any evidence to the contrary, we must presume that the use of these different terms in the claims connotes different meanings.").

Thus, I reaffirm that the claimed "wiper blade assembly" does not include a "wiper arm" or the "end portion" thereof (construed as "coupling section," *see supra* p. 8). *See* Order No. 12, Inv. No. 337-TA-928, at 34-39 (U.S.I.T.C. Mar. 30, 2015). Thus, Trico's argument that it does not infringe claim 1 because its accused wiper blades do not include a wiper arm or the coupling section of a wiper arm, fails as a matter of law.

(ii) Simple Pivoting Motion

Trico also argues that the Accused Products do not infringe claim 1 of the '798 patent because "[they] require a linear insertion in order to reach a final assembly position." (*See* RIB at 59 (citing RX-188C, Davis RWS at Q/A 156).)

I agree that a configuration requiring a linear sliding motion at the end to achieve a secure connection is outside the scope of claim 1 of the '798 patent. As explained above, *see supra* Section V(C)(4), a configuration including a compound pivoting/sliding motion is not excluded from the scope of claim 1 of the '798 patent, but a configuration requiring a linear sliding motion (without pivoting) at the end to achieve a secure connection would be excluded. Indeed, claim element 1[h] recites that the connecting element must be capable of pivoting ***until*** a secure connection between the wiper blade and wiper arm is achieved. In other words, until a secure connection is achieved, the connecting element must still be capable of pivoting with respect to the wiper arm. But when a linear sliding motion is required at the end to achieve a secure connection, there is a period of time in which a secure connection is not achieved and the connecting element is no longer capable of pivoting. Such configuration is therefore outside the scope of claim 1 of the '798 patent.

However, I disagree that such linear displacement necessarily occurs at the end for Trico's Accused Products. Rather, with Trico's Accused Products, the sliding or linear motion can occur before the connecting element is pivoted onto the wiper arm. See RX-188C, Davis RWS at Q/A 157 (". . . After the 'first location' is reached by the end portion of the wiper arm, the hook is slid to the upward end of the retention tab, then the end of the retention tab is displaced linearly, ***and only then is the wiper blade rotated relative to the wiper arm***.") (emphasis added); *see also id.* at Q/A 84 (". . . A further linear displacement is needed, either to deflect the retaining tab during the initial insertion step, or after completing the rotation to finish the assembly. . . ."). While claim element 1[h] prevents a sliding motion at the end, the term "until" appears nowhere else in claim 1 and no other element of claim 1 prevents a sliding motion before the wiper blade is pivoted relative to the wiper arm. In fact, claim 1 of the '798 Patent uses the open-ended "comprising" transitional phrase which allows for additional features (*e.g.*, sliding), unless otherwise excluded by the claim language (*i.e.*, claim element 1[h]).

The language of claim 1 makes clear that a sliding motion is excluded only if it occurs at the end (before a secure connection between the wiper blade and wiper arm is achieved) and if it occurs by itself, *i.e.*, not as part of a compound pivoting/sliding motion. Thus, the linear motion of Trico's Accused Products before pivoting does not take them outside of the scope of claim 1 of the '798 patent.

(iii) Toe-to-Heel and Heel-to-Toe Assembly Configurations

Trico also argues that the Accused Products do not infringe claim 1 of the '798 patent because "[claim] elements [1g]-[1h] require a toe-to-heel installation" while the Accused Products "were designed to install heel-to-toe." (*See* RIB at 60 (citing RX-188C, Davis RWS at Q/As 83, 140, 156).) While I agree with Trico that Valeo failed to demonstrate infringement

based on a toe-to-heel assembly configuration, I find that the claims also encompass heel-to-toe assembly and that such configuration infringes claim 1 of the '798 patent.[11]

The Accused Products are not designed for toe-to-heel but heel-to-toe assembly. For example, the assembly instructions for the Accused Products direct the end users to follow a heel-to-toe assembly sequence.[12] (*See, e.g.*, RX-191C, Ehde RWS at Q/As 52-55, 76-79, 101-105; RPX-6; RPX-8; RPX-10.)

In addition, I find Trico's expert, Dr. Davis, more credible on this issue than Valeo's expert, Dr. Trumper, and I agree with Dr. Davis that the structure of Trico's Accused Products is not compatible with toe-to-heel pivoting but causes material interference, shearing, and deformation. (*See* RX-188C, Davis RWS, at Q/As 83-91.) Valeo argues that the deformation is a feature described in the '798 patent. (*See* CRB at 12.) I disagree. The '798 patent discloses that "the locking tongues **40** are pivoted *elastically in a direction facing one another*." *See* JX-2, '798 patent at 7:20-22 (emphasis added). In contrast, the toe-to-heel assembly of Trico's Accused Products causes ***torsion*** along the length of the braces or retaining features. As explained by Dr. Davis:

> Attempting to install in a toe-to-heel method as claimed causes the coupling section of the wiper arm opposite the insertion section to interfere with the retaining features of the adapter, preventing further rotation without shearing material from the retaining

[11] As explained by Dr.Trumper, toe-to-heel and heel-to-toe refer to the part of the wiper arm that is first inserted into the connector. (*See* CX-713C, Trumper DWS at Q/A 208.) "The toe of the wiper arm coupling section is the tongue-like extension at the end of the wiper arm, also referred to as the insertion section. The heel is the locking edges on the beveled legs on the opposite end of the coupling section of the wiper arm." (*Id.*) *See, e.g.*, JX-2, the '798 patent at FIG. 4 (showing insertion section **28** and locking edges **56**).

[12] Dr. Trumper opines that Trico's accused wiper blades that include the 803 and 819 adapter types are capable of toe-to-heel assembly but admits that Trico's ExactFit Rear Blade 12-I5US (CPX-9) (which includes the 836 connector type) is not. (*See* CX-713C, Trumper DWS at Q/A 208.)

> features, causing torsion along the length of the retaining features, or otherwise deforming the retaining feature contrary to its design and to its assembly instructions.

(RX-188C at Q/As 83, 140.) The videos provided by Valeo (CPX-29, CPX-30, CPX-31, CPX-33, CPX-34, and CPX-35), rather than support Valeo's position, prove Dr. Davis's point and demonstrate the interference, shearing, and deformation that result from the forced toe-to-heel assembly of Trico's Accused Products. (*See* RX-188C, Davis RWS, at Q/As 83-91.) *See also* Hearing Tr. at 265:2-266:2 (July 20, 2015) (Trumper) (". . . Yes, [the securing sections] are twisting. . . . The little piece of plastic did fly off. . . .") Dr. Trumper also admits that such deformation and shearing only takes place with the toe-to-heel, but not the heel-to-toe, assembly sequence. (*See id.* at 265:22-266:2.)

What is more, Valeo's expert, Dr. Trumper, used similar arguments against the Weber prior art reference to argue that it is not capable of pivoting. *See* Hearing Tr. at 770:6-12 (July 23, 2015) (Trumper):

> The geometry of these nubs is also not compatible with pivoting unless you choose the shape correctly, and that shape is -- if you look at some of the other -- the shapes in the Weber reference are not compatible with rotation. They would -- those nubs would shear if you try to rotate them. There would be material interference.

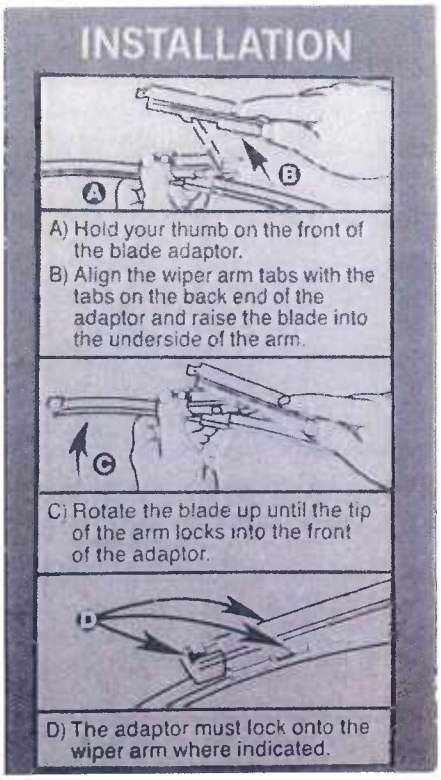
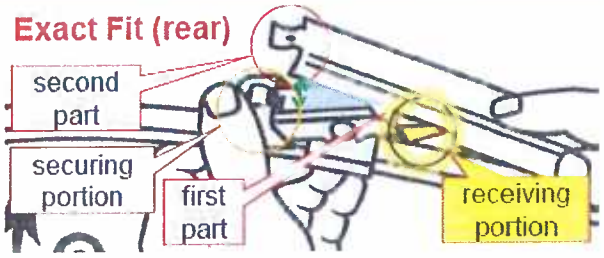
Dr. Trumper cannot, on one hand, argue that material interference and shearing prevent a device from pivoting, and on the other, opine that Trico's Accused Products are capable of toe-to-heel assembly despite the shearing, material interference, and deformation.

Valeo also argues that the presence of bevels demonstrates that it can be installed in toe-to-heel fashion. (*See* CRB at 11.) I disagree. The structural similarities between the Accused Products and the claimed embodiments (as well as Trico's discontinued -618 connector designed for toe-to-heel assembly) are not dispositive. Valeo must still establish that the Accused

Products satisfy each element of claim 1 of the '798 patent and that they are capable of being assembled in an infringing manner (*e.g.*, capable of pivoting with respect to the wiper arm until the securing portion secures the wiper arm, as required by claim element 1[h]). For instance, Valeo's prior art GEN II connector, discussed *infra* Section VII(C)(2), is structurally similar to the claimed embodiments, includes bevels, and can assemble in toe-to-heel fashion. Yet, as discussed *infra*, the GEN II connector does not invalidate the '798 patent because it is not capable of pivoting into a closed position but requires a linear sliding motion at the end. The Accused Products are not capable of toe-to-heel assembly without shearing, material interference, and deformation. The braces or retaining features of the Accused Products prevent them from pivoting until a secure connection is achieved. (*See* RX-188C at Q/As 83, 140.) This demonstrates that, while similar, the Accused Products are not structurally identical to the claimed embodiments.

Valeo's infringement theory, based on the forced toe-to-heel assembly of Trico's Accused Products, is strained and unpersuasive. Accordingly, I find that Valeo failed to demonstrate, by a preponderance of the evidence, that Trico's Accused Products infringe claim 1 of the '798 patent based on the toe-to-heel configuration.

