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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

**HOLLEY PERFORMANCE
PRODUCTS INC.**

Plaintiff and Counter-Defendant,
v.

ACES FUEL INJECTION, INC.

Defendant and Counter-Plaintiff.

Case No. 1:26-cv-00059-CEA-CHS

**PLAINTIFF/COUNTER-DEFENDANT HOLLEY PERFORMANCE
PRODUCTS INC.'S MOTION FOR SUMMARY JUDGMENT OF
INVALIDITY OF U.S. PATENT NO. 7,735,475
BASED ON 35 U.S.C. § 102**

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I. INTRODUCTION

This lawsuit involves a patent knowingly filed too late. Defendant/Counter-Plaintiff Aces Fuel Injection, Inc. (“Aces”) asserts infringement of claims 1–5 of U.S. Patent No. 7,735,475 (the “’475 Patent”) (Dkt. 22-1). The ‘475 Patent issued from an application *filed in 2008*. But Aces neither invented nor filed the application for the ‘475 Patent. Instead, on October 31, 2022, Aces purchased rights in the ‘475 Patent from Kenneth W. Farrell in a “Patent Acquisition & License Agreement.” Unlike Mr. Farrell, Aces is far removed from the application for the ‘475 Patent and the *2006 BossEFI system* the patent sought to protect.

Under 35 U.S.C. § 102, a patent application must be filed within one year when the invention was in public use or on sale; otherwise, it is invalid. Here, Mr. Farrell declared to the U.S. Patent and Trademark Office that the invention later claimed in the ‘475 Patent was in commercial use no later than September 1, 2006—more than one year before its filing date. Mr. Farrell openly placed the invention later claimed in the ‘475 Patent on numerous vehicles prior to that time, which was documented by Mr. Farrell and others. And Mr. Farrell, through his company Retrotek Speed, [REDACTED]

[REDACTED]

While Mr. Farrell and Aces likely believe that evidence of the invalidity of the ‘475 Patent was lost or discarded long ago, Mr. Farrell knows the ‘475 Patent is invalid. Aces should have known this when it acquired Mr. Farrell’s rights in the ‘475 Patent just a few years ago. Summary Judgment of invalidity should be granted so that Holley (and the Court) does not need to expend any further effort or resources defending against claims based on this clearly invalid patent.

II. FACTS

A. Electronic Fuel Injection Has Largely Replaced Carburetion

In many types of engines, electronic fuel injection (“EFI”) has replaced carburetion as the mechanism to mix fuel with air prior to combustion. Fifty years ago, most engines, including automobile engines, used carburation which relies on pressure differences to transfer fuel from a bowl through an orifice to mix with the flow of air. EFI, on the other hand, employs electronically controlled fuel injectors to introduce fuel. EFI provided several significant performance advantages over carburetion including increased fuel efficiency and reduced emissions. Dkt. 22-1 at 1:30-31. EFI also made the engine easier to start and more drivable, responsive, and consistent. *Id.* at 1:27–35. Automobiles started moving to fuel injection over fifty years ago; over time, most engines have come to be controlled via EFI.

B. Retrotek Developed the BossEFI System

Radical Concept Products, Inc. d/b/a Retrotek Speed (“Retrotek”) was founded by Ken Farrell and Warren Duff. (Ex. 1, Decl. of Shane Weckerly (“Weckerly Decl.”), at ¶ 4.) Retrotek purportedly [REDACTED]

[REDACTED]

[REDACTED] (*Id.* at ¶ 8, Weckerly Ex. A at 2.) With this technology, Retrotek employed a [REDACTED]

[REDACTED] (*Id.* at ¶ 8, Weckerly Ex. A at 2.) As recorded in the ‘475 Patent, the “end caps provide an appearance of carburetor fuel bowls while generally concealing the fuel injectors.” (Dkt. 22-1 at Abstract.)

During the development of the [REDACTED] Retrotek engaged in [REDACTED]

[REDACTED]

[REDACTED] (Weckerly Decl. at ¶ 29.) By mid-2006,

Retrotek was well along their way to this product. Indeed, on May 29, 2006, a user posted on a public internet forum that he “built and worked on a car” with a Retrotek EFI system that “Ken from [R]etrotek” tuned. (Ex. 2 at 1.) The user explained how “the car ran like a dream” and commented directly on Retrotek’s injector throttle body. (*Id.*) Specifically, he commented on the key feature of Retrotek’s throttle body: “*The fuel injectors are hidden nicely in a cavity where the fuel bowl is located.*” (*Id.* (emphasis added).) This is precisely how Retrotek later described its technology in the Abstract of the ’475 Patent. (Dkt. 22-1.)

