

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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LKQ CORPORATION and  
KEYSTONE AUTOMOTIVE INDUSTRIES, INC.,  
Petitioner,

v.

GM GLOBAL TECHNOLOGY OPERATIONS LLC,  
Patent Owner.

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PGR2020-00004  
Patent D840,306 S

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Before JOSIAH L. COCKS, SCOTT A. DANIELS, and  
ROBERT L. KINDER, *Administrative Patent Judges*.

COCKS, *Administrative Patent Judge*.

DECISION  
Denying Institution of Post-Grant Review  
*35 U.S.C. § 324*

## I. INTRODUCTION

### A. *Background and Summary*

Petitioner, LKQ Corporation and Keystone Automotive Industries, Inc. (collectively “LKQ”), filed a Petition requesting post-grant review of U.S. Patent No. D840,306 S (“the ’306 patent,” Ex. 1001). Paper 2 (“Pet.”). The Petition challenges the patentability of the sole design claim of the ’532 patent. Patent Owner, GM Global Technology Operation LLC (“GM”), filed a Preliminary Response to the Petition. Paper 7 (“Prelim. Resp.”).

A post-grant review may be instituted only if “the information presented in the petition . . . demonstrate[s] that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.” 35 U.S.C. § 324(a) (2018). Having considered the arguments and evidence presented by LKQ and GM, we determine, for the reasons set forth below, that LKQ has failed to demonstrate that it is more likely than not that the challenged claim is unpatentable based on the grounds presented. Therefore, we do not institute a post-grant review of that claim.

### B. *Related Proceedings*

One or both parties identify, as matters involving or related to the ’306 patent, Patent Trial and Appeal Board cases IPR2020-00062 (US D811,964 S), IPR2020-00063 (US D828,255 S), IPR2020-00064 (US D823,741 S), IPR2020-00065 (US D813,120 S), PGR2020-00002 (US D847,043 S), PGR2020-00003 (US D847,703 S), and PGR2020-00005 (US D841,532 S). Pet. 4; Paper 3, 2.

*C. The '306 Patent and Claim*

In a post-grant review requested in a petition filed on or after November 13, 2018, we apply the same claim construction standard used in district courts, namely that articulated in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). *See* 37 C.F.R. § 42.200(b) (2019). With regard to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent claim is not construed by providing a detailed verbal description, it may be “helpful to point out . . . various features of the claimed design as they relate to the . . . prior art.” *Id.* at 679–80; *cf. High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to the district court, in part, for a “verbal description of the claimed design to evoke a visual image consonant with that design”).

The '306 patent is titled “Vehicle Endgate,” and issued February 12, 2019, from U.S. Application No. 29/609,077, filed June 28, 2017.<sup>1</sup> Ex. 1001, codes (21), (22), (45), (54). The claim recites “[t]he ornamental design for a vehicle endgate, as shown and described.” *Id.* at code (57). The drawings of the claim depict a front surface of the claimed endgate with certain portions of the design shown as unclaimed by broken lines. *See id.* (“The broken lines shown in the drawings depict portions of

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<sup>1</sup> Because the earliest possible effective filing date for the '306 patent is after March 16, 2013 (the effective date for the first inventor to file provisions of the America Invents Act) and this petition was filed October 17, 2019, and within 9 months of its issue date, the '306 patent is eligible for post-grant review. *See* 35 U.S.C. § 321(c).

the vehicle endgate that form no part of the claimed design.”). The '306 design is depicted in five figures, which are reproduced below.<sup>2</sup>

