

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAFE HAVEN WILDLIFE REMOVAL AND
PROPERTY MANAGEMENT EXPERTS LLC,

Petitioner

v.

MERIDIAN WILDLIFE SERVICES LLC.

Patent Owner

Case: IPR2023-01340

Patent No. 9,943,073

PETITION FOR INTER PARTES REVIEW

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	MANDATORY NOTICES	2
A.	Real Party-in-Interest	2
B.	Related Matters.....	3
C.	Lead and Back-Up Counsel.....	3
D.	Service Information.....	4
III.	PAYMENT OF FEES	4
IV.	CERTIFICATION	4
V.	IDENTIFICATION OF CHALLENGE AND RELIEF REQUESTED	5
VI.	BACKGROUND	5
A.	The '073 Patent	5
B.	Prosecution History	8
C.	Prior Art.....	9
i.	Bird Barrier Video (Ex. 1003)	9
ii.	Kunz (Ex. 1009).....	13
iii.	Albanese (Ex. 1010).....	17
iv.	Sheldon (Ex. 1011)	20
VII.	LEVEL OF ORDINARY SKILL IN THE ART	22
VIII.	CLAIM CONSTRUCTION	22
IX.	THE CHALLENGED CLAIMS ARE UNPATENTABLE.....	22

A.	GROUND 1: Claims 1-3 are rendered obvious under 35 U.S.C. §103 by Bird Barrier Video in view of Kunz and/or Albanese and/or Sheldon.....	23
i.	Claim 1	23
ii.	Claims 2 and 3.....	35
iii.	Motivation for Combining	37
X.	NO SECONDARY CONSIDERATIONS	39
XI.	DISCRETIONARY DENIAL IS INAPPROPRIATE	39
A.	§325(d) Is Not a Basis for Denial	39
B.	<i>Sotera</i> Stipulation Renders Denial Under <i>Fintiv</i> Improper	40
XII.	CONCLUSION.....	41

TABLE OF AUTHORITIES

Cases

<i>Acceleration Bay, LLC v. Activision Blizzard Inc.</i> , 908 F.3d 765 (Fed. Cir. 2018)	10
<i>Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH</i> , IPR2019-01469, Paper 6 (PTAB Feb. 13, 2020)	39, 40
<i>Apple Inc. v. Fintiv, Inc.</i> , IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020)	41
<i>Bowtech, Inc. v. MCP IP, LLC</i> , IPR2019-00386, Paper 14 (PTAB July 3, 2019)	40
<i>Brunswick v. Volvo Penta</i> , IPR2020-01512, Paper 15 (Mar. 11, 2021)	39
<i>In re Klopfenstein</i> , 380 F.3d 1345 (Fed. Cir. 2004)	10
<i>KSR Intern. Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007)	38
<i>Safe Haven Wildlife Removal and Property Management Experts, LLC v.</i> <i>Meridian Wildlife Services, LLC d/b/a Meridian Bird Removal, Inc.</i> , 7:21-cv-00577-EKD (W.D. Va.)	3
<i>Shenzhen Zhiyi Technology Co. Ltd., d/b/a iLife v. iRobot Corp.</i> , IPR2017-02137, Paper 9 (PTAB Apr. 2, 2018)	40
<i>Sotera Wireless, Inc. v. Masimo Corp.</i> , IPR2020-01019, Paper 12 (PTAB Dec. 1, 2020)	41
<i>Tyco Healthcare Grp. LP v. Ethicon Endo-Surgery, Inc.</i> , 774 F.3d 968 (Fed. Cir. 2014)	38
<i>Zurn v. Sioux Chief</i> , IPR2018-00975, Paper 9 (PTAB Nov. 8, 2018)	39

Statutes

35 U.S.C. §102.....	1, 8, 23, 41
35 U.S.C § 102(a)(1).....	10
35 U.S.C. §103.....	1, 5, 41
35 U.S.C. § 112.....	8
35 U.S.C. §325(d)	39, 40
37 C.F.R. §42.15(b)	4
37 C.F.R. §42.203(a).....	4

EXHIBIT LIST

Exhibit No.	Description
1001	U.S. Patent No. 9,943,073 (“the ’073 Patent”)
1002	File History for U.S. Patent No. 9,943,073
1003	Bird Barrier, Mist Net Kit Assembly and Use, YouTube (Aug. 29, 2014), https://www.youtube.com/watch?v=yHtYi-vUFxs
1004	Transcript and Screenshots of Bird Barrier, <i>Mist Net Kit Assembly and Use</i> , YouTube (Aug. 29, 2014), https://www.youtube.com/watch?v=yHtYi-vUFxs .
1005	@BirdBarrier, Twitter (Aug. 29, 2014, 2:48 PM), https://twitter.com/BirdBarrier/status/505426711324803072
1006	@BirdBarrier, Twitter (Sept. 2, 2014, 12:22 PM), https://twitter.com/BirdBarrier/status/506851686615244801
1007	Declaration of Karen Angell (August 9, 2023)
1008	Affidavit of Nathaniel E. Frank-White in IPR2022-01253 (dated June 30, 2022)
1009	Thomas H. Kunz et al., <i>Ecological and Behavioral Methods for the Study of Bats</i> 1-29 (1st ed. 1990).
1010	Gene Albanese et al., <i>An Inexpensive Elevated Mist Net Apparatus</i> , 24 N. Am. Bird Bander 129-134 (1999)
1011	William G. Sheldon, <i>A Method of Mist Netting Woodcocks in Summer</i> , 31 Bird Banding 130-135 (1960)
1012	Meridian’s Petition for <i>Inter Partes</i> Review of U.S. Patent No. 10,251,374 in IPR2022-01253
1013	Declaration of Dr. Michael J. Chamberlain in IPR2022-01253
1014	Decision Denying Institution of <i>Inter Partes</i> Review in IPR2022-01253
1015	Safe Haven Letter Sent to Meridian on July 6, 2023
1016	Safe Haven Charts Sent to Meridian on July 6, 2023
1017	Safe Haven’s Patent Owner Preliminary Response in IPR2022-01253
1018	U.S. Patent No. 117,729

I. INTRODUCTION

Safe Haven Wildlife Removal and Property Management Experts LLC (“Petitioner” or “Safe Haven”) respectfully requests *Inter Partes* Review (“IPR”) of U.S. Patent No. 9,943,073 (“the ’073 Patent”) (Ex. 1001) and the cancellation of claims 1-3 (the “Challenged Claims”) under 35 U.S.C. § 103. The ’073 Patent claims an antiquated method for the safe live capture of a flying vertebrate within a building. The method merely involves attaching a mist net between two telescoping poles that have ropes, hooks and/or pulleys, such that the net can be attached to the ceiling of a building via the poles and then raised between the poles to a location based on the species of bird sought to be captured and its flight characteristics. In other words, any purported novelty involves raising a mist net between two poles to a height within a building where a particular bird species is expected to fly.

As detailed below, in three recent petitions for *inter partes* review in which Meridian attempted to invalidate three Safe Haven patents relating to a similar field of technology, Meridian and its expert (Dr. Chamberlain) acknowledged and expressly represented to the Board that features corresponding to each element of Claims 1-3 of the ’073 Patent are taught or rendered obvious by prior art references

that are the subject of this Petition.¹ Although the Board ultimately denied Meridian's petitions, the denials were based on unique features of Safe Haven's patents that are not present in those prior art references (including the Challenged Claims of the '073 Patent itself).² *See* Ex. 1014, at 18, 27, 34. Consequently, the positions Meridian and its expert took in those petitions, as confirmed by the clear teachings of the prior art discussed herein, render the Challenged Claims unpatentable.

II. MANDATORY NOTICES

A. Real Party-in-Interest

The real party-in-interest is Safe Haven Wildlife Removal and Property Management Experts LLC.

¹ Meridian's three petitions are IPR2022-01253, IPR2022-01254, and IPR2022-01340. Because the art and arguments Meridian and its expert relied on in those petitions were largely duplicative, in this petition Safe Haven cites to Meridian's positions in IPR2022-01253 and Dr. Chamberlain's supporting declaration.

² Indeed, Meridian also cited the application for the '073 Patent, US 2017/0238524, as invalidating prior art in IPR2022-01253. Ex 1012, at 11. For purposes of this Petition, Safe Haven is only relying on references that constitute prior art to both the '073 Patent and the aforementioned Safe Haven patents.

B. Related Matters

The '073 Patent is the subject of a pending litigation styled *Safe Haven Wildlife Removal and Property Management Experts, LLC v. Meridian Wildlife Services, LLC d/b/a Meridian Bird Removal, Inc.*, 7:21-cv-00577-EKD (W.D. Va.). Specifically, on May 26, 2023 (after the Board rejected Meridian's aforementioned petitions to invalidate Safe Haven's patents), Meridian filed a counterclaim in that case alleging that Safe Haven infringes the '073 Patent. For the reasons set forth herein, Safe Haven requested that Meridian voluntarily dismiss that counterclaim, but Meridian failed to even respond to Safe Haven's request – leading to this Petition. Exs. 1015; 1016.

C. Lead and Back-Up Counsel

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D. Service Information

Petitioner consents to service by electronic mail to lead and backup counsel at the e-mail addresses listed above.

III. PAYMENT OF FEES

Petitioner authorizes the Office to charge the fees specified by 37 C.F.R. §§42.203(a), 42.15(b) to Deposit Account 09-0528 as well as any additional fees that might be due in connection with this Petition.

IV. CERTIFICATION

Petitioner certifies that the '073 Patent is available for *inter partes* review and that Petitioner is not barred from requesting review because the '073 Patent has not been subject to a previous estoppel-based proceeding under the AIA, and the counterclaim identified in Section II.B was served within the last 12 months.

V. IDENTIFICATION OF CHALLENGE AND RELIEF REQUESTED

Petitioner requests that the Board initiate *inter partes* review of claims 1-3 of the '073 Patent and find them unpatentable as being obvious over Bird Barrier Video in view of Kunz and/or Albanese and/or Sheldon under 35 U.S.C. § 103.

