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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91200832
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Attachments	Opposers Briggs & Stratton and Kohler's Opposition to Applicant Honda's Motion to Strike.pdf(70414 bytes) Declaration of Seth Herring in Support of Opposers' Opposition to Honda's Motion to Strike.pdf(10801 bytes) Exhibit A.pdf(63873 bytes) Exhibit B.pdf(553080 bytes) Exhibit C - [Confidential].pdf(6135 bytes) Exhibit D.pdf(4404365 bytes) Exhibit E.pdf(21593 bytes) Exhibit F.pdf(169570 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BRIGGS & STRATTON CORPORATION and
KOHLER CO.,

Opposers,

v.

HONDA GIKEN KOGYO KABUSHIKI KAISHA,

Applicant.

Opposition No. 91200832 (parent)

Opposition No. 91200146

Application Serial No. 78924545

**OPPOSERS BRIGGS & STRATTON CORPORATION AND KOHLER CO.'S OPPOSITION TO
APPLICANT HONDA GIKEN KOGYO KABUSHIKI KAISHA'S MOTION TO STRIKE**

INTRODUCTION

During Opposers' recent trial testimony period, Opposers took the testimony of Jeff Whitmore. Mr. Whitmore is employed by Opposer Briggs & Stratton, and is the lead engineer for the design and development of the Briggs & Stratton 550 Series engine, an engine that competes against the Honda GX engine, and has a similar general cubic shape and configuration of its major external component parts (e.g. rectangular fuel tank on the top right, cubic air cleaner on the top left, carburetor cover with recessed portion for levers, and a slanted fan cover). In his trial testimony, Mr. Whitmore explained the purpose of the 550 engine and its main component parts, and how considerations of performance, manufacturing cost, compactness, safety and accessibility affect its design and overall appearance, as well as the disadvantages that would occur if this cubic design configuration was not available to Briggs and Kohler and their customers. This testimony is directly relevant to Opposers' functionality challenge to the applied for product configuration mark. Mr. Whitmore's testimony is based on his 17 years of personal experience as a Briggs engineer, his direct involvement as the lead engineer for the design of the

550, as well as his work on other Briggs engines, and his personal knowledge of the applications and customer requirements for this type of small utility engine. As such, Mr. Whitmore's testimony is considered fact and lay opinion testimony, and therefore admissible under Federal Rules of Evidence 602 and 701.

Contrary to Honda's motion to strike, the identification and expert report requirements of Rule 26 do not apply to Mr. Whitmore's testimony as a fact witness. Indeed, Honda's motion does not even mention Mr. Whitmore's extensive engineering experience at Briggs, nor does it assess his testimony under the proper rules of evidence. Instead, Honda quotes Mr. Whitmore's testimony out of context and mischaracterizes the import of Mr. Whitmore's statements. Moreover, Honda fails to mention that it had been notified of Mr. Whitmore's status as a relevant fact witness in this proceeding in Opposers' interrogatory responses, document productions, and pre-trial disclosures. Notably, Honda *itself* identified Mr. Whitmore as a relevant witness in its own initial disclosures. Honda cross examined Mr. Whitmore at length on two occasions: first during his discovery deposition, and later at his trial testimony. Therefore, Honda cannot claim surprise or prejudice from Mr. Whitmore's trial testimony.

Finally, Honda took substantial trial testimony from its own engineer/fact witness, Motohiro Fujita, regarding the alleged non-functionality of the cubic design of the Honda GX engine. Like Mr. Whitmore, Mr. Fujita testified based on his personal experience at Honda, including offering opinions regarding the GX cubic design's alleged lack of impact on cost or quality, and the alleged lack of impact on performance that would result from hypothetical changes to the design of the engine (e.g. alternative design considerations). Honda's attempt to create an uneven playing field by seeking to strike Mr. Whitmore's testimony while offering mirror-image testimony from its own fact witness should not be permitted.

Under similar circumstances, courts across the country – as well as the TTAB – have repeatedly denied motions to strike, and have admitted fact and lay opinion testimony such as Mr. Whitmore’s (and Mr. Fujita’s) pursuant to the Federal Rules of Evidence. The Board here should follow these holdings and deny Honda’s motion.

FACTS

I. Mr. Whitmore Led the Design Team For a Highly Relevant Briggs Engine

Mr. Whitmore, a Briggs & Stratton engineer for the past 17 years, led the design team for the Briggs 550 Series engine. Dkt. No. 129, Ex. A at 8:5-6; 23:2-4. The 550 is highly relevant to this opposition. The 550 is a single cylinder horizontal shaft engine, just like the Honda GX engine that is the subject of the applied-for product configuration mark. *Id.* at 11:21-23; 22:20-23. The 550 competes with the GX, and has the same overall cubic shape and configuration as the GX. *Id.* at 22:20-23:1; *compare* Declaration of Seth B. Herring (“Herring Decl.”), Ex. A *with* Application Serial No. 78924545.

Previously in this case, Honda requested numerous categories of documents from Briggs regarding the 550, and moved to compel production of those documents. Dkt. No. 19. Among the categories of documents that Honda requested were documents regarding the design and development of the 550, including documents regarding alternative designs. *Id.* at 12-13. Honda argued that these documents were relevant to the issue of functionality. *Id.* Throughout its motion to compel, Honda claimed that the 550 was relevant because it is allegedly a “knock-off” of the Honda GX, and therefore would allegedly embody the applied for mark and have relevant design considerations. *Id.* Pursuant to the Order granting Honda’s motion, Briggs collected and produced Mr. Whitmore’s files regarding the design of the 550 engine. Dkt. No. 129, Ex. A at 90:25-91:7.

II. Honda Has Known About Mr. Whitmore's Relevancy to This Opposition For Over Three And-a-Half Years

Opposers disclosed Mr. Whitmore as a person with relevant knowledge to this opposition numerous times. Opposers first identified Mr. Whitmore in Briggs' January 3, 2012 responses to Honda's First Set of Interrogatories, in which Honda requested the identity of all personnel involved in the "origination, design, development, addition or selection" of the Briggs 550 and similar engines. Herring Decl., Ex. B. By virtue of that identification, and the production of the above referenced documents, Honda took Mr. Whitmore's discovery deposition on March 27, 2014. In that deposition, Mr. Whitmore testified regarding many of the same topics he addressed in his trial testimony regarding the functionality of the design of the 550 engine, and the performance and competitive disadvantages of alternative designs. *Id.* at Ex. C. Following that deposition, Honda identified Mr. Whitmore in its Supplemental Initial Disclosures as having knowledge of "[p]roduct design/engineering, testing, and manufacture of the Briggs 550/750 Series engines." *Id.* at Ex. D. Opposers also identified Mr. Whitmore in their pretrial disclosures, describing his testimony as pertaining to "[d]esign and development, functionality, third party use, appearance (including shapes and colors), marketing, sale, and commercial viability of horizontal shaft utility engines, including Briggs and Honda engines and alternatives thereto; OEM marketplace for horizontal shaft utility engines." *Id.* at Ex. E.

III. Mr. Whitmore's Trial Testimony

Opposers offered Mr. Whitmore's trial testimony due to his substantial personal design experience with the 550 engine and other similar Briggs engines, as well as his significant personal knowledge of the horizontal shaft engine industry. Mr. Whitmore's trial testimony began with an explanation of his relevant educational and work experience, including a description of some of the projects he has worked on during his 17 years as a Briggs engineer.

Dkt. No. 129, Ex. A at 7-11. Mr. Whitmore confirmed that he is currently the Engineering Senior Manager for contract manufactured engines and small horizontal shaft new product development at Briggs. *Id.* at 7:12-15. Mr. Whitmore's current roles and responsibilities include managing multiple groups of engineers, including a group that handles all new product development for small single cylinder horizontal shaft engines.¹ *Id.* at 7:16-8:4. In Mr. Whitmore's 17 years of experience at Briggs, he has held various engineering and engine design roles, including leading the team that set up a new engine design, manufacture, and testing facility in China. *Id.* at 8:14-11:5. Later in the deposition, Mr. Whitmore testified that in the course of his 17 years as a Briggs engineer, he gained extensive experience in many aspects of the small engine industry, including customer design requirements (*id.* at 20:9-21:4; 83:8-85:5), manufacturing (80:12-82:9), shipping (82:10-83:7), competitive landscape (88:19-89:13), and most notably, engine design (85:6-88:18). Mr. Whitmore has worked on numerous Briggs single cylinder horizontal shaft engines while at the company, including the 550, 1450, 1650, 1850, 2100, and Intek engines. *Id.* at 89:14-90:17. Mr. Whitmore led the team that designed, developed, and tested both the original Briggs 550 Series engine and the redesigned 550 Series engine. *Id.* at 23:2-25:9; 32:4-34:23; 57:17-60:1; 62:19-25.

Once Mr. Whitmore finished testifying regarding his relevant experience, he reviewed a photograph of the Honda GX engine that is the subject of the application, and identified the main component parts that are claimed in the application, and explained their basic purpose and essential function for the operation of an engine. *Id.* at 11-17. Mr. Whitmore then explained the typical configuration, purchasers, and design considerations for this type of engine, and identified the typical equipment applications the engine is used to power (i.e. pressure washers,

¹ Likewise, the Honda GX engine that is the subject of the applied-for mark is a small single cylinder horizontal shaft engine. Dkt. No. 129, Ex. A at 11:21-23

water pumps, tillers, etc). *Id.* at 17-21. The testimony then turned to the Briggs 550 engine. Mr. Whitmore identified a photograph of the engine and its component parts, explained his involvement in the engine's design and development, and described some of the design considerations he and his team applied to the engine. *Id.* at 22-35. Specifically, Mr. Whitmore explained in detail why he chose for the air cleaner to be in the "high mount" position, rather than the "panel" position where it was originally located, due to issues with application fit and access. *Id.* at 28-35. Mr. Whitmore then proceeded to explain the functional purpose behind the shape and orientation of each of the relevant component parts of the 550, as well as the functional disadvantage of changing the shape and orientation of those parts in various ways. *Id.* at 35-56. Mr. Whitmore ended his testimony on the 550 with an explanation of the redesigned 550, including the increase in manufacturing cost that occurred as a result of Briggs adding an alternative design element to the engine. *Id.* at 57-63. All of these facts are relevant to Opposers' functionality challenge to the applied for product configuration mark.

Mr. Whitmore's testimony then turned to the issue of third party use of the applied for mark, including other Briggs single cylinder horizontal shaft engines with the same or similar shapes, configurations, and orientations as the Honda GX, as well as sales figures for those engines. *Id.* at 63-69. Mr. Whitmore also had personal knowledge of other third party engines with the same shape, configuration, and orientation as the Honda GX. This is based on his personal knowledge of the relevant industry. *Id.* at 69-74. Also based on his personal knowledge of the relevant industry, Mr. Whitmore identified the industry standard shape and configuration of single cylinder horizontal shaft engines, and explained that the particular shape and configuration came to be the industry standard due to the market power of the Honda GX. *Id.* at 74-76. Mr. Whitmore concluded this phase of his testimony with an explanation of Briggs'

efforts to design its engines to fit into the industry standard shape and configuration (which he referred to as the “Honda package”), and the struggling sales of the particular Briggs engines that did not fit within that industry standard shape and configuration. *Id.* at 76-80.

ARGUMENT

Honda seeks to strike fact and opinion testimony that was offered by virtue of Mr. Whitmore’s personal knowledge that he gained over the past 17 years as an engineer at Briggs. This testimony is not “expert testimony” under Rule 702, and thus Briggs was not required to include Mr. Whitmore in its expert disclosure or produce an expert report under Rule 26. Further, Honda is not prejudiced by Mr. Whitmore’s testimony, as it cross examined Mr. Whitmore at length on two occasions, and Honda’s own fact witness gave mirror-image testimony that was also based on his experience as a company engineer.

I. Rule 701 Allows Lay Opinion Testimony if Given By Virtue of Personal Knowledge

“The modern trend favors the admission of [lay] opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination.” *Carnegie Mellon Univ. v. Marvell Technology Group, Ltd.*, 2013 U.S. Dist. LEXIS 58331, *6-13 (W.D. Pa. April 24, 2013) (permitting party employee to testify on “unavoidably theoretical” opinions related to “technology alternatives” and “product development”). Opinion testimony from lay witnesses is governed by Fed. R. Evid. 701, which provides that such evidence is admissible if it is “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.” Part (c) of Rule 701 was added in 2000. The Advisory Committee noted that this subsection did not affect the long standing rule that lay opinion testimony was admissible if made “not because of experience,

training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business.” Fed. R. Evid. 701, 2000 Advisory Committee Note.

