

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COSTCO WHOLESALE CORPORATION,
Petitioner,

v.

ROBERT BOSCH LLC,
Patent Owner.

Case IPR2016-00034
Patent 6,973,698

**PETITIONER'S RESPONSE TO PATENT OWNER'S
MOTION FOR OBSERVATION ON
CROSS-EXAMINATION OF DAVID PECK**

Pursuant to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012) and the Board's Scheduling Order (Paper 17), Costco Wholesale Corp. ("Petitioner") submits its Response to Patent Owner's Motion for Observation On Cross-Examination of David Peck (Paper 49). Patent Owner presented four observations on the December 2, 2016 deposition testimony of Mr. Peck (Ex. 2029). Although Petitioner responds to each of Patent Owner's observations, Petitioner respectfully requests that the Board decline to consider Patent Owner's Observations because they are excessively argumentative in violation of the Office Patent Trial Practice Guide.

RESPONSE TO OBSERVATION NO. 1

Mr. Peck testified that the Trico Innovision product enjoyed considerable commercial success. Ex. 2029 at 52:7–53:2. The cited testimony of Mr. Peck (*id.* at 50:24–52:12) is not to the contrary. Mr. Peck testified that the wiper to which Patent Owner refers in its observation was offered to Ford as original equipment, but the Innovision product was “designed mainly for the aftermarket.” *Id.* at 50:24–51:5; Ex. 1100 at ¶¶ 14–15. According to Mr. Peck the Ford wiper was discontinued because of a problem unrelated to the subject matter of the '698 Patent (i.e. its connection type). *Id.* at 51:21–24 (“[The Ford wipers] didn't work well 'cause . . . they didn't have the hook coupler . . .”). Contrary to Patent

Owner's suggestion, this testimony has no tendency to show that the subject matter claimed in the '698 Patent has experienced commercial success, either directly or by comparison to the commercial success of the Trico Innovision wiper product.

RESPONSE TO OBSERVATION NO. 2

Mr. Peck testified to Trico's process for determining a target pressure distribution. Ex. 2029 at 92:14–94:20. In his testimony, Mr. Peck distinguished between an optimum pressure distribution “in a section . . . of the glass” and the pressure distribution required *in operation*. *Id.* (emphasis added). In context, the “constant load everywhere” to which Mr. Peck referred applies to the initial development of a pressure profile, before “the engineer would decide how to – which one or a slight modification would be best fit for all of the sections. . . . maybe two or 300 per specific lines which is positions on glass.” *Id.* at 92:18–20, 93:17–18. Contrary to Patent Owner's assertion, the cited testimony of Mr. Peck (*id.* at 93:19–94:20) does *not* say that the pressure distribution of a completed wiper should be uniform. In fact, Mr. Peck testified that designers may “want to, say, bias [the pressure distribution] more to the center or ends.” *Id.* at 94:2–3.

RESPONSE TO OBSERVATION NO. 3

Mr. Peck wrote in his article: “This [flat-spring wiper] replaces the current standard blade superstructure that puts localized high load points onto the glass.”

Ex. 2028 at 1; Ex. 2029 at 101:16–19. In this context, the excerpt of Mr. Peck's article referenced in Patent Owner's observation (*see id.* at 101:9–20)—that a better wiper could be produced through “a more uniform pressure distribution”—plainly refers to a *narrow* distribution (i.e. reducing pressure points caused by conventional wipers) rather than the *broad* distribution with which the '698 Patent is concerned (i.e. relative pressures among sections,). *See* Resp. (Paper 26) at 9 (“Further, the '698 patent itself acknowledges that ‘uniform’ contact force may not be absolutely 100% uniform,” i.e. local non-uniformities are inevitable). Further, the cited excerpt from Mr. Peck's article supports Costco's position that factors other than the claimed subject matter of the '698 Patent (e.g. being “better looking”) were the “driving force behind the development” of flat-spring wipers. *See* Reply (Paper 32) at 11–12. Mr. Peck confirmed. Ex. 2029 at 109:12–110:4 (explaining cited portion of Ex. 2028, “looks on a passenger car seemed to be a main driver for selling this particular type of blade.”) (redirect); *id.* at 55:24–56:2 (“The primary reason people like beam blades was aesthetics. They liked the way they looked.”) (cross-examination).

RESPONSE TO OBSERVATION NO. 4

Mr. Peck explicitly stated that he was hired to “be an industry expert.” Ex. 2029 at 12:5–6. Patent Owner's observation, on its face, is irrelevant to any of the

arguments or evidence at issue in this proceeding. It is well-established that “[t]estimony in the dual roles of both a fact witness and an expert witness . . . is permissible provided that the district court takes precautions to minimize potential prejudice.” *United States v. Farmer*, 543 F.3d 363, 370 (7th Cir. 2008). Here, where there are no concerns of confusing the jury, “[t]he gatekeeping function of the court is relaxed . . . because the court is better equipped than a jury to weigh the probative value of expert evidence.” *Traxys N. Am., LLC v. Concept Mining, Inc.*, 808 F. Supp. 2d 851, 853 (W.D. Va. 2011). Mr. Peck is indisputably testifying from his own personal observation and rational perception. Further, the questions asked under redirect simply clarify the questions put by Patent Owner’s counsel, and Mr. Peck’s responses are not inconsistent.¹

¹ Paragraph 11 of Mr. Peck’s declaration (Ex. 1100), the subject about which Mr. Peck was being questioned, concerns *general* composite beam modeling, including a single sentence describing VariFlex. However, Patent Owner’s counsel asked Mr. Peck if he had ever “us[ed] software other than VariFlex?” Ex. 2029 at 87:5–8. In each answer, Mr. Peck clarified that while VariFlex was the only program Trico *had*, he never limited the general method to VariFlex only. *See id.* at 87:5–88:11. On redirect, Mr. Peck was asked whether each sentence (other than the one noted) was limited to VariFlex, and answered in the negative. *See id.* at 112:19–114:22.

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