

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COSTCO WHOLESALE CORPORATION,
Petitioner,

v.

ROBERT BOSCH LLC,
Patent Owner.

Case IPR2016-00041
Patent 8,099,823

**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 21), Costco Wholesale Corp. ("Petitioner") submits its Response to Patent Owner's Motion for Observation On Cross-Examination of David Peck (Paper 55). Patent Owner presented fourteen 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 '823 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 '823 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

Contrary to Patent Owner's suggestion, the cited testimony of Mr. Peck shows that the Trico Innovision wiper was not fitted with a spoiler because (i) the

legal driving speeds in North American were lower than speeds that would have required a spoiler to counter “wind lift” (Ex. 2029 at 54:4–15; *see supra* Resp. to Observation 2); and because (ii) Trico did not wish to incur the capital expense of another gluing machine. *Id.* at 65:14–21. Because of its complex taper-taper cross-section, (*see id.* at 100:10–17) the Trico Innovision’s accompanying structure would naturally have been glued, as was the wiping element. *See id.* at 22:6–8. However, when Trico developed a simpler split-rail cross section, Mr. Peck testified that Trico naturally chose a spoiler that was not glued. *Id.* at 68:16–24 (“We designed VariFlex blades with spoilers [T]he decision was when we needed to extend the production line, that we would go the constant width, constant thickness split rail pretempered version, where you could then *get the air foil between the rails and hold it by the endcaps.*”) (emphasis added). The testimony provides no support for Patent Owner’s broad assertion that at the time of the claimed ’823 Patent invention, a person having ordinary skill in the art would have erroneously believed that “a spoiler would *need to be glued* to a beam blade,” as opposed to knowing how to make routine spoiler mounting choices.

RESPONSE TO OBSERVATION NO. 4

Mr. Peck testified that FEA was not new and VariFlex was not the only FEA product capable of being used to design a flat-spring wiper with a spoiler. *See Ex.*

2029 at 84:25–85:4 (“FEA programs from that time and even before that time would be capable of adding dissimilar materials and [accounting for] their effects on stiffness and deflection.”) (cross-examination); *id.* at 114:16–22 (“Q: And when you say ‘designers were quite capable of combining flat-spring wipers with spoilers . . . ,’ could they have done that with programs other than VariFlex. A: Yes.”) (redirect). Mr. Peck also testified that VariFlex was chosen only to accommodate the more complex beam equations associated with the taper-taper design. *Id.* at 84:15–23. When Trico switched to the (non-glued) split-rail design, Trico developed a simpler analysis program that could still model flat-spring wipers with spoilers by applying elementary beam equations. *See id.* at 82:8–21. The cited testimony of Mr. Peck (Ex. 2029 at 82:3–8) is not to the contrary. Whether the VariFlex program had functional limitations is irrelevant to the skills required to design a flat-spring wiper with a spoiler. Patent Owner’s identification of two other limitations of VariFlex (aerodynamics, thermal effects) is irrelevant to whether a person of ordinary skill in the art was skilled enough to design with these effects in mind. Mr. Peck testified that at the time Trico licensed VariFlex, it simply “contracted [computational fluid dynamics (“CFD”) analysis] out with an FEA house in Southeastern Michigan. They used a program called FLUENT.” *Id.* 36:5–13.

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