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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SLEEP NUMBER CORPORATION,

Plaintiff,

v.

SIZEWISE RENTALS, LLC,

Defendant.

Case Nos. 5:18-cv-00356 AB (SPx)  
5:18-cv-00357 AB (SPx)

**PLAINTIFF'S *EX PARTE*  
APPLICATION TO MODIFY THE  
STIPULATED PROTECTIVE  
ORDER**

SLEEP NUMBER CORPORATION,

Plaintiff,

v.

AMERICAN NATIONAL  
MANUFACTURING, INC.,

Defendant.

**DISCOVERY MATTER**

Hon. Sheri Pym, United States Magistrate  
Judge

1 TO: THE HONORABLE ANDRE BIROTTÉ JR. AND ALL PARTIES AND  
2 THEIR ATTORNEYS OF RECORD:

3 Plaintiff Sleep Number Corporation (“Plaintiff”) seeks *ex parte* relief outside  
4 of the regular-noticed motion procedures in order to move the District Court in Case  
5 Numbers 18-00356 AB (SPx) and 18-00357 AB (SPx) (the “District Court Action”)  
6 to modify the District Court Action’s Stipulated Protective Order, located at 356 Case  
7 Dkt. 69 and 357 Case Dkt. 75, granted at 356 Case Dkt. 74 and 357 Case Dkt. 78 and  
8 modified at 356 Case Dkt. 121 and 357 Case Dkt. 121 (“Protective Order”).  
9 Specifically, Plaintiff requests a modification of the Protective Order at paragraph 2.1,  
10 to modify the term “Action” to include the current *inter partes* review proceedings,  
11 IPR2019-00497, IPR2019-00500, and IPR2019-00514 (“IPR Proceedings”).  
12 Defendants oppose Plaintiff’s motion.

13 *Ex parte* relief is available when the movant shows that his or her cause will be  
14 “irreparably prejudiced if the underlying motion is heard according to regular noticed  
15 motion procedures” and further that the movant is not responsible for the necessity of  
16 the *ex parte* relief, or the relief is necessary because of excusable neglect. *Mission*  
17 *Power Eng’g Co. v. Cont’l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). Here,  
18 both of these requirements are met due to the tactical non-cooperation by Defendants  
19 and the expedited timeline of the IPR Proceedings, including Plaintiff’s currently  
20 pending motion for additional discovery, the expected short timeframe for the Patent  
21 Trial and Appeal Board’s (“PTAB”) decision on that motion, the necessity for the  
22 PTAB to have all the relevant information to make an informed decision on that  
23 motion, and the upcoming October deadlines for Patent Owner Responses before  
24 which all discovery must be complete.

25 In the District Court Action, Defendants Sizewise Rentals, LLC and American  
26 National Manufacturing, Inc. (collectively “Defendants”) asserted counterclaims of  
27 invalidity of U.S. Patent Nos. 8,769,747 (“the ‘747 Patent”), 9,737,154 (“the ‘154

1 Patent”), and 5,904,172 (“the ‘172 Patent”) (collectively the “Patents-in-Suit”).  
2 Discovery and disclosures included documents relating to Defendants’ invalidity  
3 claims and Plaintiff’s defenses to the same, which documents were provided subject  
4 to the Protective Order. In the middle of the District Court Action, Defendants sought  
5 to assert their invalidity claims through *inter partes* review (“IPR”) proceedings and  
6 petitioned the PTAB for IPR of the Patents-in-Suit. (See ‘356 Case Dkt. 133; 357  
7 Case Dkt. 134.) Defendants then asked this Court to stay the District Court Action  
8 pending final disposition of the IPR Proceedings, which the Court granted in light of  
9 the potential IPR institution. (See 356 Case Dkt. 143; 357 Case Dkt. 142.) In issuing  
10 the stay, this Court retained jurisdiction over the District Court Action, which would  
11 include the Stipulated Protective Order. (See *id.*)<sup>1</sup>

12 On July 24, 2019, the PTAB instituted IPRs for the ‘747 Patent and ‘154 Patent,  
13 and on August 5, 2019, instituted IPR for the ‘172 Patent. As such, per Defendants’  
14 request, the validity of the Patents-in-Suit is now being addressed through the IPR  
15 Proceedings while the District Court Action remains stayed.

16 On September 5, 2019, Plaintiff’s and Defendants’ counsel participated in an  
17 initial conference call with the PTAB regarding Plaintiff’s request for additional  
18 discovery. (See Declaration of Lukas Toft (“Toft Decl.”) Ex. 1.) At that time, the  
19 PTAB granted Plaintiff’s request to bring a motion for additional discovery, including  
20 discovery or disclosures already served in the District Court Action. That motion was  
21 filed on September 12, 2019 per order of the PTAB. (*Id.* Ex. 1; Exs. 2–4.)

