*, 53:9-71:23. ***Because Mr. Prairie could not or would not identify specific features in the***

prior art, he is unqualified to opine on the same. See id., 206:18-213:3 (Puck), 239:7-243:7 (Carrier), 121:3-131:24 (SenwaTec).

When pressed, Mr. Prairie opined that a “liquid manure pump” is a pump that is “designed, tested and marketed” for handling liquid manure and excludes pumps “merely capable of pumping liquid manure in the theoretical sense[.]” EX2004, ¶87; EX1117, 23:1-8; *see also* EX1117, 44:16-21. According to Mr. Prairie, a pump with a structure capable of pumping liquid manure would not be a “liquid manure pump” unless it is first placed in liquid manure. *See* EX1117, 23:1-8 (“[B]ased on [testing], ***you could know*** that it is indeed a pump that is capable of handling liquid manure.” (emphasis added)); *see also id.*, 37:21-43:4. Seemingly recognizing that this distinction is ridiculous, Mr. Prairie contradicts himself and admits that what matters is capability. *Id.*, 17:15-21 (“It has to do with capabilities.”), 18:4-12, 20:14-16. However, as noted above, Mr. Prairie is wholly unable to identify any structure associated with these “capabilities.”

Second, Mr. Prairie offers opinions regarding the construction of the term “liquid manure” and the application thereof. *See, e.g.*, EX2004, ¶¶79-86, 90-94, 108-109, 115, 145; EX2094, ¶¶85-131, 141-146, 151-152, 163, 195; EX2099, ¶¶43-47; EX2106, ¶¶56-63, 77-81. “Liquid manure” is a well-understood term in the industry. Despite this, Mr. Prairie makes no attempt to define liquid manure by composition, disregarding the well-understood definitions entirely in favor of a location-based

definition. EX1117, 188:15-189:6. “Liquid” is a state of matter with an associated set of physical characteristics. Defining “liquid manure” based solely on its location is wrong.

Furthermore, Mr. Prairie is unable to describe even general characteristics of a liquid manure lagoon when shown the diagrams of Puck explaining the stratification of liquid manure and mixing effects of prior art agitation equipment. *Id.*, 208:11-212:5. Mr. Prairie’s lack of knowledge (or willful ignorance) of pumps, manure, and manure agitation equipment renders his testimony on the subjects unreliable, as he demonstrates that he lacks a POSA’s “working knowledge of . . . livestock manure.” Paper 12 at 11.

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. Mr. Nuhn's statements regarding his market share data should be excluded because he is not an expert qualified to provide such opinions and 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. This unsupported, inherently self-interested declaration of the inventor 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).

This deficiency is confirmed by Mr. Nuhn's deposition testimony. Mr. Nuhn testified that he did not perform any market share study or hire an expert to do so. EX1116, 225:14-226:2. And Mr. Nuhn failed to consider the market share of potentially relevant competitors, such as dredging boats, floating agitators, SenwaTec, Truxor, and Bradley, because Mr. Nuhn was allegedly "not aware" of whether any such products were sold. *Id.*, 219:21-220:9, 226:3-227:9. Instead, Mr. Nuhn provided an arbitrary market share percentage, based on the incomplete

snapshot of the market that Mr. Nuhn has “personally seen.” *Id.*, 227:18-25, 228:17-18. Mr. Nuhn admits that his 2013 market share number is “pure[] speculati[on].” *Id.*, 217:19-23. Mr. Nuhn’s guesstimates are inadmissible. *See In re Applied Materials, Inc.*, 692 F.3d 1289, 1300 (Fed. Cir. 2012) (“Just as the number of units sold without evidence of the market share is only weak evidence of commercial success, so too is an assertion of market share lacking in sales data.”).

Mr. Nuhn’s market share is also based on hearsay, including verbal statements from competitors regarding the number of units they sold. EX1116, 227:10-13 (“Q. You base your market share data based on what people told you correct? A. Correct.”). Even Mr. Nuhn admits that the hearsay he relied upon is unreliable. *See, e.g., id.*, 226:17-20; *Cook Grp. Inc. v. Bos. Sci. Scimed, Inc.*, IPR2017-00135, Paper 82 at 31 (PTAB Nov. 15, 2018) (“We agree with Petitioner that Mr. Smith’s testimony as to what he was told by outside counsel is hearsay and thus unreliable.”). 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 54-60 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, ¶¶54-60. 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.*, ¶¶56-57; Paper 23 at 39-40 (citing EX2083, ¶¶53-60).