Ground	Claims	Basis
1	1-3	Rendered obvious by Bird Barrier Video in view of Kunz and/or Albanese and/or Sheldon – 35 U.S.C. §103

VI. BACKGROUND

A. The '073 Patent

The '073 Patent to Brugh et al. issued April 17, 2018. The '073 Patent has an earliest effective filing date of February 19, 2016. The '073 Patent claims a method for the safe live capture of flying vertebrates inside a large building. Ex. 1001, at 1:15-19.

Independent claim 1 reads:

1. A method for the safe live capture of a flying vertebrate that is inside a large building comprising:
 - a) determining the species of flying vertebrate;
 - b) selecting bird netting having netting pockets;
 - c) attaching a plurality of adjustable height support poles to the netting, the poles comprising:
 - i. a hook for attaching the poles overhead;
 - ii. a pulley attached to an upper portion of the pole; and
 - iii. a rope attached to the pulley, the rope having devices to attach the bird netting to the rope;
 - d) positioning the netting for capture based on the species of flying vertebrate and their flight characteristics utilizing the height adjustable poles to raise the netting;

- Figure 1 below illustrates the mist net system for capturing flying vertebrates that is described by '073 Patent:

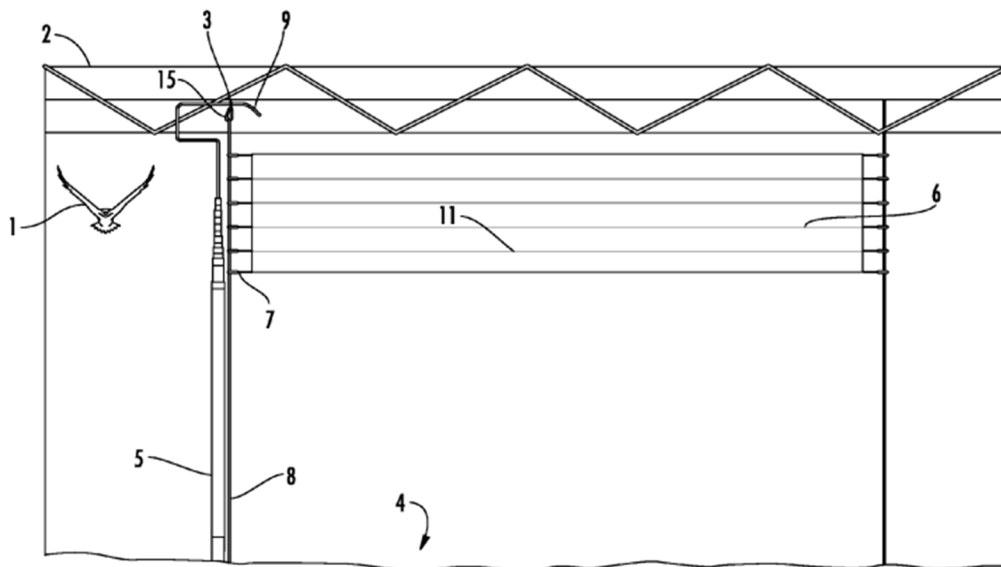


FIG. 1

6

through pulley **15** and is lengthened to allow the net to be pulled up and down and to the desired tension. *Id.* Pockets **11** in the net are formed based on the tension. *Id.*

Figure 4 below illustrates a flowchart of the '073 Patent's claimed method:

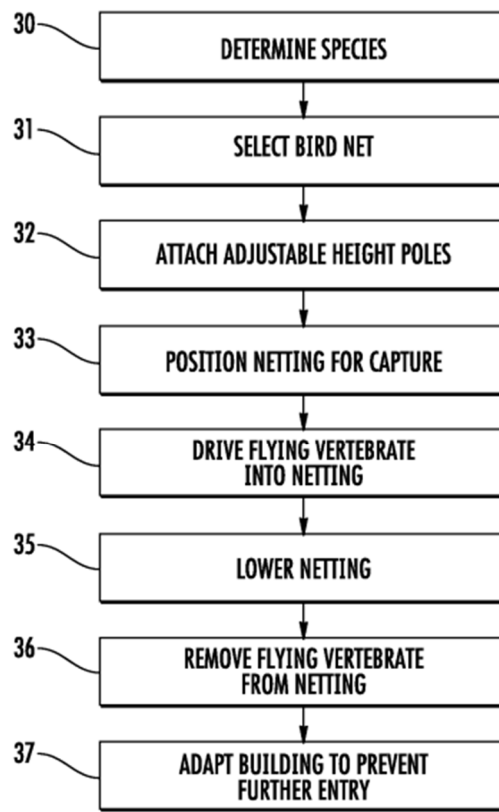


FIG. 4

According to '073 Patent, the user of the method first determines the species **30** of the flying vertebrate by inspecting the vertebrate in the location, evidence in the surrounding area of the types of vertebrates in the area, as well as the location of the vertebrate in the building. *Id.*, at 4:47-64. Next, a bird netting with pockets is selected **31** and height adjustable poles attached to the bird netting

for raising and lowering the net **32**. *Id.* The netting is then raised to an upper position for capture **33** so the bird can fly or be chased into the netting **34**. *Id.* Once the bird is captured, the netting can be lowered **35** so the bird can be removed **36** and released into the wild. *Id.* Once the bird is freed, an optional additional act of adapting the building to prevent the species from further entry **37** can be done, for example by making sure that doors stay closed, using repellants, eliminating attractants, or implementing other means to prevent or reduce bird reentry. *Id.*

B. Prosecution History

Claims 1-3 of the '073 Patent as originally filed were ultimately allowed without substantive changes. In the first and only Office Action, the Examiner rejected claims 1-4 as originally filed under 35 U.S.C. § 112 for being indefinite. Ex. 1002, at 3-4. Additionally, originally filed claim 4 was rejected under 35 U.S.C. § 102 for being anticipated by U.S. Patent No. 5,966,862 to Ueno. *Id.*, at 4-5. The Examiner indicated that claims 1-3 would be allowable if rewritten to overcome the § 112 indefinite rejections. *Id.* In response, Meridian canceled claim 4 and amended claims 1-3 to address the “antecedent basis and other wording rejections” under 35 U.S.C. § 112. *Id.*, at 11. The Examiner subsequently made a non-substantive Examiner’s Amendment seemingly to address an unaddressed antecedent basis issue and issued a Notice of Allowance for claims 1-3. *Id.*, at 13.

None of the prior art references relied upon in this Petition were cited in an IDS or relied on by the Examiner during prosecution of the '073 Patent.

C. Prior Art

i. Bird Barrier Video (Ex. 1003)

Bird Barrier Video (Ex. 1003) is an instructional video from Bird Barrier America, Inc.³ It was first uploaded to YouTube on August 29, 2014, and was publicly accessible as of that date. Ex. 1007. Bird Barrier Video's public accessibility as of August 29, 2014 is corroborated by ample evidence:

- the YouTube page hosting the Bird Barrier Video indicates that it was published on "8/29/14" (Ex. 1004, at Fig. 1);
- Bird Barrier posted a link to the Bird Barrier Video on its Twitter account on 8/29/14 (Ex. 1005, at 1) and 9/2/14 (Ex. 1006, at 1);
- Bird Barrier's website posted the video link as early as 9/9/14 (Ex. 1008, at 11) and indicated the video had been viewed numerous times as of 9/10/14 (Ex. 1008, at 14); and
- external websites linked to the Bird Barrier Video as of 9/28/15 (Ex. 1008, at 17).

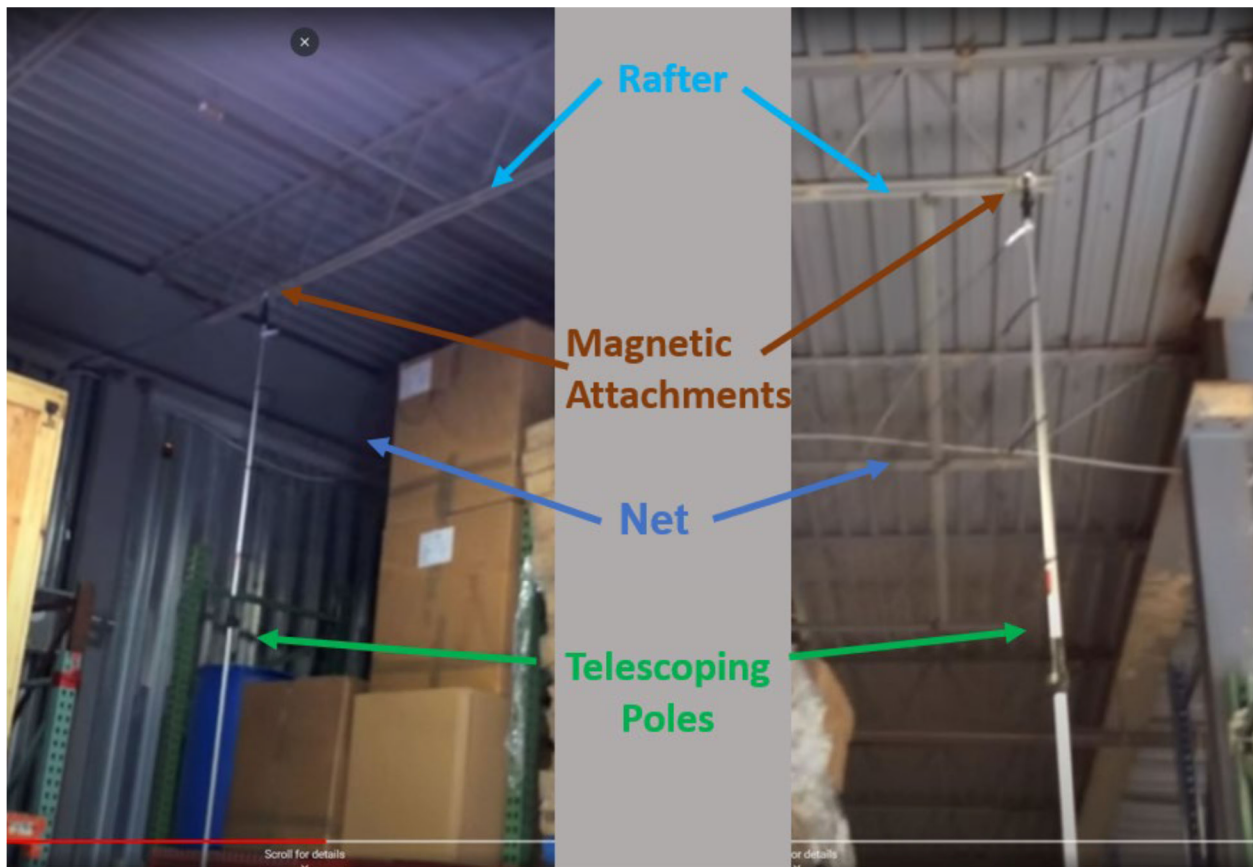
Given Bird Barrier Video's posting on YouTube (a well-known platform with sophisticated video indexing) and the proliferation of video links before the

³ Safe Haven also provides a transcript of Bird Barrier Video, including screenshots, attached to this Petition as Exhibit 1004.

