

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TOYOTA MOTOR CORPORATION  
Petitioner

v.

AMERICAN VEHICULAR SCIENCES LLC  
Patent Owner

Patent Number: 8,036,788  
Title: VEHICLE DIAGNOSTIC OR PROGNOSTIC MESSAGE  
TRANSMISSION SYSTEMS AND METHODS

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Case IPR2013-00417

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**PATENT OWNER'S REPLY IN SUPPORT OF ITS  
MOTION TO EXCLUDE PURSUANT TO 37 C.F.R. § 42.64(c)**

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All of the exhibits surrounding the Fry Article should be excluded. Exhibits 1005 and 1012 are hearsay/not business records. The declarations, Exs. 1013 and 1014, are deficient and uncorroborated. Ex. 1011 is irrelevant.

**I. Exhibit 1005 (Fry Article, with Sage Publications' webpages), Exhibit 1014 (Broadhurst Affidavit), Exhibit 1012 (webpages)**

Ms. Broadhurst is the wrong affiant. She is an employee of the Institution of Mechanical Engineers (“IME”), not the publishers. (Ex. 1014 ¶ 3.) She is therefore not competent to attest to whether Ex. 1005 (an article published by a third-party, with third-party website pages downloaded in 2013 “appended” to it) is a business record of either the publisher in 1995—Mechanical Engineering Publications Limited (“MEPL”)—or the publisher today—Sage Publications (“Sage”).

That aside, Toyota argues that Internet webpages downloaded from the Sage website in 2013 (and “appended to the Fry reference within Ex. 1005” (Paper 55 at 10)) are business records of IME. (*See* Ex. 1005 at 1.) Toyota further argues that the Broadhurst Affidavit establishes that IME assigned the “Jan 1, 1995” date of publication stated on Sage’s website (in or before 2013) to the 1995 Fry Publication. (Paper 55 at 4.) But the carefully-worded Broadhurst Affidavit makes no such statements. Broadhurst does not even mention the date January 1, 1995. Nor does Broadhurst purport to have personal knowledge of how dates are assigned to the documents / webpages, which entity does so, or even the business

practice of IME (if any) as to dating documents / webpages of Sage.

Even if Ms. Broadhurst was competent to attest to the alleged records of the IME related to Fry (and she is not, in light of these fatal defects), the Broadhurst Affidavit fails the stringent requirements of Fed. R. Evid. 803(6). Her affidavit failed to establish that the “Jan 1, 1995” was added to Sage Publications’ webpage “at or near the time” of the publication of Fry “by – or from information transmitted by – someone with knowledge.” *See* Fed. R. Evid. 803(6).<sup>1</sup> Nowhere does Broadhurst assert that the dates on Sage’s website are assigned contemporaneously; nor by someone with knowledge. The only date of record that was assigned by the IME is in Ex. 2025, showing a recipient-date stamp of the Fry Article of September 7, 1995, three months after the critical date.

Citing *United States v. Moore*, 923 F.2d 910, 914 (1st Cir. 1991), Toyota asserts that because IME’s records are allegedly stored with Sage, the Sage web-

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<sup>1</sup> Toyota argues that the dating of documents *by Sage* is “a regular practice” of IME. (Paper 55 at 10-11.) But Broadhurst does not support this argument, stating only that IME maintains (unidentified) records of dates in the ordinary course of IME’s business. (Ex. 1014 ¶ 4.) And Broadhurst does not set out the “extensive uncontroverted evidence of business practice” to establish a regular practice. *See Constant v. Adv. Micro-Devices, Inc.*, 848 F.2d 1560, 1568-69 (Fed. Cir. 1988).

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