

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 No. 8,036,788

Issue Date: October 11, 2011

Title: VEHICLE DIAGNOSTIC OR PROGNOSTIC MESSAGE  
TRANSMISSION SYSTEMS AND METHODS

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**PETITIONER'S MOTION TO STRIKE AND EXPUNGE EX2035-EX2041**

Case No. IPR2013-00417

AVS filed, on July 31<sup>st</sup>, its Reply (Paper 58) in support of its motion to exclude the only prior art in this IPR (“Fry”), and all of Toyota’s evidence dating the publication of Fry. The Reply included, for the first time, seven new exhibits (Ex. 2035-2041). In accordance with Paper 63, Toyota now moves the Board to strike and expunge this late-submitted evidence, as well as the portions of AVS’s Reply citing to it, on the basis that it is late and the improper subject of a reply brief.

Paper 15 set forth July 10, 2014, as the last date to file motions to exclude, *i.e.*, the end of fact discovery. By that date, AVS had multiple opportunities to submit its new evidence. AVS’s evidence should have been submitted with AVS’s Response to Toyota’s Petition, which Response was devoted entirely to the adequacy of Toyota’s evidence regarding Fry’s publication date. *See generally* Paper 30. At the latest, this evidence should have been submitted with AVS’s motion to exclude on July 10. Instead, AVS waited until the last moment to bring the evidence to the Board’s attention, leaving Toyota prejudiced, with no real opportunity to respond.

Rule 37 C.F.R. § 42.23(b) states that “A reply may only respond to arguments raised in the corresponding opposition . . . .” The accompanying comments clarify that, while “replies may rely upon appropriate evidence to support the positions asserted,” “[r]eply evidence . . . must be responsive and not merely new evidence that could have been presented earlier to support the movant’s motion.” 77 Fed. Reg. 48612, 48620. AVS’s evidence is not appropriate for a reply, as it is not responsive to new argument or evidence in Toyota’s Opposition brief. Indeed, the facts regarding

the Fry publication records that AVS alleges to be newly asserted were all set forth in the Broadhurst affidavit which AVS has had since February.

In addition, AVS' new evidence is unaccompanied by testimony demonstrating it to be other than unauthenticated, hearsay material from the Internet.

### **I. AVS' New Evidence Was Submitted Outside the Discovery Period**

Paper 15 set forth July 10 as the last date for motions to exclude, thus ending discovery. AVS' new evidence was submitted on July 31. It is proper to strike and expunge untimely evidence. *Cf. EMC Corp. v. Personal Web Techs., LLC*, IPR2013-00082, No. 76, at 3 (P.T.A.B. Dec. 13, 2013) (“Introducing new evidence at this late juncture—when the trial issues had been briefed fully by both parties—would prejudice PersonalWeb, who would not have the opportunity to respond . . .”).

### **II. AVS' New Evidence is Not Proper in Reply because it is not Responsive to any New Argument or Evidence Raised in Toyota's Opposition Brief**

In its Reply brief, AVS argued that it was submitting the new evidence because it was relevant to whether the Broadhurst Affidavit (Ex. 1014) sufficiently established the publication date of Fry as part of the business records of the Institution of Mechanical Engineers (“iMECHe”) under FRE 803(6). Specifically, AVS argued that its exhibits tended to show “untrustworthiness” under paragraph E of the Rule.<sup>1</sup>

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<sup>1</sup> In fact, FRE 803(6)(E) relates only to the trustworthiness of the original information upon which the record was based or of the manner in which the record

Then, during an August 7, 2014 call with the Board regarding this issue, AVS added an additional, *post hoc* reason why it should be allowed to submit its evidence on reply. Specifically, AVS argued that it submitted Exs. 2035-2041 in response to three allegedly new arguments raised by Toyota in its Opposition, namely, Toyota's assertions that: (1) the iMECHe, who arranged for publication of Fry, is the organization that assigned the publication date to Fry; (2) the iMECHe's business records that include this publication date are stored by the current publisher, Sage Publications, on its webserver; and (3) the publication date for Fry appearing in Ex. 1012 is part of the same business record as the publication date appearing in Ex. 1005.

AVS is incorrect. None of these arguments were new in Toyota's opposition. They were stated in the Broadhurst affidavit served on AVS on February 18, 2014. The Broadhurst Affidavit specifically states that the iMECHe arranged for publication of Fry, that the iMECHe maintains (i.e., creates and updates) its business records (including receipt, acceptance and publication dates), and that its business records are stored by the current publisher, Sage Publications, on its webserver:

**3.** The Institution of Mechanical Engineers has arranged for the publication of the Fry article. As indicated on the face of the article, the Fry article was originally published on behalf of the Institution of Mechanical Engineers by Mechanical Engineering

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was recorded. AVS' evidence does not address this issue; it is substantive evidence allegedly tending to show inaccuracies in the business record itself.

Publications Limited. The article is currently available to the public from Sage Publications.

4. The Institution of Mechanical Engineers maintains records of the dates on which the articles it published were received, accepted for publication, and eventually published. These records are maintained as part of the ordinary course of business of the Institution of Mechanical Engineers, and I have personal knowledge of the records.

5. I have reviewed, on Sage Publications' website, the Institution of Mechanical Engineers' records relating to the Fry article.

(Ex. 1014, at ¶¶ 3-5.) Ms. Broadhurst did not distinguish Ex. 1012 from Ex. 1005, which are printouts from the same website, bearing the same dates.

In its Response last March, AVS explicitly acknowledged all these facts:

Ms. Broadhurst's vague and conclusory statements that Fry "was made available to the public as of January 1995" appears to be supported only by her review of the information currently on Sage Publications' website. (*Id.* at ¶¶ 5-6 (indicating that "the Institution of Mechanical Engineers' records" she reviewed were "on Sage Publications' website").)

(Response, Paper 30, at p. 13.)

### **III. AVS's Late Disclosure of Exhibits 2035-2041 is Highly Prejudicial**

The proper route for AVS to take, if it wanted to challenge the testimony of the publisher's record keeper (Broadhurst) or the author (Fry), would have been to depose them last Spring with these new exhibits. This would have allowed Toyota to

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