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 REQUEST FOR REHEARING
OF FINAL WRITTEN DECISION UNDER 37 C.F.R. § 42.71(d)**

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I. INTRODUCTION

On July 23, 2020, the Patent and Trademark Board ("PTAB" or "the Board") handed-down its final written decision in the above captioned matter finding various claims of U.S. Patent No. 9,737,154 B2 (the "154 Patent") unpatentable, patentable, and patentable as amended. On page 92 of the Final Written Decision ("FWD") the Board writes:

> ANM does not refute the testimonies of Dr. Abraham and Dr. Edwards that these versions of the source code fall within the claims of '154 patent such that ANM's products using these versions infringe the claims (Ex. 2027 ¶ 29; Ex. 2029 ¶ 41)

In this passage, which in fairness may be dicta, the Board appears to make a statement about patent infringement, a matter outside the Board's statutory jurisdiction under 35 U.S.C. §311. Beyond the issue of statutory authority, the statement is not in accord with either the facts presented in the record or the posture and conduct of this proceeding. It is not accurate to imply that AMN did "not refute" or otherwise conceded Dr. Abraham's and Dr. Edwards' testimony—AMN contested the weight and admissibility of both expert opinions. Finally, there is no evidentiary basis to state that Dr. Abraham or Dr. Edward communicated any opinion about infringement in their written testimony, as both expressly disclaimed

any opinions about infringement, stating that they were only speaking to copying and nexus.

The Board should modify the opinion to either strike this sentence or modify it so that it does not prejudice Petitioner's statutory and constitutional rights to have any issue of infringement heard before a jury in the United States district court.[1] In the alternative, the Board should grant rehearing for Petitioner to fully present its positions on non-infringement.

II. LEGAL STANDARD

The rule that governs the legal standard for a request for rehearing is 37 C.F.R. § 42.71(d), which provides that "[t]he burden of showing a decision should be modified lies with the party challenging the decision." The Board evaluates a request for rehearing under an abuse of discretion standard. 37 C.F.R. § 42.71(c). The Federal Circuit has made clear that:

> "[a]n abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors."

Star Fruits S.N.C. v. U.S., 393 F.3d 1277, 1281 (Fed. Cir. 2005).

[1] By enumerating these issues for rehearing, Petitioner does not concede or waive any ground that it may have for appeal beyond that outlined in this request for rehearing.

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