

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MERIDIAN WILDLIFE SERVICES LLC,

Petitioner

v.

SAFE HAVEN WILDLIFE REMOVAL AND
PROPERTY MANAGEMENT EXPERTS LLC,

Patent Owner

Case IPR2022-01254
Patent No. 10,729,108

PATENT OWNER'S PRELIMINARY RESPONSE

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Exhibit No.	Description
2001	Declaration of Derek Tolley
2002	Perimeter Definition & Meaning, Merriam-Webster Dictionary Online, <i>available at</i> https://www.merriam-webster.com/dictionary/perimeter
2003	Excerpt of Prosecution History for U.S. Patent App. No. 16/691,664, Information Disclosure Statement by Applicant
2004	Excerpt of Prosecution History for U.S. Patent App. No. 16/691,664, Notice of Allowance
2005	Proximal Definition & Meaning, Merriam-Webster Dictionary Online, <i>available at</i> https://www.merriam-webster.com/dictionary/proximal
2006	Declaration of Angela Ney

I. INTRODUCTION AND SUMMARY OF RESPONSE

Pursuant to 35 U.S.C. § 313 and 37 C.F.R. § 42.107, Patent Owner Safe Haven Wildlife Removal and Property Management Experts LLC (“Safe Haven”) submits this Preliminary Response to Meridian Wildlife Services LLC’s (“Petitioner”) Petition for *Inter Partes* Review of U.S. Patent No. 10,729,108 (“the ‘108 Patent”).

All of Petitioner’s arguments fail because they rely on a faulty claim construction that is contrary to the plain language of the claims, significant other intrinsic evidence, the plain and ordinary meaning of “perimeter,” relevant case law, and common sense. Specifically, Petitioner argues that the Board should ignore the plain language of the claims and conclude that there is no positional distinction between “perimeter” nets and “trapping” nets in the patented method and system, arguing that such nets merely need to be “capable” of being installed along the perimeter of an enclosure or “capable” of trapping an animal, respectively. Pet. at 7. This argument requires the Board to write the words “perimeter” and “trapping” completely out of the claims, such that any nets could suffice as “perimeter” or “trapping” nets regardless of their placement within an enclosure, as long as the nets have certain structural limitations (*i.e.*, they are attached to telescoping poles, connectors, hooks and rope). Adopting Petitioner’s argument would be error.

Equally compelling is that the specification emphasizes that the arrangement and placement of the nets is critical to “greatly lessen” “the space the animal could

escape during an attempted capture,” and then repeatedly teaches that in order to achieve that objective, the perimeter nets are “set up around the ***perimeter of the enclosure***,” whereas the trapping nets are set up on the “***interior of the enclosure***.” (Ex. 1002 at 3:14-19; 4:28-33; 4:38-42; 4:46-57; Figs. 2-3) (emphasis added). These teachings are consistent with the plain and ordinary meaning of the word “perimeter,” which is widely understood to mean “a line or strip bounding or protecting an area.” Ex. 2002, *Perimeter*, Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/perimeter>. Because there is nothing in the claims or other intrinsic record suggesting that the perimeter nets merely need to be “capable” of being placed along the perimeter of the enclosure, the Board should reject Petitioner’s arguments and decline institution. *See, e.g., United Microelecs. Corp. v. Lone Star Silicon Innovations LLC*, Case IPR2017 01513, Paper 10 at 6-9 (PTAB May 22, 2018) (“the Board may, and routinely does, decline to institute trial where the patentability challenge asserted in a petition is keyed to an incorrect claim construction.”) (citing several decisions).

Nonetheless, even if Petitioner’s proposed claim construction is adopted, the Petition should be denied because it fails to demonstrate a reasonable likelihood that Petitioner will prevail as to any of the challenged claims. Petitioner recognizes that each primary reference is deficient on its own, and thus relies on obvious assertions that are divorced from reality. Importantly, none of the cited references involve the

use of multiple nets within an enclosure, much less the strategic placement of multiple nets within an enclosure to decrease the space an animal can escape when flushed by a flushing device during a capture attempt. They instead teach **single net** “hit or miss” indoor capture systems in which a net is placed near where a bird has been spotted (Brugh; Bird Barrier Video) – i.e., the “old” way of trapping birds in large, enclosed spaces -- or the use of single or multiple nets to capture bats **outside** (Kunz). A person of ordinary skill would have no motivation to modify or combine these references to arrive at the claimed invention.

Furthermore, the Board should exercise its discretion under 35 U.S.C. § 325(d) because two of Petitioner’s primary references were cited and considered during prosecution of the ‘108 Patent, Petitioner’s other primary reference is merely cumulative to art that was considered, and Petitioner has failed to demonstrate that the Office erred in a manner material to the patentability of the challenged claims. The Board should also deny institution under § 314(a) because trial would be an inefficient use of the Board’s resources, particularly in light of the parallel district court litigation.

In sum, the Petition fails to demonstrate a reasonable likelihood that the Petitioner would prevail with respect to at least one challenged claim, and thus the Board should deny institution.

II. THE ‘108 PATENT

A. Overview and Specification

The ‘108 Patent is generally directed to a method and system of animal relocation. Ex. 1002 at 1:18-19, Ex. 2001 ¶ 21. In particular, the patent is focused on providing a method and system for the trapping and relocation of animals (typically birds) in enclosed buildings, such as big box stores, warehouses, and other structures. Ex. 1002 at 1:19-21, 1:33-45. The patent notes that the rafters of some enclosed buildings provide desirable areas for birds to roost and, without the proper technique, it can take several hours or even days to remove a bird from a large-footprint structure. *Id.* at 1:34-45, Ex. 2001 ¶ 22. Among other things, one advantage of the claimed invention is that it “provides for an improved animal capture procedure whereby the space the animal could escape during an attempted capture is greatly lessened due to the arrangement of the perimeter net system and trapping system.” Ex. 1002 at 3:6-915-19 (*see also Id.* at 2:63-64, noting that the method and system of the ‘108 Patent greatly reduces the time necessary to relocate the bird). Ex. 2001 ¶ 38.

Figure 2 of the ‘108 Patent illustrates a preferred embodiment of the invention that may be used in an enclosure over 75,000 square feet. It is annotated below:

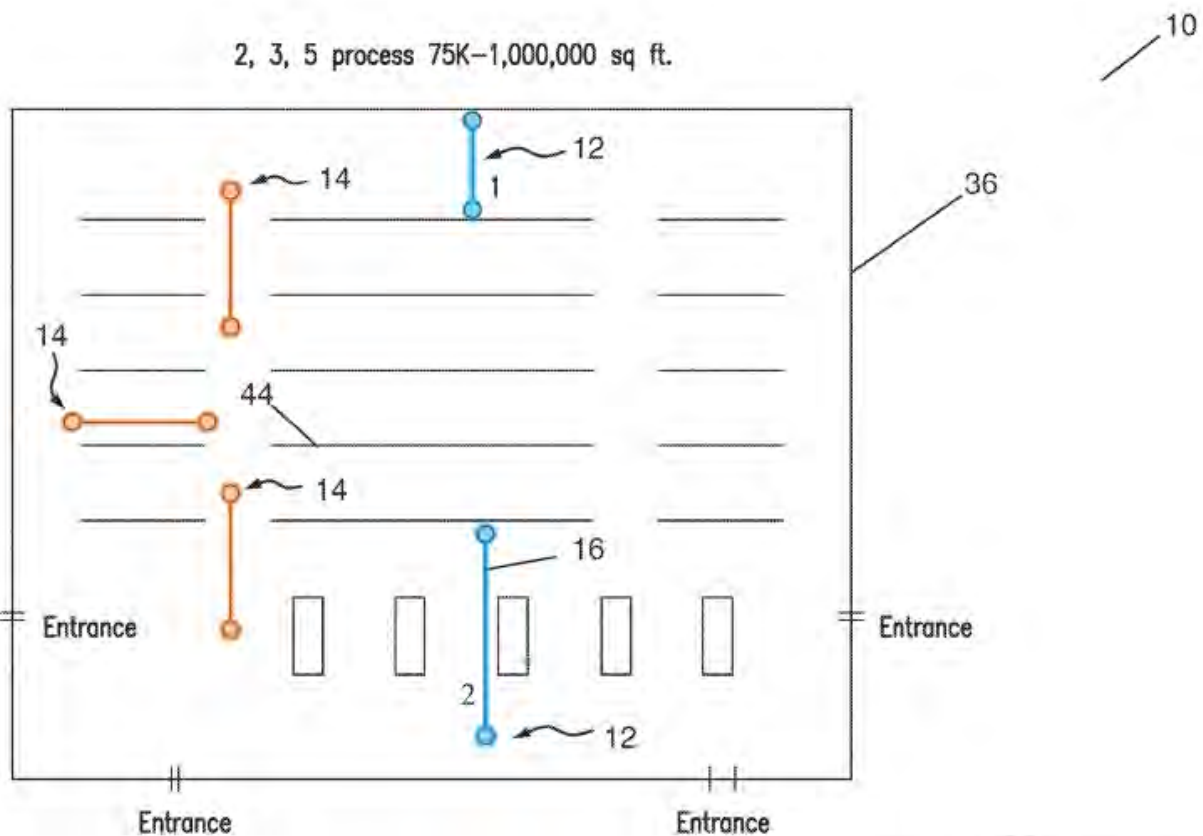


FIG. 2

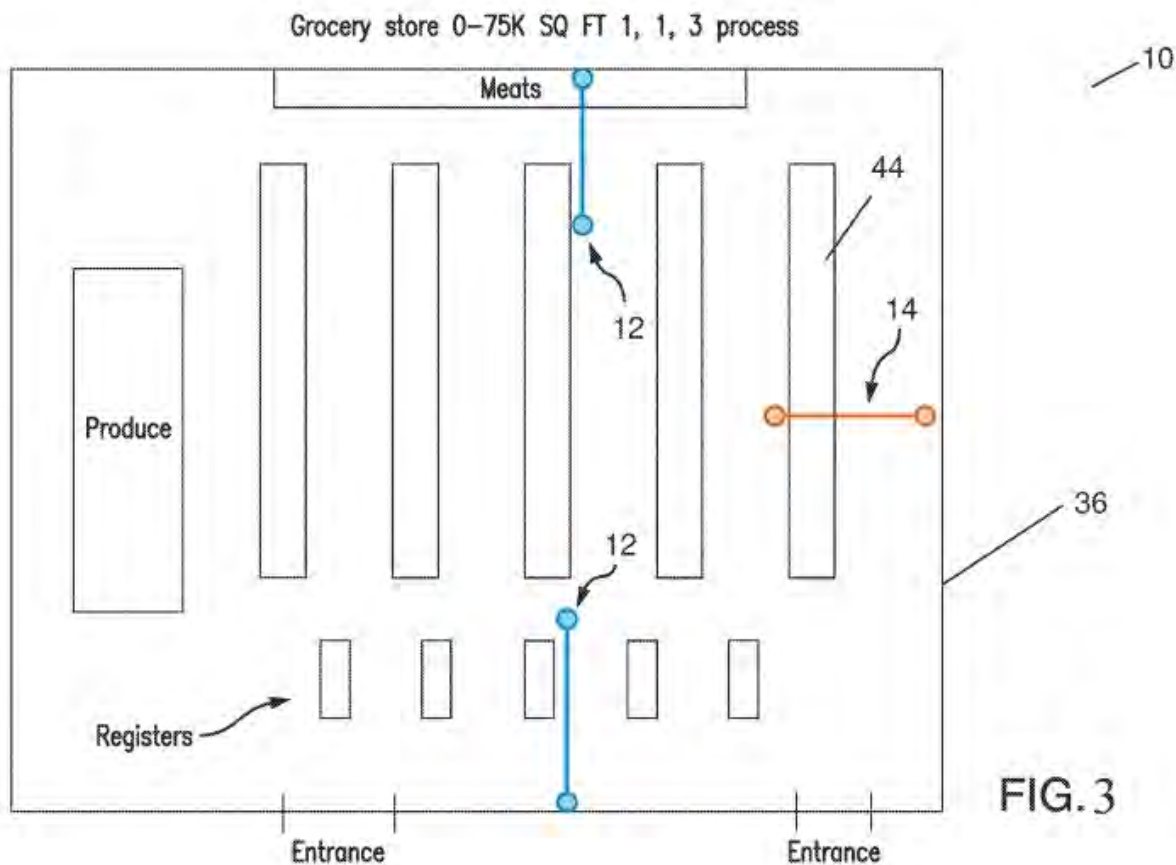
The specification teaches that the placement and location of the nets in this configuration is important to achieve the objective of the invention:

As seen in FIG. 2, an enclosure 36 over 75,000 square feet can use the setup disclosed. Preferably, *the perimeter net system 12 is set up around the perimeter of the enclosure 36. The trapping net system 14 on the interior of the enclosure 36 so as to reduce the space the animal 60 can traverse while the capture attempt is occurring.* This preferred setup is also known as the “2:3:5” system because of how the perimeter net system 12 and trapping net system 14 are setup. The setup is named “2:3:5” because it preferably uses two nets for the

perimeter net system 12 and three nets for the trapping net system 14 for a total of five nets. *By placing the perimeter net system 12 along the outer perimeter of the enclosure 36, the escape routes for the animal 60 are reduced and the animal 60 can be funneled into the trapping net system 14.* The arrangement of the trapping net system 14 is customizable and modular for enclosures 36 of differing layouts.

Ex. 1002 at 4:28-44 (emphasis added), Ex. 2001 ¶ 38.

