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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* OMEGA PATENTS, L.L.C.  
Patent Owner and Appellant

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Appeal 2020-000387  
Reexamination Control 90/014,121  
U. S. Patent 7,671,727 B2  
Technology Center 3900

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Before JOHN A. JEFFERY, MARC S. HOFF, and ERIC B. CHEN,  
*Administrative Patent Judges.*

JEFFERY, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellant<sup>1</sup> appeals under 35 U.S.C. §§ 134 and 306 the Examiner's decision to reject claims 1–10 and 12–25. We have jurisdiction under 35 U.S.C. §§ 134 and 306, and we heard the appeal on January 13, 2020.<sup>2</sup>

We AFFIRM.

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<sup>1</sup> Appellant identifies the real party in interest as Omega Patents, L.L.C. Appeal Br. 4.

<sup>2</sup> Throughout this opinion, we refer to the transcript of this oral hearing filed Jan. 22, 2020 (“Tr.”).

## STATEMENT OF THE CASE

This proceeding arose from a request for *ex parte* reexamination filed on April 10, 2018 of United States Patent 7,671,727 (“the ’727 patent”), issued to Kenneth E. Flick on March 2, 2010.

The ’727 patent describes a vehicle speed exceeded notification device including a controller for reading data related to vehicle speed from a vehicle data communications bus, and determining when a vehicle speed exceeds a speed threshold for a first time period. *See* Abstract. Claim 1 is illustrative of the invention and is reproduced below:

1. A speed exceeded notification device for a vehicle of a type comprising a vehicle data communications bus extending throughout the vehicle, and at least one vehicle device generating data related to vehicle speed on the vehicle data communications bus, the speed exceeded notification device comprising:

a wireless communications device; and

a controller to be coupled to the vehicle data communications bus for reading the data related to vehicle speed from the vehicle data communications bus, and

determining when a vehicle speed exceeds a speed threshold for a first time period and based thereon cooperating with said wireless communications device to send a remote vehicle speed exceeded notification, and

wherein the remote vehicle speed exceeded notification comprises a vehicle position.

## RELATED PROCEEDINGS

This appeal is said to be related to various pending proceedings. First, Appellant informs us of eight related reexamination proceedings involving various patents as follows:

<b>Reexamination Control</b>	<b>Corresponding U.S. Patent</b>
90/013,741	6,756,885
90/014,038	6,756,885
90/013,832	7,671,727
90/013,587	8,032,278
90/013,851	8,032,278
90/014,309	8,032,278
90/013,659	6,346,876
90/014,122	6,346,876

*See* Appeal Br. 4, 6–7; Reply Br. 3–4. We rendered decisions in connection with appeals in reexamination proceedings 90/013,851 and 90/014,122. *See See Ex parte Omega Patents, L.L.C.*, Appeal No. 2018-008119 (PTAB Nov. 13, 2018); *see also Ex parte Omega Patents, L.L.C.*, Appeal No. 2019-006299 (PTAB Dec. 3, 2019).

Appellant also informs us of related litigation involving Appellant and Requester (CalAmp Corporation) (“CalAmp litigation”). Appeal Br. 4–5; Reply Br. 4. This litigation includes a case where the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”), among other things, affirmed a jury’s verdict in a case from the Middle District of Florida that the ’727 patent’s asserted claims were valid.<sup>3</sup> *See Omega Patents, LLC v. CalAmp Corp.*, 920 F.3d 1337, 1353 (Fed. Cir. 2019).

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<sup>3</sup> Although the court set aside the infringement judgment regarding the ’727 patent’s original claims 1 and 10, it nonetheless affirmed the lower court’s

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Also, Appellant notes that a second trial involving Appellant and Requester was held the week of September 30, 2019 with a Jury Verdict finding that Requester infringed the '727 patent. Reply Br. 2.

Lastly, Appellant informs us that the parties settled in connection with an infringement trial involving Enfora, Inc. and Appellant. Appeal Br. 6; Reply Br. 3.

### THE REJECTION

The Examiner rejected claims 1–10 and 12–25 under 35 U.S.C. § 102(e) as anticipated by McClellan (US 7,859,392 B2; issued Dec. 28, 2010; filed May 22, 2007). Ans. 3–33.<sup>4</sup>

### SUBSTANTIAL NEW QUESTION OF PATENTABILITY (SNQ)

Appellant argues that the present reexamination was improperly granted due to the alleged inequities of multiple reexamination requests that are said to not only waste USPTO resources, but are also said to be unfair to Appellant. Appeal Br. 46–51; Reply Br. 14–15. According to Appellant, we should apply a standard similar to that used by the Board in deciding to institute trials for follow-on petitions in *inter partes* review proceedings. See Appeal Br. 47–51.

