

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC,

Petitioner,

v.

NUHN INDUSTRIES LTD.,

Patent Owner.

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

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

I. Nuhn's Claim Construction of the "Situated Between" Limitation is Correct and Should be Adopted in this Proceeding

Bazooka argues that Nuhn's claim construction for the limitations of the '708 Patent that require buoyant elements "situated between" respective rear and front wheels is incorrect. Bazooka fails, however, to offer its own interpretation of that limitation. Without having a position on what "situated between" means in either the Petition or the Reply granted by the Board, Bazooka cannot meet its burden.

Bazooka only argues, in its Reply, that Nuhn's construction is wrong and that a strawman definition that it conjures is also wrong. Nuhn's proposed construction is "a buoyant element is positioned in the space between the front and rear wheels on each of the right and left sides of the vehicle body." Patent Owner Preliminary Response ("POPR") at 24. The POPR sets forth the evidence supporting this construction. POPR at 23-26. Bazooka does not address any of those citations. This includes Bazooka's failure to address the annotated version of Figure 3 of the '708 Patent that plainly shows the buoyant elements "situated between" a respective front and rear wheel. POPR at 24. Instead, Bazooka erroneously states, in conclusory fashion, that "[t]he written description of the '708 Patent does not describe the buoyant elements as being between the wheels..." Reply at 3. This statement is demonstrably false in view of the evidence in the POPR, including Figure 3.

Bazooka's position is also incorrect in view of the claim language itself. The claims state that the buoyant elements are *situated* between the respective front and

rear wheels. “Situating,” which must be given some meaning, conveys the location of the buoyant members relative to the front and rear wheels of the vehicle. Bazooka’s position that the buoyant elements do not have to be located in the space between the front wheel and the rear wheel reads “situating” out of the claims.

Nuhn’s proposed construction is also supported by the Expert Declaration of Douglas Prairie (EX2004). In that declaration, Mr. Prairie explains that Nuhn’s proposed construction is supported by the claim language itself, the specification, and drawings. EX2004 at ¶79. Mr. Prairie then explains how a POSITA would understand the orientation of the first and second front wheels as compared to the first and second rear wheels. *Id.* at ¶¶79-81. Lastly, Mr. Prairie discusses the buoyant elements and explains how Figure 3 demonstrates the location of those buoyant elements. *Id.* at ¶82. Specifically, Mr. Prairie explains that one buoyant element 2 is situated in the space between a first front wheel 3 and a first rear wheel 4 on the right side of the vehicle and another buoyant element 2 is situated in the space between a second front wheel 3 and a second rear wheel on the left side of the vehicle. *Id.*

In its Reply, Bazooka fails to address any of this evidence that establishes that Nuhn’s proposed claim construction is correct.

Oddly, what Bazooka does attempt is to create a strawman claim construction argument...that it then states is also wrong. Specifically, at page 3 of the Reply, Bazooka states that “...a POSA would have understood, based on the intrinsic

evidence, that ‘between’ does not require intersecting a line drawn between two points.” Reply at 3. Neither party has offered this definition as a claim construction for the “situated between” limitation.

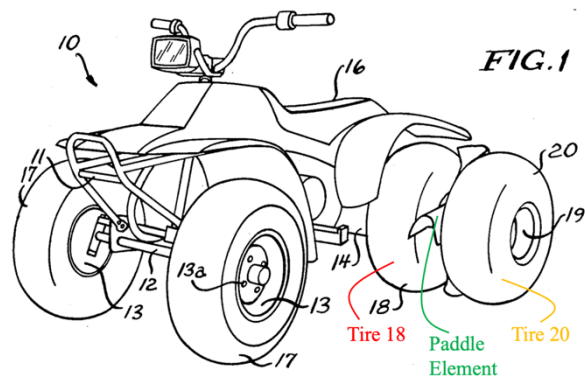
Using this conjured, yet apparently incorrect, definition, Bazooka digs deep through the prosecution history to find a single patent, Bailey, that it says is “the only piece of intrinsic evidence using the term ‘between’ when referring to the position of the wheels...” Reply at 3. Bazooka’s argument is wrong for at least three reasons. First, Bazooka’s argument is irrelevant given that the relevant claim language is “*situated* between,” not merely “between,” as referenced above. Second, in analyzing Bailey, Bazooka uses its irrelevant, conjured strawman claim construction that neither party has advanced. As such, its argument is also irrelevant.

Third, Bazooka artificially narrows the inquiry to use of “between” when referring to the position of the wheels. If there is any relevance to this line of inquiry into cited prior art at all, there is no reason (except expediency for Bazooka) to limit the uses of “between” to only referring to the position of the wheels. As one might expect, as a very common word, the word “between” is used often in the prior art cited in the ‘708 Patent prosecution history and many of those references support Nuhn’s proposed construction of an element in the space between a first object and a second object (and, counter to Bazooka’s statement, at least one reference uses “between” in the context of a space between two wheels, as proposed by Nuhn). *See*,

e.g., U.S. Pat. No. 5,176,098 at 1:7-10 (“In such a craft the wheel would need to be retractable or easily adjustable for height between a lowered position in which it would engage the ground for land use and a retracted position.”); U.S. Pat. No. 2,586,218 at 3:36-38 (“A shock absorbing spring 27 is housed between each set of cylinders as shown.”); U.S. Pat. No. 4,744,324 (discussed in the Background of U.S.

Patent No. 7,833,071 at 1:44-48: “...a conversion kit that uses rear axle extensions to mount outer rear wheels and radial paddle elements *between* the inner and outer rear wheels.”) (coloring and emphasis added).

See also Figure 1 of the ‘324 Patent, at right.



