

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 IPR2024-00098
U.S. Patent No. 11,541,708

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Petitioner Bazooka-Farmstar, LLC (“Bazooka”) moves to exclude the declarations of Mr. Prairie (EX2004, EX2099) and Mr. Nuhn (EX2083), submitted and relied upon by Patent Owner Nuhn Industries Ltd. (“Nuhn”) in its Patent Owner’s Response. *See* Paper 21.

The declarations of Mr. Prairie (EX2004, EX2099) relied upon in Nuhn’s Patent Owner Response and should be excluded because Mr. Prairie is not a POSA. Mr. Prairie has no professional experience with marine vehicles (*see* Paper 10 at 8-10), which is a central focus of the ’708 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, which Nuhn relies on at Paper 21 at 2-3, 5-7, 12, 16, 19, 21, 26-27, 30-37, 40-42, 47-53, 58, 62-69, 73-74, 78:

Exhibit	Paragraphs Regarding Liquid Manure and Fluid Pumps	Paragraphs Regarding Marine Vehicle Design
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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, 64-66, and 74-75. EX2083. Nuhn relies on these statements at Paper 21 at 15-17, 19, and 23-24.

Bazooka originally filed its objections on June 7, 2024, and August 21, 2024. *See* Papers 13 and 22. For at least the reasons detailed below, the PTAB should exclude each of the above noted paragraphs of EX2004, 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. GmbH*, 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 10 at 8-10. Knowledge of marine vehicles is crucial given the ’708 Patent’s emphasis on how the locations of various components on the vehicle are “selected to provide a desired location for a center of gravity” and to “improve handling characteristics of the vehicle while floating.” EX1001, 4:17-22. Engineers designing marine

vehicles must regularly “address[] marine propulsion, marine hydrodynamics and stability; select[] and design[] hydraulic and mechanical systems for power transmission systems; and implement[] remote control and software systems.” EX1079, ¶25. Indeed, many of the claims in the ’708 Patent (and the substitute claims in the motion to amend) focus on marine propulsion mechanisms, buoyancy mechanisms, and the specific arrangement of weighty components on the floating vehicle for providing a desired center of gravity. *See, e.g.*, EX1001 (claims 9, 14-17, 21, 23, and 35).

In his declarations, Mr. Prairie offers extensive testimony about the stability of prior art amphibious vehicles, the motivations for arranging weighty and buoyant components on amphibious vehicles, and the feasibility of remotely controlling an amphibious vehicle as the basis for his opinions on the obviousness of the ’708 Patent claims over the prior art. *See, e.g.*, EX2004, ¶¶77-83, 105-110, 127-132, 140-156, 169, 175-189, 204-215, 226-237, 251-265, 276-288, 297-303, 318-335, 343, 359-373, 381-396, 407-419; EX2099, ¶¶101-107, 131-132, 139-144, 162-168, 175-193, 196, 211, 217-232, 238, 252-270, 282-293, 296, 311-332, 344-356, 359, 366-373, 388-406, 410, 418, 434-449, 455, 463-485, 497-509, 512. Mr. Prairie relies on his own experience to support his assertions. EX2004, ¶14; EX2099, ¶14.

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 21 at 6-7. Nuhn’s POSA definition is wrong and the difference in the parties’ definitions is material. Paper 29 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 10 at 9. 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 “fluid pump for pumping liquid manure” or “liquid manure pump” and the application thereof. *See, e.g.*, EX2004, ¶¶74, 86-92, 115-121, 134-136, 156, 162-164, 171-173, 189, 305-312, 335, 345-353, 373, 419; EX2099, ¶¶98, 110-116, 126-130, 149-156, 170-172, 193, 198-206, 213-215, 232, 375-382, 406, 420-428, 449, 509, 704-707. However, Mr. Prairie is unable to identify any common or definitional structural features in any such pumps (EX1095, 15:22-30:3) or 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 opines that “a fluid pump for pumping liquid manure” 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.” EX2099, ¶98; EX1095, 22:15-23:8; *see also* EX1095, 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* EX1095, 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 (“[I]t has to do with the 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, ¶¶19-35, 38-39, 69-73; EX2099, ¶¶19-35, 38-39, 69-97. “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. EX1095, 188:15-189:6. “Liquid” is a state of matter with an associated set of physical characteristics, so defining “liquid manure” based on 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.*, 208:11-212:7. 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 10 at 9.

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. This unsupported, 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).

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. EX1098, 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. EX1098, 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 21 at 24 (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. EX1098, 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 ’708 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 21 at 17. 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 violation 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. Conclusion

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

Respectfully submitted,

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Date: January 29, 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 29, 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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