Figure 3 of the '108 Patent illustrates an alternative setup that may be used for an enclosure less than 75,000 square feet, in which the setup is known as the “1:1:3” system. Ex. 1002 at 45-57. That figure is annotated below:



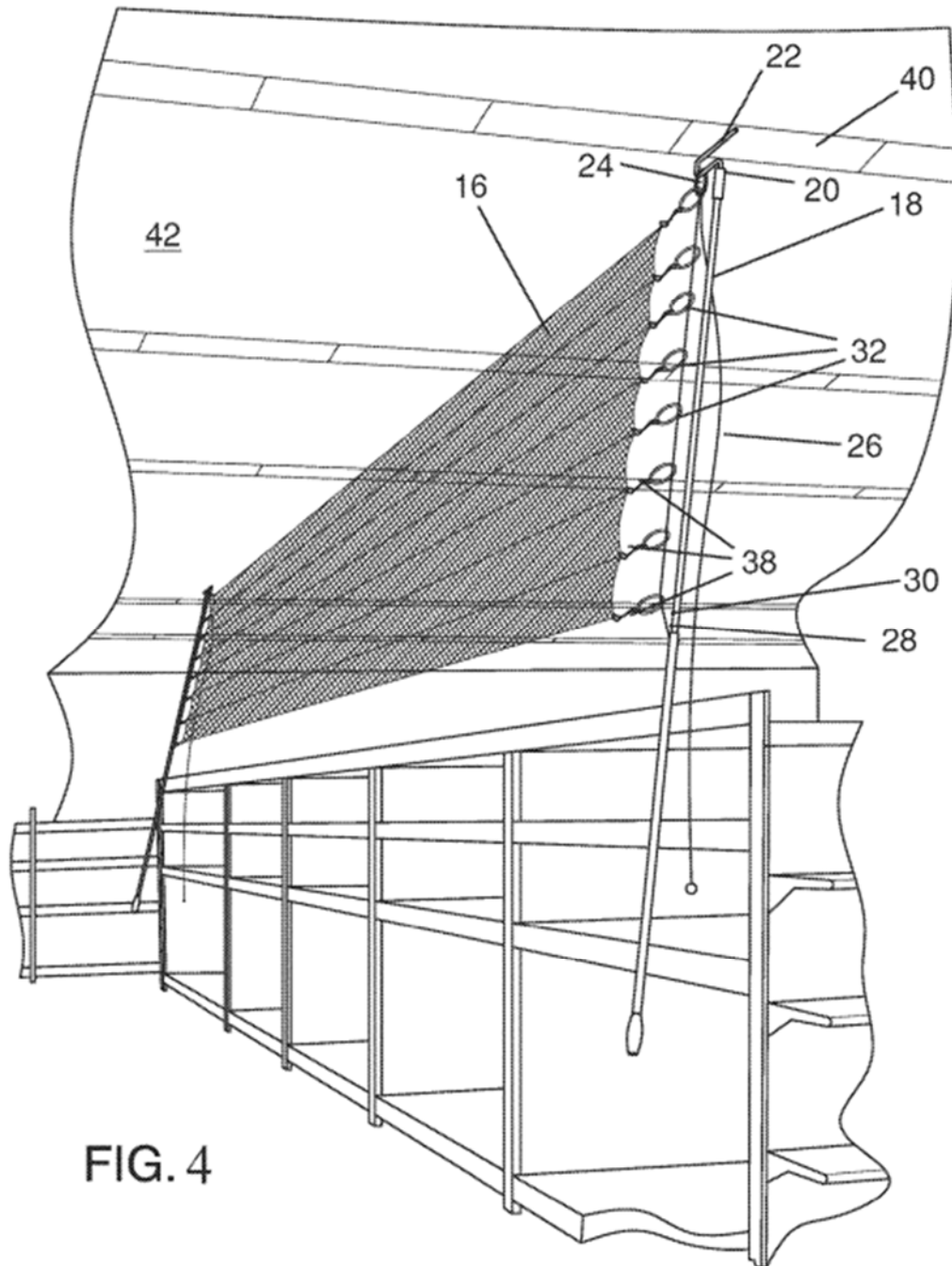
The specification teaches that the placement and location of the nets in this configuration is also important to achieve the objective of the invention:

As seen in FIG. 3, an alternative setup can be used for an enclosure 36 less than 75,000 square feet. *The perimeter net system 12 is again set up on the perimeter of the enclosure 36 and the trapping net system 14 is set up on one side of the enclosure 36 to again reduce the space the animal 60 can traverse while the capture attempt is occurring.* This alternative setup is also known as the “1:1:3” system because of how the perimeter net system 12 and the trapping net

system 14 are setup. *More specifically, the “1:1:3” system has two nets 16 on the outer perimeter of the enclosure 36, with one net 16 on opposite sides of the enclosure 36, and one net 16 for the trapping net system 14 placed based on the layout of the enclosure 36 so as to efficiently capture the animal 60.*

Ex. 1002 at 4:45-57 (emphasis added), Ex. 2001 ¶ 39.

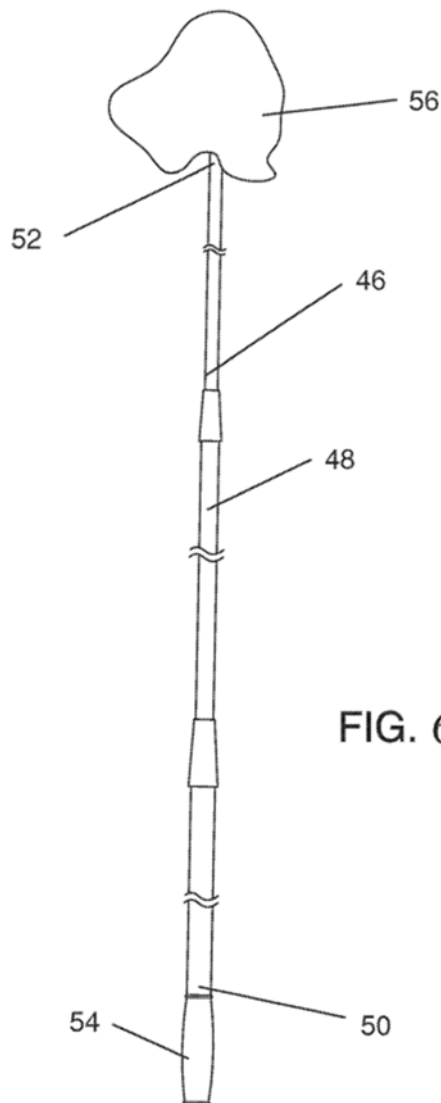
Figure 4 of the ‘108 Patent, which illustrates the construction of the nets used in either the perimeter net system or the trapping net system, is below:



Each net system includes at least one net **16** attached to a telescoping pole **18** ending at a distal end **20** with a hook **22**. Ex. 1002 at 4:6-8. The hook has a removable connector **24** which connects a rope **26** and pulley **28** forming a rope and pulley

system **30** having at least one connector **32** to connect the net **16** to the telescoping pole **18**. *Id.* at 4:9-12. Preferably, the net can be hung from a hanging member or other portion of a ceiling of the enclosure sufficient to catch the hook. *Id.* at 4:65-5:1.

The animal relocation method and system of the present disclosure further includes a flushing device having a flusher, one example of which is illustrated in Figure 6 of the '108 Patent.



The depicted flushing device **46** includes a telescoping arm **48** having a proximal end **50** and distal end **52**, where the proximal end **50** has a handle **54** and the distal end **52** has a flusher **56**. *Id.* at 5:4-7. The flusher itself can be any object that, when shaken or moved, creates noise, movement, or both to drive an animal from a hiding spot into one of the nets. *Id.* at 5:7-9.

B. Claims of the '108 Patent

Relevant passages of the independent claims of the '108 Patent are reproduced below:

1. A method of relocating birds within a structure, the method comprising:

installing a bird relocation system, the bird relocation system comprising;

at least one perimeter net,
at least one trapping net, and
at least one flushing device;

wherein a top edge of either or both of the at least one perimeter net and at least one trapping net is positioned at or near a ceiling of the structure, and

flushing the animal through the structure wherein the flushing device chases the bird toward the at least one perimeter net and into the perimeter net or the trapping net.

11. A bird relocation system for relocating a bird in a structure, the system comprising:

at least one perimeter net;
at least one trapping net;
at least one flushing device, and
at least one telescoping pole,

wherein either or both of the at least one perimeter net and the at least one trapping net are attached to at least one telescoping pole.

17. A method of relocating birds within a structure, the method comprising:

installing a bird relocation system, the bird relocation system comprising;

at least one perimeter net, and

at least one flushing device;

wherein a top edge of the at least one perimeter net is positioned at or near a ceiling of the structure, and

flushing the animal through the structure wherein the flushing device chases the bird toward the at least one perimeter net,

wherein the at least one perimeter net is installed such that one side of the at least one perimeter net is proximal to one side of the structure.

C. Prosecution History

The claims of the '108 Patent were allowed after examination of a significant body of art, including the two primary references cited by Petitioner - Brugh (Ex. 1008) and Bird Barrier Video (Ex. 1009). Pet. at 12, 26, 38. Both Brugh and Bird Barrier Video were cited on the initial IDS filed with the application. Ex. 2003 at 1-2. The Examiner did not apply Brugh or Bird Barrier Video to any of the claims during prosecution, presumably because the Examiner understood that both references, whether alone or in combination with any other reference, failed to teach or suggest the subject matter of the claims. As stated in the Notice of Allowance, the cited art "fails to disclose or render obvious a motivation to provide a bird relocation

system and method having the combination of limitations . . . and to modify the prior art to meet the claimed limitations would be an *improper hindsight reasoning*.” Ex. 2004 at 7 (emphasis added).¹

D. Person of Ordinary Skill in the Art

Safe Haven disagrees with Petitioner’s definition of a POSA to the extent it requires such a person to have a bachelor’s degree in the study of wildlife management or wildlife ecology. Capturing animals in netting systems is a niche skill that is not taught in most wildlife management or ecology programs. Ex. 2001 ¶ 9. Actual experience working with such systems is more important to understanding the nuances and reasons that result in their success. *Id.* Accordingly, Safe Haven submits that a POSA is one who has at least 2 years working with animal capture net systems. *Id.*

III. PETITIONER’S PROPOSED CLAIM CONSTRUCTIONS SHOULD BE REJECTED

A. Claim Construction Principles

Petitioner’s claim construction arguments are at odds with several fundamental claim construction principles. First, it is a “bedrock principle” that “the

¹ Petitioner has also filed a petition for *inter partes* review of United States Patent No. 10,251,374 (“the ’374 Patent”), also owned by Safe Haven IPR2022-01253.

claims of a patent define the invention to which the patentee is entitled the right to exclude.” *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004); *see also Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) (“we look to the words of the claims themselves ... to define the scope of the patented invention”); *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1998); (“The claim construction inquiry ... begins and ends in all cases with the actual words of the claim.”).

Second, all claim terms are generally presumed to have meaning within a claim. *Innova/Pure Water, supra*, 381 F.3d at 1119.

Third, courts cannot construe claims to read an express limitation or element out of the claims. *Texas Instruments Inc. v. U.S. Int'l Trade Comm'n*, 988 F.2d 1165, 1171 (Fed. Cir. 1993).

Fourth, “different claim terms are presumed to have different meanings.” *Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379 (Fed. Cir. 2008) (citing *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1333 n. 3 (Fed.Cir.2006); *CAE Screenplates Inc. v. Heinrich Fiedler GmbH*, 224 F.3d 1308, 1317 (Fed.Cir.2000)).

Finally, courts should construe terms according to their plain and ordinary meaning unless the patentee acts as his or her own lexicographer and clearly sets forth an alternative definition of the disputed claim term in either the specification

or the prosecution history. *In re Schwemberger*, 410 F. App'x 298, 303 (Fed. Cir. 2010); 37 C.F.R. § 42.100(b) (2018).

These principles dictate rejection of Petitioner's claim construction arguments, and thus petition, altogether. *United Microelecs.*, *supra*.

B. “Perimeter Net” and “Trapping Net”

Petitioner argues that “perimeter net” and “trapping net” should be construed to refer to the intended uses of the nets, such that a “perimeter net” is one “**capable of**” being installed along the perimeter of an enclosure, whereas a “trapping net” is one “**capable of**” trapping a bird. This argument fails for several reasons. Ex. 2001 ¶ 36.

First, since the patent teaches that the perimeter and trapping nets can be structurally the same, adopting Petitioner's argument would vitiate the words “perimeter” and “trapping” altogether. In other words, the claims would have the same meaning without those words because the perimeter and trapping nets could be placed at any locations within a structure. Such a construction would not only read express limitations or elements out of the claims, but also violate the tenets that different claim terms are presumed to have different meanings and all claim terms are generally presumed to have meaning. Ex. 2001 ¶ 37.

Second, Petitioner's argument ignores the fact that the patentee specifically chose to use two different words -- “perimeter” and “trapping” -- to refer to two

different nets within the context of the claimed method and system. Again, since the structure of the nets is the same, there would have been no reason for the patentee to do so if the nets were intended to be interchangeable and not dependent on their locations. Further, the plain and ordinary meaning of “perimeter” (“a line or strip bounding or protecting an area”) is inconsistent with the notion that “perimeter nets” need not be located at the perimeter of the structure.

Third, Petitioner’s argument is at odds with the express teachings in the specification. The specification teaches that the claimed invention “provides for an improved animal capture procedure whereby the space the animal could escape during an attempted capture is greatly lessened ***due to the arrangement of the perimeter net system and trapping system.***” Ex. 1002 at 3:15-19 (emphasis added). The specification then describes the two embodiments shown in the figures, and teaches that the placement and location of the perimeter and trapping nets in those embodiments is important to achieve the patent’s objective:

As seen in FIG. 2, an enclosure **36** over 75,000 square feet can use the setup disclosed. Preferably, ***the perimeter net system 12 is set up around the perimeter of the enclosure 36. The trapping net system 14 on the interior of the enclosure 36 so as to reduce the space the animal 60 can traverse while the capture attempt is occurring.*** This preferred setup is also known as the “2:3:5” system because of how the perimeter net system **12** and trapping net system **14** are setup.