By fall of 2006, Retrotek fully commercialized its EFI system using the brand BossEFI. According to Mr. Farrell’s sworn declaration to the U.S. Patent and Trademark Office, Retrotek first used BossEFI commercially no later than September 1, 2006. (Weckerly Ex. C at 3.) As confirmed by the Specimen of Use submitted in support thereof, BossEFI is Retrotek’s EFI system it had been developing for years that includes the Boss injector throttle bodies that “are dimensionally nearly identical to a standard carburetor” and that use injectors “hidden in the ‘float bowls.’” (*Id.* at 6.) The Specimen illustrates the product in commercial use by September 1, 2006 is the same product appearing in the drawings of the ’475 Patent. (*Id.*; Weckerly Decl. at ¶¶ 13–15, 31; Dkt. 22-1, Figure 1.)

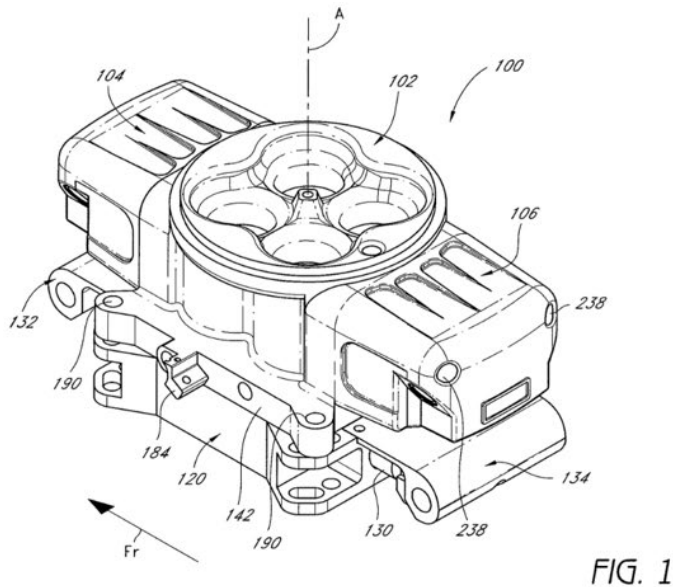


FIG. 1

C. Retrotek Widely Promoted Its BossEFI System

In September 2006, Retrotek was promoting its BossEFI system to those in the industry. (Weckerly Decl. at ¶ 20.) Through an industry connection, Holley learned of the BossEFI system and Retrotek’s desire to meet with Holley—a longstanding leader in the industry. (*Id.* at ¶¶ 5–6.) In the early to mid-2000s, Holley had been internally discussing its interest in an easily retrofittable EFI system that also included self-tuning capabilities. (*Id.* at ¶ 5.) Retrotek welcomed Holley to visit its facility in California and learn more about their products and their fledgling company; the visit occurred on September 28, 2006. (*Id.* at ¶ 6.)

During the visit, Holley saw and experienced [REDACTED]

[REDACTED] (Weckerly Decl. at ¶ 8.) Retrotek even demonstrated [REDACTED]

[REDACTED] (*Id.* at ¶ 11.) Holley understood that most of Retrotek’s prior “testing” occurred in this same manner, [REDACTED]

[REDACTED] (*Id.* at ¶ 29.) But, as recorded by Retrotek: [REDACTED]

[REDACTED] (Weckerly Ex. A at 4.)

Retrotek's [REDACTED]
[REDACTED] (Weckerly Decl. at ¶¶ 10, 12.) This appearance was accomplished through [REDACTED]
[REDACTED] (*Id.*)
[REDACTED] BossEFI throttle body that: (1) was “dimensionally nearly identical to a standard carburetor,” (2) included “injectors . . . hidden in the ‘float bowls,’” and (3) Retrotek declared was in commercial use by September 1, 2006—more than twenty years ago. (Weckerly Decl. at ¶¶ 13–15, Weckerly Ex. C at 6, *see also* Weckerly Exs. E, F.)

During the visit, Retrotek also discussed [REDACTED]
[REDACTED] The press release discussed the “Smart Tune” engine management system and how the system was designed such that “no fuel return line [was] needed,” and included an image of the Boss throttle body and explained that it possessed “dimensions essentially identical to a 4150-series carburetor.” (Weckerly Ex. F.)

