UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AMERICAN NATIONAL MANUFACTURING INC.,
Petitioner,

v.

SLEEP NUMBER CORPORATION
f/k/a SELECT COMFORT CORPORATION,
Patent Owner.

_____

Case No. IPR2019-00500
Patent No. 9,737,154

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**PATENT OWNER'S OBJECTIONS TO PETITIONER'S REPLY TO
PATENT OWNER'S EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(b)(1)**

Pursuant to 37 C.F.R. § 42.64 and the Federal Rules of Evidence, as applied by the Board, Patent Owner Sleep Number Corporation ("Sleep Number") provides the following objections to evidence submitted by Petitioner American National Manufacturing Inc. ("ANM"). These objections are timely served within five (5) business days.

Sleep Number serves ANM with these objections to provide notice that Sleep Number may move to exclude the challenged evidence under 37 C.F.R. § 42.64(c) unless ANM cures the defects associated with the challenged evidence identified below. In addition, Sleep Number reserves the right to present further objections to this or additional evidence submitted by ANM, as allowed by the applicable rules or other authority.

Exhibit 1052 – (2019-12-11 Messner Depo Transcript)

Sleep Number incorporates the objections made by counsel during Dr. Messner's deposition, which are not waived by service of these Objections.

Exhibit 1053 – (2019-12-12 Messner Depo Transcript)

Sleep Number incorporates the objections made by counsel during Dr. Messner's deposition, which are not waived by service of these Objections.

Exhibit 1054 – (2019-12-18 Abraham Depo Transcript)

Sleep Number incorporates the objections made by counsel during Dr. Abraham's deposition, which are not waived by service of these Objections.

Exhibit 1055 – (2020-01-08 Degen Depo Transcript)

Sleep Number incorporates the objections made by counsel during Mr. Degen's deposition, which are not waived by service of these Objections.

Exhibit 1056 – (Declaration of Matthew Lynde Ph.D. in Support of Petitioner's Reply)

Sleep Number objects to Exhibit 1056 as misleading, confusing, and prejudicial under Fed. R. Evid. 401-403 because ANM's expert does not identify the documents or information upon which he relies and also relies upon documents and information not previously provided to Sleep Number. For example, Dr. Lynde relies upon (1) information and a figure related to Dires LLC's advertising expenditures, never previously provided to Sleep Number, and does not cite to the source of that information (*e.g.* whether it is Exhibit 1060 and/or some other source); (2) information related to Dires LLC's Google advertising, not previously provided to Sleep Number in this proceeding, and does not cite to the source of that information (*e.g.* whether it is Exhibit 1059 and/or some other source); and (3) new information related to ANM's raw data, not previously provided to Sleep Number.

(*See, e.g.,* Exhibit 1056 at ¶¶ 36, 39, 44-46 (including Fig. 3), 48, 51, 63.) Further, Dr. Lynde broadly refers to the "Miller Declaration," without citing to Exhibit 1057, and to discussions with Craig Miller, but without providing specific reference thereto and without disclosing the underlying information received and relied upon from Mr. Miller. (*See, e.g.,* Exhibit 1056 at ¶¶ 19, 36, 39, 40, 44, 45, 46, 48, 50, 51, 52, 63.) Dr. Lynde also states that he reviewed "other relevant documents" and had conversations with ANM personnel including Ric Jansen. (*See* Exhibit 1056 at ¶ 12.) Sleep Number therefore also objects because Dr. Lynde does not identify what information Ric Jansen provided, whether he had conversations with any other ANM personnel, what "other relevant documents" he reviewed, or how any of this information helped to form his opinions. Sleep Number further objects under Fed. R. Evid. 401-403 to the specific statement that Sleep Number interfered with Dires, LLC's ability to advertise on Google because it is false, misleading, confusing, and prejudicial. (*See* Exhibit 1056 at ¶ 46.)

Sleep Number also objects to Exhibit 1056 because the discussion of the above documents and information is done without authentication as required under Fed. R. Evid. 901-902. Rule 901 requires that the "proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Yet

neither ANM nor ANM's expert sufficiently authenticates any of this information relied upon by Dr. Lynde.

Sleep Number further objects to the reliance on any such information that ANM only provided for the first time in its Reply. (*See, e.g.,* Exhibit 1056 at ¶¶ 36, 39, 44-46 (including Fig. 3), 48, 51, 63.) Sleep Number has been prejudiced by not previously having access to such information. For the same reason, Sleep Number likewise objects to Exhibit 1056 to the extent the Excel data (or any other data) upon which Dr. Lynde relies or created in order to make his opinions and/or to generate the figures in his declaration were not provided to Sleep Number contemporaneously with the filing and serving of Exhibit 1056.

Accordingly, reliance on the foregoing information is misleading, confusing, and unduly prejudicial to Sleep Number under Fed. R. Evid. 401–403. Additionally, to the extent Mr. Lynde relies on any exhibits identified herein or previously objected to in these proceedings, whether he discloses such reliance or not, Sleep Number incorporates the objections to those exhibits relied upon for testimony in Exhibit 1056.

Sleep Number further objects to Exhibit 1056 as including "[e]xpert testimony that does not disclose the underlying facts or data on which the opinion is based" in violation of 37 C.F.R. § 42.55(a) and Fed. R. Evid. 702-703 and 705. For example,

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