The setup is named “2:3:5” because it preferably uses two nets for the perimeter net system **12** and three nets for the trapping net system **14** for a total of five nets. ***By placing the perimeter net system 12 along the outer perimeter of the enclosure 36, the escape routes for the animal 60 are reduced and the animal 60 can be funneled into the trapping net system 14.*** The arrangement of the trapping net system **14** is customizable and modular for enclosures **36** of differing layouts.

Id. at 4:28-44 (emphasis added), Ex. 2001 ¶ 38.

As seen in FIG. 3, an alternative setup can be used for an enclosure **36** less than 75,000 square feet. ***The perimeter net system 12 is again set up on the perimeter of the enclosure 36 and the trapping net system 14 is set up on one side of the enclosure 36 to again reduce the space the animal 60 can traverse while the capture attempt is occurring.*** This alternative setup is also known as the “1:1:3” system because of how the perimeter net system **12** and the trapping net system **14** are setup. ***More specifically, the “1:1:3” system has two nets 16 on the outer perimeter of the enclosure 36, with one net 16 on opposite sides of the enclosure 36, and one net 16 for the trapping net system 14 placed based on the layout of the enclosure 36 so as to efficiently capture the animal 60.***

Id. at 4:45-57 (emphasis added), Ex. 2001 ¶ 39.

Contrary to Petitioner’s suggestion, Figures 2-3 then show that the perimeter nets (12) are located at or proximate to the perimeter of the structure, whereas the

trapping nets (14) are located further towards the interior of the structure such that they reduce the space the animal can traverse while the capturing method is performed. *Id.* at Figs. 2-3, Ex. 2001 ¶ 40.

Furthermore, Petitioner's proposed construction is in conflict to the claims themselves. For instance, Claim 2 requires that the at least one perimeter net is "installed such that one side of the at least one perimeter net is proximal to one side of the structure," while Claim 3 requires that the at least one perimeter net is "installed such that one side of the at least one perimeter net is substantially in contact with one side of the structure." Contrary to Petitioner's arguments, the language of these claims actually supports Safe Haven's construction. *See* Pet. at 7.

Specifically, "proximal" is defined as "situated near the center of the body or the point of attachment" or "next to or nearest the point of attachment or origin, a central point, or the point of view", whereas "proximate" is defined as "situated close to." *Proximal*, Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/proximal>. Ex. 2005. Because a "perimeter net" is a net that is located at or proximate to the perimeter of the enclosure, the additional limitations of Claims 2 and 3 are not "meaningless" as asserted by Petitioner. *See* Pet. at 8-9. That is, Claim 2 is directed to one embodiment of the claimed method in which the at least one perimeter net is positioned with respect to one side of the structure in one manner (it is "proximal" to it), while Claim 3 is directed to another embodiment

of the claimed method in which the at least one perimeter net is positioned with respect to one side of the structure in another manner (it is substantially in contact with it), both embodiments falling within Safe Haven’s proposed construction of “perimeter net” as set forth below.

Finally, Petitioner’s argument is contrary to relevant case law. Petitioner provides no case law to support its position that the claims should be construed based on what they are “capable” of rather than what they actually state, *particularly* with respect to method claims. Courts have routinely rejected similar arguments. For example, in *Cross Med. Prods. Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293 (Fed. Cir. 2005), a party argued that claims requiring that a device have an anchor seat that is in contact with bone should be construed to mean that the anchor seat merely needed to be “capable” of contacting the bone. *Id.* at 1311. The Federal Circuit rejected such a construction, stating in-relevant part, “the claim does not require that the interface be merely ‘capable’ of contacting bone; ***the claim has a structural limitation that the anchor seat be in contact with bone.***” *Id.* (emphasis added).

Similarly, in *Advance Aerospace Techs., Inc. v. United States*, 122 Fed. Cl. 445 (2015), the court rejected a party’s argument that the terms “open entrance” and “closed end” should be construed to require that the entrance is merely capable of being open and that the end is merely capable of being closed. Noting that the terms

“open” and “closed” were structural limitations, the court found that the claims required that “the entrance or mouth is open, ***not just capable of being opened***, and the end is closed, ***not just capable of being closed***.” *Id.* at 472 (emphasis added); *see also Advance Micro Devices, Inc. v. LG Elecs., Inc.*, 2017 WL 1383271, at *9 (Apr. 18, 2017) (rejecting proposed construction of “capable of being programmed” for “programmed” because the inventor “could have used “programmable” or “capable of being programmed” instead of or in addition to “programmed,” but it did not). Petitioner’s attempt to construe Safe Haven’s claim elements by what there are merely “capable of” should be rejected for the same reasons.²

For at least these reasons, Safe Haven respectfully submits that the Board should reject Petitioner’s proposed constructions for the terms “perimeter net” and “trapping net,” and instead construe “perimeter net” as “a net that is located at or proximate to the perimeter of the enclosure,” and “trapping net” as “a net that is located further to the interior of the enclosure than the perimeter net so as to reduce

² Although Petitioner does not expressly invoke 35 U.S.C. § 112(f), doing so would also be improper because (1) the claim elements are not claimed using functional language, and (2) their structure (i.e., their physical position in the claimed system) is sufficiently defined in the specification. *See Skky, Inc. v. MindGeek, s.a.r.l.*, 859 F.3d 1014, 1019 (Fed. Cir. 2017).

the space the animal can traverse while the capture attempt is occurring.” Ex. 2001 ¶ 45.

C. “Flushing Device” and “Flusher”

Similar to its erroneous constructions for “perimeter net” and “trapping net,” Petitioner argues that “flushing device” should be construed as any “device *capable* of being used by a handler to drive an animal from one location to another,” regardless of its structure. Pet. at 10. Yet the specification teaches that the flushing device has a particular structure, as shown in Figure 6: “FIG. 6 shows the flushing device **46**. The flushing device comprises a telescoping arm **48** having a proximal end **50** and distal end **52**. The proximal end **50** has a handle **54** and the distal end **52** has a flusher **56**.” Ex. 1002 at 4:4-7. Accordingly, Safe Haven submits that the term “flushing device” should be construed as “a device having an arm and a flusher.” Ex. 2001 ¶ 47.

For purposes of this Petition, Safe Haven agrees with Petitioner’s proposed construction of “flusher,” which the patent describes as “any object that, when shaken or moved, creates noise, movement, of both.” Ex. 1002 at 5:7-9, Ex. 2001 ¶ 48.

IV. THE BOARD SHOULD DISCRETIONARILY DENY THE PETITION UNDER 35 U.S.C. § 325(D)

In *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 at 8 (Feb. 13, 2020) (precedential), the Board set forth a two-part framework for considering denial under Section 325(d):

(1) whether the same or substantially the same art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office; and (2) if either condition of first part of the framework is satisfied, whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims.

As discussed below, the *Advanced Bionics* framework shows that (1) the same or substantially the same art and arguments have been presented to the Office, and (2) Petitioner is unable to demonstrate that the Office materially erred during prosecution.

1. The Same or Substantially the Same Art and Arguments Were Previously Presented to the Office

Likely appreciating that the first prong of the *Advanced Bionics* framework is met in this case, Petitioner presents just a single paragraph discussing 35 U.S.C. § 325(d) in its entirety, which attempts to place importance on the fact that “[t]he Office issued *no rejections* over any art cited here.” Pet. at 54. However, not only does Petitioner expressly admit that “Brugh” and “Bird Barrier Mist Net Kits” are

cited on the face of the patent, but both references can be found on the initial IDS filed with the application in the prosecution history of the ‘108 Patent. Ex. 2003 at 1-2. With respect to this prong, the Board has routinely found that “[p]reviously presented art includes art made of record . . . such as on an Information Disclosure Statement (IDS).” *Biocon Pharma Ltd. v. Novartis Pharmaceuticals Corp.*, IPR2020-01263, Paper 12 at 8 (PTAB Feb. 16, 2021) (citing *Advanced Bionics*). Thus, for least these reasons, Brugh and Bird Barrier “Mist Net Kits” were previously presented to the Office.

Moreover, although Kunz is not cited on the face of the ‘108 Patent, that is no surprise considering it covers the use of outdoor trapping nets, and thus has no relation to the strategic placement of nets within enclosures to minimize the space an animal can move during a capture attempt. Regardless, Kunz is merely cumulative to at least one prior-art reference that was cited by the Applicant and the Examiner during prosecution: U.S. Patent App. Pub. No. 2005/0166441 to Mattox, which is directed to a method and apparatus for deploying an animal restraining net outdoors in urban and suburban areas.

2. The Office Did Not Err in a Material Manner During Prosecution

The Petition’s single paragraph devoted to Section 325(d) of the *Advanced Bionics* analysis fails to even acknowledge the second prong of the analysis, namely,

whether the Office erred in a material manner during prosecution. Petitioner presumably does not do so because it is unable to identify any error in the Office's consideration of and decision not to apply Brugh and Bird Barrier Video. Thus, because (1) the same or substantially the same art previously was presented to the Office, and (2) Petitioner has failed to demonstrate that the Office erred in a manner material to the patentability of challenged claims, the Board should discretionarily deny the petition under 35 U.S.C. § 325(d).

V. THE BOARD SHOULD DISCRETIONARILY DENY THE PETITION UNDER 35 U.S.C. § 314

Further, the Board should deny institution under § 314(a) because trial would be an inefficient use of the Board's resources in light of parallel district court litigation in the Western District of Virginia, originally filed over one year ago on June 25, 2021, in the Middle District of North Carolina. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 2 (Mar. 20, 2020) (precedential). Safe Haven filed suit against Petitioner almost 16 months ago for infringement of the '108 Patent, and ever since, Petitioner has sought to delay resolution of the case on the merits. In this respect, Petitioner should not be rewarded by pointing to the early stage of litigation as a factor weighing against discretionary denial. Indeed, although Petitioner's motion to stay is still pending before the district court, Safe Haven has opposed that motion. It would be an inefficient use of the Board's and parties' resources to

institute this action and the parallel attacks on Safe Haven's patent portfolio when the relevant issues surrounding validity, as well as Petitioner's brazen infringement, are before the district court. The Board should exercise its discretion and deny institution under § 314(a).

VI. THE PRIOR ART FAILS TO DISCLOSE OR RENDER OBVIOUS EACH AND EVERY FEATURE OF THE '108 PATENT'S CLAIMS

Although the Board should reject Petitioner's proposed claim constructions, under either party's proposed constructions the prior art fails to teach or suggest the strategic placement of multiple nets at specific locations within enclosures to minimize the space an animal can move during a capture attempt when the animal is flushed from one location with a flushing device.

A. Legal Principles Governing Obviousness

To establish obviousness of a claim under 35 U.S.C. § 103, Petitioner must prove that the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). Obviousness is a question of law based on underlying factual findings, including (1) the scope and content of the prior art, (2) the differences between the claims and the prior art, (3) the level of ordinary skill in the art, and (4) objective considerations of

nonobviousness. *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Pat. Litig.*, 676 F.3d 1063, 1068 (Fed. Cir. 2012) (citing *Graham v. John Deere Co.*, 383 U.S. 1, 17–18, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966)).

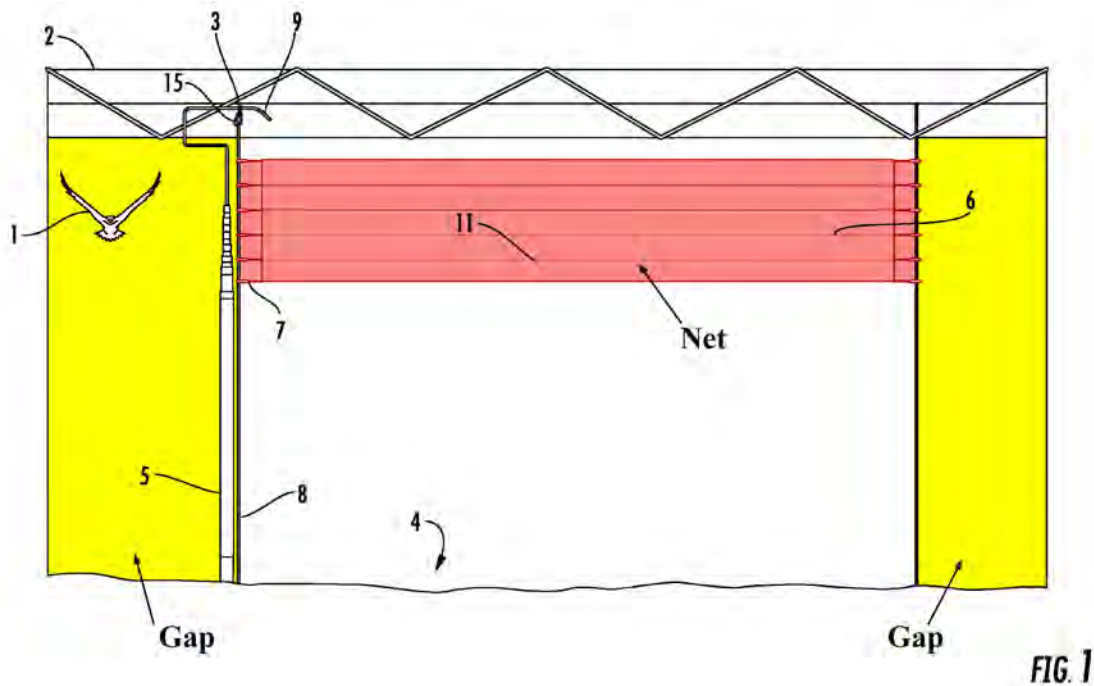
A “patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR*, 550 U.S. at 418. Rather, a determination of obviousness “requires that a skilled artisan would have perceived a reasonable expectation of success in making the invention in light of the prior art.” *Amgen Inc. v. F. Hoffman-La Roche Ltd*, 580 F.3d 1340, 1362 (Fed. Cir. 2009). Reliance on hindsight is impermissible, as the obviousness inquiry must be conducted for the time at which the invention was made. *InTouch Techs., Inc. v. VGO Commc'ns, Inc.*, 751 F.3d 1327, 1352 (Fed. Cir. 2014) (citing *In re Cyclobenzaprine*, 676 F.3d at 1073). When a petitioner merely “throws metaphorical darts at a board filled with combinatorial prior art possibilities,” the Board should not succumb to hindsight claims of obviousness. *In re Kubin*, 561 F.3d 1351, 1359 (Fed. Cir. 2009).