Retrotek Offered to Sell [REDACTED]
[REDACTED]

On September 28, 2006, Holley visited Retrotek's facility. (Weckerly Decl. at ¶ 6.) There, Retrotek informed Holley [REDACTED]
[REDACTED] (*Id.*) Retrotek also advised Holley [REDACTED]
[REDACTED]
[REDACTED] (*Id.*)

During the visit, Retrotek presented [REDACTED]
[REDACTED] (Weckerly Decl. at ¶ 16, Weckerly Ex. A at 9.) [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

(Weckerly Decl. at ¶ 8, Weckerly Ex. A at 2.) Retrotek told Holley: [REDACTED]

[REDACTED]

[REDACTED] (Weckerly Decl. at ¶ 9, Weckerly Ex. A at 4 (emphasis added).) As recorded, [REDACTED]

[REDACTED] (Weckerly Ex. A at 9.) Retrotek explained [REDACTED]

[REDACTED]

[REDACTED] (Weckerly Decl. at ¶¶ 16-17.) Indeed, the parameters of [REDACTED] offer were soon memorialized in the October 5, 2006, letter of intent signed by both Retrotek and Holley: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Weckerly Decl. at ¶¶ 16-17, Weckerly Ex. D at 2 (emphasis added).)

Holley was interested in [REDACTED]

(Weckerly Decl. at ¶¶ 27-30.) As noted above, Retrotek claimed to [REDACTED]

[REDACTED] Thus, given Holley's interest and the desire to [REDACTED]

[REDACTED] the parties drafted and signed the letter of intent mentioned above. (*Id.* at ¶ 27.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Weckerly Ex. D at 2.) Continuing further, the letter "[REDACTED]"

[REDACTED] (*Id.*)

Principally, Holley had [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 4.)

The letter of intent stated: [REDACTED]

[REDACTED]

[REDACTED] (Weckerly Ex. D at 4.) Acknowledging receipt and agreeing to the terms therein, [REDACTED]

(*Id.*)

[REDACTED]

[REDACTED] (Weckerly Decl. at ¶¶ 27–28.) [REDACTED]

[REDACTED]. (*Id.* at ¶ 28.) And while Holley was performing its analysis, Retrotek was attempting to increase Holley's interest [REDACTED]

[REDACTED] Retrotek emailed Holley [REDACTED]

[REDACTED]

[REDACTED]

(Weckerly Decl. at ¶ 26, Weckerly Ex. G.)

Holley and Retrotek ultimately [REDACTED] (Weckerly Decl. at ¶ 30.)

E. The '475 Patent Claims Retrotek's EFI Injector Throttle Body

The inventors of the '475 Patent are Ken Farrell and Warren Duff, co-founders of Retrotek. (Dkt. 22-1, Cover; Weckerly Decl. at ¶ 4.) The application for the '475 Patent was filed on September 19, 2008, and claims priority to two provisional applications: No. 60/979,702,

filed on Oct. 12, 2007, and No. 61/052,903, filed on May 13, 2008. Aces contends the priority date for asserted claims 1–5 is May 13, 2008. (Ex. 3, Aces’ Initial Infringement Contentions Excerpt at 5.) Therefore, the “critical date” for the purposes of the public use and on-sale bars May 13, 2007.¹

Claims 1–5 of the ’475 Patent are directed to the throttle body that was offered for sale to Holley on September 28, 2006—the same throttle body that was presented by Retrotek to the U.S. Patent and Trademark Office, the same throttle body that was provided to Holley to evaluate, and the same throttle body that was published by HorsePowerSports and Hot Rod Magazine. (Weckerly Decl. at ¶¶ 12, 14, 22, 25, 31, Weckerly Exs. C, E, F.)

