
From: Patton, Elizabeth A.
Sent: Wednesday, September 11, 2019 3:54 PM
To: Hare, Jaspal; Toft, Lukas
Cc: Tuttle, Kevin; Elliott, Kyle L.; Bear Brian; Allee, J. Lori; Nath, Archana
Subject: RE: Modification to PO in C.D. Cal. [Sleep Number v. Sizewise/ANM]

Jaspal,

We disagree with your positions. While we think it would be permissible under the protective order and helpful to the Board to submit redacted infringement contentions in relation to Sleep Number's motion for additional discovery, Sleep Number will refrain from doing so in light of your objection.

Additionally, we continue to believe it is proper to modify the district court protective order to allow for use in the IPR proceedings the financial documents ANM/Sizewise referenced in its district court interrogatory responses, and to obtain additional financial documents not in the district court case. Such documents are directly relevant to issues in the IPR proceedings. We will move forward with our motion for additional discovery tomorrow and our ex parte motion for leave to modify the protective order in the district court case.

Liz

Elizabeth Patton

Partner

Fox Rothschild LLP

Campbell Mithun Tower - Suite 2000

222 South Ninth St.

Minneapolis, MN 55402-3338

(612) 607-7202 - direct

(612) 607-7100- fax

epatton@foxrothschild.com

www.foxrothschild.com

From: Hare, Jaspal <jhare@spencerfane.com>
Sent: Wednesday, September 11, 2019 2:35 PM
To: Patton, Elizabeth A. <epatton@foxrothschild.com>; Toft, Lukas <ltoft@foxrothschild.com>
Cc: Tuttle, Kevin <ktuttle@spencerfane.com>; Elliott, Kyle L. <KElliott@spencerfane.com>; Bear Brian <bbear@spencerfane.com>; Allee, J. Lori <JAllee@spencerfane.com>; Nath, Archana <anath@foxrothschild.com>
Subject: [EXT] RE: Modification to PO in C.D. Cal. [Sleep Number v. Sizewise/ANM]

Liz,

We disagree with the substance of your email and do not believe it would be productive to respond point-by-point. But, I will address certain points.

First, I never made a "request" that you provide a list of confidential documents for use in the IPRs. Instead, I suggested that Defendants would consider a narrower request than Plaintiff's blanket request to be able to use any documents from the District Court actions in the IPR (including third parties' confidential documents).

Second, Defendants still oppose use of their confidential information (and also third parties' confidential information without the third parties' permission) in the IPR for the reasons stated in my prior email, among others.

Last, Defendants oppose Plaintiff's request to unilaterally redact highly confidential documents. Plaintiff is free to rely on public sources of information to make its case, but we caution: "If Par makes such a motion [for additional discovery] before the PT AB, it must be prepared to document how every aspect of that application is based exclusively on information that is either publicly available or that Jazz has previously produced to Par in the IPR proceeding. If Par violates the DCO further, Jazz should make a new application to this Court, which will consider the imposition of severe sanctions against Par and its counsel. Such potential sanctions may include a prosecution bar going forward, revocation of *pro hac vice* admission before this Court, monetary sanctions, and other appropriate relief." *Jazz Pharmaceuticals, Inc. v. Amneal Pharmaceuticals LLC*, No. 13-391(ES) (JAD), Dkt No. 211, 2016 WL 11480203 (D.N.J. Jan. 22, 2016) (emphasis added).

Jaspal S. Hare | Attorney at Law
Spencer Fane LLP

5700 Granite Pkwy, Suite 650 | Plano, TX 75024
O 214.750.3623 | M 317.294.7132 | F 972.324.0301
jhare@spencerfane.com | spencerfane.com

From: Patton, Elizabeth A. [epatton@foxrothschild.com]
Sent: Wednesday, September 11, 2019 11:29 AM
To: Hare, Jaspal; L Toft
Cc: Tuttle, Kevin; Elliott, Kyle L.; Bear Brian; Allee, J. Lori; A Nath
Subject: RE: Modification to PO in C.D. Cal. [Sleep Number v. Sizewise/ANM]

