UNITED STATES PATENT AND TRADEMARK OFFICE

_____

BEFORE THE PATENT TRIAL AND APPEAL BOARD

_____

KUBOTA NORTH AMERICA CORPORATION,

Petitioner

v.

VERMEER MANUFACTURING COMPANY,

Patent Owner

_____

IPR2025-00168
U.S. Patent No. 9,321,386

_____

PETITIONER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE

Patent Owner's Opposition ("Opp.") confirms that reliance on evidence—excerpts of Toro employee depositions and Toro documents—in EX1029, EX1030, and EX1031 to prove the truth of the matter asserted. Patent Owner's argument—that it offers the evidence not "for their truth" but to show that "the Office's previous conclusion…was correct"—is a distinction without a difference. Patent Owner (PO) cannot escape the hearsay rule by reframing its reliance as deference to the Office's prior conclusion as that conclusion depended on hearsay itself.

I. ARGUMENT

A. PO's "Not for the Truth" Argument Is a Legal Fiction.

The relevance of the Toro evidence to PO's secondary considerations argument in the present IPR depends entirely on the truth of the underlying statements. The Patent Owner Response ("POR") confirms this. The POR invokes Toro's "development story" to support claims of long-felt need, skepticism, and failure of others—each requiring the Board to accept as true that Toro's engineers actually struggled and faced the difficulties described. POR, 14-15, 60-66. These assertions are meaningful only if true. PO cannot simultaneously argue that Toro's engineer struggled while disclaiming reliance on the truth of those struggles.

PO's cited authority is inapposite. In *Cardiovascular Systems*, the Board found statements were not offered for their truth because the patent owner relied on them only to show "industry actors took notice of and commented on" a device. *Cardiovascular Sys., Inc. v. Shockwave Med., Inc.,* IPR2019-00409, Paper 75 at 60

(P.T.A.B. July 8, 2020). Similarly, *Fox Factory* involved statements offered to show industry recognition, not to establish truth of technical claims. *Fox Factory, Inc. v. SRAM, LLC*, Paper 59 at 59–60 (P.T.A.B. Apr. 2, 2018). Here, in contrast, PO argues that Toro's engineer statements prove non-obviousness because they accurately describe actual engineering struggles and difficulties.

B. PO's Reliance on Prior Office Action Does Not Cure the Hearsay Problem.

The Board must evaluate evidence under the Federal Rules of Evidence pursuant to 37 C.F.R. § 42.62. That an examiner in an *ex parte* proceeding—where no cross-examination occurs—considered certain evidence does not render it admissible in a contested IPR proceeding. *Ex parte* reexaminations involve fundamentally different procedures than IPRs, and the Board is not bound by an examiner's prior evidentiary determinations.

PO's citation to the September 16, 2025 USPTO Memorandum does not address the threshold question of admissibility. A decision cannot be "consistent" with a prior ruling based on inadmissible evidence. The Board must first determine what evidence is properly admissible. *See* FRE 104(a) ("[T]he court must decide any preliminary question about whether…evidence is admissible."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (Supreme Court) (the judge plays a "gatekeeping role"… and must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

C. PO's Discovery Arguments Confirm the Hearsay Problem.

Petitioner sought to depose the witnesses—namely, Mr. Borenstein and Mr. Kuemper—that PO is relying on; PO refused. And PO's argument that it need not produce the entire transcript, or these witnesses for deposition, underscores why the evidence must be excluded: Petitioner could not examine the portions of the testimony to see if they were taken out of context (*see* FRE106) and has had no opportunity to cross-examine these witnesses. These out-of-court statements cannot be offered for the truth absent an applicable exception, and PO identifies none. Moreover, PO's reliance on *Costco*, *Nestle*, and *Medtronic* is inapposite. Those cases addressed whether a party was required to produce a witness—not whether hearsay testimony could be relied upon for its truth. As the Board recognized in *Asetek Danmark* and *Vudu*, testimony not subject to cross-examination by the opposing party's IPR counsel is hearsay if offered for truth. *See Asetek Danmark v. CoolIT Sys.,* IPR2020-00825, Paper 50, 43-46 (Oct. 12, 2021); *Vudu v. Ideahub*, IPR2020-01688, Paper 47, 7 (Mar. 16, 2022). Because PO's secondary considerations argument depends entirely on the truth of what Toro's engineers said, any reliance on the exhibits must be prohibited.

