

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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Case No. IPR2019-00514

Patent No. 5,904,172

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**JOINT MOTION TO EXPUNGE CONFIDENTIAL INFORMATION  
UNDER 37 C.F.R. § 42.56**

## **I. THE RELIEF REQUESTED**

Pursuant to 37 C.F.R. § 42.56, and authorization received from the Board email of October 11, 2022, Petitioner American National Manufacturing, Inc. (“Petitioner”) and Patent Owner Sleep Number Corporation (“Patent Owner”) (collectively “the Parties”)<sup>1</sup> jointly move for an order expunging the following confidential documents filed under seal (collectively, the “Identified Documents”) in this proceeding:

Sealed Exhibits 1049, 1075, 1077-1078, 2076, 2078, and 2084;

Unredacted Exhibits 1047, 1056, 1066-1069, 1071-1072, 2040, 2055, and 2055 Supp.; and

The unredacted version of Patent Owner’s Response (Paper 47).

The information the Parties seek to expunge from the record constitute confidential information under the Parties’ Joint Stipulated Protective Order and the

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<sup>1</sup> Petitioner and Patent Owner are the same parties in IPR2019-00497 and IPR2019-00500 (the “Related IPRs”). They are also parties to a district court case pending but stayed in the Central District of California (“District Court Proceeding”) and were previously parties to a USITC Investigation (“USITC Proceeding”).

District Court’s Modified Protective Order (*see* Paper 40 (original) and Paper 95 (revised)), and in addition, were not relied on in the final written decision or were included in a corresponding publicly available redacted version. The confidential nature and treatment of the documents and information used in this *inter partes* review pursuant to the District Court’s modified Protective Order, and the minimal impact expungement would have on the public’s understanding of the file history of this *inter partes* review, weigh in favor of granting this motion of expungement.

If the Board is not inclined to grant this Motion, the Parties respectfully request a conference call with the Board to discuss the issues raised in this Motion before any information becomes irreversibly public. Or, in the alternative, if the Board deems expungement of any of the requested confidential information would harm the public’s interest in maintaining a complete and understandable file history, the Parties request that any such information remain under seal.

## **II. ARGUMENT IN SUPPORT OF THE RELIEF REQUESTED**

Parties may submit evidence consisting of confidential information in Patent Trial and Appeal Board proceedings under a protective order, and at the end of the proceeding “[c]onfidential information that is subject to a protective order ordinarily would become public 45 days after final judgment in a trial.” *See* Patent Trial and Appeal Consolidated Trial Practice Guide (November 2019) (“CTPG”) at 21-22.

Public policy supports public access to the information submitted in *inter partes* review proceedings, but “confidential information” is protected from disclosure. 35 U.S.C. § 316(a)(7) (“The Director shall prescribe regulations ... providing for protective orders governing the exchange and submission of confidential information.”). Accordingly, “[a] party seeking to maintain the confidentiality of information...may file a motion to expunge the information from the record prior to the information becoming public.” CTPG at 22; and *see* 37 C.F.R. § 42.56. A decision to expunge should balance “the needs of the parties to submit confidential information with the public interest in maintaining a complete and understandable file history.” CTPG at 22.

#### **A. Procedural History**

This *inter partes* review includes confidential information exchanged among the Parties pursuant to a protective order, or submitted as evidence under a protective order. On October 14, 2019, the parties filed a Joint Stipulation for Entry of a Stipulated Protective Order (“Stipulated PO”) along with a proposed stipulated protective order. Paper 40 (stipulation); Ex. 2034 (proposed Stipulated PO). The Stipulated PO modifies the Board’s default protective order to account for particular aspects of the District Court’s Modified Protective Order governing the Parties, and

the use of confidential information from the District Court litigation in this *inter partes* review. Paper 40; and *see* Ex. 2035 (redline of default protective order).

