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,
PO.

Case No. IPR2019-00500

Patent No. 9,737,154

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION FOR ADDITIONAL DISCOVERY

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I. INTRODUCTION

Patent Owner ("PO") is not entitled to this second round of discovery because its theories of commercial success and copying are without merit. First, PO controls approximately 95% of consumer air bed market, but strangely, it has not included *any* evidence of its own commercial success in its Response. This renders a showing of commercial success impossible, because PO has concealed 95% of the market from the Board's consideration. As for copying, PO intends to utilize its mere allegations of infringement from the District Court case to prove supposed copying. PO makes a generalized statement that Craig Miller, President of Petitioner had non-particular access to their "technology," but critically they cannot allege that he ever had access to PO's source code. The Board should view this request as a disingenuous attempt to take a sneak-peak at Petitioner's non-infringement theories, violate the rights of third-party source code owners, all while violating a standing District Court protective order.

II. THE REQUEST VIOLATES THE RIGHTS OF THIRD-PARTIES AND THE DISTRICT COURT'S PROTECTIVE ORDER

At the outset, PO claims they only learned "ANM was taking the position that *all* Source Code is third-party owned" on October 10. This is not a matter of "taking a position," rather, it is simply stating a fact—Providence, Arco, Elysn, and Medisphere are all independent, third-party corporations (collectively "Third Parties"). Ex. 1033, ¶13. Moreover, PO has known about the ownership of the

source code since at least December 21, 2018, when Petitioners produced the consumer air controller history (Exhibit 2052) in the District Court case. Ex. 1035, ¶¶3-4. That document plainly lists the owners of the code as Providence and Arco. Ex. 2052 pg. 2-7. Additionally, Mr. Craig Miller disclosed this fact to PO during his consultancy, and even introduced PO's personnel to contacts at Arco and Providence in 2008. Ex. 1033, ¶7.

With this knowledge, it was PO who offered to redact third-party source code to mollify concerns about third-party rights in connection with its efforts to modify the District Court's protective order. Ex. 1035, ¶¶6, 7. The District Court accepted PO's offer, allowed use of the district court materials, but expressly ordered the parties to redact all third-party source code in this specific proceeding. Ex. 2043, pg. 8. Petitioner and PO only hold the source code in their possession by virtue of the district court proceeding. Ex. 1033, ¶13; Ex. 1035, ¶5. Turning over code, without the additional protective measures and remedies of the District Court and in this forum more disposed to public disclosure, and in violation of the District Court's express order to the contrary, does not just fail to serve the "interests of justice," it actively undermines this standard as set forth in 37 CFR § 42.51(b)(2)(i).

To avoid this, PO could have sought further modification with the District Court or petitioned PTAB to serve subpoenas on the third-party entities themselves. These are precisely the "other means" envisioned under *Garmin*. But PO complains

that availing itself of 37 CFR § 42.52(a) and seeking subpoenas is somehow not "legitimate or reasonable." Their complaint in this regard is solely based on the limited time available, which is a direct result of PO's own inaction. Indeed, to the extent anything is not "legitimate or reasonable" it is PO's instant request which would have PTAB adjudicate Third Parties' substantive rights regarding the confidentiality of their source code without them being present to defend themselves, an unconstitutional proposition in violation of procedural due process.

III. THERE ARE "OTHER MEANS" FOR PO TO SHOW COMMERCIAL SUCCESS

PO controls nearly 95% of the consumer air bed market, and out scales Petitioner significantly. Ex. 1033, ¶14. The Board correctly observed that "PO can provide its own equivalent information in the form of PO's market share and sales history." Paper 34, p 10. Surprisingly, PO's response nowhere talks about their sales or financial information. Any notion of commercial success tied to the patents in suit simply cannot be proven at this point, because the Board will be in the dark about 95% of the consumer air adjustable bed market. PO could have relied on its own products, which it asserts practices the patents (See e.g. Ex. 2044, p. 11), and cease to burden Petitioner and the Board with repeated discovery requests. But now, in the absence of making *any* showing about their own product's sales

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