

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN WINDSHIELD WIPERS
AND COMPONENTS THEREOF**

Inv. No. 337-TA-928

**Inv. No. 337-TA-937
(Consolidated)**

ORDER No. 34: GRANTING IN PART VALEO'S FOURTH MOTION TO STRIKE

(July 13, 2015)

I. INTRODUCTION

On June 19, 2015, Complainants Valeo North America, Inc. and Delmex de Juarez S. de R.L. de C.V. (collectively, "Valeo") filed a motion to strike certain testimony or evidence from the rebuttal witness statements of Messrs. Wozniak ("the Wozniak Rebuttal Statement"), Ehde ("the Ehde Rebuttal Statement"), Croston ("the Croston Rebuttal Statement"), and Davis ("the Davis Rebuttal Statement"). (Motion Docket No. 928-038.) On July 2, 2015, Respondents Trico Products Corporation and Trico Componentes SA de CV (collectively, "Trico"), filed a response in opposition to Valeo's motion to strike.¹ For the reasons below, Valeo's motion to strike is granted in part and denied in part.

II. DISCUSSION

A. 842 and 843 Adapters

Valeo moves to strike Q&A Nos. 123-138 of the Wozniak Rebuttal Statement and Q&A Nos. 109-124 of the Ehde Rebuttal Statement, on the basis that they include testimony on undisclosed adapters 88776-842 and 88776-843. Trico responds that the accused products are

¹ Valeo's memorandum in support of Valeo's motion to strike and Trico's opposition thereto, are hereinafter referred to, respectively, as "Valeo Br." and "Trico Opp'n Br."

PUBLIC VERSION

wiper blade assemblies not adapters, and that no adapters were identified in the Ground Rule 7.2 disclosure of products within the scope of the Notice of Investigation.

I agree with Valeo that the testimony relating to the 842 and 843 adapters is confusing and prejudicial at this stage of the investigation. Mr. Ehde was specifically deposed about the Trico adapters that are used in the accused products but did not disclose the 842 and 843 models.

See Mr. Ehde's Deposition Transcript at 18:7-14, 19:16-19, and 22:5-10 (Mar. 31, 2015)

(reproduced below).

Page 18

7 MR. ENGLEHART: I'd like to introduce
8 another exhibit which was previously marked as
9 Complainant's Exhibit Number 14. This is the
10 respondent's amended disclosure of products within
11 the scope of the notice of investigation.

12 BY MR. ENGLEHART:

13 Q. Mr. Ehde, have you seen this document before?

14 A. Yes, I have.

...

Page 19

16 Q. All right. And so I'd like to go through all of
17 these products and have you tell me which adapter
18 is included with each product.

19 A. Okay.

...

Page 22

5 Q. Okay. So is it correct that there are three
6 different Trico adapters that are currently being
7 used on the products listed in this document?

8 A. That is correct.

9 Q. The 803, the 819, and the 836?

10 A. That is correct.

Nor did Trico identify the 842 and 843 adapters during expert discovery. Trico cannot introduce those non-infringement arguments for the first time at this stage of the investigation and through the rebuttal statements of fact witnesses. See *Certain Windshield Wipers and Components Thereof*, Inv. No. 337-TA-902, Order No. 14 at 9 (June 5, 2014) ("[G]iven the late

PUBLIC VERSION

stage of the investigation (the evidentiary hearing was merely one month from the date the motion was filed), it would be highly prejudicial to Trico and Staff to add this alternative design).”). *See also* Commission rule 210.37(b), 19 C.F.R. § 210.37(b) (“... Irrelevant, immaterial, unreliable, or unduly repetitious evidence shall be excluded. . . .”); Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of . . . unfair prejudice, confusing the issues, . . .”).

Accordingly, Valeo’s motion to strike Q&A Nos. 123-138 of the Wozniak Rebuttal Statement and Q&A Nos. 109-124 of the Ehde Rebuttal Statement is GRANTED.

B. Figures and Images

Valeo argues that Q&A Nos. 9, 12, 33, 35, 39, 41, 45, 47, 51, 53, 56, 58, 62, 64, 67, 69, 73, 80, 81, 84, 97, 98, 99, 114, 115, 124, 126, 131, 133 of the Wozniak Rebuttal Statement; Q&A Nos. 15, 43, 47, 50, 55, 69, 72, 73, 79, 96, 99, 100, 110, 112, 117, 119 of the Ehde Rebuttal Statement; Q&A Nos. 26, 29, 32, 35, 38, 41, 44, 47 of the Croston Rebuttal Statement, and Q&A Nos. 89, 94, 176, 177, 219 of the Davis Rebuttal Statement improperly include figures and images that have yet to be admitted into evidence. Trico responds that the witness statements themselves have yet to be admitted into evidence and none of the exhibits from which the figures and illustrations are derived have been ruled inadmissible.

I agree with Trico that parties are permitted to include figures and images as part of their witness statements. If it later appears that any of the exhibits from which the figures and illustrations are derived is inadmissible, Valeo can renew its objections at that time.

Accordingly, Valeo’s motion to strike Q&A Nos. 9, 12, 33, 35, 39, 41, 45, 47, 51, 53, 56, 58, 62, 64, 67, 69, 73, 80, 81, 84, 97, 98, 99, 114, 115, 124, 126, 131, and 133 of the Wozniak Rebuttal Statement; Q&A Nos. 15, 43, 47, 50, 55, 69, 72, 73, 79, 96, 99, 100, 110, 112, 117, 119

PUBLIC VERSION

of the Ehde Rebuttal Statement; Q&A Nos. 26, 29, 32, 35, 38, 41, 44, 47 of the Croston Rebuttal Statement, and Q&A Nos. 89, 94, 176, 177, 219 of the Davis Rebuttal Statement is DENIED. However, Trico should label each of the figures and images as a Demonstrative Exhibit and amend its list of demonstrative exhibits.