Patent Owner filed a Motion for Additional Discovery in this *inter partes* review on October 23, 2019 (Paper 43), and in the Related IPRs. In response, Petitioner filed an Opposition (“Opp.”) on October 30, 2019 (Paper 45) in this *inter partes* review, and in the Related IPRs. Petitioner’s Opposition included three exhibits: a Declaration of Craig S. Miller (Ex. 1047; “Miller Dec.”) referring at Paragraph 4 to an exhibit of Nautilus product sales information (Ex. 1049; “Nautilus Sales”) and a declaration of Kyle L. Elliott (Ex. 1050; “Elliott Dec.”). These three exhibits were submitted in the proceeding pursuant to the Stipulated PO. However, Petitioner’s Opposition filed in this *inter partes* review was inadvertently filed without updating the exhibit numbers from the exhibit numbers used in the Related IPRs. The three exhibits filed in this *inter partes* review correspond to the filings in the Related IPRs as shown below:

<b>Document</b>	<b>IPR2019-00497</b>	<b>IPR2019-00500</b>	<b>IPR2019-00514</b>
Opp.	Paper 49	Paper 49	Paper 45
Miller Dec.	Ex. 1033	Ex. 1033	Ex. 1047 (cited as Ex. 1033 in Paper 45)
Nautilus Sales	Ex. 1034	Ex. 1034	Ex. 1049 (cited as Ex. 1034 in Paper 45)
Elliott Dec.	Ex. 1035	Ex. 1035	Ex. 1050 (cited as Ex. 1035 in Paper 45)

Exhibit 1047 was filed both under seal and as a redacted version, and Exhibit 1049 was filed under seal only.

On October 30, 2019, Patent Owner filed an Unopposed Motion to Seal Exhibits 2076, 2078, 2084, 2040 (which refers to Exhibits 2076 and 2078), 2055 (which refers to Exhibit 2078), and Patent Owner's Response (under seal) (Paper 47). Paper 49. A redacted version of Exhibits 2040, and 2055, and Paper 47 were filed. Exhibits 2076, 2078, 2084 were filed under seal only.

On December 13, 2019, Petitioner filed the transcript of the December 6, 2019 deposition of George Edwards (Exhibit 1056) as a redacted version and under seal pursuant to 37 CFR §42.53(f)(7).

On January 6, 2020, the Board issued an Order, denying Patent Owner's second motion for additional discovery (Paper 43). Paper 67. The Order refers "only to documents filed in IPR2019-00497." *Id.* at 2. The Order did not directly cite to Exhibits 1033-1035 (filed as Exhibits 1047, and 1049-1050 in this *inter partes* review).

On January 29, 2020, Petitioner filed an Unopposed Motion to Seal Exhibits 1066, 1067, 1068, 1069, 1071, 1072, 1075, 1077, and 1078. Paper 68. Redacted versions of Exhibits 1066, 1067, 1068, 1069, 1071, and 1072 were filed. Exhibits 1075, 1077, and 1078 were filed under seal only.

On May 6, 2020, Patent Owner filed an unopposed Motion to Seal Supplemental Exhibit 2055 (which refers to Exhibit 2078). Paper 86. A redacted version of Supplemental Exhibit 2055 was filed.

On August 4, 2020, the Board issued a Final Written Decision ("FWD") conditionally granting the Parties' Motions to Seal as to the exhibits referred to therein, and the unopposed motion for entry of a Protective Order (Exhibit 2034) with required modifications. Paper 94 at 58-60. On August 11, 2020, the Parties submitted a Revised Joint Stipulated Protective Order addressing the required modifications. Paper 95.

On September 8, 2020, the Board issued an order with respect to this proceeding denying the Parties request for leave to file a motion to expunge, without prejudice, maintaining the confidentiality of the documents filed under seal until further notice, and inviting the Parties to file “a motion to preserve the record pending appeal.” Paper 96 at 2-3. On September 15, 2020, the Parties filed a Joint Motion to Preserve the Record Pending Appeal. Paper 97.

An appeal of IPR2019-00514 was filed, and a Decision issued July 25, 2022. *American National Manufacturing Inc., v. Sleep Number Corporation*, No. 2021-1030, 2021-1032, 2022 WL 2914747 (Fed. Cir. July 25, 2022). No requests for rehearing were filed, and a Mandate issued September 15, 2022. *American National Manufacturing Inc., v. Sleep Number Corporation*, No. 2021-1030, 2021-1032, ECF No. 71 (Fed. Cir. Sep. 15, 2022).