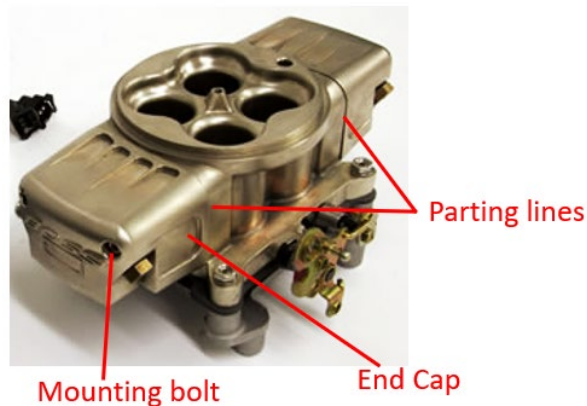
The ’475 Patent explains that the throttle body is designed to create the “appearance of a carbureted engine.” (Dkt. 22-1 at 1:39–41.) The ’475 Patent describes how the claimed throttle body resembles a “standard 4150 double pumper carburetor,” (*id.* at 2:44-47), and explains how “end caps provide an appearance of fuel bowls [of a carburetor] while generally concealing the fuel injectors.” (*Id.* at Abstract.) Indeed, claim 1 of the ’475 Patent merely describes a standard 4150 carburetor with fuel injectors in the place of the fuel bowls. Claim 1 recites: “a first fuel injector extending through said side surface toward said first air passage; said first fuel injector being generally covered by said first end cap.” The record is with replete this same disclosure in relation to Retrotek’s September 2006 throttle body, which:

- was a [REDACTED]
[REDACTED] (Weckerly Ex. A at 2);
- had “fuel injectors, which are hidden in the ‘float bowls’” (Weckerly Ex. C at 6);

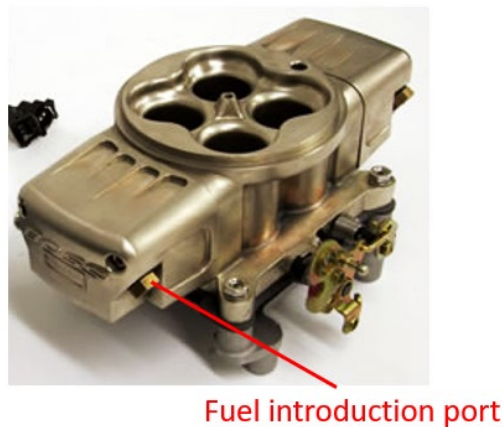
¹ The ’475 Patent is subject to pre-AIA 35 U.S.C. § 102. *Crown Packaging Tech., Inc. v. Belvac Prod. Mach., Inc.*, 122 F.4th 919, 922 (Fed. Cir. 2024).

- had “fuel injectors [that] are hidden in the ‘float bowls’” (Weckerly Ex. E at 1);
and
- had “fuel injectors [that] are hidden nicely in a cavity where the fuel bowl is located.” (Ex. 2.)

Claim 2 depends from claim 1, adding only that the first end cap is removable from the main throttle body, just like the fuel bowl on a carburetor. One can easily see the separate end cap and mounting bolt in the images of the Retrotek throttle body.

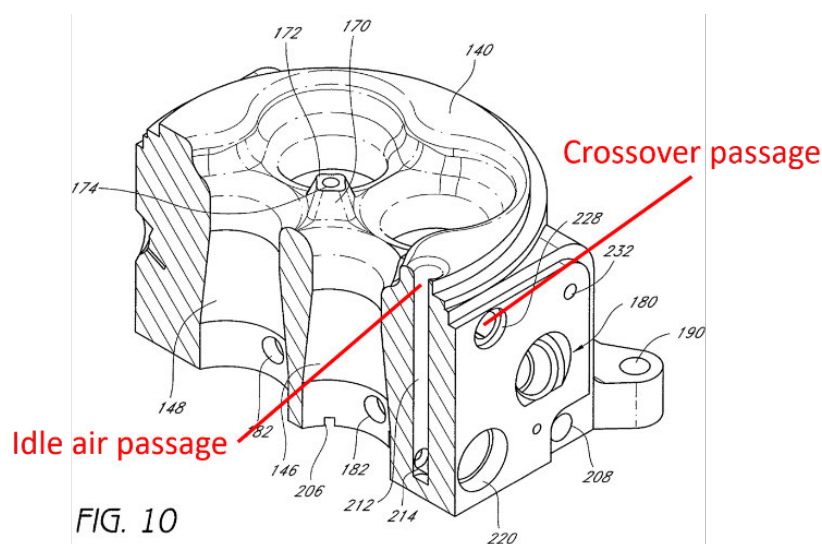


Claim 3 similarly depends from claim 1 and adds a fuel introduction port in the exterior surface of the end cap. The fuel introduction port is easily seen, and of course, is a feature from a standard 4150 carburetor.

