

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

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 REPLY IN SUPPORT OF
ITS MOTION TO EXCLUDE EVIDENCE**

TABLE OF CONTENTS

I.	Exhibit 2027 – Declaration Dr. John Abraham.....	1
II.	Exhibit 2029 – Declaration of George Edwards.	1
III.	Exhibit 2030 – Declaration of Carl Degen.	2
IV.	Exhibit 2033 – Declaration of Elizabeth Patton.....	3
V.	Exhibit 2034 – Trial Transcript.	4
VI.	Exhibit 2035 – Dires LLC Emails.	5
VII.	Exhibit 2036 – Dires LLC E-mails.....	5
VIII.	Exhibits 2044-49, PO’s District Court Infringement Contentions.	5

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Mays v. United Assn. etc.</i> , 407 F. Supp. 3d 1121 (D. Or. 2019).....	4
<i>Provepharm, Inc. v. Wista Labs. Ltd.</i> , IPR2018-00323, Paper 49 (PTAB July 2, 2019)	5
<i>Rogers v. Oregon Trail Elec. Commissioners. Co-op., Inc.</i> , No. 3:10-cv-1337, 2012 WL 163512 (D. Or. May 8, 2012)	5
<i>Sheehan v. Daily Racing Form, Inc.</i> , 104 F.3d 940 (7th Cir. 1997).....	1
<i>Sommerfield v. City of Chicago</i> , 254 F.R.D. 317 (N.D. Ill. 2008) (8th Cir. 1994)	2
<i>Teamsters, Chauffeurs, etc. v. N.Y. State Teamsters Council etc.</i> , 909 F. Supp. 102 (N.D. N.Y. 1995)	4
<i>United States v. Tran Trong Cuong</i> , 18 F.3d 1132 (4th Cir. 1994).....	2

Petitioner presents its Reply in Support of its Motion to Exclude Evidence. None of Petitioner's objections to PO's evidence have been cured by supplemental declarations from PO's witnesses.

I. Exhibit 2027 – Declaration Dr. John Abraham.

In litigation “an expert may consider (he may have a financial incentive to consider) looser standards to apply” than in the expert's scientific work. *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). When that happens, the expert has failed to exercise the required degree of care. *Id.*

Dr. Abraham did not exercise the required degree of care in this litigation as he did not test, operate, use or fully assemble a pump or air mattress. By contrast, in other engagements he fully examines the product. Opposition p. 3. PO essentially argues that Dr. Abraham's work in the past, with the same type of product, allowed him to be less diligent here. Diligence in investigation is directly related to reliability of an opinion. Dr. Abraham's work was deficient.

II. Exhibit 2029 – Declaration of George Edwards.

Dr. Edwards said that understanding the design and function of Petitioner's and PO's products “requires an understanding of the software”. Supp. Ex. 2029 ¶ 31. But Dr. Edwards does not communicate, in his declaration or in his deposition, what he says is required. He opines that ANM source code practices various claims

based solely on PO's attorney-drafted infringement contentions. *See, e.g.*, Ex. 1038 263:10-269:9. The infringement contentions, however, are just a summary of an alleged inspection and they were prepared by PO's counsel. A summary does not meet the requirement of 37 C.F.R. 42.65(a) regarding disclosure of the data on which an opinion is based. Lawyer-prepared documents "are not, by definition, of a type reasonably relied on by experts in the particular field". *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143-44 (4th Cir. 1994); *see, Sommerfield v. City of Chicago*, 254 F.R.D. 317, 321-22 (N.D. Ill. 2008) (8th Cir. 1994). Dr. Edwards' declaration should be excluded.

III. Exhibit 2030 – Declaration of Carl Degen.

Mr. Degen's analysis fails the basic test of "reliability" stated in F.R.E. 702 for admissible expert testimony. Mr. Degen acknowledged various factors (not the patents) that could be the cause of Petitioner's unit sales and he acknowledged that a regression analysis might "sort out" the cause. MTE p. 8-9. Nevertheless, Mr. Degen performed none of these analyses. Mr. Degen and PO default on proof of the necessary element of causation to an argument of commercial success.

PO characterizes Mr. Miller's statement regarding the underlying data as an "unsupported assertion". Opposition p. 6. This is false. PO deposed Mr. Miller and questioned him regarding the data. Ex. 2081/2097 24:4-35:5. If Mr. Miller's testimony was "unsupported", PO would have sought relief from the Board because

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.