

Filed on behalf of Bazooka-Farmstar, LLC

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC,
Petitioner,

v.

NUHN INDUSTRIES LTD.,
Patent Owner.

Case IPR2024-00098
U.S. Patent No. 11,541,708

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

Pursuant to the Board’s email of March 18, 2024, Petitioner submits its reply to Nuhn’s Preliminary Response (POPR) addressing Petitioner’s arguments concerning: (1) claim construction, (2) overlap with IPR2023-01161 (“the ’425 Patent IPR”), and (3) discretionary denial.

I. NUHN’S CLAIM CONSTRUCTION ARGUMENTS ARE WRONG

The ’708 Patent includes two different categories of claim terms identifying the position of the buoyant elements with respect to the wheels.

A. Claim 23 Necessarily Covers Centrally Located Buoyant Elements.

The first category is included in independent claim 23 and requires:

23. [A] first buoyant element situated between a first front wheel and a first rear wheel and a second buoyant element between a second front wheel and a second rear wheel

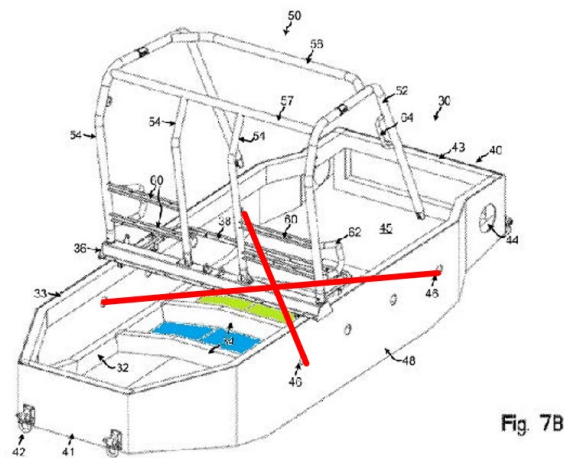
Claim 35 depends from independent claim 23 and requires that:

the first front wheel and the first rear wheel are on a first side of the vehicle and the second front wheel and the second rear wheel are on a second side of the vehicle.

Nuhn argues that, with respect to claim 23, a POSA would not interpret the first front wheel and the first rear wheel to be on opposite sides of the vehicle. *See* Paper 6 at 30. But Nuhn’s position is contradicted by the doctrine of claim differentiation, which states that “the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314-15 (Fed. Cir. 2005). Because claim 35 adds the further limitation that the first front

wheel and the first rear wheel be on the same side of the vehicle, a POSA would have understood that claim 23 does not require this limitation. Thus, contrary to Nuhn's arguments, the space between the first front wheel and the first rear wheel includes the space extending diagonally across the vehicle. *See* Paper 6 at 30.

Nuhn argues that claim 23 would not cover buoyant elements centrally located on the vehicle. However, as properly construed, claim 23 *does* cover buoyant elements located centrally on a vehicle because it covers situations where the first front wheel is located diagonally across the vehicle from the first rear wheel. Thus, for example, Bennett-II anticipates claim 23 (*see* Paper 2 at 34-37):



EX1017, FIG. 7B (annotated).

B. Nuhn's Overly Restrictive Interpretation of "Between" in Claims 17, 21, and 23 Is Contradicted by the Intrinsic Evidence.

The remaining buoyant element positional terms using "between" in claims 17 and 21 are like claim 23 but further require that the first front wheel and rear wheel are on the same side, and that the second front wheel and rear wheel are on

the same side. However, regardless of any distinction between claims 23 and these remaining terms, a POSA would have understood, based on the intrinsic evidence, that “between” does not require intersecting a line drawn between two points.

Nuhn argues that claims 17, 21, and 23 do not cover buoyant elements centrally located on the vehicle or buoyant elements located outboard of the wheels. Nuhn attempts to rewrite its claims to require *at least a portion* of the buoyant element intersects the rectangular space “between” defined by the outer bounds of the wheels on one side of the vehicle. But this is not the language Nuhn used, and such a definition still does not save Nuhn’s claims as such location of buoyant elements would have been an obvious design choice. Regardless, the intrinsic evidence does not support such a narrow interpretation of this term. The written description of the ’708 Patent does not describe the buoyant elements as being between the wheels, and the prosecution history never discusses this term.