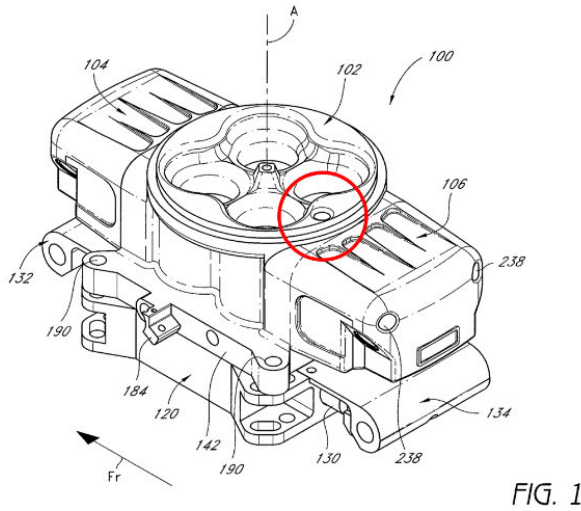


Claim 4 depends from claim 3, introducing a fuel supply passage formed in a wall of the end cap extending between the fuel introduction port and the fuel injector. For the fuel injection to work, fuel has to get from the fuel introduction port to the fuel injector somehow. Indeed, a standard 4150 carburetor has similar passages only without the electronic fuel injector. (See Weckerly Ex. B.)

Lastly, claim 5, the final asserted claim, depends from claim 4 and adds a connection passage extending through the main throttle body connecting fuel supply passages in the two end caps. This limitation was also present [REDACTED] (Weckerly Decl. at ¶ 22.) By including the crossover passage through the main throttle body, the idle air inlet passage 212 of the claimed throttle body is offset from center, as shown below in Figure 10. (Dkt. 22-1 at 4:58–59, Figure 10.)



The Retrotek throttle body included the crossover passage, as demonstrated by the offset idle air passage. (*Id.* at Figure 1; Weckerly Exs. C, E.)



It is likely that all claims of the '475 Patent were included [REDACTED] but since only claims 1–5 are asserted in this lawsuit, it is only these claims that need to be considered for the present motion.

III. ARGUMENT

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “A fact is ‘material’ for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense.” *Bruederle v. Louisville Metro Gov’t*, 687 F.3d 771, 776 (6th Cir. 2012). A dispute of material fact is not created by “conclusory assertions, unsupported by specific facts” or statements that are “nothing more than rumors, conclusory allegations and subjective beliefs.” *See Malibu Boats, LLC v. Skier’s Choice, Inc.*, 534 F. Supp. 3d 888, 900-01 (E.D. Tenn. 2021) (citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 584-85 (6th Cir. 1992)). “A conclusion that a section 102(b) bar invalidates a patent must be based on clear and convincing evidence.” *Netscape Commc’ns Corp. v. Konrad*, 295 F.3d 1315, 1320 (Fed. Cir. 2002).

No dispute of material fact exists regarding the invalidity of the ’475 Patent in view of Retrotek’s [REDACTED]

[REDACTED] The ’475 Patent is also invalid because the throttle body was in public use by Retrotek and others prior to the critical date.

A. The ’475 Patent Is Invalid Based on the On-Sale Bar

Under 35 U.S.C. § 102(b), a patent is invalid if the “invention” recited was “on sale” more than one year before the patent application was filed. This on-sale bar is a “limiting provision” on patentability that “prevents one from extending a patent monopoly beyond the statutory term by commercially exploiting an invention *prior* to seeking a patent.” *Celanese Int’l Corp. v. Int’l Trade Comm’n*, 111 F.4th 1338, 1343 (Fed. Cir. 2024) (quoting *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 64, 67 (1998)) (emphasis in original). The intent behind the bar “is to preclude an inventor’s *attempt to profit* from commercial exploitation of his invention for more

than one year before seeking a patent.” *Id.* (emphasis added). “An inventor’s ‘voluntary act’ of exploiting his invention through a commercial sale before the critical date constitutes ‘***an abandonment of his right’ to a patent.***” *Id.* (quoting *Pfaff*, 524 U.S. at 64) (emphasis added). This rationale “reverberates throughout the history of our patent statute.” *Id.*