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judgment that CalAmp directly infringed the '727 patent's original claim 11 that corresponds to amended claim 1. See *Omega Patents*, 920 F.3d at 1353, 1355 (noting that the '727 patent's original claim 1 was amended during *ex parte* reexamination to incorporate the limitations of dependent claim 11).

<sup>4</sup> Throughout this opinion, we refer to (1) the Appeal Brief filed July 12, 2019 (“Appeal Br.”); (2) the Examiner’s Answer mailed August 13, 2019 (“Ans.”); and (3) the Reply Brief filed October 15, 2019 (“Reply Br.”).

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Appellant's arguments, however, are untimely and are, therefore, not before us. Notably, Appellant must first request reconsideration of the SNQ before the Examiner before we can review that issue. Manual of Patent Examining Procedure (MPEP) § 2274(VI) (9th ed. Rev. 08.2017, Jan. 2018). That was not done here.

To be sure, in a response *after final rejection* filed May 13, 2019, Appellant included a section entitled "The Reexamination was Improperly Granted" on pages 49 to 53 with arguments similar to those raised on pages 46 to 51 of the Appeal Brief. These arguments, however, did not specifically request that the Examiner reconsider the SNQ issue, nor were they identified in the Appeal Brief as a communication in which Appellant first requested reconsideration before the Examiner in accordance with MPEP § 2274(VI). But leaving these defects aside, Appellant's "improper grant" arguments are untimely, for they were first presented after final rejection and, consequently, after prosecution closed. *See* MPEP § 2272 ("It is intended that prosecution before the examiner in a reexamination proceeding will be concluded with the final action. Once a final rejection that is not premature has been entered in a reexamination proceeding, the patent owner no longer has any right to unrestricted further prosecution.").

As Section 2272 of the MPEP explains, both the Examiner and Appellant should identify and develop *all* issues *before* the final Office action, including presenting evidence. Therefore, even if Appellant's arguments regarding the alleged improper reexamination grant could somehow be construed as a request for the Examiner to reconsider the SNQ issue, such a request was nevertheless untimely and runs counter to MPEP

procedure that, by encouraging identifying and developing *all* issues before final rejection, promotes compact prosecution. This practice is especially important where, as here, the proceeding is treated with special dispatch. *See* 35 U.S.C. § 305; *see also Ethicon, Inc. v. Quigg*, 849 F.3d 1422, 1426 (Fed. Cir. 1988) (noting that “special dispatch” envisions some type of unique, extraordinary, or accelerated movement).

The procedural mandates of MPEP § 2274(VI) only bolster this notion. As noted previously, MPEP § 2274(VI) requires that Appellant request reconsideration of the SNQ issue before the Examiner before we can review that issue. Although MPEP § 2274(VI) provides two non-limiting examples of when this reconsideration can be requested, namely in a patent owner’s statement or response under 37 C.F.R. §§ 1.530 and 1.111, respectively, this request must nevertheless be made not only before the Appeal Brief, but also during prosecution before the Examiner—not after prosecution closes—particularly when MPEP § 2274(VI) is interpreted in light of the limitations of after-final practice noted in MPEP § 2272. *See* MPEP § 2274(VI) (requiring that a patent owner *first* request consideration before the Examiner, and *then* seek review of the Examiner’s SNQ determination before the Board); *see also id.* (requiring a patent owner identify in its Appeal Brief the communication in which the owner first requested reconsideration of the SNQ before the Examiner); MPEP § 2272 (discussing after-final practice). To the extent that Appellant contends that MPEP § 2274(VI) permits requesting reconsideration of the SNQ before the Examiner in the first instance after prosecution closes, as is the case here, such a belated request runs counter to any reasonable interpretation of (1)

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MPEP § 2274(VI) that requires the request to be made before appeal, and (2) MPEP § 2272 that indicates that prosecution is closed in the reexamination proceeding when the Examiner enters a final rejection.

That is not to say, however, that despite an Appellant not complying with the procedural mandates of MPEP § 2274(VI), the Board cannot review the Examiner's SNQ determination that is so facially improper that no reasonable mind could accept it such that there is no substantial evidence to support the determination. *See In re Gartside*, 203 F.3d 1305, 1312 (Fed Cir. 2000). One such circumstance would be when it is indisputably clear from the record that a patentability question deemed as an SNQ was already decided in the original examination, for no procedural rule can enable reexamination under those circumstances. *See In re Recreative Technologies Corp.*, 83 F.3d 1394, 1396–98 (Fed. Cir. 1996).