Indeed, Circuit courts across the country routinely allow lay opinion testimony that is based on the knowledge gained from the witness’s employment experience with the party offering the testimony. *See, e.g., U.S. v. Munoz-Franco*, 487 F.3d 25, 35-37 (1st Cir. 2007) (allowing lay opinion testimony by virtue of experience gained through employment); *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.*, 320 F.3d 1213, 1223 (11th Cir. 2003) (analyzing legislative history of Rule 701 and allowing lay opinion testimony regarding “industry standards” and “reasonableness” by virtue of witness’s “particularized knowledge garnered from years of experience within the field.”); *Medforms, Inc. v. Healthcare Management Solutions, Inc.*, 290 F.3d 98, 110-11 (2d Cir. 2002) (permitting computer programmer to give opinion testimony regarding certain software by virtue of his design work on that software); *Union Pacific Resources Co. v. Chesapeake Energy Corp.*, 236 F.3d 684, 692-93 (Fed. Cir. 2001) (allowing lay opinion testimony regarding enablement due to the witness’ experience in the relevant field).

Courts have also applied Rule 701 in a number of trademark cases to allow lay opinion testimony on various subjects, including functionality of the applied for product configuration. *See, e.g., Greenwich Industries L.P. v. Specialized Seating, Inc.*, 2003 U.S. Dist. LEXIS *8-9 (N.D. Ill, May 15, 2003) (permitting employees to give opinion testimony on the design of asserted trade dress by virtue of previous employment with plaintiff: “The Hergotts’ [opinion] testimony regarding the design of Clarin’s folding chairs is directly related to the determination of a fact in issue, namely functionality”); *Newport Electronics, Inc. v. Newport Corp.*, 157 F.

Supp. 2d 202, 208-09 (D. Conn. 2001) (allowing lay opinion testimony regarding “the nature of the products sold by each company, the markets these products are sold in and the likely and potential confusion that will arise because of the alleged overlap of products” by virtue of declarants’ experience gained through employment).

In fact, the TTAB frequently applies Rule 701 to allow lay opinion testimony based on knowledge and experience gained during employment. *See, e.g., Pepsico, Inc. v. Pirincci*, 2014 TTAB LEXIS 141, *58, n. 30 (T.T.A.B. Apr. 14, 2014) (allowing company-employee opinion testimony regarding the relevant marketplace); *Six Continental Hotels, Inc. v. Marriott International*, 2004 TTAB LEXIS 535, *2, n. 2 (T.T.A.B. Aug. 31, 2004) (permitting company-employee testimony regarding opinion that company would be damaged should application register); *High Sierra Food Services, Inc. v. Lake Tahoe Brewing Co.*, 2003 TTAB LEXIS 232, *5-6 (T.T.A.B. May 14, 2003) (allowing lay opinion testimony regarding the relevant industry based on knowledge gained by virtue of position in the business).

Honda failed to cite any cases applying Rule 701, instead mistakenly analyzing the issue under FRE 702. But Mr. Whitmore is not being offered as an independent expert witness opining on matters based on his own research and analysis of the issues presented before the Board. Rather, Mr. Whitmore is testifying about the work he performed in the course and scope of his position as an employee of Opposer, and the knowledge he gained from fulfilling such employment responsibilities. As such, Mr. Whitmore did not need to be identified as an expert witness, and Opposers were not obligated to satisfy the conditions of Rule 26. Fed. R. Civ. P. 26(a)(2)(A) (requiring disclosures from witnesses presenting evidence under FRE 702, 703, or 705 only). Indeed, only one of Honda’s cases even analyzed the opinion testimony of a lay witness – *AVM Technologies, LLC v. Intel Corp.*, 927 F. Supp. 2d 139, 146 (D. Del. 2013) – and

that case has been distinguished on the grounds that the witness was not an employee of the company about which it testified and had no knowledge of the workings of that company.

Carnegie Mellon Univ., 2013 U.S. Dist. LEXIS 58331 at *12-13, n. 5.

II. Mr. Whitmore's Objected-To Testimony Was Based On His Personal Knowledge

All of the testimony that Honda objects to was given by virtue of Mr. Whitmore's personal knowledge and experience gained over the course of his 17 years as a Briggs engineer and lead designer for the 550 Series engine. As such, it is admissible under Rule 701.

A. Mr. Whitmore's Testimony Regarding the Typical Configuration and Purchasers of Relevant Engines is Based On His Personal Knowledge

Honda first seeks to strike as "improper expert opinion" Mr. Whitmore's testimony regarding the typical configuration for single cylinder horizontal shaft engines and the typical purchasers of such engines. Dkt. No. 129, Ex. A at 17, 74-77. For example, Honda argues that the following testimony should be stricken:

Q: Is [the configuration of the Honda GX] the typical configuration for a single cylinder horizontal shaft engine?

A: Yes, it would be.

...

Q: Based on your knowledge of the single cylinder horizontal shaft engine industry, is there an industry standard shape and configuration for those engines?

A: Yes.

Q: What is the industry standard shape and configuration?

A: The industry standard configuration would be the configuration where the high mount air cleaner is in the upper left-hand corner, the fuel tank is mounted directly to the right of it, and then below that is a fan cover with an upward slant towards the carb cover.

Dkt. No. 129, Ex. A at pp. 17, 74-75. This testimony is within Mr. Whitmore's personal knowledge and experience gained while at Briggs, as he is intimately familiar with the single

cylinder horizontal shaft engine industry and the typical engine configuration offered by the manufacturers of such engines, including Honda, Briggs, Kohler, Subaru, and others. Indeed, Mr. Whitmore identified these third party engines and confirmed they have the same configuration as the Honda GX engine. *Id.* at 69:20-74:14 (“Q. Do you know whether the [Subaru EX21] has the same shape and component orientation as the GX engine? A. Yes, it does.”; “Q. And [the All Power 208cc engine] has the same shape and overall orientation and location of component parts as the GX? A. Yes, same configuration with a high mount air cleaner and a fuel tank mounted above a blower housing with a slant angle directing air upwards towards the cylinder head.”). Therefore, his testimony is clearly admissible under Federal Rule of Evidence 701. *See also* Fed. R. Evid. 602 (a witness may testify based on his personal knowledge of a matter).

B. Mr. Whitmore’s Testimony Regarding Briggs’ Design Considerations for Relevant Engines is Based On His Personal Knowledge

Honda next mistakenly characterizes as “expert testimony” Mr. Whitmore’s personal knowledge of Briggs’ general design considerations for single cylinder horizontal shaft engines, as well as customer requirements for these engines. For instance:

Q: You mentioned size. How does size factor into the design [of single cylinder horizontal shaft engines]?

A: Size is very important for the design. One, because, you know, a lot of – in the applications many of these applications have a very defined space that they have to work with. There is a lot of other equipment that might be on the applications from guards, pulleys, handlebars, wheels, other aspects there. So being into as compact of a package as possible is important. Additionally, from a corporate standpoint the smaller *we* can make the engine, the smaller the shipping package becomes and allows *us* to get more engines per container which ultimately reduces *our* shipping cost and allows *us* to provide a more cost advantageous product to *our* customers.

...

Q: Are there any OEMs that require single cylinder horizontal shaft engines with shape and configuration like the engine in Exhibit 1?

A: Yes, many do.

Id. at pp. 18-22 (emphasis added). This testimony is also based on Mr. Whitmore's personal knowledge of engine design and customer requirements for engines. Mr. Whitmore has played a role in designing numerous small single cylinder horizontal shaft engines at Briggs, including leading the design team for the 550 Series, and is very familiar with customer requirements for these engines. *Id.* at 20:9-21:24; 83:8-85:5 (describing experience responding to customer requirements). As such, this testimony is well within his personal knowledge gained while an employee at Briggs and admissible under Rules 701 and 602.

C. Mr. Whitmore's Testimony Regarding Engine Fit is Based On His Personal Knowledge

Honda next objects to the following question and answer from Mr. Whitmore:

Q. How low to the ground are these engines typically mounted in their applications?

A. So often times many of these applications, you know, if they're in water pumps, other -- tillers, edgers, the engines are very low to the ground. It's a very dirty environment. As the engine pulls in the air with a panel style air cleaner, that air comes very low to the ground. There is often more dirt and debris than there would be if you were up, you know, even five inches or so like the high mount style. So with the high mount style air cleaner, you can get up and away from some of the dirt and debris better, thus, making it so that your air cleaner life is longer and the operator can potentially use the engine for a longer period of time before servicing the engine.

Id. at 31-32. As discussed, Mr. Whitmore has extensive firsthand experience dealing with customer requirements for, and development and testing of, these engines. He testified at length about the need for the engine to physically fit within customer applications and the desirability of a compact package. *Id.* at 20:24-21:24; 32:4-34:23. Indeed, in the line of testimony immediately following the above excerpt, Mr. Whitmore explains fit issues involving a prototype of the 550 Series and a water pump, and describes in detail certain testing that was run on fitting a 550 prototype into an edger, and why that application required a high mount air cleaner (as appears in

the Honda application drawing) instead of a low profile air cleaner. *Id.* at 32:4-34:23 (“Additionally, we had seen some interference with some edgers where that panel would interfere into wheels, the wheels of the application”; “Yeah, I know we had seen a number of cases where the fit was a problem and often ran into the guards.”; “So the bottom of the panel air cleaner extended downwards into the area where the wheel sits. So the edge of the air cleaner interfered with the wheel.”). He is therefore wholly qualified to give testimony regarding the location and placement of engines within applications, as he did in the testimony above.

D. Mr. Whitmore’s Testimony Regarding the Functional Features and Design Choices of the Briggs 550 Series Engine is Based On His Personal Knowledge

Next, Honda objects to Mr. Whitmore’s testimony regarding numerous aspects of the 550 Series engine, including the functional advantages of certain component shapes and orientations, as well as the rationales behind certain design choices made by him and his team. For example:

Q: Is there any manufacturing advantage to having beveling [on the 550’s air cleaner cover]?

A: From manufacturing advantage those parts are formed in a tool. And it’s a tool that opens from the top and bottom. So this part comes out very much like a cup would. The bevel at the bottom serves some purpose to help make it so that the end of that tool has a better transition, so that the part can be manufactured easier, so that that tool potentially has a longer life.

...

Q: Why is [the fuel tank of the 550] in that placement [located at the top right directly above the rewind]?

A: The fuel tank is in that location essentially as a resultant of the critical placement of the muffler and the air cleaner. With the muffler and the air cleaner placement being fixed, then essentially the fuel tank occupies the remaining volume that exists at the top of the engine.

...

Q: Does the slant [in the 550’s fan cover] have any functional benefits?

A: That slant is critical in being able to direct the air that's coming in through the rewind and fly wheel fan to direct that air up towards the hot spot of the engine to provide correct cooling.

Id. at pp. 36, 38, 45; *see also id.* at 37, 39, 44, 47-48, 60-61. This is clearly not expert opinion testimony. Instead, it is based on Mr. Whitmore's personal, firsthand knowledge of the design and development of the 550 engine. First and foremost, it is clear that Mr. Whitmore's testimony was offered in the context of the 550 Series. This line of questioning began with the entry into the record of Opposers' Exhibit 2, a labeled photograph of the Briggs 550 Series engine, and the testimony that followed frequently referenced back to that exhibit. Herring Decl., Ex. A (Opposers' Exhibit 2); Dkt. No. 129, Ex. A at 22:7-19; 26:15-22; 34:24; 38:4; 42:10; 42:20 ("Q. Let's go back to Exhibit 2. Which letter is pointing to the air cleaner cover?"; "Q. Let's talk about the fuel tank. Which letter in Exhibit 2 is pointing to the fuel tank?"; "Q. Would such a reverse configuration from what we see in Exhibit 2 result in a less commercially viable engine?"). While the testimony itself is clear on this point, Mr. Whitmore confirmed it later in his examination to make sure the record reflected the testimony's actual meaning. *Id.* at 183-186 ("Did you understand when I was asking those questions that I was asking them in the context of the Briggs 550 series engine? A. Yes. Q. And you were giving answers to those questions as to the Briggs 550 series engine? A. Correct."). As Mr. Whitmore's testimony relates to an engine for which he personally led the design efforts, it is squarely within the contours of Rule 701.

Similarly, on pages 60 and 61, Mr. Whitmore offered testimony regarding the rationale behind not changing the shape and configuration of the 550 Series when the engine was redesigned:

Q: When the -- when Briggs updated the look of the 550 series, did the overall shape and orientation of the component parts change at all?

A: No.

Q: Why not?

