

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.

DECLARATION OF MICHAEL J. CHAMBERLAIN
IN SUPPORT OF PETITION FOR *INTER PARTES* REVIEW
OF U.S. PATENT NO. 10,251,374

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I. INTRODUCTION

1. My name is Michael J. Chamberlain, Ph.D., and I am the Terrell Distinguished Professor of Wildlife Ecology and Management in the Warnell School of Forestry and Natural Resources at the University of Georgia. I have been asked to submit this declaration on behalf of Meridian Wildlife Services, LLC (“Meridian”) in connection with its petition for *inter partes* review (“IPR”) of U.S. Patent No. 10,251,374 (“the ’374 patent” or “challenged patent”) before the Patent Trial and Appeal Board (“Board”) of the United States Patent and Trademark Office.

2. I have been retained as a technical expert by Meridian to study and provide my opinions on the technology described in the challenged patent and the patentability or unpatentability of its Claims 1-16 (“the Challenged Claims”). This declaration sets forth my opinions that I have formed based on my study of the challenged patent, my review of the exhibits provided to me by counsel at Meunier Carlin & Curfman LLP and listed herein, my understanding as an expert in the field, and my education, training, research, knowledge, and personal and professional experience. My qualification in the relevant technical areas, as well as other areas, are established by my curriculum vitae, attached as Exhibit Ex-1027.

II. QUALIFICATIONS

3. I am currently the Terrell Distinguished Professor of Wildlife Ecology and Management in the Warnell School of Forestry and Natural Resources at the University of Georgia. I also serve as a Member of the Graduate Faculty at the University of Missouri. Over my more than 20-year career, I have taught multiple classes involving animal trapping. In several of these courses, I instructed students on many aspects regarding the use of mist nets, including, for example, how to assemble mist nets, safety and practical considerations when using them, techniques for adapting mist nets to a particular environment, and ways of using them to capture birds at various heights. Both my colleagues and I regard myself as a Wildlife Management Techniques expert with a solid understanding regarding the ecological study of wild animals as well as common trapping methods.

4. My full curriculum vitae (“CV”) is provided with this declaration as Ex-1027. While my expertise should be readily apparent from my CV, I have provided below a brief summary of certain relevant portions of my background and experience for the benefit of the Board.

5. **Education & Certifications.** I received my B.S. degree in Wildlife Science with a minor in Biology in 1993 from Virginia Tech University in Blacksburg, VA. I also received my A.S. in Biological Sciences in 1991 from Danville Community College in Danville, VA. In 1995, I received a M.S. in

Wildlife Ecology from Mississippi State University in Mississippi State, MS. I went on to receive my Ph.D. in Forest Resources with a major in Wildlife Ecology in 1999 again from Mississippi State University. I also became a certified Associate Wildlife Biologist in 2000 through The Wildlife Society.

6. **Experience and Research.** Since receiving my Ph.D., I have held numerous academic roles. In 2000, I joined the Louisiana State University Agricultural Center as an Assistant Professor in the School of Renewable Natural Resources. After working as an Assistant Professor for five years, I was promoted to Associate Professor within the School of Renewable Natural Resources. I was an Associate Professor for six more years and then became an Adjunct Professor within the School of Renewable Natural Resources at Louisiana State University Agricultural Center while starting as an Associate Professor in the Warnell School of Forestry and Natural Resources at University of Georgia. After a little over a year as an Associate Professor, I was promoted to Professor within the Warnell School of Forestry and Natural Resources at University of Georgia which was my job for six years. In 2018, I became the Terrell Professor of Wildlife Ecology and Management within the Warnell School of Forestry and Natural Resources, and then, in 2020, I became the Terrell Distinguished Professor of Wildlife Ecology and Management within the same. I am also currently an Adjunct Professor for the University of Tennessee, Knoxville and a Member of the Graduate Faculty at the

University of Missouri. As a professor, I have advised more than 60 graduate students pursuing masters and/or Ph.D. degrees.

7. As part of my research efforts, I have captured various types of flying vertebrates using mist nets, including passerines and bats. I have conducted research on birds for more than 25 years.

8. **Scholarship and Publications.** As detailed in my CV, I have authored or co-authored 199 peer-reviewed publications and 92 non-peer reviewed publications. I have also given 92 local presentations, 85 local presentations, and 60 national or international presentations. My pertinent research interests and work focuses on wildlife population ecology, wildlife/habitat relationships, and the ecology and management of animals. Also as detailed in my CV, I have co-authored books pertaining to wildlife monitoring and assessment.

9. I am currently an Editorial Board Member of the journal of Human Wildlife Interactions and, as detailed in my CV, I have served various roles for other wildlife-based journals over the course of my career, including as Editor-in-Chief of the Journal of Wildlife Management.

10. **Awards and Honors.** Through my career I have received numerous awards, revolving around my teaching skills and manuscripts. My award and honors are detailed in my CV.

11. **Compensation.** I am being compensated at the rate of \$175/hour for my work in this proceeding. My compensation does not depend on the outcome of this proceeding.

III. MATERIALS CONSIDERED

12. In forming my opinions expressed in this declaration, I have reviewed and considered the documents identified in the list of exhibits below, each of which were provided to me by counsel at Meunier Carlin & Curfman LLC. To the extent I am provided additional documents and information in this proceeding, including any expert declarations, I may offer further opinions.

Exhibit	Description
1001	U.S. Patent No. 10,251,374 to Tolley
1002	U.S. Patent No. 10,729,108 to Tolley
1003	U.S. Patent No. 11,064,683 to Tolley
1005	File History of U.S. Patent No. 10,251,374, U.S. Application 15/159,733 (filed May 19, 2016)
1006	File History of U.S. Patent No. 10,729,108, U.S. Application 16/691,664 (filed Nov. 22, 2019)
1007	File History of U.S. Patent No. 11,064,683, U.S. Application 16/297,820 (filed Mar. 11, 2019)
1008	U.S. Patent Publication No. 2017/0238524 to Brugh et al.
1009	Bird Barrier, <i>Mist Net Kit Assembly and Use</i> , YouTube (Aug. 29, 2014), https://www.youtube.com/watch?v=yHtYi-vUFXs .
1010	Thomas H. Kunz et. al, <i>Ecological and Behavioral Methods for the</i>

Exhibit	Description
	<i>Study of Bats</i> pp. 1-29 (1st ed. 1988)
1011	Bird Barrier Mist Net Kit Products Webpage (from page 6 of Exhibit A to Frank-White Affidavit) <i>available at</i> https://web.archive.org/web/20150919150636/http://www.birdbarrier.com/products/mist-net-kits/
1014	Transcript and Screenshots of Bird Barrier, <i>Mist Net Kit Assembly and Use</i> , YouTube (Aug. 29, 2014), https://www.youtube.com/watch?v=yHtYi-vUFXs .
1015	Bird Barrier 2013 Product Catalog (from pp. 135-194 of Exhibit B to Frank-White Affidavit) <i>available at</i> https://web.archive.org/web/20130509202821/http://www.birdbarrier.com/library/bird-barrier-catalog.pdf .
1017	Balazs I. Elody et al., <i>A Mist Net Technique Useful for Capturing Barred Owls</i> , 9 N. Am. Bird Bander 13-14 (1984)
1018	Tuttle, M.D. 1976a. <i>Collecting Techniques</i> . Pp. 71-78, in <i>Biology of the bats of the New World family Phyllostomatidae. Part I</i> (R.J. Baker, D.C. Carter, and J.K. Jones, Jr., eds.) Spec. Publ. Mus., Texas Tech Univ., Lubbock, Texas, 218 pp.
1021	Sanford D. Schemnitz et al., <i>Capturing and Handling Wild Animals</i> , in <i>The Wildlife Techniques Manual</i> 232-69 (Nova J. Silvy ed., 2009).
1022	Paul A. Racey, <i>Book Review</i> , <i>Zoological Journal of the Linnean Society</i> , 2011, 162, 243.
1023	Bird-B-Gone 2014 Product Catalog, (from pp. 21-80 of Exhibit B to Frank-White Affidavit) <i>available at</i> https://web.archive.org/web/20140726064216/http://www.birdbgone.com/media/PDFs/BirdBGone_Catalog_2014_SM.pdf
1024	Bird-B-Gone 2016 Product Catalog, (from pp. 82-133 of Exhibit B to Frank-White Affidavit) <i>available at</i>

Exhibit	Description
	https://web.archive.org/web/20160415224522/https://www.birdbgone.com/media/PDFs/2016-product-catalog.pdf
1026	J. Michael Meyers, <i>In My Experience: Improved Capture Techniques for Psittacines</i> , 22 Wildl. Soc. Bull. 511-516 (1994)
1027	CV of Dr. Michael J. Chamberlain, Ph. D.
1029	C.E. Shackelford et al. <i>Project Prairie Birds: A citizen science project for wintering grassland birds</i> , Texas Parks and Wildlife Department Publication, PWD BK W7000-485, 2001, Austin, TX. 24 pp. Available online at http://www.tpwd.state.tx.us/publications/pwdpubs/medialpwd_bk_w7000_0485.pdf .
1030	Jerome A. Jackson, <i>A Simple, Effective Net for Capturing Cavity Roosting Birds</i> , 16 N. Am. Bird Bander, 30-31 (1991)
1031	William G. Sheldon, <i>A Method of Mist Netting Woodcocks in Summer</i> , 31 Bird Banding 130-135 (1960)
1032	Bird-B-Gone Mist Net Capture Kits, <i>available at</i> https://web.archive.org/web/20160518205547/https://www.birdbgone.com/media/Literature/BBG_Mist_Net_Capture_Kit_2014_v1.pdf
1033	Bruce A. Colvin et al., <i>Techniques for Capturing Common Barn-Owls</i> , 57 J. Field Ornithol. 200-207 (1986)
1034	Seth H. Low, <i>Banding with Mist Nets</i> , 28 Bird Banding, 115-128 (1957)
1036	Brian E. Keyes et al., <i>Capturing Birds with Mist Nets: A Review</i> , 7 N. Am. Bird Bander 2-14 (1982)
1037	Peter H. Bloom et al. <i>Capture techniques: 12</i> , p. 193–219 from Raptor Research and management techniques, (2d. ed., 2007).
1038	Stephen G. Martin, <i>A Technique for Capturing Nesting Grassland Birds with Mist Nets</i> , 40 Bird Banding 233-237 (1969)

Exhibit	Description
1039	C. John Ralph et al., <i>Recommendations for the Use of Mist Nets for Inventory and Monitoring of Bird Populations</i> , 29 Studies in Avian Biology 187-196 (2004)
1040	Bird Hazing Manual (W. Paul Gorenzel & Terrell P. Salmon eds., 1 st ed., 2008)
1041	Gene Albanese et al. <i>An Inexpensive Elevated Mist Net Apparatus</i> , 24 N. Am. Bird Bander 129-134 (1999)
1042	H. Elliott McClure, <i>Methods of Bird Netting in Japan Applicable to Wildlife Management Problems</i> , 27 Bird Banding 67-73 (1956)

IV. RELEVANT LEGAL STANDARDS

13. I have been informed by counsel for Meridian that the following legal principles apply to an assessment of patentability. I have applied these legal principles throughout my analysis in this declaration.

A. Priority Date

14. I have been instructed to assume that the Challenged Claims are entitled to claim priority as of the day of filing, May 19, 2016. Accordingly, I have been asked to opine on the patentability of the Challenged Claims in view of the prior art (including patents and printed publications) publicly available as of May of 2016 and in view of the knowledge possessed by a person of ordinary skill in the art around May 2016.

B. Claim Construction

15. I have been instructed that, to assess the patentability or unpatentability of a claim, one must first ascertain the scope of the claimed invention, which requires understanding the terms in the claim. In particular, I have been informed that the claims of the '374 Patent should be given their ordinary and customary meaning as they would be understood by one of ordinary skill in the art in view of the '374 Patent's specification and prosecution history.

C. Obviousness

16. I have been informed that a claim may be rendered obvious, and therefore unpatentable, even though the claimed invention is not identically disclosed in a single prior art reference, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.

17. When considering obviousness, I was asked to (i) determine the scope and content of the prior art; (ii) ascertain the differences between the prior art and the claims at issue; (iii) resolve the level of ordinary skill in the pertinent art; and (iv) consider evidence of objective indicia (or "secondary considerations") of non-obviousness (if available). I note that I am not presently aware of any evidence of

secondary considerations for the '374 Patent that affects my opinions presented in this declaration.

18. I have been instructed that a reference may be modified or combined with other references or with the person of ordinary skill's own knowledge if the person would have found the modification or combination obvious. I have also been instructed that the obviousness analysis may take into account the inferences and creative steps that a person of ordinary skill in the art would employ.

19. In determining whether a prior art reference could have been combined with another prior-art reference or other information known to a person having ordinary skill in the art, I have been instructed that the following principles may be considered: (i) a combination of familiar elements according to known methods is likely to be obvious if it yields predictable results; (ii) the substitution of one known element for another is likely to be obvious if it yields predictable results; (iii) the use of a known technique to improve similar items or methods in the same way is likely to be obvious if it yields predictable results; (iv) the application of a known technique to a prior art reference that is ready for improvement is likely obvious if it yields predictable results; (v) any need or problem known in the field and addressed by the reference can provide a reason for combining the elements in the manner claimed; (vi) a person of ordinary skill may be able to fit the teachings of multiple references together like a puzzle; and

(vii) the proper analysis of obviousness requires a determination of whether a person of ordinary skill in the art would have a “reasonable expectation of success”—not “absolute predictability” of success—in achieving the claimed invention by combining prior art references.

20. I have also been instructed that, while there is no requirement that the prior art contain an express suggestion to combine known elements to achieve the claimed invention, a suggestion to combine known elements to achieve the claimed invention may come from the prior art as a whole or individually, as understood with the knowledge of one skilled in the art. In addition, I have been instructed that the inferences and creative steps a person of ordinary skill in the art would employ are also relevant to the determination of obviousness.

21. I have been instructed that, when a work is available in one field, design alternatives and other market forces can prompt variations of it, either in the same field or in another. I have also been instructed that if a person of ordinary skill in the art can implement a predictable variation and would see the benefit of doing so, that variation is likely to be obvious. I have been instructed that in many fields, there may be little discussion of obvious combinations, and in these fields market demand may drive design trends. I have been instructed that, when there is a design need or market pressure and there are a finite number of identified,

predictable solutions, a person of ordinary skill in the art has good reason to pursue those known options.

22. I have been instructed that there is no rigid rule that a reference or combination of references must contain a “teaching, suggestion, or motivation” to combine references. But I also have been instructed that the “teaching, suggestion, or motivation” test can be a useful guide in establishing a rationale for combining elements of the prior art. I have been instructed that it is impermissible to rely on the ’374 Patent’s teachings to combine prior art references, as such analysis would involve impermissible hindsight.

23. Furthermore, I have been informed that where there is a reason to modify or combine the prior art to achieve the claimed invention, the claims may be obvious provided there is also a reasonable expectation of success. The teachings of the prior art can provide a sufficient basis for a reasonable expectation of success.

V. LEVEL OF ORDINARY SKILL IN THE ART

24. I have been asked to consider the background and level of skill possessed by a person of ordinary skill in the subject matter of the ’374 Patent at the time of its invention.

25. Based on my experience, it is my opinion that a person of ordinary skill in the art in May of 2016 (herein “POSA”) would have at least a bachelor’s

degree in the study of wildlife management or wildlife ecology, including two or more years of field experience trapping flying animals. The POSA would be familiar with commercially-sold trapping devices and systems and would be aware of research publications pertaining to the capture and study of wild animals.

26. A POSA would also be familiar with various aspects of pest management, including common practices in animal capture and removal. The POSA would further have a familial understanding of animal mannerisms as well as an awareness of behavioral distinctions between species.

27. From my understanding, a POSA would both recognize and appreciate that the capture techniques used in field research and commercial-trapping settings apply the same general principles. In light of these similarities, the POSA would have knowledge of scientific journal publications relating to animal capture, such as those published in the fields of ornithology and chiropterology.

VI. TECHNICAL BACKGROUND OF TRAPPING WILD ANIMALS

28. Below, as a brief introduction, I have provided a technical background generally discussing the capture of animals including several common mist netting techniques that were well-understood by a POSA at the time the '374 Patent was filed.

29. The art of capturing wild creatures is nearly as old as human existence. Ex-1021, 64. Throughout the years, numerous trapping techniques have been developed and used to assist with the successful capture of animals. Among these practices, mist netting has become one of the most popular mechanisms used for catching flying animals over the last century. Ex-1021, 66 (“The number of papers describing the use of mist nets to capture birds or bats are too numerous to include in this chapter.”). This netting technique generally involves the placement of one or more pocketed nets, often held up by a series of poles, at locations along the roost or travel routes of a target species. Once the nets are deployed, the animals may be actively driven to the net by the practitioners to provoke capture. Because of their effectiveness and ease of use, mist nets are one of the most frequently discussed trapping techniques in literature. Ex-1010, 6. In my experience, mist netting principles are similarly applicable to both indoor and outdoor environments.

30. As was well known at the time, the particular trapping system and arrangement varies depending on the circumstances of the capture. The location of the animal within the capture area as well as the ecological characteristics of the interested species encourages many practitioners to equip their netting systems with different features to better adapt their nets for effective deployment. For example, it has been well-understood in the field of wildlife study that many

species of birds and bats tend to roost at the forest canopy or at or near the ceiling of a building. *See, e.g.*, Ex-1010, 5; Ex-1018, 81; Ex-1026, 515, Ex-1033, 200; Ex-1036, 7.

31. To reach these elevated positions where the flying animals roost, extendable telescoping poles are often used so that mist nets can be raised towards the expected flight path of the animal. Ex-1021, 66; Ex-1033, 200; Ex-1036, 7. In many of these instances, a pulley system is routinely incorporated to facilitate with raising and lowering mist nets. *See* Ex-1041, Fig. 1; Ex-1031, Fig. 1. Furthermore, several commercially available netting systems utilize magnets or hooks to attach the net and poles to a surface. Ex-1023, 42; Ex-1024, 41; Ex-1032; Ex-1015, 24. All of these devices have been extensively described and are easily incorporated for adaptation to a specific trapping environment.

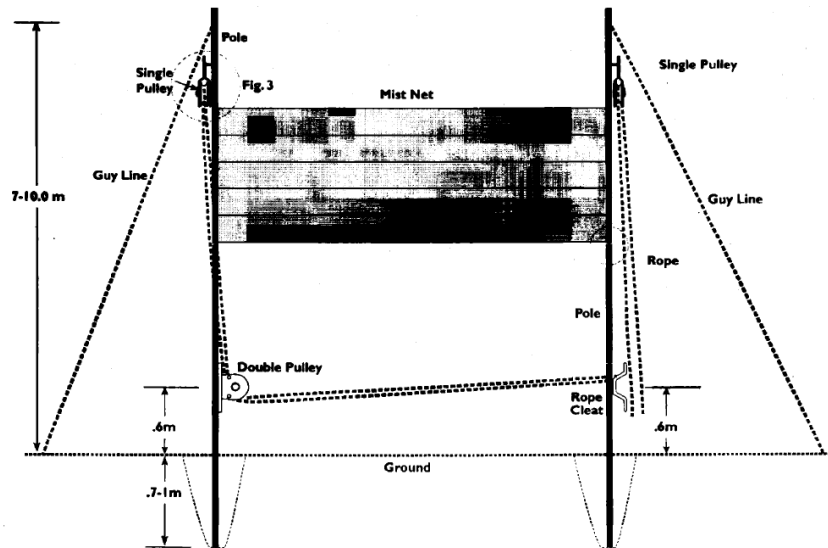
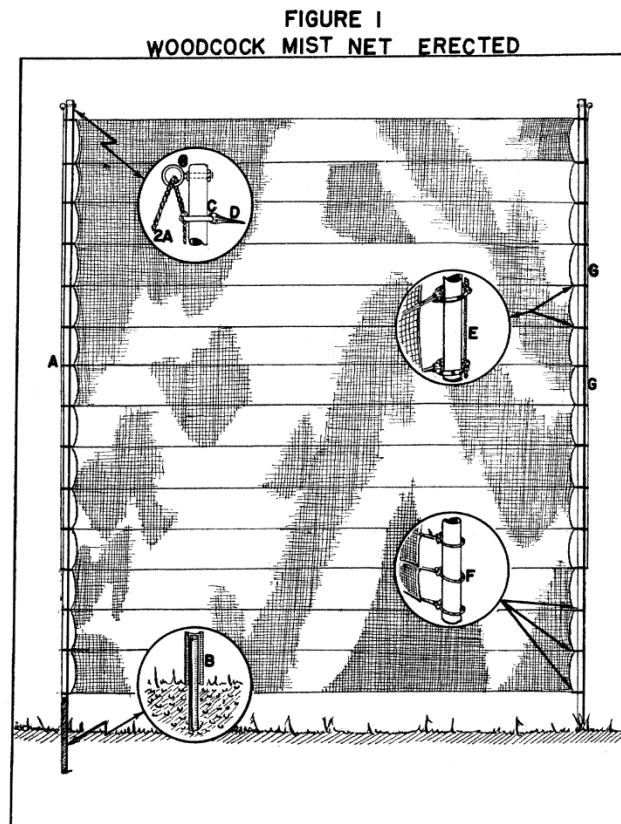


Figure 1. Diagram of elevated mist net apparatus. Diagram is not to scale

Albanese et al (1999) - Ex-1041, Figure 1



Sheldon (1960) - Ex-1031, Figure 1

32. Beyond the netting tools themselves, one additional consideration for the successful capture of a flying animal is where to place the nets. The principle is relatively simple: place the net where the animal is observed or expected to fly. Ex-1018, 85; Ex-1031, 134; Ex-1033, 200. Furthermore, a common axiom in trapping birds or bats is that including additional nets generally results in greater likelihood of successful capture. *See* Ex-1039, 191 (“As net density is increased, capture probability of individual adults will increase...”); *see also* Ex-1017, 14; Ex-1026, 513; Ex-1042, 69-70. In short-term netting systems, the number of nets utilized by practitioners is typically only limited by the time to set up the nets and the number of available personnel. Ex-1034, 123; Ex-1039, 190.