But that is not the case here. Although the patentability question at issue in *Recreative Technologies* involved the same prior art reference as the question decided in the original examination—not different references as is the case here—cumulative references that repeat the teachings of previously-considered prior art nonetheless preclude an SNQ, for they do not raise a patentability question different from that considered in an earlier examination. *See* MPEP §§ 2242, 2247. These situations, however, are rare as noted in the following guidance from the MPEP:

For purposes of reexamination, a cumulative reference that is repetitive is one that substantially reiterates verbatim the teachings of a reference that was either previously relied upon or discussed in a prior Office proceeding even though the title or the citation of the reference may be different. However, it is

expected that a repetitive reference which cannot be considered by the Office during reexamination will be a rare occurrence since most references teach additional information or present information in a different way than other references, even though the references might address the same general subject matter.

MPEP § 2258.01

Therefore, because Appellant did not preserve the SNQ issue for appeal by first requesting reconsideration of the SNQ before the Examiner, that issue is not before us.

But even if the SNQ issue was before us—which it is not—we are still unpersuaded that the Examiner’s SNQ determination is erroneous. Not only are Appellant’s procedural grievances petitionable matters,<sup>5</sup> Appellant does not specifically show error in the Examiner’s SNQ determination. Rather, Appellant merely contends that serial and sequential reexamination requests are allegedly unfair and waste resources, and, therefore, we should apply a standard similar to that used by the Board in deciding to institute trials for follow-on petitions in *inter partes* review proceedings. *See* Appeal Br. 47–51. We decline to do so here.

Accordingly, we are unpersuaded of error in the Examiner’s SNQ determination.

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<sup>5</sup> *See* MPEP § 706.01 (“[T]he Board will not hear or decide issues pertaining to objections and formal matters which are not properly before the Board.”); *see also* MPEP § 1201 (“The Board will not ordinarily hear a question that should be decided by the Director on petition . . .”).

### THE ANTICIPATION REJECTION

The Examiner finds that McClellan discloses every recited element of claims 1–10 and 12–25. Ans. 3–33.

Appellant does not dispute these findings, but rather argues that McClellan is unavailable as prior art due to the '727 patent's priority that is based on, among other things, U.S. Patent 7,720,597 ("597 patent") whose corresponding application 11/076,259 ("259 application" or "259 Appl.") is a parent to the '727 patent's underlying application (11/804,703). *See* Appeal Br. 15–46; Reply Br. 5–14. According to Appellant, the '597 patent supports Appellant's possession of the recited (1) vehicle device generating data related to vehicle speed on a vehicle data communications bus; and (2) reading that data from the bus, particularly when the '597 patent is considered in light of Appellant's U.S. Patent 6,011,460 ("460 patent") that the '597 patent references. *See* Appeal Br. 15–46; Reply Br. 5–14.

### ISSUE

Under § 102, has the Examiner erred in rejecting claims 1–10 and 12–25 by finding that McClellan discloses every recited limitation? This issue turns on whether McClellan qualifies as prior art to the '727 patent.

### ANALYSIS

As noted above, the Examiner's findings regarding McClellan's anticipating the recited limitations (Ans. 3–9) are undisputed; rather, this dispute turns solely on whether McClellan qualifies as prior art to the '727 patent. Accordingly, we confine our discussion to that issue.

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The '727 patent that is the subject of the present reexamination proceeding issued from U.S. Application 11/804,703 (“’703 application”) filed August 24, 2007. The ’703 application is a continuation-in-part of U.S. Application 11/076,259 (“’259 application” or “’259 Appl.”), filed March 9, 2005, now U.S. Patent 7,720,597.<sup>6</sup>

The McClellan reference issued on December 28, 2010, but was filed on May 22, 2007, which is *before* the ’703 application’s filing date. McClellan’s filing date, however, is *after* the filing date of the ’259 application in the ’727 patent’s priority chain.<sup>7</sup> Therefore, it is crucial that

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<sup>6</sup> Although the ’727 patent’s priority is also based on other U.S. applications, they are irrelevant to the issue before us.

