

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SDI Technologies, Inc.
Petitioner

v.

Bose Corporation
Patent Owner

Case IPR2014-00346
Patent 8,364,295

**PATENT OWNER BOSE CORPORATION'S
MOTION TO EXCLUDE EVIDENCE
PURSUANT TO 37 C.F.R. § 42.64**

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UPDATED LIST OF EXHIBITS

Patent Owner Exhibit Number	Exhibit Description
Ex. 2101	06-28-2013 Bose's Preliminary Infringement Disclosure filed in <i>Bose Corp. v. SDI Technologies, Inc.</i> , Case No. 13-cv-10277-WGY (D. Mass.) (" <i>Bose v. SDI</i> case") (Previously filed)
Ex. 2102	Excerpts of 01-15-2014 court hearing held <i>Bose v. SDI</i> case (Previously filed)
Ex. 2103	Excerpt from Webster's Third New International Dictionary of the English Language (unabridged 1993), which includes a copy of the reference's definition of "respond" on page 1935 of that reference (Previously filed)
Ex. 2104	Excerpts of 03-10-2014 Deposition Testimony of Dr. Andrew B. Lippman (Previously filed)
Ex. 2105	Operating Instructions for RM-AV2000 Integrated Remote Commander by Sony Corporation (1997) (Previously filed)
Ex. 2106	U.S. Patent 5,644,303, titled "Specialized Shaped Universal Remote Commander" (Previously filed)
Ex. 2107	U.S. Patent 5,872,562, titled "Universal Remote Control Transmitter With Simplified Device Identification" (Previously filed)
Reserved	Reserved

Ex. 2109	U.S. Patent No. 8,401,682 (sister patent to the '295 patent) (Previously filed)
Ex. 2110	U.S. Patent No. 7,277,765 (parent patent to the '295 patent) (Previously filed)
Ex. 2111	01-15-2014 Hearing Transcript in <i>Bose Corp. v. SDI Technologies, Inc.</i> , Case No. 13-cv-10277-WGY (D. Mass.) (Dkt. D108) (Previously filed)
Ex. 2112	Excerpt from 09-27-2013 Defendant's Preliminary Claim Construction Brief filed in <i>Bose Corp. v. SDI Technologies, Inc.</i> , Case No. 13-cv-10277-WGY (D. Mass.) (Previously filed)
Ex. 2113	Webpage showing the Altec Lansing ADA104 home theater speaker system. http://edsgoodstuff.com/edscart/index.php?main_page=product_info&products_id=3076 (Previously filed)
Reserved	Reserved
Ex. 2115	Excerpts of File History for U.S. Patent No. 7,277,765 (parent patent to the '682 patent) (Previously filed)
Ex. 2116	Excerpts of File History for U.S. Patent No. 8,364,295 (sister patent to the '682 patent) (Previously filed)
Ex. 2117	July 22, 2014 Patent Owner's Notice of Objections to Evidence (Previously filed)

Ex. 2118	Excerpts from William Strunk Jr. & E.B. White, <i>The Elements of Style</i> (4th ed. 2000) (Previously filed)
Ex. 2119	Excerpts from Laurel J. Brinton & Minoji Akimoto, <i>Collocational and Idiomatic Aspects of Composite Predicates in the History of English</i> , John Benjamin's Publishing 1999 http://books.google.com/books?id=jW0S0AyhGmAC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (Previously filed)
Ex. 2120	September 16, 2014 Declaration of Dr. Robert L. Stevenson (Previously filed)
Ex. 2121	Pages from the Internet Archive website (https://archive.org/legal/ and https://archive.org/legal/faq.php)

I. INTRODUCTION

Patent Owner Bose Corporation (“Bose”) moves to exclude certain evidence submitted and relied on by Petitioner SDI Technologies, Inc. (“SDI”).