The only piece of intrinsic evidence using the term “between” when referring to the position of the wheels demonstrates that Nuhn’s interpretation is too narrow. U.S. Application No. 2010/0144220 to Bailey (“Bailey”) is cited on the face of the ’708 Patent. *See Phillips*, 415 F.3d at 1317 (“‘[I]ntrinsic evidence,’ . . . includes the prior art cited during the examination of the patent.”).

Bailey describes how “FIG. 6 shows . . . [t]wo pairs of intermediate axles [red] supporting wheels 128 are located *between* the front and rear wheels 124, 126

[yellow] . . .” Bailey, ¶[0033]. This is consistent with FIG. 1 of the ’708 Patent, in which, when the wheels 3, 4 are lowered below the plane of the buoyant elements 2 to engage the ground, the buoyant elements 2 remain between the wheels 3, 4.

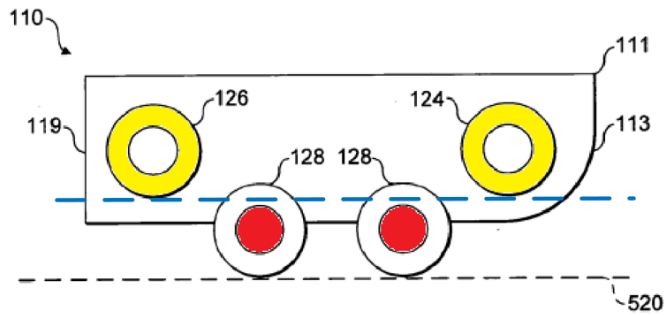


FIG. 6

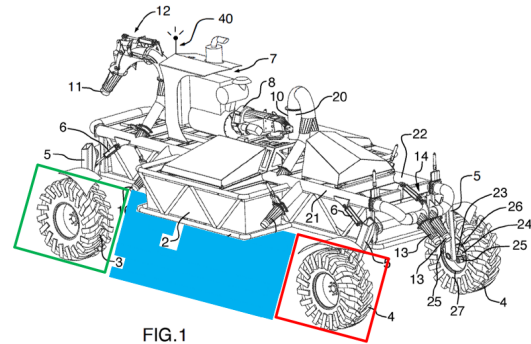


FIG. 1

Id., FIG. 6 (annotated); EX1001, FIG. 1 (annotated).

Bailey describes that the red axles are between the yellow first front wheel and the yellow first rear wheel. ***But the red axles do not intersect the blue line drawn from the yellow first front wheel to the yellow first rear wheel***, as Nuhn’s interpretation would require. Thus, as shown in FIG. 6, Nuhn’s overly narrow interpretation of this claim term is contradicted by the intrinsic evidence, which does not require “between” as meaning intersecting a line between two points.

In view of the intrinsic evidence, a POSA would have understood that the meaning of the term “between” is not as narrow as Nuhn proposes. Thus, a POSA would have understood that each of the SenwaTec, Truxor, and Puck combinations would include buoyant elements positioned between the front wheels and the rear wheels. Paper 2 at 48, 65-66, 85-86.

C. Claims 17, 21, and 23 Are Obvious Even Under Nuhn’s Overly Restrictive Interpretation.

Even under Nuhn’s overly restrictive interpretation, claims 17, 21, and 23 are obvious. SenwaTec describes a “6-wheel vehicle” with a center wheel *between* each of the front wheels and rear wheels. EX1012, 3. A POSA would have understood that wheels include tires with air, which would be buoyant elements.



Id., 1 (annotated).

And a POSA would have understood that the natural location for positioning the wheels in each of the Truxor and Puck combinations would have resulted in the buoyant elements being situated “between” the wheels. Paper 2 at 65-66, 85-86

II. NUHN’S ARGUMENTS WERE ALREADY REJECTED IN THE ’425 PATENT IPR INSTITUTION DECISION

In its POPR, Nuhn continues to rehash many of the same arguments that were already rejected in the ’425 Patent IPR institution decision, including arguments regarding: (1) the level of ordinary skill (rejected in ’425 Patent IPR, Paper 12 at 7-9), (2) the motivation to combine Truxor or SenwaTec with remote control (*id.* at

18-21, 23), (3) the ability of the Truxor and SenwaTec pumps to pump liquid manure (*id.* at 16-18, 23-24), and (4) the motivation to combine Puck with Bryham’s wheels (*id.* at 30-34). Additionally, as outlined below, Nuhn’s arguments regarding §325(d) were already rejected.