B. The Cited Prior Art

1. Brugh

Brugh is directed to a single net system that purportedly allows for more humane capture of flying vertebrates in an indoor setting. Ex. 1008 at ¶ [0003]. An

annotated version of Figure 1 of Brugh is reproduced below, which illustrates Brugh's net system in its entirety. *See also id.* at ¶ [0025].



As Brugh teaches, the system includes a capture net 6 containing a net 6 mounted on height adjustable posts 5 by attaching it to clips 7 on rope 8. *Id.* at ¶ [0049]. Hook 9 is attached to rafter 3 and the rope 8 on each pole 5 runs through pulley 15 and is lengthened to allow the net to be pulled together in the desired tension. *Id.* Further, Brugh teaches the use of telescoping poles to raise or lower the net. *Id.* at ¶ [0039].

Most notably, Brugh discloses no more than ***the random placement of a single net within an enclosure***. It contains no teachings regarding the use of multiple nets within an enclosure, much less the strategic placement of nets at or along the perimeter of the enclosure and trapping nets further towards the interior of the

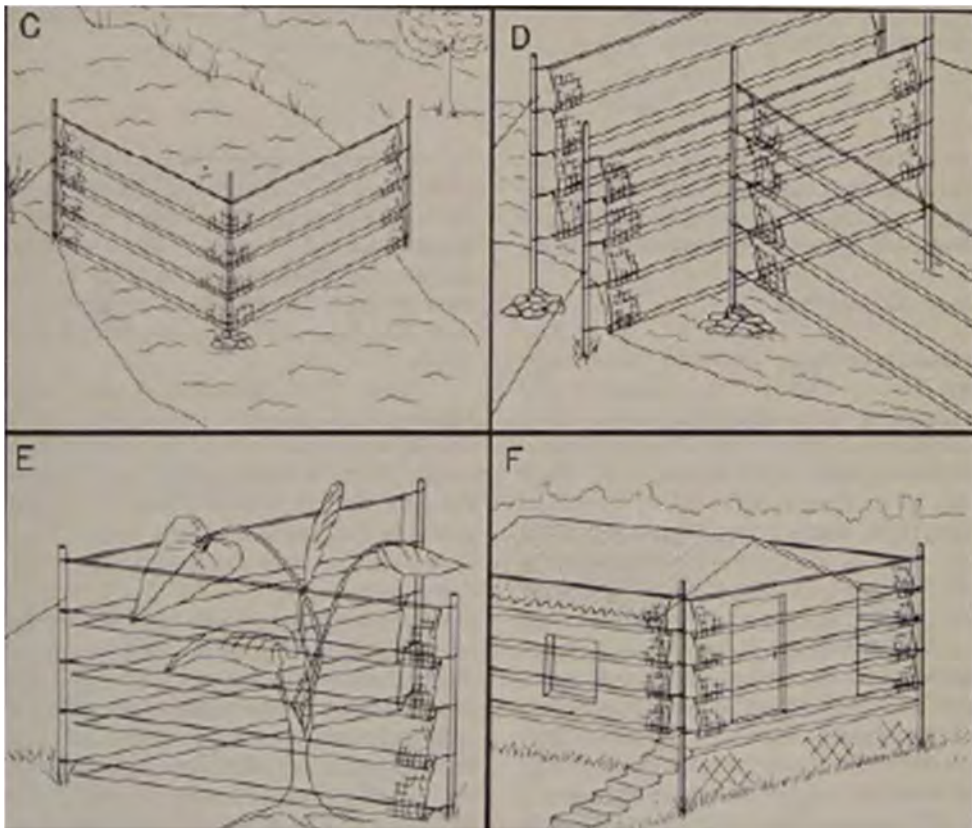
enclosure to minimize the space an animal can traverse during a capture attempt when flushed by a flushing device. *See* Ex. 2001 ¶ 50.

Further, the only figure in Brugh showing the Brugh net installed (annotated Figure 1, above) shows the net positioned *away from the perimeter of an enclosure* such that a bird can fly through the open space (highlighted in yellow) on each end of the net. *Id.* at ¶ 52. Thus, Brugh contradicts Petitioner’s assertion that “a POSA would understand that placing the capture device [of Brugh] ‘proximal to’ or ‘in contact with’ a ‘side’ wall of the structure would prevent a bird from flying between the capture device and the side of the structure to escape capture.” Pet. at 20.

Finally, Brugh contains no teaching regarding the use of a flushing device as claimed. Brugh instead merely discloses *driving a bird towards a single net* by “making a loud noise, approaching the vertebrate, or by the placement of food, light, or odorant or the like.” Ex. 1008 at ¶ [0046]; Ex. 2001 ¶ 54.

2. Kunz

Kunz is directed to various *outdoor* bat capturing methods and holding devices. Ex. 1010 at 1. Specifically, Kunz teaches that mist nets in various configurations may be used to capture bats outdoors, such as the mist nets shown in FIG. 4 C-D of Kunz, which are reproduced below:

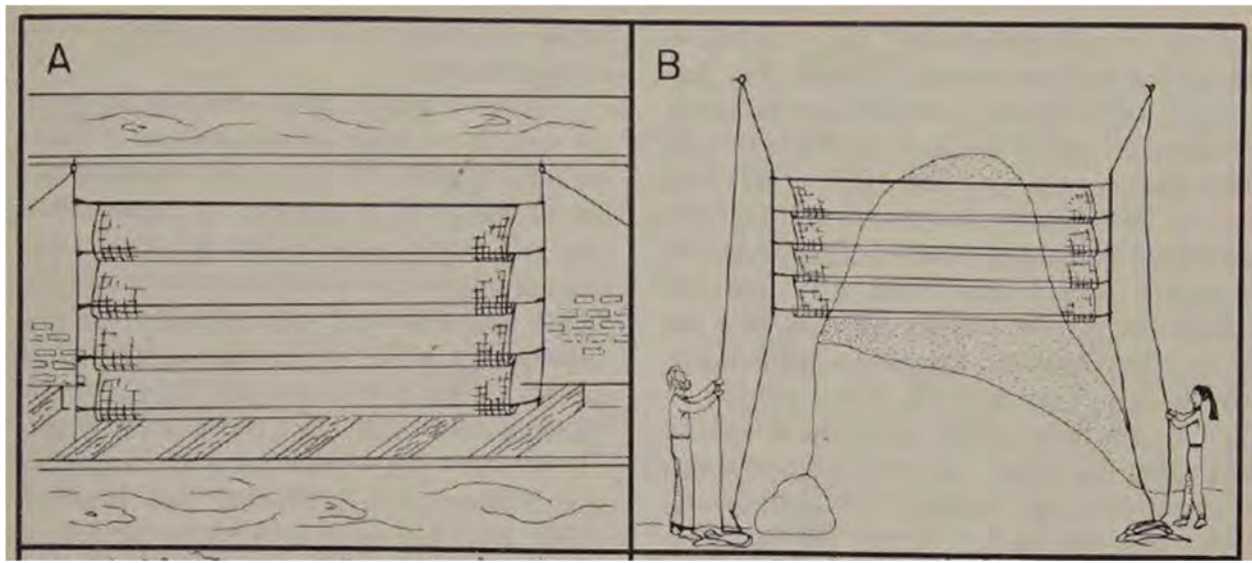


In this respect, Kunz focuses on the placement of nets in outside areas where bats are already located, such as “near roosts, at water holes, and across trails that are used as flyways.” *Id.* at 8. It does not, however, discuss the strategic placement of multiple nets to minimize the area that bats *can fly when flushed during a capture attempt*. See Ex. 2001 ¶ 60.

In fact, Kunz instead discusses placing multiple nets *around the outer perimeter* of a bat roost rather than at or along the perimeters of the roost, such that “the perimeters of roosts are either partially or completely *surrounded by one or more nets*.” Ex. 1010 at 10-11, Fig. 4 (emphasis added). Enclosing the perimeter of a structure with a series of conjoined nets is contrary to the claimed method and

system, in which perimeter nets are placed at or along (**not surrounding**) the interior perimeter of a structure, in combination with additional trapping nets that limit the space a bird can travel when being flushed during a capture attempt. *See* Ex. 2001 ¶ 62.

Kunz also teaches the placement of a single net in an attic or at the opening of a cave or mine. Ex. 1010 at 8-9, Figs. 3A-B. However, Kunz contains no teachings regarding the use of multiple nets within such enclosures, much less the strategic placement of nets at or along the perimeter of an enclosure and trapping nets further towards the interior of the enclosure to minimize the space a bat can fly when it is flushed by a flushing device during a capture attempt. *See* Ex. 2001 ¶ 63. Further, that single net shown in the Kunz figures is not located at the perimeter of the interior structure, but instead in a central area or across an opening. Specifically, Figure 3A shows the net placed in the center of an attic, and Figure 3B shows the net stretched across the opening of a cave:



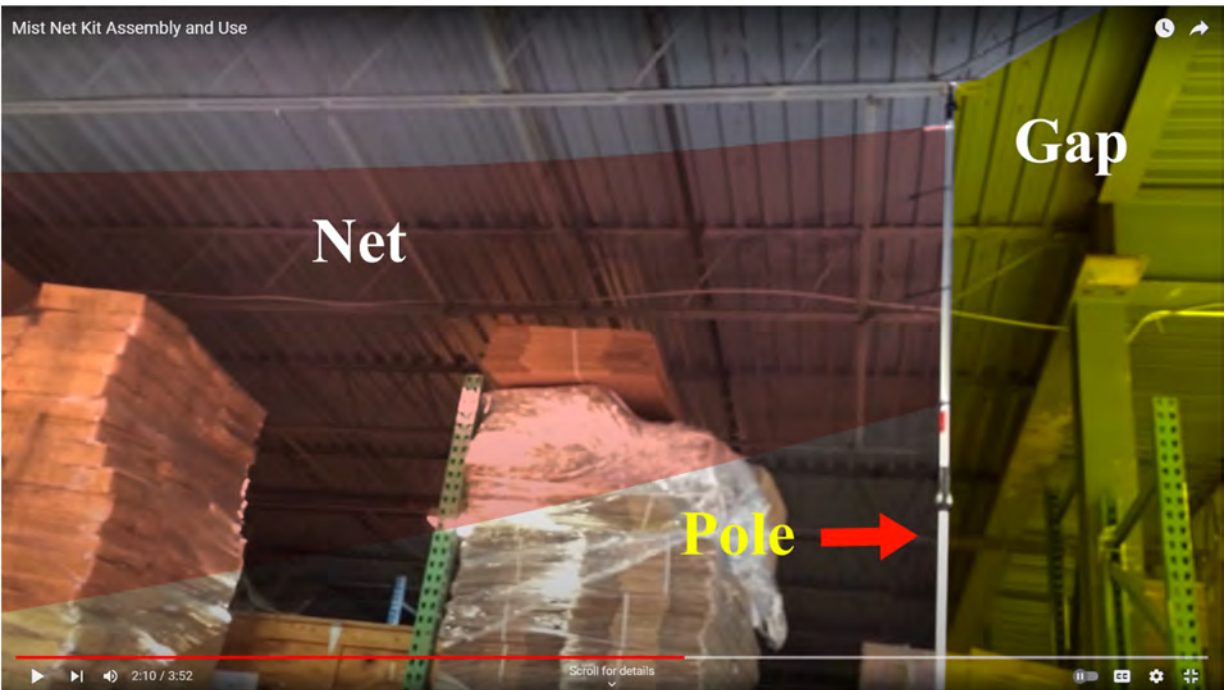
Moreover, contrary to the claimed invention, Kunz stresses that in such indoor locations “the nets should be monitored constantly to avoid the capture of large numbers of bats at one time.” Ex. 1010 at 8.

Finally, Kunz does not teach the use of a flushing device as claimed to scare bats away from their existing locations and into trapping nets during capture attempts. *Id.* On this issue, Petitioner cites to page 5 of Kunz to claim that Kunz teaches such a flushing device. However, that passage pertains to capturing bats in high locations with hand hoops, and merely states that “[H]ibernating bats that roost high on the ceilings of caves, mines, and buildings can sometimes be dislodged with long sections of bamboo poles or extension poles to which small hoop nets are attached.” *Id.* Thus, Kunz merely teaches the use of a net attached to an extension pole to capture a bat in a high location. *Id.*; Ex. 2001 ¶ 64.

3. Bird Barrier Video

Bird Barrier Video is an instructional video from Bird Barrier America, Inc. It demonstrates how to set up the company's Mist Net Kit product. The Mist Net Kit generally includes a ***single mist net*** having horizontal pockets formed in it. Ex. 1014 at 0:18. The mist net further includes a plurality of loops on each side, through which net poles are inserted. *Id.* at 0:51. At one end, each net pole is then connected to an adjustable magnetic head. *Id.* at 1:03. At another end, each net pole is then connected to a main pole using a collared receiver. *Id.* at 1:15.

Bird Barrier Video teaches that “[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.” *Id.* The adjustable magnetic head on each net pole is then attached to a magnetic surface, hanging the mist net in position as shown below:



Annotation of Petitioner's Ex. 1014, Figure 11.



Annotation of Petitioner's Ex. 1014, Figure 12.