The Board instituted trial as to claims 25, 26, 51-53, 55-62, 75 and 76 of U.S. Patent No. 8,364,295 (“the ’295 patent”) on the ground of obviousness over WinAmp (Ex. 1009), the IRMan Web Pages (Ex. 1010), and the Altec Lansing Manual (Ex. 1011), as raised in SDI’s Amended Petition requesting *Inter Partes* Review. Decision (Paper 13), p. 21. SDI’s Amended Petition relies on expert testimony from Dr. Andrew B. Lippman (Ex. 1017), who contends that a particular combination of these references renders the claims obvious. *See, e.g.*, Amended Petition (Paper 6), p. 15 (citing Ex. 1017 (Lippman Decl.), ¶¶ 39-41).

For the reasons set forth below, Bose moves to exclude ¶¶ 39-44 in Dr. Lippman’s declaration (Ex. 1017), which purport to set forth his opinions on the WinAmp, IRMan Web Pages, and Altec Lansing Manual combination. The opinions contained in these paragraphs are inadmissible evidence under Fed. R. Evid. 702 because Dr. Lippman admitted at his deposition that his opinions on obviousness in these paragraphs are based on impermissible hindsight.

Bose also moves to exclude page 7 of the Altec Lansing Manual (Ex. 1011) since page 7 is from a different document than the remainder of Exhibit 1011. Based on Fed. R. Evid. 106 and 901, page 7 should be excluded.

Finally, Bose moves to exclude the IRMan Web Pages (Ex. 1010), which are web pages that have not been authenticated and constitute inadmissible hearsay. Based on Fed. R. Evid. 802 and 901, the exhibit should be excluded.

Bose timely served objections to these exhibits. *See* Exhibit 2117. SDI has relied on the evidence in this proceeding. *See, e.g.*, Amended Petition, pp. 14-33, citing ¶¶ 39-41 in Exhibit 1017, Exhibit 1010 and page 7 of Exhibit 1011. SDI has not attempted to cure the defects in these exhibits.

II. ARGUMENT

The admissibility of exhibits submitted in a PTAB proceeding is governed by the Federal Rules of Evidence. 37 C.F.R. § 42.62 (“the Federal Rules of Evidence shall apply to a proceeding”); Trial Practice Guide, 77 Fed. Reg. 48758 (“Admissibility of evidence is generally governed by the Federal Rules of Evidence”). SDI, as the proponent, carries the burden of establishing the admissibility of the challenged evidence. *See, e.g.*, Fed. R. Evid. 901(a) (“... the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”).

A. The IRMan Web Pages—Exhibit 1010—Should Be Excluded

Exhibit 1010 consists of seven pages of three separate Internet printouts. The printouts were apparently made on June 3, 2013, from the “Internet Archive Wayback Machine” (archive.org), and purport to reflect content that was posted on

a separate website (evation.com) more than fifteen years ago. Exhibit 1010 should be excluded because it suffers from at least two separate evidentiary defects:

authenticity and *hearsay*.

1. SDI Failed to Cure the Authenticity Issue

SDI has failed to offer any evidence whatsoever that Exhibit 1010 is *authentic*. That is, there is no evidence that Exhibit 1010 is what SDI claims it to be—a printout from the Internet Archive that accurately reflects the contents of evation.com on a particular date prior to the '295 patent application.¹ Printouts such as this – particularly from the “Wayback Machine” – must be authenticated under Federal Rule of Evidence 901 by one who has relevant knowledge. *Id.*:

Plaintiff states that the web pages archived within the Wayback Machine are based upon “data from third parties who compile the data by using software programs known as crawlers,” who then “donate” such data to the Internet Archive, which “preserves and provides access to it.” (Novak Decl. ¶ 4.) Based upon Novak’s assertions, it is clear that the information posted on the Wayback Machine is only as valid as the third-party donating the page decides to make it—the authorized owners and managers of the archived websites play no role in ensuring that the material posted in the Wayback Machine

¹ SDI confusingly alleges three different dates: “June 8, 1999” (Amended Petition, p. 10), and “no later than May 8, 1999, 1998.” (*id.*, p. 10, n.2).

accurately represents what was posted on their official websites at the relevant time. As Novak proffers neither testimony nor sworn statements attesting to the authenticity of the contested web page exhibits by any employee of the companies hosting the sites from which plaintiff printed the pages, such exhibits cannot be authenticated as required under the Rules of Evidence.