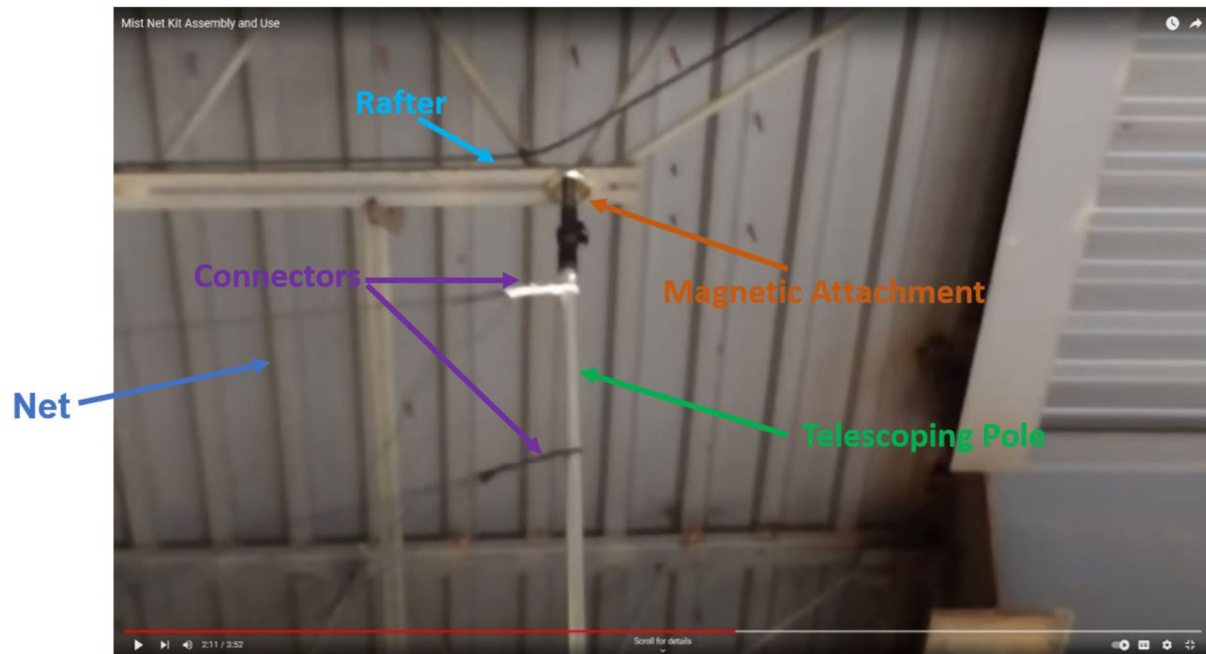
patent's filing date, Bird Barrier Video was meaningfully indexed such that an interested artisan exercising reasonable diligence would have found it. *See e.g., Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 774 (Fed. Cir. 2018); *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). Accordingly, Bird Barrier Video is a printed publication that was publicly accessible before the earliest filing date of the '073 Patent and is prior art under § 102(a)(1).

Bird Barrier Video demonstrates a method of installing a “mist net kit” configured for catching birds within a large building. Ex. 1003, at 0:10-2:19; Ex.1004, Figs. 2-15. As shown in the photos below and in the video,⁴ the method involves attaching a “mist net” having “horizontal pockets” between two “telescoping poles” to capture birds within a large building. Ex. 1003, at 0:10-0:58, 1:15-1:44; Ex. 1004, Figs. 3-4 and 5-6. Each of the poles includes a “magnetic head” for attaching the pole overhead to a rafter in the ceiling. Ex. 1003, at 1:03-1:59; Ex. 1004, Fig. 8 (showing magnetic head), Figs. 11, 13, 14 (showing pole attached to rafter):

⁴ These features are more easily seen in the actual video submitted as Ex. 1003, at at 1:15 – 2:03.



Ex. 1003, at 1:49 (right) & 1:59 (left) (annotated)



Ex. 1003, at 2:11 (annotated)

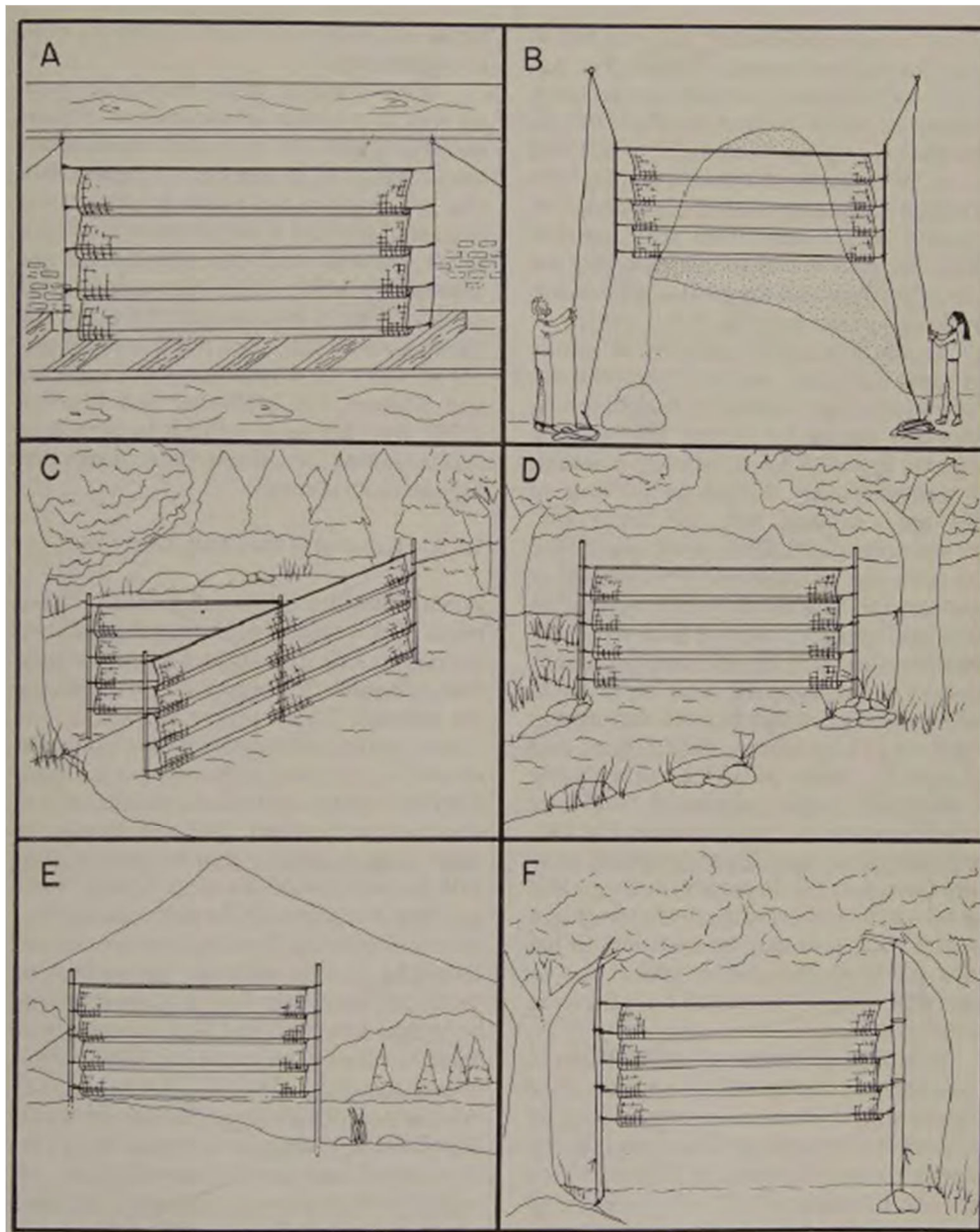
Bird Barrier Video also discloses that each side of the mist net is mounted on the poles by sliding the poles through loops on sides of the net. Ex. 1003, at 0:37- 0:58; Ex. 1004, Figs. 5-8. With the net secured to the poles, the poles can be used to raise the netting and can be attached to the overhead rafters in the ceiling (via magnetic heads), whereby the netting can be positioned at a desired height and tightness to capture targeted birds. Ex. 1004, Figs. 10-15 and Ex. 1003, at 1:15- 2:03 (“[e]ach operator should then carefully lift his or her pole together and walk the completed net assembly to a target location near where the bird activity has been observed.”; “the net is now hanging in position and ready to capture the targeted birds”). The adjustable magnetic head on each net pole is then attached to

a magnetic surface (rafter), hanging the mist net in position as shown above. *Id.* Once a bird is captured, the net is lowered and the bird is quickly removed and transported so that it can be safely returned to the wild. *See* Ex. 1003, at 2:19-2:47.

ii. Kunz (Ex. 1009)

