

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC,

Petitioner,

v.

NUHN INDUSTRIES LTD.,

Patent Owner.

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

**PATENT OWNER'S RESPONSE TO PETITIONER'S MOTION TO
EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64**

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Other Authorities

37 C.F.R. §42.8	13
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PATENT OWNER'S EXHIBIT LIST

<i>Exhibit #</i>	<i>Description</i>
2001	Petitioner's <i>Ex Parte</i> Reexamination Requests for U.S. Patent No. 11,358,425 and U.S. Patent No. 10,974,557
2002	Decision Granting Patent Owner's Petition for an Unintentionally Delayed Priority Claim in U.S. Patent. No. 10,124,638
2003	U.S. Patent No. 4,594,006 to Depeault ("Depeault")
2004	Expert Declaration of Douglas S. Prairie
2005	Curriculum Vitae of Douglas S. Prairie and Case List
2006	Screenshots from Patent Owner's YouTube Channel of Patented Product, retrieved on 10-2-23 from https://www.youtube.com/watch?v=fEgvvq9HZkk
2007	Screenshots from Petitioner's YouTube Channel of Accused Product, retrieved on 10-2-23 from https://www.youtube.com/watch?v=3y3bSJJUOps
2008	Screenshots from Progressive Dairyman YouTube Channel of 2014 Manure Lagoon Agitation Boat Demonstration, published on 7-9-14 by Progressive Dairy, retrieved on 10-2-23 from https://www.youtube.com/watch?v=FXRS-9Ip1pE
2009	Patent Classification List for U.S. Patent No. 11,358,425, retrieved on 10-4-23 from https://patents.google.com/patent/US11358425B1/en?q=US11358425
2010	U.S. Patent No. 4,406,413 to Houle ("Houle")
2011	U.S. Patent No. 7,833,071 to Gaither ("Gaither")
2012	U.S. Patent No. 5,176,098 to Royle ("Royle")
2013	U.S. Patent No. 9,462,741 to Puck ("Puck-II")
2014	U.S. Patent No. 9,572,297 to Puck ("Puck-III")
2015	DE2364962 to Kronseder ("Kronseder")
2016	DE3431345 to Lüllmann ("Lüllmann")
2017	CA2002619 to Depeault ("Depeault-II")
2018	U.S. Patent No. 10,118,138 to Tews ("Tews")
2019	Daniel L. Pfoest et al., Univ. of Mo. Extension, Anaerobic Lagoons for Storage/Treatment of Livestock Manure (Oct. 2000)

2020	Screenshots from 2023 North American Manure Expo Website, retrieved on 10-2-23 from https://www.manureexpo.ca/
2021	Dictionary Definitions of “Dredging” and “Agitation”, retrieved on 9-30-23 from https://en.wikipedia.org/wiki/Dredging , https://www.merriam-webster.com/dictionary/dredging#dictionary-entry-1 , https://www.merriam-webster.com/dictionary/agitation , and https://www.lagoonpumping.com/articles-resources/agriculture-articles/manure-articles/
2022	Envtl. Prot. Agency, Primer for Municipal Wastewater Treatment Systems (Sept. 2004)
2023	U.S. Dep’t Agric., <i>Agricultural Waste Management Systems</i> , in <i>Agricultural Waste Management Field Handbook</i> Ch. 9 (Dec. 2011)
2024	Screenshot of 2023 Commercial Manure Applicator Certification, retrieved on 10-3-23 from https://elearning-dnr.iowa.gov/course/index.php?categoryid=2
2025	Joseph Akyeampong et al., <i>Evaluation of hydraulic excavator Human-Machine Interface concepts using NASA TLX</i> , 44 Int’l J. of Indus. Ergonomics 374, 374–82 (2014)
2026	Screenshots of 2023 Truxor Website, retrieved on 10-1-23 from https://truxor.com/en/catalog/node/products and https://truxor.com/en/catalog/node/products-truxor-machines
2027	Screenshots of 2023 Berky (formerly SenwaTec) Website, retrieved on 10-4-23 from https://www.berky.de/en/berky-nereus-240-amphi/
2028	Christian Haas et al., <i>Practical Evaluation of a Control Concept for a Remote Controlled 1.8T Excavator Using a 3D Input Device</i> , BATH/ASME 2022 Symposium on Fluid Power and Motion Control, ISBN: 978-0-7918-8633-5, FPMC2022-88959, V001T01A012-1 thru V001T01A012-7 (2022)
2029	Timeline Showing Bazooka’s Post-Grant Challenges
2030	January 18, 2023 District Court Order Granting Motion to Lift Stay
2031	Reexamination History of U.S. Patent No. 11,358,425