On September 28, 2022, the Parties requested a conference call with the Board seeking authorization to file a joint motion to expunge confidential information from the record in IPR2019-00514. On October 11, 2022, the Board granted the Parties authorization to file this Motion.

**B. Good Cause Exists for Expungement of Confidential Information Filed as Evidence in this Proceeding**

Good cause exists for expungement of the Identified Documents filed in this *inter partes* review because they contain the Parties’ confidential information and



the information is not necessary for understanding the record. Good cause is shown by demonstrating that “any information sought to be expunged constitutes confidential information, and that Petitioner’s interest in expunging it outweighs the public’s interest in maintaining a complete and understandable history of this *inter partes* review.” *Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*, IPR2013-00453, Paper 97 at 2 (PTAB Apr. 15, 2015).

The Board found Identified Documents contain confidential information, and good cause was shown supporting a conditional grant of the Parties’ unopposed motions to seal pursuant to the filing of an amended Stipulated Protective Order. Paper 94 at 58-60 (referencing Paper 49 (Patent Owner’s Unopposed Motions to Seal; and Paper 68 (Petitioner’s Unopposed Motion to Seal)). Expungement of the Identified Documents is warranted.

**1. Exhibit 1047 (cited as Exhibit 1033 in Paper 45)**

The unredacted version of Exhibit 1047 should be expunged because the unredacted information constitutes non-public confidential financial and sales information, the Board does not rely on the unredacted information, and the unredacted information is not required for a complete understanding of the record.

Exhibit 1047 is a declaration of Craig Miller. In support of its Opposition to Patent Owner’s Motion for Additional Discovery, Petitioner filed an unredacted

version of Exhibit 1047 under the designation of Highly Confidential – Outside Counsel Only, and a redacted version. Paper 45. The redacted information in ¶4 of the Miller declaration refers to unit sales of a product in the context of Mr. Miller’s consulting agreement with Sleep Number. Ex. 1047 ¶4. Petitioner referred to ¶4 in its motion when addressing the focus of Mr. Miller’s consulting work for Patent Owner. Paper 45 at 4. The Board’s January 6, 2020 Order denying Patent Owner’s additional discovery does not cite to, or otherwise rely on the redacted information in ¶4 of Exhibit 1047, or page 4 of Petitioner’s opposition citing thereto. *See* Paper 67. Petitioner’s interest in protecting this sensitive commercial information outweighs the public’s interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information is confidential information not relied on by the Board, and redacted Exhibit 1047 shall remain part of the file history, unredacted Exhibit 1047 should be expunged from the file history of this *inter partes* review.

**2. Exhibit 1049 (cited as Exhibit 1034 in Exhibit 1047)**

Exhibit 1049 filed under seal should be expunged because the information constitutes confidential information, the Board does not rely on the information, and the information is not required for a complete understanding of the record.

Exhibit 1049 is a business record of Petitioner sales of Nautilus products. In support of its Opposition to Patent Owner's Motion for Additional Discovery, Petitioner filed Exhibit 1049 under seal only, with the designation of Highly Confidential – Outside Counsel Only. Paper 45. The redacted information in ¶4 of the Miller declaration refers to unit sales of a product (Ex. 1049) in the context of Mr. Miller's consulting agreement with Sleep Number. Ex. 1047 ¶4. Petitioner referred to ¶4 in its motion when addressing the focus of Mr. Miller's consulting work for Patent Owner. Paper 45 at 4.

The Board's January 6, 2020 Order denying Patent Owner's additional discovery does not cite to, or otherwise rely on the redacted information in ¶4 of Exhibit 1047, Exhibit 1049, or page 4 of Petitioner's opposition citing thereto. *See* Paper 67. Thus the Board's Order does not rely on this confidential information, and the information is not required for a complete understanding of the record.

Petitioner's interest in protecting this sensitive commercial information outweighs the public's interest in maintaining the information in the file history of this *inter partes* review. Because the information in Exhibit 1049 is confidential information not relied on by the Board, Exhibit 1049 should be expunged from the file history of this *inter partes* review.