Jaspal,

Thanks for the quick response though I'm frankly surprised at the accusations. We take confidentiality very seriously and have not improperly used or quoted confidential materials. Instead, we're done exactly as the Board requested – drafted proposed discovery per the Board's request and sought a modification to the district court Protective Order per the Board's guidance. ANM's position would only vitiate any discussion of the required *Garmin* factors in Sleep Number's brief. Further, in the emails below, I simply asked, *pursuant to your request*, that certain documents be allowed to be used in the IPR proceedings. You have said no. We are therefore left with no choice but to file our brief on Thursday noting your position and to file an ex parte motion in the district court requesting leave for a modification of the protective order.

To clarify, are you really taking the position that even *referencing* a confidential document from the district court litigation in the IPR proceedings would constitute a violation of the district court protective order? If so, we completely disagree and don't think your case law (discussed below) supports your position. We direct your attention to the following cases: *Royal Park Investments SA/NV v. Deutsche Bank Nat'l Tr. Co.*, 192 F. Supp. 3d 400, 404 (S.D.N.Y. 2016) ("Royal Park has not identified any case other than Jazz which has sanctioned a litigant, under comparable protective order language, merely for using its knowledge of the existence of discovery documents in one case to advocate for their production in other litigation in which those documents are also discoverable."); *Milwaukee Elec. Tool Corp. v. Snap-on Inc.*, No. 14-CV-1296-JPS, 2016 WL 1719657, at *3-5 (E.D. Wis. Mar. 16, 2016) (finding that referencing previously produced documents by their bates numbers in requesting discovery in an IPR proceeding did not violate the Protective Order in the related district court case, and "declin[ing] to interpret the protective order in a manner that leads to absurd results that would give an unfair competitive advantage to [defendant/petitioner] and undermine the efficacy of IPR"); *Streck, Inc. v. Research & Diagnostic Sys., Inc.*, 250 F.R.D. 426, 435 (D. Neb. 2008) (holding that defendants' were "straining the term 'use'" as plaintiff did not violate the protective order because it did not disclose any confidential information and did not rely on the materials themselves; rather, plaintiff simply referred to the documents in an attempt to secure their disclosure in collateral proceeding).

To be clear, Sleep Number is not "using" confidential information/documents to draft its IPR discovery requests or its

they contain. Instead, Sleep Number is referring merely to the existence of the documents and the conclusion that Sleep Number needs additional discovery in order to show certain secondary considerations in the IPR proceedings. The case upon which ANM relies, *Jazz Pharm., Inc. v. Amneal Pharm. LLC*, No. 13-391(ES)(JAD), 2016 WL 11480203 (D.N.J. Jan. 22, 2016), is inapposite. First, the court in Jazz had already interpreted the protective order at issue to bar the use of confidential information “in any form during related covered business method review or inter partes review (‘IPR’) proceedings.” *Id.* at *1. Such an order has not been issued in this case. Second, the Jazz court highlighted the “serious” issue that arises when parties use district court protective orders to “prohibit the legitimate use of information in other proceedings.” *Id.* at *4. Accordingly, and in an effort to “reduce the potential for unfair gamesmanship in post-grant proceedings,” the court ordered the parties to meet and confer regarding a revisions to the protective order to allow for the confidential information to be used in the IPR proceedings. *Id.* Indeed, this is exactly what Sleep Number has been trying to achieve but which ANM continues to oppose. Sleep Number believes it is improper for ANM to use the district court protective order as both a sword and a shield.

Therefore, Sleep Number requests that ANM reconsider its position as to the bates numbers identified in my email from yesterday. Additionally, Sleep Number requests that ANM and Sizewise allow Sleep Number to file redacted versions of the infringement claim charts served in the underlying district court case in support of its motion for additional discovery due tomorrow. Sleep Number would redact out all citations to any source code, thereby alleviating any confidentiality concerns. Please let us know by the COB today if ANM and Sizewise would be amenable to this request.