<sup>7</sup> McClellan is also based on U.S. provisional application 60/802,478 filed May 22, 2006. Although the Examiner cites this provisional application in the rejection (*see* Ans. 4–8), its filing date—like that of McClellan’s corresponding utility application—is after the ’259 application’s filing date. We, therefore, need not refer to McClellan’s provisional application, for it is irrelevant to the issue before us. Accordingly, we need not address the related issue of whether McClellan’s provisional application adequately provides (1) support for the subject matter of McClellan’s *claimed invention* in McClellan’s patent under 35 U.S.C. § 112, first paragraph, *and* (2) similar § 112, first paragraph support for the particular subject matter from McClellan relied on in the rejection—findings that must be made for McClellan to be entitled to the filing date of its provisional application. *See Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1380 (Fed. Cir. 2015) (“A reference patent is only entitled to claim the benefit of the filing date of its provisional application if the disclosure of the provisional application provides support for the *claims* in the reference patent in compliance with § 112, ¶ 1.”) (emphasis added) (citing *In re Wertheim*, 646 F.2d 527, 537 (CCPA 1981)); *see also Dynamic Drinkware* at 1382 (“A provisional application’s effectiveness as prior art depends on its written description support for the *claims* of the issued patent of which it was a provisional.”) (emphasis added). *Accord Amgen v. Sanofi*, 872 F.3d

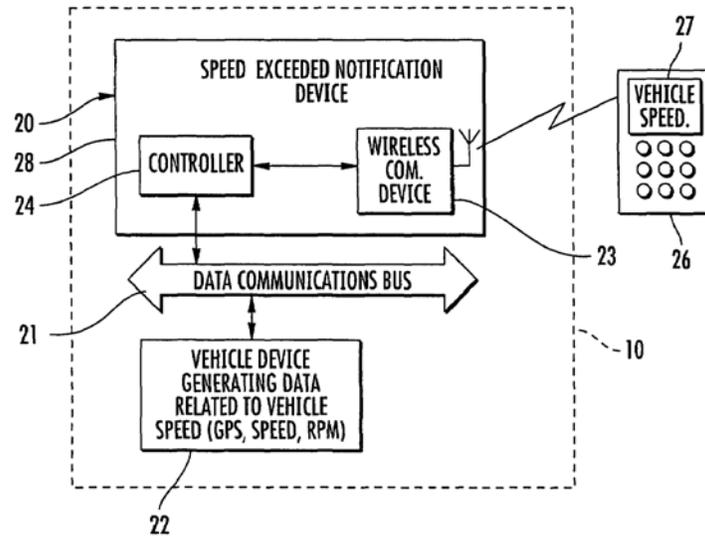
the '259 application supports possession of the claimed invention to antedate the McClellan reference.

Turning to the '727 patent's claim 1, the claim recites, in pertinent part, (1) at least one vehicle device generating data *related to* vehicle speed on a vehicle data communications bus extending throughout the vehicle; and (2) a controller for reading that data from the bus. Independent claims 13 and 19 recite commensurate limitations. Our emphasis underscores that the data that is generated on—and read from—the bus need not be vehicle speed, but rather merely be *related to* speed. The '727 patent explains that this data may include (1) a vehicle speed signal; (2) geographical position data, such as based on Global Positioning System (GPS) position data; or (3) engine revolutions per minute (RPM) in combination with transmission gearing that may be used to calculate vehicle speed. '727 patent, col. 4, ll. 9–17.

Another key aspect of the claimed invention is that this speed-related data is not only generated *on* the bus, but is also read *from* that bus, where the bus extends throughout the vehicle. This functionality is shown in the '727 patent's Figure 1, reproduced below, where vehicle device 22 generates speed-related data on vehicle data communications bus 21, and controller 24 reads this data from that bus. *See* '727 patent, col. 4, ll. 3–9, 20–22.

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1367, 1380 (Fed. Cir. 2017); MPEP § 2136.03(III); Robert W. Bahr, Memorandum to Patent Examining Corps, *Critical reference date under pre-AIA 35 U.S.C. § 102(e) of a U.S. patent or U.S. published application claiming the benefit of a prior U.S. provisional application during examination of an application*, USPTO, Apr. 5, 2018 (citing *Amgen*).