However, I find that Valeo demonstrated infringement of claim 1 of the '798 patent based on Trico's heel-to-toe assembly configuration. Dr. Trumper's testimony and element-by-element analysis of the issue are persuasive. (*See* CX-713C, Trumper DWS at Q/As 197-207, 210-214.) *See also*, for example the instructions for Trico's ExactFit Rear Blade 12-I5US (CPX-9) and CDX-4 at 37, reproduced below (showing heel-to-toe assembly):

CPX-9 (Instructions)	CDX-4, p. 37
	

Trico's entire argument rests on the erroneous assumption that a toe-to-heel assembly is required by claim 1 of the '798 patent and that the "receiving portion" must be construed as the seat for the insertion section of the wiper arm. (*See* RIB at 60, RRB at 28-29.) However, as discussed above in Section V(C)(1), the term "receiving portion" is construed in accordance with its plain and ordinary meaning and is broader than the term "seat." *See also supra* note 8 (Trico's gripe with the differences between the disclosures of the '044 and '798 patent specifications does not justify narrowing the scope of the term "receiving portion" but rather relates to whether the '798 patent claims which include the term "receiving portion," are entitled to the priority date of the '044 patent). As further evidence that the term "receiving portion" may refer to the rear portion of the connector, rather than being limited to the opening or seat on the

front portion, claim 10 of the '798 patent recites a "rear portion having a pair of receiving members, each receiving member being on a respective lateral side of said rear portion."

Under the plain and ordinary meaning of the term "receiving portion," I find that the scope of claim 1 of the '798 patent encompasses a heel-to-toe assembly configuration and that Trico's Accused Products, namely, Trico ExactFit Rear Blade 12-I5US (CPX-9), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23), infringe claim 1 of the '798 patent.

b. Claim 7

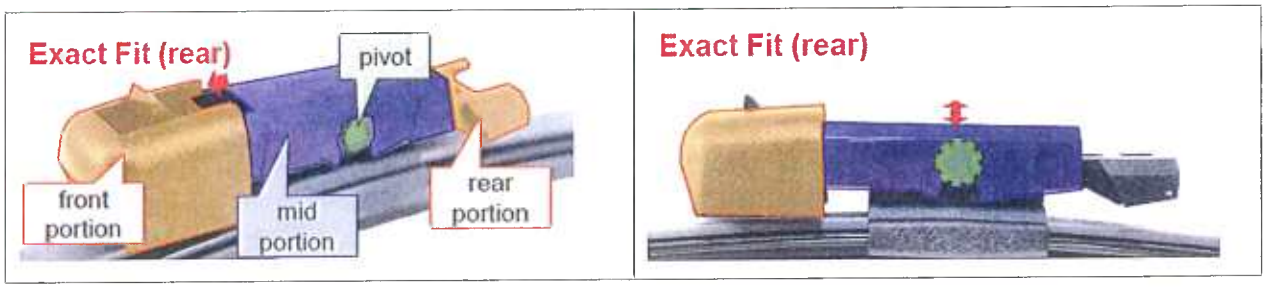
Claim 7 of the '798 patent recites:

> [a] A wiper blade assembly according to claim l, wherein the connecting element is pivotably mounted on the blade support element about a pivot, and
>
> [b] wherein said connecting element has a front portion on a front side relative to said pivot and a rear portion on a rear side relative to said pivot,
>
> [c] wherein said connecting element has a mid-portion extending over said pivot and between said front and rear portions, said mid-portion extending between lateral sides of said mid-portion which extends over said pivot, and
>
> [d] wherein said front portion has an outer top surface that is raised relative to said mid-portion which extends over said pivot.

Valeo asserts that claim 7 of the '798 patent is infringed, either literally or under the doctrine of equivalents, by the following Trico Accused Products: Trico ExactFit Rear Blade 12-I5US (CPX-9), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23). (*See* CIB at 40-41 (citing CX-713C, Trumper DWS at Q/As 256-274; CDX-4).)

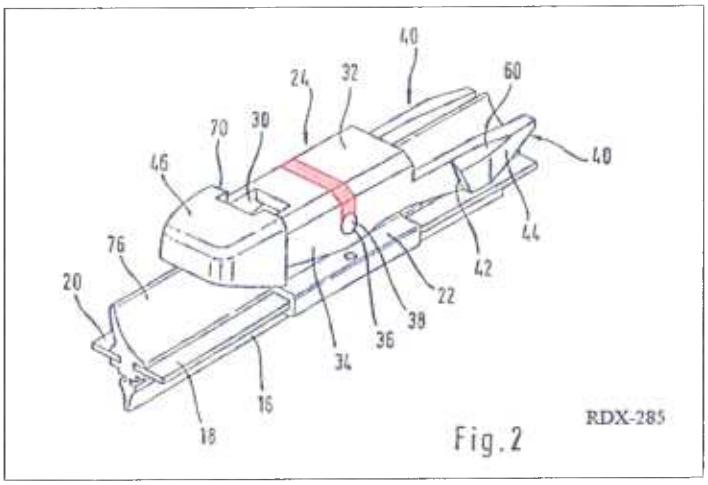
Trico responds that its accused wiper blades do not infringe claim 7 of the '798 patent because claim 7 depends from claim 1 (which according to Trico is not infringed) and because the Accused Products (having the -803 and -819 adapters) do not have a pivot and a mid-portion which extends over said pivot. (*See* RIB at 62-65.) Initially, I note that Trico's argument that claim 7 of the '798 patent is not infringed because claim 1 is not infringed, fails for the same reasons as discussed in connection with claim 1. *See supra* Section VI(B)(1)(a).

With respect to Trico ExactFit Rear Blade 12-I5US (CPX-9), which includes the -836 adapter, Trico does not appear to dispute that it has a pivot and a mid-portion which extends over said pivot, as required by claim 7 of the '798 patent. I find Dr. Trumper's testimony, as illustrated by demonstrative CDX-4 (partially reproduced below), persuasively establishes that CPX-9 satisfies all elements of claim 7 of the '798 patent. (*See* CX-713C, Trumper DWS at Q/As 259-69; CDX-4 at 45-46.)

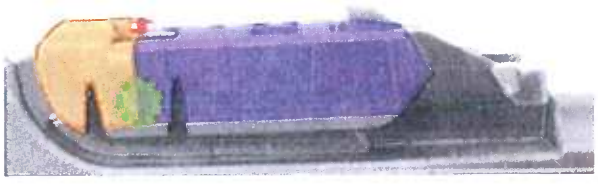
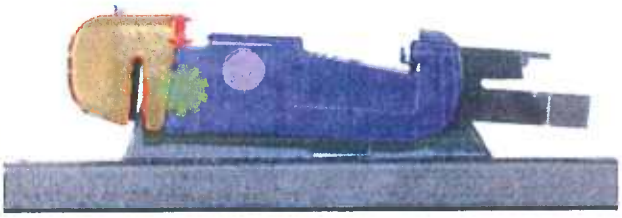


With respect to the Accused Products which include the -803 adapter (CPX-15 and CPX-23) and -819 adapter (CPX-11, CPX-12, CPX-14, and CPX-22), I find Valeo's expert's (Dr. Trumper) testimony more credible than that of Trico's expert, Dr. Davis. Accordingly, for the reasons below, I find that the Accused Products having the 803 and 819 adapters include a pivot and a mid-portion which extends over said pivot. (*See* CX-713C, Trumper DWS at Q/As 267-274.)

First, I agree with Dr. Trumper that, in view of the claim language requiring the front portion to be raised relative to the mid-portion, and the mid-portion to extend between the front and rear portions, the "change in height provides a line of demarcation between the front and mid-portions." (*See id.* at Q/A 267.) I also rejected Trico's proposed construction for "mid-portion" and its argument that the mid-portion necessarily includes at least some structure directly above and extending over the pivot. *See supra* Section V(C)(1). Similarly, I disagree with Dr. Davis that the mid-portion is limited to the portion of the connecting element as shaded in red by Dr. Davis. (*See* RX-188C, Davis RWS at Q/As 176-7.)



Thus, in view of the claim language and in view of my construction for mid-portion in Section V(C)(1), *supra*, I find more credible Dr. Trumper's representations of the mid-portions of Trico's Accused Products. *See, e.g.* (purple section):

-803 Adapter	-819 Adapter
Neoform ("-803") 	Ice 

Second, I find that the opening in the upper part of the mid-portion does not negate that it extends over at least some portion of the pivot in the Accused Products. (*See* CIB at 41; CRB at 13; CX-713C, Trumper DWS at Q/A 267; CDX-4 at 45-46; RX-12C; RX-16C.) For example, the claim language requires the mid-portion to extend between the front and rear portions, but does not prevent the presence of openings between the front and rear portions as disclosed in the '798 patent specification. *See, e.g.*, JX-2, '798 patent at Fig. 2. Thus, I agree that the mid-portion includes both the structure which extends between the front and rear portions as well as the volume defined by such structure. Importantly, there is no question that the mid-portion, not the front or rear portion, is the portion of the connector that arguably extends over the pivot.

Trico states that "[t]he Accused Products (except for the 836 adapter) pivot about a pair of trunnions extending from the inside surface of the side walls of the connecting element" and that there is no structure extending over the trunnions. (*See* RIB at 63 (citing RX-188C, Davis RWS at Q/A 177).) But as discussed above, the opening does not negate that the volume defined by the mid-portion extends over the trunnions. In addition, as admitted by Dr. Davis, the trunnions are connected to the lateral side walls of the mid-portion. (*See* RX-188C, Davis RWS at Q/A 177.). As such, at least the lateral sides of the mid-portion extend over the pivot. That is to say, the pivot is not limited to the trunnions where the rotational motion and contact take place but also includes the portion that is inside the lateral sides of the mid-portion. (*See* RX-12C (engineering drawing of 803 adapter); RX-16C (engineering drawing of 819 adapter); CIB at 41; CRB at 13-14; CDX-4 at 45-46.) In other words, a pivot can include a pin or a shaft, not just the contact point around which the rotation takes place. Further, nothing in the claim language requires the mid-portion to cover the entirety of the pivot. Thus, I find Trico's Accused Products literally infringe claim 7 of the '798 patent.