Lastly, as to your allegation about Sleep Number’s discovery disclosures in the district court: Note that Defendants chose to file IPRs and to seek a stay of the district court litigation while the parties were in the midst of producing documents and meeting and conferring on discovery requests. Whether or not Sleep Number had already produced financial documents at the specific point in time of the stay does not mean Sleep Number was ever “intentionally withholding” such documents. The same is true of whether or not Sleep Number had identified certain secondary considerations yet. Secondary considerations are clearly relevant, and they are a proper reason to ask for additional discovery in an IPR proceeding.

Liz

Elizabeth Patton

Partner

Fox Rothschild LLP

Campbell Mithun Tower - Suite 2000

222 South Ninth St.

Minneapolis, MN 55402-3338

(612) 607-7202 - direct

(612) 607-7100- fax

epatton@foxrothschild.com

www.foxrothschild.com

From: Hare, Jaspal <jhare@spencerfane.com>

Sent: Tuesday, September 10, 2019 4:27 PM

To: Patton, Elizabeth A. <epatton@foxrothschild.com>; Toft, Lukas <ltoft@foxrothschild.com>

Cc: Tuttle, Kevin <ktuttle@spencerfane.com>; Elliott, Kyle L. <KElliott@spencerfane.com>; Bear Brian <bbear@spencerfane.com>; Allee, J. Lori <JAllee@spencerfane.com>

Subject: [EXT] RE: Modification to PO in C.D. Cal. [Sleep Number v. Sizewise/ANM]

Liz,

Per our call yesterday, it is Defendants' position that Sleep Number has violated of the District Court's stipulated protective order ("PO") (-356, dkt. 69). In particular, the PO only permits Sleep Number to "use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this Action only for prosecuting, defending, or attempting to settle this Action." PO at 10-11 (emphasis added). The PO defines "this Action" as the two district court actions only, and "this Action" does not include the IPR proceedings. PO at 3. Thus, the PO prohibits Sleep Number from using confidential information in the IPRs.

However, it is evident that Sleep Number used Defendants' confidential information to craft its proposed discovery request in the IPR proceedings. See Draft Discovery emailed by Mr. Toft on 9/3/19 (e.g., expressly referencing "an identification of inflatable air beds sold or leased with Sizewise's Accused Source Code (as identified by Sleep Number in its infringement contentions served on January 25, 2019 in Sleep Number v. Sizewise, 5:18-cv-00356AB(SP)x and which includes the Platinum Source File source code).") The Platinum Source File source code is designated as confidential under the PO, and the infringement contentions served on January 25, 2019 also contain information designated as confidential under the PO. Accordingly, Sleep Number has used Defendants' confidential information for purposes of preparing its discovery requests in the IPRs. Such is improper. See, e.g., Jazz Pharmaceuticals, Inc. v. Amneal Pharmaceuticals LLC, No. 13-391(ES) (JAD), Dkt No. 211, 2016 WL 11480203 (D.N.J. Jan. 22, 2016) ("The Court finds that, in utilizing information gleaned from confidential documents that Jazz produced pursuant to the terms of the DCO (e.g., using those documents as evidence of an alleged inconsistency in a position that Jazz took in the IPR proceedings, and confirming the origin of that position by referring to specific bates-numbered documents), both Amneal and Par unequivocally violated the terms of that Order. . . . The Court finds that, by referring to the fact that Jazz had already produced documents responsive to the IPR requests in connection with this litigation (i.e., inherently relying on the contents of those confidential documents as the basis for its point), and using that fact as part of its argument as to why Jazz should have to provide additional discovery in the IPR proceedings, Par and Amneal again violated the DCO.").

Regarding your below email, it further confirms that Sleep Number is outright "using" confidential information of Defendants for the express purpose of seeking discovery in the IPR. Again, such use of Defendants' protected information is prohibited and in violation of the PO. Moreover, to date, Sleep Number has not identified "commercial success" as relevant to any claim or defense, even though it should have done so a long time ago in response to Defendants' duly propounded discovery. Sleep Number also has not produced any evidence related to commercial success of its own products, and indeed, it has been intentionally withholding producing its own financial information. Defendants do not see how any of the documents you list show commercial success. Given these issues, Sleep Number's request strongly appears to be for an improper purpose—to create a costly side show. Defendants oppose your below request.

