

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

**Patent Owner's Sur-Reply to Petitioner's Reply to
Patent Owner's Preliminary Response**

PATENT OWNER'S EXHIBIT LIST

Exhibit	Description
2001	Declaration of Dr. Michael J. Chamberlain (Nov. 29, 2023)
2002	Safe Haven's Patent Owner Preliminary Response, IPR2022-01254, Paper 8 (October 19, 2022)
2003	Safe Haven's Patent Owner Preliminary Response, IPR2022-01340, Paper 6 (November 8, 2022)
2004	Safe Haven's Sur-Reply, IPR2022-01340, Paper 8 (November 22, 2022)

I. CLAIM CONSTRUCTION

Safe Haven argues that the Trial Practice Guide allows it to “respond to any such new claim construction issues raised by the patent owner.” Reply at 1. But the claim constructions articulated in Meridian’s Preliminary Response are nothing new—they are definitions provided in the ’073 patent’s specification. Safe Haven was obligated to account for these definitions in the Petition and it failed to do so.

The ’073 patent’s specification defines “determining the species of flying vertebrate” (limitation 1.1) to mean observing a flying vertebrate and determining what kind of flying vertebrate needs to be captured using an expert, a guide book, or the like. *See* POPR at 21-22; Ex-1001, 3:58-61. Safe Haven argues that limitation 1.1 should not be construed consistent with the specification’s definition because “[t]he claims themselves contain no such requirement.” Reply at 2. However, interpreting claims based on the “claim language[] standing alone is not the correct standard of law and is contrary to uniform precedent.” *Nature Simulation Systems Inc. v. Autodesk, Inc.*, 50 F. 4th 1358, 1364 (Fed. Cir. 2022).

Despite Meridian identifying the clear definition provided in the specification, Safe Haven continues to insist that the claim term “requires no construction other than plain and ordinary meaning.” Reply at 3. Presumably, Safe Haven continues to advocate this position because its Petition fails to demonstrate that the challenged claims are unpatentable under the correct claim construction. But it is well-settled

that “a claim term will not receive its ordinary meaning if the patentee acted as his own lexicographer and clearly set forth a definition of the disputed claim term in ... the specification....” *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002). The '073 patent's definition must therefore govern. *See Sinorgchem Co., Shandong v. ITC*, 511 F. 3d 1132, 1138 (Fed. Cir. 2007) (“[A] definition set forth in the specification governs the meaning of the claims.”).

Confusingly, Safe Haven asks the Board to ignore the specification's definition and instead consider what it appears to regard as extrinsic evidence. Safe Haven's claim construction arguments voyage from dictionary definitions in Exs. 1021 and 1022 (none of which have been shown to be publicly available at the time of the invention and none of which have been authenticated), to the knowledge of birds possessed by hypothetical children (unsupported by any evidence), to image recognition technology in Ex. 1023 (the evidence of which has not been shown to be publicly available at the time of the invention or authenticated). *See* Reply at 2-3. But Safe Haven's search for meaning in these sources of questionable relevance is unnecessary. As is the case here, “[w]hen the specification explains and defines a term used in the claims, without ambiguity or incompleteness, there is no need to search further for the meaning of the term.” *Sinorgchem Co., Shandong v. Int'l Trade Com'n*, 511 F. 3d 1132, 1138 (Fed. Cir. 2007) (quoting *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1478 (Fed. Cir. 1998)).

With respect to limitation 1.4 (“positioning the netting for capture based on the species of flying vertebrate and their flight characteristics”), Safe Haven asserts that it fails to see how the definition provided in the specification “varies in any material respect from the plain and ordinary meaning.” Reply at 3. However, as explained in the Preliminary Response, the Petition appeared to regard this limitation as merely requiring placing nets based on the location of observed vertebrate activity (i.e., without regard to a determined species and how that particular species flies). *See* POPR at 40-42. Under the specification’s definition, which controls, the claim term requires (i) placing the bird netting in an upper position wherein the identified flying vertebrate can fly into the netting and (ii) positioning the netting based on the identified species of flying vertebrate and how that particular species of flying vertebrate flies. POPR at 23-24; Ex-1001, 3:37-39, 3:65 to 4:3.

Safe Haven also agrees that the preamble limits the claims to capturing a flying vertebrate inside a large building. Reply at 2. For the reasons explained in Meridian’s Preliminary Response, this is fatal to Safe Haven’s motivations for combining the prior art under Ground 1. *See* POPR at 30-35.

II. HEARSAY

Safe Haven recognizes that “Dr. Chamberlain provided his declaration for Patent Owner *in a different proceeding*” and appears to concede that it cannot produce Dr. Chamberlain for cross-examination in this IPR. Reply at 4 (emphasis in

original). Thus, Dr. Chamberlain's testimony in Exhibit 1013 is hearsay unless one of the exceptions under Fed. R. Evid. 801(d) applies.

Safe Haven argues that Dr. Chamberlain's entire testimony in Exhibit 1013 is admissible under Rule 801(d)(2)(B) as a statement that Meridian "manifested that it adopted or believe to be true." Reply at 4-5. However, Rule 801(d)(2)(B) has a "restrictive scope" that requires "a finding that the party has specifically adopted *each statement at issue* made by the expert, rather than treating as admissible any statement made by the witness within the scope of his agency." *Pernix Ireland Pain Dac v. Alvogen Malta Operations Ltd.*, 316 F. Supp. 3d 816, 824 (D. Del. 2018) (citations omitted; emphasis added). Moreover, as the proponent of the statements, "[t]he burden is on [Safe Haven] to lay a foundation for the admission of the [declaration] by laying a foundation to show that *the statements that it wishes to introduce* are non-hearsay under Rule 801(d)(2)(B)." *Id.* at 825.

Ignoring the restrictive scope of Rule 801(d)(2)(B), Safe Haven fails to identify specific statements by Dr. Chamberlain as being adopted by Meridian in relation to the '073 patent. For example, at the outset of its Petition, Safe Haven argued that 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." Pet. at 1-2. But Safe Haven identifies no specific statement in which Dr.

Chamberlain acknowledges or represents this, much less one that Meridian then manifested that it adopted or believed to be true. Indeed, Dr. Chamberlain's prior testimony makes no mention of the '073 patent's claims, how the '073 patent claims relate to the entirely different patent that was addressed in his declaration (USPN 10,251,374), or how the '073 patent claims (correctly construed) relate to the prior art cited in Safe Haven's Petition. These circumstances are in stark contrast to *Motionpoint Corp. v. Transperfect Glob., Inc.*, where the Board admitted a prior declaration directed *to the same patent*. CBM2014-00060, Paper 41 at 21-23.

Safe Haven alleges that Meridian's arguments relating to the admissibility of Dr. Chamberlain's testimony are an "attempt[] to hide from the prior testimony of its own expert." Reply at 4. Meridian is doing nothing of the sort. Dr. Chamberlain offered testimony in relation to an entirely different patent in an entirely different proceeding. Safe Haven knew this when it chose to rely on Dr. Chamberlain's prior testimony to support its Petition, failed to establish how specific statements by Dr. Chamberlain have been expressly adopted by Meridian in relation to the '073 patent's claims, and failed to support its Petition with testimony from an expert that has actually evaluated the '073 patent.

Dated: December 21, 2023

Respectfully submitted,

/Christopher B. Kelly/

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned hereby certifies that a complete and entire copy of the foregoing **Patent Owner's Sur-Reply to Petitioner's Reply to Patent Owner's Preliminary Response** was served on December 21, 2023, via e-mail to the counsel of record for Petitioner at the email addresses below. The parties both consented to electronic service prior to filing of this Petition.

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