Novak v. Tucows, Inc., 2007 WL 922306, *5 (E.D.N.Y. March 26, 2007) (excluding pages from the Wayback Machine), *aff'd*, 330 Fed. Appx. 204 (2d Cir. 2009); *see also Specht v. Google Inc.*, 747 F.3d 929, 933 (7th Cir. 2014) (affirming exclusion of Internet Archive pages, where proponent failed to provide authenticating testimony); *Schwartz v. J.J.F. Mgmt. Servs., Inc.*, 2010 WL 1529241 (D. Md. Mar. 22, 2010) (precluding use of dates provided by Wayback Machine). Here, SDI has failed to provide any supporting testimony to show that printouts are authentic, and therefore Exhibit 1010 should be excluded as inadmissible.²

² SDI's Amended Petition relies on B.P.A.I. decisions that cite Internet Archive printouts in *ex parte* patent prosecution. *See* Amended Petition, p. 10 n.2 (citing MPEP § 2128; *Ex Parte Molander*, Appeal 2008-2589, Application 9/845,537, pp. 9-12 (B.P.A.I. March 17, 2009); and *Ex Parte Shaouy*, Appeal 2007-0987, Application 09/810,992 (B.P.A.I. May 24, 1997 [sic: 2007])). But the Federal Rules of Evidence do not apply in *ex parte* patent prosecution. *See In re Epstein*,

The Board erred in previously concluding that Exhibit 1010 was authentic in the '465 Proceeding. *See* IPR 2013-00465, Final Written Decision (Paper 40), pp. 13-16. The Board incorrectly concluded that “[a]t the hearing, Patent Owner clarified that a standard affidavit from the Internet Archive would have provided sufficient authentication.” *See id.*, pp. 14-15 (citing Tr. 87:4–21.) The cited argument merely states that proper authentication testimony would involve getting what Federal Rule 901 requires—i.e., “[g]etting a declaration from Internet Archive that is sufficient to establish that what they have is -- what SDI says it is is what it is.” '465 Proceeding Tr. (Paper 39), 87:2-20. This is precisely what SDI has ***not*** done here. Regardless of whether the Internet Archive has a “standard affidavit” attesting to its general procedures, there is no testimony or other evidence whatsoever in this proceeding that Exhibit 1010 accurately reflects what was posted on evation.com on any particular date. Nor does the Board’s ability to access the same pages on the Internet Archive cure the evidentiary defect, because the Board lacks the knowledge required by the Federal Rules of Evidence. *See* Fed. R. Evid. 901(b)(1) (requiring testimony of a person with knowledge that an item is what it is claimed to be).

32 F.3d 1559, 1565 (Fed. Cir. 1994). This, in contrast, is an ***inter partes*** proceeding, where the Federal Rules of Evidence ***do*** apply.

In addition, the Board erred in relying on an unsigned “standard affidavit” form it downloaded from the Internet Archive and *sua sponte* introduced as Exhibit 3004 to conclude that Exhibit 1010 is authentic. The Internet Archive plainly states that its “standard affidavit” ***does not establish the date*** on which the posted content was available on the Internet:

Does the Internet Archive’s affidavit mean that the printout was actually the page posted on the Web at the recorded time?

The Internet Archive’s affidavit only affirms that the printed document is a true and correct copy of our records. It remains your burden to convince the finder of fact what pages were up when.

Exhibit 2121, p. 3 (bold emphasis in original, underlined emphasis added). Thus, by the Internet Archive’s own admission, even if SDI had actually obtained a “standard affidavit” (which it did not), that “standard affidavit” would not have established that Exhibit 1010 is what SDI claims it is—a printout that reflects the contents of evation.com as it appeared on a particular date.³

The Board also improperly placed the burden on ***Bose*** to show that Exhibit 1010 was not authentic. *See* ’465 Final Decision, pp. 14-15. The Federal Rules of

³ The Internet Archive also states that it “may be willing to change its standard affidavit according to particular needs.” Exhibit 2121, p. 3. Thus, other affidavits beyond the “standard” version are available from the Internet Archive.