Like Brugh, however, Bird Barrier Video discloses no more than *the placement of a single net within an enclosure*. Moreover, it involves manual movement of a single net to a location where a bird “has been observed,” and relies on the bird randomly flying into that net due to its location. *See* Ex. 2001 ¶ 55. It contains no teachings regarding the use of multiple nets within an enclosure, much less the strategic placement of nets at or along the perimeter of the enclosure and trapping nets further towards the interior of the enclosure to minimize the space an animal can traverse during a capture attempt. *See* Ex. 2001 ¶ 45. It further contains no teachings regarding the use of flushing devices used to scare birds away from their existing locations and into trapping nets during capture attempts. *Id.*

C. The Petition’s Obviousness Grounds Are Deficient

1. GROUND A: Claims 1-17 are not obvious in view of Brugh

a. Claim 1

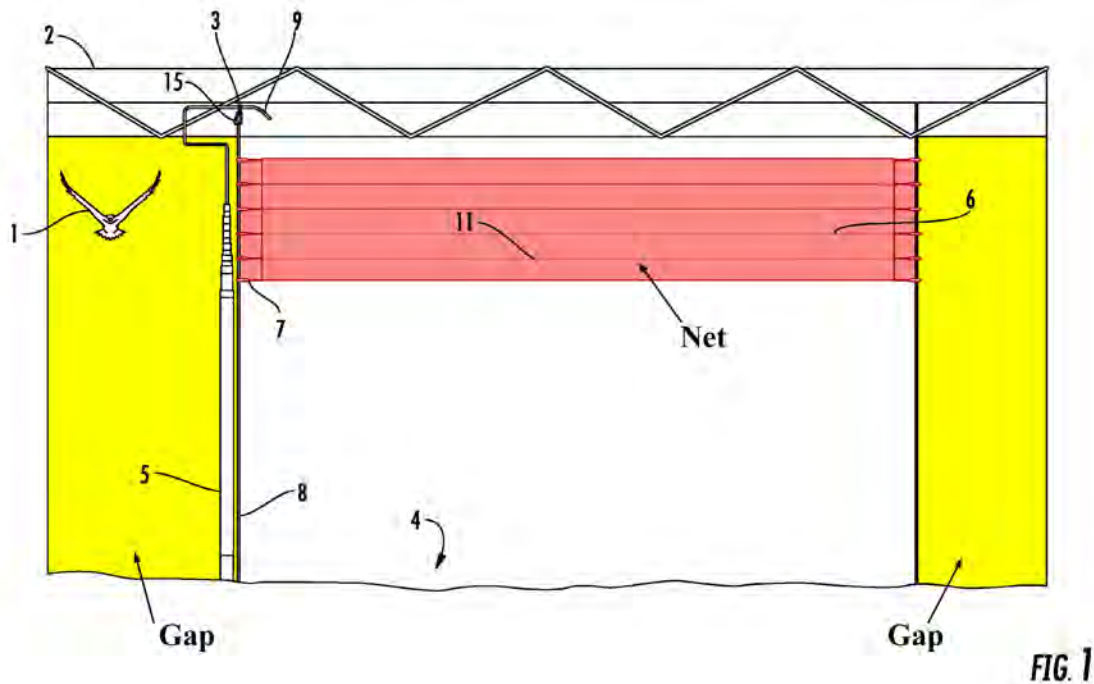
Petitioner argues that “Brugh’s capture device is both a perimeter net and a trapping net, and a POSA would have found it obvious to provide at least two of Brugh’s capture devices as part of a bird relocation system (e.g., one perimeter net and one trapping net).” Pet. at 15. Petitioner then contends that given Brugh’s teaching that a flying vertebrate’s “flight pattern” should be used to place nets, a POSA would have found it obvious to place at least one of Brugh’s capture devices along a perimeter wall and at least one of Brugh’s capture device in another location

within a building in response to observing flight patterns in those locations. *Id.* at 18. Finally, Petitioner argues that Brugh makes it obvious to a POSA to use a flushing device as claimed because Brugh discusses the use of “driving” vertebrate by “making a loud noise, approaching the vertebrate, or by the placement of food, light, or odorant or the like.” *Id.* at 19. These arguments fail for several reasons.

First, as detailed above, Brugh discloses no more than the placement of a **single net** within an enclosure. See Ex. 1008, ¶ [0025], FIG. 1. It contains no teachings regarding the use of multiple nets within an enclosure, much less the strategic placement of at least one net at or along the perimeter and ceiling of the enclosure and at least one trapping net further towards the interior of the enclosure at or near the ceiling to minimize the space an animal can traverse during a capture attempt, and then using a flushing device to chase a bird towards the perimeter or trapping net. See Ex. 2001 at ¶ 50.

Moreover, there is no teaching or suggestion in Brugh that there would be any advantage in positioning its single net **at or proximate to a perimeter wall or near the ceiling**. Brugh merely teaches its “netting for capture [is positioned] based on the species of flight vertebrate and their flight characteristics,” in which a “flight characteristics” refers to “how [a specific flying vertebrate] flies.” Ex. 1008 at ¶ [0015], [0045]. Yet there is no discussion at all about flight characteristics dictating placement of a net along the walls or ceiling of an enclosure. Ex. 2001 at ¶ 51. And

in fact, the only figure in Brugh (Figure 1, annotated below) showing the Brugh Net in operation, demonstrates the opposite—it shows a net positioned *away from the perimeter of an enclosure* such that a bird can fly through the open space on each end of the net:



In reality, the ease of repositioning Brugh’s single net system, which is expressly described by Brugh as “a device for *repeated quick set up*,” suggests an old fashioned “hit or miss” approach to bird capture. Ex. 2001 ¶ 53; Ex. 1008 at ¶ [0019] (emphasis added). Specifically, it suggests setting up a single capture net in an area where a bird has been observed, attempting to drive the bird into the net, and, if unsuccessful, moving the net to another area where the bird has moved to attempt another capture attempt. Ex. 2001 at ¶ 53; *see also* Ex. 1008 at ¶ [0007]. In practice,

this is a time-consuming process that ultimately results in wildlife removal experts “chasing down” the bird, which is precisely what the patented invention was designed to avoid and improve upon. Ex. 2001 at ¶¶ 24-28. Specifically, the patented method and system were developed upon observation that, when using a “hit or miss” capture technique such as the technique taught in Brugh, a bird’s normal patterns of movement are disrupted, resulting in the bird flying along a wall up high, near the structure’s ceiling. *Id.* The patented method and system were designed to solve these deficiencies in prior art systems like Brugh. *Id.* ¶ 55.

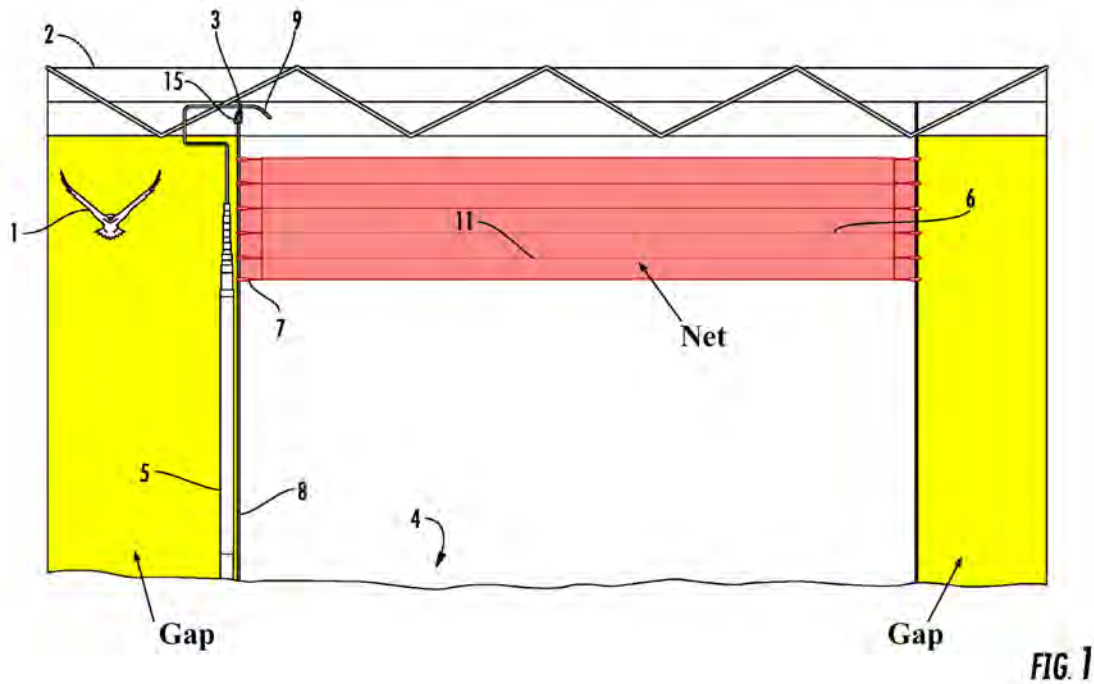
Finally, Brugh contains no teaching regarding the use of a flushing device as claimed. Brugh instead merely discloses flushing birds by “making a loud noise, approaching the vertebrate, or by the placement of food, light, or odorant or the like.” Ex. 1008 at ¶ [0046], Ex. 2001 ¶ 54.

As explained by Mr. Tolley, the Petition’s stated motivations for modifying Brugh to arrive at the claimed invention are nothing more than impermissible hindsight. Ex. 2001 ¶ 65. A POSA would have no motivation to convert Brugh’s single net “hit or miss” system into a multi-net capture system in which at least one net is positioned at or along the perimeter and ceiling of an enclosure, at least one trapping net is positioned at other locations further towards the interior and ceiling of the enclosure to minimize the space a bird can traverse during a capture attempt,

and then a flushing device is used to direct the bird into the perimeter or trapping net. Ex. 2001 ¶¶ 50-54.

b. Claims 2-17

Claim 2 is not obvious for the additional reason that it requires the at least one perimeter net to be installed such that one side of the at least one perimeter net is proximal to one side of the structure. As discussed above, “proximal” is defined as near the center. There is nothing in Brugh teaching placement of a net at or proximate to a wall of a structure, much less at or proximate to the center of a wall. The only figure in Brugh (Figure 1, annotated below) showing the Brugh Net in operation, demonstrates a net positioned *away from the perimeter of an enclosure* such that a bird can fly through the open space on each end of the net, and there is nothing showing that the net is close to the center of a wall:



Ex. 1008, FIG. 1. Thus, because the net in Brugh is positioned away from the center of the perimeter of an enclosure, Brugh clearly fails to disclose one side of at least one perimeter net being proximal to one side of the structure, much less the use of a perimeter net entirely.

Claim 3 is not obvious for the additional reason that it requires the at least one perimeter net to be installed such that one side of the at least one perimeter net is substantially in contact with one side of the structure. As discussed above with respect to Claims 1 and 2, the only figure in Brugh showing the Brugh Net in operation, demonstrates a net positioned ***away from the perimeter of an enclosure*** such that a bird can fly through the open space on each end of the net. *Id.*, FIG. 1. Thus, because the net in Brugh is positioned away from the perimeter of an

enclosure, Brugh fails to disclose one side of at least one perimeter net being substantially in contact with one side of the structure, much less the use of a perimeter net entirely.

Claims 4 and 12 are not obvious for the additional reason that they require at least one perimeter net and at least one trapping net to be mist nets. As detailed above with respect to Claim 1, Brugh discloses no more than the placement of a *single mist net* within an enclosure. *See id. at* ¶ [0025], FIG. 1. It contains no teachings regarding the use of multiple mist nets within an enclosure, much less at least one net that is located at or proximate to the perimeter of the enclosure (a perimeter net) and at least one net that is located further to the interior of the enclosure than the perimeter net so as to reduce the space the animal can traverse while the capture attempt is occurring (a trapping net). Ex. 2001 ¶ 45. Thus, because Brugh fails to disclose the use of at least one perimeter net and at least one trapping net entirely, Brugh fails to disclose doing so with mist nets.

Claim 5 is not obvious for the additional reason that it requires either or both of the at least one perimeter net and at least one trapping net to be attached to at least one telescoping pole. Brugh discloses a plurality of adjustable height support poles attached to a netting, which may be telescoping poles. Ex. 1008 at ¶¶ [0008], [0049]. However, the net that the adjustable height support poles are attached to does not constitute a perimeter or a trapping net as described by the '108 Patent. Thus, Brugh

fails to disclose the claimed at least one telescoping pole, which is attached to either or both of the at least one perimeter net and the at least one trapping net.

Claims 6 and 13 are not obvious for the additional reason that they require the at least one telescoping pole to include a means of attachment to a rafter or beam proximal to the ceiling of the structure. While Brugh does disclose a pole having a hook at the top for attaching the pole to rafters, beams, or the like, *Id.* at ¶ [0039], the pole the hook is attached to does not constitute the claimed telescoping pole for the reasons described above with respect to Claim 5. Moreover, while Brugh teaches its “netting for capture [is positioned] based on the species of flight vertebrate and their flight characteristics,” Ex. 1008 at ¶ [0015], [0045], it fails to disclose flight characteristics dictating placement of a net at or near a ceiling of an enclosure.

Claim 7 is not obvious for the additional reason that it requires the means of attachment to include a hook. While Brugh does disclose the use of a pole having a hook at the top for attaching the pole to rafters, beams, or the like on the ceiling, *Id.* at ¶ [0039], the pole the hook is attached to does not constitute the claimed telescoping pole for the reasons described above with respect to Claim 5, and the hook does not constitute the claimed means of attachment for the reasons described above with respect to Claims 6 and 13. Thus, because Brugh fails to disclose the claimed telescoping pole and the claimed means of attachment, Brugh fails to disclose a means of attachment including a hook.

