

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

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

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

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

1. **OBJECTIONS TO EXHIBIT 2079 — “DECLARATION OF DR. WILLIAM MESSNER IN SUPPORT OF PATENT OWNER’S MOTIONS TO AMEND”**

3. With respect to the “Companion Declarations” (Exs. 2001 and 2026),¹ Petitioner hereby reasserts and incorporates by reference its prior objections to evidence to these declarations filed and served on or around October 30, 2019 (Paper 51). In addition, the below objections also apply to the Companion Declarations.

4. Petitioner objects to this Exhibit on grounds of scope and timeliness as

¹ Note, this Declaration (§ 2) cites to Ex. 2025 for Mr. Messner’s prior declaration; however, that exhibit is not a declaration but instead it appears that Ex. 2026, which is Mr. Messner’s prior declaration, was intended to be cited.

Patent Owner could have presented this Exhibit as part of its Motion to Amend.

5. Petitioner objects to this Exhibit to the extent the testimony provided does not cite relevant underlying evidence upon which the testimony purports to rely on for support. For example, ¶¶ 4 (describing an admission by Dr. Phinney) is not cited. Accordingly, this testimony is inadmissible as it is not based on sufficient facts or data under FED. R. EVID. 702.

6. Petitioner objects to this Exhibit to the extent the testimony provided is not relied upon by the papers it purports to support. For example, Table 2A relates exclusively to the '747 Patent, which is not the subject of this proceeding. Accordingly, this testimony is also irrelevant, misleading, and confusing under FED. R. EVID. 401–03.

7. Petitioner objects to this Exhibit to the extent the testimony relies on the '172 Patent (“Giff”) to provide written description support to any amended claims or otherwise relies on Giff. *See* Ex. 2079, Tables 2A and 2B. Giff is only incorporated by reference into the *background* section of the '747 Patent (and parent '409 PCT App). Ex. 1001, 1:18–19; Ex. 1002 at 3, [0003]. Giff cannot be relied on for support. 37 C.F.R. § 42.121(b)(1) and § 1.83(a) (“The drawing in a nonprovisional application must show every feature of the invention specified in the claims.”); *see also Nichia Corp. v. Emcore Corp.*, IPR2012-00005, Paper 27 at 3

(PTAB June 3, 2013) (“*Nichia-CP*”) (“In particular, 37 C.F.R. § 42.121(b)(1) requires the patent owner to set forth the support in the *original disclosure* of the patent for each proposed substitute claim.” (emphasis in original)). Accordingly, this testimony is inadmissible as it is not based on sufficient facts or data under FED. R. EVID. 702.

8. Petitioner objects to this Exhibit to the extent the testimony provided does not cite any specific reference numeral of any figure in the original ’409 Application disclosure to support opinions of written description support of amended claims. *See* Ex. 2079, Tables 2A and 2B; 37 C.F.R. § 42.121(b)(1) and § 1.83(a) (“The drawing in a nonprovisional application must show every feature of the invention specified in the claims.”); *see also Nichia-CP* at 3 (“In particular, 37 C.F.R. § 42.121(b)(1) requires the patent owner to set forth the support in the *original disclosure* of the patent for each proposed substitute claim.” (emphasis in original)). Accordingly, this testimony is inadmissible as it is not based on sufficient facts or data under FED. R. EVID. 702(b). Accordingly, this testimony is inadmissible as it is not based on sufficient facts or data under FED. R. EVID. 702.

9. Petitioner objects to this Exhibit to the extent the testimony mixes multiple discrete and separate claim limitations in its analysis related to opinions of written description support of amended claims. *See* Ex. 2079, Tables 2A and 2B.

For example, the analysis for claim limitations 23.1, 25.1, and 26.6–26.7 provide no explanation how support for “essentially” is found in the cited portions of the ’409 Application. *See, e.g.*, Ex. 2079 at 21–23. Accordingly, this testimony is inadmissible as misleading and confusing under FED. R. EVID. 401–03 and also for failing to demonstrate that the testimony is the product of reliable principles and methods that have been reliably applied as required by FED. R. EVID. 702.

10. Petitioner objects to the testimony provided in this Exhibit, Tables 2A and 2B under the headings “My analysis” and “Support,” as this testimony is conclusory and fails to provide Dr. Messner’s reasoning or thought process supporting his conclusions. For example, the analysis for claim limitations 20.10–20.11, 26.9–26.10, and 32.10–32.11 (related to determining an adjustment factor error) merely cite to the “Summary” portion of the ’409 Application, which merely verbatim recites claim language and provides bare citations to the “Detailed Description” portion without any explanation. *See, e.g.*, Ex. 2079 at 16–17. Accordingly, this testimony is inadmissible under FED. R. EVID. 702 as it cannot be tested or cross-examined. *See, e.g.*, FED. R. EVID. 702, Advisory Committee’s Note to 2000 Amendment (subjective and conclusory opinions are inadmissible, instead an expert must explain how a conclusion is supported).

11. Petitioner objects to this Exhibit to the extent the testimony relies on

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