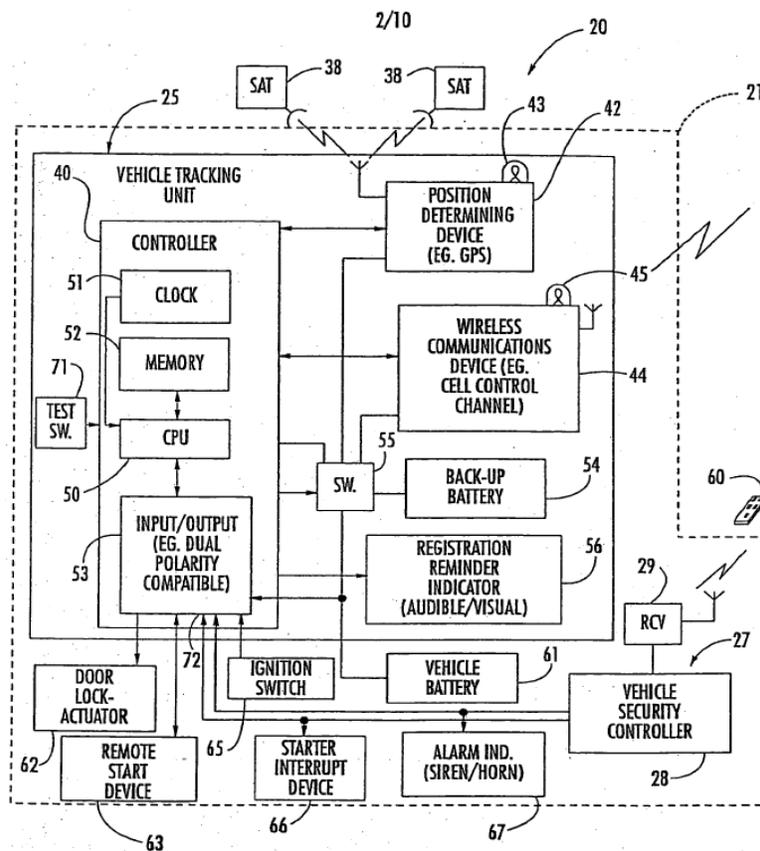
**'727 patent Figure 1 showing vehicle device generating speed-related data on bus, and controller reading data from that bus**

This functionality that is disclosed clearly and unambiguously in the '727 patent is, however, not disclosed in the parent '259 application that best reflects the corresponding '597 patent's disclosure as originally filed.<sup>8</sup> Leaving aside the fact that the '259 application lacks a figure similar to the '727 patent's Figure 1 and its associated description noted above, we find Appellant's reliance on the '259 application's Figures 2 and 6 and associated description unavailing to show possession of the speed-related data generation and reading functions of the claimed invention—even when considered in light of Appellant's '460 patent that the '259 application references in paragraph 149. *See* Appeal Br. 15–46; Reply Br. 5–14.

<sup>8</sup> Although Appellant and the Examiner refer to the '597 patent regarding whether it supports possession of the claimed invention, we nonetheless refer to the '597 patent's corresponding '259 application because it best reflects the disclosure as originally filed.

The '259 application's Figure 1 shows a vehicle 21 with vehicle tracking unit 25 connected to vehicle devices 26 and vehicle security system 27. As shown below, Figure 2 of the '259 application shows vehicle tracking unit 25 includes, among other things, controller 40 connected to position determining device 42 that may be provided by a GPS receiver.

'259 Appl. ¶ 34.



**Figure 2 of the '259 application showing vehicle tracking unit's controller 40 connected to position determining device 42**

Notably, position determining device 42 generates data that is at least related to vehicle speed given its GPS data that is used in connection with

generating a vehicle speeding alert in the flowchart of Figure 6. *See* '259 Appl. ¶ 92 (noting that GPS detection is used in connection with (1) indicating vehicle speed, (2) the location where speeding started, and (3) how long speeding occurred). Therefore, the position determining device is a device that generates data related to vehicle speed. But we cannot say that the positioning determining device is a “vehicle device” consistent with the '259 application’s parlance, particularly in view of paragraph 29 indicating that vehicle tracking unit 25 interfaces with various *vehicle devices*, such as security sensors, door locks, etc.—devices that are distinct from the positioning determining device that is part of the vehicle tracking unit. *Accord* Ans. 36 (finding that “other” vehicle devices are connected to the controller’s input/output circuitry 53).