The Supreme Court established that the on-sale bar applies when, before the critical date, (1) the invention was the subject of a commercial offer for sale, and (2) the invention is ready for patenting. *Pfaff*, 525 U.S. at 67. Importantly, even a confidential offer for sale that does not disclose the details of the invention is an offer for sale for the purpose of the on-sale bar. *Woodland Tr. v. Flowertree Nursery, Inc.*, 148 F.3d 1368, 1370 (Fed. Cir. 1998) (“[A]n inventor’s own prior commercial use, albeit kept secret, may constitute a public use or sale under § 102(b), barring him from obtaining a patent.”); *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 586 U.S. 123, 131 (2019) (The Federal Circuit “has long held that ‘secret sales’ can invalidate a patent.”); *Scaltech Inc. v. Retec/Tetra, L.L.C.*, 178 F.3d 1378, 1383 (Fed. Cir. 1999) (“We note that there is no requirement that the offer specifically identify [the later-claimed] limitations.”). “Whether an invention was on sale within the meaning of § 102(b) is a question of law.” *Crown Packaging Tech., Inc. v. Belvac Prod. Mach., Inc.*, 122 F.4th 919, 924 (Fed. Cir. 2024) (citing *Junker v. Med. Components, Inc.*, 25 F.4th 1027, 1032 (Fed. Cir. 2022)). A party asserting the on-sale bar may meet its burden of proof through either direct evidence or corroborative circumstantial evidence. *Definitive Holdings v. Powerteq*, 171 F.4th 1373, 1382 (Fed. Cir. 2026) (citing *Ingenico Inc. v. IOENGINE, LLC*, 136 F.4th 1354, 1361–62 (Fed. Cir. 2025)).

Here, the throttle body claimed in the ’475 Patent [REDACTED]

[REDACTED]

1. **Retrotek's** [REDACTED]

Whether there is a commercial offer for sale requires application of Federal Circuit law and is analyzed under the law of contracts as generally understood. *Crown Packaging Tech.*, 122 F.4th at 924–25. The focus is on activities that would be understood to be offers for sales “in the commercial community.” *Id.* at 925. “An attempt to sell is sufficient so long as it is sufficiently definite that another party could make a binding contract by simple acceptance.” *Id.* (cleaned up) (quoting *Hamilton Beach Brands, Inc. v. Sunbeam Prods., Inc.*, 726 F.3d 1370, 1374 (Fed. Cir. 2013)). It is well-established that a commercial offer to sell prototypes of an invention is an invalidating offer for sale under the on-sale bar. *Stearns v. Beckman Instruments, Inc.*, 737 F.2d 1565, 1569 (Fed. Cir. 1984) (affirming on-sale bar based on the second of three prototypes); *Atl. Thermoplastics Co. v. Faytex Corp.*, 5 F.3d 1477, 1480 (Fed. Cir. 1993) (vacating judgment that rejected on-sale bar and remanding for further fact finding regarding a prototype); *Netscape Commc’ns*, 295 F.3d at 1324–25 (affirming on-sale bar based on a “proposal . . . to provide a working prototype . . . for \$48,000.”); *Atlanta Attachment Co. v. Leggett & Platt, Inc.*, 516 F.3d 1361, 1365–68 (Fed. Cir. 2008) (applying on-sale bar to sale of the third of four prototypes); *Hamilton Beach Brands*, 726 F.3d at 1379 (applying on-sale bar based on evidence of “working prototypes”). “[O]nce there has been a commercial offer, there can be no experimental use exception.” *Atlanta Attachment*, 516 F.3d at 1366.

Retrotek [REDACTED]—a patent defeating activity if done more than one year prior to filing a patent application. [REDACTED] was unquestionably sufficiently definite to constitute a commercial offer for sale under federal contract law. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Weckerly Ex. A at 9; Weckerly Ex. D at 2.) The Federal Circuit has found the existence of these terms alone establishes a commercial offer for sale. *See Netscape Commc'ns*, 295 F.3d at 1324 (“proposal . . . to provide a working prototype . . . for \$48,000” was a commercial offer for sale). Indeed, price is not a required term to find there was an offer; rather, “[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” *Linear Tech. Corp. v. Micrel, Inc.*, 275 F.3d 1040, 1050, 1052 (Fed. Cir. 2001). Retrotek’s proposal goes even further, including additional factors the Federal Circuit has found indicative of a commercial offer for sale.