Defendants strongly caution Sleep Number against further using confidential information of Defendants or third parties produced in the District Court actions in the IPR proceedings, in particular, in preparing its upcoming motion for additional discovery. Defendants reserve their rights to seek redress for these violations and any additional violations with the District Court.

Jaspal S. Hare | Attorney at Law
Spencer Fane LLP

5700 Granite Pkwy, Suite 650 | Plano, TX 75024
O 214.750.3623 | M 317.294.7132 | F 972.324.0301
jhare@spencerfane.com | spencerfane.com

From: Patton, Elizabeth A. <epatton@foxrothschild.com>

Sent: Tuesday, September 10, 2019 11:57 AM

To: Hare, Jaspal <jhare@spencerfane.com>; Tuttle, Kevin <ktuttle@spencerfane.com>; Elliott, Kyle L. <KElliott@spencerfane.com>

Cc: L Toft <ltoft@foxrothschild.com>

Subject: RE: Modification to PO in C.D. Cal.

Jaspal and Kevin,

I am writing to confirm our discussion yesterday regarding Sleep Number's request to modify the Protective Order in the district court litigation to allow the parties to use discovery/disclosures in the course of the IPRs. We understand from the discussion that your position is that ANM/Sizewise are opposed to a wholesale modification of the Protective Order but would be willing to consider use of specific documents if Sleep Number provides a list. Although not exhaustive, Sleep Number's initial request is that it be allowed to use the documents referenced in ANM's/Sizewise's interrogatory responses:

- Exhibits A, B, C to Sizewise's First Supplemental Responses to Plaintiff's First Set of Interrogatories
- The following produced documents cited in ANM's First Supplemental Responses to Plaintiff's First Set of Interrogatories:
 - ANMI00133410, ANMI00133414-422, ANMI00132315-605, ANMI00133010-123, ANMI00133008-009, ANMI00132606-777, ANMI00132778-829, ANMI0013385-387, ANMI0013385-388, ANMI00132830-952

As some of these, particularly ANMI00133414-422, are relevant to Sleep Number's brief due this Thursday, please provide a response as to the above list by the end of the day this Wednesday. To the extent ANM/Sizewise agree to allow Sleep Number to use of any of these documents, including in its filing on Thursday, we envision agreeing that they would be filed with the Board under seal.

Thanks,
Liz

Elizabeth Patton

Partner

Fox Rothschild LLP

Campbell Mithun Tower - Suite 2000

222 South Ninth St.

Minneapolis, MN 55402-3338

(612) 607-7202 - direct

(612) 607-7100- fax

epatton@foxrothschild.com

www.foxrothschild.com

From: Toft, Lukas <ltoft@foxrothschild.com>

Sent: Friday, September 6, 2019 2:59 PM

To: Hare, Jaspal <jhare@spencerfane.com>; Patton, Elizabeth A. <epatton@foxrothschild.com>

Cc: Tuttle, Kevin <ktuttle@spencerfane.com>; Elliott, Kyle L. <KElliott@spencerfane.com>

Subject: RE: Modification to PO in C.D. Cal.

Jaspal,

As I mentioned yesterday and as suggested by the Panel, Sleep Number is seeking to modify the protective order from the C.D. Cal. case (Dkt. 75, attached for your reference) in order to allow the parties to use any discovery or disclosures already propounded or served in the district court action in the related IPR proceedings. Specifically, to allow for this, Sleep Number is proposing a modification to the existing protective order at paragraph 2.1 such that "Actions" shall be inclusive of IPR2019-00497, -00500, and -00514. In order to alleviate any concerns ANM/Sizewise may have, Sleep Number would be amenable to modifying the default protective order recommended by the PTAB with provisions

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.