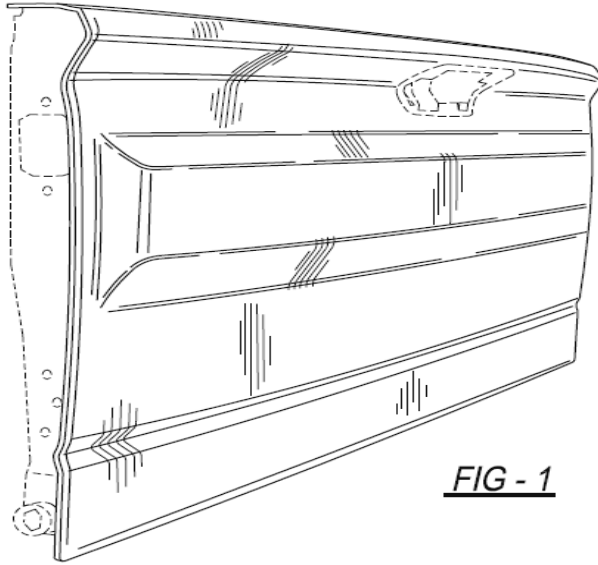


FIG - 1

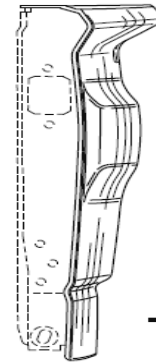


FIG - 2

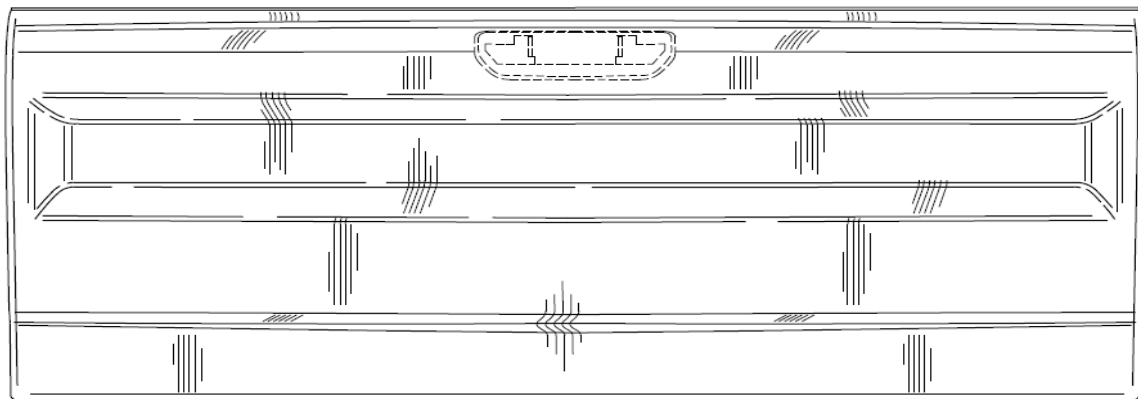


FIG - 3

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<sup>2</sup> We refer to the claim, i.e., the vehicle endgate shown in Figures 1–5, also as “the '306 design.”

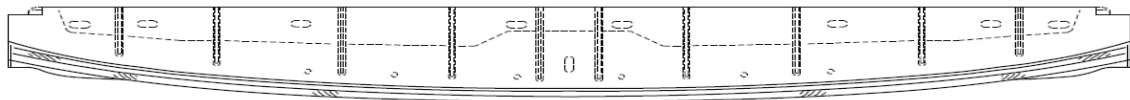


FIG - 4

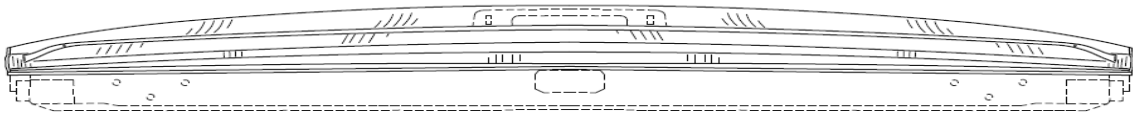


FIG - 5

Ex. 1001. Figures 1–5 above depict, respectively, the following views of the claimed vehicle endgate design: a front and left side perspective view, a left side elevation view, a front elevation view, a top plan view, and a bottom plan view. *Id.* at code (57).

The parties both describe certain features that contribute to the overall appearance of the claimed design. *See* Pet. 11–18; Prelim. Resp.; *see also* Ex. 1003 ¶¶ 30–32, Ex. 1004 ¶¶ 28–32. LKQ contends that the claim can be described according to the drawings as shown by the solid lines as

The exterior appearance of a vehicle tailgate comprising:

an upper planar surface stretching horizontally the width of the tailgate and protruding out over the tailgate, forming a contoured upper shape protruding from the horizontal upper platform first sloping, downward and away from the tailgate and then, second, sloping downward and toward the tailgate; and

a primarily unadorned vertical surface for the exterior of the tailgate overhung by the contoured upper shape, with surface features comprising:

a raised plateau that does not stretch the entire width of the tailgate in the top half of the vertical surface; and

a horizontal crease in the lower portion of the tailgate stretching horizontally across the entire surface.

Pet. 13–14.