Claims 8 and 14 are not obvious for the additional reason that they require the at least one telescoping pole to include a first end and second end; a removable connector; a rope and pulley; and a cleat, and the first end to include a hook. As discussed with respect to Claim 5, Brugh discloses a plurality of adjustable height support poles attached to a netting, which may be telescoping poles. *Id.* at ¶¶ [0008], [0049]. However, the net that the adjustable height support poles are attached to does not constitute a perimeter net or a trapping net as described by the '108 Patent. Further, Brugh fails to disclose the use of a cleat entirely, which is expressly admitted by Petitioner. *See* Pet. at 21-22. Moreover, one of ordinary skill would have no motivation to modify the system of Brugh to include a cleat, as there is no practical advantage identified by Petitioner in the rope being “secured.” *Id.* Thus, because Brugh fails to disclose the claimed at least one telescoping pole entirely, Brugh similarly fails to disclose at least one telescoping pole made up of any components, including the claimed first end and second end; a removable connector; a rope and pulley; and a cleat, and the first end to include a hook.

Claims 9 and 15 require the bird relocation system to include at least two perimeter nets, while Claims 10 and 16 require the bird relocation system to include at least two trapping nets. As detailed above, Brugh does not teach the use of a single perimeter net or a single trapping net, much less the use of two of either.

Independent Claim 11 is not obvious for generally the same reasons as Claim 1. In addition, Claim 11 further requires at least one telescoping pole, wherein either or both of the at least one perimeter net and the at least one trapping net are attached to at least one telescoping pole. Brugh discloses a plurality of adjustable height support poles attached to a netting, which may be telescoping poles. Ex. 1008 at ¶¶ [0008], [0049]. However, as detailed above, the net that the adjustable height support poles are attached to does not constitute a perimeter net or a trapping net as described by the '108 Patent. Brugh thus fails to disclose the claimed at least one telescoping pole, which is attached to either or both of the at least one perimeter net and the at least one trapping net.

Independent Claim 17 is not obvious for generally the same reasons as Claim 1. In addition, Claim 17 further requires the at least one perimeter net to be installed such that one side of the at least one perimeter net is proximal to one side of the structure. As discussed above, there is nothing in Brugh teaching placement of a net at or proximate to a perimeter wall, much less at or near the center of a perimeter wall. Again, the only figure in Brugh (Figure 1, annotated below) showing the Brugh Net in operation, demonstrates a net positioned *away from the perimeter of an enclosure* such that a bird can fly through the open space on each end of the net, and there is nothing teaching placement of a net near the center of a perimeter wall. Using hindsight to summarily argue that a POSA “would have done” so is

insufficient and fails to establish a prima facie case of obviousness of the challenged claims.

2. GROUND B: Claims 1-17 are not obvious in view of Brugh and Kunz

a. Claim 1

Petitioner argues that a POSA would have found it obvious to use and adapt Brugh's capture device in accordance with the teachings of Kunz, in order to arrive at the invention of Claim 1-17. Pet. at 28-29. This argument fails for several reasons.

First and foremost, due to the presence of walls and ceilings, trapping vertebrates in enclosed spaces is ***nothing like*** capturing bats in outdoor settings and presents a very different set of challenges. Ex. 2001 ¶ 65. A POSA would not be motivated to look to a patent direct to outdoor bat-capturing systems like Kunz to modify an indoor trapping system like that taught in Brugh. *Id.*; see also *In re Suong-Hyu Hyon*, 679 F.3d 1363, 1367 (Fed. Cir. 2012) ("It is impermissible within the framework of section 103 to pick and choose from any one reference only as much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art.").

Even if combined, Kunz and Brugh do not render the claimed inventions obvious. Petitioner primarily relies upon the teachings of Brugh to teach the claimed

“perimeter net.” Pet. at 29-30. As discussed above, Brugh contains no such teaching and in fact teaches away from the use of a perimeter net. Further, although Petitioner relies solely on the teachings of Brugh to teach the positioning of the at least one perimeter net and the at least one trapping net with respect to the ceiling (*id.* 31-32), Brugh contains no such teachings. At least two critical claim elements are thus missing entirely from the combination. *In re Miller*, 2022 WL 594417, at *4 (Fed. Cir. Feb. 28, 2022) (“**all** claim limitations must be taught or suggested by the prior art to establish obviousness of a claimed invention.”) (emphasis added).

Perhaps more importantly, Kunz focuses on trapping or catching bats in outdoor environments, sometimes through the use of multiple nets. In this respect, Kunz teaches the placement of nets in outside areas where bats are already located, such as “near roosts, at water holes, and across trails that are used as flyways.” Ex. 1010 at 8. It does not, however, discuss the strategic placement of multiple nets to minimize the area that bats ***will fly when flushed during a capture attempt.***

In fact, Kunz actually teaches away from the claimed invention because it discusses placing multiple nets ***around the perimeter*** of a bat roost such that “the perimeters of roosts are either partially or completely ***surrounded by one or more nets.***” *Id.* at 10-11, Fig. 4 (emphasis added). That is contrary to the claimed method and system, in which at least one perimeter net is placed at or along (not around) the interior perimeter of a structure, in combination with at least one trapping net that

limit the space a bird can travel when being flushed during a capture attempt. Ex. 2001 ¶ 62.

Further, in the only area that Kunz discusses interior areas where bats may reside (*e.g.*, an attic or a cave), it only discloses use of a single net. Ex. 1010 at 8-9, Figs. 3A-B. And as shown by the figures, that single net is not located at the perimeter of the interior structure, but instead in a central area or across an opening. Specifically, Figure 3A shows the net placed in the center of an attic, and Figure 3B shows the net stretched across the opening of a cave. *Id.* Further, contrary to the claimed invention, Kunz stresses that in indoor locations “the nets should be monitored constantly to avoid the capture of large numbers of bats at one time.” *Id.* at 8.

Moreover, one of ordinary skill would have no motivation to modify the capture system of Brugh, in light of Kunz, to be a multi-net capture system because any alleged advantage of Kunz’s outdoor capture system is not needed in Brugh’s indoor capture system. For instance, outdoor spaces obviously do not have any walls or a ceiling that define an enclosed space. Thus, Kunz likely employs the use multiple net configurations to create what may generally be compared to “artificial interior walls” in outdoor settings. In other words, any advantages purportedly offered by Kunz’ multiple net configurations would not apply to Brugh’s indoor

system, because Brugh inherently already has the additional barriers that Kunz' multiple nets provide via Brugh's interior walls. Ex. 2001 ¶ 65.

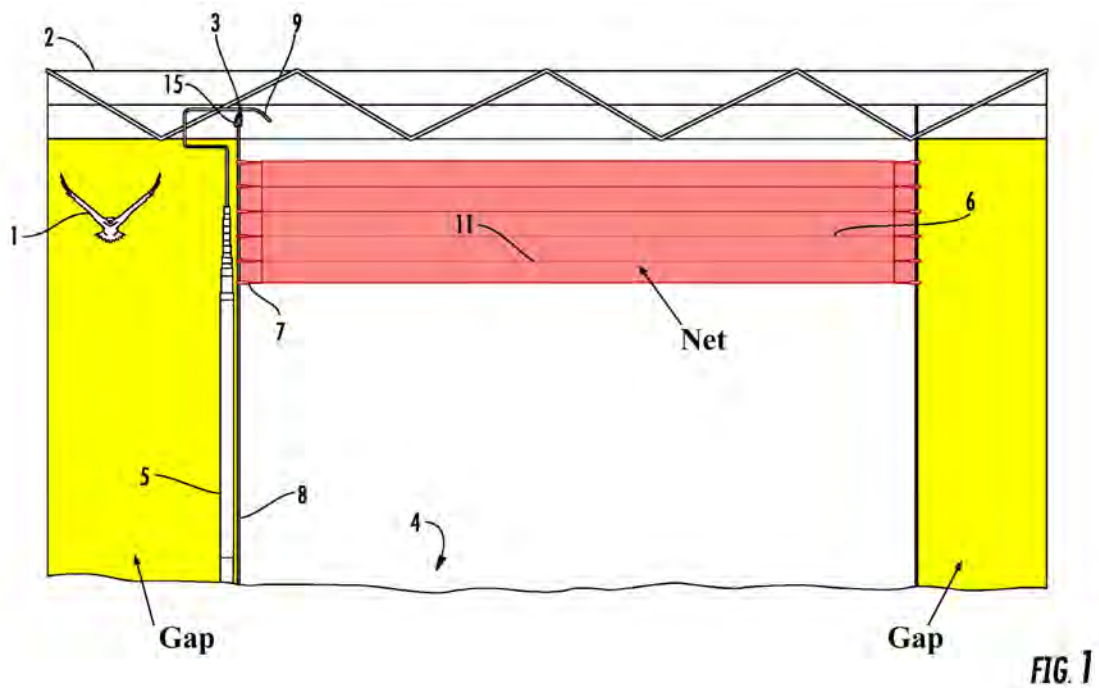
Furthermore, like Brugh, Kunz contains no discussion of the use of a flushing device as claimed to flush bats from one location so they will be captured in another. Petitioner asserts that Kunz allegedly discloses the use of a flushing device and, for support, cites to a statement of Kunz taken completely out of context. Pet. at 31. The full passage of Kunz, which is in a subchapter directed to how to capture bats using handnets, reads “[h]ibernating bats that roost high on the ceilings of caves, mines, and buildings can sometimes be dislodged with long sections of bamboo poles or extension poles to which small hoop nets are attached.” *Id.* Thus, it is clear this passage is referring to the use of a hand net connected to a long extension pole to capture bats roosted in high places, not any kind of flushing device to drive a bat into a system of nets.

For at least these reasons, a POSA would not have been motivated to combine Brugh with Kunz to arrive at the invention of Claim 1.

b. Claims 2-17

In addition to the above, Claim 2 is not obvious because it requires at least one perimeter net to be installed such that one side of at least one perimeter net is proximal to one side of the structure. As discussed above, “proximal” is defined as near the center. There is nothing in Brugh teaching placement of a net at or proximate

to a wall of a structure, much less at or proximate to the center of a wall. The only figure in Brugh (Figure 1, annotated below) showing the Brugh Net in operation, demonstrates a net positioned *away from the perimeter of an enclosure* such that a bird can fly through the open space on each end of the net, and there is nothing showing that the net is close to the center of a wall:



Ex. 1008, FIG. 1. Thus, because the net in Brugh is positioned away from the perimeter of an enclosure, Brugh clearly fails to disclose one side of at least one perimeter net being proximal to one side of the structure, much less the use of a perimeter net entirely. Kunz similarly fails to disclose this feature, as the nets in Kunz are used in outdoor settings and thus are not proximal to one side of a structure.

Claim 3 is not obvious for the additional reason that it requires the at least one perimeter net to be installed such that one side of the at least one perimeter net is substantially in contact with one side of the structure. As discussed above with respect to Claims 1 and 2, the only figure in Brugh showing the Brugh Net in operation, demonstrates a net positioned *away from the perimeter of an enclosure* such that a bird can fly through the open space on each end of the net. Thus, because the net in Brugh is positioned away from the perimeter of an enclosure, Brugh fails to disclose one side of at least one perimeter net being substantially in contact with one side of the structure, much less the use of a perimeter net entirely. Kunz similarly fails to disclose this feature, as the nets in Kunz are used in outdoor settings and thus are not substantially in contact with an interior side of a structure.

Claims 4 and 12 are not obvious for the additional reason that they require at least one perimeter net and at least one trapping net to be mist nets. As detailed above with respect to Claim 1, Brugh discloses no more than the placement of a *single mist net* within an enclosure. See Ex, 1008 at ¶ [0025], FIG. 1. It contains no teachings regarding the use of multiple mist nets within an enclosure, much less at least one net that is located at or proximate to the perimeter of the enclosure (a perimeter net) and at least one net that is located further to the interior of the enclosure than the perimeter net so as to reduce the space the animal can traverse while the capture attempt is occurring (a trapping net). Thus, because Brugh fails to disclose the use

of at least one perimeter net and at least one trapping net, Brugh fails to disclose any one of these nets being mist nets. Moreover, although Kunz does disclose the use of mist nets, none of the nets in Kunz constitute either a perimeter net or a trapping net. Furthermore, for the reasons discussed above with respect to Claim 1, one of ordinary skill would have no motivation to modify the system of Brugh with the mist nets of Kunz.

Claim 5 is not obvious for the additional reason that it requires either or both of the at least one perimeter net and at least one trapping net to be attached to at least one telescoping pole. Brugh discloses a plurality of adjustable height support poles attached to a netting, which may be telescoping poles. Ex. 1008 at ¶¶ [0008], [0049]. However, the net that the adjustable height support poles are attached to does not constitute a perimeter net or a trapping net as described in the '108 Patent. Thus, Brugh fails to disclose the claimed at least one telescoping pole, which is attached to either or both of the at least one perimeter net and the at least one trapping net. Moreover, although Kunz discloses the use of poles, Ex. 1010 at 13, it does not disclose the use of telescoping poles and thus fails to disclose this feature.

Claims 6 and 13 are not obvious for the additional reason that they require the at least one telescoping pole to include a means of attachment to a rafter or beam proximal to the ceiling of the structure. While Brugh does disclose a pole having a hook at the top for attaching the pole to rafters, beams, or the like, Ex. 1008 at ¶

[0039], the pole the hook is attached to does not constitute the claimed telescoping pole for the reasons described above with respect to Claim 5. Moreover, while Brugh teaches its “netting for capture [is positioned] based on the species of flight vertebrate and their flight characteristics,” *Id.* at ¶ [0015], [0045], it fails to disclose flight characteristics dictating placement of a net at or near a ceiling of an enclosure. Further, Kunz similarly fails to disclose this feature, as the telescoping poles in Kunz are used in outdoor settings and thus do not include a means of attachment to a rafter or beam at or near the ceiling of an enclosure.

Claim 7 is not obvious for the additional reason that it requires the means of attachment to include a hook. While Brugh does disclose the use of a pole having a hook at the top for attaching the pole to rafters, beams, or the like on the ceiling, Ex. 1008 at ¶ [0039], the pole the hook is attached to does not constitute the claimed telescoping pole for the reasons described above with respect to Claim 5, and the hook does not constitute the claimed means of attachment for the reasons described above with respect to Claims 6 and 13. Thus, because Brugh fails to disclose the claimed telescoping pole and the claimed means of attachment, Brugh fails to disclose a means of attachment including a hook. Kunz similarly fails to disclose a means of attachment including a hook at least because, as described above with respect to Claims 6 and 13, the telescoping poles in Kunz are used in outdoor settings

and thus have no use for a hook, let alone any means of attachment to a rafter or beam.

