

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC,
Petitioner,

v.

NUHN INDUSTRIES LTD.,
Patent Owner.

IPR2023-01161
Patent 11,358,425 B1

Before MEREDITH C. PETRAVICK, MATTHEW S. MEYERS and
BRENT M. DOUGAL, *Administrative Patent Judges*.

DOUGAL, *Administrative Patent Judge*.

PRELIMINARY GUIDANCE
PATENT OWNER'S MOTION TO AMEND

I. INTRODUCTION

After institution of trial on claims 1–21 of U.S. Patent 11,358,425 B1, Patent Owner filed a contingent Motion to Amend. Paper 18 (“Motion” or “Mot.”). In response, Petitioner filed an opposition. Paper 36 (“Opposition” or “Opp.”).

In the Motion, Patent Owner requests preliminary guidance. Mot. 1; *see also* Notice Regarding a New Pilot Program Concerning Motion to Amend Practice and Procedures in Trial Proceedings under the America Invents Act before the Patent Trial and Appeal Board, 84 Fed. Reg. 9,497 (Mar. 15, 2019) (providing a patent owner with the option to receive preliminary guidance from the Board on its motion to amend) (“Notice”).

In this Preliminary Guidance, we provide preliminary views on whether Patent Owner has shown a reasonable likelihood that it has satisfied the statutory and regulatory requirements associated with filing a motion to amend and whether Petitioner (or the record) establishes a reasonable likelihood that the substitute claims are unpatentable. *See* Notice, 84 Fed. Reg. at 9,497 (“The preliminary guidance . . . provides preliminary, non-binding guidance from the Board to the parties about the [motion to amend]”); *see also* 35 U.S.C. § 316(d) (statutory requirements for a motion to amend); 37 C.F.R. § 42.121 (regulatory requirements and burdens for a motion to amend); *Lectrosonics, Inc. v Zaxcom, Inc.*, IPR2018-01129, Paper 15 (PTAB Feb. 25, 2019) (precedential) (providing information and guidance regarding motions to amend).

We emphasize that the views expressed in this Preliminary Guidance are subject to change upon consideration of the complete record, including any revision to the Motion filed by Patent Owner. Thus, this Preliminary Guidance is not binding on the Board when rendering a final written decision. *See id.* at 9,500.

II. PRELIMINARY GUIDANCE

A. Statutory and Regulatory Requirements

For the reasons discussed below, based on the current record, it appears that Patent Owner has shown a reasonable likelihood that it has satisfied the statutory and regulatory requirements associated with filing a motion to amend.

1. Reasonable Number of Substitute Claims

Does Patent Owner propose a reasonable number of substitute claims? (35 U.S.C. § 316(d)(1)(B))

Yes. Patent Owner proposes no more than one substitute claim for each challenged claim. Mot. 3.
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2. Respond to Ground of Unpatentability

Does the Motion respond to a ground of unpatentability involved in the trial? (37 C.F.R. § 42.121(a)(2)(i))

Yes. Patent Owner responds to grounds of unpatentability on which we instituted trial. <i>See</i> Mot. 21–24.
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3. Scope of Amended Claims

Does the amendment seek to enlarge the scope of the claims? (35 U.S.C. § 316(d)(3); 37 C.F.R. § 42.121(a)(2)(ii))

No. Patent Owner contends that “the proposed claims add only narrowing limitations.” Mot. 2. Because no subject matter is removed along with the addition of new limitations, the amendments do not seek to enlarge the scope of the claims.

4. New Matter

Does the amendment seek to add new subject matter? (35 U.S.C. § 316(d)(3); 37 C.F.R. § 42.121(a)(2)(ii))
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No. Patent Owner states that “[t]he ‘425 Patent issued on June 14, 2022 from Application Ser. No. 17/590,125, and is one of several continuations filed off international patent application number PCT/CA2014/050789
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(filed August 18, 2014) and U.S. Provisional Application No. 61/867,598 (filed August 19, 2013).” Mot. 4. Patent Owner asserts that there is written description support in U.S. Provisional Application No. 61/867,598 for each of the proposed substitute claims. *Id.* at 4–19 (citing Ex. 2081). On this record, Patent Owner appears to have identified adequate written description support for the proposed substitute claims.