GM does not agree with LKQ’s claim construction. Rather, GM contends that the proposed “claim construction is insufficient because it focuses on generic design concepts common to many vehicle endgates, rather than addressing the particular features of the claimed design.” Prelim. Resp. 11. GM further contends that “LKQ ignores or mischaracterizes various distinctive features of the claimed design and fails to analyze all of the view provided by the ’306 patent, ignoring critical features as a result.” *Id.* at 12. GM proceeds to outline what it considers to be errors in the LKQ’s construction and requests that we deny the Petition as a result of those perceived errors. *Id.* at 12–20.

Generally in the context of a design patent, illustration, rather than a verbal description, is the better representation of the claimed design. *Egyptian Goddess, Inc.*, 543 F.3d at 679. Here, although we are mindful GM’s contention that LKQ’s verbal description is inadequate, we determine that the verbal description is helpful in this case. In making that determination, we determine that it is not necessary to resolve the particular claim construction disputes between the parties for us to resolve this proceeding.

#### *D. Asserted Grounds of Unpatentability*

LKQ asserts that the sole design claim of the ’306 patent is unpatentable on the following grounds (Pet. 15):

Claim(s) Challenged	35 U.S.C. §	References
1	103	2015 Chevrolet Colorado, <sup>3,4</sup> 2013 Ford Flex <sup>5</sup>
1	103	2015 Chevrolet Colorado, Ford Flex, 2010 Dodge Ram, <sup>6</sup> Schiavone <sup>7</sup>
1	103	2014 Chevrolet Silverado, <sup>8</sup> 2013 Ford Flex
1	103	2014 Chevrolet Silverado Review, Ford Flex Document, 2010 Dodge Ram Review, Schiavone

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<sup>3</sup> Ex. 1013, “2015 Chevrolet Colorado Work Truck Review” (Pet. ii) (characterized as “archived on March 12, 2016 by Internet Archive organization’s ‘Wayback Machine’”); Ex. 1014, “2015 Chevrolet Colorado - Review” (characterized as “archived on March 12, 2016 by Internet Archive organization’s ‘Wayback Machine’”) (Pet. ii) (collectively we reference Exhibits 1013 and 1014 as “2015 Chevrolet Colorado”).

<sup>4</sup> According to LKQ, the 2015 Chevrolet Colorado Review depicts an “embodiment of U.S. Design Patent No. D758,271 to McMahan et al. “McMahan”).” Pet. 15.

<sup>5</sup> Ex. 1010, “Ford Flex (2013)” (characterized as “archived on May 11, 2013 by Internet Archive organization’s ‘Wayback Machine’”) (Pet. ii) (“2013 Ford Flex”).

<sup>6</sup> Ex. 1012, “2010 Ram 2500 Heavy Duty Review” (Pet. i) (characterized as “archived on March 12, 2016 by Internet Archive organization’s ‘Wayback Machine’” (characterized as “archived on February 20, 2013 by Internet Archive organization’s ‘Wayback Machine’”) (Pet. ii) (“2010 Dodge Ram”).

<sup>7</sup> Ex. 1007, U.S. Design Patent D556,110 S, Nov. 27, 2007 (“Schiavone”).

<sup>8</sup> Ex. 1015, “2014 Chevrolet Silverado 1500 - Review” (Pet. ii) (characterized as “archived on April 5, 2016 by Internet Archive organization’s ‘Wayback Machine’”); Ex. 1016, “2014 Chevrolet Silverado 1500 - Review” (Pet. ii) (characterized as “archived on April 5, 2016 by Internet Archive organization’s ‘Wayback Machine’”) (Pet. iii) (collectively we reference Exhibits 1015 and 1016 as “2014 Chevrolet Silverado”).

## II. ANALYSIS

### A. Principles of Law

“In addressing a claim of obviousness in a design patent, the ultimate inquiry is whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved.” *Apple, Inc. v. Samsung Elec. Co.*, 678 F.3d 1314, 1329 (Fed. Cir. 2012) (internal quotation and citations omitted); *see also High Point Design*, 730 F.3d at 1313 (“The use of an ‘ordinary observer’ standard to assess the potential obviousness of a design patent runs contrary to the precedent of this court and our predecessor court, under which the obviousness of a design patent must, instead, be assessed from the viewpoint of an ordinary designer.”). This obviousness analysis generally involves two steps: first, “one must find a single reference, a something in existence, the design characteristics of which are basically the same as the claimed design”; second, “once this primary reference is found, other references may be used to modify it to create a design that has the same overall visual appearance as the claimed design.” *High Point Design*, 730 F.3d at 1311 (internal quotation and citations omitted).