Claims 8 and 14 are not obvious for the additional reason that they require at least one telescoping pole to include a first end and second end; a removable connector; a rope and pulley; and a cleat, and the first end to include a hook. As discussed with respect to Claim 5, Brugh discloses a plurality of adjustable height support poles attached to a netting, which may be telescoping poles. Ex. 1008 at ¶¶ [0008], [0049]. However, the net that the adjustable height support poles are attached to does not constitute a perimeter net or a trapping net as described in the '108 Patent. Thus, because Brugh fails to disclose the claimed at least one telescoping pole entirely, Brugh similarly fails to disclose at least one telescoping pole made up of any components, including the claimed first end and second end; a removable connector; a rope and pulley; and a cleat, and the first end to include a hook. Moreover, although Kunz discloses the use of poles, Ex. 1010 at 13, it does not disclose the use of telescoping poles as described above with respect to Claim 5. Furthermore, Kunz similarly fails to disclose a hook at least because the telescoping poles in Kunz are used in outdoor settings and thus have no use for a hook, let alone any means of attachment to a rafter or beam.

Claims 9 and 15 are not obvious for the additional reason that they require the bird relocation system to include at least two perimeter nets. Brugh and Kunz do not teach the use of a single perimeter net, much less the use of two.

Claims 10 and 16 are not obvious for the additional reason that they require the bird relocation system to include at least two trapping nets. Brugh and Kunz do not teach the use of a single trapping net, much less the use of two.

Independent Claim 11 is not obvious for generally the same reasons as Claim 1. However, Claim 11 is further not obvious for the additional reason that it requires at least one telescoping pole, wherein either or both of the at least one perimeter net and the at least one trapping net are attached to at least one telescoping pole. Brugh discloses a plurality of adjustable height support poles attached to a netting, which may be telescoping poles. Ex. 1008 at ¶¶ [0008], [0049]. However, as detailed above, the net that the adjustable height support poles are attached to does not constitute a perimeter net or a trapping net as described in the '108 Patent. Brugh thus fails to disclose the claimed at least one telescoping pole, which is attached to either or both of the at least one perimeter net and the at least one trapping net. Moreover, although Kunz discloses the use of poles, Ex. 1010 at 13, it does not disclose the use of telescoping poles and thus fails to disclose this feature.

Independent Claim 17 is not obvious for generally the same reasons as Claim 1. In addition, Claim 17 requires at least one perimeter net to be installed such that

one side of at least one perimeter net is proximal to one side of the structure. As discussed above, there is nothing in Brugh teaching placement of a net at or near a perimeter wall, much less at or near the center of a perimeter wall. Again, the only figure in Brugh (Figure 1, annotated below) showing the Brugh Net in operation, demonstrates a net positioned *away from the perimeter of an enclosure* such that a bird can fly through the open space on each end of the net. Ex. 1008, FIG. 1. Kunz similarly fails to disclose this feature, as the nets in Kunz are used in outdoor settings and thus are not proximal to an interior side of a structure.

3. GROUND C: Claims 1-17 are not obvious in view of Bird Barrier Video and Kunz

a. Claim 1

Petitioner argues that “Bird Barrier Video’s mist net kit is both a perimeter net and a trapping net, and a POSA would have found it obvious to provide at least two of the mist net kits as part of a bird relocation system (e.g., one perimeter net and one trapping net).” Pet. at 42-43. Petitioner then contends that, given the combined teachings of Bird Barrier Video and Kunz, a POSA would have found it obvious to install one of the mist net kits along a perimeter wall and install at least one more of the mist net kits in another location within a building in response to observing flight patterns in those locations. *Id.* at 44. These arguments fail for several reasons.

Bird Barrier Video, as Brugh, merely discloses no more than the placement of a **single net** within an enclosure. Ex. 1009 at 1:59. Further, as with Brugh, Bird Barrier Video merely teaches a single net system that is placed in an area **where a bird has been seen or is expected to be**. *Id.* at 1:15 In this respect, Claim 1 is not obvious in view of Bird Barrier Video and Kunz for the same reasons that it is not obvious in view of Brugh and Kunz, as described below.

As noted above, capturing bats in outdoor settings presents a very different set of challenges than trapping vertebrate in indoor structures due to the presence of walls and ceilings. Ex. 2001 ¶ 65. For this reason alone, a POSA would not be motivated to combine the teachings of Bird Barrier Video with Kunz. *Id.*

Additionally, one of ordinary skill would have no motivation to modify the capture system of Bird Barrier Video, in light of Kunz, to be a multi-net capture system because any alleged advantage of Kunz's outdoor capture system is not needed in Bird Barrier Video's indoor capture system. For the same reasons stated in regard to Brugh and Kunz, any advantages purportedly offered by Kunz' multiple net configurations would not apply to Bird Barrier Video's indoor system, ultimately because Bird Barrier Video inherently already has the additional barriers that Kunz' multiple nets provide via Bird Barrier Video's interior walls. *See id.*

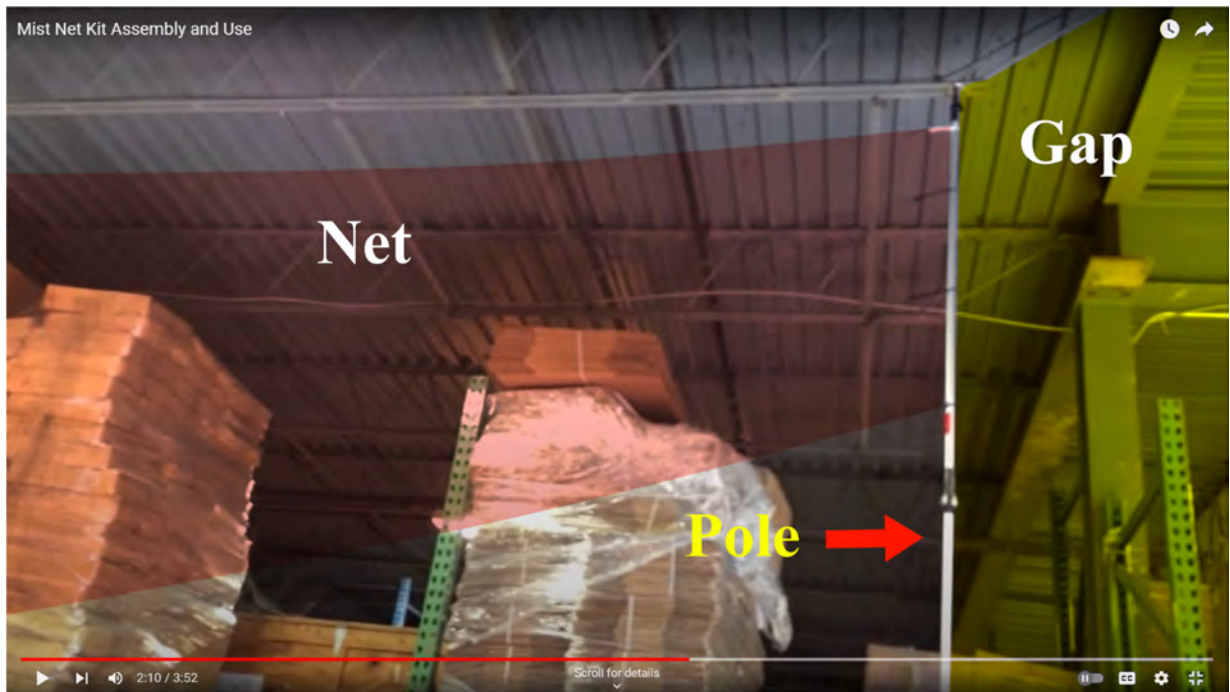
Furthermore, one of ordinary skill would have no motivation to modify the capture system of Bird Barrier Video, in light of Kunz, to include the claimed

perimeter net because Kunz teaches away from such modification, as it does with Brugh. Specifically, Kunz discusses placing multiple nets ***around the perimeter*** of a bat roost such that “the perimeters of roosts are either partially or completely ***surrounded by one or more nets***,” which is contrary to the claimed method and system in which perimeter nets are placed at or along (not around) the interior perimeter of a structure. Ex. 1010 at 10-11, Fig. 4 (emphasis added); Ex. 2001 at ¶ 62.

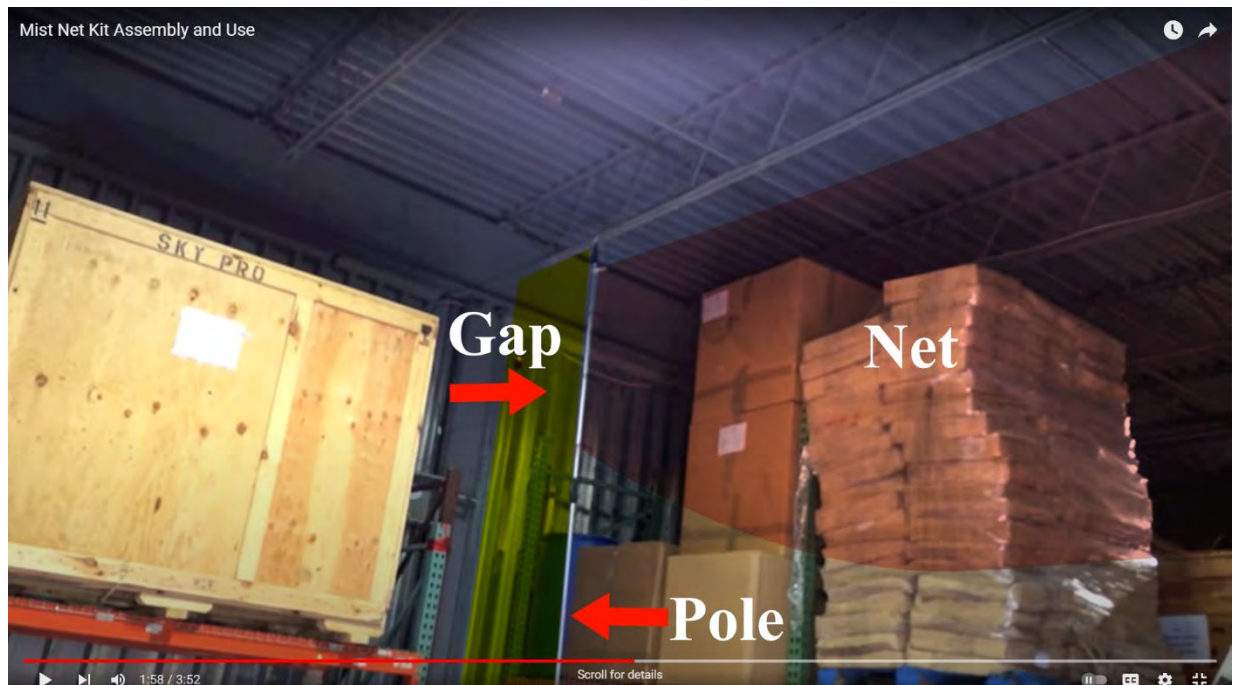
Regardless of any motivation to combine, however, the improper combination of Bird Barrier Video and Kunz still lack critical claim elements. For example, Petitioner primarily relies on Bird Barrier Video to teach the claimed perimeter net. Pet. at 42-44. However, as with Brugh, Bird Barrier Video similarly fails to teach or suggest positioning its single net ***at or proximate to a perimeter wall***. The Figures offered by Petitioner showing the Bird Barrier Net installed, Ex. 1014, Figs. 10-14, demonstrates the opposite—a net positioned ***away from the perimeter of an enclosure***. Moreover, Petitioner primarily relies on Kunz to teach the claimed flushing device, which is not taught or suggested by Kunz for the same reasons discussed above. For at least these reasons, Safe Haven respectfully submits that a POSA would not have been motivated to combine Bird Barrier Video with Kunz to arrive at the invention of Claim 1.

b. Claims 2-17

In addition to the above, Claim 2 is not obvious because it requires at least one perimeter net to be installed such that one side of at least one perimeter net is proximal to one side of the structure. Petitioner's Exhibits illustrating screen captures from Bird Barrier Video show the net in Bird Barrier Video being positioned *away from the perimeter of an enclosure, and also not near the center of a perimeter wall*:



Annotation of Petitioner's Ex. 1014, Figure 11.

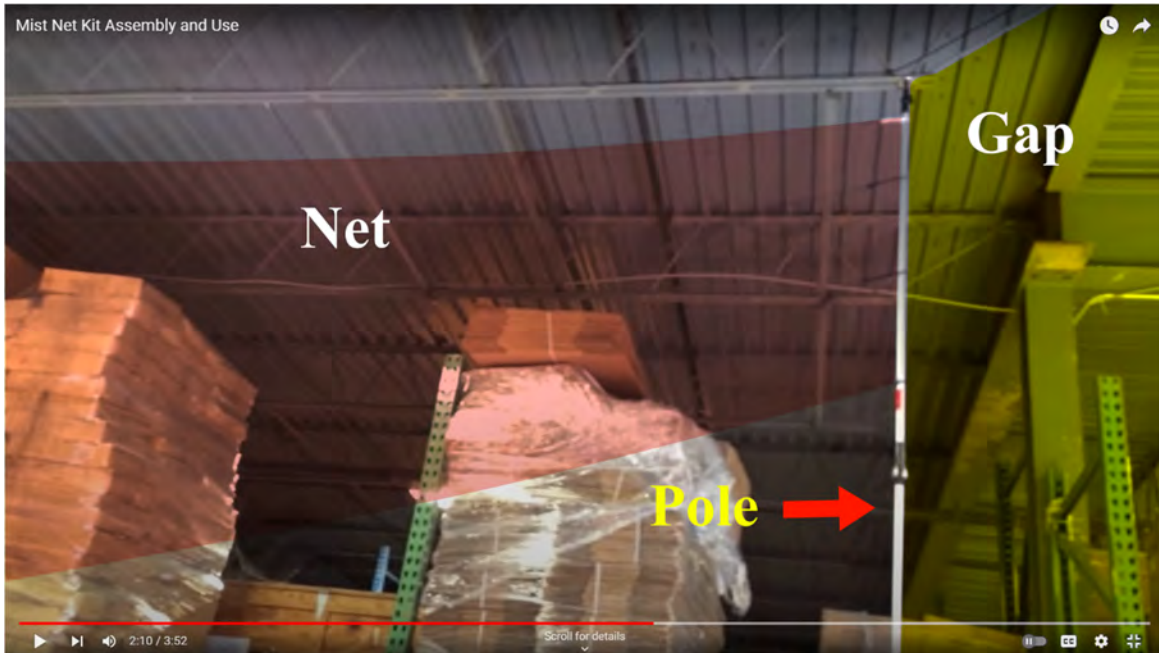


Annotation of Petitioner's Ex. 1014, Figure 12.

