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OFFICE OF CHIEF  
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Mr. Anthony Cooke  
Chief Counsel  
National Highway Traffic Safety Administration  
Suite W41-227  
1200 New Jersey Avenue S.E.  
Washington, D.C. 20590

April 6, 2009

NVS212-pco  
EA08-001

**RE: Petition for Reconsideration of the March 10, 2009 Denial of Confidential Treatment for IEE Documents Referenced in the IEE Confidentiality Request Dated August 8, 2008**

Dear Mr. Cooke:

IEE Sensing, Inc. (hereinafter IEE), is filing this Appeal of the NHTSA Denial of Confidential Treatment for three .pdf files of IEE, which were provided to the Chief Counsel's Office by BMW on August 1, 2008 in response to a NHTSA Investigation Request relating to EA08-001. These documents were also provided electronically to Mr. Otto Matheke III of your office on March 12, 2009. NHTSA denied the IEE Request for Confidential Treatment on procedural grounds on March 10, 2009, but at the time the documents were provided to Mr. Matheke, he was unaware of the denial.

On or about August 4, 2008, IEE in Luxembourg was notified by Continental in Germany that BMW had responded to a NHTSA investigation request on August 1, 2008, and that it had provided .pdf files containing IEE Confidential documents. Continental Germany suggested IEE provide NHTSA with the appropriate request for Confidentiality of the documents submitted to NHTSA by BMW. Continental filed its own request for confidential treatment of the documents submitted by BMW on August 8, 2008. IEE obtained from BMW a copy of the IEE Confidential Documents that BMW had provided to the Chief Counsel with its Request for Confidentiality.

On August 8, IEE filed with the Chief Counsel a "Request for Confidential Treatment for IEE Documents Provided by BMW in It August 1, 2008 Response to NHTSA Request dated May 29, 2008 in EA08-001" along with a Supporting Certification indicating that the documents are not publicly available. The IEE Request provided IEE's basis for believing that the public release of the documents would cause IEE substantial competitive harm and the certification that the documents were IEE Confidential and had not been released to the public. That request and the Certification accompanying it were

intended by IEE to be processed by the Chief Counsel's Office in connection with the IEE Confidential documents that had been submitted to the Chief Counsel by BMW in its request for Confidential Treatment dated August 1, 2008. The IEE Request stated in part:

"In its August 1 response to an Engineering Analysis Information Request (EA 08-001) BMW has provided NHTSA with IEE confidential information. IEE has reviewed the documents marked IEE confidential and has determined that they consist of information entitled to confidential treatment under this Agency's regulations at 49 CFR 512 and exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4). (See the Attached Certificate of Hans-Werner Heinz, General Counsel of IEE). Therefore, IEE is requesting confidential treatment of the following documents marked IEE Confidential and submitted to the Office of Chief Counsel by BMW."

Apparently, the IEE Request and Certification did not get connected to the documents submitted to the Chief Counsel's Office by BMW. As a consequence, the August 1 BMW Request for Confidential Treatment for the IEE documents was denied for procedural grounds in the Chief Counsel's response to BMW dated January 9, 2009, which stated:

...where confidentiality is requested for material obtained by the submitter from a third party, the submitter must provide a certification from that party attesting, among other things, that the materials at issue are not publicly available. Accordingly, your request for confidentiality of these... .pdf files is denied. In view of BMW's failure to provide a third party certification, these files have not been substantively reviewed.

IEE has now provided our updated Request for Confidential Treatment and Certification to BMW in connection with its February 13, 2009 "Appeal of Denial of Request of Request for Confidentiality" of documents, including the IEE Confidential documents. It is our understanding that BMW submitted this IEE information to the Chief Counsel on March 26, 2009.