33. Mist netting systems are also frequently arranged at angles to one another to create a capture grid such that the flight pattern of the animal intersects with one of the deployed nets. Ex-1010, 10 (“It is often profitable to use mist nets in V-configurations (Fig. 4C) or a combination of high and low nets in a T-configuration (Fig. 4D). As bats attempt to avoid one net they frequently become captured in another.”); *see also* Ex-1031, 134; Ex-1038, 234-235; Ex-1039, 190; Ex-1042, Fig. 3. Moreover, it is well-established to place nets around the perimeter of an area of interest in order to block available exits to the animal or to otherwise funnel the animals towards additional netting. Ex-1018, 85 (“where larger areas must be covered, nets are more easily used and should be set around the edges

parallel to the vegetation.”); Ex-1010, 10; Ex-1017, 13; Ex-1026, 513; Ex-1031, 134; Ex-1033, 200-201; Ex-1037, 205; Ex-1042, 69-70. This setup is particularly advantageous as many species of bats and other flying animals tend to roost along the perimeter walls of a structure which are more protected from frequent disturbances. Ex-1018, 81. Commonly, practitioners will additionally drive flying animals towards the netting array where they may then be captured.

34. Flushing an animal refers to the technique of disrupting or luring the animal to prompt the animal to leave its roost and fly where it may be captured by a net. By actively provoking an animal using a flushing technique, the rate of capture is normally increased as they are more prone to flying into one of the nets while attempting to flee. To accomplish this result, researchers and pest control practitioners alike have incorporated a variety of practices and devices. *See generally*, Ex-1040, 55-59. For example, common flushing methods include using fiberglass poles with strings of tape (Ex-1011, 1); plastic bags attached to a lath (Ex-1040, 34); live decoys (Ex-1042, 69-70); laser pointers (Ex-1032; Ex-1023, 42; Ex-1024), hand nets (Ex-1010, 5; Ex-1033, 200; 1030, 1-2; Ex-1018, 82); and large poles (Ex-1029, Fig. 3).

35. Generally, the exact type or construction of these flushing devices is not critical to its success, and selection normally depends on what is readily available to the researcher or best suited for a particular species. Ex-1040, 55.



Shackelford et al. - Ex-1029, Figure 3

VII. THE '374 PATENT

A. Challenged Claims 1-16

36. For reference, I have copied below the Challenged Claims of the '374 Patent. Among these claims, I note that Claims 1, 6, and 13 are the only independent claims, with Claims 2-5, 7-12, and 14-16 being dependent claims.

Claim Element	Challenged Claims
[1pre]	1. A method for relocating animals within an enclosed building comprising:
[1a]	installing an animal relocation system, the animal relocation system comprising:
[1b]	a perimeter net system comprising two perimeter nets, wherein each perimeter net comprises:
[1c]	a perimeter net, the perimeter net comprising a first perimeter net side and a second perimeter net side, wherein the first perimeter net side and the second perimeter net side each have a plurality of perimeter net connectors;
[1d]	a first telescoping pole and a second telescoping poles, each telescoping pole comprising: a first end and a second end, the first end having a hook; a removable connector; a rope and pulley; and a cleat

[1e]	wherein the first telescoping pole rope and pully secures the first perimeter net side to the first telescoping pole through the first telescoping pole removable connector and the second telescoping pole rope and pully secures the second perimeter net side to the second telescoping pole through the second telescoping pole removable connector; and wherein the first telescoping pole hook is secured to a rafter of the enclosed building and the second telescoping pole hook is secured to a rafter of the enclosed building; and wherein the first perimeter net and second perimeter net are installed parallel to one another;
[1f]	a trapping net system comprising a first trapping net, a second trapping net, and a third trapping net, wherein each trapping net comprises:
[1g]	a trapping net, the trapping net comprising a first trapping net side and a second trapping net side, wherein the first trapping net side and the second trapping net side each have a plurality of trapping net connectors;
[1h]	a first telescoping pole and a second telescoping poles, each telescoping pole comprising: a first end and a second end, the first end having a hook; a removable connector; a rope and pully; and a cleat
[1i]	wherein the first telescoping pole rope and pully secures the first trapping net side to the first telescoping pole through the first telescoping pole removable connector and the second telescoping pole rope and pully secures the second trapping net side to the second telescoping pole through the second telescoping pole removable connector; and wherein the first telescoping pole hook is secured to a rafter of the enclosed building and the second telescoping pole hook is secured to a rafter of the enclosed building; and wherein the first trapping net and second trapping net are installed parallel to the first perimeter net and second perimeter net and the third trapping net is installed at a ninety-degree-angle relative to the first perimeter net and second perimeter net; and
[1j]	a flushing device comprising a telescoping arm and a flusher;
[1k]	flushing the animal through the enclosed building wherein the flushing device chases the animal towards the perimeter net system and into the trapping net.

[2]	2. The animal relocation method of claim 1 wherein the perimeter net system further comprises placing the perimeter net system within the enclosed building such that the square footage available for the animal to travel within the enclosed building is halved.
[3]	3. The animal relocation method of claim 1 wherein the flushing device is used to guide the animal towards the animal relocation system by angling the flushing device to around a 40 degree angle and guiding the bird towards the animal relocation system.
[4]	4. The animal relocation method of claim 1 wherein the perimeter net system and trapping net system are placed at a height above the floor of the enclosed building based on the species of animal being relocated.
[5]	5. The animal relocation method of claim 1 wherein the perimeter net system and trapping net system use mist nets.
[6pre]	6. An animal relocation system for relocating an animal in a structure, the system comprising
[6a]	a perimeter net;
[6b]	a trapping net wherein the trapping net comprises a first trapping net, a second trapping net, and a third trapping net; and
[6c]	a flushing device, wherein the flushing device is used to direct the animal into the trapping net.
[7]	7. The animal relocation system of claim 6, further comprising: the perimeter net comprising: a net and a telescoping pole, the net attached to the telescoping pole and the telescoping pole attached to the structure.

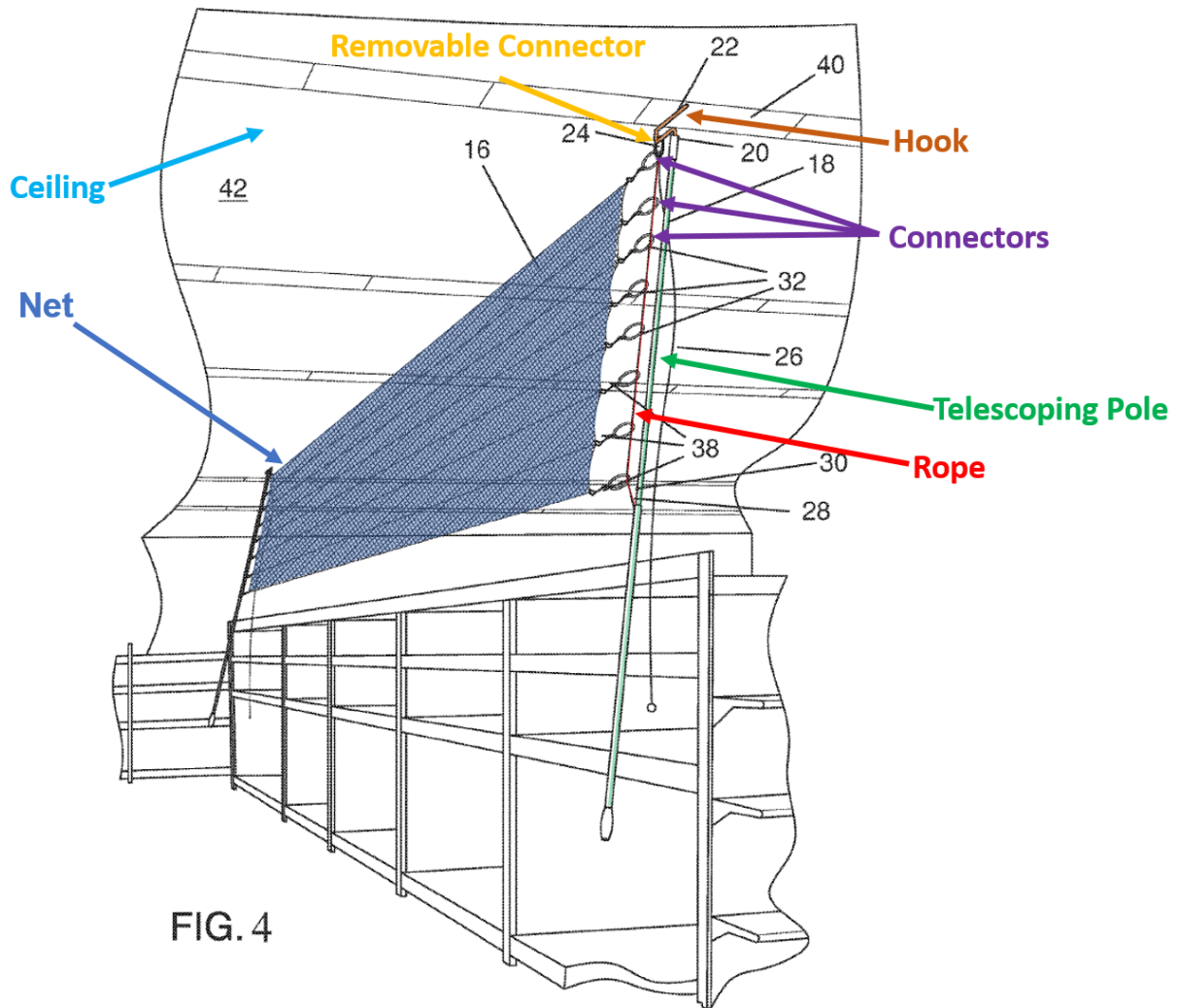
[8]	8. The animal relocation system of claim 6, wherein the structure is less than or equal to 75,000 square feet, the animal relocation system comprising: the perimeter net comprising a first net and a second net.
[9]	9. The animal relocation system of claim 8, wherein the first net and second net are installed parallel to one another.
[10]	10. The animal relocation system of claim 9, wherein the trapping net is installed at a ninety-degree angle to the perimeter net.
[11]	11. The animal relocation system of claim 6, wherein the first trapping net is installed perpendicular to the perimeter net.
[12]	12. The animal relocation system of claim 6, wherein the second trapping net is installed parallel to the perimeter net.
[13pre]	13. A method for relocating animals within a structure comprising:
[13a]	installing an animal relocation system, the animal relocation system comprising:
[13b]	a perimeter net system comprising two nets;
[13c]	a trapping net;
[13d]	and a flushing device;
[13e]	flushing the animal through the structure wherein the flushing device chases the animal towards the perimeter net system and into the trapping net.
[14]	14. The method of claim 13 further comprising: installing the perimeter net system, such that the square footage available for the animal to travel within the structure is halved.
[15]	15. The method of claim 13 further comprising: the flushing device further comprising an arm and a flusher.

[16]	16. The method of claim 15 wherein the flushing device arm comprises a telescoping arm.
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B. Overview Of The '374 Patent's Disclosure

37. To assist the Board in evaluating the Challenged Claims, I have summarized the '374 Patent's disclosure below. I have included annotations to the '374 Patent's figures (as well as to the figures and illustrations of the various prior art references discussed herein).

38. From my review of the materials, the '374 Patent discusses systems and methods for using nets to capture animals within an enclosed building. Ex-1001, Abstract, 1:24-66, 2:51-55. The Specification of the '374 Patent correctly notes that birds often roost in “[t]he rafters of big box stores, warehouses, and other structures containing exposed support beams” as these areas are “high up and away from predators.” *Id.*, 1:24-28. To facilitate the capture of birds as well as other flying animals in this environment, the '374 Patent describes a net configured to be hung from the ceiling of a building. *Id.*, 4:55-58. Below is an annotated illustration of Figure 4 from the '374 Patent depicting this netting configuration.



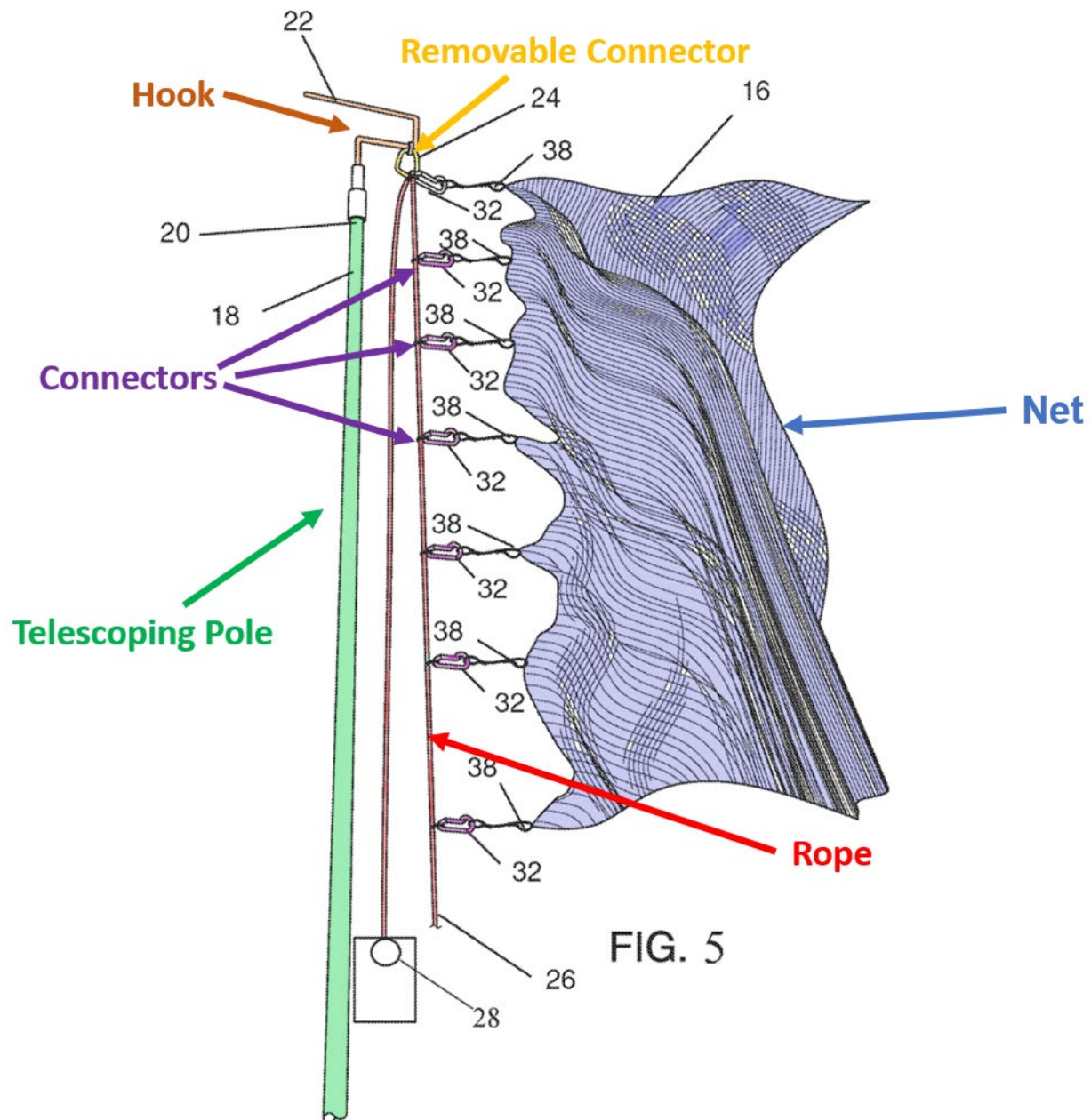
'374 Patent – Figure 4 (annotated)

39. As shown in the annotated version of Figure 4, the mist net (16) is attached between a pair of telescoping poles (18) Ex-1001, 3:63-65. Each side of the net (16) attached to one of the poles (18) by several connectors (32) (e.g., carabiners). Ex-1001, 3:63-4:2. The distal end (20) of each pole (18) includes a hook (22), which allows the poles (18) to be hung from a ceiling (42). The Specification states that the hooks (22) are attached to a “hanging member” (40),

such as a “rafter, beam, truss, or other similar support” in the ceiling. *Id.*, 4:11-17.

By securing the poles (18) to the ceiling (42), the net (16) can be suspended at a height above the building’s floor. *Id.*, 4:55-60.

40. Figure 5, which is similarly annotated below, depicts another view showing how the sides of the net (16) are attached to each pole (18). *Id.*, 4:48-50. The sides of the mist net (16) include fasteners (38), which are secured to a rope (26) by connectors (32). *Id.*, 4:53-55; 4:1-2. The rope (26) is suspended below the hook (22) by a removable connector (24) and routed through a pulley (28)—the connector (24), rope (26), and pulley (28) which form a “rope and pulley system 30.” *Id.*, 4:53-55. The rope and pulley system (30), which can be secured by a cleat or other means, allows each respective side of the net (16) to be lifted into a position proximate the ceiling (42) *Id.*, 4:3-17 and 55-60. Under this configuration, the net (16) strung between telescoping poles (18) can hang from rafters (40). *Id.*



'374 Patent – Figure 5 (annotated)

41. The '374 Patent discloses that multiple nets can be hung at various locations within a building to facilitate the capture of a bird. Ex-1001, 4:18-34. In one example shown in the Specification, five nets are positioned throughout a building (36) (also referred to as an “enclosure”). *Id.*, 4:25-28. Two nets are hung

“along the outer perimeter of the enclosure 36” (referred to as “perimeter nets 12”) and three nets are positioned “on the interior of the enclosure 36” (referred to as “trapping nets 14”). *Id.*, 4:19-23. This arrangement of two perimeter nets (12) and three trapping nets (14), identified as the “2:3:5” process, is shown below in the illustration of Figure 2. *Id.*, 4:19-20 and 25-28. The perimeter nets (12) are shown in red, while the trapping nets are depicted in blue.