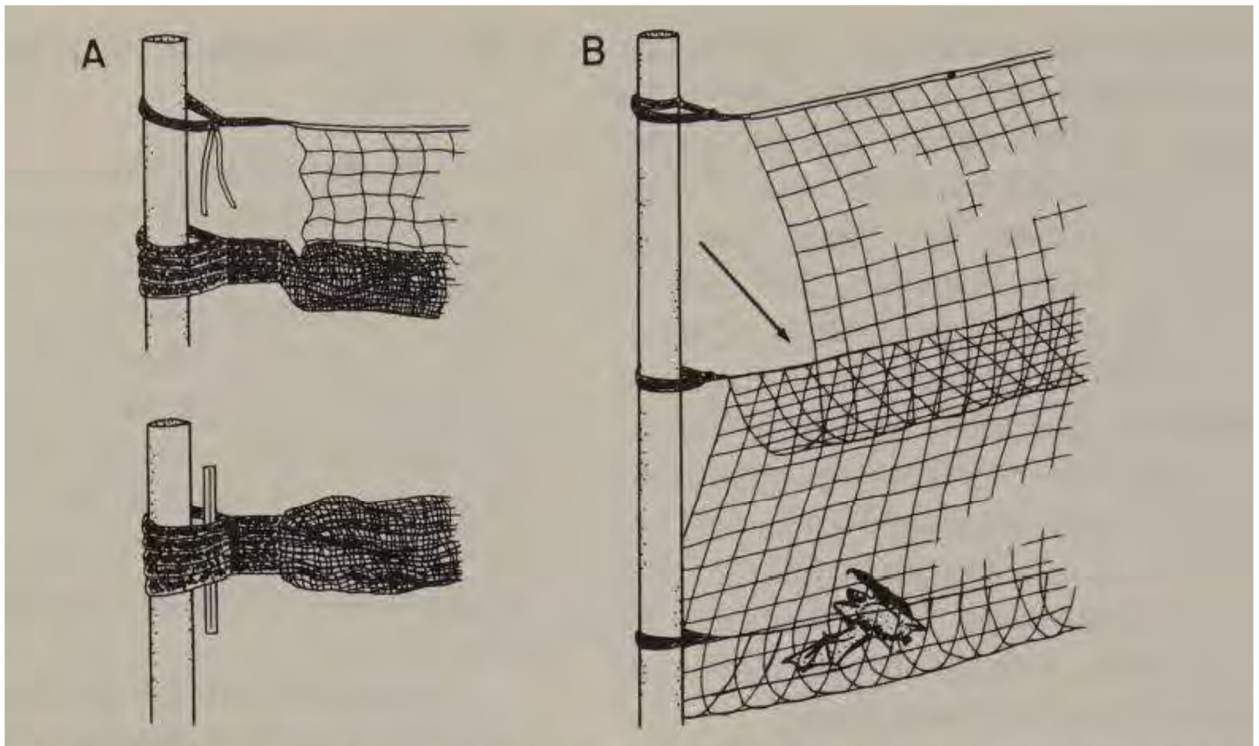
Kunz is a chapter from the book *Ecological and Behavioral Methods for the Study of Bats* by Kunz and Kurta, published in 1990.⁶ Ex. 1009 (copyright page). Kunz is therefore prior art to the '073 Patent.

Kunz discloses techniques and systems for trapping or catching a particular species of vertebrate - bats - in various environments. Most notably, Kunz describes various configurations in which mist nets secured between two poles having ropes and pulleys can be placed to effectively capture bats. Ex.1009, at 6-11. Examples of Kunz's mist-net configurations are shown below:

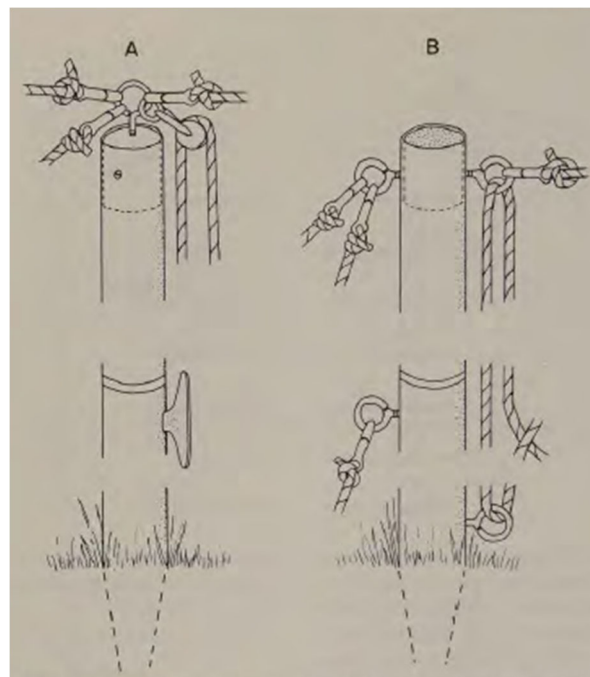


Ex. 1009, Figure 3

Kunz describes using “net poles” to which the nets are affixed and erected. *Id.*, at 7-9. Kunz further discloses erecting, raising and lowering nets using ropes, pulleys, and other netting attachments, as shown below. *Id.*, at 7-8; 10-15, Fig. 2(A-B).



Ex. 1009, Figure 2(A-B)



Ex. 1009, Figure 7

Kunz further discloses that extension poles can be used to drive the roosted bats so that they will fly into the nets and be captured. Ex. 1009, at 5.

Importantly, in discussing optimal strategies for the capture of bats, Kunz describes that it is important to place the nets in areas based on the bat species and where that species is known to fly or roost:

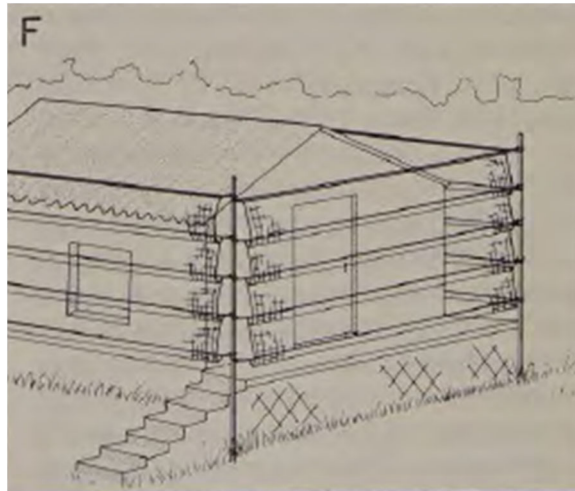
Mist nets may be deployed successfully at almost any site where bats are expected to fly. Strategies of net placement have a major influence on capture success. . . The most productive netting sites can often be identified from visual observations of flying bats. . . .

Ex. 1009, at 8.

The most productive netting sites can often be identified from visual observations of flying bats, by listening to audible or ultrasonic sounds or echolocating bats (Chapter 6), and from the sounds made by falling fruit when plant-visiting bats are feeding Bats can be netted at openings to caves, mines, and buildings, where bats regularly exit and enter.

Id., at 16.

Finally, Kunz discloses the ability to surround a building with mist nets so as to capture bats attempting to enter or leave the building, effectively adapting the building to prevent or reduce reentry. *Id.*, at 10 and Fig. 4(F) (“[O]ften bats can be captured if the perimeters of roosts are either partially or completely surrounded by one or more nets.”).



Ex. 1009, Figure 4(F)

iii. Albanese (Ex. 1010)

Albanese is an article by Gene Albanese and Victoria D. Piaskowski titled *An Inexpensive Elevated Mist Net Apparatus* from the North American Bird Bander. Albanese was published in the Oct. – Dec. 1999 edition of the North American Bird Bander publication, Ex. 1010, at 129, as is therefore prior art to the '073 Patent.

Albanese's mist net apparatus includes, among other things, affixing a height-adjustable net between two poles using a "clothesline cord", two single pulleys, one double pulley, one mid-size rope cleat, and metal shower curtain pins. Ex. 1010, at 130. Albanese's mist net apparatus, including its rope layout, is illustrated below:

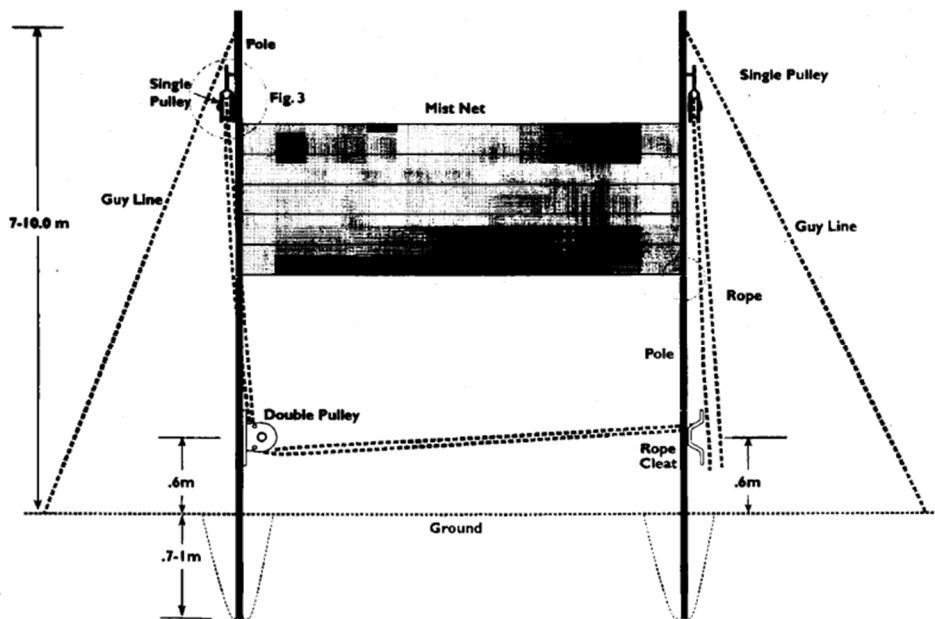


Figure 1. Diagram of elevated mist net apparatus. Diagram is not to scale

Ex. 1010, Fig. 1

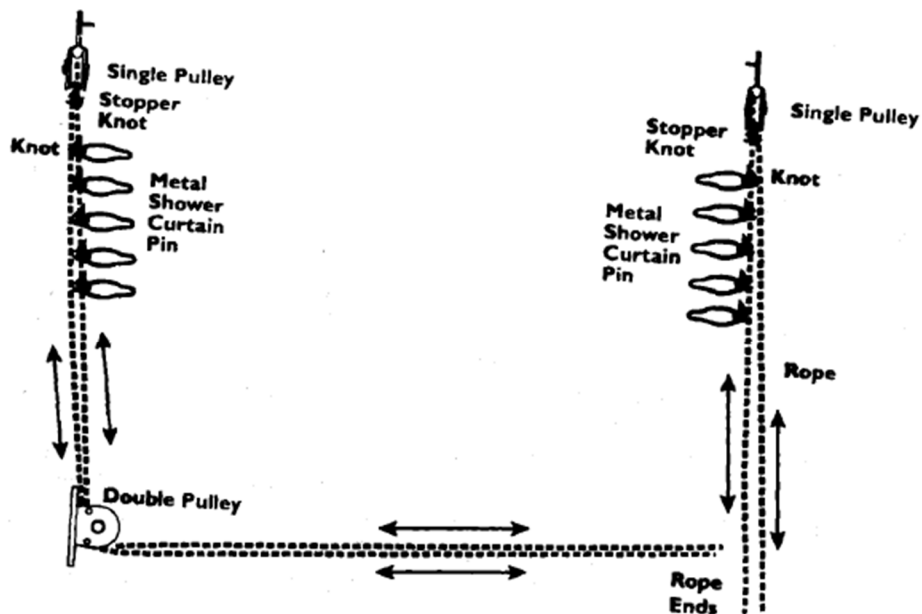


Figure 2. Diagram of rope layout and assemblage.

