

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.

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IPR2019-00500  
Patent 9,737,154 B2

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Before SCOTT A. DANIELS, FRANCES L. IPPOLITO, and  
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

DANIELS, *Administrative Patent Judge*.

DECISION  
Denying Petitioner's Request for  
Rehearing of Final Written Decision  
*37 C.F.R. §§ 42.71(d)*

## I. INTRODUCTION

ANM filed a Request for Rehearing (Paper 109, “Request” or “Req.”) of our Final Written Decision (Paper 105, “Final Written Decision” or “Dec.”) in which we determined that claims 1–4, 7–14, 16–22 of U.S. Patent No. 9,737,154 B2 (Ex. 1001, “the ’154 patent”) are unpatentable. In our Final Written Decision we also granted Sleep Number’s Revised Motion to Amend as to proposed substitute claims 23–25, 30–31, 38–41. Dec. 105–126. Sleep Number did not file an opposition to ANM’s Request for Rehearing. For the reasons that follow, ANM’s Request for Rehearing is denied.

## II. THE REQUEST FOR REHEARING

In pertinent part, 37 C.F.R. § 42.71(d) states:

The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

Thus, a request for rehearing is not an opportunity merely to disagree with the Board’s assessment of the arguments or weighing of the evidence, or to present new arguments or evidence. Moreover, “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” 37 C.F.R. § 42.71(c).

ANM requests rehearing to address one aspect of our Final Written Decision found in our discussion of secondary considerations. Req. 1 (citing Dec. 92). ANM specifically requests that we strike the following passage from page 92 of our Final Written Decision:

ANM does not refute the testimonies of Dr. Abraham and Dr. Edwards that these versions of the source code fall within the

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claims of '154 patent such that ANM's products using these versions infringe the claims (Ex. 2027 ¶ 29; Ex. 2029 ¶ 41).

*Id.* at 1. ANM argues that this passage is a statement regarding patent infringement that is outside the Board's statutory authority. *Id.* ANM contends that it is not accurate to imply that ANM failed to refute Dr. Abraham and Dr. Edwards testimony. *Id.* According to ANM "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." *Id.* at 1–2.

### III. DISCUSSION

Our review of each Declarant's individual testimony as it relates to copying and nexus is consistent with ANM's position that neither Dr. Abraham nor Dr. Edwards states an opinion as to infringement. Dr. Edwards's testimony explains his analysis of several versions of ANM's source code and comparison with the claims of the '154 patent, concluding that "at least Version 1.8, Version 1.97, and Version 2.0 of ANM's source code read on the software-related limitations of claims 1–19 of the '154 Patent and claims 1–18 of the '747 Patent." Ex. 2029 ¶ 41. Dr. Abraham performed a physical review of various ANM air controllers, and determined "that ANM's products sold with Gen 3 Arco and Gen 3 Koge air controllers read on the claimed mechanical related elements of (*i.e.* structural components of) the '154 and '747 Patents." Ex. 2027 ¶ 29. Thus, Dr. Abraham and Dr. Edwards testimony is more accurately that ANM's software and air controllers "read on" on the claims of the '154 patent.

We do not agree, however, with ANM's argument that general objections and ANM's Motion to Exclude (Pet. Mot. Exclude 1) the entirety

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of Dr. Abraham and Dr. Edwards testimony under Federal Rule of Evidence 702 and 37 C.F.R. § 42.65(a) are sufficient to disprove specific testimony and analyses with respect to nexus as it pertains to secondary considerations. Req. 1. Here, Petitioner has used its Request as an opportunity to argue positions which disagree with our Final Written Decision. Merely disagreeing with our analysis does not serve as a proper basis for a request for rehearing. Also, we do not make any finding or conclusion as to a comparison of the products and claims, only noting that ANM did not specifically address or refute the testimony that the air controllers and software read on the claims. For example, in its Motion to Exclude, ANM did not address the opinions and testimony in either of the paragraphs relied upon in this passage in our Final Written Decision. Pet. Mot. Exclude 1–6. Indeed, as we explained in our Final Written Decision discussing ANM’s effort to exclude the entirety of Dr. Abraham and Dr. Edwards testimony, “ANM does not support this broad, undeveloped, exclusion effort further, and, to the extent that ANM seeks to exclude each Declaration in its entirety rather than the enumerated paragraphs later referenced by ANM, we decline to do so.” Dec. 136.

Although we are not persuaded to strike this passage in its entirety, we are persuaded to amend page 92 of our Final Written Decision to comport with the Declarants’ testimony. Therefore, as shown by the strikeout indicating the subject matter removed and underlining indicating the added subject matter below, the objected to passage in our Final Written Decision will be amended as follows:

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 read on the claims (Ex. 2027 ¶ 29; Ex. 2029 ¶ 41)

#### IV. CONCLUSION

We have reviewed and considered the arguments in ANM’s Request and conclude that ANM has not carried its burden of demonstrating that the Board abused its discretion or misapprehended or overlooked any matters in rendering the Final Written Decision such that the objected to passage should be struck from the Final Written Decision. 37 C.F.R. § 42.71(d). Rather, ANM has persuaded us that Sleep Number’s Declarants did not testify specifically as to infringement in their respective testimony regarding objective indicia of non-obviousness, and although we deny the Request, we amend our Final Written Decision to comport with the testimony of Sleep Number’s Declarants.

Outcome of Decision on Rehearing: *Denied*—We omit a table in this case because the Request did not include a challenge or arguments with respect to any claim or ground implicated in our Final Written Decision.

Final Outcome of Final Written Decision after Rehearing:

<b>Claims</b>	<b>35 U.S.C. §</b>	<b>References</b>	<b>Claims Shown Unpatentable</b>	<b>Claims Not shown Unpatentable</b>
1–4, 7–14, 16–22	103(a)	Gifft, Mittal, Pillsbury	1–4, 7–14, 16–22	
5, 6, 15	103(a)	Gifft, Mittal, Pillsbury and Ebel		5, 6, 15
<b>Overall Outcome</b>			1–4, 7–14, 16–22	5, 6, 15

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