

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAFE HAVEN WILDLIFE REMOVAL AND
PROPERTY MANAGEMENT EXPERTS LLC,

Petitioner

v.

MERIDIAN WILDLIFE SERVICES LLC,

Patent Owner

Case IPR2023-01341
Patent No. 10,154,663

**PETITIONER'S REPLY TO PATENT OWNER'S
PRELIMINARY RESPONSE**

Exhibit No.	Description
1001	U.S. Patent No. 10,154,663 (“the ’663 Patent”).
1002	File History for U.S. Patent No. 10,154,663.
1003	Bird Barrier, Mist Net Kit Assembly and Use, YouTube (Aug. 29, 2014), https://www.youtube.com/watch?v=yHtYi-vUFXs .
1004	Transcript and Screenshots of Bird Barrier, <i>Mist Net Kit Assembly and Use</i> , YouTube (Aug. 29, 2014), https://www.youtube.com/watch?v=yHtYi-vUFXs .
1005	@BirdBarrier, Twitter (Aug. 29, 2014, 2:48 PM), https://twitter.com/BirdBarrier/status/505426711324803072 .
1006	@BirdBarrier, Twitter (Sept. 2, 2014, 12:22 PM), https://twitter.com/BirdBarrier/status/506851686615244801 .
1007	Declaration of Karen Angell (August 9, 2023).
1008	Affidavit of Nathaniel E. Frank-White in IPR2022-01253 (dated June 30, 2022).
1009	Thomas H. Kunz et al., <i>Ecological and Behavioral Methods for the Study of Bats</i> 1-29 (1st ed. 1990).
1010	Gene Albanese et al., <i>An Inexpensive Elevated Mist Net Apparatus</i> , 24 N. Am. Bird Bander 129-134 (1999).
1011	William G. Sheldon, <i>A Method of Mist Netting Woodcocks in Summer</i> , 31 Bird Banding 130-135 (1960).
1012	Meridian’s Petition for <i>Inter Partes</i> Review of U.S. Patent No. 10,251,374 in IPR2022-01253.
1013	Declaration of Dr. Michael J. Chamberlain in IPR2022-01253.
1014	Decision Denying Institution of <i>Inter Partes</i> Review in IPR2022-01253.
1015	Safe Haven Letter Sent to Meridian on July 6, 2023.
1016	Safe Haven Charts Sent to Meridian on July 6, 2023.
1017	Safe Haven’s Patent Owner Preliminary Response in IPR2022-01253.
1018	U.S. Patent No. 117,729.
1019	U.S. Patent No. 7,191,907.
1020	Declaration of John F. Morrow, Jr. Pursuant to 37 C.F.R § 1.68 for <i>Pro Hac Vice</i> Admission under 37 C.F.R. § 42.10.
1021	Email to the Parties from the Board, dated December 7, 2023.

Pursuant to the Board's authorization (Ex. 1021), Petitioner Safe Haven timely submits this reply to Patent Owner's Preliminary Response (Paper 9).

I. Claim Construction

Patent Owner asserts that the Petition "fails to sufficiently identify how the challenged claims are to be construed as required by 37 C.F.R. § 42.104(b)(3)." Paper 9 at 9-12. The Petition, however, adhered to the Consolidated Trial Practice Guide (pages 44-45) by stating that Petitioner "does not propose any constructions for this proceeding." See Patent Trial and Appeal Board Consolidated Trial Practice Guide, 44-45 (Nov. 2019) ("On the other hand, a petitioner may include a statement that the claim terms require no express construction . . . [t]he petitioner may respond to any such new claim construction issues raised by the patent owner.").

Patent Owner nevertheless argues that this rule does not allow a petitioner to "ignore its burden to identify how the challenged claims are to be construed and unilaterally defer its claim construction arguments and evidence to a time of its choosing." Paper 9 at 11. Petitioner did no such thing, but instead accurately noted that the terms are clear on their face and require no express constructions. Now that Patent Owner has advocated for specific constructions, the Board has given Petitioner permission to respond through this reply, which Petitioner does below. Patent Owner's reliance on *Volkswagen Grp. of Am., Inc. v. Michigan Motor Techs., LLC*, IPR2020-00229, Paper 13 at 10 (P.T.A.B. July 6, 2020), is thus misplaced. *Id.*

(denying petition after noting that Petitioner was afforded an opportunity to respond to Patent Owner's constructions in its Reply *but failed to do so*).

A. “wherein the rope is configured to raise the entire bird netting to the upper portion of the plurality of poles in a deployed position to capture the flying vertebrate” (in Limitation 1.2.3)

Patent Owner asserts that the phrase “configured to raise the entire bird netting” must be construed to require “the capability to raise the entire bird netting *to prevent the netting from blocking activities on the floor of the building it is used in.*” Paper 9 at 15 (emphasis added). This argument fails for several reasons. First, the claims themselves contain no such requirement, and instead merely require that the rope be “configured to raise the entire bird netting to the upper portion of the plurality of poles in a deployed position to capture the flying vertebrate.” *See, e.g., Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir 2005) (“[T]he claim language is the most important source for a Court consider in construing the claim terms.”).

