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Paper 11
Entered: August 5, 2019

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 COMPORATION,
Patent Owner.

IPR2019-00514
Patent 5,904,172

Before SCOTT A. DANIELS, FRANCES L. IPPOLITO, and ALYSSA A. FINAMORE, *Administrative Patent Judges.*

FINAMORE, *Administrative Patent Judge.*

SCHEDULING ORDER
37 C.F.R. § 42.5

A. GENERAL INSTRUCTIONS

1. Request for an Initial Conference Call

An initial conference call is not scheduled in any of these proceedings. A party may request an initial conference call within twenty-five (25) days after the institution of trial if there is a need to discuss proposed changes to this Order or proposed motions that have not been authorized in this Order or other prior Order or Notice. *See Office Patent Trial Practice Guide*, 77 Fed. Reg. 48756, 48765–66 (Aug. 14, 2012) (available at https://go.usa.gov/xU7GK) ("Practice Guide") (guidance in preparing for the initial conference call).

A party requesting an initial conference call shall: (a) identify the requested relief, e.g., proposed changes to the schedule, proposed motions; and (b) propose two or more dates and times when both parties are available for the call. When an initial conference call is scheduled in response to a request, the parties should be prepared to discuss any concerns relating to the schedule in the proceeding.

2. Protective Order

No protective order shall apply to any of these proceedings unless the parties file one and the Board approves it. The Board encourages the parties to adopt the Board's Default Protective Order if they conclude that a protective order is necessary. *See* Practice Guide, 77 Fed. Reg. at 48771 (App. B) (the "Default Protective Order"). If the parties choose to propose a protective order deviating from the Default Protective Order, they must explain why good cause exists to deviate from the Default Protective Order and must file as exhibits the proposed protective order and a marked-up

comparison showing the differences between the proposed protective order and the Default Protective Order.

If either party files a motion to seal before entry of a protective order, the motion to seal should include as an exhibit a proposed protective order that has been discussed with the opposing party and, preferably, be jointly proposed. If the protective order is not jointly proposed, the proponent of the order should identify where the parties differ in the proposed language of the order.

The Board has a strong interest in the public availability of trial proceedings. Redactions to documents filed in any of these proceedings should be limited to the minimum amount necessary to protect confidential information, and the thrust of the underlying argument or evidence must be clearly discernible from the redacted versions. We also advise the parties that information subject to a protective order may become public if identified in a final written decision in the proceeding, and that a motion to expunge the information will not necessarily prevail over the public interest in maintaining a complete and understandable file history. *See* Practice Guide, 77 Fed. Reg. at 48761.

3. Resolution of Disputes

The Board encourages parties to resolve disputes, including disputes relating to discovery, on their own and in accordance with the precepts of securing a just, speedy, and inexpensive resolution, as set forth in 37 C.F.R. § 42.1(b). To the extent that a dispute arises between the parties, the parties shall meet and confer to resolve such a dispute before contacting the Board. If attempts to resolve the dispute fail, a party may request a conference call

with the Board and the other party in order to seek authorization to move for relief.

In any request for a conference call with the Board to resolve a dispute, the requesting party shall: (a) certify that it has conferred with the other party in an effort to resolve the dispute; (b) identify with specificity any issue for which agreement has not been reached; (c) identify the precise relief to be sought; and (d) propose two or more specific dates and times at which both parties are available for the conference call.

4. *Testimony*

The parties are reminded that the Testimony Guidelines appended to the Trial Practice Guide as Appendix D apply to these proceedings. The Board may impose an appropriate sanction for failure to adhere to the Testimony Guidelines. 37 C.F.R. § 42.12. For example, reasonable expenses and attorneys' fees incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

Whenever a party submits a deposition transcript as an exhibit, the submitting party shall file the full transcript of the deposition rather than excerpts of only those portions being cited. After a deposition transcript has been submitted as an exhibit, any party who subsequently cites to portions of the transcript shall cite to the filed exhibit rather than submitting another copy of the same transcript.

5. *Cross-Examination*

Except as the parties might otherwise agree, for each due date:

Cross-examination ordinarily takes place after any supplemental evidence is due. 37 C.F.R. § 42.53(d)(2).

Cross-examination ordinarily ends no later than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. *Id.*

6. Motion to Amend

Patent Owner may file a motion to amend without prior authorization from the Board. Nevertheless, Patent Owner must confer with the Board before filing such a motion. 37 C.F.R. § 42.121(a). To satisfy this requirement, Patent Owner should request a conference call with the Board no later than two weeks prior to DUE DATE 1 set forth in the Due Date Appendix attached hereto.

Patent Owner has the option to receive preliminary guidance from the Board on its motion to amend. *See Notice Regarding a New Pilot Program Concerning Motion to Amend Practice and Procedures in Trial Proceedings under the America Invents Act before the Patent Trial and Appeal Board*, 84 Fed. Reg. 9497 (Mar. 15, 2019) ("MTA Pilot Program Notice"). If Patent Owner elects to request preliminary guidance from the Board on its motion, it must do so in its motion to amend filed on DUE DATE 1.

Any motion to amend and briefing related to such a motion shall generally follow the practices and procedures described in MTA Pilot Program Notice, unless otherwise ordered by the Board in any of these proceedings. The parties are further directed to the Board's Guidance on Motions to Amend in view of *Aqua Products* (https://go.usa.gov/xU6YV), and *Lectrosonics, Inc. v. Zaxcom, Inc.*, Case IPR2018-01129 (Paper 15) (PTAB Feb. 25, 2019) (precedential).

As indicated in the MTA Pilot Program Notice, Patent Owner has the option at DUE DATE 3 to file a revised motion to amend, instead of a reply,

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