### **3. Exhibit 1056**

The unredacted version of Exhibit 1056 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the redacted information, and the redacted information is not required for a complete understanding of the record.

Exhibit 1056 is the transcript of the December 6, 2019 deposition of Patent Owner's expert George Edwards. Petitioner filed the transcript pursuant to 37 CFR §42.53(f)(7). On December 13, 2019, Petitioner filed an unredacted version of Exhibit 1056 under seal, with the designation of Attorneys Eyes Only, and a redacted version. The redacted information on pages 419-442 of the transcript refers to a discussion of the Parties' source code. Ex. 1056, pp. 30-36. Petitioner does not refer to Exhibit 1056. The FWD does not cite Ex. 1056.

The Parties' interest in protecting this sensitive commercial information outweighs the public's interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information is confidential information not relied on by the Board, and redacted Exhibit 1056 shall remain part of the file history, unredacted Exhibit 1056 should be expunged from the file history of this *inter partes* review.

**4. Exhibit 1066**

The unredacted version of Exhibit 1066 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the unredacted information, and the unredacted information is not required for a complete understanding of the record.

Exhibit 1066 is the transcript of the January 8, 2020 deposition of Patent Owner's declarant Dr. William Messner. Petitioner's Unopposed Motion to Seal states Dr. Messner is asked questions regarding an exhibit that has been designated by Patent Owner as Highly-Confidential – Outside Counsel Only in the District Court Proceeding and the USITC Proceeding, thus Petitioner designated the testimony as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 68 at 2 and 5. Petitioner filed redacted and unredacted versions of Exhibit 1066. The redacted testimony appears on pages 105-113, and 193-194 of the transcript. Ex. 1066, pp. 28-30, and 50. The Board has determined the redacted information in Exhibit 1066 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon the confidential portions of Exhibit 1066. The Board cited to Exhibit 1066 in the FWD (Paper 94 at 28 and 36) when referring to

Patent Owner's Sur-Reply (Paper 78), but none of the citations are to the confidential information. Paper 94 at 28, 36 (citing Paper 78 at 3, 5-6, and 13).

Patent Owner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information is confidential information not relied on by the Board, and redacted Exhibit 1066 shall remain part of the file history, unredacted Exhibit 1066 should be expunged from the file history of this *inter partes* review.

#### **5. Exhibit 1067**

The unredacted version of Exhibit 1067 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the unredacted information, and the unredacted information is not required for a complete understanding of the record.

Exhibit 1067 is the transcript of the January 8, 2020 deposition of Patent Owner's declarant Carl Degen. Petitioner's Unopposed Motion to Seal states Mr. Degen is asked questions regarding portions of his declaration that have already been the subject of a motion to seal as they reference highly confidential non-public financial information of Petitioner, thus Petitioner designated the testimony as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 68 at 2

and 6. Petitioner filed redacted and unredacted versions of Exhibit 1067. The redacted testimony appears on pages 110, and 142-147 of the transcript. Ex. 1067 at 29, and 37-38. The Board has determined the redacted information in Exhibit 1067 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60. The FWD does not rely on Exhibit 1067.

Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information is confidential information not relied on by the Board, and redacted Exhibit 1067 shall remain part of the file history, unredacted Exhibit 1067 should be expunged from the file history of this *inter partes* review.

## **6. Exhibit 1068**

The unredacted version of Exhibit 1068 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the unredacted information, and the unredacted information is not required for a complete understanding of the record.

Exhibit 1068 is the transcript of the January 9, 2020 deposition of Patent Owner's declarant Paul Mahoney. Petitioner's Unopposed Motion to Seal states Mr. Mahoney is asked questions regarding an exhibit that Patent Owner designated as

Highly Confidential – Outside Counsel Only under the District Court Protective Order, thus Petitioner designated the testimony as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 68 at 2 and 6. Petitioner filed redacted and unredacted versions of Exhibit 1068. The redacted testimony appears on pages 145-148 of the transcript. Ex. 1068 at 38. The Board has determined the redacted information in Exhibit 1068 is confidential information and that good cause was shown to grant Petitioner’s Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon the confidential portions of Exhibit 1068. The Board cited to this exhibit in the FWD in reference to Patent Owner’s Sur-reply (Paper 78) (Paper 94 at 28), and Patent Owner’s Motion to Exclude (Paper 82) (Paper 94 at 57), but none of the citations are to the confidential information.