NHTSA treated IEE's August 8, 2008 "Request for Confidential Treatment for IEE Documents Provided by BMW in Its August 1, 2008 Response to NHTSA Request dated May 29, 2008 in EA08-001" as a request separate from the BMW August 1 Request. NHTSA had not sent IEE an Investigation Request and so IEE had not directly supplied any documents to NHTSA. The appropriate IEE personnel were not notified by BMW that the IEE Confidential documents were being submitted by BMW to NHTSA until after they had been submitted. In an effort to be timely, IEE provided directly to the Chief Counsel information supporting a Request for Confidential Treatment of the IEE Confidential documents submitted to the Chief Counsel's Office by BMW and a Certificate in support of that Request, rather than providing the information to BMW for BMW to submit to NHTSA. Although we clearly identified the IEE Confidential documents that had been submitted August 1 by BMW for which we were seeking

confidential treatment, we did not supply a separate copy of those documents to NHTSA, since they already had been submitted by BMW to the Chief Counsel's office.

IEE's request had asked NHTSA to notify the undersigned of the determination of the confidentiality of the documents or to contact me if they had any questions regarding IEE's request. In a telephone conference with Mr. Otto Matheke III on March 12, I asked about the status of the IEE request, in light of the January denial of the BMW request. Mr. Matheke asked me to provide him with a copy of the August 8 request electronically along with a copy of the IEE Confidential documents at issue, which I did. Mr. Matheke subsequently informed me on that same day that on March 10 NHTSA had denied the IEE Request, because IEE had not separately supplied two copies of the documents for which we were seeking Confidential Treatment. In response to our August 8 Request, NHTSA had made no substantive determination whether the IEE documents were confidential.

If IEE had not submitted an independent copy of the August 8 Request for Confidential Treatment and the documents to Mr. Matheke, the denial of our Request for Confidential Treatment would be moot, since there would be no separate copy of the confidential documents for the Chief Counsel's office to make public. The determination of confidentiality of the documents would be made solely in connection with the BMW Confidentiality Request. It is hoped that the IEE Certification and Request, now provided to NHTSA by BMW would cure the procedural deficiencies in the BMW Request with respect to the IEE documents, and that NHTSA would make a determination based upon the OEM's Request that the documents deserved confidential treatment.

However, since the Chief Counsel's office now has a separate copy of these documents supplied on March 12 to Mr. Matheke directly by IEE along with a copy of our August 8 request, IEE is filing this Petition for Reconsideration of the March 10 denial of the IEE Request for Confidential Treatment. IEE wants to avoid the potential of NHTSA determining that the documents provided to Mr. Matheke March 12 would be treated as non-confidential because IEE did not appeal the NHTSA March 10 denial of the August 8 Confidentiality Request.

Therefore, IEE hereby Petitions for Reconsideration of the NHTSA Denial of Confidential Treatment for the IEE documents submitted to NHTSA by BMW and renews its Request for Confidential Treatment. IEE asks that these documents which were provided to Mr. Matheke on March 12, 2009 be treated as confidential.

IEE has reviewed the three .pdf files marked IEE confidential, which BMW informed us it provided NHTSA in its August 1 response to an Engineering Analysis Information Request (EA 08-001). IEE has determined that they consist of information that is still entitled to confidential treatment under this Agency's regulations at 49 CFR 512 and exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4). (See the Certificate of Hans-Werner Heinz, General Counsel of IEE in ATTACHMENT A.)

#### **A. Description of Information (49 CFR 512(8)(a))**

IEE requests confidential treatment for three .pdf files BMW provided NHTSA and IEE provided Mr. Matheke. These documents, which contain the marking that they are "IEE Confidential" or "Confidential" IEE documents, are:

- Conf-GHa\_G10907+TEL+xxx+Working steps PV\_E60 MFS OC3500.pdf;
- Conf-Analysis\_BMW\_050721\_part 1.pdf; and
- Conf-Analysis\_BMW\_050721\_part 2.pdf

Two copies of these documents are attached in ATTACHMENT B.