In performing the first step, we must “(1) discern the correct visual impression created by the patented design as a whole; and (2) determine whether there is a single reference that creates basically the same visual impression.” *Id.* at 1312 (internal quotation and citations omitted). In the second step, the primary reference may be modified by secondary references “to create a design that has the same overall visual appearance as the claimed design.” *Id.* at 1311 (internal quotation and citations omitted). However, the “secondary references may only be used to modify the primary



reference if they are ‘so related [to the primary reference] that the appearance of certain ornamental features in one would suggest the application of those features to the other.’” *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996) (quoting *In re Borden*, 90 F.3d 1570, 1575 (Fed. Cir. 1996)).

When evaluating prior art references for purposes of determining patentability of ornamental designs, the focus must be on actual appearances and specific design characteristics rather than design concepts. *In re Harvey*, 12 F.3d 1061, 1064 (Fed. Cir. 1993); *see also Apple, Inc. v. Samsung Elec. Co.*, 678 F.3d at 1332 (“Rather than looking to the ‘general concept’ of a tablet, the district court should have focused on the distinctive ‘visual appearances’ of the reference and the claimed design.”).

#### *B. The Designer of Ordinary Skill*

LKQ contends that:

a designer of ordinary skill would be an individual who has at least an undergraduate degree in transportation and work experience in the field of transportation or automotive design, or someone who has more than several years’ work experience in transportation or automotive design.

Pet. 27 (citing Ex. 1003<sup>9</sup> ¶ 37; Ex. 1004<sup>10</sup> ¶ 37). GM argues, without citation to evidence, that:

[a] designer of ordinary skill in the art relevant to the ’306 Patent would have at least an undergraduate degree in automotive design, or other related industrial design field, with at least two years of relevant practical experience in designing automotive

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<sup>9</sup> Exhibit 1003 is the Declaration of LKQ’s declarant James M. Gandy.

<sup>10</sup> Exhibit 1004 is the Declaration of LKQ’s declarant Jason C. Hill.

body parts. An increase in experience could compensate for less education, and an increase in education could likewise compensate for less experience.

Prelim. Resp. 8. The parties do not identify, and we do not discern, any material difference between the parties' proposed definitions. For purposes of this decision and on the record currently before us, which includes testimony by LKQ's declarants, we adopt LKQ's proposed definition of the ordinary designer. Also, we point out that adopting GM's definition would not alter the outcome of this Decision.

### *C. The Ordinary Observer*

Both parties also offer definitions of an "ordinary observer." Pet. 28–29; Prelim. Resp. 5–7. The "ordinary observer" test is one that arises in the context of either (1) anticipation of a claim of a design patent by prior art, or (2) infringement of the patented design by an accused product design. *See Int'l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1238, 1240 (Fed. Cir. 2009). Neither anticipation nor infringement is relevant to this proceeding, which is premised on proposed grounds of unpatentability based on obviousness. The ordinary observer test, however, is not without some role in connection with contentions of obviousness. To that end, the Federal Circuit has stated the following:

For design patents, the role of one skilled in the art in the obviousness context lies only in determining whether to combine earlier references to arrive at a single piece of art for comparison with the potential design or to modify a single prior art reference. Once that piece of prior art has been constructed, obviousness, like anticipation, requires application of the ordinary observer test, not the view of one skilled in the art.

*Int'l Seaway Trading Corp.*, 589 F.3d at 1240.

According to LKQ, “the ordinary observer would be the retail consumer of truck endgates.” Pet. 28–29 (citing Ex. 1003 ¶ 35; Ex. 1004 ¶ 35). Neither LKQ, nor its declarants, provide evidentiary support for the assessment of an ordinary observer or further elaborate as to who may qualify as a retail consumer of truck endgates.

GM generally does not agree with LKQ’s position as to the ordinary observer. Prelim. Resp. 5–7. GM contends that the position is “unsupported.” *Id.* at 7. GM argues that “the ordinary observer includes commercial buyers who purchase a replacement vehicle endgate[] to repair a customer’s vehicle, such as repair shop professionals.” *Id.* at 6. GM also contends that LKQ has admitted in a related proceeding (IPR2020-00065) that “customers for aftermarket automotive parts primarily consist of professional auto body and mechanical repair shops who are knowledgeable about the automotive industry.” *Id.* at 7 (quoting IPR2020-00065, Paper 2, 21) (emphasis omitted). GM points out that “[b]ecause a repair shop buyer reviews and analyzes various products as part of his or her job duties, that buyer is particularly discerning.” *Id.*; Ex. 2001, 11 (“LKQ’s customers for aftermarket automotive parts primarily consist of professional auto body and mechanical repair shops who are knowledgeable about the automotive industry.”) (emphasis omitted).

