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File No. 5015342-80

October 19, 2018

VIA E-MAIL

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**Re: Third Request to Meet and Confer re Non-Compliance with Discovery
(Deficiencies re Plaintiff's Infringement Contentions to ANM)
Sleep Number Corp. v. Sizewise Rentals, L.L.C., No. 5:18-cv-356-AB (SPx) (C.D. Cal.)
Sleep Number Corp. v. Am. Nat'l Man., Inc., No. 5:18-cv-357-AB (SPx) (C.D. Cal.)**

Dear Ms. Patton:

Per L.R. 37, this letter is a meet and confer communication concerning the inadequacies of Plaintiff's Disclosure of Asserted Claims and Infringement Contentions (P.R. 3-1) to Defendant American National Manufacturing, Inc. ("ANM"). Please provide your availability to meet and confer regarding the below. To the extent the below are not satisfactorily resolved, Defendants intend to bring a motion to strike and/or motion to compel as appropriate.

**I. PLAINTIFF'S DISCLOSURE OF ASSERTED CLAIMS AND INFRINGEMENT CONTENTIONS
(P.R. 3-1) TO ANM**

"The Patent Rules demonstrate high expectations as to plaintiffs' preparedness before bringing suit, requiring plaintiffs to disclose their preliminary infringement contentions before discovery has even begun." *Connectel, LLC v. Cisco Systems, Inc.*, 391 F. Supp. 2d 526, 527-28 (E.D. Tex. 2005) (quotations and citation omitted). "Compliance with Patent Rule 3-1 therefore demands [infringement contentions] that set forth particular theories of infringement with sufficient specificity to provide defendants with notice of infringement beyond that which is provided by the mere language of the patent claims themselves." *Id.* (citation, quotations, and alterations omitted). "[Infringement contentions] providing vague, conclusory language or simply mimicking the language of the claims when identifying infringement fail to comply with Patent Rule 3-1." *Id.* "[M]ore than a perfunctory submission is required." *Id.* "Plaintiffs are expected to rigorously analyze all publicly available information before bringing suit and must explain with great detail their theories of infringement." *Id.*

Plaintiff's infringement contentions fail to provide the requisite detail and are deficient.

A. Identification of Accused Instrumentalities

Pursuant to P.R. 3-1(b), each accused instrumentality must be identified as specifically as possible including by name and model number. Plaintiff's contentions identify the following products by model number and no other:

- Q2, Q3, Q4, Q5, Q6, Q7, Q7-T, Q8, Q9, S6, S7, S7-T, S8, and S9;
- A2, A3, A4, A5, A6, A7, A8, A10, H5, H7, H9, H10, H11, H12, A10 Smart Bed, and H12 Smart Bed, Online Edition, Online Special, Silver, and Silver sLE; and
- Platinum 5000.

No other products have been properly identified. It is ANM's position that Plaintiff has waived accusing any other products and all other products are not a part of this case. Plaintiff's attempts to rope in additional products without specifically identifying them is improper.

B. Representative Product

Plaintiff's assertion that the certain products are "representative" is improper. It is Plaintiff's burden to show that a product is actually representative. Yet, Plaintiff's contentions lack any support for the contention that any product is representative of any other product and do not even identify which products are representative which other products. ANM demands that Plaintiff properly supports this contention, and if Plaintiff does not, it is ANM's position that Plaintiff has waived this contention.

C. Claim Charts (Exs. A–C)

Pursuant to P.R. 3-2(c), "a chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality." Plaintiff's claim charts are woefully deficient.

First, for the '172 patent chart (Ex. A), Plaintiff provides a single chart that mixes evidence from multiple sources related to different products. This obfuscates what evidence Plaintiff is relying to support its infringement claim related to each accused instrumentality. ANM demands separate charts for each Accused Instrumentality be provided clearly and specifically showing "where each element of each asserted claim is found within each Accused Instrumentality" (P.R. 3-2(c)). To the extent there are different versions of an Accused Instrumentality being accused, a separate chart for each version should be provided.

Second, for the '747 and '154 patents (Exs. B and C), Plaintiff fails to chart any product except the Gen 3 Arco. It is ANM's position that Plaintiff has waived its contention of infringement with respect to any other controller or products.

Third, Plaintiff relies on an image labelled as "Photograph of medical air mattress system" (see, e.g., Ex. A at 8). In addition to failing to properly cite this image (discussed below), Plaintiff's contentions fail to in anyway show how this unidentified mattress meets the claim limitations or infringes. ANM demands that Plaintiff properly identify this mattress and support such contentions, and if Plaintiff does not to, it is ANM's position that Plaintiff has waived such contentions and this mattress is not a part of this case.

Fourth, for the Gen X, Plaintiff fails to provide any evidence showing how this product infringes or is relevant. For example, Plaintiff does not contend when this product was sold, who sold it, or even

whether it was sold with air bladders, which is prerequisite for infringement for each asserted patent. ANM demands that Plaintiff properly support its contentions related to the Gen X, and if Plaintiff chooses not to, it is ANM's position that Plaintiff has waived its contentions related to the Gen X.