A: The shape and location of the component parts are functional. So any changes were just the small, little decorative trim piece that we could do and the other small tweaks. But based on the application requirements and the base engine design, the location of the components are functionally fixed.

Q: What did you mean when you said that the shape and location of the component parts are functional?

A: So per previous testimony what I had stated before, the air cleaner being in the upper left-hand corner is important based on clearance within the applications, trying to stay into a compact package. The air cleaner at the top directs the air into the carburetor, so *we* try to stay high with the air cleaner to keep -- to minimize the amount of debris that gets in. *We* stay high with the air cleaner to prevent interference with customer applications and equipment, and *we* try to stay inwards as much as possible just for overall compactness. The fuel tank being in the upper right-hand area is required based on that being the only area that is remaining for the fuel tank to occupy.

Id. at 60:2-61:10 (emphasis added). Much like the preceding testimony regarding the initial design of the 550 engine, Mr. Whitmore's testimony regarding the redesigned 550 engine relates to his firsthand knowledge stemming from his role in the redesign of that engine and general Briggs design principles gained in his 17 years with the company. As such, this testimony is also proper under Rules 701 and 602.

E. Mr. Whitmore's Testimony Regarding the Functional Disadvantages That Would Result From Altering the Shape and Configuration of the Briggs 550 Series Engine is Based On His Personal Knowledge

Honda next seeks to exclude Mr. Whitmore's opinions regarding the functional disadvantages that would result from altering the overall shape and orientation of the major components of the 550 Series engine. Dkt. No. 129, Ex. A at pp. 39-42, 48-56. These opinions are proper under Rule 701, as they are based on Mr. Whitmore's knowledge gained by virtue of his position at Briggs. Mr. Whitmore was the lead designer of the 550, which, in addition to his

17 years' experience as a Briggs engineer, gives him more than enough employment-based knowledge to render his opinions.

According to Mr. Whitmore, the disadvantages of changing the shape and orientation of the 550 and its component parts include higher manufacturing costs, inability to fit within customer products, decreased engine efficiency and performance, increased vibration, and decreased commercial viability. *Id.* For example:

Q: Why not flip the orientation of the [550's] fuel tank and the air cleaner so that the fuel tank is on the left side and the air cleaner is on the right side as you look at the engine from the front?

A: So if those parts were to be flipped with the engine configuration the way it is, essentially you end up with an air cleaner cover, *part C in the picture*, that would have to be much more significant. There would be significantly more material that would be needed in order to transfer the clean air from wherever the filter may be down to the carburetor. So you would lose efficiencies within your air flow, your engine performance would suffer, and you'd have a significantly more expensive component from your air cleaner.

...

Q: Would such a reverse configuration from what we see in **Exhibit 2** result in a less commercially viable engine?

A: Yes, it would be very expensive to retool the engine, to design all of the parts new, to pay for all of the tooling and to create some of those customizations.

...

Q: Let's talk about the fuel tank. Would there be any functional disadvantages of moving the [550's] fuel tank out to the right as we look at the front view of the engine?

A: So moving the fuel tank out to the right as far as functional disadvantages, that fuel tank contains a large amount of fuel which has a significant weight to it. That weight is currently placed roughly above the center of gravity of the engine. If we move it to the right, it will increase the stresses that that fuel tank will see as vibrations and other things occur with the engine. So moving it to the right would require additional structure. It would require us to potentially change the structure for mounting in order to make the fuel tank stronger. So that would add cost into those components. Additionally, then the fuel tank would be moving outside of the compact package that's defined by the customer

applications.

Id. at 39-40; 42; 50-51 (emphasis added to show that questioning related to the 550). Each of these opinions is based on Mr. Whitmore's knowledge gained as the lead designer for the 550 engine and by virtue of his 17 years' experience as a Briggs engineer. As discussed above, Mr. Whitmore is currently the Engineering Senior Manager for contract manufactured engines and small horizontal shaft new product development at Briggs. Mr. Whitmore has in-depth, firsthand experience with the manufacture, shipping, and design of those engines, as well as with customer requirements for, and the commercial landscape of, those engines. Mr. Whitmore led Briggs' efforts to create a new engine design, manufacture, and testing center in China, and was the lead designer of both the initial and the redesigned Briggs 550 Series engine, which Honda has claimed to be a "knock-off" of the Honda GX engine, and therefore, according to Honda, allegedly embodies and/or is allegedly confusingly similar to the applied-for mark. Dkt. No. 19 at p. 9. As such, the functional design requirements of these types of engine are clearly at issue.

Also as discussed, the context of these questions makes clear that this testimony relates specifically to the 550 Series. Herring Decl., Ex. A; Dkt. No. 129, Ex. A at 22:7-19; 26:15-22; 34:24; 38:4; 42:10; 42:20. Mr. Whitmore later confirmed this fact. *Id.* at 183-186.

Courts frequently allow similar lay opinion testimony regarding design and development issues, including the feasibility of alternative designs, pursuant to Rule 701. *See, e.g., Open Text S.A. v. Box, Inc.*, 2015 U.S. Dist. LEXIS 11318, *22-24 (N.D. Cal. Jan. 29, 2015) (holding that company employee may testify regarding his opinions on the technical feasibility of hypothetical changes to a product he helped develop); *Carnegie Mellon Univ.*, 2013 U.S. Dist. LEXIS 58331 at *6-13 (permitting party employee to testify on "unavoidably theoretical" opinions related to "technology alternatives" and "product development"); *In re Google AdWords Litig.*, 2012 U.S.

Dist. LEXIS 1216, *16-23 (N.D. Cal. Jan. 5, 2012) (collecting cases and permitting lay witness to testify on what Google AdWords “does when certain variables are changed”); *B&G Plastics, Inc. v. Eastern Creative Industries, Inc.*, 2004 U.S. Dist. LEXIS 2311, *21-25 (S.D.N.Y Feb. 18, 2004) (allowing party employee to testify to his opinions on the benefits of certain design modifications and observations on the marketplace in general due to his experience at company).

The recent *Open Text* case is particularly instructive. There, plaintiff moved to strike the opinion testimony of one of defendant’s engineers regarding the technical feasibility of an alternative design to the accused software on the grounds that it was undisclosed expert testimony. *Open Text, S.A.*, 2015 U.S. Dist. LEXIS 11318 at *22. The engineer was an “Architect” at the company, having managed other engineers and worked on defendant’s products himself. *Id.* at 22, 24. Based on this experience at the company, the court held that “whether [defendant’s] products could be modified to include a certain non-infringing alternative and how long it would take to do so thus fall within the ‘particularized knowledge’ that he has ‘by virtue of his or her position in the business’ and is admissible under Rule 701.” *Id.* at 24.

Likewise here, Mr. Whitmore has given testimony regarding the technical and commercial feasibility of certain changes to the design of the Briggs 550 Series engine. Like the defendant’s employee in *Open Text*, Mr. Whitmore’s opinions were based on the knowledge that he gained as a Briggs engineer working on the design of the engine. And like the defendant’s employee in *Open Text*, Mr. Whitmore’s testimony is therefore admissible under Rule 701.

F. Honda Opened the Door to Mr. Whitmore’s Testimony Regarding the Distinctiveness of the Honda GX Engine, Which is Also Based On His Personal Experience with Engine Design

Honda next objects to Mr. Whitmore’s testimony on re-direct regarding his opinion on what makes the GX engine distinctive:

Q: And what makes the GX engine visually distinctive?

A: I believe the GX engine is visually distinctive based on the white fuel tank, red blower housing and the big Honda logo that's always present on the rewind.

Dkt. No. 129, Ex. A at 182:10-15. Honda opened the door to this testimony when it repeatedly asked Mr. Whitmore about his opinions regarding the distinctiveness of the Briggs 550 engine compared to that of the applied-for mark. For example, during Mr. Whitmore's cross examination, Honda asked him "is it your view that the external appearance of the 500 engine as shown in Exhibit 2 is visually distinctive from the line drawing [of the applied-for mark]?" To which Mr. Whitmore responded "Overall I think they're very similar . . . there are the same general similarities as far as configuration of the engine." *Id.* at 121:22-122:4. Honda continued with this line of questioning: "Isn't it true, Mr. Whitmore, that the engine shown in Opposers' Exhibit 2 and the line drawing [of the applied-for mark] are visually distinctive from one another?" *Id.* at 122:5-8. These questions opened the door to Mr. Whitmore's testimony on re-direct on what sets the Honda GX apart from the Briggs 550 engine. Honda should not be permitted to elicit opinion testimony regarding the distinctiveness of the relevant engines while striking evidence it does not like related to the same topic.

Further, this is merely Mr. Whitmore's personal opinion – not expert testimony – which he has the requisite knowledge and experience to render by virtue of his work with industrial design firms on the styling for the Briggs 550. *Id.* at 115:11-15; 117:21-120:5; 187:14-190:8 ("in order to come up with the unique Briggs and Stratton style for the 550 engine, Briggs hired an industrial designer or industrial design firm, correct? A. Correct."). Mr. Whitmore is also aware of the competitive landscape for the GX engine, and testified that the Briggs 550 engine competes with the Honda GX. *Id.* at 22:20-25; 69:20-74:14; 88:19-89:13 ("Q. Is the Briggs 550 series a single cylinder horizontal shaft engine? A. Yes, it's a small horizontal single cylinder

overhead valve engine. Q. Does that engine compete with the Honda GX we were looking at in Exhibit 1? A. Yes.”). As such, Mr. Whitmore’s testimony is admissible pursuant to Rule 701, in addition to being admissible by virtue of Honda’s opening the door.

G. Mr. Whitmore’s Testimony Ensuring a Clear Record is Not Expert Testimony

Finally, Honda seeks to strike Mr. Whitmore’s testimony on redirect regarding his prior testimony on the Briggs 550 Series engine. *Id.* at 183-186. This testimony was merely meant to ensure that the prior record was clear² – Honda does not even argue that this is expert opinion testimony, nor could it. Honda puts forth no argument that this testimony is improper, and its motion to strike it should be denied.

III. Honda is Not Prejudiced By Mr. Whitmore’s Testimony

Mr. Whitmore’s testimony has not prejudiced Honda, as Honda had two separate opportunities to cross examine Mr. Whitmore on these topics. *See Carnegie Mellon Univ.*, 2013 U.S. Dist. LEXIS 58331 at *7 (lay opinion testimony admissible when “susceptible to specific cross-examination.”). Not only was Honda able to cross examine Mr. Whitmore at his trial deposition, Honda also cross examined Mr. Whitmore at his discovery deposition in 2014. Notably, Mr. Whitmore provided similar testimony in his discovery deposition to the testimony Honda seeks to strike here, including testimony regarding the competitive landscape and customer preferences for small utility engines, functional requirements for the Briggs 550 Series, and his opinion regarding the technical feasibility of hypothetical design alternatives to the 550. Herring Decl., Ex. C at 39:4-44:21; 82:6-15; 87:19-88:2; 92:3-20; 119:8-121:16; 125:13-126:9;

² This line of questioning was prompted by counsel for Honda’s delayed disclosure of the specific grounds for its objections. In response to numerous non-specific objections from Honda, counsel for Opposers requested that Honda specify the grounds for its objections. *Id.* at 56:5-11. That is when, for the first time, Honda indicated it believed that certain of Mr. Whitmore’s responses constituted “improper expert testimony.” *Id.* at 56:12-57:5. This

140:6-24; 148:25-153:25; 168:10-169:14 (“Many customer applications and customers tend to prefer what is referred to here as an up-style [air cleaner]”; “As we developed [a panel style air cleaner], we had realized that that configuration of engine presents some significant challenges for a lot of applications.”; “the fuel tank base would have been generally established based on functional requirements, size, shape, things like that.”). For instance, Mr. Whitmore testified at his discovery deposition regarding his opinions on design alternatives to the 550’s slanted fan cover:

Q: So is it your testimony that you need the exact same fan cover as shown in Exhibit 129 [Briggs 550 Series engine], to achieve maximum air flow?

A: I wouldn’t be comfortable with the word “exact.” I think you need a fan cover that's relatively similar in shape, size, and angles, in order to be able to capture air appropriately and then direct air correctly towards the hot spots. I believe that any slight alterations that you might get into of angle wouldn’t realistically change the appearance.

Id. at 152:2-13. Because Honda had two separate opportunities to cross examine Mr. Whitmore on this and similar testimony, Honda cannot claim that it has been prejudiced by any lack of disclosure on the part of Briggs.