2032	Screenshots from YouTube of SenwaTec video, retrieved on January 15, 2024 from https://www.youtube.com/watch?v=ecnlfMf7CH4&t=1s
2033	Printout of Bazooka's webpage for its Wolverine Agitation Boat, retrieved on March 30, 2024 from: https://www.bazookafarmstar.com/equipment/wolverine-agitation-boat/
2034	K. Smith et al., <i>Natural Crusting Of Slurry Storage As An Abatement Measure For Ammonia Emissions On Dairy Farms</i> , 97 Biosystems Engineering 464 (2007)
2035	Brochure for MY2017 of Nuhn's Gen 1 Lagoon Crawler
2036	Operator's/Safety Manual for the MY2017 of the Gen 1 Lagoon Crawler
2037	Parts Catalog for Gen 1 Lagoon Crawler
2038	Brochure for Nuhn's Gen 1 Lagoon Crawler
2039	Brochure for MY2018 of Nuhn's Gen 2 Lagoon Crawler
2040	Operator's/Safety Manual for the MY2019 Gen 2 Lagoon Crawler
2041	Parts Book for the MY2018 Gen 2 Lagoon Crawler
2042	Brochure for Gen 2 Lagoon Crawler
2043	Operator's/Safety Manual for the MY2020 of the Gen 3 Lagoon Crawler
2044	Operator's/Safety Manual for the MY2020 of the Gen 3 Lagoon Crawler
2045	Parts catalog for the MY2021 of the Gen 3 Lagoon Crawler
2046	Brochure for Crawler X
2047	Parts Catalog for MY2022 Lagoon Crawler X
2048	U.S. Provisional Patent Application No. 63/040,562 filed June 18, 2020
2049	U.S. Provisional Patent Application No. 63/104,887 filed October 23, 2020
2050	U.S. Patent Application Publication US 2021/0394571 published December 23, 2021
2051	Notice of Allowance in U.S. Application No. 17,590,125, Mailed April 22, 2022.

2052	Notice of Intent to Issue Ex Parte Reexamination Certificate, Control No. 90/019,107, Mailed November 2, 2022.
2053	Print No. 1 of Nuhn YouTube Video - "Nuhn Lagoon Crawler Unrivaled Lagoon Agitation!", accessed at https://www.youtube.com/watch?v=fEgvvq9HZk
2054	Lagoon Crawler Prototype Brochure, Aggressive Agitation
2055	Intentionally Omitted
2056	Intentionally Omitted
2057	Intentionally Omitted
2058	Intentionally Omitted
2059 (Under Seal)	Lagoon Crawler Sales Report - X Models
2060	Print No. 2 of Nuhn YouTube Video - "Nuhn Lagoon Crawler Unrivaled Lagoon Agitation!", accessed at https://www.youtube.com/watch?v=fEgvvq9HZk
2061	<i>New Lagoon Crawler Demos Will Satisfy Curiosity</i> , Canada's Outdoor Farm Show Official Show Guide for September 9-11, 2014 in Woodstock, Ontario
2062	H. Rivers, <i>Farm show opens with a splash</i> , The Beacon Herald (Sept. 10, 2014)
2063	B. Shypula, <i>Transforming farming</i> , The London Free Press (Sept. 9, 2013))
2064	B. Shypula, <i>Crawler makes manure almost sexy</i> , The Beacon Herald (Sept. 6, 2013)
2065	30th Annual AMC Engineering Conference Brochure for May 5-7, 2015 in Waterloo, Iowa
2066	Certificate of Services Awarded to Ian Nuhn
2067	M. Beitz, <i>Crawler is turning heads</i> , The Beacon Herald at A2 (Jan. 30, 2014)
2068	C. Elmore, <i>Innovative Uses of Horsepower – A real crapshoot</i> , Diesel Progress North American Edition (Dec. 2014)
2069	D. Rankin, <i>Nuhn Industries celebrates employees at expansion grand opening</i> , 100th lagoon crawler unveiling, St. Marys Independent (Aug. 7, 2015)