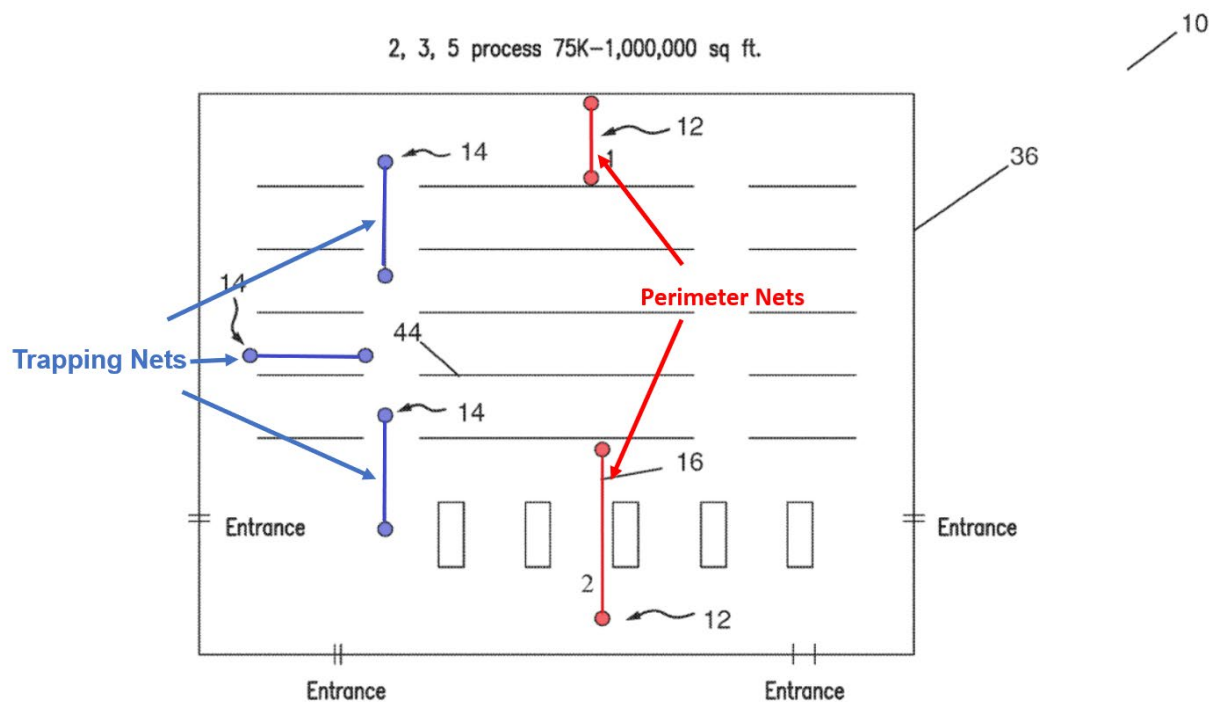


FIG. 2

'374 Patent – Figure 2 (annotated)

42. Based on my reading of the '374 Patent and technical understanding, the perimeter nets (12) and trapping nets (14) are structurally identical. Each of the perimeter and trapping nets (12, 14) includes a net (16) attached to a pair of

telescoping poles (18) as shown and described with respect to Figures 4 and 5. Ex-1001, 3:61-65, 4:48-50. This makes it clear that there is no structural difference between the perimeter nets (12) and trapping nets (14). *Id.*

43. According to the '374 Patent, the positioning of the perimeter nets (12) “reduces the escape routes” for the birds, while the positioning of the trapping nets (14) “reduce[s] the space the [bird] can traverse while the capture is occurring.” The Specification also notes that other net layouts can be provided based on the layout and square footage of the enclosure (36). *Id.*, 4:3-8 and 35-47. For example, the Specification proposes the use of two perimeter nets (12) and one trapping net (14) in smaller enclosures (shown in Figure 3). Ex-1001, 4:35-47, Fig. 3.

44. To capture a bird using the perimeter and trapping nets (12, 14), the '374 Patent also suggests “using flushing device 46 to drive the [bird] toward a net.” *Id.*, 4:13-15. As shown in annotated Figure 7 of the '374 Patent below, the flushing device (46) includes a telescoping arm (48) having a “flusher” (56) positioned at a distal end of the arm (48). *Id.*, 4:61-64. The Specification discloses that “[t]he flusher 56 can be any object that, when shaken or moved, creates noise, movement, or both,” such as “plastic bag.” *Id.*, 4:64-66 and 5:1-2.

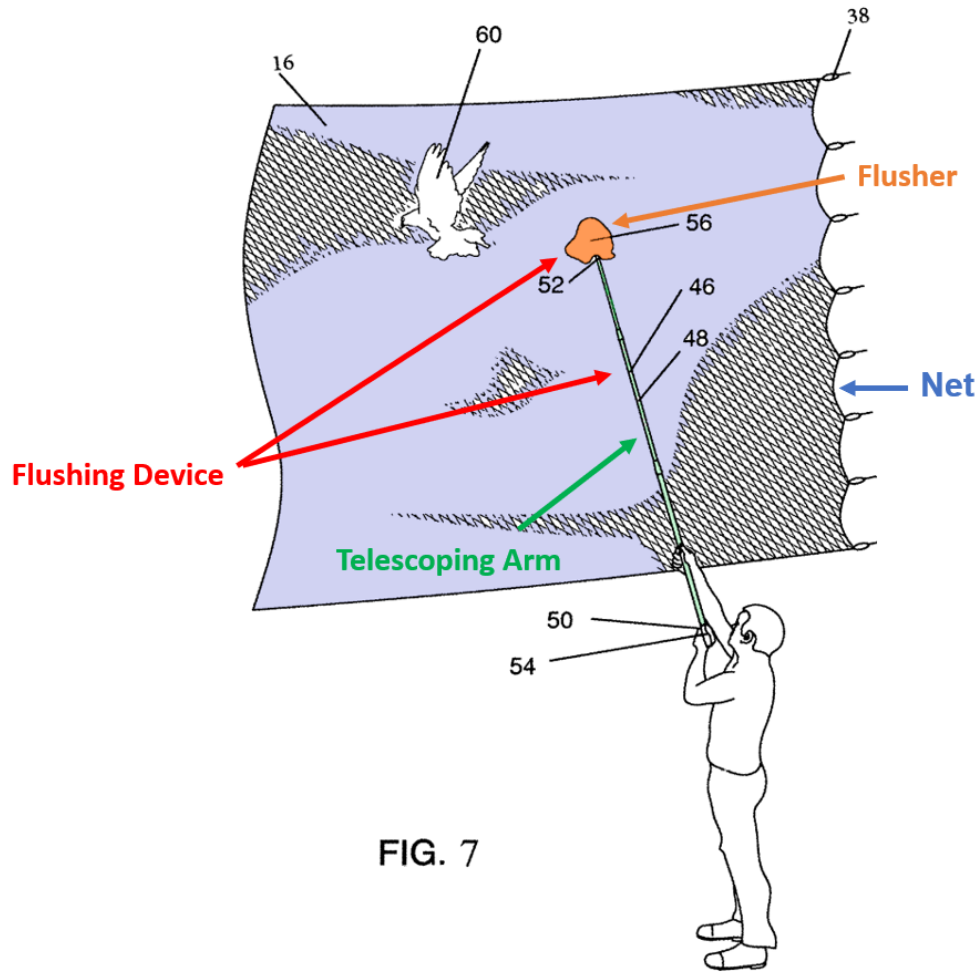


FIG. 7

'374 Patent – Figure 7 (annotated)

45. A handler using the flushing device (46) can thereby create “noise and/or movement [that] can drive the [bird] from a hiding spot into one of the nets 16.” Ex-1001, 4:66-67. Once the bird is entrapped in one of the nets, the handler can remove and relocate the bird away from the enclosure (36). *Id.*, 5:12-13.

C. Summary Of The '374 Patent's Prosecution History

46. As part of my review and assessment of the '374 Patent, I have been asked to review and consider the '374 Patent's prosecution history. To assist the

Board, I have briefly summarized the aspects of the '374 Patent's prosecution history that I believe to be of relevance.

47. The '374 Patent was originally filed as U.S. Patent Application No. 15/159,733 on May 19, 2016. Ex-1001, (21), (22). The Examiner issued a restriction requirement on May 31, 2018, requiring election of species between originally filed claims 8 and 11. Ex-1005, 59-61. In the response, the Patent Owner elected the species of claim 11 and amended claims 1 and 6 to include that the "trapping net system" or "trapping net," comprised a first trapping net, second trapping net, and third trapping net. *Id.*

48. Following this amendment, the Examiner mailed a Notice of Allowance which identified some informalities before issuance. *Id.*, 72. In this Notice of Allowance, the Examiner generally explained that the prior art, "fails to disclose or render obvious a motivation to provide a bird relocation system having the combination of method limitations such as claimed in claims 1, 6, and 14." *Id.*, 72-73.

VIII. CLAIM CONSTRUCTION

49. As noted earlier herein, I have been instructed that the terms appearing in the '374 Patent should be interpreted as they would have been understood by a person of ordinary skill at the time of the invention in view of the

patent's specification and prosecution history. I have interpreted the Challenged Claims according to this instruction throughout my analysis.

A. A POSA would have understood the “trapping net” and “perimeter net” to refer to their intended use, but do not require installation in a particular location.

50. Based on my reading of the '374 Patent, the terms *perimeter net* and *trapping net* refer to the same structure—nets, such as net 16 disclosed in the patent. In some instances, the nets are described as being installed in different locations, but the terms perimeter net and trapping net are consistently used to refer to the same structure.

51. Because of this, it is my opinion that a POSA would understand the '374 Patent's uses of the terms “perimeter net” and “trapping net” to refer to the intended use of the recited nets. In other words, a “perimeter net” is one capable of being installed along the perimeter of an enclosure, while a “trapping net” is one capable of trapping an animal. In my opinion, the '374 Patent (and its related Patents) support this interpretation in several ways.

52. First, the patent expressly teaches that both the *perimeter net* and *trapping net* can be identical structures: “Each net system [referring to the perimeter and trapping net 12 and 14, respectively] comprises at least one net 16....” Ex-1001, 3:62-65. Furthermore, the installation (i.e., how each net attached to the structure) is generically written for each net. *Id.* 4:9-14. From my reading,

the Specification does not describe any structural differences and both perimeter nets and trapping nets could be interchangeably used.

53. Second, the '374 Patent confirms that its “perimeter net” is not always installed along a perimeter of a building. The Specification discloses only that perimeter nets are “preferably ... set up around the perimeter.” Likewise, the term “trapping net” requires no particular location and can be set up “on the interior” of an enclosed structure (Ex-1001, 4:19-21) or “on one side” of the structure (Id., 4:38). In fact, Figure 2 depicts a trapping net (14) installed along a perimeter of an enclosure (36) (see left-most net (14)) in a position functionally indistinguishable from one of the perimeter nets (12) (see bottom net (12)). Id., 4:18-28, Fig. 2.

54. The alternative “layouts” shown in FIGs. 2 and 3 show there is no practical difference between the nets. Perimeter nets can be parallel to or perpendicular to trapping nets (Claims 11 and 12 of the '374 Patent in fact recite alternative embodiments where the “perimeter” and “trapping nets” are arranged “parallel” and “perpendicular” to one another, respectively); perimeter nets can be on the left or right side of trapping nets; perimeter nets can be close to (or perhaps abut) a side of the enclosure or be farther away; trapping nets can also be placed on the interior (at varying distances from the side), as in FIG. 2, or placed along the exterior side, as in FIG. 3. Indeed, without the reference numerals, it would be difficult to identify whether any “net” is a perimeter net or a trapping net.

55. Third, the Specification and related patents indicate that the term “perimeter net” should not be interpreted as requiring the net to be installed in a particular location. For example, in the ’108 Patent (which issued from a continuing application), the term “perimeter net” is included in Claim 1. However, in the ’108 Patent, dependent Claims 2 and 3 require that one side of the perimeter net is “proximal” or “in contact with” one side of the structure, respectively. Ex-1002, 5:53-58 and 6:54-56. These additional limitations would be meaningless if the term “perimeter net” were itself intended to require installation along a perimeter.

56. The ’374 Patent claims simply do not require installation of the nets in a particular location or orientation by the use of the term “perimeter net” or “trapping net.” When the patent intends to require the nets to be placed in a particular location or orientation, it says so. For example, the ’374 patent includes claim language requiring nets to be installed in particular locations (e.g., “secured to a rafter” in Claim 1), particular orientations (e.g., “parallel” or “perpendicular” in Claims 1, 9, 11, and 12), and particular arrangements (e.g., “such that the square footage available for the animal to travel is halved” in Claims 2 and 14). I also note that the ’108 Patent included claims requiring a particular installation location (e.g., “one side of the perimeter net proximal to one side of the structure” in Claim 2). But none of the ’374 Patent claims require that a “perimeter net” is installed

along a building's perimeter, and none of the '374 Patent claims require that a "trapping net" is installed away from a building's perimeter.

57. As such, it is my opinion that a POSA would understand the term "perimeter net" to mean a net capable of being installed along the perimeter of an enclosure, and the term "trapping net" to mean a net capable of trapping an animal.

B. A POSA would have understood "flusher" to be any object that creates noise movement, or both when shaken or moved and "flushing device" to be a device capable of driving an animal from one location to another.

58. Based on my review of the patent, each independent claim recites a "flushing device." The '374 Patent describes as a device capable of "driv[ing] the animal 60 toward a net 16." Ex-1001, 4:13-14. While Claims 1 and 15 require the "flushing device" to include an "arm and a flusher," the other claims describe the "flushing device" only by what it does. *E.g.*, Claim 6 ("used to direct the animal into the trapping net"), Claim 13 ("chases the animal towards the perimeter net system and into the trapping net"); *see also* Ex-1001, Abstract ("[T]he flushing device channels the animal through the perimeter net system and into the trapping net."), *Id.*, 5:9-10 (describing how an animal "is driven into the net ... by a handler using the flushing device").

59. I note that the Specification discloses one embodiment of a flushing device with a telescoping arm and a "flusher" at the end, but even the flusher is characterized by its intended use: "The flusher 56 can be *any object* that, when

shaken or moved, creates noise, movement, or both,” so that the “noise and/or movement can drive the animal ... from a hiding spot into one of the nets.” *Id.*, 4:64-66 (emphasis added). I highlight that the Specification states that the “flusher” can simply be a “plastic bag” that is “attached to [the] flushing device 46 and shaken.” *Id.*, 5:1-2. Claims 1 and 15 recite a “flusher,” but claim no specific structure.

60. In my opinion, the term “flushing device” would be understood by a POSA to mean a device capable of being used by a handler to drive an animal from one location to another, and the term “flusher” would be understood by a POSA as “any object that creates noise, movement, or both when shaken or moved.” For example, the flushing methods noted above in ¶34, such as the fiberglass poles with strings of tape (Ex-1011, 1); plastic bags attached to a lath (Ex-1040, 34); live decoys (Ex-1042, 69-70); laser pointers (Ex-1032; Ex-1023, 42; Ex-1024), hand nets (Ex-1010, 5; Ex-1033, 200; 1030, 1-2; Ex-1018, 82); and large poles (Ex-1029, Fig. 3), would each be a respective flushing device and/or flusher.

IX. SUMMARY OF INVALIDITY GROUNDS

61. It is my opinion that the Challenged Claims of the '374 Patent would have been obvious in view of the prior art noted in the table below. I explain below in detail my conclusion as to why a POSA would find the claims invalid.

Ground	Claims	Statute	Prior Art
A	6-14	§ 103(a)	Brugh
B	1-16	§ 103(a)	Brugh and Kunz
C	1-16	§ 103(a)	Bird Barrier Video and Kunz

X. GROUND A: CLAIMS 6-14 ARE OBVIOUS IN VIEW OF BRUGH

62. It is my opinion that Claims 6-14 of the '374 Patent would have been obvious to a POSA in view of the disclosure of Brugh.

A. Overview of Brugh

63. U.S. Patent Publication No. 2017/0238524 to Brugh et al. ("Brugh") (Ex-1008) is a patent publication directed to a netting system for removing flying vertebrates from a structure. I have been instructed by counsel that Brugh's February 19, 2016 filing date predates the earliest filing date of the '374 Patent (May 19, 2016) and is therefore prior art to the Challenged Patent. The following description summarizes several pertinent features of the reference that I have identified as being relevant to my analysis.

64. Brugh describes that the "advent of large warehouses, big box stores, large grocery stores, malls, and the like, has caused an increase in the number of

birds, as well as other large flying vertebrates, such as bats, finding their way inside the buildings.” Ex-1008, ¶0005. To address this problem, Brugh discloses “a device for repeated quick set up for safe live capture of a flying vertebrate in a large building.” Ex-1008, ¶0019. For the sake of clarity, I refer to this device as Brugh’s “capture device.”

65. I note that Brugh’s capture device includes a net (6) suspended between a pair of telescoping poles (5). Ex-1008, ¶¶0007-0024, 0039-0042, 0049-0052, Figs. 1 and 2. Although Figure 1 depicts one of the poles (5), Brugh makes it clear that its capture device includes telescoping poles (5) on each side of the net (6). *See* Ex-1008, ¶¶0008, 0019, 0042, 0049, 0052. Each of the poles (5) includes a hook (9) configured for attachment to a rafter (3) in a ceiling (2). Ex-1008, ¶¶0008, 0012, 0022, 0039, 0049. The net (6) also defines pockets (11) for trapping flying vertebrates. Ex-1008, ¶¶0043, 0049, Fig. 1. Brugh describes the netting used as “to nylon or other plastic netting designed in the trade for the capture of birds” and “typically [has] one or more pockets designed to trap a bird.” Ex-1008, ¶0043. Based on this description and Figure 1 (annotated below), a POSA would have recognized Brugh’s netting as a mist net capable of animal trapping. While discussing trapping of flying vertebrates, Brugh’s capture device is configured for trapping any flying vertebrate, including “birds, bats or any large flying mammal or the like.” Ex-1008, ¶0037.

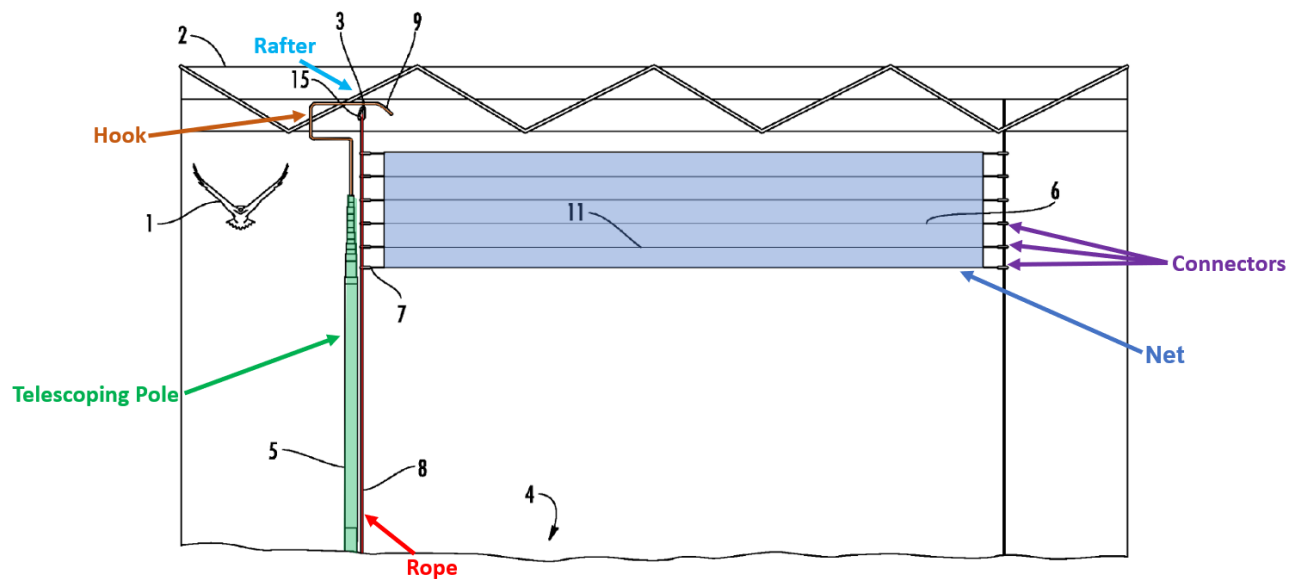


FIG. 1

Brugh – Figure 1 (annotated)

66. I also note that Brugh discloses that the net (6) is mounted on the poles (5) by clips (7) secured to ropes (8). Ex-1008, ¶¶0049, 0051. The ropes (8) are each run through a pulley (15), which allows the net (6) to be raised and lowered to a desired tension. Ex-1008, ¶¶0042, 0049. This system of securing the poles (5) to the ceiling (2) (e.g., by using their respective hooks) and raising the net (6) (e.g., using the rope and pulley system), the net (6) can be positioned for capturing flying vertebrates. Ex-1008, ¶¶0008-0018.