IV. Mr. Whitmore’s Testimony Was Not An Attempt to “Shoehorn” Expert Testimony

Honda’s argument that Opposers “shoehorned more favorable functionality opinions” through Mr. Whitmore is a red herring. Mr. Whitmore’s testimony is based on his personal knowledge pursuant to FRE 602 and 701, while Dr. Reisel’s testimony is based on his expertise and training pursuant to Rule 702. Nothing in those rules requires that there be any relationship between the testimony offered pursuant to those rules, let alone that they perfectly overlap.³ Mr.

late disclosure of the nature of Honda’s objections prompted Opposers’ questions on pp. 183-186, to make sure the record was clear that Mr. Whitmore’s prior testimony related to the 550 Series engine.

³ Honda is incorrect that Dr. Reisel’s testimony “undermines” Opposers’ functionality arguments, or that it is inconsistent with Mr. Whitmore’s testimony. In the testimony immediately preceding the testimony cited by Honda, Dr. Reisel explains that beveling serves a functional purpose, namely ease of manufacturing. Dkt. No. 129, Ex. C at 120:8-16. Mr. Whitmore is in agreement. *Id.* at Ex. A at 36:15-25.

Whitmore's testimony is not "gamesmanship," but rather testimony based on his personal knowledge that Opposers had no obligation to disclose and that Honda had two opportunities to explore via cross examination.

V. Honda Elicited Mirror Image Testimony From Its Own Fact Witness

Honda is in no position to complain about Mr. Whitmore's testimony when Honda itself elicited testimony regarding the functionality of its engine and consequences of changing certain configurations from its fact witness, Mr. Motohiro Fujita. Just as Mr. Whitmore led the development of the Briggs 550, Mr. Fujita was involved with the design and development of the Honda GX. Herring Decl., Ex. F at 11:16-24. And just as Mr. Whitmore offered opinion testimony regarding the functional advantages of certain features of the 550 based on his experience with that engine, Mr. Fujita offered opinion testimony regarding the alleged lack of functional advantages of certain features of the GX based on his experience with that engine. *Id.* at 30:24-33:12 ("Q: Now, based on your familiarity with the GX engine, to what extent does the fuel tank need to have these various features that you described in order to perform the function of holding fuel? A: These items just now are not needed for function."); 37:23-38:9 ("Q: And based on your knowledge of the GX engine, to what extent does the air cleaner cover need to have the features you described in order to perform its function of protecting the air cleaner element? A: They're not particularly necessary."); 39:19-25; 41:20-43:17; 45:13-46:14. Honda even explicitly predicated Mr. Fujita's opinion testimony on his experience as a Honda engineer, just as Opposers have done with Mr. Whitmore:

Q: Mr. Fujita, based on your 20-plus years of experience designing engines for Honda, to what extent is it necessary to have cubic styling in order to function as a general purpose engine?

A: My understanding is that it is not particularly necessary.

Q: And based on your 20 years' experience designing general purpose engines for Honda, to what extent is it necessary to have the cubic styling in order to achieve the performance of the GX engine?

A: My understanding is that it is not particularly necessary.

Q: Based on your experience, to what extent is it necessary to have the cubic styling in order to achieve the quality of the GX engine?

A: Not necessary at all. I do not think it is necessary at all.

Q: And based on your experience, to what extent is it necessary to have the cubic styling in order to achieve the compactness of the GX engine?

A: It is not necessary.

Q: Based on your 20 years' experience, Mr. Fujita, developing -- or 20 years-plus experience developing engines for Honda, to what extent is it necessary to have the cubic styling in order to produce a low-cost engine?

A: Not necessary at all. It's the opposite. My understanding is that it inhibits that.

Id. at 51:22-52:24. Finally, Honda elicited testimony from Mr. Fujita regarding the consequences resulting from hypothetical changes to the GX, just as Mr. Whitmore testified about the same topic with respect to the 550:

Q: And where else could Honda have placed the air cleaner in order to still have achieved a compact design?

A: For example, a much lower part, you can't see this too well in this drawing, but I think that the air cleaner could have been placed beside the carburetor.

...

Q: Now, earlier, Mr. Fujita, you described how it *would* have been possible for the air cleaner to be placed next to the carburetor cover. Do you recall that?

A: Yes.

Q: And if Honda had made that design choice, what impact *would* that have had on the carburetor cover?

A: If the air cleaner element was brought to the side of the carburetor, then the carburetor cover *would* have taken on a simpler shape than it is. And, therefore, the cost, I think,

would have been lower.

Id. at 39:13-19; 42:14-24 (emphasis added). The testimony Honda elicited from its fact witness Mr. Fujita is precisely the type of testimony that Honda seeks to exclude here.

As both sides offered evidence regarding the functional features of relevant engines from the designers of those engines, Honda should not be permitted to strike one set of testimony while using the other to bolster its case. Indeed, the TTAB has found the moving party's eliciting of similar testimony to be noteworthy in denying a motion to strike under Rule 701. *High Sierra Food Services, Inc.* 2003 TTAB LEXIS 232 at *5-6 (noting that the moving party offered similar testimony from its CEO, "that is, [opinion] testimony based on his experience in the brewing industry.").⁴ Honda's attempt to create an uneven playing field by seeking to strike Mr. Whitmore's testimony while eliciting mirror image testimony of from its own fact witness should not be permitted.

CONCLUSION

Honda seeks to exclude testimony from a fact witness regarding his observations and opinions related to an industry in which he has worked for 17 years, and an engine for which he led the design efforts. This testimony is all based on the witness's firsthand knowledge and experience gained at Briggs, and as such is admissible under the Federal Rules of Evidence and need not have been part of the Rule 26 identification of experts and exchange of reports. Honda's motion does not apply the proper legal standard for Mr. Whitmore's testimony, let alone show that the testimony was not based on his knowledge and experience gained as a Briggs employee. As such, Honda's motion should be denied.

⁴ While Opposers do not believe Mr. Fujita's testimony is objectionable under Rules 702 and 26, if the Board is inclined to grant Honda's motion to strike Mr. Whitmore's testimony, Opposers request that the Board strike the cited testimony of Mr. Fujita as well in the interest of fairness.

Dated: August 6, 2015

By: /s/ Robert N. Phillips

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Attorneys for Opposer *Briggs & Stratton Corporation*

Dated: August 6, 2015

By: /s/ Kenneth Nowakowski

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing OPPOSERS BRIGGS & STRATTON CORPORATION AND KOHLER CO.'S OPPOSITION TO APPLICANT HONDA GIKEN KOGYO KABUSHIKI KAISHA'S MOTION TO STRIKE was served on the following counsel by depositing in the U.S. mail this 6th day of August, 2015.

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Deborah Kalahale

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>BRIGGS & STRATTON CORPORATION and KOHLER CO.,</p> <p style="text-align:center">Opposers,</p> <p>vs.</p> <p>HONDA GIKEN KOGYO KABUSHIKI KAISHA,</p> <p style="text-align:center">Applicant.</p>	<p>Opposition No. 91200832 (Parent)</p> <p>Opposition No. 91200146</p> <p>Application Serial No. 78924545</p>
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**DECLARATION OF SETH B. HERRING IN SUPPORT OF OPPOSERS’ OPPOSITION
TO HONDA’S MOTION TO STRIKE**

I, Seth B. Herring, declare as follows:

1. I am an attorney in the law firm of Reed Smith LLP, counsel for Opposer Briggs & Stratton Corporation (“Briggs”). The matters set forth herein are based upon my personal knowledge, except where otherwise indicated, and if called as a witness I could and would testify competently thereto.
2. Attached hereto as **Exhibit A** is a true and correct copy of Opposers’ Trial Exhibit 2, showing a labeled photograph of the initial design for the Briggs 550 Series engine.
3. Attached hereto as **Exhibit B** is a true and correct copy of Briggs’ Responses to Honda’s First Set of Interrogatories, dated January 3, 2012.
4. Attached hereto as **Exhibit C** are true and correct excerpts from the discovery deposition of Mr. Jeff Whitmore, taken March 27, 2014.
5. Attached hereto as **Exhibit D** is a true and correct copy of Honda’s Supplemental Initial Disclosures, dated May 15, 2014.

6. Attached hereto as **Exhibit E** is a true and correct copy of Opposers' Pretrial Disclosures, dated June 1, 2015.

7. Attached hereto as **Exhibit F** are true and correct excerpts from the trial testimony deposition of Mr. Motohiro Fujita, taken December 12, 2014.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on the 6th day of August, 2015 at San Francisco, California.

By /s/ Seth B. Herring
Seth B. Herring

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing DECLARATION OF SETH B. HERRING IN SUPPORT OF OPPOSERS' OPPOSITION TO HONDA'S MOTION TO STRIKE was served on the following counsel by depositing in the U.S. mail this 6th day of August, 2015.

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EXHIBIT A

A

B

C

D



EXHIBIT
Briggs & Stratton v. Honda
Opposers' 2
Whitmore 6/24/15

EXHIBIT B

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BRIGGS & STRATTON CORPORATION,

Opposer,

vs.

HONDA GIKEN KOGYO KABUSHIKI
KAISHA,

Applicant.

Opposition No. 91/200832

OPPOSER'S RESPONSE TO APPLICANT'S FIRST SET OF INTERROGATORIES

Opposer Briggs & Stratton Corporation ("Opposer") hereby responds to Applicant Honda Motor Co., Ltd's ("Applicant") First Set of Interrogatories as follows:

General Objections

1. Opposer objects to Applicant's definition of "Applicant's Mark" as vague and ambiguous to the extent it includes the phrase "any other mark used by Applicant that is a colorable imitation of the mark."
2. Opposer objects to the Applicant's definition of "Opposer's Products" as argumentative and inaccurate to the extent it infers that Opposer's 550 Series of engines, or any other engines manufactured or sold by Opposer, have a design that is "substantially similar" to "Applicant's Mark."
3. Opposer objects to the extent the Interrogatories seek documents or information protected by the attorney-client privilege, that is protected by the work product doctrine, or which constitutes or discloses the mental impressions, conclusions, opinions, or legal theories of any attorney or the representative of Opposer concerning this opposition (hereinafter "Privileged Information"). Such information shall not be provided in response hereto, and inadvertent

disclosure of them shall not be deemed a waiver of any privilege or of protection of attorney work product.

4. Opposer objects to the Interrogatories to the extent they seek to impose obligations beyond those provided in the Federal Rules of Civil Procedure.

5. Consistent with Fed. R. Civ. P. 33(d), Opposer objects to providing responses to Interrogatories where the information can be derived from documents which are being produced in response to related document requests propounded by Applicant.

6. Opposer generally objects to the interrogatories to the extent they seek information that is wholly unrelated to the issues in this opposition and not reasonably calculated to lead to the discovery of admissible evidence.

7. Opposer generally objects to the interrogatories to the extent they seek information for an unreasonable period of time.

8. Opposer generally objects to the interrogatories to the extent they are vague and ambiguous, and thus not susceptible to a reasoned interpretation or response.

9. Opposer generally objects to the interrogatories to the extent they are overly broad, unnecessarily burdensome, or oppressive.

10. Opposer objects to all introductory instructions and definitions to Applicant's First Set of Interrogatories to the extent the instructions or definitions purport to enlarge, expand, or alter in any way the plain meaning and scope of any specific Interrogatory on the ground that such enlargement, expansion, or alteration renders said Interrogatory vague, ambiguous, unintelligible, unduly broad, and/or uncertain.

11. Opposer objects to each Interrogatory to the extent it purports to require Opposer to obtain information outside of its possession, custody, and control from other persons or entities.

12. Opposer objects to each Interrogatory to the extent it calls for information that is publicly available and/or seeks information already within Applicant's knowledge, possession, custody or control.

13. Opposer objects to each Interrogatory to the extent it seeks confidential, proprietary information.

14. Opposer objects to each Interrogatory to the extent that it improperly contains multiple subparts. Accordingly, Opposer reserves the right to treat each Interrogatory as multiple interrogatories for purposes of the applicable interrogatory limits.

15. The answers provided below are based upon information currently available to Opposer through due inquiry and Opposer reserves the right to supplement these responses during the course of discovery as additional information is ascertained.

16. Opposer reserves the right to modify, amend or supplement its General Objections, any additional specific objections, and the answers provided below.

17. Opposer's answers are made without waiver of, and with preservation of, all objections as to competency, relevancy, materiality, privilege and admissibility of the answers and the subject matter thereof as evidence for any purposes in any further proceeding in this action and any other action or proceeding.

18. Each and every one of these General Objections is incorporated by this reference into each and every one of the Responses set forth below.

INTERROGATORIES

INTERROGATORY NO. 1:

Please state the date on which you first sold or offered each and every different engine in Opposer's 550 Series of engines, specifying the product for each date.:

RESPONSE: Subject to and without waiving the General Objections, Opposer responds that it first offered 550 Series engines for sale in the United States in or about May 2009.