2070	B. Reid, <i>Agitator has reclaimed manure lagoons around the world</i> , Ontario Farmer (Aug. 18, 2015)
2071	L. Cudworth, <i>Nuhn marks major milestone</i> , The London Free Press (Aug. 11, 2015)
2072	L. Cudworth, <i>Marking a major milestone</i> , The Stratford Beacon Herald (Aug. 7, 2015)
2073	J. Algie, <i>Made-in-Sebringville lagoon crawler to be featured on Discovery Channel</i> , Betterfarming.com (Sept. 2, 2015)
2074	B. Reid, <i>Self-propelled</i> , Western Dairy Farmer (Oct. 2015)
2075 (Under Seal)	March 21, 2022 Email to Nuhn re: Licensing Lagoon Crawler Technology
2076 (Under Seal)	Nuhn Invoice to Eldon C. Stutsman, Inc. (Sept. 9, 2015)
2077 (Under Seal)	Nuhn Invoice to Eldon C. Stutsman, Inc. (June 20, 2020)
2078 (Under Seal)	Nuhn Invoice to Eldon C. Stutsman, Inc. (Sept. 28, 2020)
2079	Print of Bazooka's YouTube Video - "Meet the Wolverine Agitation Boat," accessed at https://www.youtube.com/watch?v=ehAHKL442as
2080	Discovery Channel's Lagoon Crawler Feature (Sept. 3, 2015)
2081	U.S. Provisional Application No. 61/867,598 (filed August 19, 2013).
2082	U.S. Patent No. 3,384,047 to Remley
2083 (Under Seal)	Declaration of Ian Nuhn
2084	U.S. Patent Application Publication 2010/0144220 to Bailey
2085	Intentionally Omitted
2086	Intentionally Omitted
2087	D. Prairie CV and Case List updated April 2, 2024 (cited here for completeness)
2088	Proposed Protective Order (Redline)
2089	Proposed Protective Order (Clean)
2090	U.S. Patent No. 6,922,922 to Cheramie
2091	Dredge Yard Auger Dredger ECO200-A8-brochure, downloaded

	from https://dredgeyard.com/wp-content/uploads/2021/01/ECO200-A8-brochure.pdf
2092	Hydraulic Dredgers – Dredge Brokers LLC, accessed at https://dredgebrokers.com/equipment/hydraulic-dredgers/dt-horizontal-cutter/
2093	MANURE MANAGER, Jan./Feb. 2011 (Manure-Manager)
2094	July 9, 2024 Expert Declaration of Douglas Prairie Regarding ‘835 Patent (cited here for completeness)
2095	Agriculture – manure storage statistics, eurostat, Sept. 2013, accessed at https://url.us.m.mimecastprotect.com/s/ZSdwCkRw8BHqom10i2tW
2096	Bazooka’s brochure for the Bazooka Wolverine Agitation Boat from: https://www.bazookafarmstar.com/wp-content/uploads/2023/01/Cutsheet-Wolverine-1.pdf
2097	H. Landry et al., Physical and Rheological Properties of Manure Products, Applied Engineering in Agriculture, at 278 (2004)
2098	Hydrostatic Pto’s Run in Reverse, Farm Show, Vol. 1 No. 5, 1977
2099	November 12, 2024 Declaration of Douglas S. Prairie
2100	Intentionally Omitted
2101	US 8,944,758 to Nuhn
2102	Intentionally Omitted
2103	Intentionally Omitted
2104	Intentionally Omitted
2105	Intentionally Omitted
2106	January 13, 2025 Declaration of Douglas S. Prairie
2107	U.S. Patent Application Publication 2013/0145980 to Puck (“Puck II”)
2108	Chart Showing Support For Substitute Claims
2109	Redline Comparison between U.S. Provisional Patent Application No. 61/867,598 and International Patent Application No. PCT/CA2014/050789
2110	Redline Comparison between U.S. Provisional Patent Application No. 61/867,598 and U.S. Patent Application No. 15/044,905 (now U.S. Patent No. 9,694,636)
2111	Redline Comparison between U.S. Provisional Patent Application No. 61/867,598 and U.S. Patent Application No. 15/586,493 (now