Patent Owner’s interest in protecting this sensitive information outweighs the public’s interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information is confidential information not relied on by the Board, and redacted Exhibit 1068 shall remain part of the file history, unredacted Exhibit 1068 should be expunged from the file history of this *inter partes* review.



**7. Exhibit 1069**

The unredacted version of Exhibit 1069 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the unredacted information, and the unredacted information is not required for a complete understanding of the record.

Exhibit 1069 is a Declaration of Dr. Robert Giachetti in support of Petitioner's Reply. Petitioner's Unopposed Motion to Seal states this declaration analyzes and references an exhibit designed as Highly-Confidential – Outside Counsel Only in the District Court Proceeding and the USITC Proceeding, thus Petitioner designated the testimony as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 68 at 3. Petitioner filed redacted and unredacted versions of Exhibit 1069. The redacted testimony appears in paragraphs 5, 13, and 25-26 of the declaration. Ex. 1069, pp. 4, 7, and 13-14. The Board has determined the redacted information in Exhibit 1066 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon the confidential portions of Exhibit 1069. The Board cited to Exhibit 1069 in the FWD (Paper 94 at 28) when addressing the construction of the term “substantially fluidly sealed,” but none of the citations are to the confidential information. Paper 94 at 28 (citing Ex. 1069 ¶19).

The Parties' interest in protecting this sensitive information outweighs the public's interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information is confidential information not relied on by the Board, and redacted Exhibit 1069 shall remain part of the file history, unredacted Exhibit 1069 should be expunged from the file history of this *inter partes* review.

#### **8. Exhibit 1071**

The unredacted version of Exhibit 1071 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the unredacted information, and the unredacted information is not required for a complete understanding of the record.

Exhibit 1071 is a Declaration of Matthew Lynde in support of Petitioner's Reply. Petitioner's Unopposed Motion to Seal states this declaration cites to highly confidential non-public financial information of Petitioner, and portions of Mr. Degen's declaration and deposition where Petitioner's financial information is discussed. Thus, Petitioner designated the testimony as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 68 at 3 and 6. Petitioner filed redacted and unredacted versions of Exhibit 1071. The redacted testimony appears in paragraphs 36, 41, 49, 50, 51, 53, and 60, and footnotes 24, 27, and 32 of the

declaration. Ex. 1071, pp. 23, 29, 35-37, 39, 42, 44, and 46. The Board has determined the redacted information in Exhibit 1071 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon the confidential portions of Exhibit 1071. Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information is confidential information not relied on by the Board, and redacted Exhibit 1071 shall remain part of the file history, unredacted Exhibit 1071 should be expunged from the file history of this *inter partes* review.

#### **9. Exhibit 1072**

The unredacted version of Exhibit 1072 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the unredacted information, and the unredacted information is not required for a complete understanding of the record.

Exhibit 1072 is a Declaration of Craig Miller, Jr. in support of Petitioner's Reply. Petitioner's Unopposed Motion to Seal states this declaration cites to highly confidential non-public financial information of Petitioner, and portions of Mr.

Degen's declaration and deposition where Petitioner's financial information is discussed. Thus, Petitioner designated the testimony as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 68 at 3 and 6. Petitioner filed redacted and unredacted versions of Exhibit 1072. The redacted testimony appears in paragraphs 5, 12, 14, and 16-17 of the declaration. Ex. 1072, pp. 4-5, 7, and 8-11. The Board has determined the redacted information in Exhibit 1072 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon the confidential portions of Exhibit 1072. Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information is confidential information not relied on by the Board, and redacted Exhibit 1072 shall remain part of the file history, unredacted Exhibit 1072 should be expunged from the file history of this *inter partes* review.

#### **10. Exhibit 1075**

Exhibit 1075 filed under seal should be expunged because the information constitutes confidential information, the Board does not rely on the information, and the information is not required for a complete understanding of the record.

