

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TOYOTA MOTOR CORPORATION

Petitioner

v.

Patent of AMERICAN VEHICULAR SCIENCES LLC

Patent Owner

Patent No. 8,036,788

Issue Date: October 11, 2011

Title: VEHICLE DIAGNOSTIC OR PROGNOSTIC MESSAGE
TRANSMISSION SYSTEMS AND METHODS

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

Case No. IPR2013-00417

Pursuant to 37 C.F.R. § 42.64 and the Initial Conference Call on February 3, 2014, Patent Owner American Vehicular Sciences LLC (“AVS”) serves and submits the following amended objections to evidence served with Toyota Motor Corporation’s (“Toyota”) Petition for *Inter Partes* Review of U.S. Pat. No. 8,036,788 (the “788 patent”). These amended objections supersede AVS’s prior objections to evidence served and submitted on January 27, 2014 (Paper No. 16).

1. EXHIBITS 1003 AND 1004 (ISHIHARA)

In Ground 2 of its Petition, Toyota argues that certain claims of the ‘788 patent are anticipated by Japanese Unexamined Patent Application Publication H01-197145 to Ishihara (“Ishihara”). Ishihara, however, purports to be an unexamined patent application that was published in Japanese. (*See Ex. 1003.*) AVS objects to the admission of Exhibit 1003 (a purported copy of the Japanese Ishihara reference) and Exhibit 1004 (the proffered translation of Ishihara) because: (1) they have not been sufficiently authenticated under Fed. R. Evid. 901(a); and (2) the proffered translation does not conform to the requirements of a proper affidavit under 37 C.F.R. § 42.63(b).

Federal Rule of Evidence 901(a) requires that as a condition precedent to admission a piece of evidence must be authenticated through “evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). Ordinarily, documents are authenticated by attaching them to an affidavit

of an individual with personal knowledge of their authenticity who swears that the documents are true and correct copies of the originals. *See* Fed. R. Evid. 901(b)(1). Documents from a foreign office are typically authenticated by providing a certified copy. *See* Fed. R. Evid. 902(3). The Rules governing *inter partes* review provide that only United States Patent Office documents are self-authenticating without requiring a certified copy. *See* 37 C.F.R. § 42.61. Toyota has not provided a certified copy of Ishihara or any other affidavit from a person with personal knowledge of its authenticity. (*See* Exs. 1003 & 1004.) As such, Ishihara is not admissible.

Second, in order to rely on Ishihara as prior art, Toyota was required to provide a translation and “an affidavit attesting to the accuracy of the translation.” 37 C.F.R. § 42.63(b). In lieu of an affidavit, a party may submit a declaration “only if, the declarant is, on the same document, warned that willful false statements and the like are punishable by fine or imprisonment, or both (18 U.S.C. 1001)” 37 C.F.R. § 1.68 (emphasis added); *see also* 37 C.F.R. § 42.2.

The certification provided by Toyota with its Petition is not an affidavit or compliant declaration. (*See* Ex. 1004 at 7.) Further, Toyota’s certification is deficient because it lacks authentication. Under the Federal Rules of Evidence (which apply to *inter partes* review) “[w]itness testimony translated from a foreign language must be properly authenticated and any interpretation must be shown to

be an accurate translation done by a competent translator.” *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 659 (N.D. Cal. 1994); *see also Townsend Eng’g Co. v. HiTec Co.*, 1 U.S.P.Q.2d 1987, 1988 (N.D. Ill. 1986); 37 C.F.R. § 42.62. The certification offered by Toyota does not properly authenticate the translation of Ishihara. The certification merely states: “This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Japanese into English of the patent that is entitled: Unexamined Patent Application Publication H01-197145.” (Ex. 1004 at 7.) The certification, signed by a “Project Manager,” does not describe this individual’s qualifications to make the translation. (*Id.*) In fact, the certification does not even state that this individual is fluent in Japanese or that this individual actually translated the document in question. (*Id.*) The certification therefore fails to properly authenticate the translation. *See Jack*, 854 F. Supp. at 659 (striking translations from the record where the party only provided “a statement by an individual at a local translation center stating that the translations were true and correct”); *Townsend*, 1 U.S.P.Q.2d at 1988.

Toyota has since attempted to submit a supplemental translation affidavit for Ishihara. (*See* 12/5/13 Order Denying Petitioner’s Request to Submit Supplemental Evidence (Paper No. 13).) The Board indicated that any such a supplement must follow the process for objections under 37 § C.F.R. 42.64. (*See*

id.) AVS therefore submits its present objections to the deficient translation certification provided by Toyota with its Petition.

2. EXHIBIT 1005 (FRY)

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 ‘788 patent. For that reason, Fry is irrelevant pursuant to Fed. R. Evid. 402 and/or inadmissible pursuant to Fed. R. Evid. 403. *See, e.g., Nordock Inc. v. Systems Inc.*, No. 11-C-118, 2013 U.S. Dist. LEXIS 34661, at *7 (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.*, No. 03-8749, 2006 U.S. Dist. LEXIS 100800, at *19 (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 1005. 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.

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