As in *Crown Packaging Tech.*, Retrotek’s offer was “directed to a specific company,” Holley, and was memorialized in a document “signed by [Retrotek]’s representative.” 122 F.4th at 925; (Weckerly Ex. A at 1, 9 [REDACTED] Weckerly Ex. D.) Like *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, there is “no suggestion” that the offer “did not involve transfer of title; it expressly contemplated it.” 855 F.3d 1356, 1364 (Fed. Cir. 2017); *see Sunoco Partners Mktg. & Terminals L.P. v. U.S. Venture, Inc.*, 32 F.4th 1161, 1170 (Fed. Cir. 2022); (Weckerly Ex. D at 2.) And, as in *Sunoco Partners*, the language of the documents “reinforces the [offer]’s commercial character” because “[i]t states that [Retrotek] already ‘developed’ the relevant technology and equipment[and] that [Holley] wanted to purchase it.” *Sunoco Partners*, 32 F.4th at 1169–70. (Weckerly Ex. D at 1.) Moreover, [REDACTED]

[REDACTED] (Weckerly Ex. A, Weckerly Ex. D at 2.) [REDACTED]

thus contains a similar level of definiteness as the invalidating offer to process refinery waste in *Scaltech, Inc. v. Retec/Tetra, LLC*, that noted the offer was based on a specific centrifuge and was firm for 90 days, 269 F.3d 1321, 1329 (Fed. Cir. 2001).

At bottom, [REDACTED]

[REDACTED] was a commercial offer for sale, triggering the on-sale bar. *Netscape Commc'ns*, 295 F.3d at 1324.

2. Retrotek's injector throttle body was ready for patenting

An invention is ready for patenting if it was reduced to practice before the critical date or if the inventor prepared sufficiently specific drawings or other descriptions of the invention. *Pfaff*, 525 U.S. at 67. Critically, there is “no requirement that an invention . . . be in a commercially satisfactory stage of development in order to reduce the invention to practice.” *DSL Dynamic Scis. Ltd. v. Union Switch & Signal, Inc.*, 928 F.2d 1122, 1126 (Fed. Cir. 1991). Accordingly, further prototyping or the addition of subsequent improvements neither indicates nor prevents finding that an earlier prototype was not ready for patenting. *Atlanta Attachment*, 516 F.3d at 1367–68; *Hamilton Beach Brands*, 726 F.3d at 1379 (“Hamilton Beach’s argument that some of the prototypes did not work as intended is of no moment . . . because ‘fine-tuning’ of an invention after the critical date does not mean that the invention was not ready for patenting.”). Rather, an invention is reduced to practice upon a demonstration of workability for its intended purpose as informed by the specification and claims of the later-filed patent. *Minerva Surgical, Inc. v. Hologic, Inc.*, 59 F.4th 1371, 1377–78 (Fed. Cir. 2023).

Here, there can be no reasonable dispute; the throttle body [REDACTED]

[REDACTED] (Weckerly Decl. at ¶ 9, Weckerly Ex. A at [REDACTED])

2, 4;) *see Netscape Commc'ns*, 295 F.3d at 1324–25 (finding invention was ready for patenting based on inventor's admission of the date it was reduced to practice). Indeed, Retrotek possessed

[REDACTED]

[REDACTED]

[REDACTED] (Weckerly Decl. at ¶¶ 8–9, 11, 28.) The '475 Patent establishes that the intended purpose of the claimed throttle body is to provide the appearance of a carbureted engine but allow for the use of EFI technology. (Dkt. 22-1 at 1:39–41, Abstract.) By demonstrating the [REDACTED]

[REDACTED] *See DSL Dynamic Scis.*, 928 F.2d at 1125 (coupler mount assembly was reduced to practice for its intended purpose based on tests performed with a train caboose that simulated conditions present on a freight car coupler).

Therefore, [REDACTED]

[REDACTED] the '475 Patent is invalid under the on-sale bar to the extent directed to [REDACTED] Summary judgment of invalidity is therefore proper. *Netscape Commc'ns*, 295 F.3d at 1325.

B. The '475 Patent is Separately Invalid Based on Public Use

Under the public use bar, “[a] person shall be entitled a patent unless . . . the invention was . . . in public use . . . in this country, more than one year prior to the date of the application for patent in the United States.” Pre-AIA 35 U.S.C. § 102(b). Whether a patent is invalid for public use is a question of law. *Minerva Surgical*, 59 F.4th at 1377-78 (affirming summary judgment of invalidity based on public use). The bar is triggered when, before the critical date, the invention was (1) “in public use” and (2) “ready for patenting.” *Id.* The “in public use”

element is met if the invention was accessible to the public or was commercially exploited by the inventor. *Id.* “Either direct or circumstantial evidence corroborating public use may be sufficient for a party to meet its burden of proof.” *Ingenico*, 136 F.4th at 1362 (“Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”).

