

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,
Patent Owner.

Case No. IPR2019-00514
Patent No. 5,904,172

**REPLY IN SUPPORT OF
PATENT OWNER'S MOTION TO EXCLUDE
PETITIONER'S EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(c)**

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INTRODUCTION

Patent Owner (“PO”) files this Reply in support of its Motion to Exclude Petitioner’s Evidence Pursuant to 37 C.F.R. § 42.64(c) (Paper 82) (“MTE”) and in response to Petitioner’s (“ANM”) Opposition (Paper 88) (“Opp.”).¹

ARGUMENT

I. Certain Giachetti Testimony Should Be Excluded.

PO’s motion as to portions of Giachetti’s testimony that were not cited in the Petition, (*see* Paper 2), and for which ANM has made no attempt to remedy or rely on the evidence, is proper. Such portions are irrelevant and inadmissible under the rules of evidence. Indeed, ANM admits it does not cite to the paragraphs in Giachetti’s declaration at issue, conceding they were only provided for “helpful background and context” but without even explaining how so. (Opp. at 1.) This violates the rules and, thus, the Board must exclude. 37 C.F.R. § 42.104(b)(5)

¹ ANM previously served supplemental declarations of Giachetti and Lynde, which failed to cure PO’s objections, but did not file them with its opposition. Accordingly, those declarations are not in evidence and cannot be considered by the Board. *Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, IPR2013-00132, Paper 42 at 46 n.10 (PTAB July 24, 2014) (“The revised declaration is not in the record . . . because ACS did not file a copy with its opposition.”).

(exclusion of evidence not specifically identified); *Actifio, Inc. v. Delphix Corp.*, IPR2015-00108, Paper 56 at 57 (PTAB Apr. 29, 2016) (excluding exhibits not relied upon). Additionally, ANM’s lack of a single citation to these portions of Giachetti’s testimony demonstrates that this evidence lacks relevance to this proceeding and is unfairly prejudicial. *See* FRE 401-403. Thus, such testimony should be excluded.

II. PO’s Objections to the Miller Declaration Have Not Been Cured.

Miller lacks personal knowledge to support his opinions. The fact that “PO knows Mr. Miller personally” does not imbue Miller with personal knowledge of PO’s alleged intentions. Nor does his position as President of ANM imbue him with personal knowledge of highly specific information regarding sourcing, mechanical components, source code, sales, advertising, or the like, particularly considering he was unable to provide details on such topics during his deposition. (MTE at 9-10.) Miller’s attempt to offer unqualified expert opinion under the guise of lay witness testimony does not save his testimony either. (Ex. 1080 ¶¶3-18.)² ANM cannot avoid the requirements of FRE 702 by characterizing Miller’s lay opinions as “observations.” (Opp. at 6.)

² In its Opposition, ANM cites the Supplemental Miller Declaration as Ex. 1079. The correct citation as filed, however, is Ex. 1080. Accordingly, PO cites the Supplemental Miller Declaration herein as Ex. 1080.

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