Even if Trico's Accused Products do not literally infringe, which they do, I would find that Trico's Accused Products infringe claim 7 of the '798 patent under the doctrine of equivalents. I find Dr. Trumper's testimony on the issue more credible and that he persuasively established that shifting the pivot forward to the front portion of the connecting element, under the opening defined by the front portion and mid-portion, would represent an insubstantial difference. (*See* CX-713C, Trumper DWS at Q/As 270-274.) Specifically, Dr. Trumper testified that the mid-portion of the Accused Products: (1) performs the same function as the claimed mid-portion, namely "it forms a portion of a pivotable connecting element that is covered by the coupling section of a wiper arm"; (2) works in substantially the same way as the claimed mid-portion, namely "it lies between the front and rear portions of the connecting element and has walls that are spaced by a distance that accounts for the wall thickness of the wiper arm"; and (3) achieves substantially the same result as the claimed mid-portion, namely "it promotes effective wiping by supporting the coupling section of a wiper arm and it helps to streamline the connection between the connecting element and the coupling section of the wiper arm." (*See id.*)

Trico makes the legal argument that the Accused Products do not have any structure "extending over said pivot" so there can be no equivalence. However, as recognized in *Deere & Co. v. Bush Hog, LLC*, "the doctrine of equivalents, by definition, recognizes that an element is missing that must be supplied by the equivalent substitute." 703 F. 3d 1349, 1356-57 (Fed. Cir. 2012). Thus, even if an element is missing, there may still be an insubstantial difference with an equivalent substitute. *See id.* at 1357. Here, I find the lateral attachment of the trunnions to the side walls of the mid-portion in Trico's Accused Products is an equivalent substitute to, and insubstantially different from, a mid-portion with a structure extending over the pivot.

Accordingly, I find Trico's Accused Products, namely, Trico ExactFit Rear Blade 12-I5US (CPX-9), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23), infringe claim 7 of the '798 patent.

c. Claim 10

Claim 10 of the '798 patent recites:

[a] A wiper blade assembly comprising:

[b] a wiper blade; and

[c] a connector coupled to said wiper blade such that said connector and said wiper blade pivot relative to each other about a pivot, said pivot having a pivot axis extending through lateral side walls of said connector in a direction transverse to a longitudinal axis of said wiper blade;

[d] wherein said connector has a front portion on a front side of the connector relative to the pivot and a rear portion on a rear side of the connector relative to said pivot, said front portion defining part of an opening on an outer top surface of said front portion, and said rear portion having a pair of receiving members, each receiving member being on a respective lateral side of said rear portion,

[e] wherein said connector has a mid-portion extending over said pivot and between said front and rear portions, said mid-portion extending between lateral sides of said mid-portion,

[f] wherein said outer top surface of said front portion is raised relative to said mid-portion which extends over said pivot, and

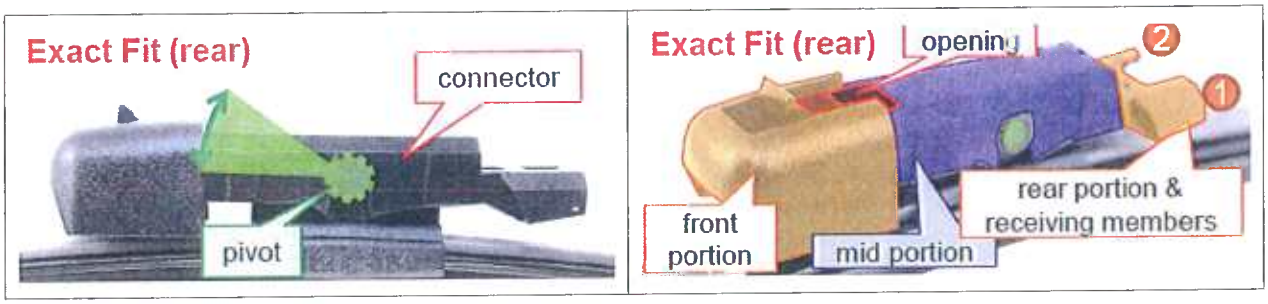
[g] wherein said front portion has lateral sides that are wider apart than said lateral sides of said mid-portion which extends over said pivot.

Valeo asserts that claim 10 of the '798 patent is infringed by the following Trico Accused Products: Trico Chill Winter Blade 37-2413USA (CPX-8), Trico ExactFit Rear Blade 12-I5US (CPX-9), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry

Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23). (*See* CIB at 43 (citing CX-713C, Trumper DWS at Q/As 289-314; CDX-4).) Valeo's expert, Dr. David L. Trumper, explained in detail how each element of claim 10 of the '798 patent is satisfied. (CX-713C, Trumper DWS at Q/As 294-314.)

Trico responds that its accused wiper blades do not infringe claim 10 of the '798 patent, because they do not have "a 'pivot' which is separate and distinguishable from an arbitrary 'pivot axis,'" and a mid-portion extending over said pivot. (*See* RIB at 66.)

With respect to Trico ExactFit Rear Blade 12-I5US (CPX-9), which includes the -836 adapter, Trico does not appear to dispute that it has a pivot and a mid-portion which extends over said pivot, as required by claim 10 of the '798 patent. I find Dr. Trumper's testimony, as illustrated by demonstrative CDX-4 (partially reproduced below), persuasively establishes that CPX-9 satisfies all elements of claim 10 of the '798 patent. (*See* CX-713C, Trumper DWS at Q/As 294-309; CDX-4 at 49-55.)



With respect to the Accused Products which include the -803 adapter (CPX-8, CPX-15 and CPX-23) and -819 adapter (CPX-11, CPX-12, CPX-14, and CPX-22), I find Valeo's expert's (Dr. Trumper) testimony more credible than that of Trico's expert, Dr. Davis. (*See* CX-713C, Trumper DWS at Q/As 291-314; CDX-4 at 49-55.)

Trico argues that claim 10 of the '798 patent is not infringed because claim element 10(c) requires "a 'pivot' which is separate and distinguishable from an arbitrary 'pivot axis.'" (*See* RIB at 66.) I disagree. I find that Dr. Trumper persuasively establishes that the Accused Products include a pivot and satisfy claim element 10(c). (*See* CX-713C, Trumper DWS at Q/As 298-9; CDX-4 at 49-55.) In addition, Trico itself admits that "the accused Trico products (except for the Exact Fit (rear)) pivot about a pair of trunnions extending from the inside surface of the side walls of the connecting element." (*See* RX-188C, Davis RWS at Q/A 177; RIB at 66.)

Trico also argues that claim 10 of the '798 patent is not infringed because claim element 10(e), which requires a mid-portion extending over said pivot, is missing. (*See* RIB at 66.) As recognized by both parties, however, claim element 10(e) is the same as claim element 7(c), discussed above. Thus, for the reasons discussed *supra* Section VI(B)(1)(b), I find that the Accused Products literally satisfy claim element 10(e). As with claim element 7(c), even if the Accused Products did not literally meet claim element 10(e), I would still find the element met under the doctrine of equivalents.[13]

Accordingly, I find Trico's Accused Products, namely, Trico Chill Winter Blade 37-2413USA (CPX-8), Trico ExactFit Rear Blade 12-I5US (CPX-9), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23), infringe claim 10 of the '798 patent, both literally and under the doctrine of equivalents.

[13] Although CPX-8 was not discussed in connection with claim 7, I find that it satisfies claim element 10(e) for the same reasons as the other Accused Products. (*See* CX-713C, Trumper DWS at Q/As 291-314; CDX-4 at 49-55.)

d. Claim 12

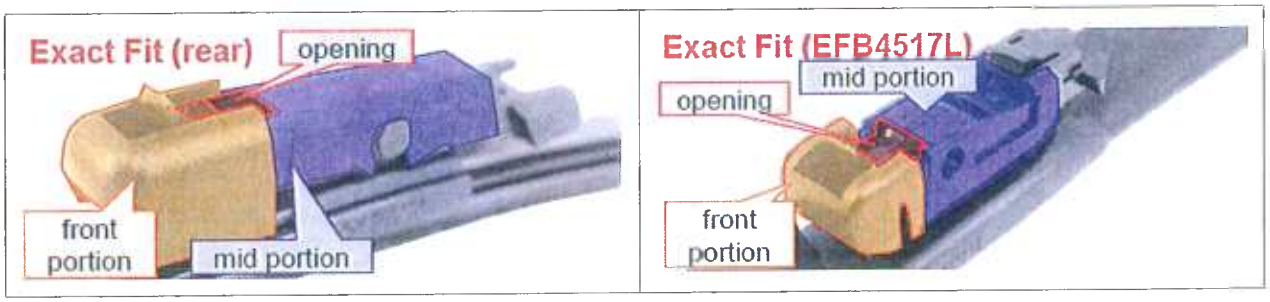
Claim 12 of the '798 patent recites:

> A wiper blade assembly according to claim 10, wherein said mid-portion defines another part of said opening on a side next to said front portion such that said opening extends from said mid-portion to said front portion.

Valeo asserts that claim 12 of the '798 patent is infringed by the following Trico Accused Products: Trico Chill Winter Blade 37-2413USA (CPX-8), Trico ExactFit Rear Blade 12-I5US (CPX-9), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23). (*See* CIB at 45 (citing CX-713C, Trumper DWS at Q/As 322-8; CDX-4).)

Trico responds that its accused wiper blades do not infringe claim 12 of the '798 patent because claim 12 depends from claim 10, which according to Trico is not infringed. (*See* RIB at 67.) Trico's argument that claim 12 of the '798 patent is not infringed because claim 10 is not infringed, fails for the same reasons as discussed in connection with claim 10. *See supra* Section VI(B)(1)(c).

I find that Dr. Trumper persuasively established the Accused Products satisfy claim 12 of the '798 patent. (*See* CX-713C, Trumper DWS at Q/As 327-8; CDX-4 at 57, reproduced partially below.)



I also disagree with Trico that "the plain language of claim 12 indicates that the mid-portion does not include any "opening.'" (*See* RRB at 37.). As explained above in Section VI(B)(1)(b), the claim language does not prevent the presence of openings.

Accordingly, I find Trico's Accused Products, namely, Trico Chill Winter Blade 37-2413USA (CPX-8), Trico ExactFit Rear Blade 12-I5US (CPX-9), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23), infringe claim 12 of the '798 patent.

e. Claim 15

Claim 15 of the '798 patent recites:

[a] A wiper blade assembly according to claim 10, wherein said wiper blade has an elongate wiper strip on a bottom side of the wiper blade and

[b] an elongate support element on a top side of the wiper blade, and

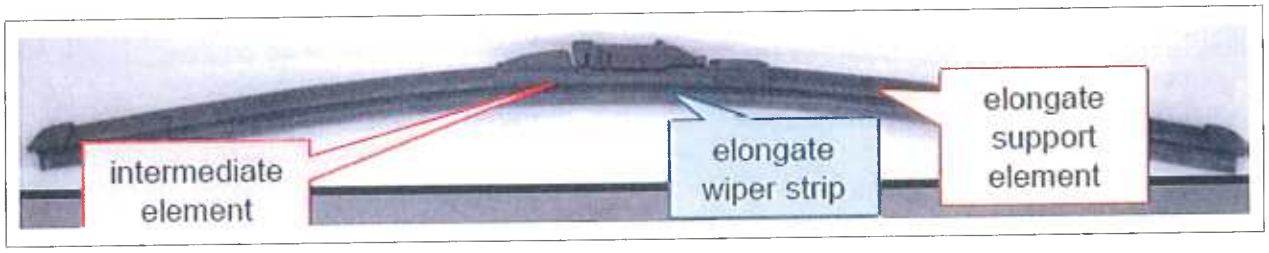
[c] wherein said connector is coupled to said wiper blade via an intermediate element secured to a portion of the elongate support element of the wiper blade.