The first of these documents provides information on test set-up and requirements to document that the sensing system will meet the customer's performance specifications. This document contains results of tests and analyses of thirteen different seats. These tests were designed to evaluate the pre-loads of the sensor systems to assure that the effects of temperature on the seats would not cause a detrimental affect on the required pre-load for the sensors.

The next two .pdf files provided by BMW to NHTSA are really part of a single PowerPoint presentation, with "Content" Test Results, and "Conclusion". Alternative vehicle component designs were tested which lead to conclusions as to factors affecting failures and a potential countermeasure to alleviate these factors. This document shows the criteria that IEE used to evaluate issues related to the sensing system. This information includes details pertaining to vehicle system/component design and performance at various temperatures learned as a result of conducting such tests and analyses. These tests and analyses have been developed by IEE in order to understand issues regarding vehicle systems/components supplied by IEE and to evaluate product improvements.

This PowerPoint presentation was also submitted as a single document to the Office of the Chief Counsel by Continental Corporation with a Request for Confidential Treatment in connection with Continental's April 23, 2008 Response to a NHTSA IR in this investigation. (Bates numbers 00391-00406 of that production). IEE provided Continental with a Certificate in Support of the Request for Confidentiality, which we believe was submitted to NHTSA with the Request for Confidential Treatment. It is our understanding that there had been a grant of Confidential Treatment by the Chief Counsel's office dated July 3, 2008 that covered this presentation.

#### **B. Confidentiality Standard (49 CFR 512(8)(b))**

The information for which confidential treatment is sought is subject to the substantial competitive harm standard set forth in 49 CFR 512.15(b). Under this standard, the information qualifies for confidential treatment if disclosure of the information would result in substantial competitive harm to the submitter of the information.

**C. Justification for Confidential Treatment (49 CFR 512.8(c))**

The documents contain information which IEE considers to be trade secrets and these materials also have commercial value that can only be obtained independently at considerable cost. Disclosure would show IEE's competitors various tests used by IEE in product testing, the different conditions under which the tests were run, and the conclusions IEE has reached relating to factors affecting the performance of their sensing systems. This information can provide insight to IEE's competitors, helping them to identify quality and performance problems or differences between their products and IEE's products without them having to expend the manpower or resources to obtain these evaluations. It would also allow them to get the results of countermeasure durability evaluations, without having to make the expenditures to conduct tests on their own. This could enable them to improve their own products, all at the expense of IEE. Disclosure of the commercial information contained in these documents would likely result in substantial competitive harm to IEE.

These are the kinds of competitive disadvantages that FOIA exemption 4 was designed to protect against. *See e.g. Public Citizen Health Research Group v FDA*, 185 F3d. 898, 905 (D.C. Cir. 1981) and *Worthington Compressors, Inc. v Costle*, 662 F. 2d. 45, 51 (D.C. Cir. 1981).

**D. Class Determinations (49 CFR 512(8)(d))**

The information is not subject to a class determination

**E. Duration for which Confidential Treatment is Sought (49 CFR 512(8)(e))**

IEE anticipates that the information will retain its competitive value and therefore is requesting confidential treatment for these documents on a permanent basis.

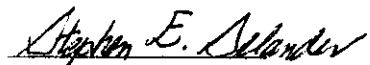
**F. Contact Information (49 CFR 512(8)(f))**

It is requested that a copy of the agency's decision on reconsideration of IEE's Request for Confidential Treatment be addressed to Stephen E. Selander, outside counsel for IEE Sensing, Inc. at:

Stephen E. Selander, Esq.  
Selander Law Office, PLLC  
410 West University Dr.  
Suite 200  
Rochester, MI 48307

If the Agency has any questions regarding the confidentiality of the IEE documents, please contact me at (248) 930-8393 or [sselander@selanderlaw.com](mailto:sselander@selanderlaw.com).

Sincerely,



Stephen E. Selander  
Selander Law Office, PLLC  
Counsel for IEE Sensing, Inc.

Attachments