GM has presented credible argument and evidence as to why the ordinary observer would be a repair shop professional. The evidence, however, also reveals that a retail consumer, such as the owner of a vehicle, may also be in the position of an ordinary observer. A vehicle owner may have a contract with its insurance agent which “require the insurer to repair vehicles with parts of ‘like kind and quality’ to the OEM parts.” Ex. 2001,

14, *see also id.* at 11 (“Automobile owners seek to repair their automobiles in a way that returns their automobile as closely as possible to its original appearance and condition.”). For purposes of this Decision we accept that both parties’ definitions fall within the purview of an ordinary observer. Our analysis reaches the same result using either parties’ definition of the ordinary observer.

*D. Alleged Obviousness the Claim based on 2015 Chevrolet Colorado and 2013 Ford Flex*

*1. Overview of the 2015 Chevrolet Colorado*

The 2015 Chevrolet Colorado provides reviews of the 2015 model year Chevrolet Colorado truck, and includes several images. An image from page 5 of Exhibit 1013 is reproduced below on the left as well as an image presented in the Petition that is also said to be from page 5 of Exhibit 1013 (Pet. 31).<sup>11</sup>

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<sup>11</sup> In reviewing page 5 of Exhibit 1013, we do not discern that the image from page 31 of the Petition is present on page 5 of that exhibit. Page 1 of Exhibit 1013 appears to include an image that may be a cropped version of the image offered on page 31 of the Petition, but, in our view, is clearly not the same image. The image from Exhibit 1013 is bifurcated and it spans pages 1 and 2. We have some concerns as to whether the image as it appears on page 31 of the Petition is present in the evidentiary record before us. Nevertheless, we reproduce the image from page 31 of the Petition for purposes of discussing LKQ’s proposed ground of unpatentability based on the 2015 Chevrolet Colorado.



The images above are understood to show rear views of a 2015 Chevrolet Colorado including its tailgate.

## *2. Overview of the 2013 Ford Flex*

Images appearing in the 2013 Ford Flex are presented as a part of a marketing brochure discussing features of the model year 2013 Ford Flex vehicle. An image from page 1 of Exhibit 1010 is reproduced below as well as an image presented in the Petition that is also said to be a “cropped, enlarged, and annotated” image from page 1 of Exhibit 1010 (Pet. 37).<sup>12</sup>

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<sup>12</sup> In reviewing page 1 of Exhibit 1010, we note that the image from page 37 of the Petition appears to resemble a portion of an image from Exhibit 1010 but is of considerably higher quality resolution. We are cognizant of GM’s objection to the image from page 37 of the Petition on the basis that it does not appear to come from the evidentiary record that is before us and “appears to have been doctored to a higher resolution than shown in Exhibit 1010.” See Prelim. Resp. 8–11. We share GM’s concern to some extent as it is not apparent readily from where the higher quality image on page 37 of the Petition is derived. Nevertheless, for reasons discussed below, even considering the higher quality image, we are not satisfied that any of LKQ’s grounds are sufficient to warrant institution of a post grant proceeding.



The images above are understood to be rear views of a model year 2013 Ford Flex vehicle.

### 3. Discussion

LKQ contends that the '306 design would have been obvious over the 2015 Chevrolet Colorado taken with the 2013 Ford Flex. LKQ is of the view that the 2015 Chevrolet Colorado is a proper primary, or *Rosen*,<sup>13</sup> reference because it “has basically the same overall visual appearance as the

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<sup>13</sup> In the context of design patent law, a proper primary, or *Rosen*, reference is “something in existence, the design characteristics of which are basically the same as the claimed design.” *In re Rosen*, 673 F.2d 388, 391 (CCPA 1982).

design claimed in the '306 Patent, making Patent Owner's 2015 Chevrolet Colorado a proper primary *Rosen* reference. Pet. 21 (citing Ex. 1003 ¶ 46; Ex. 1004 ¶ 51; *Durling*, 101 F.3d at 103). According to LKQ, "[t]he only difference between Patent Owner's 2015 Chevrolet Colorado and the claimed design of the '306 Patent is the addition of a raised plateau in the midsection of the tailgate that does not stretch the entire width of the tailgate." Pet. 35 (citing Ex. 1003 ¶ 47; Ex. 1004 ¶ 53).