Valeo asserts that claim 15 of the '798 patent is infringed by the following Trico Accused Products: Trico ExactFit Rear Blade 12-I5US (CPX-9), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23). (*See* CIB at 46 (citing CX-713C, Trumper DWS at Q/As 336-46; CDX-4).)

Trico responds that its accused wiper blades do not infringe claim 15 of the '798 patent because claim 15 depends from claim 10, which according to Trico is not infringed. (*See* RIB at 67.) Trico's argument that claim 15 of the '798 patent is not infringed because claim 10 is not

infringed, fails for the same reasons as discussed in connection with claim 10. *See supra* Section VI(B)(1)(c).

I find that Dr. Trumper persuasively established the Accused Products satisfy each element of claim 15. (*See* CX-713C, Trumper DWS at Q/As 341-6; CDX-4 at 59, partially reproduced below.)



Accordingly, I find Trico's Accused Products, namely, Trico ExactFit Rear Blade 12-I5US (CPX-9), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23), infringe claim 15 of the '798 patent.

2. Indirect Infringement

Valeo also asserts indirect infringement of the '798 patent against Trico under an alternative hypothetical construction of the asserted claims of the '798 patent that would require a wiper arm. However, as discussed *supra* Sections I(C) and VI(B)(1)(a)(i), I found that the asserted claims of the '798 patent do not require a wiper arm. Thus, Valeo's indirect infringement claims are moot.

C. '044 Patent

1. Asserted Claims

Valeo asserts direct and indirect infringement of claims 1, 8, 11, 12, 14, 32, and 33 of the '044 patent against the following Trico Accused Products: Trico Chill Winter Blade 37-

2413USA (CPX-8), Trico Force Blade 25-180A (CPX-11), Trico Ice Blade 35-180 (CPX-12), Trico Sentry Blade 32-220 (CPX-14), Trico Tech Blade 19-220WD5 (CPX-15), Trico ExactFit Blade EFB4517L (CPX-22), and Trico NeoForm Blade 16-2113USA (CPX-23).[14] (*See* CIB at 79.)

As discussed below, Valeo's infringement theory for the asserted claims of the '044 patent is based solely on the alleged toe-to-heel assembly of Trico's Accused Products. But, for the reasons discussed *supra* Section VI(B)(1)(a)(iii), I find that Trico's Accused Products are not compatible with toe-to-heel assembly.

Unlike the '798 patent, the asserted claims of the '044 require toe-to-heel assembly of the wiper blade and wiper arm. For example, Valeo admits that claim 1 of the '044 patent is limited to a toe-to-heel assembly. *See* CIB at 36:

> In fact, this is an important distinction from claim 1 of the '044 Patent, for example, which specifically states that the connecting element has a seat for the tongue-shaped insertion section. A [person of ordinary skill in the art] would understand that claim 1 of the '798 Patent is deliberately written to be broad enough that it does not matter which end of the coupling section of the wiper arm is first inserted into the connector. In other words, claim 1 of the '798 Patent is agnostic to whether a connector structure permits heel-toe or toe-heel assembly.

In addition, independent claims 1 and 32 of the '044 patent include claim language that necessitates a toe-to-heel assembly sequence. For instance, claim elements 1[j]-[k] require pivoting about an insertion section/seat contact area and a plurality of securing sections. *See* claim 1 of the '044 patent, reproduced and highlighted below:

[14] As discussed *supra* note 3, Order No. 36 prevents Valeo from asserting infringement of the '044 patent against Trico's Exact Fit 12-15US rear blade having the 836 adapter (CPX-9).

Claim 1:

[a] Device for releasably connecting a wiper blade to a drivable wiper arm, wherein the wiper blade comprises

[b] a wiper strip which faces the windscreen to be wiped,

[c] at least one strip-shaped elongate support element,

[d] a slide element which is connected to the support element, and

[e] a connecting element for connection to a coupling section of the wiper arm,

[f] wherein the connecting element is mounted on the slide element in a manner such that it can pivot,

[g] wherein the coupling section has a tongue-shaped insertion section,

[h] wherein the connecting element has a seat for the insertion section, and

[i] wherein the coupling section and the connecting element have securing sections for providing a mutual permanent connection,

[j] wherein, in order to reach a preassembly position in which the longitudinal axis of the wiper arm and the longitudinal axis of the connecting element enclose an angle α in the range from approximately 10° to 100°, the insertion section can be inserted in a substantially rectilinear manner into the seat, and

[k] wherein, in order to reach a final assembly position, the wiper arm and the connecting section can be pivoted onto one another about the insertion section/seat contact area until the securing sections allow a permanent mutual connection.

Similarly, claim elements 32[c]-[e] require pivoting about one end of the coupling section and a plurality of elastically flexible locking tongues for engaging legs of said coupling section, reproduced and highlighted below:

Claim 32:

[a] A device for releaseably connecting a wiper blade to a drivable wiper arm having a coupling section, said device comprising:

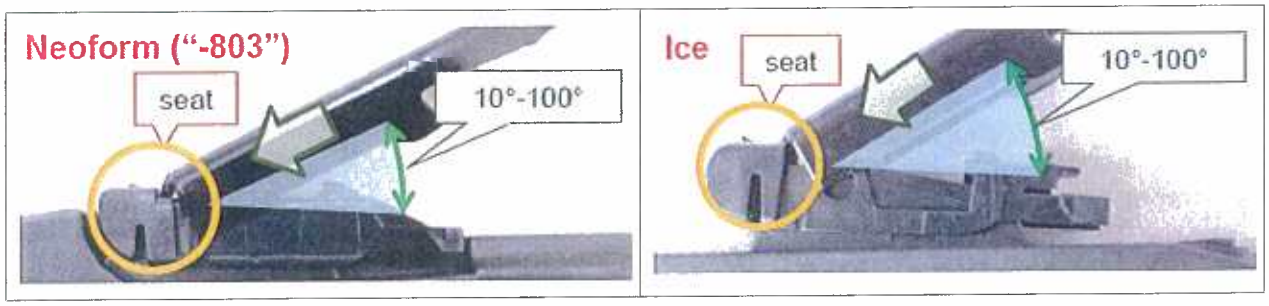
[b] a connecting element coupled to said wiper blade;

[c] said connecting element being pivotally coupled to one end of the coupling section; and

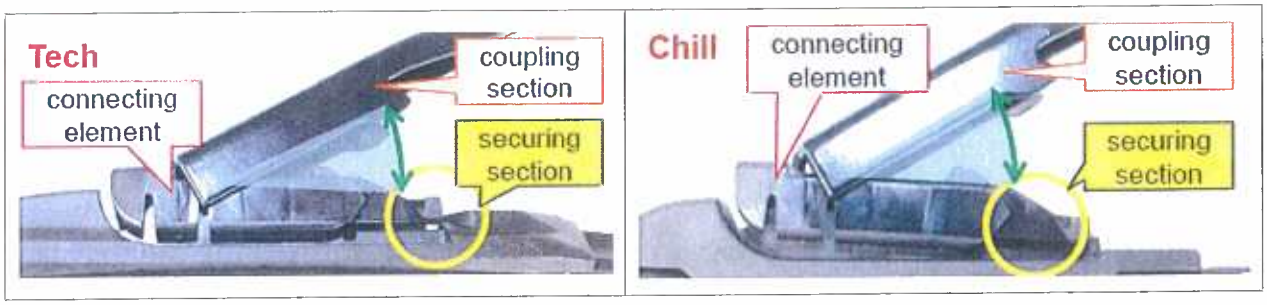
[d] at least one securing section for securing said connecting element to said coupling section when said connecting element is pivoted to a closed position whereupon said wiper blade becomes detachably secured to said wiper arm; and

[e] wherein said at least one securing section comprises a plurality of elastically flexible locking tongues for engaging legs of said coupling section in order to lock said connecting element to said coupling section.

Furthermore, Valeo only attempted to prove infringement of independent claims 1 and 32 based on the toe-to-heel assembly sequence. (*See* CIB at 95-6, 99-103; CX-713C, Trumper DWS at Q/As 66-70, 176-82; CDX-4 at 7-8, 29-31.) For example, relying on CDX-4 at 7-8 (partially reproduced below), Dr. Trumper testified that the Accused Products satisfy claims elements 1[j] and 1[k] based on a toe-to-heel assembly configuration. (*See* CX-713C, Trumper DWS at Q/As 66-70; CDX-4 at 7-8.)



Similarly, relying on CDX-4 at 29-31 (partially reproduced below), Dr. Trumper testified that the Accused Products satisfy claims elements 32[c]-[e] based on a toe-to-heel assembly configuration. (*See* CX-713C, Trumper DWS at Q/As 176-82; CDX-4 at 29-31).



However, for the reasons discussed *supra* Section VI(B)(1)(a)(iii), Trico's Accused Products are not designed for toe-to-heel but heel-to-toe assembly. In addition, I find Trico's expert, Dr. Davis, more credible on this issue than Valeo's expert, Dr. Trumper, and I agree with Dr. Davis that the structure of Trico's Accused Products is not compatible with toe-to-heel pivoting but causes material interference, shearing, and deformation. *See supra* Section VI(B)(1)(a)(iii).

Accordingly, I find that Valeo failed to demonstrate, by a preponderance of the evidence, that Trico's Accused Products infringe claims 1 and 32 of the '044 patent. Because the other asserted claims 8, 11, 12, 14, and 33 of the '044 patent depend from claims 1 and 32 (and thereby include all their limitations), I find that they are also not infringed.

2. Indirect Infringement

As construed, the asserted claims of the '044 patent also require the presence of a wiper arm. *See supra* Section I(C). Because Trico does not sell wiper arms, Valeo argues that infringement occurs when Trico tests the Accused Products in combination with a pinch tab wiper arms in the United States, or when Trico's end users install an accused Trico wiper blade product on a Valeo pinch-tab style arm. (*See* CIB at 80-90.).

However, as discussed *supra* Section VI(C)(1), even assuming the claim elements relating to a wiper arm are satisfied, there is no direct infringement of the asserted claims of

the '044 patent by Trico's Accused Products. Accordingly, Trico does not indirectly infringe the asserted claims of the '044 patent.