Ex. 1010, Fig. 2

Three electrical metallic tubes are joined via black pipe nipples to form the poles for each side of the elevated net system. *Id.*, at 130-31. Each pole is slid through shower curtain pins, which are secured to (i) the rope in the pulley system via knots and (ii) corresponding mist net loops, as shown below:

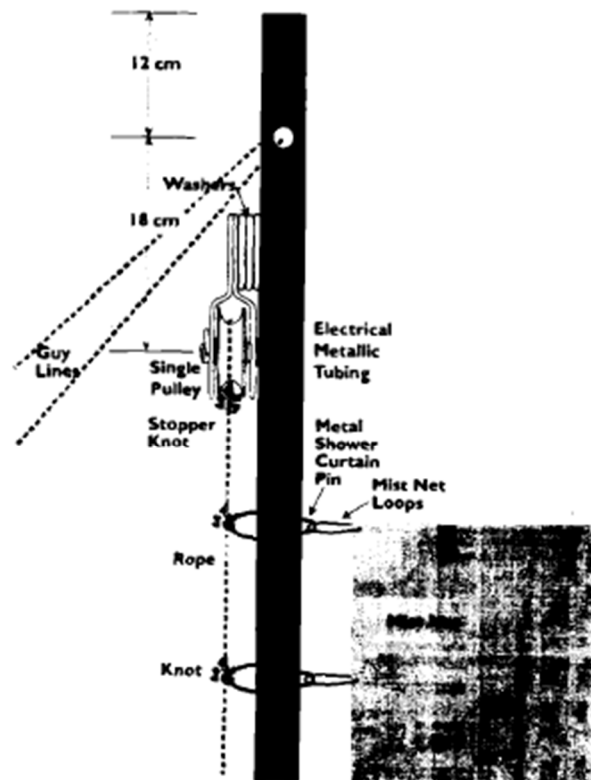


Figure 3. Detail of single pulley and guy line dimensions. Note correct metal shower curtain pin and rope assemblage attachment.

Ex. 1010, Fig. 3

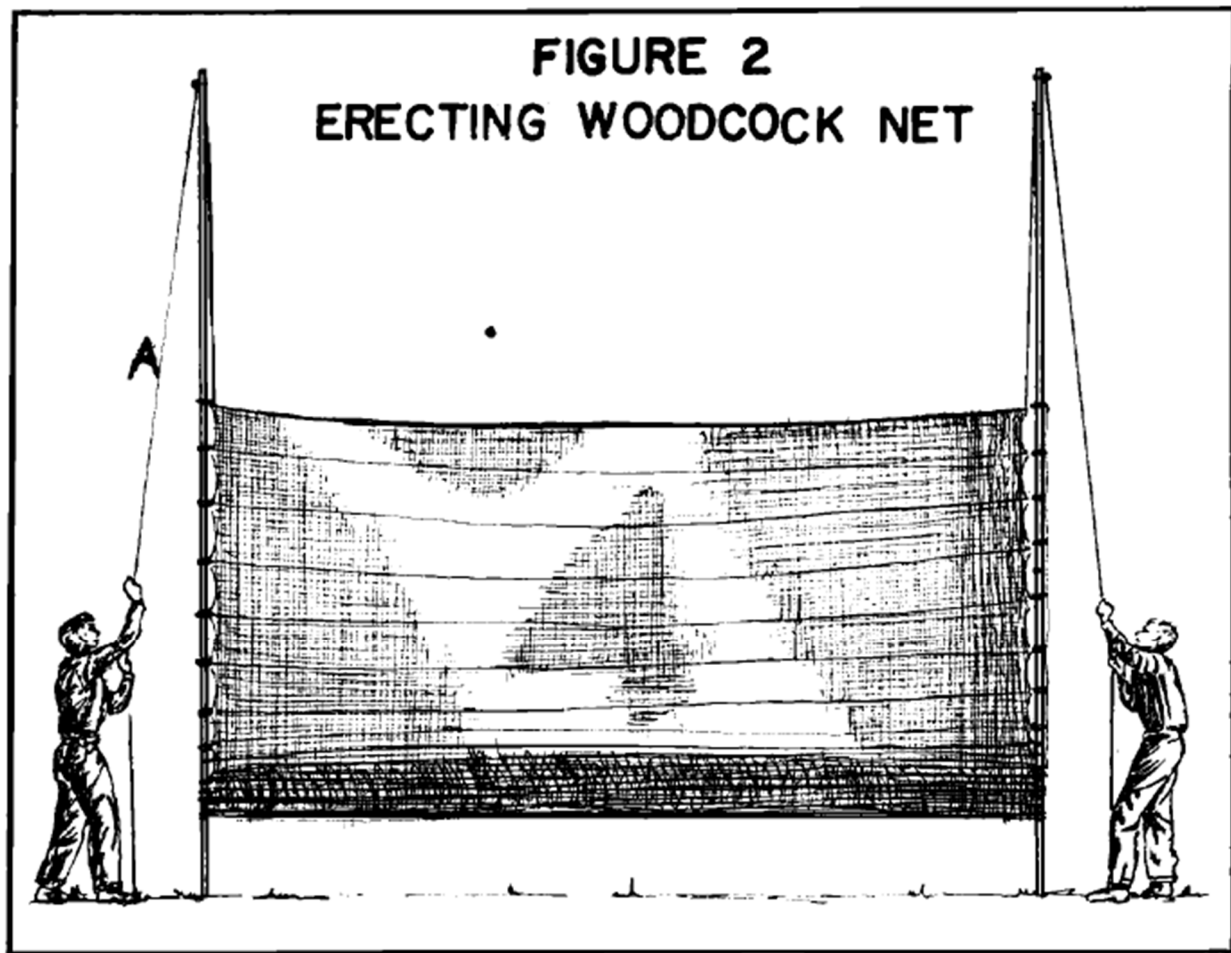
See id., at 131-32. “Pockets” are formed in the mist net via precise positioning of the shower curtain pins. *See id.*, at 132. As shown in Figures 1 and 2 of Albanese, the single pulleys are affixed to upper portions of the poles. *Id.*

Albanese further teaches that its mist net should “cover the entire vegetation height of a habitat to allow adequate sampling of birds preferring higher vegetation strata.” *Id.*, at 133. To this point Albanese discloses “that sampling all vegetation strata might aid in determining vertical distribution patterns.” *Id.* After birds are captured in the mist net, the mist net is lowered and the captured bird is removed. *See id.* (“[W]hen birds are captured in the net, care should be taken to keep the net level when lowering.”).

iv. Sheldon (Ex. 1011)

Sheldon is an article by William G. Sheldon titled *A Method of Mist Netting Woodcocks in Summer* from the journal “Bird-Banding.” Sheldon was published in Volume XXXI of Bird-Banding’s publication in 1960, Ex. 1011, at 131, as is therefore prior art to the ’073 Patent.

Sheldon discloses a technique of capturing a particular species of bird (American woodcocks) with a mist net. *Id.*, at 130. The mist net in Sheldon is suspended between two poles and can be raised/lowered, as shown below:



Ex. 1011, Figure 2

Placement of the net in Sheldon “is determined by observation of the flight paths of incoming birds.” *Id.*, at 134. For example, Sheldon teaches positioning certain sets of nets to “cover the usual flight paths of the birds.” *Id.* In this regard, Sheldon’s net is positioned based on the species (i.e., American woodcocks) and their flight characteristics (i.e., “usual flight paths”). *Id.* (“Woodcocks which are netted usually fly into the field just over the tops of trees or in any break between tree clumps.”).

VII. LEVEL OF ORDINARY SKILL IN THE ART

The '073 Patent describes its “Field” as “the live capture of flying vertebrates in an indoor setting” and, more specifically, “a net deploying system designed for inside large enclosure buildings.” Ex. 1001, at 1:15-19. Safe Haven’s ’374 Patent involves a similar field of technology. In IPR2022-01253, the Board concluded that a POSA “would have had at least either (i) at least a bachelor’s degree in the study of wildlife management or wildlife ecology or (ii) two or more years of field experience trapping flying animals.” Ex. 1014, at 9. For purposes of this petition Safe Haven adopts the Board’s position in that regard.

VIII. CLAIM CONSTRUCTION

The claims of the '073 Patent have never been construed in any proceeding. Safe Haven does not propose any constructions for this proceeding. However, Safe Haven does not waive and expressly reserves its claim scope arguments, constructions, and evidence that it may raise in other proceedings, and further reserves the right to respond to any claim construction positions offered by Patent Owner.

IX. THE CHALLENGED CLAIMS ARE UNPATENTABLE

A. GROUND 1: Claims 1-3 are rendered obvious under 35 U.S.C. §103 by Bird Barrier Video in view of Kunz and/or Albanese and/or Sheldon.

i. Claim 1

Bird Barrier Video in view of Kunz and/or Albanese and/or Sheldon discloses all limitations of independent claim 1.

a) Limitation [1.0]. “A method for the safe live capture of a flying vertebrate that is inside a large building comprising:”

To the extent the preamble is a limitation, Bird Barrier Video discloses a method for the safe live capture of a flying vertebrate that is inside a large building. As admitted by Meridian, “Bird Barrier Video demonstrates installing a ‘mist net kit’ configured for catching birds within a building.” Ex. 1012, at 47. And as shown by the video, the building is large. Ex. 1004, at 1:59-2:19.