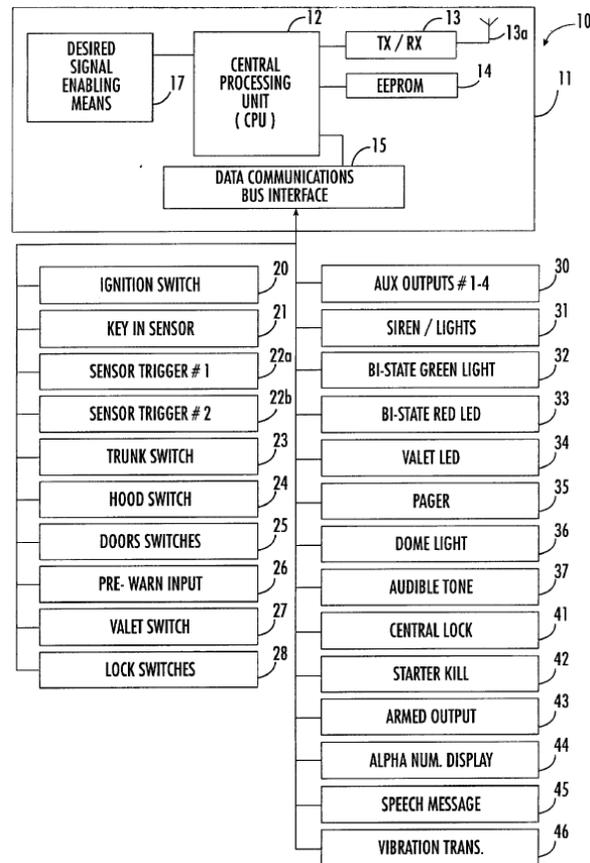
But even assuming, without deciding, that the position determining device 42 could somehow be considered a “vehicle device,” we cannot say—nor has Appellant shown—that the position determining device generates speed-related data *on* a vehicle data communications bus as claimed, let alone on a bus that extends throughout the vehicle, to show possession of that feature. Notably, the '259 application’s Figure 2 shows both the controller and position determining device located *within* the vehicle tracking unit 25 with a double-arrow connecting those contained components. *Accord* Declaration By Joseph C. McAlexander, III Under 37 C.F.R. § 1.132 dated Oct. 27, 2018 (Evid. App. Ex. 1) (“McAlexander Decl.”) ¶ 15 (acknowledging that the controller and positioning determining device are *in* the vehicle tracking unit). Nor does the '259 application’s

Figure 2 show a data communications bus, let alone one that extends throughout the vehicle as claimed.

To be sure, the '259 application's paragraph 149 indicates that, in all embodiments, the "tracking device"—which the Examiner equates to vehicle tracking unit 25 (Ans. 36)—may communicate with *other* vehicle devices via a vehicle data communications bus. But the '259 application does not specify what these "other" vehicle devices are, despite indicating in paragraph 29 that vehicle tracking unit 25 interfaces with various *vehicle devices*, such as security sensors, door locks, etc. Nor does the '259 application show or describe a vehicle data communications bus with sufficient particularity to show possession of functionality of the recited components that generate and read speed-related data to and from that bus, let alone one that extends throughout the vehicle as claimed.

The '259 application's paragraph 149, however, notes that further aspects of interfacing with a vehicle data communications bus are described in U.S. Patents 5,719,551 and 6,011,460. According to Appellant, the '460 patent provides the requisite support for the disputed limitations, particularly in light of the '460 patent's reference to various Society of Automotive Engineers (SAE) documents that describe an associated data bus standard. *See* Appeal Br. 26–28 (quoting '460 patent, col. 2, ll. 31–53).

As shown below, the '460 patent's Figure 1 illustrates a vehicle security system with a central processing unit (CPU) 15 connected to a data communications bus interface 15 that is connected to (1) ten vehicle input devices 20–28, and (2) 14 output devices 30–46. *See* '460 patent, col. 4, l. 44 – col. 5, l. 31.



**Figure 1 of the '460 patent showing vehicle devices connected to data communications bus interface**

Although the 24 vehicle devices in the '460 patent are connected to a data communications bus as shown above, none of them generate data related to vehicle speed. *Accord* Ans. 45 (noting that none of the 24 listed devices that communicate with the CPU in the '460 patent include position determining or “speed type” devices).

Given these shortcomings, the '460 patent does not provide the requisite support to show possession of the recited vehicle device that

generates data related to vehicle speed on a data communications bus, let alone such a bus that extends throughout the vehicle as claimed. Nor does the '460 patent support possession of a controller for reading the data related to vehicle speed from that bus.

To be sure, the '460 patent contemplates other inputs to the controller 11, as well as receiving an input signal from a remote transmitter 50 which can be a handheld unit such as that shown in Figure 2 or a central station. *See* '460 patent, col. 5, ll. 6–10, 32–65. These alternatives, however, do not change our conclusion. First, Appellant's reliance on the '460 patent's remote transmitter's functionality, including its implementation as a central station, for ostensibly supporting possession of the claimed invention was not raised in the Briefs, but rather was raised for the first time on appeal in the oral hearing. *Compare* Appeal Br. 26–27, 34–36; Reply Br. 10–12 (discussing the '460 patent) *with* Tr. 9–10. As such, these particular arguments, which were not presented to the Examiner, are waived as untimely, nor has Appellant shown good cause to present them in the first instance at the oral hearing. *See* MPEP § 1209 (“At the oral hearing, appellant may *only* rely on evidence that has been previously entered and considered by the primary examiner and *present arguments that have been relied upon in the brief or reply brief.*”) (emphasis added).