3. Exhaustion and Permissible Repair

Trico also asserts exhaustion and permissible repair as affirmative defenses to Valeo's claim of infringement.[15] (*See* RIB at 25.) Specifically, Trico asserts that "the owners of vehicles originally equipped with a pinch tab arm and blade supplied by Valeo have the right to repair this combination when the wiper blade wears out." (*See id.* at 26.)

The patent exhaustion and permissible repair doctrines serve as complete defenses to a claim of infringement. *See Tessera, Inc. v. International Trade Comm'n*, 646 F.3d 1357, 1370 (Fed. Cir. 2011); *Jazz Photo Corp. v. International Trade Comm'n*, 264 F.3d 1094, 1101-02 (Fed. Cir. 2001). "The patent exhaustion doctrine provides that a patented item's initial authorized sale terminates all patent rights to that item." *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008). In addition, the doctrine of permissible repair provides that the lawful owner of a patented article may replace unpatented parts of that article. *See Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 346 (1961).

In view of my finding that Trico does not infringe the asserted claims of the '044 patent, Trico's exhaustion and permissible repair defenses are moot. In any event, I find that Trico's exhaustion and permissible repair defenses are not applicable here because there is no initial authorized sale of the patented combination of a wiper arm with Trico's accused wiper blades, and because the wiper blade is not "unpatented" but separately protected under the '798 patent. *See Aro Mfg.*, 365 U.S. at 346 ("Mere replacement of individual ***unpatented*** parts, one at a time,

[15] In Order No. 19, I granted Valeo's motion for summary determination of no exhaustion or permissible repair with respect to the '798 patent but denied it with respect to the '044 patent. *See* Order No. 19, Inv. No. 337-TA-928 (U.S.I.T.C. May 19, 2015).

whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property.") (emphasis added); *Jazz Photo*, 264 F.3d at 1103-04 (Permissible repair includes the "replacement of ***unpatented*** parts that had become worn or spent, in order to preserve the utility for which the article was originally intended") (emphasis added).

VII. INVALIDITY

A. Legal Standards

1. Invalidity

It is Respondents' burden to prove invalidity, and the burden of proof never shifts to the patentee to prove validity. *Scanner Techs. Corp. v. ICOS Vision Sys. Corp. N.V.*, 528 F.3d 1365, 1380 (Fed. Cir. 2008). "Under the patent statutes, a patent enjoys a presumption of validity, *see* 35 U.S.C. § 282, which can be overcome only through facts supported by clear and convincing evidence[.]" *SRAM Corp. v. AD-II Eng'g, Inc.*, 465 F.3d 1351, 1357 (Fed. Cir. 2006).

The clear and convincing evidence standard placed on the party asserting the invalidity defense requires a level of proof beyond the preponderance of the evidence. Although not susceptible to precise definition, "clear and convincing" evidence has been described as evidence which produces in the mind of the trier of fact "an abiding conviction that the truth of a factual contention is 'highly probable.'" *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993) (citing *Buildex, Inc. v. Kason Indus., Inc.*, 849 F.2d 1461, 1463 (Fed. Cir. 1988)).

2. § 102(b) Anticipation

Prior art "anticipates" a claim where a single piece of prior art discloses every limitation of that claim. *In Re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997).

a. On-Sale Bar

Under pre-AIA § 102(b), a patent is invalid for anticipation if "the invention was . . . on sale in this country, more than one year prior to the date of the application for patent in the United States." 35 U.S.C. § 102(b).

"The on-sale bar under 35 U.S.C. § 102(b) applies when, before the critical date, the claimed invention (1) was the subject of a commercial offer for sale; and (2) was ready for patenting." *Medicines Co. v. Hospira, Inc.*, 791 F.3d 1368, (Fed. Cir. 2015) (citing *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67-68 (1998)). "The on-sale bar is a question of law based on underlying factual findings." *Hamilton Beach Brands, Inc. v. Sunbeam Products, Inc.*, 726 F.3d 1370, 1375 (Fed. Cir. 2013) (citations omitted).

"An actual sale is not required for the activity to be an invalidating commercial offer for sale. An attempt to sell is sufficient so long as it is sufficiently definite that another party could make a binding contract by simple acceptance." *Id.* at 1374 (citations omitted). With respect to the "ready for patenting" prong, it is satisfied when, "prior to the critical date: (1) the invention is reduced to practice; or (2) the invention is depicted in drawings or described in writings of sufficient nature to enable a person of ordinary skill in the art to practice the invention." *See id.* at 1375 (citations omitted).

b. Public Use

Under pre-AIA § 102(b), a patent is invalid for anticipation if "the invention was . . . in public use . . . in this country, more than one year prior to the date of the application for patent in the United States." 35 U.S.C. § 102(b). "Whether a patent is invalid due to public use under § 102(b) is a question of law based on underlying questions of fact." *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 424 F.3d 1374, 1378 (Fed. Cir. 2005) (citations omitted). The test for

"public use" is "whether the purported use: (1) was accessible to the public; or (2) was commercially exploited." *See id.* at 1380.

B. Summary of the Parties' Positions

Trico contends that the Asserted Patents are invalid under 35 U.S.C. § 102(b) for anticipation, based on Valeo's alleged offers for sale and public use of Valeo's Gen II and Gen IIB flat blade connectors prior to the critical date.[16] The parties agree that the "critical date" with respect to the Asserted Patents is November 21, 2002.[17] (*See* CIB at 50; RIB at 34, 67.) In addition, Valeo does not dispute that the Gen II and Gen IIB connectors were ready for patenting before the critical date. (*See, e.g.*, RX-143C; RX-144C; RX-89; RX-90.) Further, while Valeo admits the Asserted Claims read on the Gen IIB connector and that it is the commercial embodiment of the Asserted Patents (*see* CIB at 3, 6), Valeo denies that the Gen IIB connector was the subject of an offer for sale to [ ] before the critical date. With respect to the Gen II connector, which was an earlier flat blade connector model and was the subject of an earlier patent, U.S. Patent 7,716,780 ("the '780 patent") (RX-89) (and its

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[16] Trico also argues, for the first time in its reply post-hearing brief, that claim 32 of the '044 patent is invalid for lack of enablement under 35 U.S.C. § 112, ¶ 1. Trico has the burden of proof on invalidity, yet Trico failed to raise this ground of invalidity in its opening post-hearing brief. Such sandbagging is unfair to Valeo and denied Valeo an opportunity to respond. *See, e.g., Certain Optical Disk Controller Chips and Chipsets and Products Containing Same, Including DVD Players and PC Optical Storage Devices*, Inv. No. 337-TA-506, Comm'n Op. at 40 (U.S.I.T.C. Sept. 28, 2005) ("Allowing a party to raise an issue in a reply brief is unfair because such action denies the party's opponent an opportunity to respond. Furthermore, requiring the ALJ to address issues not raised until the reply brief would threaten the integrity of Commission proceedings in that such a practice would require the ALJ to decide issues that were not fully briefed."). Accordingly, I find that Trico waived its claim of invalidity based on lack of enablement under 35 U.S.C. § 112, ¶ 1.

[17] Indeed, for applications subject to pre-AIA 35 U.S.C. § 102, the effective filing date is the filing date of the U.S. application, not the filing date of a foreign priority document. *See* Manual of Patent Examining Procedure § 706.02(VI). Thus, the critical date of the Asserted Patents is one year prior to their November 21, 2003 the U.S. effective filing date, *i.e.* November 21, 2002.

corresponding PCT Publication WO 03/080409 (RX-90)), Valeo admits that it may have been the subject of the offer for sale to [ ] (*see* CIB at 51, 54), but Valeo denies that the Gen II connector is within the scope of the Asserted Claims. Specifically, Valeo argues that the Gen II connector requires linear assembly and cannot be pivoted into a closed position with respect to the wiper arm. (*See* CIB at 62.)

C. Gen II Connector

As discussed above, Trico contends that the Asserted Patents are invalid under 35 U.S.C. § 102(b) for anticipation, based on Valeo's alleged offer for sale and public use of Valeo's Gen II connector prior to the critical date. Trico asserts that the Gen II connector has all the structural features claimed in the Asserted Patents. (*See* RIB at 41.) Valeo responds that the Gen II connector is not capable of pivoting until a secured connection is achieved (as required by claim 1 of the '798 patent and claims 1 and 32 of the '044 patent) but requires a linear sliding motion in order to form a secure connection with the wiper arm. (*See* CIB at 61-2.) Thus, the main disputes between the parties can be distilled to the following: (1) whether the Asserted Claims exclude a connector that requires a linear sliding motion to achieve a secure connection; and (2) whether the Gen II connector is capable of pivoting into a closed position without such linear sliding motion.

1. Scope of Asserted Claims

As explained *supra* Section V(C)(4), a configuration including a compound pivoting/sliding motion is not excluded from the scope of claim 1 of the '798 patent, but a configuration requiring a linear sliding motion (without pivoting) at the end to achieve a secure connection would be excluded. Indeed, claim element 1[h] of the '798 patent recites that "the connecting element can pivot with respect to [the wiper arm] . . . ***until*** said securing portion secures . . . the wiper arm." Similarly, claim elements 1[k] and 32[d] of the '044 patent recite,

respectively, "the wiper arm and the connecting section can be pivoted onto one another . . . ***until*** the securing sections allow a permanent mutual connection" and "[the] connecting element is pivoted to a closed position." In other words, until a secure connection is achieved, the connecting element must still be capable of pivoting with respect to the wiper arm. But when a linear sliding motion, by itself (*i.e.*, not as part of a compound pivoting/sliding motion), is required at the end to achieve a secure connection, there is a period of time in which a secure connection is not achieved and the connecting element is no longer capable of pivoting. Such configuration is therefore outside the scope of claim 1 of the '798 patent and claims 1 and 32 of the '044 patent.

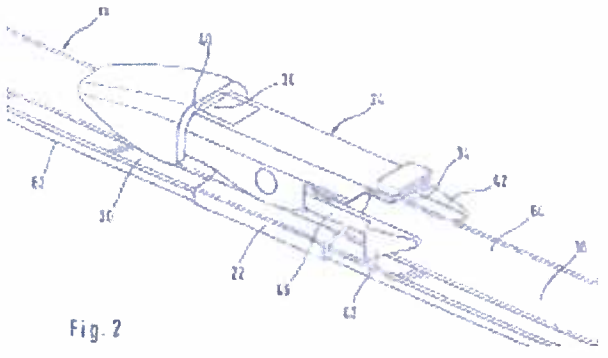
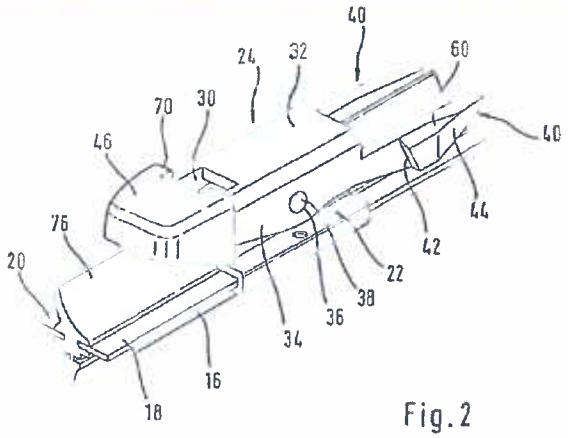
Trico also argues that the use of the open-ended "comprising" transitional phrase means that the asserted claims include additional features beyond those claimed. (*See* RRB at 20.) However, the "comprising" language allows additional unclaimed features, but it does not allow features that are specifically excluded by the claim language (*e.g.*, claim element 1[h] of the '798 patent).