B. Claim 6

1. [6pre] – “An animal relocation system for relocating an animal in a structure, the system comprising”

67. The preamble of Claim 6 reads: “An animal relocation system for relocating an animal in a structure, the system comprising.” Brugh discloses a “device for repeated quick set up for safe live capture of a flying vertebrate in a large building.” Ex-1008, ¶¶0019-0024, 0049-0052, Fig. 1, Claim 4. Brugh also discloses that captured flying vertebrates can be removed from the capture device and released into the wild. Ex-1008, ¶0052, Abstract. In my opinion, Brugh’s capture device clearly constitutes “[a]n animal relocation system for relocating an animal in a structure.”

2. [6a] – “a perimeter net;” [6b] – “a trapping net wherein the trapping net comprises a first trapping net, a second trapping net, and a third trapping net;”

68. The animal relocation system recited in Claim 6 first includes “a perimeter net” and “a trapping net wherein the trapping net comprises a first trapping net, a second trapping net, and a third trapping net” (Elements [6a]) and [6b]). As I have discussed above in VIII.A, it is my opinion that the perimeter nets and trapping nets of the ‘374 Patent are (or at least can be) structurally identical. Claim 6 recites that the animal relocation system includes “a perimeter net” (i.e., at least one net capable of being placed along the outer perimeter of an enclosure) and three “trapping nets” (i.e., at least three nets that are each capable of trapping

an animal). I note that Claim 6 recites the “trapping net” includes a first, second and third trapping net. I assume that the Patentee instead intended for the “trapping net system” to include a first, second, and third trapping net. However, Claim 6’s inclusion of “a trapping net” is clearly satisfied by the presence of a first, second, and third trapping net.

69. Because Brugh’s capture device includes a net that is both capable of being placed along the outer perimeter of an enclosure and capable of trapping an animal, it is my opinion that the capture device is both a perimeter net and a trapping net. Therefore, a POSA would have found it obvious to provide four of Brugh’s capture devices as part of an animal relocation system (e.g., one perimeter net and three trapping nets) for several reasons, for which I discuss in detail below.

70. I note that Brugh’s capture device includes a net (6) configured to being hung from rafters (3) inside a building. Ex-1008, ¶¶0007-0024, 0039-0042, 0049-0052, Figs. 1 and 2. It is my position that a POSA would have understood and appreciated that Brugh’s capture device is capable of being positioned along the perimeter of an enclosure (e.g., by hanging the net (6) from a building’s rafters (3) proximal to a perimeter wall). *See* Ex-1008, Fig. 1. In Figure 1, the sides of the net (6) and poles (5) are substantially straight and can be positioned adjacent a wall. Brugh’s net (6) also includes pockets (11) configured for trapping a flying vertebrate. Ex-1008, ¶¶0043, 0049, 0052. As such, it is my opinion that a POSA

would have appreciated from Brugh's disclosure that the capture device is both a perimeter net and a trapping net.

71. In view of Brugh's disclosure and the common knowledge of the art, it is my opinion that a POSA would have found it obvious to provide four of Brugh's capture devices. First, Brugh discloses that a flying vertebrate's "flight characteristics" within a building should be observed and that the observed "flight pattern can then be used to place the netting in relationship to the position of the flying vertebrate." Ex-1008, ¶¶0015, 0045. A POSA would have been well-aware that deploying netting where animals are seen or expected to fly increases the likelihood of eventual capture. Ex-1031, 134; Ex-1033, 200. In view of this teaching and the knowledge in the art, it is my opinion that a POSA would have also found it obvious to provide four of Brugh's capture devices, for example, in instances where (i) the flight pattern of a flying vertebrate (or multiple vertebrates) within a building includes (or is expected to include) four different locations or (ii) where four or more flying vertebrates are present (or expected to be present) in the building.

72. Additionally, it is my position that a POSA would have understood that providing four or more of Brugh's capture devices as part of an animal relocation system would generally increase the likelihood of capturing flying vertebrates within the building. *See* Ex-1039, 191 ("As net density is increased,

capture probability of individual adults will increase...” Here, a POSA would have found the effect of using four of Brugh’s capture devices entirely expected. A POSA would understand that the inclusion of additional nets, such as the capture device of Brugh, increases netting coverage within the building and results in a higher likelihood that the animal will eventually become entrapped in one of the nets.

73. It is therefore my opinion that POSA would have found it obvious to provide four of Brugh’s capture devices, which would necessarily include “a perimeter net” (i.e., at least one net capable of being placed along the outer perimeter of an enclosure) and three “trapping net[s]” (i.e., at least three nets that are each capable of trapping an animal).

74. I note that Claim 6 does not require that the “perimeter net” or first/second/third “trapping net[s]” be installed in a building (or placed in a particular location within a building). Nevertheless, it is my opinion that a POSA would have found it obvious to install one of Brugh’s capture devices along a perimeter wall within a building as well as including three more of Brugh’s capture devices in additional locations (e.g., around the interior of the building).

75. First, Brugh includes that a flying vertebrate’s observed “flight pattern” should be used to place nets. It is my opinion that a POSA would have found it obvious to place at least one of Brugh’s capture devices along a perimeter

wall and at least three of Brugh's capture devices in other locations within a building in response to observing flight patterns in those four locations. Ex-1008, ¶¶0015, 0045.

76. Second, a POSA would have understood that placing additional netting, such as multiple of Brugh's capture device, at a location proximal to a flying vertebrate (i.e., with at least one capture device along a perimeter wall and at least three capture devices in other locations) would effectively shrink the area in which the vertebrate is able to fly. When a flying vertebrate has fewer escape routes along the perimeter and more obstacles in the interior, likelihood of capture is improved. Indeed, this is a matter of basic geometry and a predictable result of using multiple capture devices in a building.

77. Third, it is well-established that net density (the abundance of nets in an area) is positively correlated with capture rate. *See* ¶32. In animal trapping systems, the number of nets used is generally limited by the time and available personnel. Ex-1034, 123; Ex-1039, 190. It is my opinion that a POSA would have recognized that using several of Brugh's capture devices, which can be quickly placed and removed, would substantially avoid the burden typically associated with multi-net systems. Ex-1008-Abstract.

78. For at least the foregoing reasons, it is my opinion that a POSA would have found it obvious in view of Brugh to provide "a perimeter net" and "a

trapping net wherein the trapping net comprises a first trapping net, a second trapping net, and a third trapping net,” as recited in elements [6a] and [6b].

3. [6c] – “a flushing device, wherein the flushing device is used to direct the animal into the trapping net.”

79. Element [6c] of the ‘374 Patent includes “a flushing device, wherein the flushing device is used to direct the animal into the trapping net.” Brugh recognizes that flying vertebrates can be captured by “driving the flying vertebrate . . . into the netting pockets” of the capture device. Ex-1008, ¶0016. Furthermore, Brugh notes that this may be accomplished by “getting the flying vertebrate to fly, by making a loud noise, approaching the vertebrate, or by the placement of food, light, or odorant or the like.” Ex-1008, ¶0046.

80. Based on the claim construction above as understood by a POSA (VIII.B) and Brugh’s disclosure, it is my opinion that a POSA would have found it obvious to provide a flushing device for “making a loud noise,” “approaching the vertebrate,” or placing “light” in a manner that would induce flight. Ex-1008, ¶0046.

81. For example, a POSA would have known that a noise-maker could be used to “mak[e] a loud noise,” a pole or other elongated member could be used to “approach[] the vertebrate,” and a laser pointer or flash light could be used to place “light” near the flying vertebrate. In fact, these devices are well-known and frequently used in the art. As I noted above in the technical background section,

some common flushing devices include fiberglass poles with strings of tape (Ex-1011, 1); plastic bags attached to a lath (Ex-1040, 34); live decoys (Ex-1042, 69-70); laser pointers (Ex-1032; Ex-1023, 42; Ex-1024), hand nets (Ex-1010, 5; Ex-1033, 200; 1030, 1-2; Ex-1018, 82); and large poles (Ex-1029, Fig. 3).

82. Each of these devices are capable of being used to direct a flying vertebrate into Brugh's net (6) and are therefore each a "flushing device" as defined by the claim construction. It is my opinion that a POSA would have understood that Brugh's disclosure of "driving the flying vertebrate . . . into the netting pockets" appreciates "a flushing device, wherein the flushing device is used to direct the animal into the trapping net," as recited in element [6c].

83. For at least the reasons I have explained above, it is my opinion that a POSA would have found Claim 6 to be obvious in view of Brugh.

C. Claim 7 – "The animal relocation system of claim 6, further comprising: the perimeter net comprising: a net and a telescoping pole, the net attached to the telescoping pole and the telescoping pole attached to the structure."

84. Claim 7 of the '374 Patent reads: "The animal relocation system of claim 6, further comprising: the perimeter net comprising: a net and a telescoping pole, the net attached to the telescoping pole and the telescoping pole attached to the structure." As I have discussed above in my analysis of Claim 6, Brugh's capture device is both a "perimeter net" and a "trapping net." I note that Brugh discloses that its capture device includes a "net 6 mounted on height adjustable

posts 5 by attaching [the net] to clips 7 on [a] rope 8.” Ex-1008, ¶0007-0024, 0039-0042, 0049-0052, Figs. 1-3. Brugh notes that the “adjustable posts 5 in this embodiment are telescoping poles.” Ex-1008, ¶0049, 0039. Furthermore, Brugh discloses that each of the telescoping poles (5) include a hook (9) configured for attachment to a rafter (3) in a ceiling (2) (i.e., a “structure”). Ex-1008, ¶0008, 0012, 0022, 0039, 0049. The annotated Figure 1 of Brugh below further illustrates that Brugh includes the elements of Claim 7.

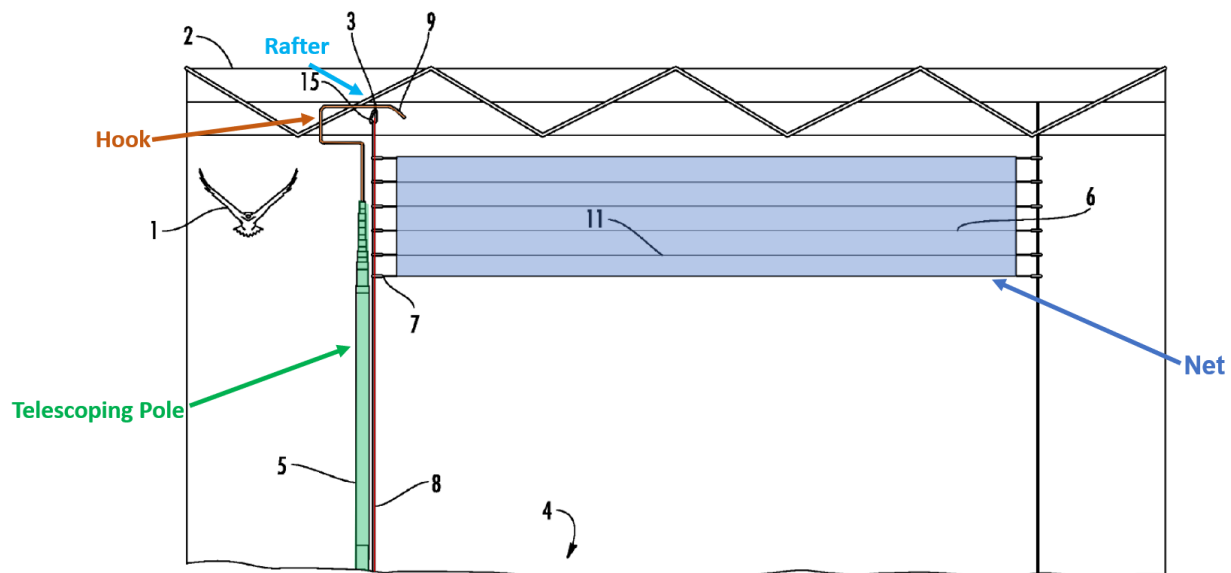


FIG. 1

Brugh – Figure 1 (annotated)

85. It is therefore my opinion that a POSA would recognize Brugh as disclosing “perimeter net comprising: a net and a telescoping pole, the net attached to the telescoping pole and the telescoping pole attached to the structure,” as

recited in Claim 7. Thus, a POSA would have found Claim 7 obvious in view of Brugh.

D. Claim 8 – “The animal relocation system of claim 6, wherein the structure is less than or equal to 75,000 square feet, the animal relocation system comprising: the perimeter net comprising a first net and a second net.”

86. Brugh discloses that its capture device is configured “for repeated quick set up for safe live capture of a flying vertebrate in a large building,” such as “large warehouses, big box stores, large grocery stores, malls, and the like.” Ex-1008, ¶¶0019, 0005. It is my opinion that a POSA would recognize that many large buildings of this type are “less than or equal to 75,000 square feet.” Furthermore, a POSA would have readily understood that Brugh’s capture device is capable of being used and is suited for structures “less than or equal to 75,000 square feet.” It is therefore my opinion that a POSA would have found the relocation system in a structure of less than or equal to 75,000 square feet is obvious in view of Brugh.

87. As I have discussed above in reference to Claim 6, a POSA also would have found it obvious to provide two perimeter nets (i.e., “the perimeter net comprising a first net and a second net”). Brugh discloses that a flying vertebrate’s observed “flight pattern” should be used to place nets. Ex-1008, ¶¶0015, 0045. It is my opinion that a POSA would have it found obvious to provide multiple capture devices (such as the five nets included in Claim 8) in a variety of circumstances. For example, a POSA would have known to include multiple nets based on Brugh

where the flight pattern of flying vertebrate(s) within a building included five different locations or where five or more flying vertebrates are present. Ex-1031, 134; Ex-1033, 200.

88. It is my further opinion that a POSA would have found it obvious to place at least two of Brugh's capture devices along a perimeter wall of the building. For example, a POSA would have been motivated to place Brugh's capture device along the structure's perimeter after observing the flight pattern of flying vertebrate(s) in such a location. Additionally, a POSA would recognize that placing netting in this configuration can shrink the effective area in which an identified vertebrate can fly. As is well-established, reducing the size of the capture area leads to a greater likelihood of quicker animal capture. Ex-1017, 13; Ex-1026, 513; Ex-1031, 134; Ex-1033, 200-201; Ex-1042, 69-70.

89. Accordingly, for at least these reasons, it would have been obvious to a POSA in view of Brugh to include a first and second perimeter net "wherein the structure is less than or equal to 75,000 square feet." It is therefore my opinion that Claim 8 is obvious in view of Brugh.

E. Dependent Claims 9-12.

90. Dependent Claims 9-12 each recite relative orientations of the perimeter and trapping nets. It is my opinion that each of these orientations would have been obvious to a POSA in view of Brugh.

91. I note that Brugh discloses its capture device is configured for being hung from rafters (3) in a building's ceiling (2). The hooks (9) of the capture device's telescoping poles (5) are attached to the rafters (3). Between the telescoping poles (5), the net (6) is suspended. As a result, the orientation of the each hung capture device is generally dictated by the orientation of the rafters (3).

92. I note above in my analysis of Claim 6 and 8 that a POSA would be motivated to use multiple of Brugh's capture devices. In addition to this, a POSA would have appreciated that the rafters (3) of "large box stores, warehouses, storage facilities, retail buildings and the like" as discussed by Brugh, are often straight and arranged in a grid formation (i.e., with each rafter either parallel or perpendicular to an adjacent rafter). It is therefore my opinion that a POSA would understand that the net (6) of any hung capture device would be parallel to (or perpendicular to) the net of the other hung capture devices.

93. Beyond this, I point out that Brugh also discloses that a flying vertebrate's observed "flight pattern" can be "used to place the netting in relationship to the position of the flying vertebrate." Ex-1008, ¶¶0015, 0045. In my opinion, a POSA would have also appreciated from this teaching that a capture device's net (6) should intersect the anticipated flight pattern of a targeted vertebrate. *See also* Ex-1031, 134; Ex-1033, 200. Based on the disclosure of Brugh and the general knowledge of a POSA, a POSA would know to select the

location and orientation of each capture device based on the anticipated flight pattern(s) of targeted flying vertebrates and the orientation of the rafters from which the capture devices can be hung.

94. **Claim 9** depends from Claim 8 and recites “wherein the first net and second net are installed parallel to one another” which refers to the pair of perimeter nets from Claim 8. It is my opinion that it would have been obvious to a POSA to install perimeter nets parallel to one another in several instance. For example, perimeter nets would be installed parallel where **(i)** the flight pattern of flying vertebrate(s) was observed (or expected to be) along two locations of the same perimeter wall (or a parallel perimeter walls) or **(ii)** where the observed/expected flight pattern otherwise required hanging of Brugh’s capture device from parallel rafters. It is further well-known that installing netting parallel can form a barrier, thereby preventing escape routes for the animal. Ex-1018, 85.

95. Similarly, **Claim 12** depends from Claim 6 and recites “wherein the second trapping net is installed parallel to the perimeter net.” For many of the same reasons I have just discussed, a POSA would have found it obvious to install one of Brugh’s capture devices (a trapping net) parallel to another of Brugh’s trapping devices along perimeter wall (a perimeter net). In particular, it is my belief that a POSA would have appreciated that an observed flight pattern or rafter orientation would frequently require this orientation.

96. **Claim 10** depends from Claim 9 and recites “wherein the trapping net is installed at a ninety-degree angle to the perimeter net,” while **Claim 11** depends from Claim 6 and recites “wherein the first trapping net is installed perpendicular to the perimeter net.” Both of these claims appear to cover the same general thing: placing a trapping net perpendicular to one or more perimeter net(s). For similar reasons as to Claims 9 and 12, it is my opinion that a POSA would have found it obvious to install one of Brugh’s capture devices (a trapping net) in an orientation perpendicular to (specifically, at a 90-degree angle to) another of Brugh’s trapping devices along perimeter wall (a perimeter net). For example, a POSA would have readily appreciated that an observed (or expected) flight pattern or rafter orientation would frequently require this orientation between trapping and perimeter nets. As I provided above, a POSA would have recognized that including nets at an angle relative to one another increases the probability of capture by, for example, creating additional obstacles the animal has to traverse. Ex-1031, 134; Ex-1039, 190; Ex-1042, Fig. 3.

97. It is therefore my opinion that each of Claims 9-12 would have been obvious to a POSA in view of Brugh.

F. Independent Claim 13

1. [13pre] – “A method for relocating animals within a structure comprising:”

98. I first note that Brugh discloses “a method for the safe live capture of a flying vertebrate inside a large building.” Ex-1008, ¶¶0008-0018, 0028, 0049-0052, Figs. 1 and 4, Claims 1-3. Brugh also discloses that captured vertebrates can be relocated into the wild after they are captured. Ex-1008, ¶0052, Abstract. Thus, it is my opinion that Brugh discloses “[a] method for relocating animals within a structure,” as recited in Claim 13’s preamble.

2. [13a] – “installing an animal relocation system, the animal relocation system comprising:”

99. As I have discussed above related to my analysis of Claim 6’s preamble, Brugh discloses a capture device that is “an animal relocation system.” Ex-1008, ¶¶0019-0024, 0049-0052, Fig. 1, Claim 4. This capture device is used as part of the capture method of Brugh, which, as I’ve previously discussed, relates to capturing and relocating animals within a structure. Ex-1008, ¶¶0008-0018, 0028, 0049-0052, Figs. 1 and 4, Claims 1-3. As such, it is my opinion that a POSA would find element [13a] obvious in view of Brugh.

3. [13b] – “a perimeter net system comprising two nets;” [13c] – “a trapping net;”

100. I previously discussed with respect to Claim 6 (elements [6a] and [6b]) and Claim 8 why a POSA would have found it obvious in view of Brugh to

provide at least two perimeter nets (e.g., two of Brugh's capture devices hung along a perimeter wall) and at least one trapping net (e.g., a third capture device hung in an additional location within the building). *See* Ex-1008, ¶¶0007-0024, 0039-0043, 0049-0052, Fig. 1. Generally speaking, a POSA would have been motivated to include multiple nets, such as two perimeter nets and a trapping net, at least where (i) the flight pattern of a flying vertebrate (or multiple vertebrates) within a building includes (or is expected to include) three different locations or (ii) where three or more flying vertebrates are present (or expected to be present) in the building. Because of this, it is my opinion that a POSA would have found it obvious to apply an animal relocation system having three nets (i.e., two perimeter nets and a trapping net) based on the disclosure of Brugh.

4. [13d] – “and a flushing device;”

101. It is my opinion that a POSA would have found it obvious to incorporate a flushing device based on the reasons I have discussed above relating to element [6c] of Claim 6.