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23

24 <sup>1</sup> Because the Court retains jurisdiction over the District Court Action, the Court need  
25 not reopen the case to decide this motion. See *Millennium Labs., Inc. v. Allied World*  
26 *Assurance Co. (U.S.), Inc.*, No. 12-CV-2280-BAS-KSC, 2017 WL 4810181, at \*2  
27 (S.D. Cal. Oct. 24, 2017) (“This Court . . . retains the power to modify [the protective  
order] and it is not necessary for this case to be ‘reopened’ in order to consider  
Millennium’s request to modify.”).

28

1 During the call with the PTAB, Plaintiff made clear that its motion for  
2 additional discovery would request discovery regarding ANM’s sales and financial  
3 information, which is relevant, at minimum, to adequately evaluate commercial  
4 success—a secondary consideration of non-obviousness relevant to validity of the  
5 Patents-in-Suit. (Toft Decl. Ex. 1.) Plaintiff notified the PTAB that it already had  
6 certain, limited financial data from the District Court Action it would seek to use in  
7 conjunction with the additional discovery and that this financial data produced in the  
8 District Court Action supported why the additional discovery in the IPR Proceedings  
9 was necessary. (*Id.*) Importantly, “[t]he Board instructed that where Sleep Number  
10 was already in possession of certain sales information in the district court litigation,  
11 it should request a modification of the protective order from the district court in order  
12 to use that information in these proceedings.” (*Id.* Ex. 1, at 3; Ex. 5, Tr. at 27:2-7  
13 (stating on the call that “you need to go back to the district court and modify [the  
14 protective order] so you can produce [information] in front of us.”).) Indeed, during  
15 the call, the Board stated: “[t]hat’s what the parties have done in the past and it is  
16 fairly straight forward.” (Toft Decl. Ex. 5, Tr. at 27:7-9.)

17 Plaintiff is seeking to do exactly what the Board instructed—modify the  
18 Protective Order to allow use of the District Court Action discovery in the IPR  
19 Proceedings. But Defendants have been unwilling to cooperate, and Plaintiff has had  
20 to resort to filing the present *ex parte* motion to seek the Court’s assistance.  
21 Specifically, in response to the Board’s request and in order to streamline the  
22 modification process and serve this Court’s judicial economy, Plaintiff’s counsel  
23 reached out to Defendants’ counsel to seek agreement on a stipulation to modify the  
24 Protective Order. (Toft Decl. Ex. 6.) In response, Defendants’ counsel stated that it  
25 would “need more detail.” (*Id.*) Plaintiff’s counsel then provided more detail,  
26 specifying that Plaintiff sought to include the IPR proceedings in the Protective  
27 Order’s definition of “Action” to allow for the use of the District Court Action

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PROTECTIVE ORDER

1 documents in the IPR Proceedings. (*Id.*) Plaintiff also communicated it would be  
2 amenable to modifying the PTAB’s default protective order to include confidentiality  
3 provisions similar to the District Court Action’s Protective Order to maintain the  
4 confidentiality protection of any documents used in the IPR Proceedings. (*Id.*)

5 On September 9, 2019, the parties met and conferred via telephone between  
6 counsel. During that phone call, Defendants’ counsel stated that they would not agree  
7 to a “wholesale” modification of the Protective Order to allow all documents in the  
8 District Court to be used in the IPR Proceedings, but that they would be willing to  
9 consider a specific list of documents. (Toft Decl. Ex. 6.) In response, Plaintiff’s  
10 counsel provided Defendants’ counsel with an initial exemplary list of thirteen  
11 specific documents it requested to use in the course of the IPR Proceedings, all of  
12 which are documents Defendants identified or attached to Defendants’ interrogatory  
13 responses in the District Court Action. (*Id.*) In response, Defendants again refused to  
14 consider stipulating to a modification. (*Id.*) Instead, Defendants’ counsel baselessly  
15 accused Plaintiff’s counsel of violating the Protective Order by “using” its  
16 confidential information in referencing bates numbers of documents in the District  
17 Court Action in Plaintiff’s IPR discovery requests. (*Id.*) Plaintiff responded that it was  
18 simply narrowing the scope of the requested modification and that Defendant’s  
19 accusations that Plaintiff “used” Defendants confidential information by simply  
20 indicating bates ranges and exhibit numbers in its requests were baseless and contrary  
21 to law. (*Id.*) Plaintiff again asked Defendants to reconsider stipulating to a  
22 modification but Defendants again refused. (*Id.*)

23 Additionally, Plaintiff requested that Defendants at least allow it to file with  
24 the PTAB redacted versions of Plaintiff’s infringement contention claim charts served  
25 in the District Court Action in support of Plaintiff’s motion for additional discovery  
26 in the IPR Proceedings. (*Id.*) Plaintiff further ensured that all citations to source code  
27 and other confidential information would be redacted from the contentions,

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