Exhibit 1075 is advertising expenditures of Dires, LLC. Exhibit 1075 was cited in the Miller declaration in paragraphs 12, and 17, and the information from Exhibit 1075 was redacted. Ex. 1072, pp. 7, and 10-11. Petitioner's Unopposed Motion to Seal states the entire exhibit sets forth Dires's non-public financial expenditures related to advertising costs. Thus, Petitioner designated the testimony as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 68 at 3 and 7. Petitioner filed Exhibit 1075 under seal only. The Board has determined the information in Exhibit 1075 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon Exhibit 1075. Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unsealed version in the file history of this *inter partes* review. Because the information in Exhibit 1075 is confidential information not relied on by the Board, Exhibit 1075 should be expunged from the file history of this *inter partes* review.

#### **11. Exhibit 1077**

Exhibit 1077 filed under seal should be expunged because the information constitutes confidential information, the Board does not rely on the information, and the information is not required for a complete understanding of the record.

Exhibit 1077 is a deposition transcript from USITC Investigation No. 337-TA-971 involving Petitioner and Patent Owner. Petitioner's Unopposed Motion to Seal states the entire exhibit was deemed Confidential Business Information by agreement of the Parties. Thus, the Parties designated the testimony as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 68 at 3-4, and 7. Petitioner filed Exhibit 1077 under seal only. The Board has determined the information in Exhibit 1077 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon Exhibit 1077. The Parties' interest in protecting this sensitive information outweighs the public's interest in maintaining the unsealed version in the file history of this *inter partes* review. Because the information in Exhibit 1077 is confidential information not relied on by the Board, Exhibit 1077 should be expunged from the file history of this *inter partes* review.

## **12. Exhibit 1078**

Exhibit 1078 filed under seal should be expunged because the information constitutes confidential information, the Board does not rely on the information, and the information is not required for a complete understanding of the record.

Exhibit 1078 is an exhibit to the deposition transcript from USITC Investigation No. 337-TA-971 involving Petitioner and Patent Owner. Petitioner's

Unopposed Motion to Seal states the entire exhibit was deemed Confidential Business Information by agreement of the Parties. Thus, the Parties designated the testimony as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 68 at 4 and 7. Petitioner filed Exhibit 1078 under seal only. The Board has determined the information in Exhibit 1078 is confidential information and that good cause was shown to grant Petitioner’s Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon Exhibit 1078. The Parties’ interest in protecting this sensitive information outweighs the public’s interest in maintaining the unsealed version in the file history of this *inter partes* review. Because the information in Exhibit 1078 is confidential information not relied on by the Board, Exhibit 1078 should be expunged from the file history of this *inter partes* review.

### **13. Exhibit 2040**

The unredacted version of Exhibit 2040 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the redacted information, and the redacted information is not required for a complete understanding of the record.

Exhibit 2040 is a declaration of Dr. Messner in support of Patent Owner’s Response. Patent Owner’s Unopposed Motion to Seal states this declaration cites to information Petitioner produced and designated as Highly Confidential – Outside

Counsel Only in the underlying District Court Proceeding, specifically Exhibits 2076 and 2084, and thus designated as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 49 at 1 and 4. Patent Owner filed redacted and unredacted versions of Exhibit 2040. The redacted testimony appears in paragraphs 33, 214, and 216 of the declaration. Ex. 2040, pp. 17, 91, and 93. The redacted information in ¶33 cites to information in Exhibit 2084, and Exhibit 2084 was filed under seal. The Response cites to ¶33 as support for background statements regarding the litigation history. Paper 47 at 2. The redacted information in ¶214 cites to information in Exhibit 2076, Petitioner’s non-public confidential internal documents obtained pursuant to the District Court Protective Order, and filed under seal. The Response cites to ¶214 in support of Patent Owner’s arguments regarding industry praise. Paper 47 at 60. The redacted information in ¶216 cites to information in Exhibit 2084. The Response cites to ¶216 in support of Patent Owner’s arguments regarding copying. Paper 47 at 63. The Board has determined the redacted information in Exhibit 2040 is confidential information and that good cause was shown to grant Patent Owner’s Motion to Seal. Paper 94 at 60.