- b) **Limitations [1.1] and [1.4].** “determining the species of flying vertebrate;” and “positioning the netting for capture based on the species of flying vertebrate and their flight characteristics utilizing the height adjustable poles to raise the netting;”⁵

In Bird Barrier Video, two men use height adjustable poles to raise a mist net so that the net is placed in a position to capture a targeted bird. Ex. 1003, at 1:44-2:11. In IPR2022-01253, Meridian and Dr. Chamberlain represented that “Bird Barrier Video discloses positioning nets ‘at a height above the floor of the enclosed building based on the species of animal being relocated.’” Ex. 1012, at 70; *see also* Ex. 1013, at ¶ 204 (stating the same). They further represented that:

The Bird Barrier Video also indicates that mist nets should [be] installed in “a target location near where the bird activity has been observed.” A POSA would have appreciated that mist nets should intersect the anticipated flight pattern of a targeted bird. Thus, a POSA would select the location and orientation of each mist net based on the anticipated flight pattern(s) of the bird and the orientation of the rafters.

⁵ For purposes of simplicity, Limitations [1.1] and [1.4] are discussed jointly in this Petition. Safe Haven recognizes that the steps in Limitations [1.2]-[1.3.3] all occur in between the steps in Limitations [1.1] and [1.4]. Because a person practicing the claimed invention must determine the species of flying vertebrate prior to positioning the netting for capture based on the species of flying vertebrate, these elements are best analyzed together.

Ex. 1012, at 57; *see also* Ex. 1013, at ¶ 177 (stating the same) (citing Ex. 1003, at 1:27-1:40).

Kunz is directed to using mist nets to capture a specific species of vertebrate - - bats. Kunz thus teaches a method of net capture that is based on determining a particular species. Indeed, citing to Kunz, Dr. Chamberlain opined as follows:

- “This netting technique generally involves the placement of one or more pocketed nets, often held up by a series of poles, at locations along the roost or travel routes of a target species.” Ex. 1013, at ¶ 29;
- “As was well known at the time, the particular trapping system and arrangement varies depending on the circumstances of the capture. The location of the animal within the capture area as well as the ecological characteristics of the interested species encourages many practitioners to equip their netting systems with different features to better adapt their nets for effective deployment. For example, it has been well-understood in the field of wildlife study that many species of birds and bats tend to roost at the forest canopy or at or near the ceiling of a building. *Id.*, at ¶ 152 (citations omitted);
- “Beyond applicability to bats, Kunz also discloses that its techniques are “equally suitable for ecological and behavioral studies of *other terrestrial vertebrates*, ...” *Id.*, at ¶ 110 (emphasis in original);
- “Kunz identifies that among trapping devices, mist nets . . . are one of ‘the most commonly used devices for capturing flying bats’ and ‘may be deployed successfully at almost any site where bats are expected to fly.’” *Id.*, at ¶ 111;
- “Kunz discloses that mist nets can be deployed anywhere bats (and other animals) ‘are expected to fly’ . . . Kunz discloses that mist nets should be placed in sites ‘used as flyways’ and are ‘most productive’ when placed in locations ‘identified from visual observations of flying bats.’ *Id.*, at ¶ 114.

Importantly, in discussing optimal strategies for the capture of bats, Kunz describes that it is important to place the nets in areas based on the bat species and where that species is known to fly or roost:

Mist nets may be deployed successfully at almost any site where bats are expected to fly. Strategies of net placement have a major influence on capture success. . . The most productive netting sites can often be identified from visual observations of flying bats. . . .

Ex. 1009, at 8.

The most productive netting sites can often be identified from visual observations of flying bats, by listening to audible or ultrasonic sounds or echolocating bats (Chapter 6), and from the sounds made by falling fruit when plant-visiting bats are feeding Bats can be netted at openings to caves, mines, and buildings, where bats regularly exit and enter.

Id., at 16; *see also id.*, at 16 (“Other capture biases may reflect differences in . . . flight behavior (altitude, speed, maneuverability)”; 18 (“As with mist nets, harp traps are best set at sites where bats use natural flyaways.”).

Albanese teaches that different species of flying vertebrates tend to fly at different heights above the ground. Ex. 1010, at 133 (“mist nets should cover the entire vegetation height *of a habitat to allow adequate sampling of birds preferring higher vegetation strata.*”) (emphasis added). Albanese further recognizes that “sampling all vegetation strata might aid in determining vertical distribution patterns” of different species of flying vertebrates. *Id.*

Sheldon discloses a technique of capturing a particular species of bird (American woodcocks) with a Japanese mist net. Ex. 1011, at 130. Placement of the net in Sheldon “is determined by observation of the flight paths of incoming birds.” *Id.*, at 134. For example, Sheldon teaches positioning certain sets of nets to “cover the usual flight paths of the birds.” *Id.* In this regard, Sheldon’s net is positioned based on the species (i.e., American woodcocks) and their flight characteristics (i.e., “usual flight paths”). Indeed, Sheldon teaches raising a mist net to a height and location based on flight paths of American woodcocks: “Woodcocks which are netted usually fly into the field just over the tops of trees or in any break between tree clumps.” *Id.*

If the Board determines that these limitations are not expressly or inherently taught by Bird Barrier Video, it would have been obvious for a POSA to modify the system of Bird Barrier Video with the teachings of Kunz, Albanese or Sheldon to include determining the species of flying vertebrate and positioning the netting for capture based its flight characteristics. Indeed, each of Kunz, Albanese and Sheldon disclose placing a mist net between two poles at a height where a particular species of bird is expected to fly. As further detailed below, a POSA would be motivated to combine those references with the teachings of Bird Barrier Video to increase the chances of capturing a targeted bird within a large building. As acknowledged by Dr. Chamberlain and Meridian, this creates the “most

productive” netting site for the capture of the species in question. Ex. 1013, at ¶ 114.

c) **Limitation [1.2]. “selecting bird netting having netting pockets;”**

Bird Barrier Video’s method further requires selecting bird netting having pockets. Ex. 1003, at 0:18-0:37. Meridian and Dr. Chamberlain have acknowledged same. *See* Ex. 1012, at 47 (“The [Bird Barrier Video] mist net also includes ‘horizontal pockets’ to capture birds.”); *see also* Ex. 1013, at ¶ 152 (stating the same). Pockets are formed in the mist net of Kunz by “[p]roperly adjusted vertical spacing of net loops and shelf-cords.” Ex. 1009, at 8. Additionally, “pockets” are formed in the mist net of Albanese via precise positioning of its shower curtain pins. *See* Ex. 1010, at 132. Sheldon likewise teaches this element. Ex. 1011, at 132 (“To catch woodcocks, the pockets must be deep enough to drop at least half the vertical depth of the tier immediately below.”).

d) **Limitation [1.3]. “attaching a plurality of adjustable height support poles to the netting, the poles comprising:”**

Bird Barrier Video’s method further requires attaching a plurality of adjustable height support poles to the netting. Ex. 1003, at 0:37-0:58. Meridian and Dr. Chamberlain acknowledged same. *See* Ex. 1012, at 47 (“As shown below, the

Bird Barrier Video shows and discusses a ‘mist net’ suspended between a pair of ‘telescoping poles.’”); *see also* Ex. 1013, at ¶ 152 (stating the same).

e) **Limitation [1.3.1].** “a hook for attaching the poles overhead;”

Bird Barrier Video fails to expressly disclose a hook for attaching the poles overhead. Instead, the poles in Bird Barrier Video are secured to overhead magnetic surfaces via adjustable magnetic heads. Ex. 1003, at 1:03. Nevertheless, using hooks instead of magnetic heads would have been obvious to a POSA as there is no material difference between hooks and magnetic connectors in this regard, and the use of hooks on the ends of poles to attach the poles to an overhead structure is commonly used in various fields. *See, e.g.*, Ex. 1018, U.S. Patent No. 117,729, issued August 8, 1871, which is directed to improved rafter hooks. Indeed, as acknowledged by Meridian and Dr. Chamberlain, “it would have been an obvious and easily implemented design choice to a POSA to replace the magnetic heads with another known attachment means providing the same functionality, such as a ‘hook’” Ex. 1012, at 66; *see also* Ex. 1013, at ¶ 194 (stating the same).

f) **Limitation [1.3.2].** “a pulley attached to an upper portion of the pole”

Bird Barrier Video fails to expressly disclose a pulley attached to an upper portion of the pole. Nevertheless, doing so would have been obvious to a POSA

because affixing nets to pulley systems to enable the nets to be raised and lowered has been ubiquitous in many fields for years (*e.g.*, football field-goal nets). Indeed, as acknowledged by Meridian and Dr. Chamberlain, Kunz discloses that mist nets can be secured to poles using “a rope” and a “pulley” as evidenced by Kunz Figures 3(B) and 7. Ex. 1009, at 9, 14; *see also* Ex. 1012, at 66-67 (citations omitted); *see also* Ex. 1013, at ¶ 195 (stating the same). As further admitted by Meridian and Dr. Chamberlain, “[i]t would have been obvious to a POSA to modify the Bird Barrier Video’s mist net kit to include the rope/pulley/cleat/connector arrangement disclosed in Kunz . . . to allow for easy adjustment of the mist net position.” Ex. 1012, at 66-67 (citations omitted); *see also* Ex. 1013, at ¶ 195 (stating the same).