GM contends that there are "many readily visible differences between the 2015 Chevrolet Colorado and the '306 Patent" (Prelim. Resp. 23). In that respect, GM argues the following:

LKQ fails to show the claimed design would result even if the references were combined because of the many visible differences between the purported raised plateau of the 2013 Ford Flex compared to the claimed design. Additionally, LKQ fails to satisfy its burden of demonstrating the 2015 Chevrolet Colorado is a proper *Rosen* reference, or that the 2013 Ford Flex is an appropriate secondary reference for combination with the 2015 Chevrolet Colorado. Thus, Ground 1 is deficient.

*Id.* at 24.

Irrespective of whether the 2015 Chevrolet Colorado is a proper *Rosen* reference, for the reasons that follow we agree with GM that, even if the design of the 2013 Ford Flex is combined with the design of 2015 Chevrolet Colorado, the resulting combination would be visually distinct from the '306 design. To that end, we focus first on certain required claim elements.

*a) Claim Elements*

First, LKQ's own claim construction requires a "primarily unadorned vertical surface" with "a raised plateau that does not stretch the entire width

of the tailgate *in the top half of the vertical surface.*” Pet. 14 (emphasis added). The requirement that the raised plateau reside in the top half of the vertical surface is also visually apparent from the figures that depict the ’306 design. LKQ has relied on the 2013 Ford Flex as satisfying the above-noted raised plateau requirement, but has seemingly disregarded or discounted that the raised plateau must reside in the top half of a vertical surface. We again reproduce the image from page 37 of the Petition that LKQ purports to be an image from page 1 of Exhibit 1010.



The image above shows what we understand to be the back of a 2013 Ford Flex vehicle. We agree with GM that LKQ does not provide any meaningful detail as to what surface in the 2013 Ford Flex constitutes the claimed “vertical surface.” Prelim. Resp. 33–34. To the extent that such surface constitutes the surface in silver on which the raised portion with the word “FLEX” resides, the raised portion is clearly in the center of that silver surface, not its “top half.” If the “vertical surface” extends above that silver surface then the raised portion is even further from the top half of the vertical surface. In either case, we agree with GM that the required claim feature is not taught in the 2013 Ford Flex. *Id.* at 34.

Moreover, we observe that the vertical surface of the tailgate of the 2015 Chevrolet Colorado is not viewed reasonably as being “primarily unadorned.” That is so, at least due to the presence of the tailgate’s handle



and the Chevrolet logo both of which reside on the vertical surface of the tailgate. We again reproduce the image from page 31 of the Petition that LKQ purports to be an image from the 2015 Chevrolet Colorado.



The image above shows what LKQ contends is the tailgate of a 2015 Chevrolet Colorado truck. *See* Pet. 31. We do not regard the tailgate depicted in the 2015 Chevrolet Colorado as being “primarily unadorned.”

Furthermore, it is apparent from the above-reproduced image that at least the handle of the tailgate is located in the top half of the tailgate’s vertical surface. The handle, thus, is seemingly in the location where any raised plateau would need to be positioned in order to account for the ’306 design. Given the positioning of that handle in the 2015 Chevrolet Colorado and given the positioning of the raised portion in the 2013 Ford Flex, we conclude that a designer of ordinary skill simply would not have been led to locate a raised plateau in the top half of a vertical surface of an endgate.<sup>14</sup> A conclusion to the contrary is seemingly premised on the

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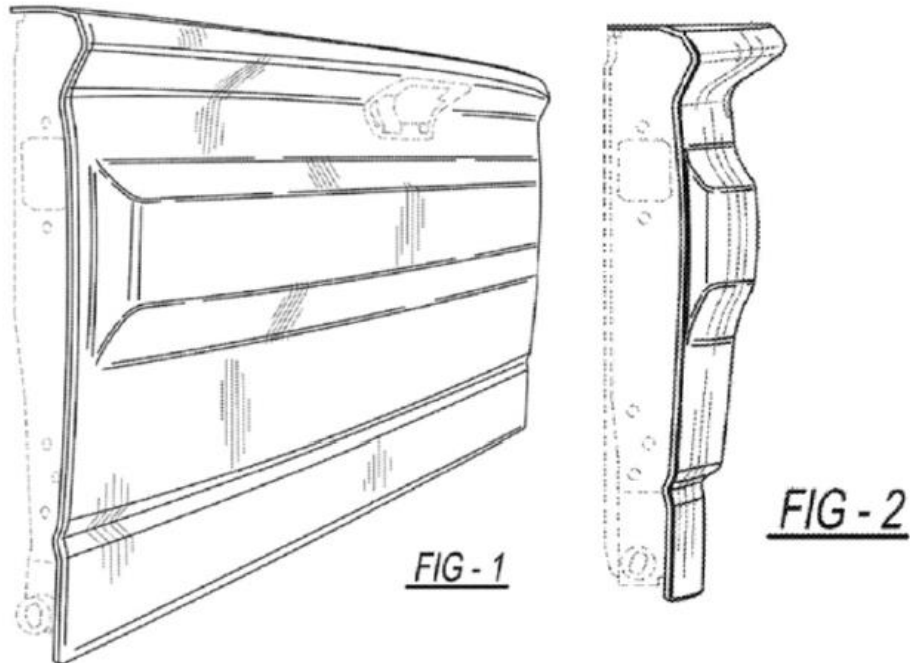
<sup>14</sup> We note that although a handle is not claimed as a part of the ’306 design, it is clear from that design that the unclaimed handle is not positioned on the