“liquid manure pump”

Petitioner notes that “Patent Owner’s amended claims seek to replace the term ‘fluid pump for pumping liquid manure’ with ‘liquid manure pump,’” and asserts that “[t]his term lacks written description support in the specification.” Opp. 23. Petitioner asserts that “the ’425 Patent never describes what a ‘liquid manure pump’ is.” *Id.* at 24. According to Petitioner, “the disclosed pump is only generically described as a ‘pump’ or a ‘fluid pump’ used for ‘pumping fluid from rivers, ponds, [and] lakes’ in addition to liquid manure.” *Id.* at 25. Petitioner concludes that “to the extent that ‘liquid manure pump’ is understood to mean anything other than ‘a fluid pump’ the claims are invalid under 35 U.S.C. § 112(a) as failing to sufficiently describe the claimed invention.” *Id.*

For support, Patent Owner cites, among other things, paragraph 1 of U.S. Provisional Application No. 61/867,598 for the “liquid manure pump” limitation. Mot. 5. Paragraph 1 recites, in part, “the invention relates to manure pumps and amphibious vehicles equipped for pumping liquid manure.” Ex. 2081 ¶ 1. Based on the current record, this portion of the ’598 application supports the term “liquid manure pump,” as recited in the proposed substitute claims.

Petitioner’s ultimate argument appears to be an issue of claim construction, rather than written description. Indeed, Petitioner points out that in IPR2024-00004, we “construe[d] the term ‘liquid manure pump’ only to the extent that it requires a pump with a structure that is capable of pumping liquid with suspended solids.” Opp. 4 (quoting IPR2024-00004, Paper 12, 18). Based on the current record, we do not construe the term differently here than the construction applied in IPR2024-00004.

In view of the above, we are not persuaded that the term “liquid manure pump” amounts to new matter.

B. Patentability

For the reasons discussed below, and based on the current record,¹ it appears that Petitioner (or the record) has shown a reasonable likelihood that proposed substitute claims 22–42 are unpatentable.

Does the record establish a reasonable likelihood that the proposed substitute claims are unpatentable?

1. 35 U.S.C. § 103 – Obviousness

Yes. Based on the current record, Petitioner (or the record) has shown a reasonable likelihood of establishing that proposed substitute claims 22–42 are unpatentable under 35 U.S.C. § 103 as obvious over the following combinations of references:

- (1) Puck (Ex. 2014), Bryham (Ex. 1015), and Manure Manager (Ex. 1088), asserted against claims 22–42; and
- (2) Cheramie (Ex. 1087) and Yoon (Ex. 1011) or Carrier (Ex. 1005), asserted against claims 22–25, 27, 28, and 33–40.

Based on the current record, Petitioner (or the record) has not shown a reasonable likelihood of establishing that proposed substitute claims 22–25, 27, 28, and 33–40 are unpatentable under 35 U.S.C. § 103 as obvious over the following combinations of references:

- (1) SenwaTec (Ex. 1012) and Yoon or Carrier, asserted against claims 22–25, 27, 28, and 33–40; and
- (2) Truxor (Ex. 1006) and Yoon or Carrier, asserted against claims 22–25, 27, 28, and 33–40.

We acknowledge that Patent Owner has not yet had the opportunity to respond to Petitioner’s contentions that proposed substitute claims 22–42 are unpatentable under 35 U.S.C. § 103 as obvious. Patent Owner will have the opportunity to do so in its reply to Petitioner’s Opposition (or in a revised motion) in this proceeding.

¹ We express no view on the patentability of original claims 1–21 in this Preliminary Guidance.

a. Proposed Substitute Claims 22–42 (Puck, Bryham, and Manure Manager)

Petitioner argues that the combination of Puck, Bryham, and Manure Manager would have rendered obvious the added limitations in proposed substitute claim 22. Opp. 20–22. Petitioner asserts that a person of ordinary skill in the art “would have been motivated to have substituted the Puck pump with Patent Owner’s pump described in Manure Manager, to take advantage of Patent Owner’s self-described improved efficiency and manure pumping capabilities of the Nuhn Pump, which includes a housing and immersible impeller.” *Id.* at 2021 (citing Ex. 1088, 27; Ex. 1109 ¶¶ 128–137). Petitioner further asserts that a person of ordinary skill in the art “would have located the Nuhn Pump in the same location as the location in which Puck’s pump was arranged, as the vehicle already includes an access point through which the pump could extend into the liquid of the manure lagoon.” *Id.* at 21 (citing Ex. 1109 ¶ 143).