Fifth, Plaintiff's charts lack any showing with respect to many claim elements. For example, for the '172 patent:

1. Plaintiff provides no evidence or showing to support that the claim element of "a processor for providing commands . . . during the inflate/deflate cycle" is present within any Accused Instrumentality. Indeed, Plaintiff appears to acknowledge this deficiency and contends this claim element is met only supported by "information and belief." See Ex. A at 15.
2. Plaintiff provides no citation to the specification and figures to support its contention for what is the disclosed structure of the means-plus-function claim element of a "pressure monitor means." Such is a prerequisite to determining infringement of a means-plus-function element, which requires a comparison of the disclosed structure to the structure of an accused product.
3. Plaintiff's assertion of certain claim elements being "capable of" being performed is also deficient. See, e.g., Ex. A at 44. Plaintiff must show how such elements are actually present in or performed by any Accused Instrumentality.

For example, for the '154 and '747 patents:

1. Plaintiff provides no evidence or showing to support its contention that the claim element of "calculating a pressure target for the pump housing" is performed by any Accused Instrumentality.
2. Plaintiff provides no evidence or showing to support its contention that the claim element of "a pressure adjustment factor" is performed by any Accused Instrumentality.
3. Plaintiff provides no evidence or showing to support its contention that the claim element of "determining an actual chamber pressure within the air chamber" is present within any Accused Instrumentality.
4. Plaintiff provides no evidence or showing to support its contention that the claim element of "an adjustment factor error" is present within any Accused Instrumentality.
5. Plaintiff provides no citation to the specification and figures to support its contention for what is the disclosed structure of the means-plus-function claim element of "a pressure sensing means." Such is a prerequisite to determining infringement of a means-plus-function element, which requires a comparison of the disclosed structure to the structure of an accused product.

ANM demands that Plaintiff properly support such contentions, and if Plaintiff does not, it is ANM's position that Plaintiff has waived such contentions.

Sixth, the charts provided do not properly cite or identify (such as by Bates Number) evidence upon which Plaintiff is relying. For example, many of the photographs reproduced in the charts appear to come from Defendants' websites (see, e.g., Ex. A at 3), yet no URL is provided for such photographs. Other photographs appear to be of physical samples, but the contentions do not provide a serial number for the products or describe when, how, or where these physical samples were obtained. ANM demands

that Plaintiff properly cites and identifies the evidence it is relying on for its contentions and all also to produce all such evidence. If Plaintiff does not, it is ANM's position that Plaintiff has waived its contentions that rely on such evidence.

D. Doctrine of Equivalents

Pursuant to P.R. 3-1(d), Plaintiff is required to disclose elements for which it is relying on doctrine of equivalents. Plaintiff's perfunctory recitation of boilerplate language is insufficient to provide Defendants with notice of which claim elements Plaintiff intends to rely on doctrine of equivalent. It is ANM's position that Plaintiff has waived any argument under doctrine of equivalents that are not specially made in the charts.

E. Indirect Infringement

Plaintiff's recitation of conclusory allegations of indirect infringement is insufficient to provide Defendants with notice of Plaintiff's indirect infringement theory. For example, Plaintiff does not identify a single customer or describe how any customer directly infringes. Such contentions are deficient. It is ANM's position that Plaintiff has waived such allegations.

F. Reservation of Rights

Plaintiff's attempts to reserve rights to modify and/or supplement is contrary to P.R. 3-6. To the extent Plaintiff attempts to modify or supplement its contentions, it is required to follow the procedure of P.R. 3-6.

G. Incorporation by Reference

Plaintiff throughout its contentions attempts to incorporate by reference or rely on contentions from other documents or cases. This is confusing and improper. For example, Plaintiff attempts to incorporate by reference and rely on charts from the Sizewise case (*see, e.g.*, at 5:1–3 and 5:16–20); however, it is unclear what are the relevant portions of such incorporated-by-reference documents upon which Plaintiff is relying. Accordingly, ANM demands that Plaintiff properly disclose all its contentions and withdraw all attempts to incorporate by reference.

II. DOCUMENT PRODUCTION ACCOMPANYING DISCLOSURE (P.R. 3-2)

The documents bearing the Bates Nos. SN_0017648 and SN_0017899 each state "THIS DOCUMENT WAS PROVIDED IN NATIVE FORMAT UPON REQUEST;" however, native versions were not produced. This document is cited in Plaintiff's infringement contentions pursuant to P.R. 3-2(b) as relevant to the conception and reduction to practice of the '172 patent. Defendants demand that all such native documents that have been withheld be produced immediately and that Plaintiff explains why such documents were withheld.

* * *

Please provide your availability to meet and confer within ten (10) days to discuss the above. To the extent the above issues are not satisfactorily resolved, Defendants intend to bring an appropriate motion(s).

**Third Deficiencies Letter re
Plaintiff's Infringement Contentions to ANM**
Sleep Number v. Sizewise/ANM
October 19, 2018
Page 5



Sincerely,

SPENCER FANE LLP

/s/ Jaspal S. Hare

By: _____
Jaspal S. Hare