	U.S. Patent No. 10,124,638)
2112	Redline Comparison between U.S. Provisional Patent Application No. 61/867,598 and U.S. Patent Application No. 16/157,950 (now U.S. Patent No. 10,710,422)
2113	Redline Comparison between U.S. Provisional Patent Application No. 61/867,598 and U.S. Patent Application No. 16/891,627 (now U.S. Patent No. 10,974,557)
2114	Redline Comparison between U.S. Provisional Patent Application No. 61/867,598 and U.S. Patent Application No. 17/201,100 (now U.S. Patent No. 11,491,835)
2115	Nuhn Header Series Vertical Pit Pump Brochure

I. INTRODUCTION

Petitioner's Motion (Paper 53) seeks to exclude the technical expert Patent Owner Nuhn Industries Ltd. ("Nuhn" or "Patent Owner") retained for this proceeding. Petitioner also seeks to exclude portions of inventor Ian Nuhn's declaration as allegedly being based on "speculation" and "hearsay" and EX2108-EX2115 as allegedly being filed in violation of 37 C.F.R. § 42.121(b). The Board should deny Petitioner's Motion in all respects because the Declarations submitted by both witnesses are admissible and EX2108-EX2115 are not in violation of 37 C.F.R. § 42.121(b).

II. PRAIRIE DECLARATIONS (EX2004, EX2094, EX2099, EX2106)

A. Petitioner's Definition of a POSITA is Incorrect

Petitioner's Motion to Exclude highlights the errors in its definition of a POSITA. Petitioner defines a POSITA as requiring "professional experience in marine and off-road vehicles." (Paper 1, 31). Petitioner's definition of a POSITA is incorrect at least because a POSITA does not need experience with both marine vehicles and off-road vehicles. Petitioner argues that "marine vehicles ... is a central focus of the '835 Patent" (Paper 53, 1), but the words "marine" or "marine vehicles" do not appear anywhere in the '835 Patent. Instead, the claims of the '835 Patent are directed to a purpose-built vehicle with a "liquid manure mover" and/or "liquid manure pump." Marine applications are markedly different from the application that

is described and claimed in the '835 Patent – manure lagoon agitation.

Petitioner's definition of a POSITA excludes those most familiar with manure agitation equipment because persons skilled in the art of manure lagoon maintenance and agricultural manure application lack experience with both marine vehicles and off-road vehicles. This is illustrated by the declarations (EX1119 and EX1120) of the "manure industry veterans" submitted by Petitioner. Petitioner offers declarations from Benny Puck, the founder of Puck Custom Enterprises, Inc., and Ernie Sundstrom, the owner of Sundstrom's Pit Plumbing, LLC, to demonstrate the knowledge of those skilled in the art. (EX1119, EX1120, and Paper 34, 10, 11, 16, 23). Neither "industry veteran" mentions experience with marine vehicles. In other words, the "manure industry veterans" Petitioner lined up to provide declarations in this IPR do not even qualify as a POSITA under Petitioner's definition because they do not have professional experience with both marine vehicles and off-road vehicles. Marine vehicles are not synonymous with floating manure lagoon agitators. Notably, Petitioner did not characterize these individuals as "marine industry veterans" even though they designed and operated floating manure lagoon agitators. If exclusion of Mr. Prairie's declarations were appropriate, then the same could be said of EX1119 and EX1120. This shows the inconsistency in Petitioner's arguments.

The proper definition of a POSITA for this matter is "a livestock farmer or commercial manure applicator familiar with manure agitation equipment or an

engineer with at least 2 years of experience designing agricultural equipment and knowledge of manure agitation equipment” (Paper 9, page 32 *quoting* EX2004, ¶64).

Mr. Prairie is a qualified POSITA under the proper definition and thus, his opinions should not be excluded.

B. Mr. Prairie Qualifies as a POSITA Using Petitioner’s Definition

Even under Petitioner’s definition, Mr. Prairie qualifies as a POSITA. Petitioner’s definition of a POSITA requires expertise in a technology area including marine and off-road vehicles. Thus, experience with either marine or off-road vehicles should be sufficient to satisfy Petitioner’s definition of a POSITA.

