UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

HOYT A. FLEMING, Plaintiff, v. ESCORT INC. and BELTRONICS USA, INC. Defendants.	)	Case No. 1:09-cv-00105-BLW ATTORNEYS EYES ONLY

SUPPLEMENTAL REBUTTAL EXPERT REPORT OF
CHRIS GREGORY BARTONE, Ph.D., P.E.

I. INTRODUCTION

1. I have been retained by Park, Vaughan, Fleming & Dowler LLP, counsel for plaintiff, Hoyt A. Fleming (hereinafter referred to as "plaintiff" or "Fleming"), to render opinions with respect to the following U.S. Patent Numbers and claims (collectively, the "patents-in-suit"):

Patent	Asserted Claims
RE39,038	1, 3, 5-8, 11, 13, 18, 23, 25-28, 45-48
RE40,653	22, 24, 26, 30-33, 38, 41-42, 45-46, 48-50

2. Specifically, I was asked to respond to the invalidity and non-infringement arguments made in the expert report of John R. Grindon, D.Sc.

3. This is the report of my response, which I am told I am required to prepare pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure and the Court's scheduling order.

II. STATEMENT OF OPINIONS AND THE BASIS AND REASONS THEREFOR

4. It is my opinion that Dr. Grindon has not shown any of the asserted claims in any of the patents-in-suit to be invalid or unenforceable for any reason.

5. It is also my opinion that Dr. Grindon has not shown that any of the asserted claims in any of the patents-in-suit are not infringed by Escort's Passport 9500i, Escort's Passport 9500ix, Escort's Passport iQ, and Beltronics' GX65 (collectively the "accused products").

6. I expect to testify concerning the process I undertook in arriving at the opinions

expressed herein.

7. I understand that the first step in performing a validity/invalidity or infringement/non-infringement analysis is to determine the meaning of the asserted patent claims from the perspective of the person of ordinary skill in the art at the time of the invention without reference to any accused devices or methods.[1]

8. My opening expert report explains the claim constructions that I have applied in my analysis. I hereby incorporate the entirety of my opening report.

Presumption of Validity

9. I understand that, under 35 U.S.C. §282, a patent is to be presumed valid. As such, I am informed that clear and convincing proof is required to invalidate a patent.

Validity (Indefiniteness)

10. I understand that, under 35 U.S.C. §112 ¶2, a patent specification must conclude with one or more claims particularly pointing out and distinctly claiming the subject matter that the applicant regards as his invention. Claims are indefinite if they do not reasonably apprise those skilled in the relevant art of the applicant's intended scope of the invention when read in light of the specification. Claims that reasonably apprise those skilled in the art are, therefore, definite.

Validity (Written Description and Enablement)

11. I understand that the written description of a patent (or patent application as the case may be) under 35 U.S.C. §112 ¶1 must convey clearly to those skilled in the art, that, as

[1] I understand that during the prosecution of the patents in suit that the Patent Office has described a person of ordinary skill in the art as "a person with a degree in electrical engineering with several years of practical experience in the design and/or testing of radar detector systems."

of the filing date sought, the applicant was in possession of the invention claimed.

12. I further understand that a claimed invention is not enabled under 35 U.S.C. §112 ¶1 if the patent specification does not teach those of ordinary skill in the art how to make and use the invention as broadly as it is claimed, without undue experimentation. I have been advised that the assessment of undue experimentation is based on the level of skill in the art as of the effective filing date of the application on which the patent-in-suit claims priority. Thus, a specification enables a claimed invention when it does in fact teach those of ordinary skill in the art how to make and use the invention as broadly as it is claimed, without undue experimentation.

Validity (Anticipation)

13. I understand that the first step in determining either validity or infringement is to properly construe the claims. I also understand that the claims must be construed the same way in determining validity/invalidity and infringement/non-infringement.

14. It is my understanding that, for a finding of invalidity of a patent under 35 U.S.C. §102, i.e., anticipation, each and every element of a claim, as properly construed, must be found either explicitly or inherently in a single prior art reference. Under the principles of inherency, if the prior art necessarily functions in accordance with, or includes the claimed limitations, it anticipates. However, if the prior art could function without the claimed limitations, then the claimed limitations are not inherent.

15. I understand that a patent claim is invalid under 35 U.S.C. §102 (a) if the claimed invention was known or used by others in the U.S., or was patented or published anywhere,

before the applicant's invention. I further understand that a claim is invalid under 35 U.S.C. §102 (b) if the invention was patented or published anywhere, or was in public use, on sale, or offered for sale in this country, more than one year prior to the filing date of the patent application. A claim is invalid, as I understand, under 35 U.S.C. §102 (e), if an invention described by that claim was described in a U.S. patent granted on an application for a patent by another that was filed in the U.S. before the date of invention for such a claim.

16. It is also my understanding that a claim is invalid under 35 U.S.C. §102 (g)(2) if, prior to the date of invention for the claim, the invention was made in the U.S. by another who had not abandoned, suppressed or concealed the invention.

17. In this case, I understand that Dr. Grindon contends that Mr. Orr made certain of the claimed Fleming inventions in April-May 1996. I am informed that, from a legal standpoint, this means that Dr. Grindon believes that Mr. Orr conceived and reduced the subject matter of those claims to practice prior to Mr. Fleming. Indeed, while I note that Dr. Grindon says nothing about Mr. Orr's conception, he argues that Mr. Orr "reduced to practice certain inventions in and about April and May 1996." (Grindon Report, pg. 6.)

18. In order to prove a "prior invention" in these circumstances, I am informed that defendants must prove by clear and convincing evidence that Mr. Orr conceived and reduced to practice the challenged patent claims in April or May 1996. Given that Dr. Grindon has said nothing about conception, I will assume that it is Dr. Grindon's contention that conception also allegedly occurred in April or May 1996. If the Court allows Dr. Grindon (or anyone else) to testify otherwise, I reserve the right to consider and opine on that contention at that time.

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