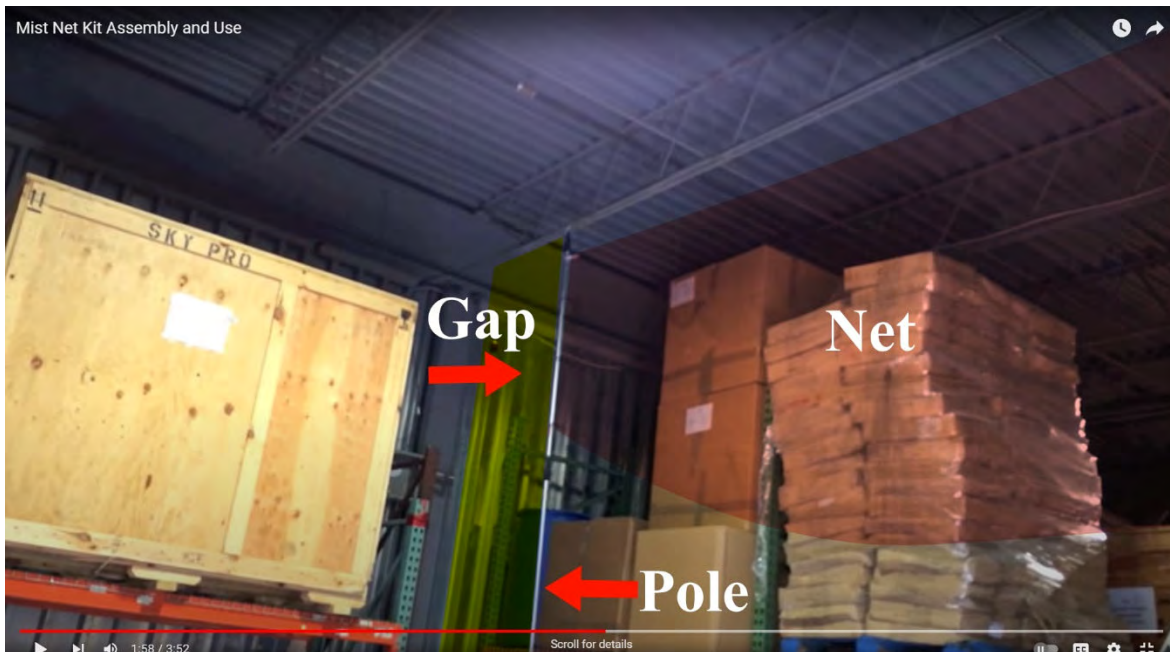
Thus, because the net in Bird Barrier Video is positioned away from the perimeter of an enclosure, Bird Barrier Video fails to disclose one side of at least one perimeter net being proximal to one side of the structure, much less the use of a perimeter net entirely. Kunz similarly fails to disclose this feature, as the nets in Kunz are used in outdoor settings and thus are not proximal to one side of a structure.

In addition to the above, Claim 3 is also not obvious for the addition reason that it requires the at least one perimeter net to be installed such that one side of the at least one perimeter net is substantially in contact with one side of the structure. As discussed above with respect to Claim 2, Petitioner's Exhibits illustrating screen

captures from Bird Barrier Video clearly show the net in Bird Barrier Video being positioned *away from the perimeter of an enclosure*:



Annotation of Petitioner's Ex. 1014, Figure 11.



Annotation of Petitioner's Ex. 1014, Figure 12.

Thus, because the net in Bird Barrier Video is positioned away from the perimeter of an enclosure, Bird Barrier Video clearly fails to disclose one side of at least one perimeter net being substantially in contact with one side of the structure, much less the use of a perimeter net entirely. Kunz similarly fails to disclose this feature, as the nets in Kunz are used in outdoor settings and thus are not substantially in contact with one side of a structure.

Claims 4 and 12 are not obvious for the additional reason that they require at least one perimeter net and at least one trapping net to be mist nets. As detailed above, Bird Barrier Video discloses no more than the placement of a **single net** within an enclosure. It contains no teachings regarding the use of multiple nets within an enclosure, much less at least one net that is located at or proximate to the perimeter of the enclosure (a perimeter net) and at least one net that is located further to the interior of the enclosure than the perimeter net so as to reduce the space the animal can traverse while the capture attempt is occurring (a trapping net). Thus, because Bird Barrier Video fails to disclose the use of at least one perimeter net and at least one trapping net, Bird Barrier Video fails to disclose any one of these nets being mist nets. Moreover, although Kunz does disclose the use of mist nets, none of the nets in Kunz constitute either a perimeter net or a trapping net. Furthermore, for the reasons discussed above, one of ordinary skill would have no motivation to modify the system of Bird Barrier Video with the mist nets of Kunz.

Claims 5 is not obvious for the additional reason that it requires either or both of the at least one perimeter net and at least one trapping net to be attached to at least one telescoping pole. Bird Barrier Video discloses the use of telescoping poles. Ex. 1014 at 1:15. However, the net that the telescoping poles are attached to does not constitute a perimeter net or a trapping net as described by the '108 Patent. Thus, Bird Barrier Video fails to disclose at least one telescoping pole that is attached to either or both of the perimeter net and trapping net. Moreover, although Kunz discloses the use of poles, Ex. 1010 at 13, it does not disclose the use of telescoping poles and thus fails to disclose this feature.

Claims 6 and 13 are not obvious for the additional reason that they require the at least one telescoping pole to include a means of attachment to a rafter or beam proximal to the ceiling of the structure. While Bird Barrier Video does disclose a pole attached to an adjustable magnetic head, Ex. 1014 at 1:03, the pole the hook is attached to does not constitute the claimed telescoping pole for the reasons described above with respect to Claim 5. Further, Kunz similarly fails to disclose this feature, as the telescoping poles in Kunz are used in outdoor settings and thus do not include a means of attachment to a rafter or beam proximal to the ceiling of a structure.

Claim 7 is not obvious for the additional reason that it requires the means of attachment to include a hook. Bird Barrier Video does not disclose the use of a hook and, instead, teaches a pole attached to an adjustable magnetic head being attached

to a rafter. Ex. 1014 at 1:03-1:59. Kunz similarly fails to disclose a means of attachment including a hook at least because, as described above with respect to Claims 6 and 13, the telescoping poles in Kunz are used in outdoor settings and thus have no use for a hook, let alone any means of attachment to a rafter or beam.

Claims 8 and 14 are not obvious for the additional reason that they require the at least one telescoping pole to include a first end and second end; a removable connector; a rope and pulley; and a cleat, and the first end to include a hook. As discussed with respect to Claim 5, the net that the telescoping poles are attached to in Bird Barrier Video does not constitute a perimeter net or a trapping net as described the '108 Patent. Further, Bird Barrier Video does not disclose the use of a hook and, instead, teaches a pole attached to an adjustable magnetic head being attached to a rafter, as discussed with respect to Claim 7. Ex. 1014 at 1:03-1:59. Moreover, although Kunz discloses the use of poles, Ex. 1010 at 13, it does not disclose the use of telescoping poles as described above with respect to Claim 5. Furthermore, Kunz similarly fails to disclose a hook at least because the telescoping poles in Kunz are used in outdoor settings and thus have no use for a hook, let alone any means of attachment to a rafter or beam.

Claims 9 and 15 are not obvious for the additional reason that they require the bird relocation system to include at least two perimeter nets. Bird Barrier Video and Kunz do not teach the use of a single perimeter net, much less the use of two.

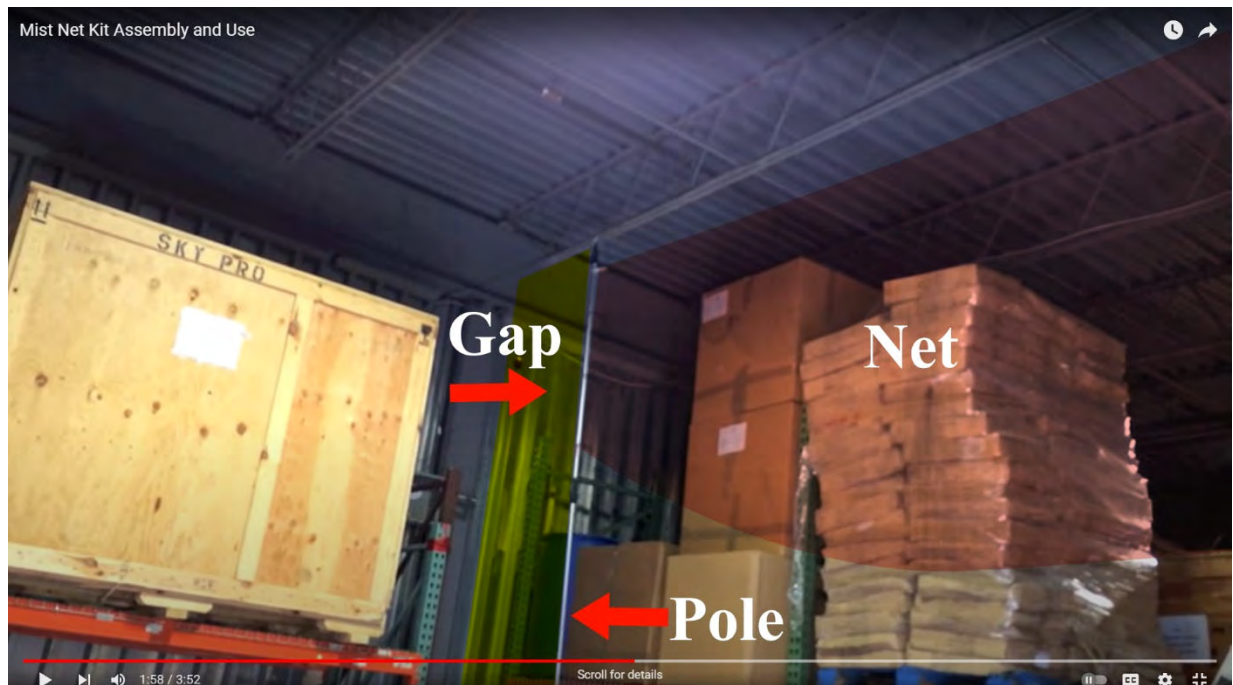
Claims 10 and 16 are not obvious for the additional reason that they require the bird relocation system to include at least two trapping nets. Bird Barrier Video and Kunz do not teach the use of a single trapping net, much less the use of two.

Independent Claim 11 is not obvious for generally the same reasons as Claims 1 and 5.

Independent Claim 17 is not obvious for generally the same reasons as Claim 1. In addition, Claim 17 requires at least one perimeter net to be installed such that one side of the perimeter net is proximal to one side of the structure. Petitioner's Exhibits illustrating screen captures from Bird Barrier Video clearly show the net in Bird Barrier Video being positioned *away from the perimeter of an enclosure*:



Annotation of Petitioner's Ex. 1014, Figure 11.



Annotation of Petitioner's Ex. 1014, Figure 12.

Thus, because the net in Bird Barrier Video is positioned away from the perimeter of an enclosure, Bird Barrier Video clearly fails to disclose one side of at least one perimeter net being proximal to one side of the structure, much less the use of a perimeter net entirely. Kunz similarly fails to disclose this feature, as the nets in Kunz are used in outdoor settings and thus are not proximal to one side of a structure.

D. Secondary Considerations of Non-Obviousness

Moreover, even if Petitioner makes a *prima facie* case of obviousness in its Petition, which it does not, there are ample secondary considerations of non-obviousness. For example, the method and system of the '108 Patent exhibits unexpected results – the strategic placement of multiple nets within an enclosure as

required by the claims **greatly** reduces the time necessary to relocate the animal, as compared to prior methods. Ex. 2001 ¶ 28. Petitioner's copying of Safe Haven's claimed invention also evidences the non-obviousness of the challenged claims. *Liqwd, Inc. v. L'Oreal USA, Inc.*, 941 F.3d 1133, 1137 (Fed. Cir. 2019) (citing *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2004) ("It is well established that copying by a competitor is a relevant consideration in the objective indicia analysis.")).

VII. CONCLUSION

As demonstrated throughout this Preliminary Response, Petitioner anchors all of its arguments on faulty claim constructions, mischaracterizes the claimed invention, and employs faulty analysis to prop up its defective Petition. Only through impermissible hindsight could a POSA take the cited prior art and arrive at the claimed inventions. Safe Haven thus respectfully submits that *inter partes* review of the '374 Patent should be denied.

Respectfully submitted,

Dated: October 19, 2022

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

Lead Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(d), the undersigned certifies that this Preliminary Response 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 Preliminary Response indicates that the Preliminary Response contains 13,737 words.

Dated:

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

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e), I hereby certify that a true and correct copy of the foregoing Preliminary Response and all exhibits cited therein were served on Petitioner via electronic mail at the following:

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Dated: October 19, 2022

/Preston H. Heard/

Preston H. Heard

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