Moreover, Petitioner asserts that a person of ordinary skill in the art would have “understood that the most logical location for attaching the wheels of Bryham would have been to place one wheel at each corner of the steel frame . . . of the Puck vehicle, which is the typical arrangement of wheels on a four sided vehicle.” *Id.* at 21 (citing Ex. 1109 ¶ 144)

With respect to claims 23–25, 28–30, and 33–40, Petitioner argues that it would have been obvious “to connect the Nuhn Pump on the Puck vehicle in the same manner in which the Puck pump was connected to the transport pipe 42 on the Puck vehicle.” Opp. 22 (citing Ex. 1109 ¶ 145).

With respect to claims 26, 29, 31, 32, 41, and 42, Petitioner asserts that Puck “describes a plurality of fluid nozzles arranged about the body of the vehicle to steer, propel, and agitate,” and that Puck further “describes how directing fluid from the nozzle (48) to the starboard side of the vehicle steers the vehicle to the port direction.” Opp. 22 (Citing Ex. 1014 ¶ 32). According to Petitioner, it would have been obvious “to have added additional fluid nozzles to each of the left side of the vehicle and the right side of the vehicle to better facilitate steering and maneuverability of the vehicle, not to mention better agitation.” *Id.* (citing Ex. 1109 ¶¶ 146–148). Petitioner further states that Puck “teaches a remote-control system for opening and closing the valves that direct fluid to each of the nozzles to propel and steer the vehicle.” *Id.* at 22–23 (citing Ex. 1014 ¶ 33).

With respect to claim 27, Petitioner asserts that a person of ordinary skill in the art would have “understood that the most logical location for attaching the wheels of Bryham would have been to place one wheel at each corner of the steel frame . . . of the Puck vehicle. Opp. 23 (citing Ex. 1014 ¶ 22; Ex. 1109 ¶150). Petitioner further asserts that “[t]o the extent that the Nuhn Pump would not already be arranged forward of the rear spindles and rearward of the front spindles when arranged within the vehicle of Puck, as explained above, [a person of ordinary skill in the art] would have considered it obvious to have located the pump in such a way so as to centrally locate the center of gravity and mitigate the effect of any negative forces generated by the operation of the fluid pump.” *Id.* (citing Ex. 1109 ¶¶ 151–154.)

On this record, Petitioner has shown sufficiently that the limitations of proposed substitute claims 22–42 are taught or suggested by the combination of Puck, Bryham, and Manure Manager. Further, Petitioner’s reasons for combining these references have a rational underpinning and are supported by expert testimony (Ex. 1109), which is unrebutted at this stage of the proceeding. Accordingly, on this record, Petitioner has shown a reasonable likelihood of establishing that proposed substitute claims 22–42 are unpatentable under 35 U.S.C. §103 as obvious over Puck, Bryham, and Manure Manager.

b. Proposed Substitute Claims 22–25, 27, 28, and 33–40 (Cheramie and Yoon or Carrier)

Petitioner argues that the combination of Cheramie and Yoon or Carrier would have rendered obvious the added limitations in proposed substitute claims 22 and 34. Opp. 7–9, 13. Petitioner argues that a person of ordinary skill in the art “would have been motivated to combine the amphibious dredging device of Cheramie with remote-control technology, like that of Yoon or Carrier, to eliminate the risk of harm to operators of the vehicle.” Opp. 6–7 (citing Ex. 1109 ¶¶49–53; Ex. 1011 ¶¶ 13, 19, 41). Petitioner asserts that Cheramie discloses an amphibious vehicle with a dredge pump and impeller housing located along the underside of the vehicle, between the tracks and the front and back of the vehicle. *Id.* at 7–8 (citing Ex. 1087, Abstract, 2:54–59, 4:25–27, Figs. 1–2).

