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

PETITIONER'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE EVIDENCE

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Petitioner presents its Reply in Support of its Motion to Exclude Evidence. None of Petitioner's objections to PO's evidence have been cured by supplemental declarations from PO's witnesses.

I. Exhibit 2041 – Declaration Dr. John Abraham.

In litigation "an expert may consider (he may have a financial incentive to consider) looser standards to apply" than in the expert's scientific work. *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). When that happens, the expert has failed to exercise the required degree of care. *Id.*

Dr. Abraham did not exercise the required degree of care in this litigation as he did not test, operate, use or fully assemble a pump or air mattress. By contrast, in other engagements he fully examines the product. Opposition p. 3. PO essentially argues that Dr. Abraham's work in the past, with the same type of product, allowed him to be less diligent here. Diligence in investigation is directly related to reliability of an opinion. Dr. Abraham's work was deficient.

II. Exhibit 2054 – Declaration of George Edwards.

Dr. Edwards said that understanding the design and function of Petitioner's and PO's products "requires an understanding of the software". Supp. Ex. 2054 ¶ 31. But Dr. Edwards does not communicate, in his declaration or in his deposition, what he says is required. He opines that ANM source code practices various claims

based solely on PO's attorney-drafted infringement contentions. *See, e.g.*, Ex. 1038 263:10-269:9. The infringement contentions, however, are just a summary of an alleged inspection and they were prepared by PO's counsel. A summary does not meet the requirement of 37 C.F.R. 42.65(a) regarding disclosure of the data on which an opinion is based. Lawyer-prepared documents "are not, by definition, of a type reasonably relied on by experts in the particular field". *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143-44 (4th Cir. 1994); *see, Sommerfield v. City of Chicago*, 254 F.R.D. 317, 321-22 (N.D. Ill. 2008) (8th Cir. 1994). Dr. Edwards' declaration should be excluded.

III. Exhibit 2055 – Declaration of Carl Degen.

Mr. Degen's analysis fails the basic test of "reliability" stated in F.R.E. 702 for admissible expert testimony. Mr. Degen acknowledged various factors (not the patents) that could be the cause of Petitioner's unit sales and he acknowledged that a regression analysis might "sort out" the cause. MTE p. 8-9. Nevertheless, Mr. Degen performed none of these analyses. Mr. Degen and PO default on proof of the necessary element of causation to an argument of commercial success.

PO characterizes Mr. Miller's statement regarding the underlying data as an "unsupported assertion". Opposition p. 6. This is false. PO deposed Mr. Miller and questioned him regarding the data. Ex. 2081/2097 24:4-35:5. If Mr. Miller's testimony was "unsupported", PO would have sought relief from the Board because

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