These hearsay statements are inadmissible and should be excluded. *The Data Co. Techs. Inc.*, IPR2022-00135, Paper 51 at 80-84. Nearly all of Mr. Nuhn’s identified “skepticism” stems from “others in the industry,” “others at these tradeshow,” and “skeptical customers.” EX2083, ¶¶54, 56-57, 59. 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, ¶¶55, 60. 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). Furthermore, the hearsay testimony from Dennis Nuhn is particularly troublesome, as Dennis Nuhn is an unsworn witness with a financial interest in the outcome of this proceeding. EX1116, 17:10-13; Fed. R. Evid. 807(a)(1).

C. Mr. Nuhn Relies on Hearsay Statements from an Unidentified Service Mechanic and Competitors.

In Paragraphs 64-66 of Mr. Nuhn’s declaration (EX2083), Mr. Nuhn cites an email from his competitor, Jeremy Puck, as proof that Jeremy Puck sought to license the ’835 Patent. Later, in paragraphs 74-75, Mr. Nuhn discusses “conversations [he had] with a service mechanic.” EX2083, ¶74. Paragraphs 64-66 and 74-75 should be excluded because they introduce hearsay statements from a competitor and an unidentified mechanic, neither of whom have submitted declarations in this case.

Regarding the email from Jeremy Puck, Mr. Nuhn relies on this email for the truth of the matter asserted, stating that it indicates “Puck Enterprises wanted to license Nuhn’s Lagoon Crawler technology[.]” *Id.*, ¶66. 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.*, ¶75; *see also* Paper 23 at 32. 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 75 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, ¶75. 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 35, 38, 40-41, and 43-45 of Mr. Nuhn’s declaration (EX2083) should be excluded because they contain hearsay statements. In Paragraphs 34-52, Mr. Nuhn purports to authenticate a series of media publications. EX2083, ¶¶34-52. In paragraphs 35, 38, 40-41, and 43-45, Mr. Nuhn goes further, characterizing the media publications as “accurate[] reporting.” *See, e.g., id.*, ¶43. 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.*, ¶41. 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 35, 38, 40-41, and 43-45. 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 35, 38, 40-41, and 43-45 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 14, 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. Nuhn Written Description Support Chart (EX2108) and Provisional Application Comparisons (EX2109-EX2115) Should Be Excluded

Nuhn’s written description support chart (EX2108) and provisional application comparisons (EX2109-EX2115) should be excluded because they are

filed in violation of 37 C.F.R. §§ 42.121(b). Section 42.121(b) requires support for the substitute claims to be filed in a motion to amend—not as an exhibit to a reply brief. While a claim listing may be filed in an appendix, “[a]ll arguments and evidence in support of the motion to amend shall be in the motion itself. *Lectrosonics, Inc. v. Zaxcom, Inc.*, IPR2018-01129, Paper 15 at 8 (PTAB Feb. 25, 2019) (precedential). Exhibits purporting to identify written description support for substitute claims are improper and are excluded by the PTAB. *See, e.g., SAP America, Inc. v. Lakshmi Arunachalam*, IPR2013-00195, Paper 60 at 20 (PTAB Sept. 18, 2014). By introducing EX2108-EX2115, Nuhn flouts the 12-page limit for its reply. Such tactics have been deemed “fundamentally unfair” by the Federal Circuit. *Promptu Sys. Corp. v. Comcast Cable Comm’s, LLC*, 92 F.4th 1384, 1385 (Fed. Cir. 2024).

IV. Conclusion

For the reasons provided above, Bazooka asks that the PTAB exclude EX2004, EX2083, EX2094, EX2099, EX2106, and EX2108-EX2115.

Respectfully submitted,

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Date: January 17, 2025

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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>	January 17, 2025
<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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