With respect to claims 23–25, Petitioner argues that a person of ordinary skill in the art “would have understood that the combination of Cheramie

and Yoon or Carrier would yield an amphibious vehicle that could be steered by remote control by changing the orientation of the directable-discharge-control means” of Cheramie. Opp. 9 (citing Ex. 1087, 5:24–27, 5:36–43; Ex. 1109 ¶¶ 73–74).

With respect to claim 27, Petitioner asserts Cheramie teaches interchangeability of tracks with wheels, and that a person of ordinary skill in the art “substituting the tracks for wheels would have been motivated to attach ground engaging wheels to the axles.” Opp. 10 (citing Ex. 1087, Fig. 1, 1:54–58; Ex. 1109 ¶¶ 75–76. According to Petitioner, “[s]ubstituting the sprockets for wheels at the axles would result in the dredge pump . . . being rearward of the front set of spindles and forward of the rear set of spindles. *Id.* (citing Ex. 1109 ¶ 77). Petitioner also asserts that Cheramie teaches a water pump between the axles and that a person of ordinary skill in the art “would have understood that the logical choice for the water pump . . . would be a pump with an impeller” and further that “such impeller-equipped water pumps are capable of pumping liquid manure.” *Id.* at 11 (citing Ex. 1087, 5:44–59; Ex. 1109 ¶ 78).

With respect to claims 28, 39, and 40, Petitioner asserts that “[w]hile floating, the speed and direction of the vehicle is controlled by discharging fluid from the pump, through discharge plumbing, out the directable discharge.” Opp. 12, 14 (citing Ex. 1087, 4:66–5:5). With respect to claim 33, Petitioner asserts that a person of ordinary skill in the art “would have understood Cheramie discloses a mechanical drive between [a] diesel engine and hydraulic pump.” *Id.* at 13.

With respect to claims 35–38, Petitioner asserts that Cheramie discloses a tracked vehicle, and that it would have been obvious to replace the tracks with wheels, with one at each corner of the vehicle. Opp. 13 (citing Ex. 1087, 1:54–59; Ex. 1109 ¶ 88. According to Petitioner, “[i]t would have been obvious to provide each wheel with its own variable speed hydraulic motor to provide enhanced traction, as Cheramie and Carrier teach separate hydraulic motors for each ground engaging element.” *Id.* (citing Ex. 1087, 4:40–47; Ex. 1005, ¶ 45).

On this record, Petitioner has shown sufficiently that the limitations of proposed substitute claims 22–25, 27, 28, and 33–40 are taught or suggested by the combination of Cheramie and Yoon or Carrier. Further, Petitioner’s reasons for combining these references have a rational underpinning and are supported by expert testimony (Ex. 1109), which is unrebutted at this stage of the proceeding. Accordingly, on this record,

Petitioner has shown a reasonable likelihood of establishing that proposed substitute claims 22–25, 27, 28, and 33–40 are unpatentable under 35 U.S.C. §103 as obvious over Cheramie and Yoon or Carrier.

c. Proposed Substitute Claims 22–25, 27, 28, and 33–40 (SenwaTec and Yoon or Carrier)

Petitioner argues that the combination of SenwaTec and Yoon or Carrier teaches or suggests the added limitations in proposed substitute claim 22. Opp. 14–17. Petitioner asserts that SenwaTec discloses a centrifugal pump including a housing and impeller. Opp. 15 (citing Ex. 1109 ¶ 95; Ex. 1094 ¶ 28; Ex. 1096 ¶ 12). Petitioner asserts that a person of ordinary skill in the art would have understood that the location of the pump on the vehicle is a matter of design choice evidenced by the pump being mounted on an articulating arm configured to change the location of the pump with respect to the vehicle. *Id.* at 15–16 (citing Ex. 1109 ¶¶ 96, 102–105; Ex. 1012). Petitioner asserts that a person of ordinary skill in the art would have understood that the pump could be moved by the articulating arm to a position in which the pump would be between the front wheels. *Id.* at 16 (citing Ex. 1012, 2).

