UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TOYOTA MOTOR CORPORATION

Petitioner

v.

Patent of AMERICAN VEHICULAR SCIENCES

Patent Owner

Patent No. 6,738,697

Issue Date: May 18, 2004

Title: TELEMATICS SYSTEM FOR VEHICLE DIAGNOSTICS

PATENT OWNER'S AMENDED OBJECTIONS TO EVIDENCE SUBMITTED BY TOYOTA MOTOR CORPORATION

Case No. IPR2013-00412

Pursuant to 37 C.F.R. § 42.64 and the Initial Conference Call on February 3, 2014, Patent Owner American Vehicular Sciences ("AVS") serves and submits the following amended objections to evidence served with the Petition by Toyota Motor Corporation ("Toyota") for *Inter Partes* Review of U.S. Pat. No. 6,738,697 ("the '697 patent"). These amended objections supersede AVS's prior objections to evidence served and submitted on January 27, 2014. (Paper No. 21.)

1. EXHIBIT 1002 (FRY REFERENCE)

AVS objects to the admissibility of K.N. Fry, "Diesel Locomotive Reliability Improvement by System Monitoring," Proc. Instn. Mech. Engrs. Vol. 209, 3-12 (1995) ("Fry") because Toyota has not sufficiently established that Fry is prior art to the '697 patent. For that reason, Fry is irrelevant pursuant to Fed. R. Evid. 402. *See, e.g., Nordock Inc. v. Systems Inc.*, 2013 U.S. Dist. LEXIS 34661 (E.D. Wis. Mar. 13, 2013) ("Because insufficient evidence has been presented regarding the dates of the two publications, they are not admissible as prior art and Nordock's motion to exclude 'undated' and 'unpublished' references from evidence as asserted 'prior art' references is granted."); *Amini Innovation Corp. v. Anthony California, Inc.*, 2006 U.S. Dist. LEXIS 100800 (C.D. Cal. Sept. 21, 2006) ("Without knowing the publication dates, the documents are not admissible as prior art."). In addition, AVS objects to a 2013-dated Internet cover page and abstract of Fry that Toyota submitted as part of Exhibit 1002. Those documents

are inadmissible hearsay under Fed. R. Evid. 801 and 802 as to the alleged publication date of Fry, and lack authenticity or reliability under Fed. R. Evid. 901.

Specifically, Toyota acknowledges that the '697 patent claims priority to June 7, 1995. (*See* Petition at p. 5, fn. 2.) Toyota argues only that claims 19, 20, and 40 of the '697 patent, which relate to GPS location identification, have a later effective filing date of June 19, 2002. The presumed §102(a) date for all other claims, therefore, is June 7, 1995. The Fry reference, however, indicates only that it was published in "1995," without a more specific date. (*See* Exhibit 1002.) The publication date of "1995" indicated on the face of Fry could mean that it was published in the middle or end of the year. Indeed, the Fry reference discloses on its face that it was not accepted for publication until December 22, 1994, making it highly unlikely that the reference was published and publicly available by January 1, 1995. (*See* Exhibit 1002.) Accordingly, absent evidence that Fry was, for example, publicly accessible at a library prior to June 7, 1995, it cannot constitute §102(a) prior art to the '697 patent.

Toyota nevertheless asserts that because a third-party website later recorded the publication date as being January 1, 1995, that this is the actual date of publication. (*See* Petition at p. 5.) In particular, a cover page and abstract from Sage Publications downloaded by Toyota in 2013 indicate a "version of record"

date for Fry of January 1, 1995 and cite the reference with a January 1995 date. (*See* Ex. 1002 at pages 1, 13.)

Toyota has not shown, however, that January 1, 1995 is the date Fry was actually publicly available, as opposed to being merely a recording convention of Sage Publications in its 2013 database (*e.g.*, for articles that do not identify a specific date of publication, but identify only a year). (*See id.*) *See also, e.g.*, *Carella v. Starlight Archery*, 804 F.2d 135, 139, 231 USPQ 644, 647 (Fed. Cir. 1986) (as to an advertisement mailed on a certain date, "[n]o evidence was presented as to the date of receipt of the mailer by any of the addressees."); *DH Technology, Inc. v. Synergystex International, Inc.*, 1994 U.S. Dist. LEXIS 5301 (N.D. Calif. 1994) ("the June 1989 notation on the manual's cover does not identify the date in June 1989 on which the manual was published, or if the manual was actually published in June 1989"); *Mannesmann Demag Corp. v. Engineered Metal Products Co.*, 226 USPQ 466, 468-70 (D. Del. 1985) , *aff'd*, 793 F.2d 1279 (Fed. Cir. 1986) (Section 102(b) bar critical date was June 26, 1977; as to a printed brochure with a "6.77" date mark, the evidence did not show that it was actually accessible to the public prior to the critical date).

Further, to the extent that Toyota is relying on the cover page and abstract for the truth of the alleged publication date, they constitute inadmissible hearsay that does not fall within one of the permissible exceptions. *See* Fed. R. Evid. 802.

See also United States v. Jackson, 208 F.3d 633, 637 (7th Cir. 2000) (web postings from the Internet were inadmissible hearsay); *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Texas 1999) ("Any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretations of the hearsay exception rules.").

2. EXHIBIT 1007 (AVS'S LITIGATION INFRINGEMENT CONTENTIONS)

AVS objects pursuant to Fed. R. Evid. 402 ~~and 403~~ to the admissibility of Exhibit 1007, AVS's infringement contentions in the district court litigation between AVS and Toyota in the Eastern District of Texas. Toyota only attempted to rely on AVS's non-final, pre-discovery litigation positions as alleged admissions dispositive of the priority dates of the '697 patent claims. (*See*, *e.g.*, Petition at p. 5.) The Board, however, did not cite to or rely on Exhibit 1007 in its Decision Instituting Inter Partes Review. (*See* Paper 18, 1/13/14 Board Decision.) And for purposes of these proceedings, AVS does not dispute the priority dates asserted in Toyota's Petition.

Further, Exhibit 1007 is not arguably relevant to prove any other issues in the proceeding. Toyota has not pointed to Exhibit 1007 for any other purpose. It is well established that litigation positions and even district court rulings are not binding before the USPTO because of the different standards for invalidity and claim construction. *See, e.g.*, *Infinera Corp. v. Cheetah Omni, LLC*, Appeal 2011-

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