2. Structure of the Gen II Connector

Trico relies heavily on Mr. Moreman's hearing testimony and on the '780 patent (which discloses the Gen II connector) to establish that the Gen II connector has the same structure as claimed in the Asserted Patents. (*See* RIB at 42.) But as admitted by Trico, Mr. Moreman also testified that an additional linear movement was required for the final snap. (*See* RIB at 42.) While Trico demonstrated that the Gen II connector is certainly capable of pivoting with respect to the wiper arm, through the cross-examination of Mr. Moreman (*see* RIB at 42), as explained below, Trico failed to carry its burden to demonstrate by clear and convincing evidence that the Gen II connector can pivot ***into a closed position***, as required by claims 1 of the '798 patent and claims 1 and 32 of the '044 patent.

First, I agree with Valeo that the Gen II connector was initially designed for (and the '780 patent describes) linear not pivotal assembly. *See* Hearing Tr. at 93:11-16 (July 20, 2015) (Moreman); RX-89, '780 patent at 2:22-26 ("The connection of the wiper arm to the connecting element is in this case advantageously effected in the direction of the longitudinal axis of the wiper arm, wherein upon connection the tongues are received at least partially in a form-fitting manner by the tongue receivers.").

Second, while the '780 patent shows structural similarities between the Gen II connector and the Asserted Claims, such structural similarities are not dispositive.[18]

'780 Patent Fig. 2 (Gen II)	'798 Patent, Fig. 2
 Fig. 2	 Fig. 2

Indeed, to establish anticipation, Trico must still prove, by clear and convincing evidence, that the Gen II connector satisfies each element of the Asserted Claims. For example, Trico must demonstrate that the Gen II connector is capable of pivoting with respect to the wiper arm until a secure connection is achieved, as required by claim elements 1[h] of the '798 patent and 1[k] and 32[d] of the '044 patent. Trico suggests that such functional claim language is irrelevant. (*See*

[18] Trico erroneously claims that the side-by-side figures on page 68 of its initial post-hearing brief show a "comparison between the Figure 1 of the '780 Patent and Figure 2 the '798 Patent." (*See* RIB at 68.) Rather, they are both from the '780 patent, and both show a Gen II connector, as correctly stated on page 41 of Trico's brief. (*See* RIB at 41.)

RIB at 43.) Trico reasons that, to be valid, apparatus claims must have structural differences with the prior art. (*See* RIB at 43-4 (citing *Cross Med. Products, Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1311-12 (Fed. Cir. 2005); *Hewlett–Packard Co. v. Bausch & Lomb, Inc.*, 909 F.2d 1464, 1468 (Fed. Cir. 1990); *In re Michlin*, 256 F.2d 317, 320 (C.C.P.A. 1958)).) But this does not mean that functional limitations should be ignored as those functional limitations may impose additional structural requirements that distinguish the claimed invention from the prior art. *See Biosig Instruments, Inc. v. Nautilus, Inc.*, 783 F.3d 1374, 1383 (Fed. Cir. 2015) (noting that "the PTO examiner found [the functional limitation in apparatus claim] to be 'crucial' as a reason for overcoming the cited prior art and confirming the patentability of the asserted claims upon reexamination" and finding "the recitation of [the functional limitation] 'highly relevant' to ascertaining the proper bounds of [claim element]"); *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1363 (Fed. Cir. 1999) ("The functional language is, of course, an additional limitation in the [apparatus] claim.").

Here, claim elements 1[h] of the '798 patent and 1[k] and 32[d] of the '044 patent impose additional structural requirements that cannot be ignored. For instance, Dr. Trumper explained the differences between the Gen II connector and those Asserted Claims as follows:

> Q. What, if any, physical differences are there between claim 1 of the '044 patent and RPX-22?
>
> A. When I look at RPX-22, which is, of course, a Gen II style connector, there is no structure which allows pivoting into one another about the insertion section, seat contact area, and there's no securing sections which allow securing after that pivotal motion.
>
> . . .
>
> If you look at the nose of the connector, there's nothing that allows pivoting into a closed connection. The nose is shaped differently than that. And if you look at the securing sections, they have a vertical edge on the locking tongues, and that doesn't suffice to secure after a pivoting motion.
>
> . . .

Q. Dr. Trumper, what, if any, physical differences are there between what's claimed in claim 32 and RPX-22?

A. The Gen II connector does not have a securing section which can secure after pivoting. The walls of the locking tongues are vertical. They cannot secure after pivoting. And it doesn't have any structure that allows pivoting to a closed position. When you look at the nose of the connector and the way the rear tab is oriented, you cannot pivot to a closed location.

Q. What, if any, physical differences are there between the subject matter of claim 1 of the '798 patent and RPX-22?

A. When you look at the last claim element, there is no structure which allows pivoting to a secured position. Again, the nose of the connector is shaped differently. It doesn't have a feature that would allow pivoting to a closed location, to a secured -- I think it says secured -- yeah, secures the second part. And the securing sections -- the securing portions are not shaped so as to allow securing in a pivotal motion. They only secure in a linear motion.

Q. Can you explain why they only secure in a linear motion?

A. Because the edges of the locking tongues are vertical. They have no bearing -- pivoting motion is free. If you have a vertical edge, the connector can pivot with respect to that without restraint. And when -- when the front -- the front structure is sized such that when you pivot down, actually, the legs of the connector aren't even close to the locking edges on the tongues. They're several millimeters behind, and you're not even engaging those edges of the locking tongues with the legs when you pivot.

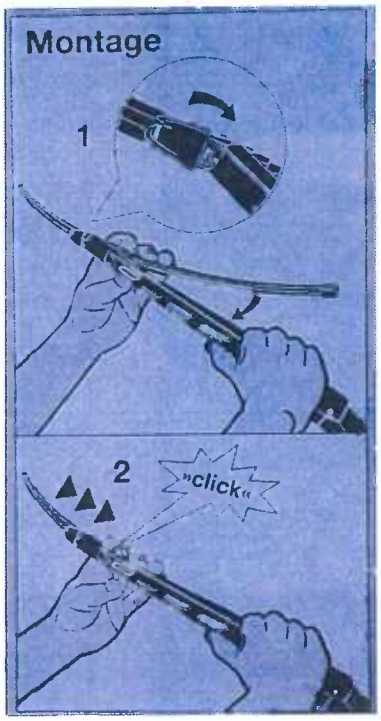
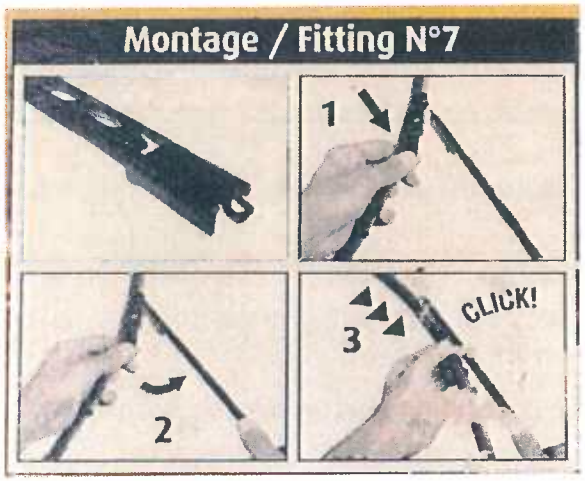
Hearing Tr. at 709:16-713:5 (July 22, 2015) (Trumper).

Thus, while the Gen II connector is similar to the claimed embodiments of the Asserted Patents, they are not identical, and structural similarity alone does not establish by clear and convincing evidence that the Gen II connector can pivot into a closed position, as required by claims 1 of the '798 patent and claims 1 and 32 of the '044 patent.

Third, Trico argues that the GEN II connector is within the scope of the Asserted claims for the same reasons as the Accused Products which also require a linear sliding motion. (*See*

RIB at 43.) However, as discussed *supra* Section VI(B)(1)(a)(ii), the linear displacement in the Accused Products does not occur at the end for Trico's Accused Products. Rather, with Trico's Accused Products, the sliding or linear motion can occur before the connecting element is pivoted onto the wiper arm. The sliding feature is excluded only if it occurs at the end (before a secure connection between the wiper blade and wiper arm is achieved) and if it occurs by itself, *i.e.*, not as part of a compound pivoting/sliding motion. *See* Section VI(B)(1)(a)(ii), Section VII(C)(1). Thus, Trico's Accused Products are distinct from the Gen II connector.

Finally, the evidence relied upon by Trico does not establish, by clear and convincing evidence that the Gen II connector is capable of pivoting into a closed position. Trico cites post-critical date instructions as evidence that the Gen II connector is capable of pivoting into a closed position or secure connection. (*See* RIB at 44 (citing instructions for RPX-22, Gen II connector).) But such evidence is contradicted by instructions included with other Gen II blades, including RX-22 and RPX-46 (reproduced below), which show arrows indicating the requirement for a linear sliding motion to achieve a secure connection. *See also* Hearing Tr. at 93:1-10 (July 20, 2015) (Moreman)) ("[T]he last step is the linear sliding together. That's the little arrows on 2 [in RX-82], and that's where you get the click, and that's the way it goes together most securely.").

RX-82 (Gen II)	RPX-46 (Gen II)
	

I also find credible Mr. Moreman's testimony explaining that the discrepancy in instructions relates to the use of Gen IIB instructions for Gen II wiper blades for cost reduction. *See, e.g.*, Hearing Tr. at 679:6-12 (July 22, 2015) (Moreman):

> Q Why do you think the packaging is the same for RPX-22 [(Gen II)] and CPX-17 [(Gen IIB)]?
>
> A I think it's a cost reduction. [
>
>] It was probably cost-prohibitive.