Mr. Prairie is “an agricultural engineer with over 25 years of experience in machine design and product development solutions, specializing in off-highway and agricultural machinery systems.” (EX2004, ¶4). Despite lacking professional experience with marine vehicles, Mr. Prairie does have professional experience with off-road vehicles (e.g., off-highway and agricultural machinery systems) and thus is a qualified POSITA who has expertise in the technology area including marine or off-road vehicles. Any argument by Petitioner that a POSITA must have experience in two separate fields (i.e., marine vehicles on one hand and off-road vehicles on the other) is unreasonably restrictive when the ‘835 Patent makes no mention of “marine vehicles” at all.

C. Petitioner Incorrectly Argues That Mr. Prairie Lacks Experience With Pumps and Liquid Manure

Petitioner incorrectly alleges that Mr. Prairie “lacks the requisite knowledge of or familiarity with fluid pumps and liquid manure.” (Paper 53, 5). Petitioner is incorrect and is wholly overlooking at least paragraphs 5, 7 and 10 of EX2004 and EX2094, and at least paragraphs 6, 8 and 11 of EX2099 and EX2106, which explain that his experience includes “design of high horsepower trash pumps.” Trash pumps are pumps that are configured to pump a mixture of solids and liquids, making this experience highly relevant to the issues that have been raised in this proceeding. Petitioner’s argument that Mr. Prairie is unfamiliar with “pumps” is entirely false given Mr. Prairie’s experience with trash pumps.

Mr. Prairie’s declarations (EX2004, EX2094, EX2099, EX2106) also explain that he grew up on a livestock farm where he handled manure. Mr. Prairie worked on his in-laws’ dairy farm where he has helped with their manure management system. In particular, he describes in detail his in-laws’ manure lagoon, which “is an earthen style structure with steep side walls and a shallower concrete apron where the tractor and power take-off (“PTO”) powered agitator can be backed into the lagoon to agitate prior to the manure being pumped out.” (EX2004, ¶5). He further describes that the manure lagoon is agitated several times a year by a “floating manure agitator.” *Id.* It is clear that, unlike Petitioner’s expert, Mr. Prairie has firsthand knowledge and experience with manure and manure agitation equipment.

Further, Petitioner cites to Page 15, line 22 - Page 30, line 3 Mr. Prairie's deposition testimony (EX1117) to support its allegations that "Mr. Prairie is unable to identify any common or definitional structural features in a 'liquid manure pump.'" (Paper 53, 6). But Petitioner mischaracterizes Mr. Prairie's deposition testimony. Page 15, line 22 - Page 30, line 3 of EX1117 includes repetitive questioning from Petitioner that led to Mr. Prairie repeatedly answering that a pump must be designed and tested for a particular application – in this case pumping liquid manure. Mr. Prairie repeatedly states that he worked with a variety of pumps in his professional career. (EX1117, 25:24; 26:5-8, 12-14, 20-22; 27:20-25).

Petitioner also alleges Mr. Prairie "is unable to identify any structural features of a centrifugal pump" and states "despite requesting pictures of such pumps before identifying their features (*Id.*, 49:13-52:23 and 77:14-81:15), when presented with one, Mr. Prairie remained unable or unwilling to identify any associated features." (Paper 53, 6). Again, Petitioner is mischaracterizing Mr. Prairie's deposition testimony. At Page 49, lines 13-16 and lines 23-25 of EX1111, Mr. Prairie noted that if a picture was put on the screen, he would be able to identify components of the pump. At this point in the deposition, no picture was put on the screen. Petitioner alleges that Mr. Prairie was unwilling or unable to identify features of the pump when in reality he asked follow-up questions in attempt to clarify his understanding of what was being asked and Petitioner failed to provide him the necessary additional

information for him to provide the opinions they were seeking. *Id.* It is a mischaracterization of Mr. Prairie's deposition testimony to allege that he was unable or unwilling to identify features of a pump when the questioning was about prior art asserted in a different IPR proceeding and when he was not given a fair opportunity to identify features due to Petitioner's inability or unwillingness to provide the more detail documentation (e.g., a parts list) Mr. Prairie requested.

Petitioner also alleges that "Mr. Prairie makes no attempts to define liquid manure by composition." (Paper 53, 7). Petitioner again mischaracterizes Mr. Prairie's deposition testimony. For example, when discussing liquid manure, Mr. Prairie described his opinions with respect to the '835 Patent and how the inventor "provided their definition to the context of what that piece of machinery can handle" in response to Petitioner's questions about whether a POSITA would understand what liquid manure is. (EX1117, 188:7-189:6).