5. [13e] – “flushing the animal through the structure wherein the flushing device chases the animal towards the perimeter net system and into the trapping net.”

102. It is clear that Brugh discloses that flying vertebrates can be captured by “driving the flying vertebrate . . . into the netting pockets” of the capture device. Ex-1008, ¶0016. Brugh states that this may be accomplished by “getting the flying

vertebrate to fly, by making a loud noise, approaching the vertebrate, or by the placement of food, light, or odorant or the like.” Ex-1008, ¶0046. As I have discussed above for Claim 6 (element [6c]), a POSA would have found it obvious to use a flushing device for “making a loud noise,” “approaching the vertebrate,” or placing “light” in a manner that would induce flight. Ex-1008, ¶0046. Therefore, it is my opinion that element [13e] of Claim 13 would have been obvious to a POSA based on the disclosure of Brugh.

103. Because a POSA would have appreciated from Brugh’s disclosure each of the steps of the claim, it is my opinion that Claim 13 would have been obvious to a POSA at the time of filing.

G. Claim 14 – “The method of claim 13 further comprising: installing the perimeter net system, such that the square footage available for the animal to travel within the structure is halved.”

104. For the reasons I have explained above in my analysis of Claim 6 and Claim 8, a POSA would have found it obvious to install Brugh’s capture device in multiple locations throughout a building. Among these spots, a POSA would routinely know to include at least two along perimeter walls and at least three in other locations, such as on the interior of the building. It is my opinion that a POSA would have understood that placing multiple capture devices proximal to a flying vertebrate in an enclosure would effectively reduce the area the vertebrate is able to fly. Ex-1018, 85. By shrinking this capture area, the flying vertebrate would

be restricted to a specific zone in the enclosure which would improve the likelihood of capture. Ex-1017, 13; Ex-1026, 513; Ex-1031, 134; Ex-1033, 200-201; Ex-1042, 69-70. A POSA would have found it obvious to hang Brugh's capture devices "such that the square footage available for the animal to travel within the structure is halved" as (i) this would be a matter of basic geometry, (ii) would frequently occur simply as a function of placing the capture devices in the flight patterns of observed flying vertebrates, and (iii) would have the entirely predictable result of improving the likelihood of capture. Ex-1008, ¶¶0015, 0045.

105. Accordingly, it is my opinion that Claim 14 would have been obvious to a POSA in view of Brugh.

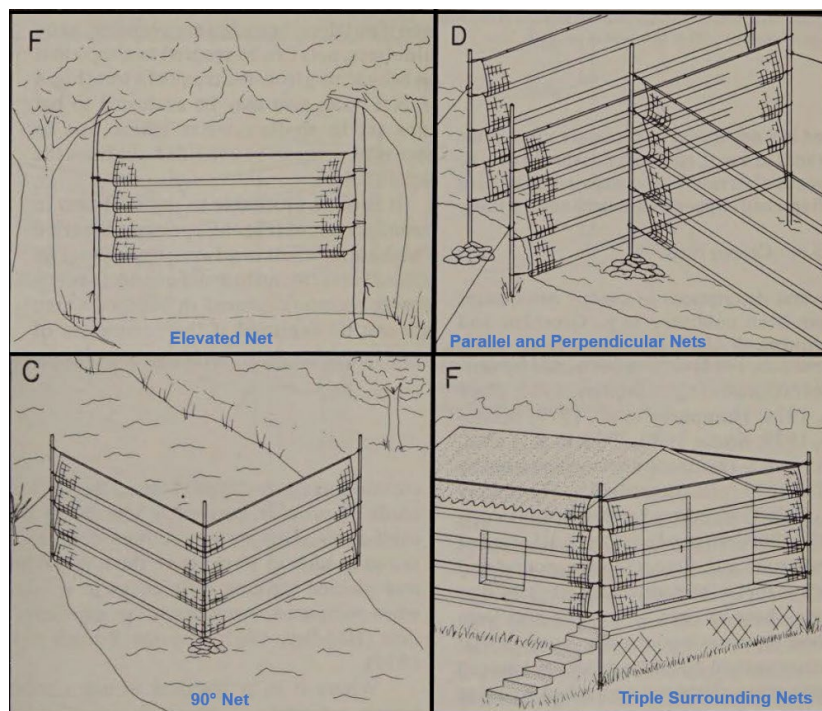
XI. GROUND B: CLAIMS 1-16 ARE OBVIOUS IN VIEW OF BRUGH AND KUNZ.

106. For the reasons I have explained above in X.B through X.G, it is my opinion that a POSA would find Claims 6-14 of the '374 Patent are obvious in view of the disclosure of Brugh. However, I have also been asked to consider the disclosure of Kunz as it relates to the disclosure of Brugh and the Challenged Claims. As I explain in more detail below, it is my opinion that Claims 1-16 would have been further obvious to a POSA in view of the combined teachings of Brugh and Kunz.

A. Overview of Kunz

107. Kunz is a chapter from the book *Ecological and Behavioral Methods for the Study of Bats* by Kunz and Kurta, which was first published in 1990. Ex-1010 (copyright page). I have been instructed by counsel that based on this publication date, Kunz is prior art to the '374 Patent.

108. Kunz discloses common techniques and systems for trapping bats (and other flying vertebrates) in various environments. *See generally* Ex-1010. In my review, Kunz describes various netting configurations in which multiple, pole-mounted mist nets are used to effectively capture bats. Ex-1010, 10. While also including single-net systems, Kunz highlights the use of multi-net capture systems, noting that “[a]s bats attempt to avoid one net they frequently become captured in another.” Ex-1010, 10. Kunz additionally includes several examples of mist-net configurations, some of which are reproduced and labeled below for reference.



Kunz – Figs. 3 (F) and 4 (C, D, F) (annotated)

109. Beyond multi-net systems, Kunz also discloses various field equipment used for animal capture, and in particular several devices for adapting mist-net systems to a particular environment. For example, Kunz describes poles to erect mist netting (Ex-1010, 7-9); ropes, pulleys, extension poles, cleats, and other netting attachments (Ex-1010, 12-17); and flushing devices for dislodging roosted bats. Ex-1010, 5. Importantly, Kunz discusses extension poles (Ex-1010, 8), raising netting using a rope and pulley system (Ex-1010, 14-15), as well as securing netting to a pole using connectors (Ex-1010, 8).

B. Motivation to Combine

110. It is my opinion that a POSA would be motivated to combine the teachings of Brugh and Kunz and arrive at the claimed invention. From my reading of the '374 patent, the Specification broadly defines its "Field" as "animal relocation" and, more specifically, relocating animals in buildings "using a net system and various flushing techniques." Ex-1001, 1:8-12. Likewise, Brugh "relates to the live capture of flying vertebrates," specifically by using a "net deploying system designed for inside large enclosure buildings." Ex-1008, ¶0003. I note that Brugh teaches its method is useful to capture "wild vertebrate, such as birds and bats." Ex-1008, ¶0005. Kunz similarly demonstrates techniques of the use of mist nets to capture bats. Ex-1010, 10-12. Beyond applicability to bats, Kunz also discloses that its techniques are "equally suitable for ecological and behavioral studies of *other terrestrial vertebrates*," Ex-1010, ix, which would include birds. *See also id.* at 1 (observing that "methods used to capture animals" is a "fundamental" topic in "ecology and behavior"). This generally aligns with the knowledge of POSAs, in which capture methods are various species of ecology study.

111. Kunz would have been well-known to a POSA as a leading treatise on the capture and study of bats (and other flying vertebrates). Ex-1022. Both Kunz and Brugh apply similar techniques for animal capture. For example, both

references disclose the use of mist nets suspended between poles to capture flying vertebrates. Kunz identifies that among trapping devices, mist nets (like the ones described in Brugh and the Challenged Patent) are one of “the most commonly used devices for capturing flying bats” and “may be deployed successfully at almost any site where bats are expected to fly.” Ex-1010 at 6, 8. In fact, Kunz specifically identifies on several occasions, the capture of bats within a building, such as those highlighted in Brugh and the ‘374 Patent. *Id.* at 4 (“When bats are to be captured in small, enclosed roosts (e.g., small caves, *buildings*, buttress cavities, etc.), we suggest that the exit routes be covered with netting material (Section 3.7) to prevent bats from escaping.”) (emphasis added).

112. Accordingly, it is my opinion that a POSA would have been motivated to look to the teachings of both Kunz and Brugh within the field of animal capture and relocation, more so as these methods relate to flying vertebrates such as bats and birds. Also relevant, the Challenged Patent notes that a POSA could adapt its techniques “different animals” with “different movement tendencies” Ex-1001, 1:50-65.

C. Independent Claim 6

1. [6a] – “a perimeter net;”

[6b] – “a trapping net wherein the trapping net comprises a first trapping net, a second trapping net, and a third trapping net;”

113. As I discussed above in X.B through X.G relating to Brugh, it is my opinion that Claims 6-14 would have been obvious to a POSA over Brugh alone. Specifically, Claim 6 would have been obvious over Brugh and Kunz for at least the same reasons explained in X.B. However, Kunz, which includes a multitude of capture strategies and devices, would have further motivated a POSA to use a plurality of Brugh’s capture devices. In particular, the disclosure of Kunz would supplement Brugh so a POSA would have included at least one “perimeter net” and at least three “trapping nets” as recited in elements [6a] and [6b].

114. Kunz discloses that mist nets can be deployed anywhere bats (and other animals) “are expected to fly.” Ex-1010, 8. Consistent with Brugh’s disclosure that a flying vertebrate’s “flight pattern” should be used to place nets, Kunz discloses that mist nets should be placed in sites “used as flyways” and are “most productive” when placed in locations “identified from visual observations of flying bats.” Ex-1010, 8; Ex-1008, ¶¶0015, 0045. This is often at locations where bats “regularly enter and exit”. Ex-1010, 8. As a single bat (or multiple bats) may traverse many different flyways, Kunz proposes various multi-net “configurations,” which ensure that when a bat attempts to “avoid one net” it may

“become captured in another.” Ex-1010, 10, Figures 3-4. In particular, Kunz notes that it is effective to place multiple nets such that “the perimeters of roosts are either partially or completely surrounded by one or more nets.” Ex-1010, 10-11, Fig. 4. Several figures from Kunz showing these configurations are reproduced later in this section.

115. In view of Kunz’s teachings regarding the placement of multiple nets, it is my opinion that a POSA would have found it obvious (and would have been motivated) to observe the flyways of flying vertebrates in a building and place multiple nets, such as the at least one perimeter net and at least three trapping nets, within the building. This inclusion of multiple nets is advantageous for the purpose of effectively capturing the identified flying vertebrates. Beyond this, it is my opinion that a POSA would have found it further obvious in view of Kunz to specifically **(i)** install one of Brugh’s capture devices along a perimeter wall within a building and **(ii)** three more of Brugh’s capture devices in additional locations. By installing multiple of Brugh’s capture device according to the disclosure of Kunz (e.g., in result to observing flyways in these locations) success of the capture system would have been predictably effectuated. Accordingly, it is my opinion that elements [6a] and [6b] would have been obvious to a POSA in view of Brugh and Kunz.

2. [6c] – “a flushing device, wherein the flushing device is used to direct the animal into the trapping net.”

116. In addition to the netting arrangement, Kunz also discloses the use of a “flushing device” to assist with capture. In particular, Kunz discloses that roosting bats can be “dislodged with ... extension poles to which small hoop nets are attached” to aid in capture. Ex-1010, 5. Brugh specifically identifies the step of “driving the flying vertebrate” to “cause it to fly into the netting and one of the pouches in the netting.” Ex-1008, ¶0046. Based on my reading of Brugh and Kunz combined with my knowledge of the art, a POSA would have found it obvious (and would have been motivated) to dislodge a flying vertebrate using Kunz’s net-extension pole and drive it into Brugh’s capture device. Ex-1010, 5; Ex-1008, ¶0016, 0046. The use of hand nets, such as the net disclosed by Kunz, have been frequently used to flush flying animals away from a roost for capture. Ex-1033, 200; 1030, 1-2.

117. Accordingly, it is my view that Claim 6 would have been obvious to a POSA in view of Brugh and Kunz (Ground B).

D. Claim 7 – “The animal relocation system of claim 6, further comprising: the perimeter net comprising: a net and a telescoping pole, the net attached to the telescoping pole and the telescoping pole attached to the structure.”

118. As I previously discussed above in X.C, Brugh discloses the all of the features of Claim 7. In addition to those features, Kunz furthers discloses netting

systems using multiple nets secured between poles (including extension poles). Ex-1010, 4, 7-11. Accordingly, Claim 7 would have been further obvious to a POSA under the combined teachings of Brugh and Kunz.

E. Claim 8 – “The animal relocation system of claim 6, wherein the structure is less than or equal to 75,000 square feet, the animal relocation system comprising: the perimeter net comprising a first net and a second net.”

119. It is my view that Claim 8 would have been obvious over Brugh and Kunz for similar reasons relating to my analysis of Claim 8 under Brugh alone. *See* X.D. However, Kunz would have further motivated a POSA to provide two perimeter nets (i.e., “the perimeter net comprising a first net and a second net”) as recited in Claim 8 for the reasons below.

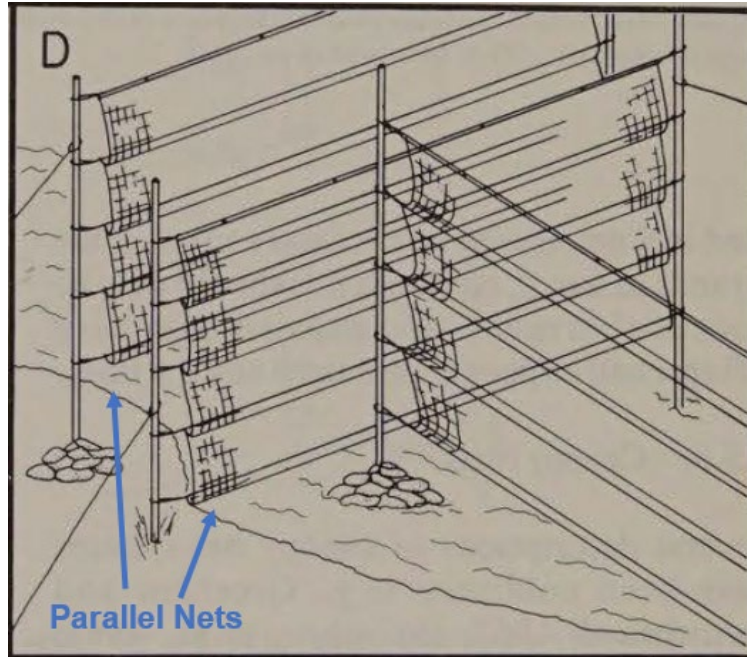
120. I first note that Kunz reaffirms Brugh’s teaching that the flight patterns of flying vertebrates should be used to place capture devices. Thus, it is my opinion that a POSA would have found it obvious to use first and second perimeter nets in instances where those nets would intersect observed flight patterns. Ex-1010, 8; Ex-1008, ¶¶0015, 0045. In addition, Kunz identifies the advantages of using multiple nets (Ex-1010, 8-11) and teaches the effectiveness of nets placed such that “the perimeters of roosts are either partially or completely surrounded by one or more nets” (Ex-1010, 10-11, Fig. 4). This setup of surrounding the perimeter as disclosed by Brugh is advantageous, for example, by reducing the likelihood that an animal will escape the netting array. *Id.* Thus, in

view of Brugh and Kunz, a POSA would have found it obvious (and been motivated) to provide two perimeter nets as recited in Claim 8.

F. Dependent Claims 9-12

121. As I discussed earlier, Claims 9-12 would have been obvious over Brugh alone. *See* X.E. Kunz provided additional disclosure that would have further motivated a POSA to arrange perimeter and trapping nets as well as in the relative orientations recited in Claims 9-12.

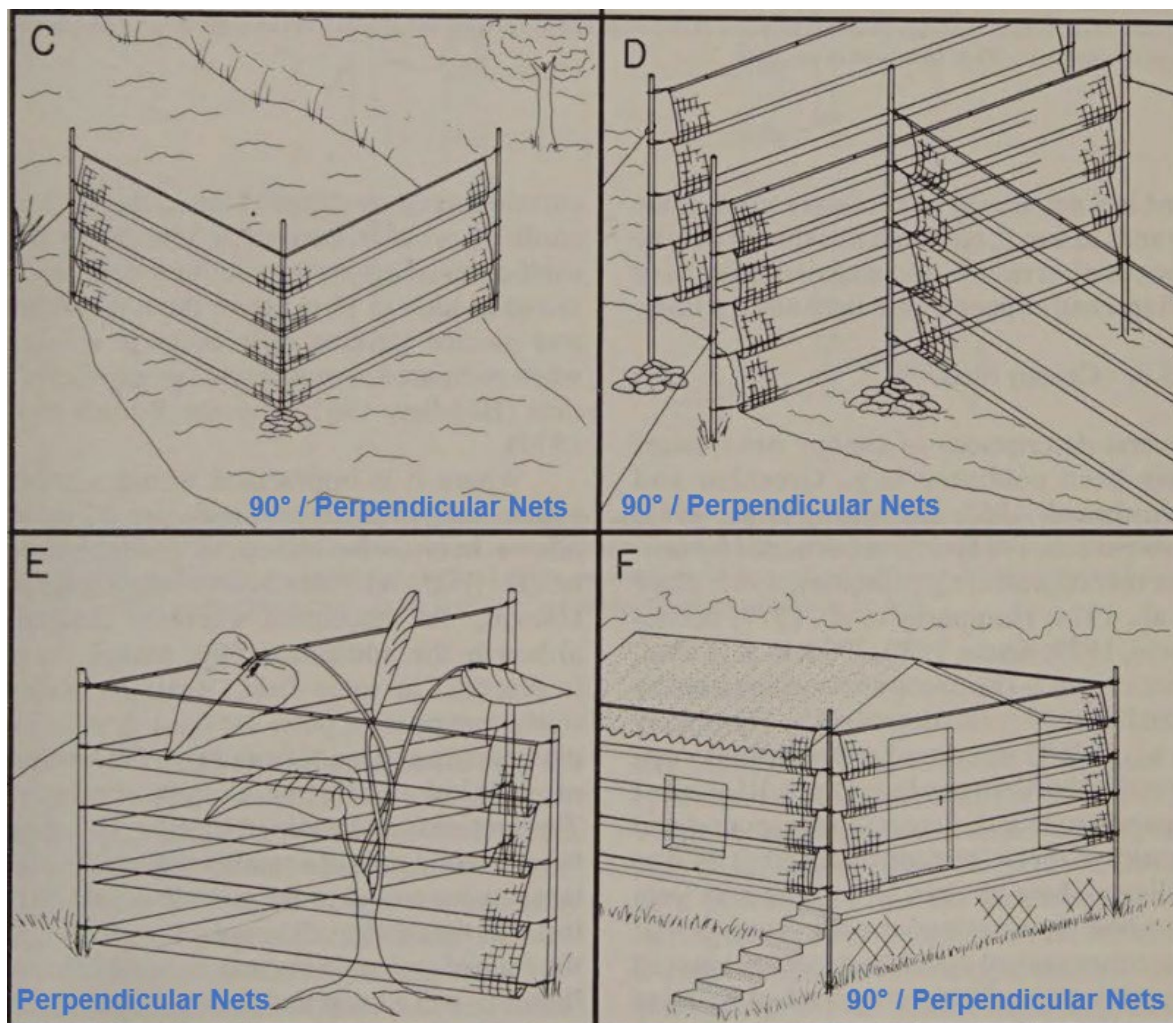
122. For example, Claim 9, which recites perimeter nets “parallel” to one another and Claim 12, which recites trapping net “parallel” to perimeter net, would have been recognized by the disclosure of Kunz. Kunz illustrates several examples of multi-net systems, including an example of multiple nets positioned parallel to one another for effective vertebrate capture. Ex-1010, 10-11, Fig. 4(D). In combination with Brugh and Kunz’s previously discussed teachings regarding the placement of nets in flight patterns in addition to the general knowledge of a POSA of the typical grid-like orientation of building rafters, a POSA would have found it obvious (and would have been motivated to) position Brugh’s capture nets in a parallel orientation. Therefore, it is my opinion that a POSA would have found it obvious to place perimeter nets “parallel” to one another as well as include trapping nets “parallel” to perimeter net as recited in Claims 9 and 12.