INTERROGATORY NO. 2:

Please identify each person involved in the origination, design, development, addition or selection of each of Opposer's Products and for each person, identify the nature and extent of such involvement and identify documents concerning such involvement.

RESPONSE: Opposer objects to Interrogatory No. 2 as being vague, ambiguous, burdensome, overbroad, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Opposer further objects to the interrogatory to the extent it seeks Privileged Information. Opposer further objects to the interrogatory to the extent it requests documents concerning "such involvement" as vague, ambiguous, overbroad, burdensome and oppressive, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections and General Objections, Opposer states that at least Peter Hotz, Jeff Whitmore, and Ron Weber have knowledge about the design and development of the 550 Series engine.

INTERROGATORY NO. 3:

Please describe the circumstances under which you first learned of Applicant's use of Applicant's Mark.

RESPONSE: Opposer objects to Interrogatory No. 3 as being vague, ambiguous, burdensome, overbroad, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Opposer further objects to the interrogatory to the extent it seeks

Privileged Information. Subject to and without waiving the foregoing objections and General Objections, Opposer states that it likely first learned of Applicant's GX engine at or about the time the engine was introduced in the market.

INTERROGATORY NO. 4:

Please specify each and every different version of Opposer's Products ever sold or offered by you, and for each, please indicate if the product is currently being sold or offered.

RESPONSE: Opposer objects to Interrogatory No. 4 as being vague, ambiguous, overbroad, burdensome and oppressive, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Opposer further objects to the interrogatory to the extent it seeks Privileged Information. Subject to and without waiving the foregoing objections and General Objections, Opposer states that it has offered for sale at least the following engines with horizontal shaft designs:

- (a) 550 Series Engine Model M8
- (b) 750 Series Engine Model M10
- (c) 800 & 900 Series Engine Model M12
- (d) 1150 Series Engine Model 15
- (e) 1350 and 1450 Series Engine Model M13
- (f) 1650 Series Engine Model 21
- (g) 2100 Series Engine Model 25
- (h) Vanguard Engine Model 5, 2.4 HP
- (i) Vanguard Engine Model 8, 4 HP
- (j) Vanguard Engine Model 11, 6 HP
- (k) Vanguard Engine Model 13, 5.5-6.5 HP
- (l) Vanguard Engine Model 13, 7.5 HP
- (m) Vanguard Engine Model 18, 9 HP
- (n) Vanguard Engine Model 19, 8-10 HP

- (o) Vanguard Engine Model 24, 13 HP

INTERROGATORY NO. 5:

For each product identified in response to Interrogatory Number 5, please state:

- (a) the prices at which the product is being sold, and the prices at which it was sold over the past five years for which data is available;
- (b) whether the product is sold or offered to wholesale or retail customers, and whether such customers use the product for business or personal purposes;
- (c) the price of an average sale; and
- (d) if applicable, the dollar amount of sales for that product in each of the last five years for which data is available.

RESPONSE: Opposer objects to Interrogatory No. 5 as being vague, ambiguous, compound, overbroad, burdensome and oppressive, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Opposer further objects to the interrogatory to the extent it seeks Privileged Information. Opposer further objects to the interrogatory to the extent it seeks confidential, proprietary information. Subject to and without waiving the foregoing objections and General Objections, and upon entry of an appropriate protective order regarding handling of confidential information, Opposer will provide information regarding the total annual U.S. sales of the products identified in response to Interrogatory No. 4.

INTERROGATORY NO. 6:

Describe in detail the channels of distribution which Opposer uses for the Opposer's Products identified in response to Interrogatory No. 5, including representative outlets, such as the top five (by dollar volume of sales) retailers, wholesalers or distributors, through which Opposer sells such goods.

RESPONSE: Opposer objects to Interrogatory No. 6 as being vague and ambiguous, overbroad, burdensome and oppressive, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence.

INTERROGATORY NO. 7:

If Opposer is aware of the use by any person, other than Applicant, of any engine that incorporates, substantially or entirely, the design of Applicant's Mark, or any colorable imitation thereof, please provide the details of such use(s).

RESPONSE: Opposer objects to Interrogatory No. 7 as being vague and ambiguous, overbroad, burdensome and oppressive. Opposer further objects to the interrogatory to the extent it seeks Privileged Information. Subject to and without waiving the foregoing objections and General Objections, and in addition to the products identified in response to Interrogatory No. 4, Opposer states it is aware of at least the following third party horizontal shaft engine designs which are similar to the design illustrated and described in Applicant's subject trademark application:

- (a) Subaru Robin SP and EX Series Engines
- (b) Kohler Command Pro and Courage Series Engines
- (c) Tecumseh Engines
- (d) Loncin G, Viper, and Dewalt Series Engines
- (e) Predator (212 cc) OHV Horizontal Shaft Gas Engine
- (f) Lifan Pro Series Engines
- (g) RATO Engines
- (h) Zongshen Engines
- (i) Champion OHV Horizontal Replacement Engines Models 61301, 61151, 66504, and 64001
- (j) LCT Engines
- (k) Kawasaki Engines

(l) Jiangdong Engines

In addition, Opposer is aware of equipment incorporating the above referenced engines, or other similarly designed horizontal shaft engines. Opposer will produce documents identifying such equipment.

INTERROGATORY NO. 8:

Please identify all market research that you have had conducted relating to Applicant's Mark and/or Opposer's Products.

RESPONSE: Opposer objects to Interrogatory No. 8 as being vague and ambiguous, overbroad, burdensome and oppressive, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Opposer further objects to this interrogatory as overbroad and premature to the extent it seeks information that will be the subject of expert testimony. Opposer further objects to the interrogatory to the extent it seeks Privileged Information.

INTERROGATORY NO. 9:

Identify all of Opposer's past and present trademark registrations or applications (federal, state and foreign) for any engine design.

RESPONSE: Opposer objects to Interrogatory No. 9 as being overbroad, burdensome and oppressive, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Opposer further objects to the Interrogatory to the extent it calls for information that is publicly available and would be directly accessible by Applicant.

INTERROGATORY NO. 10:

Please:

(a) identify the principal competitors in the business in which Opposer provides Opposer's Products;

(b) describe the market position, including customer identity and product type, to which Opposer targets or intends to target its business in which Opposer provides Opposer's Products; and

(c) describe any plans Opposer currently has for expansion or contraction of its business in which Opposer provides Opposer's Products.

RESPONSE: Opposer objects to Interrogatory No. 10 as being vague, ambiguous, compound, overbroad, burdensome and oppressive, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Opposer further objects to the interrogatory to the extent it seeks Privileged Information.

INTERROGATORY NO. 11:

If anyone acting on Opposer's behalf has ever contacted anyone who was a customer or prospective customer of Applicant or Opposer relating to this Opposition or Applicant's Mark or describe the circumstances surrounding that contact.

RESPONSE: Opposer objects to Interrogatory No. 11 as vague and ambiguous, overbroad, burdensome and oppressive, irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Opposer further objects to the interrogatory to the extent it seeks Privileged Information. Subject to and without waiving the foregoing objections and General Objections, Opposer states that there is no nonprivileged responsive information to disclose with respect to contacts regarding this Opposition proceeding.

INTERROGATORY NO. 12:

Please state the basis for any contention by Opposer that "the Engine Design as shown and described in the opposed application is not inherently distinctive and has not acquired distinctiveness in accordance with §2 of the Federal Trademark Act, 15 U.S.C. §1052(f)."

RESPONSE: Opposer objects to Interrogatory No. 12 as overbroad and premature to the extent it seeks information that will be the subject of expert testimony. Opposer further objects to the interrogatory to the extent it seeks Privileged Information. Subject to and without waiving the foregoing objections and General Objections, Opposer states that the Engine Design in the

opposed application is not inherently distinctive and has not acquired distinctiveness because it is a common design for horizontal shaft engines, there are a number of manufacturers of horizontal shaft engines selling engines having a similar design, and the Engine Design as claimed in the opposed application is not associated solely with Applicant. Moreover, Opposer is unaware of any look-for advertising by Applicant for the claimed Engine Design; rather, Applicant relies on the HONDA trademark to identify its products. Opposer states its investigation continues. Discovery in this case is ongoing, and Opposer reserves the right to supplement this response.

INTERROGATORY NO. 13:

Please state the basis for any contention by Opposer that “the Engine Design as shown and described in the opposed application is functional.”

RESPONSE: Opposer objects to Interrogatory No. 13 as overbroad and premature to the extent it seeks information that will be the subject of expert opinion. Opposer further objects to the interrogatory to the extent it seeks Privileged Information. Subject to and without waiving the foregoing objections and General Objections, Opposer states that the Engine Design in the opposed application is functional because features of the Engine Design as claimed are essential to the use, purpose, efficiency, and safety of the engine. Further, features of the Engine Design as claimed in the opposed application are selected and configured in the engine for ease of manufacturing, cost efficiency, and practicality. For at least these reasons, a number of other engine manufacturers have adopted a similar design for horizontal shaft engines. Limited options are available for the design of a compact, efficient, and safe horizontal shaft engine. Opposer states its investigation continues. Discovery in this case is ongoing and Opposer reserves the right to supplement this response.

INTERROGATORY NO. 14:

Please state the basis for any contention by Opposer that “the Engine Design as shown and described in the opposed application has not been used as a trademark.”

RESPONSE: Opposer objects to Interrogatory No. 14 as overbroad and premature to the extent it seeks information that will be the subject of expert opinion. Opposer further objects to the

interrogatory to the extent it seeks Privileged Information. Subject to and without waiving the foregoing objections and General Objections, Opposer states that the Engine Design in the opposed application has not been used as a trademark because Opposer is unaware of any look-for advertising by Applicant for the claimed Engine Design; rather, Applicant relies on the HONDA trademark to identify its products. Also, the Engine Design as claimed in the opposed application is not associated solely with Applicant. Opposer further states its investigation continues. Discovery in this case is ongoing and Opposer reserves the right to supplement this response.

INTERROGATORY NO. 15:

Please describe in detail the basis for any contention that “there are substantial differences in appearance between Applicant’s Mark and Opposer’s Products.”

RESPONSE: Opposer objects to Interrogatory No. 15 as irrelevant to the subject matter of this action, and not likely to lead to the discovery of admissible evidence. Opposer further objects to the interrogatory to the extent it seeks Privileged Information.

INTERROGATORY NO. 16:

Please state the names and addresses of all natural persons who supplied information on which the answers to the foregoing Interrogatories are based and for each such person list the specific Interrogatory numbers for which he or she supplied such information. If the information is not within the personal knowledge of such person, identify the source of the information so furnished.

RESPONSE: Subject to and without waiving the General Objections, Opposer responds that the following persons supplied information in response to Applicant’s First Set of Interrogatories to Opposer:

- (a) Kenneth Lemke
Intellectual Property Counsel
Briggs & Stratton Corporation

12301 W. Wirth St.
Wauwatosa, WI 53222-2110

(b) Ron Weber
Briggs & Stratton Corporation
12301 W. Wirth St
Wauwatosa, WI 53222-2110

(c) Peter Hotz
Briggs & Stratton Corporation
12301 W. Wirth St
Wauwatosa, WI 53222-2110

INTERROGATORY NO. 17:

Please state the names and addresses of all natural persons who participated in any way in locating or providing documents or things in response to Applicant's First Set of Requests for Production of Documents and Things, specifying for each such person the specific Requests on which the person participated in preparing a response.

RESPONSE: Subject to and without waiving the General Objections, Opposer responds that the following persons participated in providing documents or things in response to Applicant's First Set of Requests for Production of Documents:

(a) Kenneth Lemke
Intellectual Property Counsel
Briggs & Stratton Corporation
12301 W. Wirth St
Wauwatosa, WI 53222-2110

(b) Ron Weber
Briggs & Stratton Corporation
12301 W. Wirth St.
Wauwatosa, WI 53222-2110

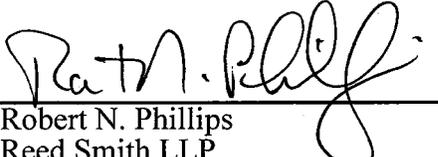
(c) Peter Hotz
Briggs & Stratton Corporation
12301 W. Wirth St.
Wauwatosa, WI 53222-2110

INTERROGATORY NO. 18:

Identify each expert that you expect to call as a witness in this proceeding and state the subject matter on which each expert is expected to testify, the substance of the expert's opinion, and the grounds of the opinion.