III. DISCRETIONARY DENIAL IS NOT APPROPRIATE

A. Section 325(d) Denial Is Not Appropriate

Bazooka never filed any prior post-grant challenges against the ’708 Patent. Nuhn faults Bazooka for filing its ’708 Petition after its now-instituted ’425 Patent petition and ’835 Patent petition, but the staggered schedule is Nuhn’s fault by obtaining its patents serially and suing Bazooka on these patents in separate lawsuits (asserting the ’425 Patent on July 20, 2022, the ’835 Patent on November 8, 2022, and the ’708 Patent on January 3, 2023). Bazooka’s IPR petitions mirror this timing.

Further, the Board already found that, when considering Puck and Bryham (with or without Bennett-II), “the Office erred in a manner material to the patentability of the challenged claims” ’425 Patent IPR, Paper 12 at 38. And when considering Truxor, SenwaTec, and Yoon, the Board found that the references “do not appear to be cumulative” to the art of record and are capable of pumping liquid manure. *Id.* at 40; *see also id.* at 17, 23-24.

Finally, the Nuhn Reference is not cumulative, *at least* because it is the only pump of record that is described as being remotely controlled (not to mention the

dual tangential outlets to a combiner). Despite this, Nuhn argued that implementing remote control “functionality from a distance would be a **major problem**” (Paper 6 at 59), while its own Nuhn Reference shows that this functionality was well known in the art.

B. *Fintiv* Denial Is Not Appropriate

The *Fintiv* factors also weigh in favor of institution. Bazooka filed a *Sotera*-style stipulation. Thus, discretionary denial is prohibited. See USPTO, Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation, at 3 (June 21, 2022).

Bazooka’s stay motion is still pending in the district court. Additionally, there is no trial date, and the Court is unlikely to set one soon. Fact discovery does not close until June 27, 2024, which will likely be extended. The Court also postponed ruling on other preliminary motions, including Bazooka’s Motion to File Amended Counterclaims, Nuhn’s Motion to Dismiss, and Bazooka’s Motion for Judgment on the Pleadings, which were fully briefed between seven and eleven months ago. Nor has the court set any deadlines for expert discovery or dispositive motions.

Finally, the instituted ’425 Patent petition includes much of the same prior art as the ’708 Patent petition, demonstrating its strength on the merits. The ’425 Patent institution also makes the PTAB the most efficient venue for resolving Bazooka’s invalidity challenges, as the ’708 Patent shares a specification and similar claims.

Respectfully submitted,

MERCHANT & GOULD P.C.

Date: March 25, 2024

/Thomas J. Leach/

Thomas J. Leach

Registration No. 53,188

Robert A. Kalinsky

Registration No. 50,471

Michael A. Erbele (*pro hac vice*)

Taylor R. Stemler

Registration No. 79,777

MERCHANT & GOULD P.C.

150 South Fifth Street, Suite 2200

Minneapolis, MN 55402

TLeach@merchantgould.com

RKalinsky@merchantgould.com

MErbele@merchantgould.com

TStemler@merchantgould.com

Jeffrey D. Blake

Registration No. 58,884

MERCHANT & GOULD P.C.

191 Peachtree Street NE, Suite 3800

Atlanta, GA 30303

JBlake@merchantgould.com

(Trial No. IPR2024-00098)

ATTORNEYS FOR PETITIONER

CERTIFICATION OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e), that service was made on Counsel for Patent Owner as detailed below.

Date of service:	March 25, 2024
Manner of service:	Electronic mail addressed to: bluchsinger@harnessip.com syackey@harnessip.com mcutler@harnessip.com
Documents served:	Petitioner's Reply to Patent Owner's Preliminary Response
Persons served:	James B. Luchsinger HARNESS, DICKY & PIERCE P.L.C. 5445 Corporate Dr., Suite 200 Troy, MI 48098 Phone: 248-641-1600 Fax: 248-641-0270 bluchsinger@harnessip.com Scott E. Yackey HARNESS, DICKY & PIERCE, P.L.C. 2801 Network Blvd., Suite 600 Frisco, TX 75034 syackey@harnessip.com Matthew L. Cutler HARNESS, DICKY & PIERCE, P.L.C. 7700 Bonhomme, Suite 400 Clayton, MO 63105 mcutler@harnessip.com

/Thomas J. Leach/
Thomas J. Leach, Reg. No. 53,188