

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ROBERT BOSCH LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 12-574-LPS
)	(consolidated)
ALBEREE PRODUCTS, INC.,)	
API KOREA CO., LTD.,)	JURY TRIAL DEMANDED
SAVER AUTOMOTIVE PRODUCTS, INC.,)	
and COSTCO WHOLESALE CORPORATION,)	
)	
Defendants.)	

**ROBERT BOSCH LLC'S BRIEF IN OPPOSITION TO
COSTCO WHOLESALE CORPORATION'S MOTION TO DISMISS**

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Defendant Costco Wholesale Corporation's ("Costco") motion to dismiss challenges Bosch's allegation of direct infringement for the period before Plaintiff Robert Bosch LLC ("Bosch") gave actual notice based on Costco's contention that marking was required to be pled. However, Bosch's complaint did plead marking sufficiently, by pleading willful infringement.¹ Costco's motion also challenges Bosch's allegation of indirect infringement for the period before Bosch gave actual notice. However, Bosch is not alleging indirect infringement for any patent/product combination during any period when actual notice had not been provided. Accordingly, Costco's motion should be denied.

I. NATURE AND STAGE OF THE PROCEEDINGS

Bosch filed its original complaint for patent infringement of twelve of its wiper blade patents on May 4, 2012, naming as defendants Alberee Products, Inc., API Korea Co., LTD, and Saver Automotive Products, Inc. (D.I. 1.) On May 30, 2012, Bosch sent Costco a notice letter, in which it identified all of the originally asserted patents and accused products. On October 9, 2014, Bosch filed a consolidated amended complaint combining Case No. 14-142 with this case, asserting a total of seventeen patents, and adding Costco as a defendant. (D.I. 84.) Costco was served with the consolidated amended complaint on October 10, 2014. (D.I. 86.) On October 22, 2014, Bosch gave notice of its intent to assert an eighteenth patent in a second amended complaint, which was filed on October 31, 2014. (D.I. 95.) On December 23, 2014, Costco filed a Rule 12(b)(6) Motion to Dismiss Claims for Alleged Pre-Notice Damages and Pre-Notice Indirect Infringement ("Costco MTD"). (D.I. 112, 113.) Bosch respectfully submits this brief in opposition to Costco's motion.

¹ If the Court concludes that there is alleged direct infringement for which Bosch did not properly plead marking, Bosch (which does mark its products) requests leave to amend.

II. SUMMARY OF THE ARGUMENT

In its non-dispositive motion to dismiss, Costco asserts that Bosch has failed to state a claim for damages prior to the time when Costco received actual notice from Bosch because Bosch allegedly failed to adequately plead and prove compliance with the marking statute, 35 U.S.C. § 287(a), and specifically name every accused product in its complaints. Costco also asserts that Bosch failed to adequately plead the requisite knowledge to seek damages for indirect infringement. Costco is incorrect, and its motion fails for several reasons.

First, as to compliance with 35 U.S.C. § 287(a), as a matter of law, Bosch's complaints against Costco (D.I. 84, 95) sufficiently plead constructive notice for all asserted patents by pleading willful infringement. *See, e.g., Sentry Prot. Prods. v. Eagle Mfg. Co.*, 400 F.3d 910, 918 (Fed. Cir. 2005) (finding that pleading willful infringement is sufficient to rely on marking for damages).

Second, Costco is incorrect that Bosch is required to prove compliance with the marking requirement of 35 U.S.C. § 287(a) at the pleadings stage. While "the patentee bears the burden of proving compliance with the marking and notice provisions by a preponderance of evidence," for a motion to dismiss under Fed. R. Civ. P. 12(b)(6) "the Federal Rules require only a 'short and plain statement of the claim.'" *See* Fed. R. Civ. P. 8(a); *see, e.g., Inzer v. Frantz*, No. 03 C 0552, 2003 WL 21877645, at *7 (N.D. Ill. Aug. 7, 2003) (finding that the plaintiff need not prove compliance with the marking requirement at the pleading stage). As set forth above, Bosch's complaints contain sufficient pleading of compliance with the marking statute to state a claim for past damages. Further, Costco fails to demonstrate that Bosch is required to comply with § 287(a) for all eighteen asserted patents. Costco also fails to show that Bosch's products were not marked or challenge the sufficiency of Bosch's marking practices to justify a determination at this stage of the case that there was a lack of constructive notice to Costco. *See,*

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