Moreover, Albanese’s net apparatus includes a pulley attached to an upper portion of a pole. Specifically, as discussed in Albanese and illustrated below, Albanese’s mist net apparatus includes, among other things, electrical metallic tubes, a clothesline cord, two single pulleys, one double pulley, one midsize rope cleat, and shower metal curtain pins. *Id.*, at 130:

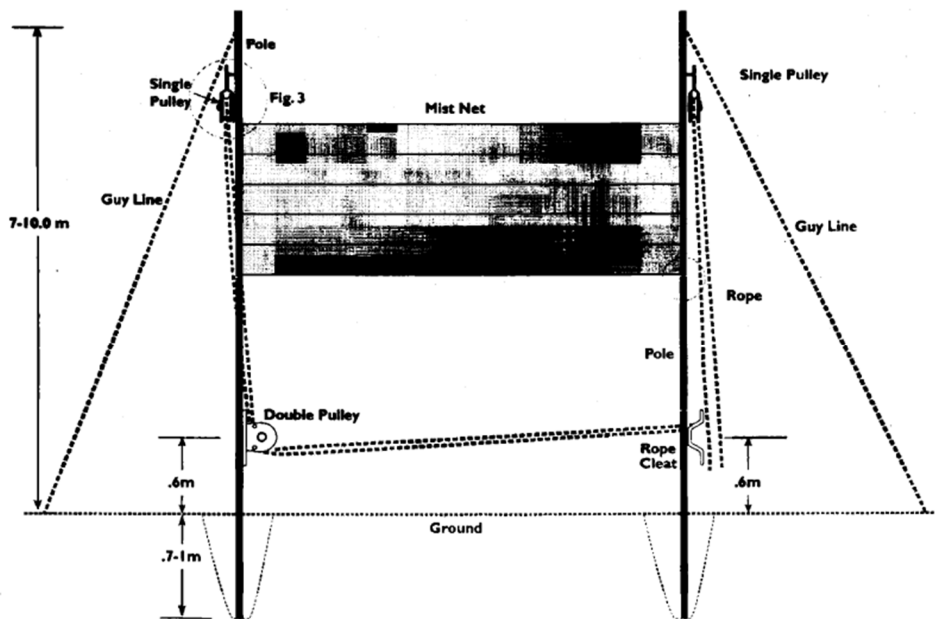


Figure 1. Diagram of elevated mist net apparatus. Diagram is not to scale

Ex. 1010, Fig. 1

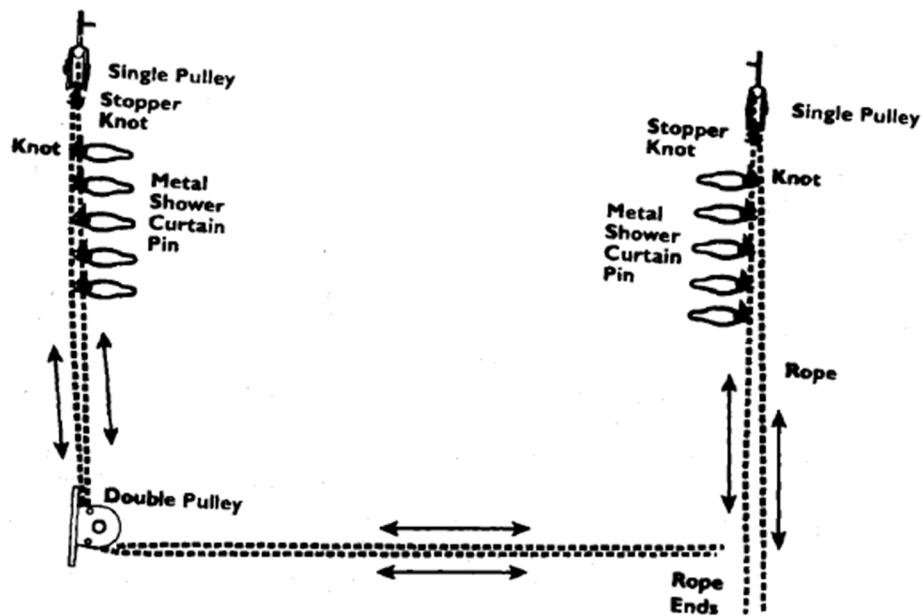
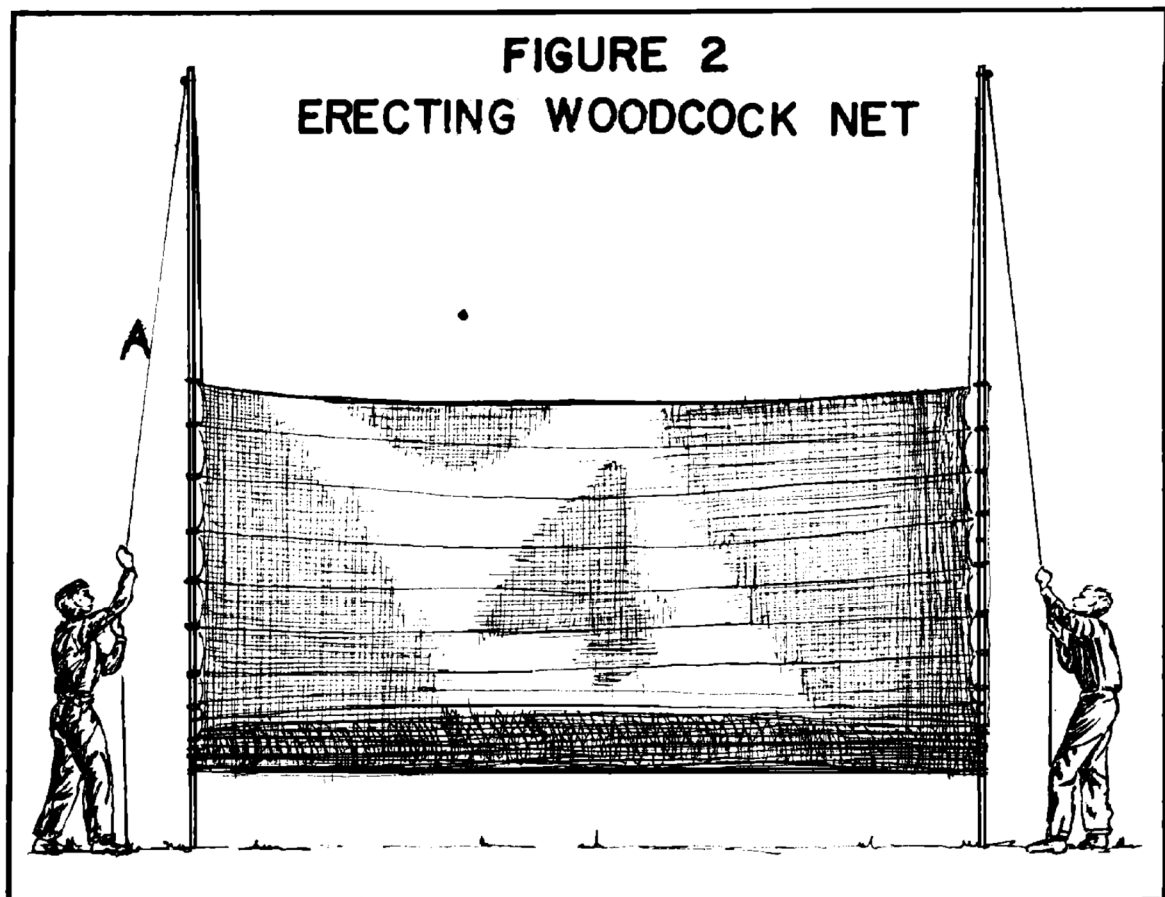


Figure 2. Diagram of rope layout and assemblage.

Ex. 1010, Fig. 2

Sheldon likewise discloses using pulleys attached to the upper portions of the poles that are used to raise and lower the mist net. Ex. 1011, at 132 (“A heavier string was tied to the top ring and run through an eye bolt or pulley at top of pole and down to ground (Figure 1-2A and Figure 2A)”):



It similarly would have been obvious to a POSA to modify the Bird Barrier Video’s mist net kit to include the rope/pulley/cleat/connector arrangement disclosed in Albanese or Sheldon to facilitate raising and lowering the mist net position.

g) **Limitation [1.3.3].** “a rope attached to the pulley, the rope having devices to attach the bird netting to the rope;”

For at least the reasons discussed above with respect to Limitation [1.3.2], this limitation is rendered obvious by Bird Barrier Video in view of Kunz and/or Albanese or Sheldon. Moreover, as acknowledged by Meridian and Dr. Chamberlain, the mist net in Bird Barrier Video is secured to the poles by loops, and it would have been “an obvious design choice to a POSA to replace the loops with removable connectors (e.g., carabiners) providing the same functionality.” Ex. 1012, at 66; *see also* Ex. 1013, at ¶¶ 194-95 (stating the same).

h) **Limitation [1.5].** “driving the flying vertebrate or waiting for the flying vertebrate to fly into the netting pockets;”

Bird Barrier Video, Kunz, Albanese and Sheldon all necessarily teach “waiting for the flying vertebrae to fly into the netting pockets,” as the nets are specifically designed for such purpose. Indeed, Bird Barrier Video teaches that after its net is setup and attached to a rafter, the net is “ready to catch the target birds.” Ex. 1003, at 1:59. Bird Barrier Video then shows a bird that has been captured in the net and teaches that “[w]hen a bird is captured, the net should be taken down immediately so the bird may be removed while it is still alive.” *Id.*, at 2:19. Albanese similarly teaches waiting for flying vertebrates to fly into netting pockets. Ex. 1010, at 129 (“Mist netting is one of the most efficient means used to

sample small birds.”), 133 (“[W]hen birds are captured in the net, care should be taken to keep the net level when lowering[.]”). Sheldon also teaches this element. Ex. 1011, at 134 (“Woodcocks which are netted usually fly into the field just over the tops of trees or in any breach between tree clumps.”).

Moreover, Kunz teaches that its net system is designed to capture bats when they fly into the nets. Ex. 1009, at 8. As admitted by Meridian and Dr. Chamberlain, Kunz further discloses using extension poles to dislodge or move bats from their roosting spots such that they will fly into and be captured by the nets. Ex. 1012, at 53 (citations omitted); *see also* Ex. 1013, at ¶¶ 167-68 (stating the same). Meridian and Dr. Chamberlain further admit that “[a] POSA would have found it obvious (and would have been motivated) to dislodge a bird using Kunz’s net-extension pole and drive it into the Bird Barrier Video’s mist net kit” Ex. 1012, at 53 (citations omitted); *see also* Ex. 1013, at ¶¶ 167-68 (stating the same).

Based on the above, Bird Barrier Video, Kunz, Albanese and Sheldon teach this element, and it would have also been obvious to combine them to meet this element.

i) **Limitation [1.6].** “lowering the netting using the height adjustable support poles; and”

Bird Barrier Video shows the net being lowered using height adjustable support poles. Ex. 1003, at 2:19-3:01; FIGS. 16-17. Meridian and Dr. Chamberlain admitted same. Ex. 1013, at ¶ 154 (“After the bird is captured, the netting is lowered so that the animal can be removed and relocated outside of the building.”).

j) **Limitation [1.7].** “removing the flying vertebrate from the netting.”