Petitioner also alleges that "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." (Paper 53, 8). Petitioner again mischaracterizes Mr. Prairie's deposition testimony. For example, when discussing Figure 4 of EX1014, Petitioner asked "Would you agree with me that in Figure 4, the manure lagoon shown there, that the middle layer, the supernatant, 128, would have the lowest total solid content as

depicted of the various types of manure in that lagoon?” (EX1117, 208:11-15). After several clarifying statements and questions, Mr. Prairie noted that it is a generalized statement to allege that the supernatant has the lowest total solid context and stated “you could take this same cross-section across multiple different manure lagoons and get different percent solids. So you're asking me a hard yes-or-no question, and I'm telling you that this is a generalization. So it's hard to give a hard yes-or-no answer across a generalized depicted diagram.” (EX1117, 210:8-15). It is clear from this testimony that Mr. Prairie is very familiar with manure lagoons and simply could not provide a yes-or-no answer due to variations from one manure lagoon to the next. Failure to agree with Petitioner’s yes-or-no questions on cross-examination during a deposition does not provide a basis to exclude. Petitioner’s criticisms go to the weight of the testimony, not admissibility.

Mr. Prairie was able and willing to discuss pumps, manure, and manure agitation equipment during his deposition. Petitioner’s failure to elicit desirable responses from Mr. Prairie in his deposition testimony does not correlate to a conclusion that he is unfamiliar with either pumps, manure, or manure agitation equipment.

D. Mr. Prairie’s Education Remedies Any Alleged Lack of Experience

Even if Petitioner’s definition of a POSITA is adopted, Mr. Prairie is qualified as a POSITA because his additional education remedies any lack of experience

Petitioner alleges. Petitioner’s definition for a POSITA is someone who “had a bachelor’s degree in mechanical engineering or similar field, and two years of professional experience in marine and off-road vehicles. A POSA would have had a working knowledge of fluid pumps and livestock manure.” (Paper 1, 31). Petitioner’s own definition further specifies that a “[l]ack of work experience can be remedied by additional education, and vice versa.” *Id.*

Mr. Prairie has a Bachelor of Science in Agricultural Engineering with a Power and Machinery Focus from South Dakota State University and a Masters in Mechanical Engineering from Boise State University. (EX2005, 2). If the Board determines that a POSITA in the field of the ‘835 Patent would have professional experience in marine vehicles, Mr. Prairie’s additional education (i.e., a Masters degree in Mechanical Engineering) overcomes any lack of professional experience. Thus, Mr. Prairie qualifies as a POSITA under Petitioner’s definition and Mr. Prairie’s declarations should not be excluded.

III. NUHN DECLARATION (EX2083)

A. Mr. Nuhn’s Statements in Paragraph 27 of EX2083 are Not Hearsay

Mr. Nuhn’s statements in paragraph 27 of EX2083 are related to his own market research. Mr. Nuhn repeatedly uses the phrases “my market research” and “my research” when describing market share in the relevant market of manure agitation vehicles. (EX2083, ¶27). Mr. Nuhn’s statements are his own, are based on

his personal knowledge, and are not hearsay.

Petitioner alleges that Mr. Nuhn's statements in paragraph 27 of EX2083 are "based on hearsay, including verbal statements from competitors regarding the number of units they sold." (Paper 53, 10). While Mr. Nuhn answered "Correct" to the question "You base your market share data based on what people told you, correct?" (EX1116, 227: 10-13), Mr. Nuhn testified that it was not the sole basis for his testimony, stating "I haven't personally seen any new JT Boats in 2023. And quite frankly, I have not seen any new Puck boats in 2023." (EX1116, 227: 18-22). Mr. Nuhn further testified that the serial number provided on Puck's boats identifies the build number for each boat (EX1116, 215:10 - 216:15) so he knows about how many Puck boats were built as of certain points in time and that he would know if any Puck boats were made or sold recently because "It would get around. It's a small industry." (EX1116, 227:23 - 228:5). Thus, Mr. Nuhn is knowledgeable about the manure boat agitation industry and any statements made about the industry are his own and based on his own personal knowledge. This testimony is factual in nature. Mr. Nuhn is not offering expert testimony as Petitioner argues. To the extent, Mr. Nuhn offers an opinion, it is admissible under FRE 701 because it is rationally based on his own perception of the market Nuhn occupies and competes in. For at least these reasons, the statements in paragraph 27 of EX2083 are Mr. Nuhn's statements and are not hearsay and should not be excluded.