impermissible application of hindsight knowledge. As with utility patents, obviousness in the context of design patents cannot be based on hindsight knowledge. *See L.A. Gear, Inc. v. Thom McAn Shoe Company*, 988 F.2d 1117, 1124 (Fed. Cir. 1993) (“In applying the law of § 103 to the particular facts pertinent to the patented design, obviousness *vel non* is reviewed from the viewpoint of a designer of ordinary skill or capability in the field to which the design pertains. [citation omitted]. As with utility patents, obviousness is not determined as if the designer had hindsight knowledge of the patented design.”).

Further still, GM contends that there are noticeable visual differences in the appearances of the raised plateau of the '306 design and the raised portion of the 2013 Ford Flex. To that end, GM contends that, as seen for instance, in Figures 1 and 2 (reproduced below from GM's Preliminary Response) of the '306 patent, the feature characterized as the “raised plateau” (Pet. 14) is shown as “a flat rectangular portion that is about twice as tall as the width of the surrounding slanted portion.” Prelim. Resp. 32–33.

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vertical surface so as to interfere with the placement of the raised plateau in the top half of the vertical surface.



Prelim. Resp. 32.

Figures 1 and 2 above depict views of an endgate of the '306 design. In contrast, as seen in the image from page 31 of the Petition (asserted to be the 2013 Ford Flex), the raised portion with the word “FLEX” “is only slightly taller than the width of the surrounding slanted portion.” *Id.*



The image above shows what we understand to be a back view of a Ford Flex vehicle. We agree with GM’s assessment of the visual distinctions between the raised portions of the '306 design and the 2013 Ford Flex.

Following the principles set out in *Int'l Seaway Trading Corp.*, we conclude that if a designer of ordinary skill were to have combined the 2015 Chevrolet Colorado and the 2013 Ford Flex, the result would not be a piece of prior art that accounts for the visual appearance of the '306 design. See *Int'l Seaway Trading Corp. v.* 589 F.3d at 1240; see *High Point Design*, 730 F.3d at 1311. That conclusion is supported by the premise that, for the reasons discussed above, an ordinary observer would not regard the design of the resulting piece of prior art based on the combination and the '306 design as being of such similarity as to deceive the observer with respect to the design that emerges from the prior art as compared with the '306 design. See *Gorham Co. v. White*, 81 U.S. 511 (1871).<sup>15</sup>

*b) Basis (or Reason) for a Designer of Ordinary Skill to Create the Design*

Furthermore, even were we to consider that all the claim features of the '306 design are present in the 2015 Chevrolet Colorado and the 2013 Ford Flex, as with considerations of obviousness with respect to utility patents, when it comes to such considerations with design patents it is not sufficient simply to find all the features of a design claim in the prior art.

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<sup>15</sup> The ordinary observer test for design patent infringement was first enunciated by the Supreme Court in *Gorham Co.* as follows:

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

*Id.* at 528.

*See L.A. Gear, Inc.*, 988 F.2d at 1124 (“A reconstruction of known elements does not invalidate a design patent, absent some basis whereby a designer of ordinary skill would be led to create this particular design.”). Thus, there must be some basis or reason that would lead to modification of a primary reference based on secondary references. *See Durling*, 101 F.3d at 103 (Fed. Cir. 1996) (“These secondary references may only be used to modify the primary reference if they are ‘so related [to the primary reference] that the appearance of certain ornamental features in one would suggest the application of those features to the other.’”)