But even if these particular arguments were timely presented—which they were not—we still find them unpersuasive to show possession of the claimed invention. Even assuming, without deciding, that the central station in the '460 patent's column 5, lines 59 to 63 can be the central station 88 shown in the embodiment of Figure 6A that is connected to a satellite link as

described in column 7, lines 31 to 48, ordinarily skilled artisans would still have to infer that this functionality could somehow be applied in connection with the position determining device 42 in the '259 application that receives signals from satellites 38 or can be based on "other satellite transmissions." See '259 Appl. ¶¶ 34–35. Leaving aside the fact that central station 88 is not connected directly to bus 62 in the '460 patent's Figure 6A, and that the '259 application does not specify these "other satellite transmissions" with particularity, applying the '460 patent's functionality regarding the ability of a remote transmitter, such as a central station, to provide input signals to a bus that extends throughout the vehicle in connection with the functionality of the controller and positioning determining device in the '259 application's Figure 2 would have, at best, been obvious from the collective disclosures cited by Appellant.

Although the written description requirement does not demand any particular form of disclosure or require a verbatim recitation, a description that merely renders the invention obvious does not satisfy the requirement. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1352 (Fed. Cir. 2010) (en banc). Therefore, to the extent that Appellant contends that it would have been obvious to provide (1) a vehicle device that generates vehicle speed-related data on a data communications bus that extends throughout the vehicle, and (2) a controller that reads data from that bus, based on the '259 application's disclosure considered in light of the other cited documents, such a position is unavailing in light of *Ariad*. Nor has Appellant shown that the other patent that the '259 application's paragraph 149 references for describing data communications bus interfacing aspects, namely U.S. Patent

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5,719,551, provides the requisite support to show possession of the disputed limitations.

That the '460 patent refers to various SAE documents, including “‘Surface Vehicle Standard, Class B Data Communications Network Interface,’ SAE J1850, July 1995” (“SAE J1850”) in column 2, lines 44 to 53 as Appellant indicates (Appeal Br. 26–28, 30–31), does not change our conclusion. Despite Appellant’s arguments to the contrary (Appeal Br. 26–28; Reply Br. 11–14), Appellant does not persuasively rebut the Examiner’s finding that the SAE J1850 document and the related SAE J1979 document do not support possession of the recited (1) vehicle device that generates data related to vehicle speed on a data communications bus, and (2) controller that reads that data from that bus, let alone a bus that extends throughout the vehicle as claimed. *See* Ans. 41–42. As the Examiner explains, these documents pertain to off-vehicle test equipment, albeit involving speed data. *See* Ans. 41. Despite this reference to speed data in connection with the diagnostic test data in the SAE documents, that is still insufficient to show possession of the disputed limitations, even when considered with the teachings of the other cited documents, including the '259 application.

That is, even assuming, without deciding, that the SAE documents teach that vehicle speed data can be transmitted over a vehicle data bus as Appellant contends (Reply Br. 12), ordinarily skilled artisans would still have to infer that this capability for diagnostic test equipment could somehow be applied to a data communications bus that extends throughout a vehicle, where a controller and vehicle devices are connected to that bus,

such that speed-related data is not only generated *on* the bus, but is also read *from* that bus. In short, applying such a capability to a bus that extends throughout the vehicle in connection with the functionality of the controller and positioning determining device in the '259 application's Figure 2 would have, at best, been obvious from the collective disclosures cited by Appellant.

Therefore, to the extent that Appellant contends that it would have been obvious to provide (1) a vehicle device that generates vehicle speed-related data on a data communications bus that extends throughout the vehicle, and (2) a controller that reads data from that bus, based on the '259 application's disclosure considered in light of the other cited documents, such a position is unavailing in light of *Ariad*.

We reach this conclusion despite Mr. Alexander's view that, in Figure 2 of the '259 application, any connection between the tracking unit 25 and vehicle devices, including door lock actuator 62, remote start device 63, ignition switch 65, starter interrupt device 66, alarm indicator 67, or security controller 28, *could be* via a vehicle data communications bus.

McAlexander Decl. ¶ 18. Although we appreciate Mr. Alexander's insight as to what variations to the '259 application's disclosed configuration might be possible, such undisclosed alterations would have, at best, been obvious from the '259 application's teachings, even when considered in light of the other cited documents. But as noted previously, obviousness is insufficient to show possession of these features. *See Ariad*, 598 F.3d at 1352.