Evidence clearly place the burden on SDI, the proponent of the evidence, to establish that Exhibit 1010 is authentic. *See* Fed. R. Evid. 901(a) (“... the **proponent** must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” (emphasis added)). Although 37 C.F.R. § 42.20(c) states that for motions “[t]he moving party has the burden of proof to establish that it is entitled to the requested relief,” in this context, *i.e.*, where the applicable Federal Rules of Evidence place the burden on the proponent SDI, Bose carries its burden on its Motion to Exclude (with respect to Exhibit 1010) by showing that SDI has failed to provide the required proof of authenticity. *See* 37 C.F.R. § 42.20(c). In the prior proceeding, the Board misapprehended the relevant burdens of the parties in this context and improperly ruled that Bose was required to “articulate [something] about the document itself that would indicate unreliability.” *See* ’465 Final Decision, p. 15. There is no such threshold requirement.

2. SDI Failed to Cure the Hearsay Issue

The IRMan Web Pages are also *hearsay*, because they include an out-of-court statement offered to prove the truth of the matter asserted—namely, the alleged statement by the Internet Archive website (www.archive.org) about what the content of a separate website (www.evation.com) reflected on a particular date. In addressing the admissibility of the IRMan Web Pages in the ’465

Proceeding, the Board only addressed Bose's *authentication* objections. *See* '465 Final Decision, at pp. 15-16. The IRMan Web Pages are hearsay by definition, because as discussed, SDI is offering them to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c) (defining "hearsay"). And because SDI has not shown—and the Board has not addressed—why any exception would apply to the general rule that hearsay is inadmissible, *see* Fed. R. Evid. 802, the IRMan Web Pages should be excluded.

The web pages have not been authenticated, and constitute inadmissible hearsay. Accordingly, based on Rules 802 and 901 of the Federal Rules of Evidence, Exhibit 1010 should be excluded.

B. Page 7 in the Altec Lansing Manual—Exhibit 1011—Should Be Excluded

The Board should exclude page 7 of SDI's Exhibit 1011 (Altec Lansing Manual) for the same reasons the Board excluded that page in the '465 Proceeding. *See* '465 Final Decision, pp. 16-17 (excluding page 7 of the same Exhibit 1011). As the Board found, page 7 does not belong with Exhibit 1011 because it relates to a different product (*id.*) (footnote omitted):

While the majority of the Altec Lansing Manual describes the ADA310W product, page seven describes an ADA104 product. *Id.* at 4–5; Ex. 1011, at 7. As Patent Owner points out (PO Mot. to Exclude 4), page seven is in a landscape orientation while the remaining pages

of the exhibit are in a portrait orientation. Petitioner argues its declarant, Dr. Lippman, testified that page seven might be a part of the manual for the ADA310W product because the ADA104 and ADA310W products might use the same remote control discussed at page 7. Pet. Opp. to Mot. to Exclude 4 (citing Ex. 2015, 92:8–14; 96:3–9). However, every indication is that page 7 is from a different document than the remainder of Exhibit 1011. Petitioner has not offered persuasive evidence to the contrary.

As page 7 does not belong with the rest of Exhibit 1011, Bose objected to the exhibit under Rule 106, which codifies the doctrine of completeness, and Rule 901, which requires that a proponent of evidence “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” In its Reply, SDI implicitly concedes that page 7 does not belong with the rest of Exhibit 1011, as it now claims that Bose’s objection is “not necessary to invalidate the claims addressed in this IPR.” Reply (Paper 17), p. 1.

Accordingly, page 7 of Exhibit 1011 should be excluded.