Kunz – Fig. 4(D) (annotated)

123. Claim 10 recites a trapping net at a 90° angle to perimeter net and Claim 11 recites a trapping net “perpendicular” to perimeter net. From my reading, Kunz clearly demonstrates both of these arrangements and shows several examples of nets arranged in 90°/perpendicular orientations for effective flying vertebrate capture. Ex-1010, 8-11, Figs. 3(C), 4(C-F). In combination with Brugh and Kunz’s previously discussed teachings regarding the placement of nets in flight patterns (and a POSA’s knowledge of the typical grid-like orientation of building rafters), it is my opinion that a POSA would have found it obvious (and would have been motivated to) position Brugh’s capture nets in 90°/perpendicular orientations as recited in Claims 10 and 11. Accordingly, the arrangements recited in Claims 10

and 11 would have been further obvious under the combination of Brugh and Kunz.



Kunz – Fig. 4(C-F) (annotated)

G. Independent Claim 13

1. [13pre] – “A method for relocating animals within a structure comprising:”

124. As I explained above, Claim 13’s preamble would have been obvious to a POSA in view of Brugh and Kunz for the same reasons as to Brugh alone.

2. [13a] – “installing an animal relocation system, the animal relocation system comprising:”

125. Similarly, element [13a] would have been obvious to a POSA in view of Brugh and Kunz as I mentioned above in my analysis of Brugh alone.

**3. [13b] – “a perimeter net system comprising two nets;”
[13c] – “a trapping net;”**

126. It is my opinion that elements [13b] and [13c] would have been obvious to a POSA in view of Brugh and Kunz as explained in my discussion of Brugh alone. However, as I explained above with respect to Claim 6 (elements [6a] and [6b]) and Claim 8, it is my position that a POSA would have been further motivated by the additional disclosure of Kunz to provide at least two perimeter nets such as two of Brugh’s capture devices along a perimeter wall of the structure and at least one trapping net as recited in [13b] and [13c]. *See* Ex-1010, 8-11, Figures 3-4; Ex-1008, ¶¶0007-0024, 0039-0043, 0049-0052, Fig. 1.

**4. [13d] – “and a flushing device;”
[13e] – “flushing the animal through the structure wherein the flushing device chases the animal towards the perimeter net system and into the trapping net.”**

127. In my opinion, elements [13d] and [13e] would have been obvious to a POSA in view of Brugh and Kunz according to same reasons explained with respect to Brugh alone. However, as discussed above with respect to Claim 6 (element [6c]) under Ground B, a POSA would have been further motivated by the additional disclosure of Kunz to provide “a flushing device” and to “flush[] the

animal through the structure wherein the flushing device chases the animal towards the perimeter net system and into the trapping net,” as recited in [13d] and [13c].

See also Ex-1010, 5; Ex-1008, ¶¶0016, 0046 .

128. Accordingly, for at least these additional reasons, it is my opinion that Claim 13 would have further been obvious in view of Brugh and Kunz .

**H. Claim 14 – “The method of claim 13 further comprising:
installing the perimeter net system, such that the square footage
available for the animal to travel within the structure is halved.”**

129. Claim 14 is obvious over Brugh and Kunz for at least the same reasons explained with respect to Brugh alone (Ground A). *See* X.G. However, Kunz would have further motivated a POSA to provide multiple nets in an effort to shrink the area in which the vertebrate is able to fly and improve the likelihood of capture. Ex-1010, 10-11 (discussion of multiple net configurations and surrounding areas with the same). In view of Brugh and Kunz, a POSA would have found it further obvious to hang Brugh’s capture devices “such that the square footage available for the animal to travel within the structure is halved” as recited in Claim 14.

130. Accordingly, for at least these additional reasons, Claim 14 would have further been obvious to a POSA in view of Brugh and Kunz.

I. Claim 15 and Claim 16

131. Claim 15 depends from Claim 13 and recites “the flushing device further comprising an arm and a flusher.” Claim 16 depends from Claim 15 and recites “wherein the flushing device arm comprises a telescoping arm.” Both of these dependent claims would have been obvious in view of Kunz. Kunz notes that roosting bats can be “dislodged with ... extension poles to which small hoop nets are attached” to aid in capture. Ex-1010, 5. A POSA would have recognized that Kunz’s extension pole is a “flushing device” as it is capable of being used by a handler to drive an animal from one location to another. Furthermore, a POSA would have regarded Kunz’s “extension pole” as both an “arm” (Claim 15) and a “telescoping arm” (Claim 16). Moreover, it is my opinion that a POSA would have recognized that Kunz’s “small hoop net” on the end of the extension pole is a “flusher” as it is capable of creating noise, movement, or both when shaken or moved.

132. As I explained above in relation to element [6c] (Ground B), a POSA would have found it obvious (and would have been motivated) to dislodge a flying vertebrate using Kunz’s net-extension pole and drive it into Brugh’s capture device. Ex-1010, 5; Ex-1008, ¶0016, 0046. Moreover, to the extent there is any doubt Kunz’s extension pole is a “telescoping pole,” a POSA would have found it obvious to use the telescoping pole disclosed in Brugh for the same dislodging

purpose. Ex-1008, ¶0026, 0050, Fig. 2. And to the extent there is any doubt that Kunz's "hoop net" is a "flusher," it is my opinion that a POSA would have found it obvious to substitute any device capable of making noise, approaching a vertebrate, or emitting light as recommended in Brugh. Ex-1008, ¶0046.

133. In my opinion, a POSA would have found it obvious to (and would have been motivated to) provide a flushing device "comprising an arm and a flusher," as recited in Claim 15, and specifically a flushing device having a "telescoping arm" as recited in Claim 16 in view of the combined teachings of Brugh and Kunz. Accordingly, it is my view that a POSA would have found Claims 15 and 16 each obvious in view of Brugh and Kunz.

J. Independent Claim 1

1. Element [1pre] and [1a]

134. In my opinion, Claim 1's preamble would have been obvious to a POSA in view of Brugh and Kunz for at least the same reasons explained in my discussion of Elements [13pre] and [13a] under Brugh or the combination of Brugh and Kunz.

2. Perimeter Net System (Elements 1b-1e)

135. Claim 1 recites "a perimeter net system" that include "two perimeter nets." It is my opinion that a POSA would have found it obvious to provide two perimeter nets, such as those as recited in *Element [1b]*, nets for the same reasons

explained with respect to Claim 6, Claim 8, and Claim 13 under either Brugh or the combination of Brugh and Kunz.

136. I note that Claim 1 also recites that each of the perimeter nets includes a variety of features (Elements [1c]-[1e]), each of which is disclosed in the combination of Brugh and Kunz. As explained earlier, Brugh's capture device is a "perimeter net." Furthermore, as shown below in annotated Figure 1, Brugh's capture device includes a net (6) having a first side and a second side, each having a plurality of connectors (7), as recited in *Element [1c]*.

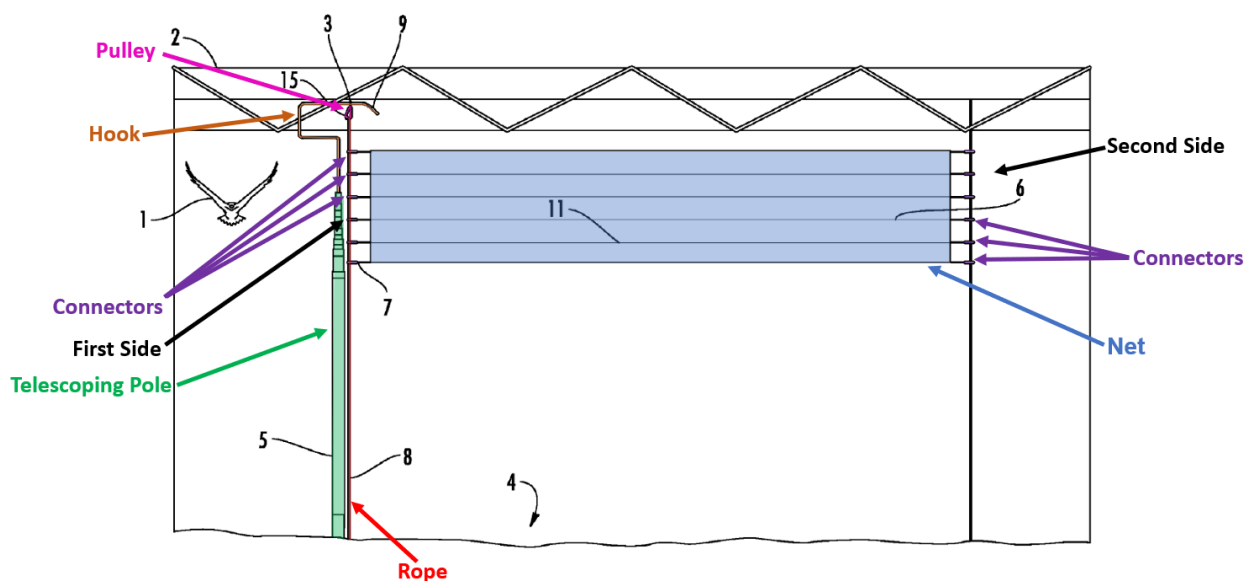


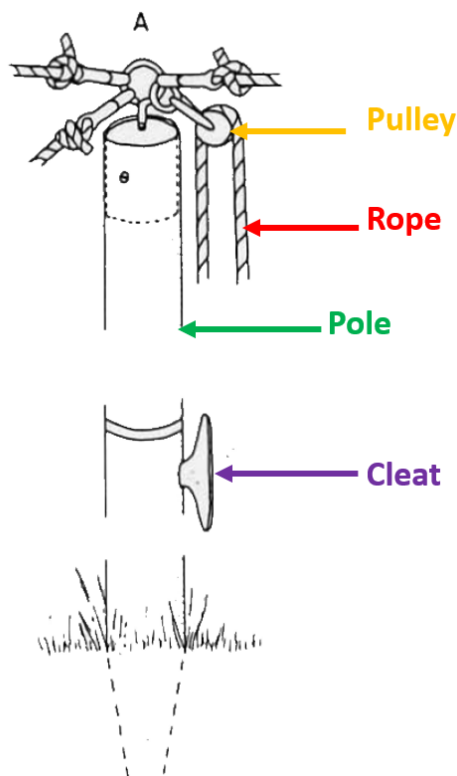
FIG. 1

Brugh – Fig. 1 (annotated)

137. It is clear that Brugh discloses a net (6) suspended between a pair of telescoping poles (5). Ex-1008, ¶¶0007-0024, 0039-0042, 0049-0052, Figs. 1 and 2. Brugh further discloses that its capture device includes telescoping poles (5) on

each side of the net (6). See Ex-1008, ¶¶0049 (“net 6 mounted on height adjustable posts 5”), 0008, 0019, 0042, 0049, 0052. Based on Kunz’s disclosure of using nets suspended between poles, it is my opinion that it would have been obvious to a POSA to use Brugh’s telescoping poles (5) on both sides of its net (6) (and would have motivated a POSA to modify any conceivable embodiment of Brugh having one pole). As shown above in the annotated Figure, Brugh also discloses that each of its telescoping poles (5) (even though only a single pole is shown in the Figure) includes “a first end and a second end, the first end having a hook” (9), “a removable connector” (one of the clips 7), “a rope” (8), “and pulley” (15), as recited in *Element [1d]*. Ex-1008, ¶¶0019-0024, 0042, 0049-0051.

138. Beyond this, Kunz (which also discloses a pole, rope, and pulley arrangement), additionally includes pole configurations having a “cleat” for securing a rope (shown below in the annotated Figure 7). Ex-1010, 13-15, Fig. 7. In my opinion, it would have been obvious to a POSA to provide Kunz’s cleat on Brugh’s telescoping poles for the purpose of securing Brugh’s rope (8). In addition to Brugh’s disclosure of a rope and pulley, Kunz’s further disclosure of rope-pulley mechanisms further supports a finding of obvious of this element. Accordingly, it is my opinion that the combination of Brugh and Kunz discloses the features of *Element [1d]*.



Kunz – Fig. 7 (annotated)

139. I emphasize that Brugh discloses that its ropes (8) and pulleys (15) secure both sides of its net (6) to their respective telescoping poles (5) through removable connectors (7), as recited in Element [1e]. Ex-1008, ¶0019-0024, 0042, 0049-0051, Figs. 1-3. As previously discussed, Brugh also discloses that its telescoping poles (5) are secured to rafters (3). Ex-1008, ¶0049, Fig. 1. Furthermore, for the reasons I have discussed above with respect to Claims 9 and 12, a POSA would have found it obvious to install first and second perimeter nets “parallel” to one another. *See* X.E and XI.F. Thus, it is my opinion that the combination of Brugh and Kunz discloses the features of ***Element [1e]***.

3. Trapping Net System (Elements 1f-1i)

140. Claim 1 also recites “a trapping net system” that includes first, second, and third “trapping nets.” It is my opinion that a POSA would have found it obvious to provide three trapping nets as recited in *Element [1f]* for the reasons I have explained above. As I have previously emphasized, including additional nets is a routine practice in animal trapping and generally leads to greater capture efficiency. *See* Ex-1039, 191 (“As net density is increased, capture probability of individual adults will increase...”); *see also* Ex-1017, 14; Ex-1026, 513; Ex-1042, 69-70.

141. Claim 1 also recites trapping net features (Elements [1g]-[1i]) that are identical to those identified for the perimeter nets (Elements [1c]-[1e]). As explained earlier, Brugh’s capture device is also “trapping net.” As previously discussed above regarding Elements [1c]-[1e], the trapping net features recited in *Elements [1g]-[1i]* would have been obvious in view of Brugh or the combination of Brugh and Kunz.

142. Element [1i] further recites that the first/second trapping nets are installed “parallel” to the first/second perimeter nets, and that the third trapping net is installed “at a ninety-degree-angle” relative to the first/second perimeter nets. For the reasons discussed above with respect to Claims 9-12 (under Grounds A and B), a POSA would have found it obvious to install the perimeter and trapping nets

in these basic orientations (which in many cases are dictated by rafter orientations).

See X.E and XI.F.

4. Flushing Device (Elements 1j-1k)

143. Elements 1j-1k of Claim 1 recite “a flushing device comprising a telescoping arm and a flusher” ([1j]) and “flushing the animal through the enclosed building wherein the flushing device chases the animal towards the perimeter net system and into the trapping net” ([1k]). Elements [1j], [1k] would have been obvious to a POSA in view of Brugh and Kunz for the same reasons I have discussed regarding Elements [6c], [13d], [13e] and Claims 15 and 16 under Grounds A and B.

144. Accordingly, for at least the foregoing reasons, it is my opinion that Claim 1 is obvious in view of Brugh and Kunz.

K. Claim 2 – “The animal relocation method of claim 1 wherein the perimeter net system further comprises placing the perimeter net system within the enclosed building such that the square footage available for the animal to travel within the enclosed building is halved.”

145. Claim 2 recites “placing the perimeter net system within the enclosed building such that the square footage available for the animal to travel within the enclosed building is halved.” However, in view of Brugh and Kunz and further explained in my analysis of Claim 14 under Grounds A and B, it is my opinion that Claim 2 would have been obvious to a POSA at the time of filing. *See* X.G, XI.H.

- L. Claim 3 – “The animal relocation method of claim 1 wherein the flushing device is used to guide the animal towards the animal relocation system by angling the flushing device to around a 40 degree angle and guiding the bird towards the animal relocation system.”**

146. Claim 3 recites that “the flushing device is used to guide the animal towards the animal relocation system by angling the flushing device to around a 40 degree angle and guiding the bird towards the animal relocation system.” As I have discussed above in relation to Elements [6c], [13d], [13e], Claims 15-16, and Elements [1j] and [1k], it would have been obvious to use a pole as a flushing device.

147. In my opinion, a POSA using a pole would necessarily hold the pole at a 40° angle for at least some period of time during flushing. For example, the pole would be angled at 40° when lifting the pole from the ground or where the flushing device would need to be angled to move around other objects (e.g., rafters, shelves, or the like). Thus, it is my opinion that Claim 3 would have been obvious in view of Brugh and Kunz.

- M. Claim 4 – “The animal relocation method of claim 1 wherein the perimeter net system and trapping net system are placed at a height above the floor of the enclosed building based on the species of animal being relocated.”**

148. It is my opinion that Claim 4 would have been obvious in view of Brugh and Kunz. Claim 4 recites placing the perimeter net system and trapping net system “at a height above the floor of the enclosed building based on the species of

animal being relocated.” The capture device of Brugh is configured for adaptation towards a rafter of a structure and therefore would be placed at “at a height above the floor of the enclosed building.” Ex-1008, ¶0008-0018, 0044, 0058, 0052, Fig. 1 (net above floor); Furthermore, Brugh notes steps of “determining the species” and “positioning the netting for capture based on the species.” *Id.* In view of this, it is my opinion that Claim 4 would have been obvious to a POSA in view of at least Brugh and Kunz.

N. Claim 5 – “The animal relocation method of claim 1 wherein the perimeter net system and trapping net system use mist nets.”

149. Claim 5 recites that “the perimeter net system and trapping net system use mist nets.” Both Brugh and Kunz disclose the use of mist nets as part of their capture systems. Brugh discloses that its net (6) can be “nylon or other plastic netting,” and Kunz discloses that mist nets are “braided nylon,” “the most commonly used devices for capturing flying bats,” and “may be deployed successfully at almost any site where bats are expected to fly.” Ex-1008, ¶0043; Ex-1010, 6-8. Furthermore, Brugh depicts as part of its capture device netting with pockets. Ex-1008, Fig. 1. In view of Brugh and Kunz, it is my opinion that a POSA would have thus found it obvious (and would have been motivated to) use a mist net in the perimeter net system and trapping net system.

XII. GROUND C: CLAIMS 1-16 ARE OBVIOUS IN VIEW OF BIRD BARRIER VIDEO AND KUNZ.

150. For the following reasons, it is my opinion that Claims 1-16 would have been obvious in view of the Bird Barrier Video, *Mist Net Kit Assembly and Use* Video (“Bird Barrier Video”) and Kunz.

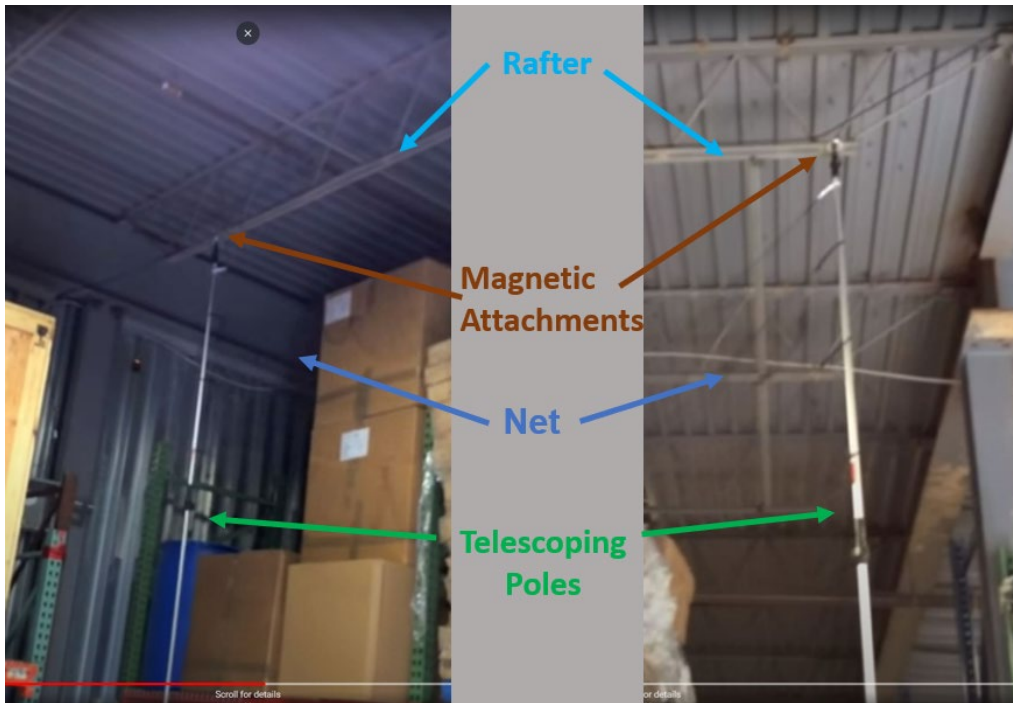
A. Overview of Bird Barrier Video.