C. Improper Expert Testimony by Lay Witness

Valeo moves to strike Q&A Nos. 91, 92, 107, 108, 121, 122, and 136 of the Wozniak Rebuttal Statement on the basis that it is impermissible expert testimony by a lay witness. Trico responds that the Wozniak Q&As at issue do not constitute expert testimony or opinion.

I agree with Valeo that Q&A Nos. 91, 92, 107, 108, 121, 122, and 136 of the Wozniak Rebuttal Statement are impermissible expert testimony. Mr. Wozniak is a fact witness and was not identified as an expert by Trico pursuant to Ground Rule 10 and Order No. 10 setting the consolidated procedural schedule.² Nor did Mr. Wozniak prepare an expert report in this investigation. Trico will not be permitted to backdoor undisclosed technical expert opinions through a fact witness.

The testimony provided by Mr. Wozniak in Q&A Nos. 91, 92, 107, 108, 121, 122, and 136 of the Wozniak Rebuttal Statement impermissibly crosses into expert opinion territory. *See Certain Sulfentrazone, Sulfentrazone Compositions, and Processes for Making Sulfentrazone*, Inv. No. 337-TA-914, Order No. 34, 2015 WL 737624, *1 (U.S.I.T.C. Jan. 29, 2015) (“The testimony of witnesses who have not been qualified as experts must be limited to factual testimony within their personal knowledge, or lay opinions based on their personal knowledge.”) (citing *Verizon Servs. Corp. v. Cox Fibernet Virginia Inc.*, 602 F.3d 1325, 1339-40 (Fed. Cir. 2010)); *Certain Wireless Communications Base Stations and Components Thereof*, Inv. No. 337-TA-871, Order No. 29, 2013 WL 6355749, *1 (U.S.I.T.C. Nov. 22, 2013) (excluding witness’s

² See Order No. 10, Inv. No. 337-TA-928 (U.S.I.T.C. Jan. 21, 2015).

PUBLIC VERSION

testimony who was not identified as an expert because it “cross[ed] the line into expert opinions”). *See also Baran v. Med. Device Technologies, Inc.*, 616 F.3d 1309, 1318 (Fed. Cir. 2010) (striking portions of witness’s declaration on the basis that it was “opinion testimony based on scientific, technical, or other specialized knowledge within the scope of [Fed. R. Evid.] 702”) (citations omitted). While Rule 701 of the Federal Rules of Evidence permits opinion testimony by lay witnesses, such opinion must be:

- (a) rationally based on the witness’s perception;
- (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

For example, in response to Q&A No. 91, Mr. Wozniak opines that the “windshield wiper equipped with the ‘803 adapter” does not infringe the asserted patents. In response to Q&A No. 92, he testifies about the features of the ‘803 adapter and explains why it does not include certain claim limitations. Thus, in Q&A Nos. 91 and 92, Mr. Wozniak testifies about the technical features of Trico’s adapters and compares them to the scope of the asserted patents. Such testimony is not factual but based on scientific, technical, or other specialized knowledge within the scope of Fed. R. Evid. 702. As such, it is impermissible. *See also* Q&A Nos. 107, 108, 121, 122, and 136.

Accordingly, Valeo’s motion to strike Q&A Nos. 91, 92, 107, 108, 121, 122, and 136 of the Wozniak Rebuttal Statement is GRANTED.

III. CONCLUSION

Valeo’s fourth motion to strike is GRANTED IN PART and DENIED IN PART, as explained above.

PUBLIC VERSION

Within 7 days of the date of this order, the parties shall jointly submit: (1) a proposed public version of this order with any proposed redactions bracketed in red; and (2) a written justification for any proposed redactions specifically explaining why the piece of information sought to be redacted is confidential and why disclosure of the information would be likely to cause substantial harm or likely to have the effect of impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions.³

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

³ Under Commission Rules 210.5 and 201.6(a), confidential business information includes:

information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.

See 19 C.F.R. § 201.6(a). Thus, to constitute confidential business information the disclosure of the information sought to be designated confidential must *likely have the effect of* either: (1) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions; or (2) *causing substantial harm* to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained.

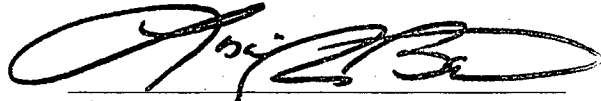
**IN THE MATTER OF CERTAIN WINDSHIELD WIPERS
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CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 34** have been served upon, **The Office of Unfair Import Investigations** and the following parties on

JUL 17 2015.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112A
Washington, DC 20436

**FOR COMPLAINANTS VALEO NORTH AMERICA, INC. & DELMEX de JUAREZ S.
de R.L. de C.V.:**

Eric W. Schweibenz, Esq.
**OBLON, McCLELLAND,
MAIER & NEUSTADT, LLP**
1940 Duke Street
Alexandria, VA 22314

() Via Hand Delivery
(☒) Via Express Delivery
() Via First Class Mail
() Other: _____

**FOR RESPONDENT TRICO PRODUCTS CORPORATION, TRICO PRODUCTS &
TRICO COMPONENTS SA de CV**

Scott M. Daniels, Esq.
WESTERMAN, HATTORI, DANIELS & ADRIAN LLP
1250 Connecticut Avenue, N.W., Suite 700
Washington, DC 20036

() Via Hand Delivery
(☒) Via Express Delivery
() Via First Class Mail
() Other: _____