When Retrotek filed a trademark application for BossEFI, the trade name for Retrotek’s fuel injection system that includes the injection throttle body claimed in the ’475 Patent, Mr. Farrell made a declaration to the Patent and Trademark Office that BossEFI was first used in commerce at least as early as September 1, 2006. (Weckerly Ex. C at 3.) Mr. Farrell submitted a Specimen of Use in support of that declaration. (*Id.* at 6.) That specimen evidenced use of the BossEFI mark in association with the throttle body claimed in the ’475 Patent. (*Id.*) Accordingly, by Mr. Farrell’s sworn declaration to the PTO, the BossEFI throttle body was in use in commerce more than one year before the earliest claimed priority date of the ’475 Patent. *See In re Cygnus Telecommunications Tech., LLC, Pat. Litig.*, 536 F.3d 1343, 1354 (Fed. Cir. 2008) (“Cygnus is bound by the statements that Mr. Alleman made in his declaration to the PTO.”). And, as shown above, Retrotek’s throttle body was already working for its intended purpose and thus was ready for patenting. *Minerva Surgical*, 59 F.4th at 1377. Accordingly, the ’475 Patent is invalid as it was in public use no later than September 1, 2006.

The invention of the ’475 Patent has been in public use and ready for patenting since long before that, however. [REDACTED]

[REDACTED] (Weckerly Decl. at ¶ 11, 29.) For example, on May 29, 2006, a member of the public posted on an open internet forum and provided key details about Retrotek’s injector throttle body used on a car with which he worked. He explained that “Ken from [R]etrotek” got “everything

running smoothly” and that “[t]he fuel injectors are hidden nicely in a cavity where the fuel bowl is located.” (Ex. 2 at 2.) The individual confirmed the throttle body worked for its intended purpose and was even “running smoothly.” (*Id.*) “The inescapable conclusion of the [forum post] is that [Retrotek] allowed [a] knowledgeable individual[] to scrutinize the invention enough to recognize and understand the [design Retrotek] later sought to patent.” *Minerva Surgical*, 59 F.4th at 1379 (“public use may also occur where, as here, the inventor used the device such that *at least one* member of the public without any secrecy obligations *understood* the invention”)(emphasis added); *see Dey, L.P. v. Sunovion Pharms., Inc.*, 715 F.3d 1351, 1355-56 (Fed. Cir. 2013) (“Even limited disclosure to those who are skilled enough to know, understand, and ‘easily demonstrate the invention to others,’ may mean that there was no reasonable expectation of secrecy and that the invention was therefore in public use.”) (quoting *Netscape Commc’ns*, 295 F.3d at 1321); *see also Eolas Techs. Inc. v. Microsoft Corp.*, 399 F.3d 1325, 1335 (Fed. Cir. 2005) (finding invalidating public use by third party where third party “made no attempt to maintain confidentiality”).

Given [REDACTED]

[REDACTED] (Weckerly Decl. at ¶ 29), the undisputed record shows at least one invalidating use. *See Eolas Techs.*, 399 F.3d at 1334 (“third party prior use accessible to the public is a section 102(b) bar.”). Relatedly, Retrotek also disclosed the claimed throttle body to third parties for the express purpose of publication to the public and thus were under no obligation of secrecy. (Weckerly Decl. at ¶ 20;) *see Netscape Commc’ns*, 295 F.3d at 1320 (“Public use includes any use of the claimed invention by a person other than the inventor who is under no limitation, restriction or obligation of secrecy to the inventor.”) (cleaned up). By September 2006, [REDACTED] [REDACTED] (Weckerly Decl. at ¶¶ 20, 23–25.)

These third parties began publishing details about and photographs of the invention by November 2006—much more than one year before Aces’ asserted priority date of May 13, 2008.

(*Id.* at ¶¶ 25–26, Weckerly Exs. E, F.)

Accordingly, the ’475 Patent is invalid based on public use. *Minerva Surgical*, 59 F.4th at 1381–82.

IV. CONCLUSION

Retrotek offered to sell the invention of the ’475 Patent to Holley, including all prototypes and production materials, prior to the critical date. Because the throttle body was ready for patenting at the time, the ’475 Patent is invalid under the on-sale bar of 35 U.S.C. § 102. Additionally, the ’475 Patent was in public use prior to the critical date also rendering it invalid based on 35 U.S.C. § 102. Accordingly, Holley respectfully requests that the Court grant its Motion for Summary Judgment and enter judgment of invalidity of the ’475 Patent against Aces.

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