B. Mr. Nuhn's Statements in Paragraphs 54-60 and 64-66 of EX2083 are Not Hearsay

Petitioner alleges that Mr. Nuhn's statements in paragraphs 54-60 of EX2083 are hearsay. (Paper 53, 11). Petitioner is incorrect because these statements are not offered to prove the truth of the matter asserted, but instead are only offered to prove the existence of statements expressing skepticism about the invention.

Paragraphs 54-60 of EX2083 describe the feedback Mr. Nuhn received about his invention between 2013 and 2014. These paragraphs explain that the Lagoon Crawler received skepticism as well as praise when the Prototype and Gen 1 were released, describes skepticism about the invention that Dennis Nuhn, the owner of Nuhn Industries Ltd, expressed to Mr. Nuhn when he was working on the prototype, list nine specific points of skepticism that Mr. Nuhn received from others in the industry between 2013 and 2014 when Nuhn was exhibiting the prototype and initial model at tradeshow, and describe the publicity and feedback Nuhn received from customers related to the Lagoon Crawler.

Mr. Nuhn is not offering these statements of skepticism to prove the truth of the matter asserted (i.e., that the statements of skepticism are correct – that Nuhn's Lagoon Crawler would fail). Accordingly, this evidence does not fall under the definition of hearsay, which is set forth in FRE 801(c)(2). Instead, Mr. Nuhn offers this evidence to simply show that statements expressing skepticism were made, irrespective of the accuracy of the statements themselves (i.e., the truth of the

statements). The statements are also admissible under FRE 803 because statements of a declarant's then-existing state of mind are exceptions to the rule against hearsay. *See Juniper Network Inc., Ruckus Wireless, Inc., Brocade Communication Systems, Inc. and Netgear, Inc. v. Chrimar Systems, Inc.*, IPR2016-01391, Paper 66 at 98 (PTAB Dec. 20, 2017) (Overruling hearsay objection of Petitioner because the statements were not hearsay as they “are offered as proof of skepticism, the state of mind of a person of ordinary skill.”). Thus, the statements in paragraphs 54-60 of EX2083 are not hearsay and should not be excluded.

Petitioner incorrectly argues that paragraphs 64-66 of EX2083 should be excluded “because they introduce hearsay statements from a competitor.” (Paper 53, 12). Paragraphs 64-66 of EX2083 describes a written solicitation that Mr. Nuhn received from Puck requesting a license to Nuhn's patents. Mr. Nuhn's statements describing this licensing email (EX2075) are offered only to show the existence of licensing discussions. These statements are not hearsay under FRE 801(c)(2) because they are not being offered to prove the truth of the matter asserted. Rather, Mr. Nuhn is citing to the email to provide authentication and show that the statements were in fact made. The licensing email (EX2075) supports Mr. Nuhn's statements that the Lagoon Crawler is commercially successful and that he has had offers for licenses. Thus, the statements in paragraphs 64-66 of EX2083 are not hearsay and should not be excluded. Moreover, as a practical matter, Petitioner filed

two declarations in this IPR that are signed by Benny Puck (EX1119 and EX1121) and also took his deposition (EX1158). Mr. Puck did not refute Mr. Nuhn's description of the licensing email (EX2075).

C. Mr. Nuhn's Statements in Paragraphs 74-75 of EX2083 are Not Hearsay Because They are Admissions of a Party Opponent

Petitioner incorrectly argues that paragraphs 74-75 of EX2083 should be excluded "because they introduce hearsay statements from . . . an unidentified mechanic." (Paper 53, 12). Paragraphs 74-75 of EX2083 describes a conversation Mr. Nuhn had with Roy Felts, a service mechanic at Eldon C. Stutsman, Inc. ("Stutsman"), who serviced Nuhn Lagoon Crawlers purchased and sold by Stutsman. (EX1137, 230:4-15). Mr. Nuhn describes how Mr. Felts "was uncomfortable with the Wolverine." (EX2083, ¶75). Mr. Felts explained to Mr. Nuhn that "Stutsman had him work with Bazooka to advice on Bazooka's design for a yet-to-be-released manure lagoon agitation vehicle" and that "he felt increasingly uncomfortable as Bazooka's manure lagoon agitation vehicle—ultimately released as the Wolverine—began more and more to mimic the Lagoon Crawler." *Id.*