**C. Because Dr. Lippman’s Opinions in Paragraphs 39-44
Of His Declaration—Exhibit 1017—Are Unreliable,
They Should Be Excluded**

Rules 702 and 703 of the Federal Rules of Evidence, along with *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and its progeny, set forth the legal framework for admission of expert testimony. Rule 702 states:

A witness who is qualified as an expert by knowledge, skill,

experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Under this rule and Supreme Court precedents, the Board, acting as a gatekeeper, must exclude evidence if it is based upon unreliable principles or methods, or legally insufficient facts and data. *See Daubert*, 509 U.S. at 595 (emphasizing that the focus in determining the admissibility of expert testimony “must be solely on principles and methodology, not on the conclusions that they generate”); *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831, 854 (Fed. Cir. 2010) (stating that “*Daubert* and Rule 702 are safeguards against unreliable or irrelevant opinions, not guarantees of correctness”).

In recent decisions, the Board has stated, “Similar to a district court in a bench trial, the Board, sitting as a non-jury tribunal with administrative expertise, is well-positioned to determine and assign appropriate weight to evidence presented.” *See, e.g.*, Final Written Decision (Paper 71, p. 44), *Gnosis S.p.A. v.*

Merck & CIE, IPR2013-00117, June 20, 2014, citing *Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1941).⁴ While that may be so, just as in a bench trial setting, however, the Board as the gatekeeper must ensure that the *Daubert* standards of relevance and reliability of expert testimony are met. *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002) (standards of relevance and reliability as to expert testimony must be met in a bench trial); *Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009) (same).

Dr. Lippman's deposition testimony demonstrates that his opinion on obviousness of the challenged claims as it relates to the combination of WinAmp, IRMan Web Pages, and the Altec Lansing Manual is based upon unreliable principles and methods and thus must be excluded. Fed. R. Evid. 702; *Daubert*.

In an obviousness analysis, the challenger must demonstrate that "the differences between the [claimed] subject matter ... and the prior art are such that the subject matter as a whole would have been obvious at the time the invention

⁴ *Donnelly* was issued prior to promulgation of the Federal Rules of Evidence in 1975, and the *Donnelly* court decided to apply the standard for admissibility of evidence "which applies to special masters in equity proceedings" for NLRB proceedings. See 123 F.2d at 224. That standard is not applicable in an IPR.

was made to a person having ordinary skill in the art to which said subject matter pertains.” 35 U.S.C. § 103. The Federal Circuit has emphasized that “the great challenge of the obviousness judgment is proceeding without any hint of hindsight.” *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 655 F.3d 1364, 1375 (Fed. Cir. 2011), citing *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546 (Fed. Cir. 1998) (observing that obviousness “cannot be based on the hindsight combination of components selectively culled from the prior art to fit the parameters of the patented invention”).

At his deposition, Dr. Lippman testified, without equivocation, that the only combination of WinAmp, IRMan Web Pages, and the Altec Lansing Manual that “was relevant” in his mind was the combination that corresponded to what was “shown in the patent.” *See* BOSE 2104, Tr. 158:11-159:6:

Q. And what you’re declaring is a way to render the claims that the patents invalid, right? [Objection omitted]

A. Well, I’m showing a combination that would render them – could render them, invalid, yeah.

Q. Okay. And there’s another way to combine them – at least one other way to combine them that would not render the claims invalid, correct?

A. Well, that’s not relevant to the report. There’s many things one could do, but – I mean, you have a computer system. You

have speakers. You have controls. You can do all sorts of things.
They're not relevant to the report.