On this record, Petitioner has not shown sufficiently that the limitations of proposed substitute claim 22 requiring a “liquid manure pump including a housing and an impeller that are positioned along the underside of the floatable vehicle body between at least two of the ground engaging elements such that the housing and the impeller are rearward of the front of the vehicle body and forward of the rear of the floatable vehicle body” are taught or suggested by the combination of SenwaTec and Yoon or Carrier. In particular, Petitioner has not demonstrated that the combination discloses or suggests a pump positioned as required by the claim. While Petitioner asserts that “the pump could be moved by the articulating arm to a position along the underside of the vehicle body” (Opp. 16), Petitioner does not identify any teaching in SenwaTec that calls for or suggests such positioning. Petitioner’s testimony indicating that the pump **could** be moved into such a position is insufficient to establish that it would have been obvious to do so. Accordingly, based on the current record, Petitioner has not shown a reasonable likelihood of establishing that proposed substitute claims 22–25, 27, 28, and 33–40 are unpatentable

under 35 U.S.C. §103 as obvious based on the combination of SenwaTec and Yoon or Carrier.

d. Proposed Substitute Claims 22–25, 27, 28, and 33–40 (Truxor and Yoon or Carrier)

Petitioner argues that the combination of Truxor and Yoon or Carrier teaches or suggests the added limitations in proposed substitute claim 22. Opp. 17–20. Petitioner asserts that Truxor discloses a pump that is capable of pumping liquid manure. Opp. 18 (citing Ex. 1106, 10). Petitioner asserts that a person of ordinary skill in the art would have understood that the location of the pump on the vehicle is a matter of design choice evidenced by the pump being mounted on an articulating arm configured to change the location of the pump with respect to the vehicle. *Id.* (citing Ex. 1109 ¶ 113; Ex. 1006, 10). Petitioner asserts that a person of ordinary skill in the art would have understood that the pump could be moved by the articulating arm to a position along the underside of the vehicle rearward of the front of the vehicle body. *Id.* at 18–19 (citing Ex. 1109 ¶ 114).

On this record, Petitioner has not shown sufficiently that the limitations of proposed substitute claim 22 requiring a “liquid manure pump including a housing and an impeller that are positioned along the underside of the floatable vehicle body between at least two of the ground engaging elements such that the housing and the impeller are rearward of the front of the vehicle body and forward of the rear of the floatable vehicle body” are taught or suggested by the combination of Truxor and Yoon or Carrier. In particular, Petitioner has not demonstrated that the combination discloses or suggests a pump positioned as required by the claim. While Petitioner asserts that “the pump could be moved by the articulating arm to a position along the underside of the vehicle,” Petitioner does not identify any teaching in Truxor that calls for or suggests such positioning. Petitioner’s testimony indicating that the pump **could** be moved into such a position is insufficient to establish that it would have been obvious to do so. Accordingly, based on the current record, Petitioner has not shown a reasonable likelihood of establishing that proposed substitute claims 22–25, 27, 28, and 33–40 are unpatentable under 35 U.S.C. §103 as obvious based on the combination of Truxor and Yoon or Carrier.

2. 35 U.S.C. § 112(a) – Written Description

No. Petitioner raised unpatentability arguments under 35 U.S.C. § 112 based on lack of written description for proposed substitute claims 22–42, which we have addressed above in Section II.A. For the reasons discussed above, based on the current record, Petitioner has not shown a reasonable likelihood of establishing that the proposed substitute claims are unpatentable under 35 U.S.C. § 112(a) as lacking written description support.

III.CONCLUSION

This concludes the Preliminary Guidance, which is Patent Owner’s first option under the Board’s pilot program. Notice, 84 Fed. Reg. at 9,497. Patent Owner has an additional option under the Board’s pilot program to file a revised MTA by DUE DATE 3. Paper 13.

In addition to those two options under the Board’s pilot program, Patent Owner is reminded that amendments of the challenged claims may also be pursued in a separate reissue or reexamination proceeding before, during, or after an AIA trial proceeding, including subsequent to the issuance of the Final Written Decision. We draw Patent Owner’s attention to the April 2019 *Notice Regarding Options for Amendments by Patent Owner Through Reissue or Reexamination During a Pending AIA Trial Proceeding*. See 84 Fed. Reg. 16,654 (Apr. 22, 2019). If Patent Owner chooses to file a reissue application or a request for reexamination of the challenged patent, we remind Patent Owner of its continuing obligation to notify the Board of any such related matters in updated mandatory notices. See 37 C.F.R. § 42.8(a)(3), (b)(2).

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