Here, we agree with GM (Prelim. Resp. 40–41) that the only reason offered by LKQ to modify the design of the 2015 Chevrolet Colorado to incorporate aspects of the 2013 Ford Flex would have been “a desire to make the vehicle appear muscular and large.” Pet. 40 (citing Ex. 1003 ¶ 50; Ex. 1004 ¶ 57). None of GM, Mr. Gandy (Ex. 1003), or Mr. Hill (Ex. 1004) provides any explanation or point to record evidence that conveys why a designer of ordinary skill would regard the raised portion of the 2013 Ford Flex as making any vehicle to appear muscular and large.

*c) Conclusion—Ground Based on 2015 Chevrolet Colorado and 2013 Ford Flex*

For the foregoing reasons, we conclude that LKQ has not met its burden of demonstrating that it is more likely than not that the challenged claim is unpatentable based on the 2015 Chevrolet Colorado and the 2013 Ford Flex.

*E. Alleged Obviousness of the Claim Based on 2015 Chevrolet Colorado, 2013 Ford Flex, 2010 Dodge Ram, and Schiavone*

LKQ also contends that the '306 design would have been unpatentable based on the 2015 Chevrolet Colorado, the 2013 Ford Flex, the 2010 Dodge Ram, and Schiavone. LKQ relies on modification of the 2015 Chevrolet Colorado based on the 2013 Ford Flex to account for the “raised plateau” requirement of the '306 design. Pet. 43–44. LKQ does not point to teachings of either the 2010 Dodge Ram or Schiavone to remedy the deficiencies discussed above in that regard. We also conclude that LKQ has not met its burden of demonstrating that it is more likely than not that the challenged claim is unpatentable based on the 2015 Chevrolet Colorado, the 2013 Ford Flex, the 2010 Dodge Ram, or Schiavone.

*F. Alleged Obviousness of the Claim over 2014 Chevrolet Silverado and 2013 Ford Flex*

LKQ argues that the '306 design would have been obvious over the 2014 Chevrolet Silverado and the 2013 Ford Flex. Pet. 51–58. We conclude that this ground fares no better than the ones discussed above based on the 2015 Chevrolet Colorado. An image from LKQ’s Petition stated to be an image from page 1 of Exhibit 1016 is reproduced below.



The image above is understood to be a view of the endgate of a 2014 Chevrolet Silverado truck. Like the endgate of the 2015 Chevrolet Colorado, the endgate of the 2014 Chevrolet Silverado does not include a “primarily unadorned vertical surface” with a “raised plateau that does not stretch the entire width of the tailgate in the top of the vertical surface.” *See* Pet. 14. Also like the 2015 Chevrolet Colorado, the 2014 Chevrolet Silverado includes a Chevrolet logo on the vertical surface as well as an endgate handle seemingly where the “raised plateau” of the ’306 design resides. For this ground also, LKQ relies on the 2013 Ford Flex to account for the feature of the “raised plateau” and its placement on the endgate of the 2014 Chevrolet Silverado. For the same reasons discussed above in connection with the ground based on 2015 Chevrolet Colorado and the 2013 Ford Flex, we are not persuaded that has demonstrated that the challenged claim of the ’306 patent is unpatentable based on the 2014 Chevrolet Silverado and the 2013 Ford Flex.

*G. Alleged Obviousness of the Claim Based on 2014 Chevrolet Silverado, 2013 Ford Flex, 2010 Dodge Ram, and Schiavone*

LKQ also contends that the '306 design would have been unpatentable based on combining the ornamental designs of four distinct references. Specifically, LKQ contends that ornamental features of the 2014 Chevrolet Silverado, the 2013 Ford Flex, the 2010 Dodge Ram, and Schiavone, could be merged to teach the design claimed by the '306 patent. Pet. 58–67. LKQ relies on modification of the 2014 Chevrolet Silverado based on the 2013 Ford Flex to account for the “raised plateau” requirement of the '306 design. LKQ does not point to teachings of either the 2010 Dodge Ram or Schiavone to remedy the deficiencies discussed above in that regard. We also conclude that LKQ has not met its burden of demonstrating that it is more likely than not that the challenged claim is unpatentable based on the 2014 Chevrolet Silverado, the 2013 Ford Flex, the 2010 Dodge Ram, or Schiavone.

### III. CONCLUSION

LKQ has not demonstrated that that it is more likely than not that the challenged design claim of the '306 patent is unpatentable.

### IV. ORDER

For the foregoing reasons, it is

ORDERED that the Petition is *denied* and no trial is instituted.



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