Nor does Dr. Trumper's cross-examination testimony support Trico's position that the Gen II connector is capable of pivoting into a closed position, as suggested by Trico. (*See* RIB at 44.) While Trico's counsel attempted to demonstrate that the Gen II connector is capable of achieving a secure connection with a wiper arm, through a compound pivoting/sliding motion, Dr. Trumper credibly and repeatedly disagreed, stating that a linear sliding motion was still

needed, and denying that a secure connection was achieved through the compound motion. *See, e.g.*, Hearing Tr. at 793:7-22, 794:9-19 (July 23, 2015) (Trumper). In addition, the attorney's claimed demonstration of the alleged compound motion with the Gen II connector is certainly not evidence and was not replicated by any of the witnesses.

Accordingly, I find that Trico failed to carry its burden to demonstrate by clear and convincing evidence that the Gen II connector anticipates independent claim 1 of the '798 patent and independent claims 1 and 32 of the '044 patent. In addition, with respect to independent claim 10 of the '798 patent, it requires an opening in the outer top surface of the front portion. (*See* CIB at 63; CRB at 40; Hearing Tr. at 171:20-24 (July 20, 2015) (Fink).) Because Trico did not establish that the Gen II connector has such an opening, I find that Trico did not demonstrate by clear and convincing evidence that the Gen II connector anticipates claim 10 of the '798 patent. Furthermore, claims 7, 12, and 15 of the '798 patent and claims 8, 11, 12, 14, and 33 of the '044 patent depend directly or indirectly from independent claim 1 or 10 of the '798 patent or independent claim 1 or 32 of the '044 patent. As such, Trico also failed to carry its burden to demonstrate invalidity by clear and convincing evidence with respect to the dependent claims of the Asserted Patents.

D. Gen IIB Connector

As discussed above, Trico contends that the Asserted Patents are invalid under 35 U.S.C. § 102(b) for anticipation, based on Valeo's alleged offer for sale and public use of Valeo's Gen IIB connector prior to the critical date. The parties do not dispute that the Gen IIB connector was ready for patenting and that it is the commercial embodiment of the Asserted Patents, *i.e.*, that the Asserted Claims read on the Gen IIB connector. (*See, e.g.*, CRB at 41; RX-143C; RX-144C.) Indeed, Valeo relies on wiper blades with the Gen IIB connector as evidence that the

domestic industry requirement is satisfied. *See supra* Section III. In effect, the only factual dispute between the parties is whether the Gen IIB connector was the subject of an offer for sale to [ ] before the critical date. Valeo admits that offers for sale were made to [ ] in connection with the [ ] and [ ] programs. Valeo also admits that the vehicles under those programs were ultimately equipped with Gen IIB connectors. (*See* CIB at 54, 58.) However, Valeo denies that offers for sale, specifically relating to the Gen IIB connector, were made before the critical date. For the reasons below, I find that Trico does not satisfy its burden to demonstrate by clear and convincing evidence that Valeo made an offer for sale to [ ] that encompasses the claimed Gen IIB connector before the critical date.

1. [ ]

Trico asserts that the timing of Valeo's offer of the GEN IIB wiper blade to [ ] in connection with the [ ] program can be discerned from two drawings, JX-7C and JX-8C (also introduced into evidence as RX-112C and RX-113C, respectively), and from Valeo's internal [ ] (RX-79C). (*See* RIB at 45-48) While the drawings appear to relate to a Gen IIB connector and to indicate a date of release for prototype in [ ] and a date of release for production in [ ], they say nothing about the timing of the offer for sale to [ ] in connection with the [ ] program and do not establish that such offer was made before the critical date.

Nor does the [ ] (RX-79C) establish that an offer for sale was made to [ ] in connection with the Gen IIB connector before the critical date. Trico asserts that RX-79C shows that a presentation was made to [ ] comparing the Gen II and Gen IIB connectors, no later than [ ] (*See* RIB at 48 (citing RX-79C at entry #2908).) But [ ] describes the issue as [

] (*See* RX-79C at entry #2908.) To make its point, Trico

speculates that Gen III referred to a Gen IIB connector at the time and extrapolates that the [ ] presentation to [ ] was about the Gen IIB connector. (*See* RIB at 48.) Trico's assumption is misplaced. Indeed, the only documentary evidence cited in support of Trico's assertion is a [ ] drawing showing a Gen IIB connector being referred to as Gen III. (*See* RIB at 44-45 (citing RX-143C).) On the other hand, Valeo contends that the "Gen III" designation in RX-143C was an isolated error which was later corrected. (*See* CRB at 41 (citing RX-143C; RX-144C; Hearing Tr. at 433:21-434:7 (July 21, 2015) (Fink)).) Valeo also states that the Gen III designation refers in fact to a traditional arm and blade with a shepherd's hook. (*See id.* (citing Hearing Tr. at 118:1-3 (July 20, 2015) (Moreman); *id.* at 544:1-6 (July 22, 2015) (Eimers)). I agree with Valeo that there is credible evidence that the Gen III designation refers in fact to a traditional arm and blade. (*See* RX-96C (referring to "standard Gen III Arm" and "standard shepherd hook arm"); RX-79C at entry #4064 (referring to Gen IIB as early as [ ] which negates Trico's assertion that Gen IIB was initially referred to as Gen III); RX-104C (showing a selling price for the [ ] Certainly, the single reference to Gen III by a [ ] does not support Trico's broad assertion that Gen III meant Gen IIB consistently and both in [ ]

I note RX-79C also shows that the Gen II connector, which is not within the scope of the claims, was presented to the [ ] and that the earliest entry indicating a customer presentation in connection with the Gen IIB connector is dated in [ ] after the November 21, 2002 critical date. (*See* RX-79C at entries # 3353, 3758.)

Accordingly, I find that Trico failed to demonstrate by clear and convincing evidence public use or an offer for sale with the patented Gen IIB wiper blade before the critical date, in connection with the [ ]

2. [ ]

Trico also asserts that Valeo made an offer for sale including the GEN IIB wiper blade to [ ] in connection with the [ ] program. (*See* RIB at 49-54.) However, the evidence cited by Trico does not show, clearly and convincingly, that [ ] was offered the patented Gen IIB wiper blade before the critical date. Indeed, Trico's alleged evidence is based on two unsupported assumptions. First, Trico erroneously equates the term "flat blade" with "Gen IIB" when "flate blade" could also refer to the Gen II model. Indeed, a [ ] presentation shows that Valeo initially considered the Gen II flat bade connector for the [ ] program. (*See* RX-101C at 9-10.) Second, Trico unreasonably assumes that Gen III and Gen IIB are synonymous but, as discussed *supra* Section VII(D)(1), they are not. Rather, the documentary evidence shows that Gen III consistently refers to the standard shepherd hook model, except for a [ ] *See* Section VII(D)(1). A review of Trico's cited evidence is summarized below:

- JX-11C, RX-97C: Trico cites an internal Valeo email [ ] (*See* RIB at 49 (citing JX-11C).) However, as discussed above, the term "flat blade" can also refer to the Gen II connector, which is not within the scope of the Asserted Claims. Similarly, RX-97C, [ ] does not establish by clear and convincing evidence that an offer for sale encompassing the patented Gen IIB connector was made before the critical date. (*See* RIB at 51 (citing RX-97C).)

- RX-99C: Trico also cites an undated document showing that a [ ] was offered for sale to [ ] (*See* RIB at 49 (citing RX-99C).) Trico speculates that the document actually refers to Gen IIB and that it was likely dated before September 2002. (*See id.* at 50.) However, as discussed *supra* Section VII(D)(1) Trico's assumption that Gen III is synonymous with Gen IIB is unsupported by the evidence of record.

- RX-116C, RX-102C, RX-104C to RX-109C: Trico also relies on correspondence between Valeo and [ ] and on a number of unsigned [ ] as evidence that an offer for sale was made as early as [ ] (*See* RIB at 50-1 (citing RX-116C, RX-102C, RX-104C to RX-109C).) Initially, I disagree that the [ ] evidence a pre-critical date offer that is "sufficiently definite that another party could make a binding contract by simple acceptance." *See Hamilton Beach*, 726 F.3d at 1374. In addition, even accepting Trico's premise as true that the cited evidence establishes an offer for sale before the critical date, the [ ] say nothing about a Gen IIB connector but refer to [ ] which as stated above could also refer to the Gen II connector, which is not within the scope of the Asserted Claims. (*See* RX-104C to RX-109C.) I also note that the [ ] refer to a Gen III arm & blade with a [ ] (*See, e.g.*, RX-104C at 1.) This further supports that Gen III in the [ ] refers to the [ ] traditional arm and blade. (*See* Hearing Tr. at 521:21-24 (July 22, 2015) (Eimers).) In addition, the [ ] are dated in [ ] and by then, Trico admits that "Gen III" did not refer to Gen IIB connectors. (*See* RIB at 50 ("[T]he GEN IIB connector was sometimes initially referred to as the 'GEN III' connector, but by [ ] when the product was [ ] it was called the 'GEN IIB.'").) *See also* RX-96C at 3 (referring to [ ]

- RX-117, RX-118C: Trico also cites a Valeo press release dated February 24, 2003 announcing that Valeo was selected by [ ] to supply wiper systems and components for the [ ] program. (*See* RIB at 51 (citing RX-117).) But the press release is after the November 21, 2002 critical date and does not indicate when Valeo's offer for sale was actually made. (*See* RX-117.) In addition, the press release states that "the wiper systems will be Valeo's innovative Flat Blade technology with curved steel splines," but as discussed above, this could also relate to the Gen II connector which is not within the scope of the Asserted Claims. (*See* RX-117; RX-101C at 9-10.) Trico also relies on a side-by-side comparison of the features described in the February 24, 2003 press release (flat blade connector) and in a [ ] [ )], as evidence that the press release referred in fact to the Gen IIB connector. (*See* RIB at 51-52 (comparing RX-117 and RX-118C).) However, it is equally credible, as explained by Mr. Eimers, that the benefits described in the press release (RX-117) apply to flat blade technology generally, not to Gen IIB specifically. (*See* Hearing Tr. at 569:5-570:2 (July 22, 2015) (Eimers).)

- RX-96C and RX-120C: While RX-96C and RX-120C suggest that [ ] was considering a change from a Gen IIB connector to a standard Gen III or shepherd's hook between [ ] and [ ] I find that they do not establish by clear and convincing evidence that the Gen IIB connector was offered for sale to [ ] before the critical date. (*See* RIB at 52 (citing RX-96C, RX-120C).)

- RX-79C: As discussed *supra* Section VII(D)(1), the [ ] (RX-79C), does not establish that an offer for sale was made to [ ] in connection with the Gen IIB connector before the critical date. (*See* RIB at 53 (citing RX-79C).) Rather, it tends to show that the Gen II connector, which is not within the scope of the claims, was presented to [ ] in

[

], after the November 21, 2002 critical date. (*See* RX-79C at entries # 3353, 3758.)

