

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

PATENT OWNER'S OBJECTIONS TO PETITIONER'S EVIDENCE
PURSUANT TO 37 C.F.R. § 42.64(b)(1)

Pursuant to 37 C.F.R. § 42.64 and the Federal Rules of Evidence, as applied by the Board, Patent Owner Sleep Number Corporation (“Sleep Number”) provides the following objections to evidence submitted by Petitioner American National Manufacturing Inc. (“ANM”). These objections are timely served within ten (10) business days.

Sleep Number serves ANM with these objections to provide notice that Sleep Number may move to exclude the challenged evidence under 37 C.F.R. § 42.64(c) unless ANM cures the defects associated with the challenged evidence identified below. In addition, Sleep Number reserves the right to present further objections to this or additional evidence submitted by ANM, as allowed by the applicable rules or other authority.

Exhibit 1002 – “File History of U.S. Patent No. 5,904,172”

Sleep Number objects to Exhibit 1002 under Fed. R. Evid. 106 because ANM did not include the entire file history and the entire file history of U.S. Patent No. 5,904,172 “ought in fairness [] be considered.”

Exhibit 1003 – “File History of Re-Examination No. 90-012456 of U.S. Patent No. 5,904,172”

Sleep Number objects to Exhibit 1003 under Fed. R. Evid. 106 because ANM did not include the entire file history and the entire file history of Reexamination No. 90-12456 of U.S. Patent No. 5,904,172 “ought in fairness [] be considered.”

Exhibit 1005 – “Opening Expert Report of Dr. Robert Giachetti”

Sleep Number objects to Exhibit 1005 to the extent the testimony provided by Dr. Giachetti is not cited to or relied upon by the Petition. *See* 37 C.F.R. § 42.104 (In the Petition, “[t]he Board may exclude or give no weight to the evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge.”); *Actifo, Inc. v. Delphix Corp.*, IPR2015-00108, Paper 56 at 57 (PTAB Apr. 29, 2016) (excluding evidence not relied upon by the Petition); *SK Innovation Co., Ltd. v. Celgard, LLC*, IPR2014-00679, Paper 58 at 49 (PTAB Sept. 25, 2015) (same). For example, paragraphs 16–18, 20–26, 28–34, 39–41, 43–44, 62–79, 91–93, 95, 98–145, 157, 162–177, 194–198, 203–204, 222–224, 238, 260–269, 271, 278–279, 297–318, 329, 340–349, and 355–356 of Dr. Giachetti’s report are not cited to or relied upon in the Petition. This failure cannot be cured because Petitioner is now time-barred from filing another petition under 35 U.S.C. § 315(b). Accordingly, this testimony is also irrelevant, misleading, and confusing under Fed. R. Evid. 401–403.

Sleep Number further objects to Exhibit 1005 as including “[e]xpert testimony that does not disclose the underlying facts or data on which the opinion is based” in violation of 37 C.F.R. § 42.55(a) and Fed. R. Evid. 702–703 and 705. For example, Dr. Giachetti testifies that “Vrzalik discloses a low air loss bed having compartmentalized air bags (or bladders), and a means (including valves, pump means, and associated circuitry) for inflating said bags.” *See* Ex. 1005 at ¶ 217. But Dr. Giachetti provides no citations in support of such an argument. In another

example, Dr. Giachetti testifies that “[m]anifolds are common pieces of equipment today and they were common pieces of equipment well before the ‘172 application. They are common in hydraulic applications, and any application where one is interested in dividing or adding air streams” but fails to provide any underlying facts or data to support such an opinion. *See* Ex. 1005 at ¶ 19. Sleep Number further objects to other portions of Exhibit 1005 to the extent it does not adequately disclose the underlying facts or data on which statements and/or the opinion is based, either by (1) providing no citations or (2) failing to cite where in a reference the disclosure supporting the statement and/or opinion can be found, i.e., by providing pin cites. *See* Ex. 1005 at ¶¶ 17–26, 39, 42, 45, 47, 50, 54–55, 57, 59, 61–62, 82–84, 90, 94–97, 148, 152, 182–183, 191–192, 211, 215, 217, 220, 231, 241, 254, 270, 272–273, 277, 280–282, 289, 291, 319, 331, and 350. Indeed, Dr. Giachetti relies on quotes or concepts disclosed in books and other purported prior art but cites generally to the entire book or reference instead of providing any pin cites and without providing the book or reference. *See, e.g.*, Ex. 1005 at ¶¶ 22–26, and 192. In addition, Dr. Giachetti fails to provide adequate citations for several statements and/or opinions, i.e., the citations fail to provide support for the statement and/or opinion being proffered. Ex. 1005 at ¶¶ 46, 57, 59, 82, 86–87, 89–90, 150–151, 180–181, 218–219, 234, and 239. This is also true for any analysis that cites to paragraphs identified herein as deficient. *See, e.g.*, Ex. 1005 at ¶ 88 (citing to ¶¶ 57–61, of which paragraphs 57, 59, and 61 are identified above as deficient). Because many statements and opinions in Exhibit 1005 are unsupported and conclusory, Sleep

Number further objects to this testimony as irrelevant, misleading, unduly prejudicial, and confusing under Fed. R. Evid. 401–403.

Sleep Number objects to Exhibit 1005 to the extent it references unspecified other arguments to support a position. *See* Ex. 1005 at ¶¶ 53, 102, 231, and 282. Accordingly, this testimony is misleading and confusing under Fed. R. Evid. 401–403.

Sleep Number further objects to the extent Exhibit 1005 relies on evidence not filed in this proceeding in violation of 37 C.F.R. § 42.63(a). *See* Ex. 1005 at ¶¶ 17, 19–25, and 192. Similarly, Sleep Number objects to the pictures on pages 15 and 19 of Exhibit 1005 under Fed. R. Evid. 1002, which requires “an original writing, recording, or photograph ... in order to prove its content.” The images on pages 15 and 19 are purported to be images from books, but ANM has failed to provide a copy of these books. Sleep Number further objects to reliance on such evidence under Fed. R. Evid. 901–902 because ANM “must produce evidence sufficient to support a finding that the item is what the proponent claims it is” and ANM has not made a sufficient showing that the references contain content that existed as of a particular date as is evidently claimed. Accordingly, Sleep Number also objects to the reliance on such evidence as misleading, prejudicial, and confusing the issues under Fed. R. Evid. 401–403.

Exhibit 1013 – “U.S. Patent 3,155,991 (‘Dunham’)”

Sleep Number objects to Exhibit 1013 to the extent the exhibit is not cited to or relied upon by the Petition. For example, Exhibit 1013 is only cited in paragraph

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