We reach a similar conclusion regarding Mr. Alexander's view that the position determining device 42 in Figure 2 of the '259 application *could*

*be* located remote from the controller 40 and, therefore, use the vehicle data bus for communications in a manner similar to the above-noted vehicle devices if a bus were so provided. *See* McAlexander Decl. ¶ 18. But here again, these undisclosed alterations would have, at best, been obvious from the '259 application's teachings, even when considered in light of the other cited documents and are, therefore, unavailing to show possession of these features in light of *Ariad*. *See Ariad*, 598 F.3d at 1352.

To be sure, in some embodiments, the position determining device can be provided based on (1) communications with a cellular telephone network or (2) other satellite transmissions. '259 Appl. ¶ 35. But even assuming, without deciding, that the position determining device could somehow be located remote from the vehicle tracking unit in these embodiments as Appellant seems to suggest (*see* Appeal Br. 30–31; Reply Br. 8–9), the '259 application still does not support possession of the disputed limitations, even when considered in light of the other cited documents. That is, these documents' collective teachings do not support possession of connecting the position determining device to a vehicle data communications bus to which the controller is attached such that the controller reads the position determining device's generated data from that bus, let alone such a bus that extends throughout the vehicle as claimed. At best, such undisclosed alterations would have been obvious from the '259 application's teachings, even when considered in light of the other cited documents. But as noted previously, obviousness is insufficient to show possession of these features. *See Ariad*, 598 F.3d at 1352.

We reach this conclusion despite the '259 application's paragraph 149 indicating that, in all embodiments, the "tracking device"—which the Examiner equates to vehicle tracking unit 25 (Ans. 36)—may communicate with *other* vehicle devices via a vehicle data communications bus. As noted previously, the '259 application does not specify what these "other" vehicle devices are, despite indicating in paragraph 29 that vehicle tracking unit 25 interfaces with various *vehicle devices*, such as security sensors, door locks, etc. Nor does the '259 application show or describe a vehicle data communications bus with sufficient particularity to show possession of functionality of the recited components that generate and read speed-related data to and from that bus, let alone one that extends throughout the vehicle as claimed.

In short, to suggest that the position determining device 42 in the '259 application's Figure 2 could somehow be considered one of the "other" unspecified vehicle devices in paragraph 149 that communicate with the "tracking device" via a vehicle data communications bus would have, at best, been obvious from the '259 application's teachings, even when considered in light of the other cited documents. But as noted previously, obviousness is insufficient to show possession of these features. *See Ariad*, 598 F.3d at 1352. Appellant's arguments in this regard (Appeal Br. 29–32; Reply Br. 9) are, therefore, unpersuasive.

We reach a similar conclusion regarding Mr. McAlexander's view that vehicle speed determined in the '259 application *could be* provided by another device connected to the vehicle data bus, such as that shown in a prior art reference cited by the Examiner. McAlexander Decl. ¶ 19.

Although we appreciate Mr. McAlexander's insights as to what variations to the '259 application's disclosed configuration might be possible, such undisclosed alterations would have, at best, been obvious from the '259 application's teachings, even when considered in light of the other cited documents. But as noted previously, obviousness is insufficient to show possession of these features. *See Ariad*, 598 F.3d at 1352.

On this record, then, we find that the parent '259 application does not provide written description support for (1) at least one vehicle device generating data related to vehicle speed on a vehicle data communications bus extending throughout the vehicle; and (2) a controller for reading that data from the bus as claimed. Accordingly, the McClellan reference qualifies as prior art to the '727 patent.

Because the Examiner's findings regarding McClellan are otherwise undisputed, we are unpersuaded of error in the Examiner's anticipation rejection of claims 1–10 and 12–25 based on that reference.

## CONCLUSION

The Examiner's decision rejecting claims 1–10 and 12–25 is affirmed.

## DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1–10, 12–25	102(e)	McClellan	1–10, 12–25	

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REQUESTS FOR EXTENSIONS OF TIME

Requests for extensions of time in this ex parte reexamination proceeding are governed by 37 C.F.R. § 1.550(c). *See* 37 C.F.R. § 41.50(f).

AFFIRMED

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**PATENT OWNER:**

ADD&G - 27975  
1401 Citrus Center 255 South Orange Avenue  
P.O. Box 3791  
Orlando, FL 32802-3791

**THIRD PARTY REQUESTER:**

MERCHANT & GOULD P.C. (GENERAL)  
P. O. Box 2903  
Minneapolis, MN 55402-0903