Second, Patent Owner's only support for reading this limitation into the claims comes from a single sentence from an Office Action in which Patent Owner argued that the claims provide for “the capability to raise the entire bird netting to prevent the netting from blocking activities on the floor of the building it is used in.” Paper 9 at 14. But not every statement made by the applicant will limit the interpretation of the patent claim. *Goodyear Dental Vulcanite Co. v. Davis*, 102 U.S. 222, 227 (1880). Indeed, the Federal Circuit has made clear that statements regarding

a claimed invention's perceived advantages over aspects of the prior art do not necessarily amount to a surrender of claim coverage unless they express a clear and unmistakable disavowal of coverage. *See, e.g., Purdue Pharma L.P. v. Endo Pharmaceuticals Inc.*, 438 F.3d 1123, 1136 (Fed. Cir. 2006) (declining to apply prosecution history disclaimer where, in discussing advantages over the prior art, patentee did not make a clear and unmistakable disavowal of claim scope); *Gemstar-TV Guide Int'l, Inc. v. Int'l Trade Comm'n*, 383 F.3d 1352 (Fed. Cir. 2004) (same). That rule should apply here because there was no clear and unmistakable disavowal of the plain and ordinary meaning – raising the entire netting to an upper portion of the poles. *See also Bayer AG v. Biovail Corp.*, 279 F.3d 1340, 1348 (Fed. Cir. 2002) (“[E]xtraneous limitations cannot be read into the claims from the specification or prosecution history.”).

Third, Patent Owner's proposed definition is overly subjective and invites confusion. Specifically, what type of activities must be blocked in order to meet the height requirement? Activities involving employees over 6' tall, or just 5'6" tall? And what if an activity (e.g., stocking a shelf) requires use of a ladder? Such unmoored subjectivity itself would render the claims indefinite.

For at least these reasons, Patent Owner's construction should be rejected, as the terms are straightforward and understandable on their face and require no express construction. *See, e.g., Summit 6, LLC v. Samsung Elecs. Co., Ltd.*, 802 F.3d 1283,

1291 (Fed. Cir. 2015). Notwithstanding the above, even if Patent Owner’s proposed construction is adopted, that would not affect the grounds of unpatentability set forth in the Petition. As the Petition makes clear, there is nothing novel about raising the entire netting to any particular height between two poles, which simply involves pulling the rope attached to the netting for a little bit longer. Paper 1 at 33.

II. Declaration of Dr. Michael J. Chamberlain (Ex. 1013)

Patent Owner attempts to hide from the prior testimony of its own expert, Dr. Chamberlain, through two arguments. First, Patent Owner argues that “Safe Haven cannot comply with 37 C.F.R. §§ 42.51-53” because Safe Haven cannot make Dr. Chamberlain available for cross-examination. 37 C.F.R. § 42.51(b)(1)(ii) requires “[c]ross examination of affidavit testimony *prepared for the proceeding*” in question. *Id.* It therefore does not control here because Dr. Chamberlain provided his declaration for Patent Owner *in a different proceeding* (IPR2022-01253).

From a more practical standpoint, the rule was designed to ensure that a party can cross-examine declarants who provide testimony for their opponents. *See* Patent Trial and Appeal Board Consolidated Trial Practice Guide, 23 (Nov. 2019). Such is not the case here. Dr. Chamberlain provided his declaration for Patent Owner and remains under contract with Patent Owner. *See* Ex. 1013 at 7; Ex. 2001 at ¶ 4. Patent Owner compensated Dr. Chamberlain for that declaration and surely could have obtained additional testimony from him for this proceeding if it desired.

Patent Owner next argues that Dr. Chamberlain's declaration is inadmissible hearsay. But pursuant to Fed. R. Evid. 801(d)(2)(B), a statement that is offered against an opposing party and is one the party manifested that it adopted or believed to be true is non-hearsay. *Id.* Applied here, Patent Owner manifested that it adopted or believed Dr. Chamberlain's declaration to be true by filing it with the USPTO in three prior proceedings. It is thus non-hearsay and admissible. *See Motionpoint Corp., Petitioner, v. Transperfect Glob., Inc.*, CBM2014-00060, Paper 41 at 23 (P.T.A.B. July 15, 2015) (finding prior declaration non-hearsay under 801(d)(2)(B) because it "was submitted by, and on behalf of, Patent Owner to the Patent Office, thus evidencing that Patent Owner manifested a belief that the statements contained therein were true."); *see also Pernix Ireland Pain Dac v. Alvogen Malta Operations Ltd.*, 316 F. Supp. 3d 816, 823-26 (D. Del. 2018) (citing cases).

At base, Patent Owner submitted Dr. Chamberlain's prior sworn testimony to the Board to advocate the very positions it now disputes. In response, rather than submit additional testimony from Dr. Chamberlain seeking to clarify or otherwise explain why his prior testimony does not support unpatentability, Patent Owner instead obtained a declaration from him in which he refuses to provide any additional testimony even though he remains under contract. *See Ex. 2001*, at ¶ 4. Although Dr. Chamberlain's prior testimony is not necessary to find the claims unpatentable, Patent Owner's attempted shielding of him speak volumes.

Respectfully submitted,

Dated: December 14, 2023

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

Lead Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e), I hereby certify that a true and correct copy of the foregoing Reply was served on Patent Owner via electronic mail at the following:

ckelly@mcciplaw.com
wthomas@mcciplaw.com
shri.abhyankar@alston.com

Dated: December 14, 2023

/Preston H. Heard/
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