D. Rule 403 Supports Exclusion.

Rule 403 addresses not only unfair prejudice but also confusion of issues—concerns fully applicable here. The probative value of the Toro evidence is *de*

minimis because a vertical lift CUL is explicitly shown in Petitioner's prior art reference KR996. Whether Toro's engineers were skeptical does not inform any question properly before this Board. Additionally, Petitioner does not have complete deposition transcripts—PO refused to provide them—and the excerpts were selected by PO in advocacy. These facts justify exclusion.

E. PO's Characterization Has Been Inconsistent.

PO asserts its characterization of Toro's development story is "consistent across proceedings." Opp. 8. The record demonstrates otherwise. In the present IPR, PO characterizes Toro's efforts as demonstrating the difficulty of achieving any vertical lift CUL. Yet in PGR2020-00081, PO argued that the same evidence was "directed to a scissor lift mechanism mounted to the front of a machine via a front support assembly"—a narrow characterization serving PO's advocacy there. PO argues "it was Toro who changed its story." Opp. 9. But the issue is how PO characterized the same evidence. PO cannot credibly argue here that Toro's story proves broad skepticism while having argued it was narrowly directed elsewhere.

Most tellingly, in PGR2020-00081, PO submitted Mr. Kuemper's testimony stating that applying "vertical lift or four-bar linkage to a compact utility loader" "would **not** be difficult or impossible" "[b]ecause there are so many other loaders out there that have vertical lift on them." EX1060, 7-8. PO did not produce this excerpt in the present IPR because it directly contradicts its narrative here. This

selective presentation epitomizes the prejudice warranting exclusion.

F. Dr. Fleming's Declaration Cannot Launder Inadmissible Hearsay.

Dr. Fleming's declaration (EX2016, ¶¶60, 153-164) should be excluded because it simply parrots the hearsay statements. Contrary to PO's argument, FRE 703 does not authorize admission of underlying inadmissible evidence through expert testimony. Opp. 13. Federal Circuit has held that FRE "does not authorize admitting inadmissible evidence" where the expert has "added nothing to the inadmissible evidence other than transmitting it to the fact-finder." *Wi-LAN Inc. v. Sharp Electronics Corp*., 992 F.3d 1366, 1374 (Fed. Cir. 2021).

PO's attempt to distinguish *Wi-LAN* on the ground that the evidence there was of "highly dubious" trustworthiness is unavailing. Opp. 15. *Wi-LAN* was not limited to situations involving dubious evidence; rather, the Federal Circuit articulated a general principle that experts cannot serve as conduits for otherwise inadmissible hearsay. And the fact that PO believes that the Toro evidence is trustworthy—i.e., true—demonstrates that it is improperly relying on this hearsay evidence for the truth of the matter asserted.

II. CONCLUSION

The Board should exclude reliance on EX1029, EX1030, EX1031, and the corresponding portions of Dr. Fleming's declaration (EX2016) as hearsay, or accord these materials no weight.

Respectfully submitted,

/David M. O'Dell/
David M. O'Dell
Lead Counsel for Petitioner
Registration No. 42,044

Dated: March 4, 2026
HAYNES AND BOONE, LLP
2801 N. Harwood St., Suite 2300
Dallas, TX 75201
Customer No. 27683

CERTIFICATE OF SERVICE

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

Date of service	March 4, 2026
Manner of service	Electronic Mail: rbrophy@atllp.com mvandertuig@atllp.com; mvandermolen@atllp.com
Documents served	***PETITIONER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE***
Persons served	Richard L. Brophy Armstrong Teasdale LLP 7700 Forsyth Boulevard, Suite 1800 Saint Louis, Missouri 63105 Marc Vander Tuig Armstrong Teasdale LLP 7700 Forsyth Boulevard, Suite 1800 Saint Louis, Missouri 63105 Michael J. Vander Molen Armstrong Teasdale LLP 7700 Forsyth Boulevard, Suite 1800 Saint Louis, Missouri 63105

/ David M. O'Dell /
David M. O'Dell
Lead Counsel for Petitioner
Registration No. 42,044