RESPONSE: Opposer objects to Interrogatory No. 18 as premature to the extent it seeks information that will be the subject of expert opinion. Opposer further objects to the interrogatory to the extent it seeks Privileged Information.

January 3, 2012

By: 
Robert N. Phillips
Reed Smith LLP

Nina Habib Borders
Reed Smith LLP

Attorneys for Opposer
BRIGGS & STRATTON
CORPORATION

VERIFICATION

I, Peter Hotz, am Vice President Engine Product Development of Briggs & Stratton Corporation, and am authorized to make this Verification on its behalf. I have read the foregoing OPPOSER'S RESPONSE TO APPLICANT'S FIRST SET OF INTERROGATORIES, and know its contents. I am informed and believe that the matters stated therein are true.

I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

Executed at Wauwatosa, Wisconsin on this 3rd day of January, 2012.



PETER HOTZ

CERTIFICATE OF SERVICE

In accordance with Rule 2.105(a) of the Trademark Rules of Practice, as amended, it is hereby certified that a true copy of the foregoing OPPOSER BRIGGS & STRATTON CORPORATION'S RESPONSES TO APPLICANT'S FIRST SET OF INTERROGATORIES was served on the following counsel of record for Applicant, by depositing same in the U.S. mail, first class postage prepaid, this 3rd day of January, 2012:

Michael J. Bevilacqua, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109-1800
Phone: (617) 526-6448
Fax: (617) 526-5000


Deborah L. Kalahela

EXHIBIT C

**[CONFIDENTIAL – SUBMITTED
UNDER SEAL]**

EXHIBIT D

CONFIDENTIAL — SUBJECT TO PROTECTIVE ORDER

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

_____)	
BRIGGS & STRATTON CORPORATION)	
and KOHLER CO.,)	
)	Opposition No. 91200832 (parent)
Opposers,)	
)	Opposition No. 91200146
v.)	
)	Application Serial No. 78924545
HONDA GIKEN KOGYO KABUSHIKI KAISHA,)	
)	
Applicant.)	
_____)	

**APPLICANT HONDA GIKEN KOGYO KABUSHIKI KAISHA'S
SUPPLEMENTAL INITIAL DISCLOSURES**

Applicant Honda Giken Kogyo Kabushiki Kaisha (Honda Motor Co., Ltd.) (hereinafter “Honda”), makes the following supplement to its initial disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure.

Honda’s disclosure is based upon information presently available to it, and Honda reserves the right to amend, clarify, modify, or supplement these disclosures if and when additional information becomes available. By making these disclosures, Honda does not represent that it has identified every document, tangible thing or witness possibly relevant to this proceeding. Rather, Honda’s disclosures represent a good faith effort to identify information that Honda reasonably believes to be relevant to its defenses.

Honda expressly does not waive attorney-client privilege, work-product protection, or any other applicable privilege or immunity through these disclosures. Furthermore, Honda makes these disclosures without waiving any of its rights, including but not limited to: (1) the

CONFIDENTIAL — SUBJECT TO PROTECTIVE ORDER

right to object to the relevance or admissibility of the information disclosed; (2) the right to object to the use of any disclosed information for any purpose, in whole or in part, in any subsequent proceeding in this action or in any other action; and (3) the right to object on proper grounds to any discovery request relating to the subject matter of these disclosures.

The disclosures set forth below are made subject to the above objections and qualifications.

I. Individuals Likely to Have Discoverable Information

Based upon information reasonably available to Honda at the present time, Honda identifies the following as individuals/entities likely to have discoverable information that Honda may use to support its claims or defenses (unless solely for impeachment).

In making these disclosures, Honda does not waive its right to object to the deposition testimony of the individuals/entities listed in the following table. Further, Honda does not consent to or otherwise authorize the Opposers, or any of its attorneys or representatives, to communicate with any current or former Honda employees or consultants.

Name	Categories of information
Scott Conner Vice President American Honda Motor Co., Inc. Power Equipment Division To be contacted through Honda's counsel of record.	Sales, awards, and/or marketing by Honda of products bearing the applied-for mark that is the subject of Application Serial No. 78924545 ("GX Engine Trade Dress") in the United States; the market, customers, and channels of trade in the United States for products bearing the GX Engine Trade Dress; use of the GX Engine Trade Dress in the United States; enforcement efforts by Honda of the GX Engine Trade Dress in the United States; distinctiveness of GX Engine Trade Dress; and differences between GX Engine Trade Dress and third-party engines.
Mike Rudolph Assistant Vice President	Sales, awards, and/or marketing by Honda of products bearing the GX Engine Trade Dress in

CONFIDENTIAL — SUBJECT TO PROTECTIVE ORDER

<p>American Honda Motor Co., Inc. Power Equipment Division To be contacted through Honda's counsel of record.</p>	<p>the United States; the market, customers, and channels of trade in the United States for products bearing the GX Engine Trade Dress; use of the GX Engine Trade Dress in the United States; distinctiveness of GX Engine Trade Dress; and differences between GX Engine Trade Dress and third-party engines.</p>
<p>John Lally Manager of Advertising and E-commerce American Honda Motor Co., Inc. Power Equipment Division To be contacted through Honda's counsel of record.</p>	<p>Marketing by Honda of products bearing the GX Engine Trade Dress in the United States; use of the GX Engine Trade Dress in the United States.</p>
<p>Motohiro Fujita Chief Engineer Honda R&D Co., Ltd. Internal Audit Division To be contacted through Honda's counsel of record.</p>	<p>Product design/engineering of Honda GX Engines; and nonfunctionality of the GX Engine Trade Dress.</p>
<p>Yukio Sugimoto Chief Engineer Honda R&D Co., Ltd. Development Division 1 To be contacted through Honda's counsel of record.</p>	<p>Product design/engineering of the late 2010/early 2011 refresh of the large Honda GX Engines, and late 2011/early 2012 refresh of the mid-size Honda GX Engines.</p>
<p>Any custodian of records or other person who may be required to establish authenticity of documents.</p>	
<p>Any and all persons identified by Opposers in their Disclosures.</p>	
<p>Jeff Whitmore Engineering Manager Briggs & Stratton Corporation</p>	<p>Product design/engineering, testing, and manufacture of the Briggs 550/750 Series engines.</p>
<p>Manny Rumao Business Unit Manager Kohler Co.</p>	<p>Product design/engineering, testing, and manufacture of the Kohler SH 265 ("Courage") engines.</p>
<p>Brooks Stevens, Inc. 7741 Commercial Lane Allenton, WI 53002</p>	<p>Design and redesign of the Briggs 550/750 Series engines.</p>
<p>Damen Jackson (formerly Spark Marketing</p>	<p>Design and redesign of the Kohler SH 265</p>

CONFIDENTIAL — SUBJECT TO PROTECTIVE ORDER

Services) 820 W. Jackson Blvd Suite 250 Chicago, IL 60607	(“Courage”) engines.
Design Concepts Inc. 5301 Buttonwood Drive Madison, WI 53718	Design and redesign of the Kohler Command Pro engines.

In addition to the above-named individuals and entities, other persons/entities identified in the documents described in Section II below may have discoverable information that Honda may use to support its claims or defenses. Honda reserves the right to seek discovery from, and relating to, other persons/entities that may subsequently become known as those likely to have discoverable information. Honda further reserves the right to modify the foregoing list and to identify and call as a witness at trial any additional individuals that Honda subsequently learns has knowledge or information that Honda may use to support its claims or defenses, including witnesses designated by Opposers in their initial disclosures or called by Opposers at trial.

Honda has identified testifying expert witnesses as required by Rule 26(a)(2) and Trademark Trial and Appeal Board Manual of Procedure § 401.03.

II. Relevant Documents and Tangible Things

Based upon information reasonably available to Honda at the present time, Honda identifies the following categories of documents, data compilations, and/or tangible things that Honda may use to support its claims or defenses (unless solely for impeachment):

1. Samples of products manufactured, offered for sale, or sold by Honda bearing the GX Engine Trade Dress.
2. Documents concerning the use by Honda of the GX Engine Trade Dress.
3. Documents concerning Honda’s enforcement efforts of the GX Engine Trade dress and/or related trade dress concerning the GX Engines.

CONFIDENTIAL — SUBJECT TO PROTECTIVE ORDER

4. Documents concerning the design and manufacture by Honda of products bearing the GX Engine Trade Dress.

5. Documents concerning the advertising, marketing, merchandising, and promotion of products bearing the GX Engine Trade Dress by Honda and/or its customers.

6. Documents concerning recognition of the GX Engine Trade Dress by consumers in the relevant market(s), including but not limited to survey evidence and distributor declarations.

7. Documents concerning the inventory or sales by Honda of products bearing the GX Engine Trade Dress.

8. Documents concerning the markets, customers, potential customers, and channels of trade in the United States for products bearing the GX Engine Trade Dress.

9. Documents concerning the principal competitors in the markets in which Honda offers for sale or sells products bearing the GX Engine Trade Dress.

10. Documents concerning the market position and reputation of products bearing the GX Engine Trade Dress, including but not limited to awards.

11. Documents reflecting the acknowledgement by third parties of the validity of the GX Engine Trade Dress, including its distinctiveness and non-functionality.

12. Documents concerning Opposers' creation, consideration, design, development, testing, selection, adoption, manufacture, and use of the Kohler SH 265 and Briggs 550 and 750 Series engines, and any alternative designs considered.

13. Documents concerning the advertising, marketing, merchandising, promotion or sale of the Kohler SH 265 and Briggs 550 and 750 Series engines.

CONFIDENTIAL — SUBJECT TO PROTECTIVE ORDER

14. Documents concerning the revenues, sales, profits, losses, expenses, and costs of manufacture for Opposers' horizontal shaft, overhead valve engines, including but not limited to the Kohler SH 265 and Briggs 550 and 750 Series engines.

15. Documents concerning Opposers' awareness of the GX Engine Trade Dress and/or other trade dress concerning the GX Engines.

16. Communications and/or documents concerning communications between Opposers and any other person concerning Honda, GX Engines, products manufactured using the GX engines, the GX Engine Trade Dress, and/or other trade dress concerning the GX Engines.

17. Documents concerning Honda and/or Opposers' design patents on horizontal shaft, overhead valve engines.

18. Photos of Opposers' engines other than the SH265 and Briggs 550 and 750 series engines and/or third party engines that compete or have competed with the GX Engines.

To the extent not already produced, Honda will make responsive, non-privileged documents in its possession falling within the foregoing categories, located after a reasonably diligent search, available for inspection or copying at a mutually agreeable time and place.

Honda reserves the right to object to the production of documents on any basis, including that the information sought: (i) is not relevant; (ii) is protected from disclosure by an applicable privilege, doctrine, or immunity; (iii) would be unduly burdensome or expensive to produce; (iv) contains third party confidential information and cannot be produced without that party's notification and consent; or (v) constitutes proprietary or trade secret information that should not be produced before an appropriate protective order has been entered.

CONFIDENTIAL — SUBJECT TO PROTECTIVE ORDER

Honda's investigation for discoverable information that it may use to support its claims or defenses in this proceeding is ongoing, and expressly reserves the right to supplement these disclosures with such additional documents or information. Honda may also rely on documents that are produced by any party to this litigation, including Honda itself and Opposers, as well as third parties and publicly available documents.

HONDA GIKEN KOGYO KABUSHIKI KAISHA
(HONDA MOTOR CO., LTD.)

By its attorneys,

/s/ Silena Paik
Vinita Ferrera, Esq.
John Regan, Esq.
Silena Paik, Esq.
Sarah Frazier, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, Massachusetts 02109
(617) 526-6000

Date: May 15, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Applicant Honda Giken Kogyo Kabushiki Kaisha's Supplemental Initial Disclosures was served by Federal Express this 15th day of May, 2014 upon:

Donald Daugherty
Whyte Hirschboeck Dudek S.C.
555 E. Wells Street, Suite 1900
Milwaukee, Wisconsin 53202

And

Robert N. Phillips
Seth B. Herring
Reed Smith LLP
101 Second Street
Suite 1800
San Francisco, California 94105

/s/ Sarah Frazier
Sarah Frazier

EXHIBIT E

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BRIGGS & STRATTON CORPORATION)	
)	
Opposer,)	Opposition No. 91200832 (Parent)
vs.)	
)	
HONDA GIKEN KOGYO KABUSHIKI KAISHA,)	
)	
Applicant.)	
)	
KOHLER CO.)	
)	
Opposer,)	Opposition No. 91200146
vs.)	
)	
HONDA GIKEN KOGYO KABUSHIKI KAISHA,)	
)	
Applicant.)	
)	

United States Patent and Trademark Office
 Trademark Trial and Appeal Board
 P.O. Box 1451
 Alexandria, Virginia 22313-1451

**OPPOSERS BRIGGS & STRATTON CORPORATION’S AND KOHLER CO.’S
PRETRIAL DISCLOSURES**

Pursuant to TBMP §702.01 and Rule 26(a)(3) of the Federal Rules of Civil Procedure, Opposers Briggs & Stratton Corporation and Kohler Co. (“Opposers”) provide this pretrial disclosure to Applicant HONDA GIKEN KOGYO KABUSHIKI KAISHA (“Applicant”).

