

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COSTCO WHOLESALE CORPORATION,
Petitioner,

v.

ROBERT BOSCH LLC,
Patent Owner.

Case IPR2016-00038
Patent 6,292,974

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

Pursuant to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012) and the Board's Scheduling Order (Paper 17), Costco Wholesale Corp. ("Petitioner") submits its Response to Patent Owner's Motion for Observation On Cross-Examination of David Peck (Paper 52). Patent Owner presented eight observations on the December 2, 2016 deposition testimony of Mr. Peck (Ex. 2029). Although Petitioner responds to each of Patent Owner's observations, Petitioner respectfully requests that the Board decline to consider Patent Owner's Observations because they are excessively argumentative in violation of the Office Patent Trial Practice Guide.

RESPONSE TO OBSERVATION NO. 1

Mr. Peck testified that the Trico Innovision product enjoyed considerable commercial success. Ex. 2029 at 52:7–53:2. The cited testimony of Mr. Peck (*id.* at 50:24–52:12) is not to the contrary. Mr. Peck testified that the wiper to which Patent Owner refers in its observation was offered to Ford as original equipment, but the Innovision product was “designed mainly for the aftermarket.” *Id.* at 50:24–51:5; Ex. 1100 at ¶¶ 14–15. According to Mr. Peck the Ford wiper was discontinued because of a problem unrelated to the subject matter of the '974 Patent (i.e. its connection type). *Id.* at 51:21–24 (“[The Ford wipers] didn't work well 'cause . . . they didn't have the hook coupler . . .”). Contrary to Patent

Owner's suggestion, this testimony has no tendency to show that the subject matter claimed in the '974 Patent has experienced commercial success, either directly or by comparison to the commercial success of the Trico Innovision wiper product.

RESPONSE TO OBSERVATION NO. 2

Contrary to Patent Owner's suggestion, the cited testimony of Mr. Peck shows that the Trico Innovision wiper was fully understood to be subject to "wind lift," but that "wind lift" was not a *practical* concern in North America because of speed limits here. Ex. 2029 at 54:4–15 ("Q: Why didn't [Innovision] need one? A: Because it wouldn't lift 'til above 110 miles an hour, and who drives a car in America at 110 miles an hour in the rain? . . . We didn't have to worry about things like the Autobahn and super-high speeds."). The cited testimony of Mr. Peck (*id.* at 53:24–54:25) also does not support Patent Owner's broad assertion that "companies . . . did not believe their beam blades suffered from wind lift problems significant enough to require spoilers." Mr. Peck's testimony clearly refers to the effect of *speed limits* in North America, not any lack of understanding that flat-spring or "beam"-style wipers were subject to "wind lift" forces.

RESPONSE TO OBSERVATION NO. 3

The cited testimony of Mr. Peck shows that the Trico Innovision wiper was fully understood to be subject to "wind lift," but that "wind lift" was not a

practical concern in North America because of speed limits here. Ex. 2029 at 54:4–15 (“Q: Why didn’t [Innovision] need one? A: Because it wouldn’t lift ‘til above 110 miles an hour, and who drives a car in America at 110 miles an hour in the rain? . . . We didn’t have to worry about things like the Autobahn and super-high speeds.”); *see supra* Resp. to Observation 2. Mr. Peck’s testimony shows that the industry recognized the “possibility” of spoilers on flat-spring wipers not later than 1997 when he testified that computer programs, such as VariFlex, had such capabilities at that time. *Id.* at 81:9–24 (“Q: . . . Was there any button or manual option in the VariFlex software that said ‘Spoiler’ on it? [Objection] “A: . . . I don’t know if he said spoiler or wind lift or whatever, but you had to put in the profile. But there was a special routine for adding something above the line, including a coupler. . . .”). The cited testimony (*id.* at 68:12–69:8) provides no support for Patent Owner’s assertion that adding a spoiler to a flat spring or “beam”-style wiper was beyond the skill of a person having ordinary skill in the art of the ’974 Patent at the time the claimed invention was made.

RESPONSE TO OBSERVATION NO. 4

Mr. Peck testified, in the citation offered by Patent Owner (Ex. 2029 at 70:25–71:6), that the design process described in paragraph 8 of his declaration is applicable to both conventional and flat wipers. *Id.* at 70:5–71:6 (“Q: Is Paragraph

8 describing the design of a rigid spoiler? . . . [Objection] [A:] Well, if it were on a whiffletree, it would be rigid. If it's a beam blade, it's a flexible structure.”). Instead of supporting Patent Owner's assertion that “considerations for designing a spoiler” for conventional and flat-spring wipers “would have been fundamentally different,” Mr. Peck's testimony supports the *opposite* proposition—that the process described in paragraph 8 of his declaration applies to both.

RESPONSE TO OBSERVATION NO. 5

Mr. Peck testified that the industry focused primarily on *operational* noise—as opposed to *wind* noise. Ex. 2029 at 98:4–19 (“As I said in [my report], usually if you actually are driving the vehicle, and you have all this engine noise; you have all this – people have radios on. And one of the biggest noise generators from wind noise happens to be side-view mirrors, which kind of drowned everything out.”). The cited testimony of Mr. Peck (*id.* at 97:23–98:19) is not to the contrary, and supports neither of Patent Owner's assertions: that the success of Bosch's products “was attributable in part to their being quiet,” nor that designing a flat-spring wiper with a spoiler required more than ordinary skill.

RESPONSE TO OBSERVATION NO. 6

Mr. Peck testified, in the citation offered by Patent Owner (Ex. 2029 at 109:16–110:4), that the main reason for commercialization of flat wipers

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