151. I was instructed that the Bird Barrier Video was a video uploaded to YouTube on August 29, 2014 and would therefore constitute prior art over the ‘374 Patent. I was additionally provided screenshots and a complete transcript (Ex-1014) from the Bird Barrier Video. Based on my review, the Bird Barrier Video (Ex-1009) shows assembly and use instructions for erecting a mist net system. The video relates to Bird Barrier’s Mist Net Kit, a commercially available trapping kit for the removal of trapped birds and bats from a structure. *See also* Ex-1011, 1; Ex-1015, 24. In forming my opinion, I rely on the contents of the Bird Barrier Video, which generally describes hanging a mist net attached to two telescoping poles adjacent to the ceiling of a building by magnetically securing the poles to the rafters.

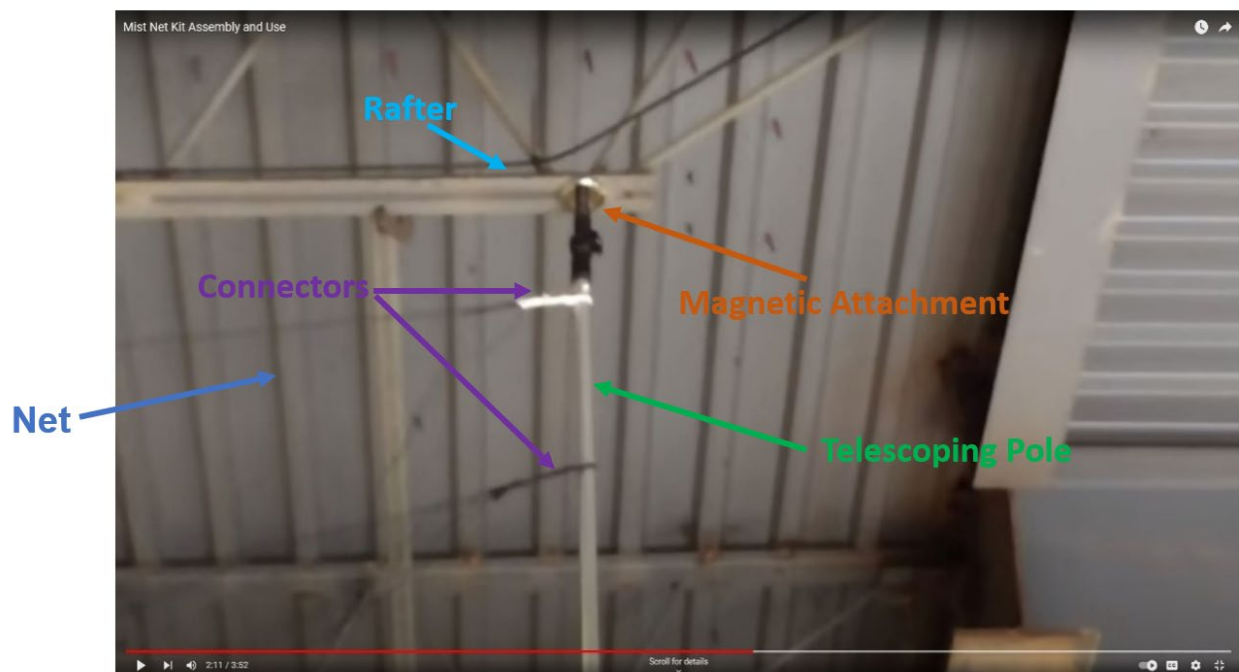
152. The video begins with general preparation of the netting system, including laying the mist net on the floor, folding the net to form horizontal pockets for capturing birds, and sliding each of the extension poles into several loops on each side of the net. Ex-1014, 1, Figs. 3-6. Once in place, the telescoping

poles are secured to the loops on each side of the mist net using strands of adhesive duct tape. Ex-1014, 1, Fig. 7. The operator in the video is shown securing a removable magnetic head to a pole, which is later used to secure the netting system to the rafters, at the top end of each of the poles. Ex-1014, Fig. 8. The top portion of the pole is then inserted into a receiving portion of the bottom pole section and locked in place at the desired height. Ex-1014, 1, Fig. 9.

153. Once at the desired height, the netting system is moved to a location in the building and each pole is raised towards a magnetic surface, such as a rafter, so that the magnetic attachments on the telescoping poles attach to the surface. Ex-1014, 1 Figs. 10-14. Below, are annotated screenshots from the Bird Barrier Video identifying some relevant features. The first image shows a combined illustration of Figures 11 and 13, which show attachment of the poles to the rafters at different sides of the same net. Ex-1014, Fig. 11, 13. Notably, each of the poles are secured to the rafter by the magnetic attachment. *Id.* In this view, the netting device is shown at the rafters along the perimeter of the structure. *Id.* The second image shows a closer view of the magnetic attachment secured to the rafter. *Id.*, Fig. 14.



Bird Barrier Video – Screenshot at 1:49 (right) & 1:59 (left) (annotated)



Bird Barrier Video – Screenshot at 2:11

154. After the bird is captured, the netting is lowered so that the animal can be removed and relocated outside of the building. Ex-1014, ¶3. The mist net and poles are then disassembled, and the system is stored for future use. Ex-1014, ¶¶3-4; 16-17.

B. Motivation for Combining Bird Barrier Video and Kunz.

155. The Bird Barrier video discloses a netting device for capturing birds trapped within a structure. As previously stated in my discussion of Brugh and Kunz, Kunz's capture techniques "should be equally suitable for ecological and behavioral studies of other terrestrial vertebrate." Ex-1010, ix. The capture device of the Bird Barrier Video, Therefore, it is my opinion that, both the Bird Barrier Video and Kunz analogously involve methods for capturing flying vertebrate.

156. Both Kunz and the Bird Barrier Video use similar techniques, such as the use of nets suspended between poles to capture flying vertebrates. Kunz describes mist nets (like the ones described in the video and the Challenged Patent) are also one of "the most commonly used devices for capturing flying bats" and "may be deployed successfully at almost any site where bats are expected to fly." Ex-1010 at 6, 8.

157. It is my opinion that a POSA would be motivated to combine the teachings of the Bird Barrier Video and Kunz to arrive at the claimed invention. As I mentioned above, Kunz is recognized as a leading treatise on the capture and

study of bats (and other flying vertebrates) and would have been well-known to a POSA. Ex-1022. I also note that the '374 Patent broadly defines its "Field," generally encompassing relocating animals with a "net system and various flushing techniques." Ex-1001, 1:8-12. In particular, the Bird Barrier Video is directed to the same field, relating specifically to the installation of a mist net system for capturing birds inside of a building. Ex-1014, 1, Fig. 2. Likewise, Kunz discusses the use of mist nets to capture bats (Ex-1010, 6, 8, 10-12) and discloses that its techniques are "equally suitable for ... other terrestrial vertebrate," which would include birds (Ex-1010, ix, *see also* 1). Indeed, both the Bird Barrier Video and Kunz disclose techniques for using mist nets and poles to capture flying vertebrates.

158. Accordingly, it is my opinion that a POSA would have been motivated to look to the teachings of both the Bird Barrier Video and Kunz with respect to the capture and relocation of flying vertebrates. Furthermore, for the reasons described below, it is my opinion that a POSA would have found it obvious to use and adapt the Bird Barrier Video mist net kit in accordance with the teachings of Kunz.

C. Claim 6

1. [6pre] – “An animal relocation system for relocating an animal in a structure, the system comprising”

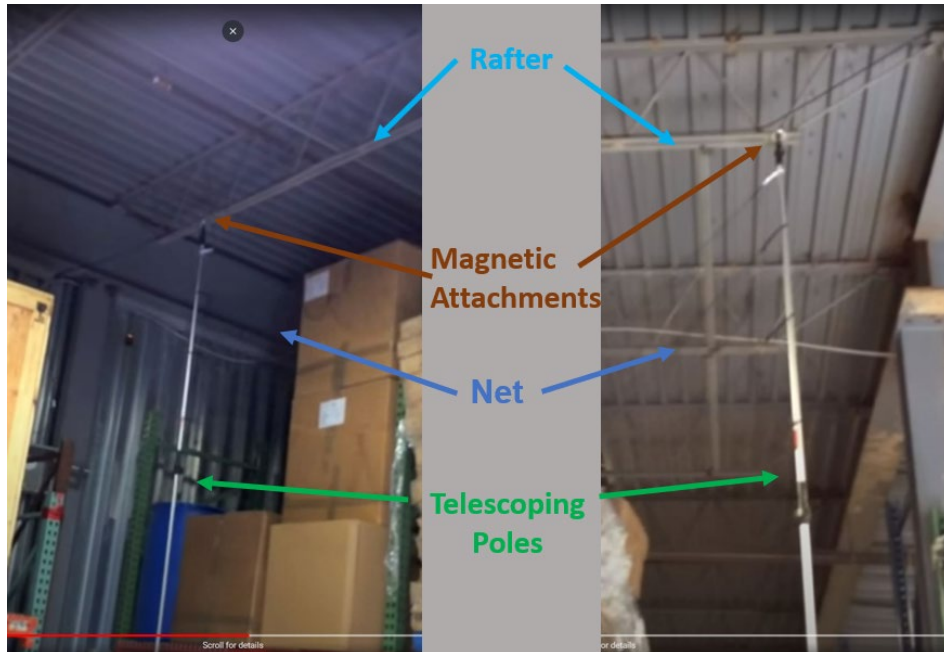
159. The Bird Barrier Video discloses a guide for installing a mist net kit in a building to capture birds. Once captured, the birds are removed from the netting and released outside. Ex-1009, 2:19-2:34; Ex-1014, ¶2, Fig. 15. In view of this, it is my view that the Bird Barrier Video and Kunz disclose “[a]n animal relocation system for relocating an animal in a structure,” as recited in Claim 6’s preamble.

2. [6a] – “a perimeter net;”

[6b] – “a trapping net wherein the trapping net comprises a first trapping net, a second trapping net, and a third trapping net;”

160. As discussed above, elements [6a] and [6b] recite that the animal relocation system of Claim 6 includes “a perimeter net” (i.e., at least one net capable of being placed along the outer perimeter of an enclosure) and three “trapping nets” (i.e., at least three nets that are each capable of trapping an animal). The Bird Barrier Video shows a mist net placed adjacent to the outer wall of a structure that is capable of trapping an animal. Ex-1009, 1:44-2:06; Ex-1014, Fig. 13. In view of the Bird Barrier Video expressly showing the net deployed adjacent to the perimeter wall of the structure having pockets for the purpose of trapping a flying animal, in my opinion it is clear that capture device taught by the Bird Barrier Video qualifies both as a trapping net and a perimeter net. As I explain further below, it is my opinion that a POSA would have found it obvious to

provide four of the capture devices from the Bird Barrier Video as part of an animal relocation system (e.g., one perimeter net and three trapping nets).



Bird Barrier Video – Combined Screenshot at 1:49 & 1:59

161. The Bird Barrier Video indicates that during installation, operators should “walk the completed net assembly to a target location near where the bird activity has been observed.” Ex-1009, 1:27-1:40; Ex-1014, ¶2. Under this teaching, a POSA would have found it obvious to provide four of the capture devices shown in the Bird Barrier Video, for example, in instances where **(i)** the flight pattern of a flying bird (or multiple birds) within a building includes (or is expected to include) four different locations or **(ii)** where four or more flying birds are present (or expected to be present) in the building.

162. Beyond this, a POSA would have understood that providing four or more of the Bird Barrier Mist Nets Kits as part of an animal relocation system would generally increase the probability of capturing flying birds within the building. *See* Ex-1039, 191 (“As net density is increased, capture probability of individual adults will increase...”); *see also* Ex-1017, 14; Ex-1026, 513; Ex-1042, 69-70. In order to speed up the time of a capture and thereby decrease the likelihood of potential disease transmission, a POSA would have routinely incorporated multiple nets to the capture system.

163. Further to this point, the Bird Barrier Video makes it clear that at least a single trapping/perimeter net can be provided to trap and relocate birds from a structure. The inclusion of four nets, as recited by the ‘374 Patent predictably increase the effectiveness of the capture system.

164. As previously discussed in VIII.A, a “perimeter net” would only need to be capable of being placed along the outer perimeter of an enclosure. Claim 6 does not require installing either the “trapping net[s]” (i.e., at least three nets that are each capable of trapping an animal) or “perimeter nets” (i.e., at least one net capable of being placed along the outer perimeter of an enclosure) at particular locations in the enclosure. Nevertheless, the Bird Barrier Video shows operators actually installing the capture device adjacent to the perimeter of a structure. Ex-1009, 1:28-2:11; Ex-1014, Figs. 12-13. Beyond this device shown in the Bird

Barrier Video (a perimeter net), it is my opinion that a POSA would find it obvious to install additional capture nets (such as three nets arranged along the interior of the building).

165. First, given the Bird Barrier Video's teaching that the capture device should be moved to a "target location near where the bird activity has been observed," a POSA would have it found obvious to place at least one of the Bird Barrier Video capture devices along a perimeter wall and at least three of the Bird Barrier Video's capture devices in other locations within a building in response to observing flight patterns in those four locations. Ex-1009, 1:21-1:44; Ex-1014, ¶1. Second, in my opinion, a POSA would have understood that placing the Bird Barrier Video's capture device proximal to a bird—with at least one capture device along a perimeter wall and at least three capture devices in other locations—would effectively shrink the area in which the bird is able to fly and thereby improve the likelihood of capture. Indeed, this is a matter of basic geometry and a predictable result of using multiple capture devices in a building. Additionally, as I have previously discussed, bats and other animals, tend to roost along the perimeter walls of a structure as they are more protected from frequent disturbances. Ex-1018, 81.

166. Accordingly, for at least the foregoing reasons, it is my opinion that a POSA would have found elements [6a] and [6b] obvious in view of the Bird

Barrier Video and Kunz to provide “a perimeter net” and “a trapping net wherein the trapping net comprises a first trapping net, a second trapping net, and a third trapping net,” as recited in elements [6a] and [6b].

3. [6c] – “a flushing device, wherein the flushing device is used to direct the animal into the trapping net.”

167. Although the Bird Barrier Video does not explicitly show a flushing device, it nevertheless would have been obvious to a POSA to incorporate the extension pole with a small hoop net attached as recited by Kunz to flush the animal into the trapping net for the similar reasons to those I discussed above in Claim 6 in Ground B. *See also* Ex-1010, 5.

168. Kunz’s extension pole is capable of being used by a handler to drive an animal from one location to another and is therefore a “flushing device”). *See* VIII.B. In my opinion, a POSA would have found it obvious (and would have been motivated) to dislodge a flying vertebrate using Kunz’s net-extension pole and drive it into the Bird Barrier Video’s mist net kit (rendering element [6c] obvious). Ex-1010, 5; Ex-1014, Fig. 15 (capturing bird).

D. Claim 7 – “The animal relocation system of claim 6, further comprising: the perimeter net comprising: a net and a telescoping pole, the net attached to the telescoping pole and the telescoping pole attached to the structure.”

169. As I’ve discussed above, the Bird Barrier Video shows a net that is both a “trapping net” and a “perimeter net.” Telescoping poles are further threaded

through loops on each side of the mist net and secured using tape to attach the net to the telescoping pole. Ex-1009, 0:37-0:58; Ex-1014, ¶1; Figs. 5-7. The Bird Barrier Video also shows removable magnetic attachments screwed at the top end of the telescoping pole. Ex-1009, 1:03-1:15; Ex-1014, ¶2; Fig. 8. The telescoping poles on each side of the mist net are then extended and moved towards the target location where the bird activity has been observed (the target location shown in the Bird Barrier Video is adjacent to the perimeter of the structure). Ex-1009, 1:15-1:44; Ex-1014, ¶2; Figs. 9-10, 12-13. From here, the operators are shown raising the poles so that the magnetic attachment secures to a magnetic surface on the building. Ex-1009, 1:44-2:11; Ex-1014, ¶2; Figs. 10-14.

170. Accordingly, it is my opinion that the Bird Barrier Video shows a perimeter net comprising a net attached to a telescoping pole and the telescoping pole attached to the structure.

E. Claim 8 – “The animal relocation system of claim 6, wherein the structure is less than or equal to 75,000 square feet, the animal relocation system comprising: the perimeter net comprising a first net and a second net.”

171. It is my opinion that a POSA also would have found it obvious to provide two perimeter nets (i.e., “the perimeter net comprising a first net and a second net”). As I’ve noted in my discussion of Claim 6, the Bird Barrier Video discloses that the capture device should be moved to a “target location near where the bird activity has been observed.” Ex-1009, 1:21-1:44; Ex-1014, ¶1. The Bird

Barrier Video's mist net kit is configured for capturing birds within a building and, in fact, shows this occurring in a warehouse. Ex-1009, 1:15-1:44; Ex-1014 Figs. 12-13. Because many of these buildings are less than or equal to 75,000 square feet, a POSA would have understood that the Bird Barrier Video mist net kit is capable of being used in these structures.

172. It is my opinion that a POSA would have it found obvious to use additional capture devices (for a total of five capture devices) in a variety of circumstances. For example, including where the flight pattern of flying vertebrate(s) within a building included five different locations or where five or more flying birds are present as well as to generally increase capture rate. *See* Ex-1039, 191 ("As net density is increased, capture probability of individual adults will increase..."); *see also* Ex-1017, 14; Ex-1026, 513; Ex-1042, 69-70.

173. It is further my opinion that a POSA would have found it obvious to place at least two of the Bird Barrier Video's capture devices along a perimeter wall of the building, particularly where the capture device displayed in the Bird Barrier Video is expressly placed along the perimeter. Ex-1009, 1:15-1:44; Ex-1014 Figs. 12-13. A POSA would have been motivated to do this in response to observing the flight pattern of flying bird(s) in such a location or for the purpose of shrinking the effective area in which an identified vertebrate can fly. Moreover, it is well established to place nets around the perimeter of an area of interest in order

to block available exits or to otherwise funnel the animals towards additional netting. *See* Ex-1018, 85 (“where larger areas must be covered, nets are more easily used and should be set around the edges parallel to the vegetation.”); Ex-1017, 13; Ex-1026, 513; Ex-1031, 134; Ex-1033, 200-201; Ex-1037, 205; Ex-1042, 69-70. As I previously noted, this setup is particularly advantageous as many species of bats and other flying animals tend to roost along the perimeter walls of a structure which are more protected from frequent disturbances. Ex-1018, 81.

174. Accordingly, it is my opinion that the Bird Barrier Video renders obvious “wherein the structure is less than or equal to 75,000 square feet, the animal relocation system comprising: the perimeter net comprising a first net and a second net,” as recited in Claim 8. Claim 8 is thus obvious in view of the Bird Barrier Video under § 103.

F. Dependent Claims 9-12

175. Dependent Claims 9-12 each recite relative orientations of the perimeter and trapping nets. Nevertheless, each of these orientations would have been obvious to a POSA in view of Bird Barrier Video.

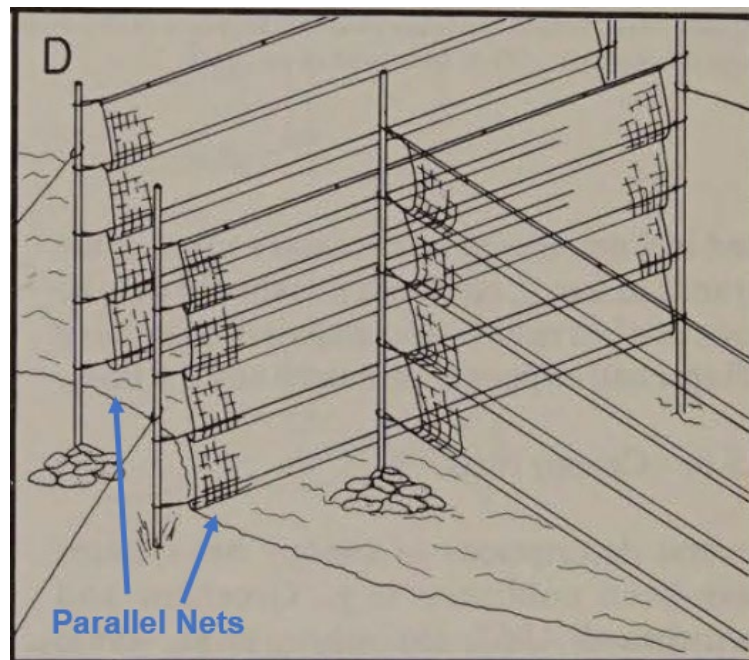
176. The Bird Barrier Video discloses that its capture device is configured for being hung from rafters (3) in a building’s ceiling (2). The hooks (9) of the capture device’s telescoping poles (5) are attached to the rafters (3), with the net (6) suspended between the poles (5). As a result, the orientation of the each hung

capture device is generally dictated by the orientation of the rafters (3). As a POSA would have appreciated, the rafters (3) “large box stores, warehouses, storage facilities, retail buildings and the like”—in which the Bird Barrier Video’s capture device can be used—are often straight and arranged in a grid (i.e., with each rafter either parallel or perpendicular to an adjacent rafter). In this regard, when installing multiple capture devices (for the reasons I have explained above for Claims 6-8), it is my opinion that a POSA would understand that the net (6) of any hung capture device would be parallel to (or perpendicular to) the net of the other hung capture devices.