Witness	Address	Subject(s)	Documents
Mr. Jeffrey Whitmore –	Briggs & Stratton Corp.	Design and development,	Documents related to the design,

<p>Engineering Senior Manager – Contract Manufactured Engines and Small Horizontal NPD at Briggs & Stratton Corp.</p>	<p>3300 North 124th St., Milwaukee, WI, 53222 (414) 259-5333</p> <p>Mr. Whitmore should be contacted through counsel for Briggs.</p>	<p>functionality, third party use, appearance (including shapes and colors), marketing, sale and commercial viability of horizontal shaft utility engines, including Briggs and Honda engines and alternatives thereto; OEM marketplace for horizontal shaft utility engines.</p>	<p>development, marketing and sale of Briggs engines; evidence of third party use of horizontal shaft utility engines.</p>
<p>Mr. Peter Hotz – VP Global Technical Service at Briggs & Stratton Corp.</p>	<p>Briggs & Stratton Corp. 3300 North 124th St., Milwaukee, WI, 53222 (414) 259-5333</p> <p>Mr. Hotz should be contacted through counsel for Briggs.</p>	<p>Design and development, functionality, third party use, appearance (including shapes and colors), marketing, sale and commercial viability of horizontal shaft utility engines, including Briggs and Honda engines and alternatives thereto; OEM marketplace for horizontal shaft utility engines.</p>	<p>Documents related to the design, development, marketing and sale of Briggs engines; evidence of third party use of horizontal shaft utility engines.</p>
<p>Mr. Cameron Litt – Manager - Marketing at Kohler Co.</p>	<p>Kohler Co. 444 Highland Drive Kohler, WI 53044 (920) 457-4441</p>	<p>Design and development, functionality, third party use, appearance</p>	<p>Documents related to the design, development, marketing and sale of Kohler engines;</p>

	Mr. Litt should be contacted through counsel for Kohler.	(including shapes and colors), marketing, sale and commercial viability of horizontal shaft utility engines, including Kohler and Honda engines and alternatives thereto; OEM marketplace for horizontal shaft utility engines.	evidence of third party use of horizontal shaft utility engines.
Mr. Manuel Rumao – International Product Manager at Kohler	Kohler Co. 444 Highland Drive Kohler, WI 53044 (920) 457-4441 Mr. Rumao should be contacted through counsel for Kohler.	Design and development, functionality, third party use, appearance (including shapes and colors), marketing, sale and commercial viability of horizontal shaft utility engines, including Kohler and Honda engines and alternatives thereto; OEM marketplace for horizontal shaft utility engines.	Documents related to the design, development, marketing and sale of Kohler engines; evidence of third party use of horizontal shaft utility engines.
Mr. Hal Poret – Opposers’ Secondary Meaning Survey Expert	ORC International 625 Avenue of the Americas New York, NY 10011 (914) 772-5087 Mr. Poret should be contacted through	Survey evidence demonstrating the lack of secondary meaning of the applied-for mark.	Survey materials.

	counsel for Opposers.		
Dr. John Reisel – Opposers’ Functionality Expert	3200 North Cramer St. Milwaukee, WI 53211 (414) 229-4671 Dr. Reisel should be contacted through counsel for Opposers.	The functionality of the applied-for mark and its component parts.	Utility patents and utility models; evidence of third party use of horizontal shaft utility engines; evidence regarding the functionality of Opposers’ and Honda’s engines; Honda’s trademark application materials.
Affiant for Subaru Industrial Power Products	905 Telser Road Lake Zurich, IL 60047 800-277-6246	Functionality, marketing, sale, and distribution of Subaru engines.	Documents related to the functionality, marketing, sale, and distribution of Subaru engines.
Affiant for Generac Power Systems, Inc.	S45W29290 Wisconsin 59 Waukesha, WI 53189 (888) 436-3722	Functionality, marketing, sale, and distribution of Generac engines.	Documents related to the functionality, marketing, sale, and distribution of Generac engines.
Affiant for Lifan Power USA	2205 Industrial Park Road Van Buren, AR 72956 (866) 471-7464	Functionality, marketing, sale, and distribution of Lifan engines.	Documents related to the functionality, marketing, sale, and distribution of Lifan engines.
Affiant for Jiang Dong North America Corp./All Power USA	16273 E. Gale Ave City Of Industry, CA 91745 (888) 988-2299	Functionality, marketing, sale, and distribution of Jiang Dong/All Power engines.	Documents related to the functionality, marketing, sale, and distribution of Jiang Dong/All Power engines

Opposers reserve the right to supplement this disclosure in the event that additional individuals are identified that may need to testify to support Opposers’ claims or defenses or in

the event that additional topics of testimony or documents are identified for the foregoing individuals.

Dated: June 1, 2015

By: /s/ Robert N. Phillips
Robert N. Phillips
Seth B. Herring
Reed Smith LLP
101 Second Street
San Francisco, CA 9410

Attorneys for Opposer
Briggs & Stratton Corporation

Dated: June 1, 2015

By: /s/ Kenneth R. Nowakowski
Kenneth R. Nowakowski
Melinda S. Giftos
Whyte Hirschboeck Dudek, S.C.
535 East Wells Street, Suite 1900
Milwaukee, WI 53202

Attorneys for Opposer *Kohler Co.*

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing OPPOSERS BRIGGS & STRATTON CORPORATION'S AND KOHLER CO.'S PRETRIAL DISCLOSURES has been served on the following counsel of record, via email and by depositing same in the U.S. mail, first class postage prepaid, this 1st day of June, 2015:

Michael J. Bevilacqua
Silena Paik
Vinita Ferrera
Sarah Frazier
Shira Hoffman
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109-1800
Telephone (617) 526-6448
Facsimile: (617) 526-5000

Kenneth R. Nowakowski
Melinda S. Giftos
Whyte Hirschboeck Dudek S.C.
555 E. Wells Street, Suite 1900
Milwaukee, Wisconsin 53202
Telephone: (414) 273-2100
Facsimile: (414) 223-5000

/s/ Deborah L. Kalahale

Deborah L. Kalahale

EXHIBIT F

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK AND APPEAL BOARD

3
4 _____
5 BRIGGS & STRATTON CORPORATION,)
6 Opposer,)
7 vs.) No. 91200832 (Parent)
8 HONDA GIKEN KOGYO KABUSHIKI)
9 KAISHA,)
10 Applicant.)

11 _____
12 KOHLER CO.,)
13 Opposer,)
14 vs.) No. 91200146
15 HONDA GIKEN KOGYO KABUSHIKI)
16 KAISHA,)
17 Applicant.)

18
19 CONFIDENTIAL - ATTORNEYS' EYES ONLY

20 DEPOSITION OF MOTOHIRO FUJITA

21 Los Angeles, California

22 Friday, December 12, 2014

23 Volume I

24 Reported by:

JUDITH A. MANGO

25 CSR No. 5584

Job No. 1975835

PAGES 1 - 134

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK AND APPEAL BOARD

3 _____
4 BRIGGS & STRATTON CORPORATION,)
5 Opposer,)
6 vs.) No. 91200832 (Parent)
7 HONDA GIKEN KOGYO KABUSHIKI)
8 KAISHA,)
9 Applicant.)

10 _____
11 KOHLER CO.,)
12 Opposer,)
13 vs.) No. 91200146
14 HONDA GIKEN KOGYO KABUSHIKI)
15 KAISHA,)
16 Applicant.)

17 _____
18
19
20 Deposition of MOTOHIRO FUJITA, Volume I, taken
21 on behalf of Opposers, at 3635 Fashion Way, Torrance,
22 California, beginning at 9:05 a.m. and ending at 5:37
23 p.m. on Friday, December 12, 2014, before JUDITH A.
24 MANGO, Certified Shorthand Reporter No. 5584.

25

1 APPEARANCES :

2

3 For Opposer Briggs & Stratton Corporation:

4 REED SMITH LLP

5 BY: ROBERT N. PHILLIPS

6 Attorney at Law

7 101 Second Street, Suite 1800

8 San Francisco, California 94105

9 (415) 659-5953

10 robphillips@reedsmith.com

11

12 For Opposer Kohler Co.:

13 WHYTE HIRSCHBOECK DUDEK S.C.

14 BY: KENNETH R. NOWAKOWSKI

15 Attorney at Law

16 555 East Wells Street, Suite 1900

17 Milwaukee, Wisconsin 53202

18 (414) 273-2100

19 knowakowski@whdlaw.com

20

21

22

23

24

25

1 APPEARANCES (CONTINUED) :

2

3 For Applicant:

4 WILMER CUTLER PICKERING HALE AND DORR LLP

5 BY: VINITA FERRERA

6 SILENA Y. PAIK

7 Attorneys at Law

8 60 State Street

9 Boston, Massachusetts 02109

10 (617) 526-6028

11 vinita.ferrera@wilmerhale.com

12 silena.paik@wilmerhale.com

13

14 Also Present:

15 CRAIG J. LOEST

16 MASAHIRO TOIYA, JAPANESE INTERPRETER

17 HIROMI YOSHIKAWA, CHECK INTERPRETER

18 TOSHIYUKI MATSUDAIRA

19 YUICHIRO KAWAMURA

20 C. DONALD STEVENS

21

22

23

24

25

1 A I conduct audits for the purpose of
2 comprehending the operational efficiency of Honda R&D
3 and improving upon it.

4 Q So, Mr. Fujita, have you worked continuously
5 for Honda or a Honda subsidiary since 1973?

6 A Yes.

7 Q So that's been for over 40 years?

8 A Yes.

9 Q Now, Mr. Fujita, I'm handing you what was
10 previously marked Exhibit 190.

11 A Yes.

12 Q Do you recognize that drawing?

13 A Yes.

14 Q And can you tell us what it is a drawing of?

15 A It is a head-on drawing of a GX engine.

16 Q Were you involved in the original development
17 of the GX engine?

18 A Yes.

19 Q What was your involvement?

20 A I did performance design on this engine.

21 Q Did you have a particular role or title in
22 connection with that project?

23 A When I was pressing forward with this project I
24 was a project leader of performance design.

25 Q When did development of the GX engine first

1 you mean the lowest part of the fuel tank?

2 Q I think so.

3 (The check interpreter spoke in Japanese.)

4 THE WITNESS: So, according to this drawing,
5 it's this part. So I think that it is the lowest part
6 of the fuel tank.

7 BY MS. FERRERA:

8 Q Okay. And then the fourth thing you mentioned
9 was the walls on the upper part of the fuel tank that
10 you said are almost vertical. You're referring to the
11 right and left sloping portions of the upper part?

12 A Yes. But the part that was made closer to
13 vertical was the left side.

14 Q Okay. And why were these various styling
15 choices that you just described incorporated into the
16 fuel tank on the GX engine?

17 A Styling designers -- as I said earlier, styling
18 design, in order to achieve this, express this, what is
19 called target of the cubic design, which was a styling
20 designer's idea, use of many straight lines were used or
21 made. Use of many straight lines were made to express
22 this cubic design. And that is why I think it is this
23 way.

24 Q Now, based on your familiarity with the GX
25 engine, to what extent does the fuel tank need to have

1 these various features that you described in order to
2 perform the function of holding fuel?

3 A These items just now are not needed for
4 function.

5 Q And based on your familiarity with the GX
6 engine, what effect, if any, did the decision to
7 incorporate these styling features have on the
8 performance of the engine?

9 A Performance-wise, performance such as the
10 output and durability, these performance items were not
11 affected in particular.

12 Q Is fuel capacity something that Honda was --
13 strike that.

14 Is fuel capacity a feature that relates to
15 performance of the engine?

16 A Yes. Well, yes.

17 Q And do you know what effect, if any, the
18 styling features that you described with respect to the
19 fuel tank had on fuel capacity?

20 A So with respect to the tank capacity, there was
21 an effect. As I said earlier, to make the bottom of the
22 fuel tank flat and straight and also to have the left
23 sidewall flatter, more -- more flat would have decreased
24 the fuel capacity.

25 So as is, the target fuel capacity would not

1 have been satisfied. Therefore, to compensate for that,
2 we made the overall fuel tank larger.