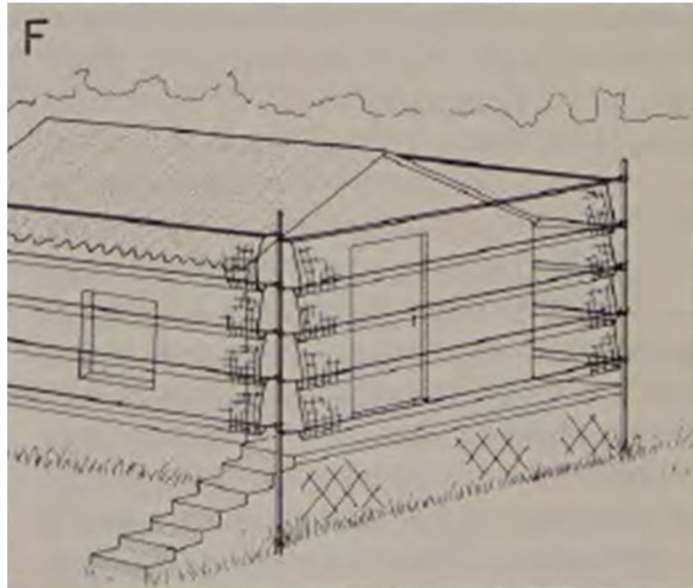
Bird Barrier Video shows and discusses that the captured bird should be quickly removed from the netting to reduce the risk that the bird will be injured or killed. Ex. 1003, at 2:19 (“When a bird is captured, the net should be taken down immediately so the bird may be removed while it is still alive.”). Kunz likewise contains a section specifically discussing the removal of captured bats from the nets discussed therein, as does Albanese. Ex. 1009, at 10-11; Ex. 1010, at 133.

ii. **Claims 2 and 3**

Bird Barrier Video and Kunz disclose and otherwise render obvious all limitations of dependent claims 2 and 3.

Claim 2 adds the limitation that the claimed method includes the additional step “adapted a [sic] building to prevent further entry by the determined species of flying vertebrate.” The ‘073 Patent teaches this can be done, for example, by “adapting the building so that the species cannot easily return to the inside of the

building. . . . Also adapting the entrances to prevent the species of bird from entering the building. . . .” Ex. 1001, at 4:14-24. To the extent such solutions are not imminently obvious to anyone trying to keep birds out of a building, Kunz expressly shows placing nets around a building to prevent bats from entering:



Ex. 1009, Figure 4(F)

Id., at Figure 4(F). In relation to this figure, Kunz further teaches that “[O]ften bats can be captured if the perimeters of roosts are either partially or completely surrounded by one or more nets.” *Id.*, at 10. It would have been obvious to a POSA to modify the method of Bird Barrier Video to include the additional step of adapting a building to prevent further entry by the determined species of flying vertebrate, as taught by Kunz. A POSA would be motivated to do so to limit the number of birds entering the building. Specifically, adapting a building to prevent

further flying vertebrate entry assists in keeping vertebrates out of indoor spaces, which is the ultimate objective of any system designed to minimize birds in particular spaces.

Claim 3 adds the limitation that the poles are telescoping poles. For at least the reasons discussed above with respect to Limitation [1.3], this limitation is disclosed by Bird Barrier Video.

iii. Motivation for Combining

In IPR2022-01253, Meridian and Dr. Chamberlain argued that a POSA would be motivated to combine Bird Barrier Video and Kunz to arrive at the invention claimed in the '374 Patent. Ex. 1012, at 49-50; *see also* Ex. 1013, at ¶ 155-158. The claims of the '374 Patent, which were ultimately found to not be invalid over Bird Barrier Video and Kunz, include fundamentally different claim limitations than the claims of the '073 Patent (*e.g.*, the use of strategically placed “perimeter” and “trapping” nets to reduce the space in which a bird can fly). Because of those differences, in IPR2022-01253 Safe Haven argued that a POSA would not be motivated to combine Bird Barrier Video with Kunz *to arrive at the multi-net system claimed by the '374 Patent*. See Ex. 1017, at 49-51. The Board agreed, and ultimately held that a POSA would not have been motivated to combine the teachings of Bird Barrier Video and Kunz “to arrive *at the recited system of nets*.” Ex. 1014, at 35 (emphasis added).

Unlike the '374 Patent, the Challenged Claims in this Petition do not require the use of multiple nets or strategically placed nets positioned with respect to perimeter walls. Rather, the Challenged Claims in this Petition cover a single rudimentary bird capture mist net hung between two poles that is raised to a height based on the flight characteristics of a bird species. The only arguable novelty involves raising the net to a height based on flight characteristics of the targeted species. Although Meridian and Dr. Chamberlain repeatedly argued that Bird Barrier Video discloses this feature (*see* Ex. 1012, at 57, 70; Ex. 1013, at ¶ 177, 204), if the Board determines otherwise then (as discussed above) Kunz, Albanese and Sheldon each expressly teach it.

Further, because those references and Bird Barrier Video all pertain to mist nets hung between two poles that can be raised and lowered, and they all focus on the common goal of capturing birds, a POSA would have been motivated to combine them to arrive at the claimed invention. *See, e.g., KSR Intern. Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007) (there is a motivation to combine when a known technique “has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way”); *Tyco Healthcare Grp. LP v. Ethicon Endo-Surgery, Inc.*, 774 F.3d 968, 978 (Fed. Cir. 2014) (finding motivation to combine where references are “clearly within a common field of endeavor”).

X. NO SECONDARY CONSIDERATIONS

The Examiner did not rely on any secondary considerations when allowing the claims to issue. Therefore, this Petition is not required to address any purported secondary considerations. The Board should, as it has done before, institute trial to address any new evidence Meridian might offer. *See, e.g., Brunswick v. Volvo Penta*, IPR2020-01512, Paper 15 at 47 (Mar. 11, 2021) (declining to find that new secondary considerations evidence indicated a petition deficiency because the “objective indicia of nonobviousness is highly fact-specific,” and “Petitioner has not had the opportunity to respond to the specific arguments raised by Patent Owner”); *Zurn v. Sioux Chief*, IPR2018-00975, Paper 9 at 39 (PTAB Nov. 8, 2018).

XI. DISCRETIONARY DENIAL IS INAPPROPRIATE

A. §325(d) Is Not a Basis for Denial.

In *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 (PTAB Feb. 13, 2020) (precedential), the Board explained that a two-part framework is used to determine whether to exercise discretion under §325(d), considering first, whether the same or substantially the same art or arguments were presented to the Office, and second, whether the Office materially erred in its patentability review. *Id.*, at 8.

Discretionary denial is inappropriate under the first prong of the *Advanced Bionics* framework because none of Safe Haven’s references—Bird Barrier Video, Kunz, Albanese, or Sheldon—were before the Examiner during prosecution. The Board has “consistently held that a reference that ‘was neither applied against the claims nor discussed by the Examiner’ does not weigh in favor of exercising [its] discretion under § 325(d).” *Bowtech, Inc. v. MCP IP, LLC*, IPR2019-00386, Paper 14 at 5-6 (PTAB July 3, 2019) (collecting cases including *Shenzhen Zhiyi Technology Co. Ltd., d/b/a iLife v. iRobot Corp.*, IPR2017-02137, Paper 9 at 9-10 (PTAB Apr. 2, 2018) (declining to exercise discretion under 35 U.S.C. §325(d) when the reference was merely cited in a Notice of References Cited)). Thus, discretionary denial under §325(d) is not warranted here because Bird Barrier Video, Kunz, Albanese, and Sheldon were not considered during prosecution. Neither of these references are cumulative of the only reference the Examiner substantively applied (U.S. Patent No. 5,966,862 to Ueno), and Safe Haven’s arguments are not even substantially the same as the arguments previously presented to the Office.

B. *Sotera* Stipulation Renders Denial Under *Fintiv* Improper

Institution is consistent with the Director’s recent guidance on applying the *Fintiv* Factors. *Memorandum: Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation* (“Director

Memorandum”) (June 21, 2022) (providing guidance regarding *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential)).

First, the merits of this Petition are “compelling” because the evidence herein (which consists largely of Meridian’s own admissions) “would plainly lead to a conclusion that one or more claims are unpatentable by a preponderance of the evidence,” which “alone demonstrates that the PTAB should not discretionarily deny institution under *Fintiv*.” *Id.*, at 3-5.

Second, if instituted, Safe Haven will not pursue, in any parallel district court proceeding, the same grounds asserted in this Petition or any grounds that could have reasonably been raised in an IPR (i.e., any ground that could be raised under §§ 102 or 103 on the basis of prior art patents or printed publications). *See Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 at 18-19 (PTAB Dec. 1, 2020) (precedential as to Section II.A). This stipulation mitigates any concerns of duplicative efforts and potentially conflicting decisions, and is, by itself, sufficient for the Board to decline to deny the petition under *Fintiv*. *Id.*, at 19; *Director Memorandum* at 7-8. Institution is proper in this case.

XII. CONCLUSION

For the foregoing reasons, there is a likelihood that Safe Haven will prevail as to each of the claims, and thus *inter partes* review of the Challenged Claims is respectfully requested.

IPR2023-01340
U.S. Patent No. 9,943,073

Respectfully submitted,

Dated: August 22, 2023

/Preston H. Heard/
Reg. No. 64,675

Lead Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. §42.24(d), the undersigned certifies that this Petition complies with the type-volume limitation of 37 C.F.R. §42.24(b). The word count application of the word processing program used to prepare this Petition indicates that the Petition contains 6,913 words, excluding the parts of the Petition exempted by 37 C.F.R. §42.24(a).

Dated: August 22, 2023

/Preston H. Heard/
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CERTIFICATE OF SERVICE

The undersigned certifies service pursuant to 37 C.F.R. §§42.6(e) and 42.105(b) on the Patent Owner by Express Mail of a copy of this Petition for *Inter Partes* Review and supporting materials at the current known correspondence address for the Patent Owner:

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