In view of the above, uncontroverted evidence from Nuhn, Nuhn’s proposed construction for the “situated between” limitation should be adopted for independent claims 17, 21, and 23, and the claims that depend therefrom. That is, the proper construction is “a buoyant element is positioned in the space between the front wheel and the rear wheel on each of the right and left sides of the vehicle body.”

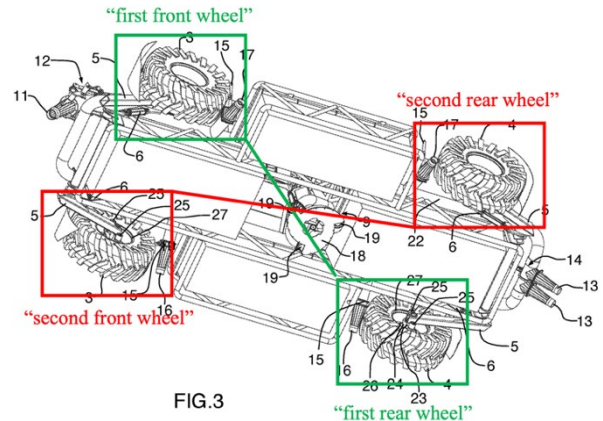
Relative to claims 17 and 21, Bazooka offers has no argument regarding the plain language of those claims, as best illustrated in the annotated version of Figure 3, that require one buoyant element located in the space between the front and rear wheels on one side of the vehicle and the other buoyant element located in the space

between the front and rear wheels on the opposite side of the vehicle. Instead, Bazooka simply tries to ignore that inconvenient language and sweep those claims into a faulty claim differentiation argument relating to claim 23. But that claim differentiation argument plainly does not apply to claims 17 and 21 because there is no claim that is dependent from claims 17 or 21 that provides Bazooka with such an argument relative to these claims. As such, when the “situated between” language is properly construed, the patentability of claims 17-22 should be confirmed.

Regarding claim 23, claim differentiation is a tool for use in claim construction, but not an absolute rule. *Nomos Corp. v. BrainLAB USA, Inc.*, 357 F.3d 1364, 1368 (Fed. Cir. 2004) (referring to claim differentiation as “a guide, not a rigid rule”). That is, even if claim differentiation could arguably apply in the comparison of claims 23 and 35, that does not necessitate that Nuhn’s proposed construction of “situated between” is improper for claims 17-22 of even claims 23 and 35.

In this case, Bazooka is seeking to improperly broaden claim 23 beyond its correct scope through claim differentiation arguments. *Curtiss-Wright Flow Control Corp. v. Velan, Inc.*, 438 F.3d 1374, 1381 (Fed. Cir. 2006) (“claim differentiation can not broaden claims beyond their correct scope.”). But to read the claims as advocated by Bazooka ignores how a POSA would understand the claims and leads

to an illogical result that is outside the correct scope of the claims. Referring to an annotated version of Figure 3, at right, Bazooka's position requires an illogical orientation of the first front and rear wheels and second front and rear wheels on opposite, at caddy-corner ends of the vehicle.



Nothing in the specification of the '708 Patent would support that the above configuration was ever contemplated by the inventor or that a POSITA would find reason to flip-flop the naming convention for what they considered as the "first" and "second" wheel when moving from the front set of wheels to the rear set of wheels. As set forth in the POPR and Mr. Prairie's declaration, the '708 specification only discloses a configuration whereby the first front wheel and the first rear wheel are on one side of the vehicle and the second front wheel and the second rear wheel are on the opposite side of the vehicle. POPR at 23-26; EX2004 at ¶¶79-81. Further, Mr. Prairie opined that "a POSITA would find it illogical and would not interpret the first front wheel and the first rear wheel as being on opposite sides of the vehicle body." EX2004 at ¶77. Bazooka did not respond to any of this evidence.

In a last-ditch attempt, Bazooka attempts to interject a new argument that the middle wheel in the SenwaTec vehicle is the "buoyant" element. Reply at 5. This argument is conclusory attorney argument, was not made in the Petition, and cites

to no evidence in support (because there is none). SenwaTec has buoyant elements, and they are outboard of SenwaTec's wheel. If the wheels of SenwaTec, let alone only the middle wheels, could be considered buoyant elements, then the actual buoyant elements disclosed in SenwaTec would be superfluous. Nothing in SenwaTec, or the '708 Patent, remotely suggests that wheels and buoyant elements refer to the same thing. Bazooka's argument is irreconcilable with the language of the '708 Patent and the claims that recites buoyant elements separately from the wheels. A POSITA would understand these to be two different structures because they have two different names and Bazooka's attempts to read "buoyant elements" out of the claims since its argument would only require a vehicle with wheels.

In short, Nuhn's proposed construction of the "situated between" limitation is correct and the claims 17-38 should be confirmed as patentable.

II. The Board Should Discretionarily Deny Bazooka's Petition

Bazooka's argument regarding why the Board should not discretionarily deny its Petition is largely based on the fact that the Board did not discretionarily deny a related patent (the '425 Patent). But the claims of the '708 Patent are materially different than those previously considered and the litigation is at a later (unstayed) stage. As such, Nuhn reiterates the arguments set forth in the POPR as the reasons why this Petition should be discretionarily denied.

Dated: April 1, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the page limit set forth by the Board.

The undersigned further certifies this brief complies with the typeface requirements of 37 C.F.R. § 42.6(a)(2)(ii) and typestyle requirements of 37 C.F.R. § 42.6(a)(2)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in Times New Roman 14-point font.

Dated: April 1, 2024

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. 42.6(e), I certify that on this 1st day of April 2024, a true and correct copy of the foregoing **PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE** was served by electronic mail on Petitioner's lead and backup counsel at the following addresses:

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