3 Q And what -- in terms of the cost to manufacture
4 the engine, what was the impact of making the fuel tank
5 larger?

6 A So to make the fuel tank slightly larger would
7 have increased the cost, including the cost of the
8 material, I think.

9 Q Now, other than the cost associated with making
10 the fuel tank larger, did the styling features that you
11 described on the fuel tank have any other impact on the
12 cost to manufacture the engine?

13 A Yes.

14 Q What other impact did it have?

15 A So one is, as I said earlier, this seam which
16 connects the upper part and the lower part of the fuel
17 tank which is near the center.

18 Since this fuel tank is made of a steel plate,
19 in order to make this, the lower part and upper part
20 employs a method called the press process or pressing
21 process.

22 And so in order to press fabricate these parts
23 in the first place, I think the manufacturability would
24 be very good if the seam was right at the center. But
25 since the styling design wanted to have this seam a

1 little below the center, as a result the upper portion
2 had a deeper depth to be formed.

3 So including the -- so that involved a longer
4 manufacturing step. So in that sense, cost, I think,
5 was increased.

6 And also the bevelling at the top of the fuel
7 tank that I mentioned earlier, in order to fabricate
8 this part, press fabricate this part to accentuate the
9 straight line clearly, I think it would have involved
10 extra steps, and that was a cost increase is my
11 understanding.

12 That's about all I can think of right now.

13 Q Now, Mr. Fujita, you were deposed on Wednesday
14 of this week. Do you recall that?

15 A Yes.

16 Q And during that deposition you were asked the
17 question "Why is the right side of the fan cover aligned
18 with the right side of the --" sorry. I misstated that.

19 You were asked the question "Why is the right
20 side of the fuel tank aligned with the right side of the
21 fan cover?"

22 Do you understand that?

23 A I do not have that understanding.

24 Q You were asked that question on Wednesday. Do
25 you understand that?

1 different from the bevelling that's on the upper left
2 corner?

3 A The left side has a little larger bevelling.
4 That's how it appears.

5 Q And do you know whether that was -- whether or
6 not that was a styling choice by the styling designers?

7 Now --

8 A Yes.

9 Q I'm starting to just interpret "hai" as "yes."
10 That's okay.

11 Can you tell us why these various styling
12 features were incorporated into the air cleaner cover?

13 A Yes.

14 Q And why were they incorporated?

15 A My understanding is that, as I said earlier, a
16 styling designer had that styling concept of a cubic
17 design for the external appearance. So in order to
18 achieve this for styling, many uses of straight line
19 were made in order to achieve the cubic styling in an
20 ornamental sense.

21 And that is why they were incorporated. That
22 is my understanding.

23 Q And based on your knowledge of the GX engine,
24 to what extent does the air cleaner cover need to have
25 the features you described in order to perform its

1 function of protecting the air cleaner element.

2 A They're not particularly necessary.

3 Q What effect, if any, do the styling features
4 you described have on the performance of the engine?

5 The styling features of the air cleaner cover, that is.

6 A The same as before. There is no effect in the
7 sense of the output or the durability. But in terms of
8 cost, my understanding is that the cost was slightly
9 increased.

10 Q And why was that?

11 A The air cleaner element that is inside is oval
12 in shape. So in order to protect this oval-shaped
13 element, the cover could have been designed to go along
14 the line of the element, the cleaner element.

15 So the air cleaner cover itself could have been
16 made smaller in that sense, and therefore the material
17 cost would have been less. So in that sense the cost
18 would have been lower. But in order to reflect the
19 wishes of the styling design people, this shape was
20 chosen, so the cost was slightly increased.

21 Q To what extent were the features for the air
22 cleaner chosen in order to achieve a compact design?

23 A My thinking is that they made no contribution
24 to the -- achieving the compactness of the engine.

25 Q Now, Mr. Fujita, where is the air cleaner

1 located on the GX engine?

2 A Above the carburetor to the left of the fuel
3 tank.

4 Q And the air cleaner cover covers the air
5 cleaner element, correct?

6 A Yes.

7 Q Why was the location that you just described
8 for the air cleaner -- why was that location chosen for
9 the GX engine?

10 A My understanding is that this location was
11 chosen in order to achieve the styling designers'
12 concept; that is, the cubic styling concept.

13 Q And where else could Honda have placed the air
14 cleaner in order to still have achieved a compact
15 design?

16 A For example, a much lower part, you can't see
17 this too well in this drawing, but I think that the air
18 cleaner could have been placed beside the carburetor.

19 Q And what, if any, performance benefit is there
20 to the location that actually was chosen for the air
21 cleaner?

22 A I don't think there is any in particular.

23 Q Is there any cost benefit to having the air
24 cleaner on top of the carburetor cover as it is here?

25 A I don't think there is any in particular.

1 you talking about the four lines that go across the
2 carburetor cover horizontally at the top portion?

3 A Yes.

4 Q And then when you talked about the straight
5 line on the bottom part, are you talking about the
6 bottom edge of the carburetor cover, the straight line
7 that runs horizontally across that?

8 A Yes.

9 Q And then you talked about the left side as also
10 made up of a straight line. Are you talking about the
11 vertical line that runs along the left edge of the
12 carburetor cover?

13 A Yes.

14 Q And why did Honda incorporate these styling
15 features into the carburetor cover?

16 A My answer would be the same as earlier. In
17 order to achieve the styling designers' target of cubic
18 styling, many uses of straight lines were made in order
19 to add ornamental aspects to it.

20 Q And to what extent does the carburetor cover
21 need to have these styling features in order to perform
22 the function of directing clean air from the air cleaner
23 to the carburetor?

24 A They are not necessary.

25 Q What effect, if any, do these styling features

1 that you described have on the performance of the
2 engine?

3 A There is no particular effect on the
4 performance.

5 Q What effect, if any, do these styling features
6 have on the quality of the engine?

7 A There's also no effect on quality.

8 Q And how about in terms of cost? What effect,
9 if any, do these styling features have on the cost to
10 manufacture the engine?

11 A These styling specifications just now do not
12 have an effect on cost or, rather, I would say that
13 there's almost no effect on cost.

14 Q Now, earlier, Mr. Fujita, you described how it
15 would have been possible for the air cleaner to be
16 placed next to the carburetor cover. Do you recall
17 that?

18 A Yes.

19 Q And if Honda had made that design choice, what
20 impact would that have had on the carburetor cover?

21 A If the air cleaner element was brought to the
22 side of the carburetor, then the carburetor cover would
23 have taken on a simpler shape than it is. And,
24 therefore, the cost, I think, would have been lower.

25 Q Now, Mr. Fujita, do you see on the drawing,

1 Exhibit 190, an area where -- an area in the carburetor
2 cover where the controls are located?

3 A Did you say in the carburetor cover?

4 Q Right.

5 A Yes.

6 Q And that area is recessed; is that correct?

7 A It does appear to be recessed somewhat.

8 Q What is the purpose of that recessed area?

9 A This, too, my understanding is a styling
10 design.

11 Q What, if any, performance benefit is to that
12 recessed area?

13 A I don't think there is any in particular.

14 Q Does that area have any -- that recessed area
15 have any benefit in terms of preventing interference
16 when a consumer pulls the starter handle?

17 A No, there is not.

18 Q Now, with respect to the carburetor cover,
19 Mr. Fujita, to what extent were the various styling
20 features that you described chosen in order to achieve a
21 compact engine?

22 A I do not think that it had made any
23 contribution to compactness.

24 Q Mr. Fujita, I have probably another 10 or 15
25 minutes more. Would you like to take a break now or

1 Q And just for clarity, the third thing I think
2 you mentioned was a straight line on the lower left.

3 A Yes.

4 Q You were talking about the straight line that's
5 slanted upwards on the left side?

6 A Yes.

7 Q Okay. And why did Honda incorporate these
8 various styling features into the fan cover?

9 A This is the same as earlier. My understanding
10 is that in order to accentuate the styling designers'
11 target; namely, the cubic style, many straight lines
12 were chosen.

13 Q And to what extent does the fan cover need to
14 have these styling features that you described in order
15 to perform the function of directing the airflow?

16 A In terms of the role of sending cooling air,
17 there was a reduction in terms of the functionality.

18 Q Can you explain why that is.

19 A Also, as I said earlier, by incorporating a
20 straight line in the lower left part and also the upper
21 right and making them intersect, the flow of the air
22 became worse. So the cooling fan capacity had to be
23 increased.

24 No, let's go up to the worsened airflow part
25 only.

1 (The interpreter spoke to the witness
2 in Japanese.)

3 MR. PHILLIPS: What did you just say to him?

4 THE INTERPRETER: Sorry. The witness told me
5 to stop at the worsened airflow, and I informed him
6 that's where I stopped interpreting.

7 MR. PHILLIPS: Okay.

8 THE INTERPRETER: Since the witness asked at
9 what point I stopped translating his testimony.

10 MR. PHILLIPS: Okay. Thank you.

11 THE WITNESS: Therefore, I would have taken the
12 way of increasing the fan capacity because the airflow
13 became worse. As a result airflow became -- cooling fan
14 became a little larger.

15 BY MS. FERRERA:

16 Q And just so we're clear, when you talked about
17 the straight line on the left, again you were talking
18 about the slanted portion of the fan cover on the left
19 side?

20 A What I said now is that slanted part on the
21 left side and both the top and the left side.

22 Q Okay. And so am I correct you explained that
23 as a result of that, Honda had to use a larger fan? Is
24 that what you said?

25 A Yes.

1 styling of the GX engines has become the
2 de facto standard for general purpose engines?

3 A No.

4 Q Okay. And then the next sentence says:

5 "However, when it comes to OHV
6 technology, every manufacturer has
7 had an equal opportunity to apply
8 it."

9 A Yes.

10 Q Do you agree or disagree with that statement?

11 A I agree.

12 Q To your knowledge, Mr. Fujita, is Honda seeking
13 a trademark on the GX engine's appearance in order to
14 prevent other manufacturers from using the OHV
15 technology?

16 A No.

17 Q And, to your knowledge, is Honda seeking a
18 trademark on the GX engine's appearance in order to
19 prevent other manufacturers from using inclined
20 cylinders?

21 A No.

22 Q Mr. Fujita, based on your 20-plus years of
23 experience designing engines for Honda, to what extent
24 is it necessary to have cubic styling in order to
25 function as a general purpose engine?

1 A My understanding is that it is not particularly
2 necessary.

3 Q And based on your 20 years' experience
4 designing general purpose engines for Honda, to what
5 extent is it necessary to have the cubic styling in
6 order to achieve the performance of the GX engine?

7 A My understanding is that it is not particularly
8 necessary.

9 Q Based on your experience, to what extent is it
10 necessary to have the cubic styling in order to achieve
11 the quality of the GX engine?

12 A Not necessary at all. I do not think it is
13 necessary at all.

14 Q And based on your experience, to what extent is
15 it necessary to have the cubic styling in order to
16 achieve the compactness of the GX engine?

17 A It is not necessary.

18 Q Based on your 20 years' experience, Mr. Fujita,
19 developing -- or 20 years-plus experience developing
20 engines for Honda, to what extent is it necessary to
21 have the cubic styling in order to produce a low-cost
22 engine?

23 A Not necessary at all. It's the opposite. My
24 understanding is that it inhibits that.

25 MS. FERRERA: Thank you, Mr. Fujita. No

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1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

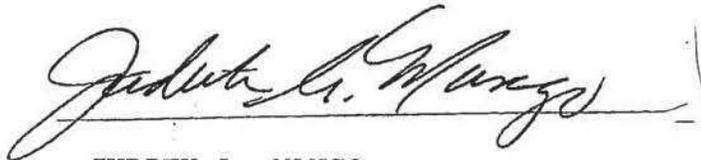
3 That the foregoing proceedings were taken before
4 me at the time and place therein set forth; that any
5 witnesses in the foregoing proceedings, prior to
6 testifying, were administered an oath; that a record of
7 the proceedings was made by me using machine shorthand
8 which was thereafter transcribed under my direction;
9 further, that the foregoing is a true record of the
10 testimony given.

11 Further, that if the foregoing pertains to
12 the original transcript of a deposition in a Federal
13 Case, before completion of the proceedings, review
14 of the transcript [x] was [] was not requested.

15 I further certify I am neither financially
16 interested in the action nor a relative or employee of
17 any attorney or any party to this action.

18 IN WITNESS WHEREOF, I have this date subscribed
19 my name.

20
21 Dated: 12/24/2014

22 

23 JUDITH A. MANGO

24 CSR No. 5584

25