The FWD does not rely upon the confidential portions of Exhibit 2040. Petitioner’s interest in protecting this sensitive information outweighs the public’s interest in maintaining the unredacted version in the file history of this *inter partes*



review. Because the redacted information in Exhibit 2040 is confidential information not relied on by the Board, and redacted Exhibit 2040 shall remain part of the file history, unredacted Exhibit 2040 should be expunged from the file history of this *inter partes* review.

#### **14. Exhibit 2055**

The unredacted version of Exhibit 2055 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the redacted information, and the redacted information is not required for a complete understanding of the record.

Exhibit 2055 is a declaration of Carl Degen in support of Patent Owner's Response. Patent Owner's Unopposed Motion to Seal states this declaration cites to information Petitioner produced in this *inter partes* review and designated as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 49 at 1-2, and 4. Patent Owner filed redacted and unredacted versions of Exhibit 2055. The redacted testimony appears in paragraphs 20, and 22-31, and footnotes 9-11 of the declaration. Ex. 2055, pp. 11-19. The redacted information in the declaration cites to information in Exhibit 2078, filed under seal. The Board has determined the redacted information in Exhibit 2055 is confidential information and that good cause was shown to grant Patent Owner's Motion to Seal. Paper 94 at 60.

The Response cites to Exhibit 2055 and Exhibit 2078 in support of Patent Owner's arguments regarding commercial success. Paper 47 at 66. The FWD does not rely upon the confidential portions of Exhibit 2055. Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information in Exhibit 2055 is confidential information not relied on by the Board, and redacted Exhibit 2055 shall remain part of the file history, unredacted Exhibit 2055 should be expunged from the file history of this *inter partes* review.

**15. Exhibit 2055 Supp.**

The unredacted version of Supplemental Exhibit 2055 on May 6, 2020 should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the redacted information, and the redacted information is not required for a complete understanding of the record.

Supplemental Exhibit 2055 is a declaration of Carl Degen in support of Patent Owner's Response. Supplemental Exhibit 2055 was filed with Patent Owner's Opposition to Petitioner's Motion to Exclude. Paper 85. Patent Owner's Motion to Seal Supplemental Exhibit 2055 states that the supplemental declaration cites to information Petitioner produced in this *inter partes* review and designated as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 86 at 1-2.

Patent Owner filed redacted and unredacted versions of Supplemental Exhibit 2055. The redacted testimony appears in paragraphs 20, 22-30, and footnotes 11-15 of the supplemental declaration. Supp. Ex. 2055, pp. 18-32. The redacted information in the supplemental declaration cites to information in Exhibit 2078, filed under seal, and pursuant to the same grounds as original Exhibit 2055. The Board has determined the redacted information in Supplemental Exhibit 2055 is confidential information and that good cause was shown to grant Patent Owner's Motion to Seal. Paper 94 at 60.

The FWD does not rely upon the confidential portions of Supplemental Exhibit 2055. Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the redacted information in Supplemental Exhibit 2055 is confidential information not relied on by the Board, and redacted Supplemental Exhibit 2055 shall remain part of the file history, unredacted Supplemental Exhibit 2055 should be expunged from the file history of this *inter partes* review.

#### **16. Exhibit 2076**

Exhibit 2076 filed under seal should be expunged because the information constitutes confidential information, the Board does not rely on the information, and the information is not required for a complete understanding of the record.

Exhibit 2076 is an exhibit to the declaration of Dr. William Messner (Ex. 2040), and discloses Petitioner's confidential product feature and product planning information as well as comparisons drawn by and for the customer, and was produced in the District Court Proceeding pursuant to the District Court Protective Order with the designation of Highly-Confidential – Outside Counsel Only. Paper 49 at 1 and 3. Patent Owner filed Exhibit 2076 under seal only. The Board has determined the information in Exhibit 2076 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60.

The FWD cites to a page of Patent Owner's Response that includes Exhibit 2076 in a long string cite, but otherwise does not specifically rely upon Exhibit 1078. Paper 94 at 27. Exhibit 2040 refers to Exhibit 2076 in paragraphs 214 and 215, but the FWD does not cite to these portions of Exhibit 2040.

Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unsealed version in the file history of this *inter partes* review. Because the information in Exhibit 2076 is confidential information not relied on by the Board, Exhibit 2076 should be expunged from the file history of this *inter partes* review.

**17. Exhibit 2078**

Exhibit 2078 filed under seal should be expunged because the information constitutes confidential information, the Board does not rely on the information, and the information is not required for a complete understanding of the record.

Exhibit 2078 is an exhibit to the declaration of Carl Degen (Ex. 2055). Patent Owner's Unopposed Motion to Seal states this exhibit discloses confidential sales and other financial information of Petitioner, and was produced in this *inter partes* review with the designation of Highly-Confidential – Outside Counsel Only under the Stipulated PO. Paper 49 at 1 and 3. Patent Owner filed Exhibit 2078 under seal only. The Board has determined the information in Exhibit 2078 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon Exhibit 2078. Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unsealed version in the file history of this *inter partes* review. Because the information in Exhibit 2078 is confidential information not relied on by the Board, Exhibit 2078 should be expunged from the file history of this *inter partes* review.

**18. Exhibit 2084**

Exhibit 2084 filed under seal should be expunged because the information constitutes confidential information, the Board does not rely on the information, and the information is not required for a complete understanding of the record.

Exhibit 2084 is an exhibit to the declaration of Dr. William Messner (Ex. 2040). Patent Owner's Unopposed Motion to Seal states this exhibit discloses confidential product features and product planning information as well as comparisons drawn by and for customer, and was produced in the District Court Proceeding pursuant to the District Court Protective Order with the designation of Highly-Confidential – Outside Counsel Only. Paper 49 at 1 and 4. Patent Owner filed Exhibit 2084 under seal only. The Board has determined the information in Exhibit 2084 is confidential information and that good cause was shown to grant Petitioner's Unopposed Motion to Seal. Paper 94 at 60.

The FWD does not rely upon Exhibit 2084. Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unsealed version in the file history of this *inter partes* review. Because the information in Exhibit 2084 is confidential information not relied on by the Board, Exhibit 2084 should be expunged from the file history of this *inter partes* review.

### **19. Paper 47**

The unredacted version of Patent Owner's Response (Paper 47) should be expunged because the unredacted information constitutes confidential information, the Board does not rely on the redacted information, and the redacted information is not required for a complete understanding of the record.

Paper 47 is an unredacted version of Patent Owner's Response. Patent Owner's Unopposed Motion to Seal states this paper quotes or refers to the confidential information contained in Exhibits 2040, 2055, 2076, 2078, and 2084, and designated as Highly Confidential – Outside Counsel Only under the Stipulated PO. Paper 49 at 3-4. Patent Owner filed a redacted (Paper 46) and an unredacted version (Paper 47) of the Response. The redacted testimony appears on pages 60 and 63 of Paper 46. The Board has determined the unredacted information in Paper 47 is confidential information and that good cause was shown to grant Patent Owner's Motion to Seal. Paper 94 at 60.

The Response cites to redacted information in support for Patent Owner's arguments regarding industry praise and copying. Paper 46 at 60 and 63. The FWD does not rely upon the confidential portions of the Response. Petitioner's interest in protecting this sensitive information outweighs the public's interest in maintaining the unredacted version in the file history of this *inter partes* review. Because the

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redacted information in Paper 46 is confidential information not relied on by the Board, and redacted Paper 46 shall remain part of the file history, unredacted Paper 47 should be expunged from the file history of this *inter partes* review.



### III. CONCLUSION

For the reasons set forth above, Petitioner and Patent Owner respectfully request that this Joint Motion to Expunge Confidential Information be granted, and that the Board expunge the Identified Documents from the file history of IPR2019-00514.

Date: October 20, 2022

Respectfully Submitted,  
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**CERTIFICATE OF SERVICE**

Pursuant to 37 C.F.R. § 42.6(e), the undersigned hereby certifies that a copy of the foregoing JOINT MOTION TO EXPUNGE CONFIDENTIAL INFORMATION UNDER 37 C.F.R. § 42.56 is served in its entirety on October 20, 2022, by electronic mail, as authorized by Patent Owner's Updated Mandatory Notices, directed to the attorneys of record for Patent Owner at the following correspondence address of record:

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