Q. Any why isn't that relevant to the report?

A. Why would it be relevant to the report? ***It doesn't bear on the combination that is relevant – that's shown in the patent.***

Dr. Lippman well understood, but disregarded, other combinations of the references because they do not "bear on the case in point." *Id.*, Tr. 157:6-158:17. For instance, Dr. Lippman admitted that the skilled person could modify the IRMan software to control the Altec Lansing speakers and by doing that, the IRMan receiver would control both the Winamp music software and the attached speakers. *Id.*, Tr. 155:8-157:5. He did not consider this combination because the challenged claims are written differently—"the case in point has the control system going the other way." *Id.*, Tr. 157:6-158:17:

Q. Okay. When you were working on your declaration, did you consider that possible combination?

A. Did I consider that combination as being feasible and reasonable?

Q. Yes?

A. I don't think I commented on it.

Q. I know you didn't comment on it. I'm asking if you considered it.

A. In my mind?

Q. Yes. In your mind.

A. As being something one could do?

Q. Yes.

A. I might have.

Q. Do you know why you didn't write about it, then?

A. Because it doesn't bear on the case in point.

Q. Why doesn't it bear on the case in point?

A. Because the case in point has the control system going the other way.

Q. "The case in point" meaning the patents in suit, right?

A. Yes.

It is rare in patent cases that an expert confesses to conducting such a flawed obviousness analysis. *KSR*, 500 U.S. at 421 (cautioning that "[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning"). Dr. Lippman's **admission** that his opinions with respect to the combination of WinAmp, IRMan Web Pages, and the Altec Lansing Manual are fraught with hindsight bias makes them categorically inadmissible under Fed.R.Evid. 702 and guiding precedent. *See Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1373-74 (Fed. Cir. 2013) (holding that because expert's data source and methodology were unreliable under Rule 702, district court abused its discretion in admitting such testimony); *Innogenetics, N.V., v. Abbott Labs.*, 512 F.3d 1363, 1373-74 (Fed. Cir. 2008) (holding that district court did not err in excluding expert testimony on

obviousness where “[s]uch vague testimony would not have been helpful to a lay jury in avoiding the pitfalls of hindsight that belie a determination of obviousness”). *See also InTouch Technologies, Inc., v. VGO Communications, Inc.*, 751 F.3d 1327, 1348-49 (Fed. Cir. 2014) (reversing judgment of invalidity as to two asserted patents because expert’s testimony was “nothing more than impermissible hindsight” and therefore not substantial enough to support obviousness findings); *ActiveVideo Networks, Inc. v. Verizon Communications, Inc.*, 694 F.3d 1312, 1327 (Fed. Cir. 2012) (affirming district court’s grant of ActiveVideo’s JMOL motion which precluded the issue of obviousness from reaching the jury, where the obviousness testimony of Verizon’s expert was “fraught with hindsight bias”).

By using the claims as a starting point and ignoring the teachings of the references, Dr. Lippman’s analysis, which is SDI’s only “evidence” of its assertions of obviousness, must be excluded. It lack the hallmarks of genuinely useful, reliable expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 156 (1999).

III. CONCLUSION

For at least the reasons stated above, Patent Owner requests that the Board grant this Motion to Exclude.

Respectfully submitted,

Date: January 13, 2015/

/Mark J. Hebert/

Mark J. Hebert, Reg. No. 31,766

Dorothy P. Whelan, Reg. No. 33,814

W. Karl Renner, Reg. No. 41,265

Attorneys for Patent Owner, Bose Corp.

Customer Number 26171

Fish & Richardson P.C.

Telephone: (617) 521-7840

Facsimile: (612) 288-9696

CERTIFICATE OF SERVICE

Pursuant to 37 CFR §§ 42.6(e)(4) and 42.205(b), the undersigned certifies that on January 13, 2015, a complete and entire copy of this Patent Owner Bose Corporation's Motion to Exclude Evidence Pursuant to 37 C.F.R. § 42.64, along with Exhibit 2121, was provided via email to the Petitioner by serving the correspondence email addresses of record as follows:

Matthew B. Lowrie
Aaron W. Moore
James C. De Vellis
Foley & Lardner LLP
111 Huntington Avenue
Boston, MA 02199

Email: mlowrie-PTAB@foley.com
Email: amoore-PTAB@foley.com

/Jessica K. Detko/
Jessica K. Detko
Fish & Richardson P.C.
60 South Sixth Street, Suite 3200
Minneapolis, MN 55402
(612) 337-2516