The statements in paragraph 74-75 of EX2083 are not hearsay under FRE 801(d)(2) because they are statements made by the party opponent (i.e., an employee of Petitioner's parent company) and are offered against Petitioner. Stutsman is Petitioner's parent company and is listed in the mandatory notices of the Petition as a real-party-in-interest under 37 C.F.R. §42.8. (Paper 1, 1). The statements made by

the service mechanic were about the close resemblance between Bazooka's Wolverine and Nuhn's Lagoon Crawler and the mechanic's own discomfort with the direction Petitioner took with the design. EX2083, ¶75. Mr. Felts was working with Bazooka on Bazooka's manure lagoon agitation vehicle. Thus, his statements were on a matter within the scope of his relationship with his employer, Stutsman, as required by FRE 801(d)(2)(D), and were against the interest of Bazooka and Stutsman, who are party opponents (i.e., real-parties-in-interest) in this IPR. For at least this reason, the statements in paragraphs 74-75 of EX2083 are not hearsay and should not be excluded.

D. Mr. Nuhn's Statements Related to Media Publications are Not Hearsay

Petitioner alleges that paragraphs 35, 38, 40-41, and 43-45 of EX2083 contain hearsay statements. (Paper 53, 13). In particular, Petitioner notes that Mr. Nuhn "purports to authenticate a series of media publications" in paragraphs 34-52 of EX2083. *Id.* Petitioner then states "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." *Id.* at 13-14. Petitioner is incorrect.

Mr. Nuhn's description of numerous media publications does not fall under the definition of hearsay provided in FRE 801(c)(2) because Nuhn is not relying on the media publications for the truth of the matter asserted (i.e., to prove the accuracy of the information reported). Instead, Mr. Nuhn is noting that these media

publications exist to support his statement that the Lagoon Crawler was praised by the industry. (EX2083, ¶34). In other words, Nuhn offers evidence of numerous media publications, which it kept with Nuhn's business records, to simply show the existence of praise by others, rather than as proof that the statements contained therein are correct. Thus, none of paragraphs 35, 38, 40-41, and 43-45 of EX2083 contain hearsay statements and should not be excluded.

IV. WRITTEN DESCRIPTION SUPPORT CHART (EX2108) AND PROVISIONAL APPLICATION COMPARISONS (EX2109-EX2115)

Petitioner alleges that Nuhn's written description support chart (EX2108) and provisional application comparisons (EX2109-EX2115) should be excluded because they were allegedly filed in violation of 37 C.F.R. § 42.121(b). Petitioner is incorrect. In both Patent Owner's Conditional Motion to Amend (Paper 21) and Patent Owner's Revised and Conditional Motion to Amend (Paper 42), Patent Owner identified support for the substitute claims in U.S. Provisional Application No. 61/867,598 ('598 Application). The '598 Application has substantially the same specification as each subsequent application in the '835 Patent's priority chain. Thus, the citations to the '598 Application provide the requisite support under 37 C.F.R. § 42.121. EX2108-EX2115 were filed with Patent Owner's Reply (Paper 50) to demonstrate the lack of substance and futility of Petitioner's arguments, are proper rebuttal evidence, and therefore should not be excluded.

V. CONCLUSION

For the foregoing reasons, it is respectfully requested that Petitioner's Motion to Exclude Evidence be denied in all respects.

Dated: January 27, 2025

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type volume limitations of 37 C.F.R. § 42.24(a)(1)(v), and that this Response to Petitioner's Motion to Exclude Evidence is 15 pages or less.

The undersigned further certifies this brief complies with the typeface requirements of 37 C.F.R. § 42.6(a)(2)(ii) and typestyle requirements of 37 C.F.R. § 42.6(a)(2)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. 42.6(e), I certify that on this 27th day of January, 2025, a true and correct copy of the foregoing **Patent Owner's Response to Petitioner's Motion to Exclude Evidence** was served by electronic mail on Petitioner's lead and backup counsel at the following addresses:

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