177. Furthermore, the Bird Barrier Video indicates that during installation, operators should “walk the completed net assembly to a target location near where the bird activity has been observed.” Ex-1009, 1:27-1:40; Ex-1014, ¶2. In my opinion, a POSA would have appreciated from this teaching that a capture device’s net (6) should intersect the anticipated flight pattern of a targeted bird. Thus, a POSA would select the location and orientation of each capture device based on the anticipated flight pattern(s) of the bird and the orientation of the rafters from which the capture devices can be hung.

178. **Claim 9** depends from Claim 8 and recites “wherein the first net and second net are installed parallel to one another” (referring to the pair of perimeter nets recited in Claim 8). It would have been obvious to a POSA to install perimeter

nets parallel to one another in instances where (i) the flight pattern of flying vertebrate(s) was observed (or expected to be) along two locations of the same perimeter wall (or a parallel perimeter walls or (ii) where the observed/expected flight pattern otherwise required hanging of the Bird Barrier Video's capture device from parallel rafters. Moreover, Kunz confirms that multiple nets positioned parallel to one another are effective for vertebrate capture, which would have further motivated this orientation in combination with the Bird Barrier Video's disclosure. Ex-1010, 10-11, Fig. 4(D). Placement of netting around the perimeter in a parallel arrangement imposes a geometric boundary to enclosure the animal. See Ex-1018, 85 ("where larger areas must be covered, nets are more easily used and should be set around the edges parallel to the vegetation.").



Kunz – Fig. 4(D) (annotated)

179. Similarly, **Claim 12** depends from Claim 6 and recites “wherein the second trapping net is installed parallel to the perimeter net.” For the same reasons, it is my opinion that a POSA would have found it obvious to install one of Bird Barrier Video’s capture devices parallel to another of the trapping devices along perimeter wall (a perimeter net). It is my opinion that a POSA would have appreciated that an observed flight pattern or rafter orientation would frequently require this orientation.

180. **Claim 10** depends from Claim 9 and recites “wherein the trapping net is installed at a ninety-degree angle to the perimeter net,” while **Claim 11** depends from Claim 6 and recites “wherein the first trapping net is installed perpendicular to the perimeter net.” A POSA would have found it obvious to install one of the Bird Barrier Video’s capture devices (a trapping net) in an orientation perpendicular to (specifically, at a 90-degree angle to) another of the Bird Barrier Video’s capture devices along perimeter wall (a perimeter net). In particular, the Bird Barrier Video clearly depicts several rafters arranged in a grid-like formation, capable of supporting a capture device. Ex-1009, 1:44-1:49; Ex-1014, Fig. 10. It would have been obvious to include perimeter nets and trapping nets arranged following the orientation of the rafters, which includes, *inter alia*, two perimeter nets arranged in parallel as well as trapping nets perpendicular to and/or parallel

with the perimeter nets. A POSA would have appreciated that an observed flight pattern or rafter orientation would frequently require this orientation between trapping and perimeter nets.



Bird Barrier Video – Screenshot at 1:44

181. Accordingly, for at least these reasons, each of Claims 9, 10, 11, and 12 are obvious in view of the Bird Barrier Video under § 103.

G. Independent Claim 13

1. [13pre]

182. The Bird Barrier Video discloses a capture device for trapping birds within a building. Once captured, the birds are removed from the netting and released outside. Ex-1009, 2:19-2:34; Ex-1014, ¶2, Figs. 10-15. Thus, although the

preamble is not limiting, the Bird Barrier Video discloses “[a] method for relocating animals within a structure,” as recited in Claim 13’s preamble.

2. [13a]

183. For the reasons discussed above with respect to Claim 6’s preamble, the Bird Barrier Video discloses an animal relocation system. The Bird Barrier Video also provides instructions for assembling and using the animal relocation system. As such, it is my opinion that the Bird Barrier Video discloses “installing an animal relocation system” as recited in element [13a].

3. [13b]; [13c]

184. For the reasons discussed above with respect to Claim 6 (elements [6a] and [6b]) and Claim 8, a POSA would have found it obvious in view of the Bird Barrier Video and Kunz to provide at least two perimeter nets (e.g., two of the Bird Barrier Video’s capture devices hung along a perimeter wall) and at least one trapping net (e.g., a third capture device hung in an additional location within the building). *See* Ex-1009, 1:21-2:19; Ex-1014, 1; Figs. 10-14.

4. [13d]; [13e]

185. As explained above with respect to Claim 6 (element [6c]), a POSA would have found it obvious in view of the Bird Barrier Video to provide “a flushing device” as disclosed in Kunz. Furthermore, Kunz discloses that its extension pole is used to dislodge a roosted bat for the purpose of then trapping

that bat using netting. Ex-1010, 5 (discussing extension pole flushing device), 6-11 (discussing trapping bats using mist nets). Similarly, the Bird Barrier Video discloses that the purpose of its mist net is capturing birds. Ex-1009, 1:59-2:47; Ex-1014, Fig. 15. As such, it is my opinion that a POSA would have found it obvious to use the flushing device to “flush[] the animal through the structure wherein the flushing device chases the animal towards the perimeter net system and into the trapping net.”

H. Claim 14

186. For the reasons explained above with respect to Claim 6 and Claim 8, a POSA would have found it obvious to install the Bird Barrier Video’s capture device in several locations throughout a building, including at least two along perimeter walls and at least three in other locations. It is my opinion that a POSA would have understood that placing multiple capture devices proximal to a bird would effectively shrink the area in which the vertebrate is able to fly and thereby improve the likelihood of capture. Furthermore, A POSA would have found it obvious to hang the Bird Barrier Video’s capture devices “such that the square footage available for the animal to travel within the structure is halved” as (i) this would be a matter of basic geometry, (ii) would frequently occur simply as a function of placing the capture devices in the flight patterns of observed flying

vertebrates, and (iii) would have the entirely predictable result of improving the likelihood of capture. Ex-1009, 1:21-1:44; Ex-1014, ¶2; Figs. 11-12.

187. Accordingly, for at least the foregoing reasons, Claim 14 would have been obvious in view of the Bird Barrier Video and Kunz.

I. Claim 15 and Claim 16

188. Claim 15 depends from Claim 13 and recites “the flushing device further comprising an arm and a flusher,” while Claim 16 depends from Claim 15 and recites “wherein the flushing device arm comprises a telescoping arm.” Kunz discloses that roosting bats can be “dislodged with ... extension poles to which small hoop nets are attached” to aid in capture. Ex-1010, 5. In my opinion, a POSA would have recognized that Kunz’s extension pole is a “flushing device” as it is capable of being used by a handler to drive an animal from one location to another. Furthermore, a POSA would have regarded Kunz’s “extension pole” as both an “arm” (Claim 15) and a “telescoping arm” (Claim 16), or otherwise understood it to be a simple substitution. Moreover, a POSA would have recognized that Kunz’s “small hoop net” on the end of the extension pole is a “flusher” as it is configured to create noise, movement, or both when shaken or moved. *See* VIII.B.

189. As I previously explained above in relation to Element [6c], a POSA would have found it obvious (and would have been motivated) to dislodge a flying vertebrate using Kunz’s net-extension pole and drive it into the Bird Barrier

Video's mist net. *See also* Ex-1010, 5. Moreover, a POSA would have found it obvious to use the telescoping pole disclosed in the Bird Barrier Video for the same dislodging purpose. Ex-1014, ¶¶2-3; Figs. 6, 9, 10. And to the extent there is any doubt that Kunz's "hoop net" is a "flusher," a POSA would have found it obvious to substitute any device capable of making noise, approaching a vertebrate, or emitting light for the purpose of inducing flight. For example, one of the flushers and flushing devices described in fiberglass poles with strings of tape (Ex-1011, 1); plastic bags attached to a lath (Ex-1040, 34).

190. Therefore, it is my opinion that a POSA would have found it obvious (and would have been motivated to) to provide a flushing device "comprising an arm and a flusher," as recited in Claim 15. Specifically, a POSA would be motivated to use a flushing device having a "telescoping arm" as recited in Claim 16 in view of the combined teachings of the Bird Barrier Video and Kunz, for example, to flush a bird or bat in a difficult to reach place. Accordingly, it is my position that Claims 15 and 16 would have each been obvious over the Bird Barrier Video and Kunz.

J. Independent Claim 1

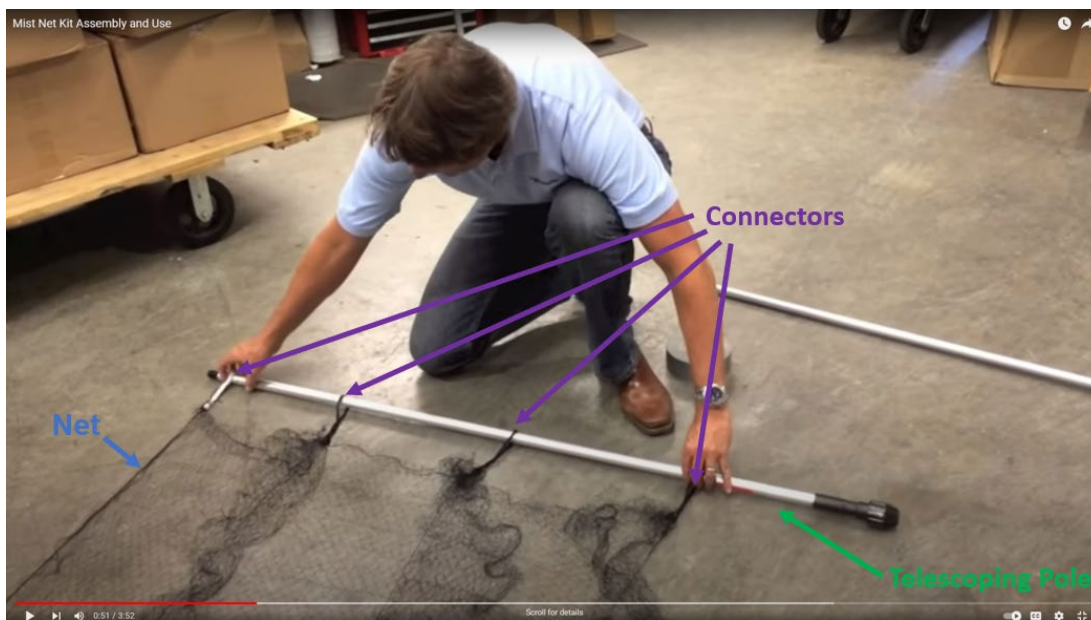
5. Element [1pre] and [1a]

191. It is my opinion that Claim 1's preamble would have been obvious to a POSA over the Bird Barrier Video and Kunz in accordance with my explanation for Elements [13pre] and [13a] under Ground C.

6. Perimeter Net System (Elements 1b-1e)

192. Claim 1 recites "a perimeter net system" that includes "two perimeter nets." It is my opinion that a POSA would have found it obvious to provide two perimeter nets as recited in *Element [1b]* for the same reasons I have discussed above for Claim 6 ([6a]), Claim 8, and Claim 13 ([13B]).

193. I also note that Claim 1 additionally recites that the perimeter nets include a variety of features (elements [1c]-[1e]), each of which is disclosed in the combination of the Bird Barrier Video and Kunz. As explained earlier, the Bird Barrier Video's mist net is a "perimeter net." As shown below, the first/second sides of the Bird Barrier Video's mist net include plurality of connectors ("loops"), as recited in *Element [1c]*. Ex-1009, 0:10-0:58; Ex-1014, Fig. 6.

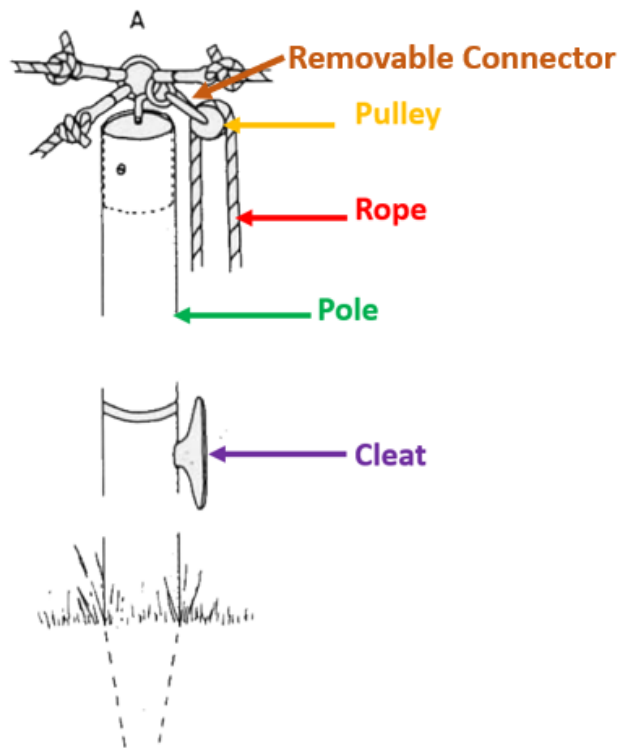


Bird Barrier Video –0:51 (annotated)

194. I note that the Bird Barrier Video discloses that its mist net is suspended between a pair of telescoping poles. Ex-1009, 1:15-2:11; Ex-1014, Figs. 10-13. Although the mist net is secured to the rafters by magnetic heads, it would have been conventional for a POSA to use a similar attachment means to secure the poles to a rafter. See Ex-1023, 41; 1024, 42; Ex-1032 (each depicting a commercially available mist net kit having both a magnetic attachment and an interchangeable hook attachment). It is my opinion that a POSA would have recognized a number of available options to secure the poles to a rafter and would have routinely adapted the poles with another known attachment feature to provide the same functionality, such as a “hook” as recited in Element [1d]. Furthermore, although the mist net is secured to the poles by loops, it would have been obvious

to a POSA to replace the loops with removable connectors (e.g., carabiners) as both are frequently used and provide the same functionality.

195. Additionally, Kunz discloses that mist nets can be secured to poles using “a removable connector,” “a rope,” a “pulley”, and a “cleat,” as recited in Element [1d]. Ex-1010, 13-15, Fig. 7. In my opinion, it would have been obvious to a POSA to modify the Bird Barrier Video’s mist net kit to include the rope/pulley/cleat/connector arrangement disclosed in Kunz to arrive at the features recited in Element [1d]. It is my opinion that a POSA would have been motivated to make this modification to allow for easy adjustment of the mist net position. As I explained above, a type of pulley system is routinely incorporated in mist netting setups to facilitate raising and lowering mist nets. *See* Ex-1041, Fig. 1; Ex-1031, Fig. 1. Incorporating a rope/pulley/cleat/connector to a mist net and pole device, such as the one shown in the Bird Barrier Video, would have been a simple modification in view of the skill in the art. Thus, it is my opinion that the combination of the Bird Barrier Video and Kunz discloses the features of *Element [1d]*.



Kunz – Fig. 7 (annotated)

196. Similarly, as discussed above, the Bird Barrier Video’s mist net kit—modified in view of Kunz—would have resulted in ropes and pulleys securing both sides of the net to their respective telescoping poles through removable connectors, as recited in Element [1e]. The Bird Barrier Video also discloses that its telescoping poles are secured to rafters. Ex-1014, Figs. 10-13. Furthermore, for the reasons I have explained above with respect to Claims 9 and 12, a POSA would have found it obvious to install first and second perimeter nets “parallel” to one another. *See* XII.F. Thus, the combination of the Bird Barrier Video and Kunz discloses the features of *Element [1e]*.

7. Trapping Net System (Elements 1f-1i)

197. Claim 1 also recites “a trapping net system” that includes first, second, and third “trapping nets.” In my opinion, a POSA would have found it obvious to provide three trapping nets as recited in *Element [1f]* nets for the same reasons explained with respect to Claim 6 ([6b]) under Ground C.

198. Claim 1 also recites trapping net features (Elements [1g]-[1i]) that are identical to those identified for the perimeter nets (Elements [1c]-[1e]). As explained earlier, the Bird Barrier Video’s mist net is also “trapping net” and, for the same reasons provided above regarding Elements [1c]-[1e], renders obvious (with Kunz) the trapping net features recited in *Elements [1g]-[1i]*.

199. I note that Element [1i] further recites that the first/second trapping nets are installed “parallel” to the first/second perimeter nets, and that the third trapping net is installed “at a ninety-degree-angle” relative to the first/second perimeter nets. As I discussed in my analysis of Claims 9-12 above, a POSA would have found it obvious to install the perimeter and trapping nets in these basic orientations (which in many cases are dictated by rafter orientations). *See XII.F*

8. Flushing Device (Elements 1j-1k)

200. Claim 1 also recites “a flushing device comprising a telescoping arm and a flusher” ([1j]) and “flushing the animal through the enclosed building wherein the flushing device chases the animal towards the perimeter net system

and into the trapping net” ([1k]). Elements [1j], [1k] would have been obvious to a POSA in view of the Bird Barrier Video and Kunz for the same reasons as I discussed in my analysis of Elements [6c], [13d], [13e] and Claims 15 and 16.

201. Accordingly, for at least the foregoing reasons, it is my opinion that Claim 1 would have been obvious over the Bird Barrier Video and Kunz.

K. Claim 2

202. Claim 2 recites placing the perimeter net system “such that the square footage available for the animal to travel within the enclosed building is halved.” For the reasons I explained with respect to Claim 14 under Grounds A and B, Claim 2 would have been obvious over Bird Barrier Video and Kunz. *See* XII.H.

L. Claim 3

203. Claim 3 recites “angling the flushing device to around a 40 degree angle and guiding the bird towards the animal relocation system.” For the reasons discussed above in relation to Elements [6c], [13d], [13e], Claims 15-16, and Elements [1j] and [1k] under Ground C, it would have been obvious to use a pole as a flushing device. In my opinion, a POSA using a pole would hold the pole at a 40° angle for some period of time during flushing (e.g., when lifting the pole) and during maneuvering of the flushing device. Therefore, it is my view that a POSA would find Claim 3 obvious over Bird Barrier Video and Kunz.

M. Claims 4 and 5

204. Based on the combined disclosure of Bird Barrier Video and Kunz, Claim 4 would have been obvious to a POSA. The Bird Barrier Video discloses positioning nets “at a height above the floor of the enclosed building based on the species of animal being relocated.” Ex-1014, Figs. 10-13. Claim 5 recites that “the perimeter net system and trapping net system use mist nets.” The Bird Barrier Video discloses that its net is a mist net. Ex-1009, 0:10-0:51; Ex-1014, Fig. 2. Accordingly, it is my opinion that a POSA would have found Claims 4 and 5 obvious under the combination of the Bird Barrier Video and Kunz.

XIII. CONCLUSION

205. The findings and opinions set forth in this declaration are based on my work and examinations to date. I may continue my examinations. I may also receive additional documentation and other factual evidence over the course of this proceeding that will allow me to supplement and/or refine my opinions. I reserve the right to add to, alter, or delete my opinions and my declaration upon discovery of any additional information. I reserve the right to make such changes as may be deemed necessary.

206. In signing this declaration, I recognize that the declaration will be filed as evidence in a contested case before the Patent Trial and Appeal Board of the United State Patent and Trademark Office. I also recognize that I may be

subject to cross-examination in the case and that cross-examination will take place within the United States. If cross-examination is required of me, I will appear for cross-examination within the United States during the time allotted for cross-examination.

207. I declare that all statements made herein on my own knowledge are true and that all statements made on information and belief are believed to be true, and further, that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under § 1001 of Title 18 of the United States Code.

Executed on: July 8, 2022

X 

Michael Chamberlain