Thus, I find that Trico failed to demonstrate by clear and convincing evidence public use or an offer for sale with the patented Gen IIB wiper blade before the critical date, in connection with the [ ] program.

3. Other Pre-Critical Date Evidence

Trico also cites other pre-critical date evidence but Trico admits that such evidence relates to activity that occurred in Europe. (*See* RIB at 55.) However, this evidence is irrelevant, for offers for sale or public use in Europe are not actionable under pre-AIA § 102(b), which states that a patent is invalid for anticipation if "the invention was . . . in public use or on sale ***in this country***, more than one year prior to the date of the application for patent in the United States." 35 U.S.C. § 102(b) (emphasis added).

VIII. CONCLUSIONS OF LAW

1. The Commission has personal jurisdiction over the parties and subject-matter jurisdiction over the Accused Products.
2. The importation or sale requirement of Section 337 is satisfied.
3. Valeo's Domestic Industry Products practice claims 1, 7, 10, 12, and 15 of U.S. Patent No. 7,937,798 ("the '798 patent").
4. The domestic industry requirement is satisfied with respect to the '798 patent.
5. Trico's Accused Products infringe claims 1, 7, 10, 12, and 15 of the '798 patent.
6. The Asserted Claims of the '798 patent have not been shown to be invalid.
7. There is a violation of Section 337 with respect to the '798 patent.

8. Valeo's Domestic Industry Products practice claims 1, 8, 11, 12, 14, 32, and 33 of U.S. Patent No. 7,891,044 ("the '044 patent").

9. The domestic industry requirement is satisfied with respect to the '044 patent.

10. Trico's Accused Products do not infringe claims 1, 8, 11, 12, 14, 32, and 33 of the '044 patent.

11. The Asserted Claims of the '044 patent have not been shown to be invalid.

12. There is no violation of Section 337 with respect to the '044 patent.

IX. INITIAL DETERMINATION AND ORDER

Based on the foregoing,[19] it is my Initial Determination that there is a violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain windshield wipers and components thereof, in connection with the asserted claims of U.S. Patent No. 7,937,798.

It is also my Initial Determination that there is no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain windshield wipers and components thereof, in connection with the asserted claims of U.S. Patent No. 7,891,044.

Furthermore, it is my determination that a domestic industry in the United States exists that practices or exploits U.S. Patent Nos. 7,937,798 and 7,891,044.

---

[19] The failure to discuss any matter raised by the parties or any portion of the record herein does not indicate that said matter was not considered. Rather, any such matter(s) or portion(s) of the record has/have been determined to be irrelevant, immaterial or meritless. Arguments made on brief which were otherwise unsupported by record evidence or legal precedent have been accorded no weight.

The undersigned hereby CERTIFIES to the Commission this Initial Determination AND Recommended Determination on Remedy and Bond, together with the record of the hearing in this investigation consisting of the following: the transcript of the evidentiary hearing, with appropriate corrections as may hereafter be ordered; and the exhibits accepted into evidence in this investigation as listed in the appendices hereto.[20]

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review pursuant to 19 C.F.R. § 210.43(a) or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination or certain issues therein.

X. RECOMMENDED DETERMINATION ON REMEDY AND BOND

Pursuant to Commission Rules 210.36(a) and 210.42(a)(1)(ii), the Administrative Law Judge is to consider evidence and argument on the issues of remedy and bonding and issue a recommended determination thereon.

A. Limited Exclusion Order

Section 337 requires the Commission to issue limited exclusion orders against named respondents that are found to have imported, sold for importation, or sold after importation infringing articles:

> If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States . . . .

[20] The pleadings of the parties filed with the Secretary need not be certified as they are already in the Commission's possession in accordance with Commission rules.

See 19 U.S.C. § 1337(d)(l). *See also Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1358 (Fed. Cir. 2010) ("[T]he Commission is required to issue an exclusion order upon the finding of a Section 337 violation absent a finding that the effects of one of the statutorily-enumerated public interest factors counsel otherwise.").

Title 19, Section 1337(d)(1) of the United States Code states that "[i]f the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States[.]" 19 USC § 1337 (d)(1) (emphasis added.) In this Initial Determination, I found a violation of Section 337 with respect to the '798 patent.

Accordingly, I recommend that a limited exclusion order issue.

B. Cease and Desist Order

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for violation of section 337. (*See* 19 U.S.C. § 1337(f)(1).) The Commission generally issues a cease and desist order directed to a domestic respondent when there is a "commercially significant" amount of infringing, imported product in the United States that could be sold so as to undercut the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, USITC Pub. 2391, Comm'n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334, Comm'n Op. at 26-28 (Aug. 27, 1997). The complainant bears the burden of proving that a respondent has a commercially significant

inventory in the United States. *Certain Integrated Repeaters, Switches, Transceivers & Products Containing Same*, Inv. No. 337-TA-435, Comm'n Op., 2002 WL 31359028 (Aug. 16, 2002).

Valeo argues that Trico "maintains approximately [ ] worth of significant commercial inventory of the accused products in the U.S. at any given time." (*See* CIB at 125 (citing CX-207C at 59:9-15).) However, as explained by Trico, the cited testimony does not support Valeo's contention but appears to relate to the entire inventory of Trico's aftermarket products, not just the inventory of the Accused Products. (*See* RRB at 94; RFF12 (citing CX-207C at 43:15-44:20).) Indeed, Trico's corporate representative, George W. Rigney, testified that he did not know the inventory for the Accused Products and that it would be necessary to [ ] See CX-207C, Rigney Dep. Tr. at 43:7-44:20, partially reproduced below:

> Q. And what would the inventory typically be during the highest point, like [ ]
>
> A. I think -- and I'm speculating. . . . I'm estimating [ ] would be approaching a peak, perhaps [ ] I just can't -- honestly can't recall.
>
> Q. Okay. Do you have any sense of what proportion of the total Trico wiper blade products held in inventory are those on this list[21]?
>
> A. I'm sorry, I do not.
>
> . . .
>
> Q. How difficult would it be to determine the proportion of the total Trico wiper blade products held in inventory that are the products on this list [ ]
>
> . . .

[21] The list appears to refer to Trico's disclosure of products within the scope of the Notice of Investigation, designated as Exhibit 3 during Mr. Rigney's deposition. (*See* CX-207C at 8:25-9:3.)

> A. We would have to go in and [
>
>]. It would be a – I'm not sure how long it would take. It would be a somewhat laborious task, but it could be done.

See also id. at 40:22-41:11 (". . . Our inventory, most recent inventory of aftermarket products, had a value of approximately [ ]

Valeo also argues that a cease-and-order is warranted "even where the evidence of commercially significant inventories of the accused products is not presented in a traditional format (*e.g.*, the actual quantity of goods stored at a warehouse), where it is clear based on the activities of the respondent that it maintains a 'commercially significant' inventory of the accused products in the U.S., a cease and desist order is warranted. (*See* CIB at 125 (citing *Certain Optoelectronic Devices, Components Thereof*, Inv. No. 337-TA-669, 2010 WL 1249683, at *64).) However, unlike the 337-TA-669 investigation, Valeo presented no additional evidence to support its argument that Trico maintains a commercially significant inventory. *Compare id.* ("Thus, it is clear that, based on these activities, Emcore maintains 'commercially significant' inventories of the accused products in the United States."). While I agree with Valeo that [

], Valeo provided no evidence of the significance of such inventory (other than the questionable [

] (*See* CIB at 30 (citing CX-207C at 55:24- 58:21).)

Thus, I find that Valeo failed to carry its burden to prove that Trico has a commercially significant inventory in the United States. Accordingly, I do not recommend that a cease and desist order issue in this investigation.

C. Bond During Presidential Review Period

The administrative law judge and the Commission must determine the amount of bond to be required of a respondent, pursuant to section 337(j)(3), during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to order a remedy. The purpose of the bond is to protect the complainant from any injury. (19 CFR §§ 210.42(a)(1)(ii), 210.50(a)(3).) The complainant has the burden of supporting any bond amount it proposes. *Certain Rubber Antidegradants, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-533, Comm'n Op., 2006 ITC LEXIS 591 (Jul. 21, 2006).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. a 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41 (1995). The Commission has set a bond of 100% when the evidence supported a finding that it would be difficult or impossible to calculate a bond based on price differentials. *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, Comm'n Op., 1996 WL 1056209 (Sept. 23, 1996) (finding that a bond of 100% was appropriate "because of the difficulty in quantifying the cost advantages of respondents' imported Enercon E-40 wind turbines and because of price fluctuations due to exchange rates and market conditions."); *Certain Systems For Detecting and Removing Viruses or Worms, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-510, Comm'n Op., 2007

WL 4473083 (Aug. 2007) (imposing a bond of 100% based on a finding that the parties had numerous models and products lines, and that a price comparison would be difficult because respondent's products were a combination of hardware and software while the complainant's products were software only); *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be de minimis and without adequate support in the record).

Valeo provided no evidence to support its request for a 100% bond. Valeo conclusorily stated that "the price differential has not been reliably established given the wide variety of accused and domestic industry products (*e.g.*, aftermarket, original equipment manufacturer, and original equipment supplier)." (*See* CIB at 126). Yet, Valeo provided no actual data (proof) to support its assertions. In addition, Valeo asserts, without any support, that "no reasonable level of royalty can be ascertained because no license agreement of the asserted patents is of record." (*See id.*) But Valeo entered into a settlement agreement with the Federal-Mogul Respondents. While the settlement agreement is not part of the record, Valeo still has the burden to explain why a reasonable royalty level cannot be determined.

Thus, I find that Valeo failed to carry its burden to prove that a 100% bond is appropriate. Accordingly, I recommend that the bond rate be set at zero.

Confidentiality Notice:

This Initial Determination and Recommended Determination is being issued as confidential, and a public version will be issued pursuant to Commission Rule 210.5(f). Within seven (7) days of the date of this Initial Determination and Recommended Determination, the parties shall jointly submit: (1) a proposed public version of these opinions with any proposed

redactions bracketed in red; and (2) a written justification for any proposed redactions specifically explaining why the piece of information sought to be redacted is confidential and why disclosure of the information would be likely to cause substantial harm or likely to have the effect of impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions.[22]

SO ORDERED.

Thomas B. Pender
Administrative Law Judge

[22] Under Commission Rules 210.5 and 201.6(a), confidential business information includes:

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

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

IN THE MATTER OF CERTAIN WINDSHIELD WIPERS AND COMPONENTS THEREOF

337-TA-928
337-TA-937
(Consolidated)

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC INITIAL DETERMINATION has** been served upon, **The Office of Unfair Import Investigations** and the following parties on NOV 13 2015.

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

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

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