UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of CERTAIN AIR MATTRESS SYSTEMS, COMPONENTS THEREOF AND METHODS OF USING THE SAME	Investigation No. 337-TA-971

SIZEWISE'S INITIAL COMMENTS SUPPORTING VACATUR

Respondents/Appellants Sizewise Rentals LLC, American National Manufacturing Inc., and Dires LLC, d/b/a Personal Comfort Bed (collectively, "Sizewise") hereby submit their Initial Comments Supporting Vacatur in response to the U.S. International Trade Commission's March 20, 2018 order. Sizewise, because of the limited appeal provision in Section 337(c), was denied appellate review of the Commission's findings and now faces having that unreviewed decision used against it in district court. As demonstrated below, relevant precedent and the unique facts and circumstances of this case make vacatur of the Commission's Final Determination both appropriate and necessary.

I. FACTUAL AND PROCEDURAL BACKGROUND

Select Comfort Corporation and Select Comfort SC Corporation (collectively, "Select Comfort")[1] filed U.S. Patent No. 5,904,172 ("the '172 patent") on July 28, 1997. With only 21 months remaining until expiration of the '172 patent, on October 16, 2015, Select Comfort filed its Section 337 complaint with the Commission. During the investigation, the *Markman* hearing was postponed by two months and eventually not held at all (*see* Order Nos. 6-7). The claims of

[1] On October 27, 2017, Select Comfort Corporation amended its articles of incorporation to change its name to Sleep Number Corporation. *Sleep Number Corporation v. Sizewise Rentals LLC*, Case No. 5:18-cv-00356-AB-SP, Dkt. No. 1, p. 6, n. 1.

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the ’172 patent were thus construed solely on the parties’ briefs, without the benefit of a full evidentiary record on claim construction issues (*see* Order No. 19). The ALJ and Commission found no violation as to U.S. Patent No. 7,389,554 (“the ’554 patent”), but found a violation with respect to claims 12 and 16 of the ’172 patent. The Commission’s determination became final on July 17, 2017. Two days later, Sizewise appealed the Commission’s determination regarding the ’172 patent to the U.S. Court of Appeals for the Federal Circuit. (*Sizewise Rentals LLC v. ITC*, Case No. 17-2334, Dkt. No. 1).

The ’172 patent expired on July 28, 2017, thus terminating the limited exclusion order which had been in effect for only 11 days. On October 18, 2017, the Commission moved to dismiss Sizewise’s appeal based on mootness due to the patent’s expiration. (*Sizewise v. ITC*, Dkt. No. 14). In its motion, the Commission noted that Sizewise would not object to dismissal of the appeal if, consistent with Federal Circuit practice, the underlying determination were vacated. Notably, the Commission consented to vacatur. (*Sizewise v. ITC*, Dkt. No. 14, p. 3) (“The Commission does not object to the vacatur of the Commission’s final determination as to the ’172 patent.”). Sizewise also responded to the Commission’s motion on October 30, 2017, withholding objection to the proposed dismissal “so long as the Commission’s underlying determination with respect to the ’172 patent is vacated, per applicable precedent.” (*Sizewise v. ITC*, Dkt. No. 15, p. 2).

Select Comfort failed to timely respond to the Commission’s motion to dismiss—rather, Select Comfort impudently filed a purported “reply” to Sizewise’s response to the Commission’s motion, two days after Select Comfort’s response was due, on November 1, 2017. (*Sizewise v. ITC*, Dkt. No. 16). On December 26, 2017, the Federal Circuit granted the Commission’s motion, dismissing Sizewise’s appeal but remanding the case for the Commission to address

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whether to vacate its final determination relating to the '172 patent. (*Sizewise v. ITC*, Dkt. No. 17, p. 3).

Select Comfort quickly attempted to capitalize on the Federal Circuit's decision not to vacate the Commission's determination itself, (1) by filing parallel patent infringement litigation in the Northern District of Texas on December 29, 2017 (only 3 days after dismissal of the appeal), and (2) by trumpeting the Commission's determination on the '172 patent as support for its claims of infringement. (*Sleep Number Corporation v. Sizewise Rentals LLC*, Case No. 3:17-cv-03518-N, Dkt. No. 1; *Sleep Number Corporation v. American National Manufacturing, Inc.*, Case No. 3:17-cv-03517-N, Dkt. No. 1). After a meet-and-confer between the parties, it became evident that venue was improper, and Select Comfort therefore voluntarily dismissed the Texas cases on February 20, 2018. (*Id.* at Dkt. Nos. 27, 29.) That same day, before the ink was dry on the dismissals, Select Comfort refiled duplicate complaints in the Central District of California. (*Sleep Number Corporation v. Sizewise Rentals LLC*, Case No. 5:18-cv-00356-AB-SP, Dkt. No. 1, attached hereto as Exhibit A; *Sleep Number Corporation v. American National Manufacturing, Inc.*, Case No. 5:18-cv-00357-AB-SP, Dkt. No. 1, attached hereto as Exhibit B).[2]

Just like its Texas complaints, Select Comfort's California complaints detail the Commission's determination in paragraphs 21 through 29. (Ex. A, *Sleep Number v. Sizewise*, Dkt. No. 1; Ex. B, *Sleep Number v. American National*, Dkt. No. 1). Then, in the subsequent paragraphs, Select Comfort relies on the Commission's determination as threadbare support

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[2] Select Comfort's litigiousness was also evidenced by its filing of a second Section 337 complaint against American National Manufacturing and Dires in April 2016, which was instituted as Inv. No. 337-TA-999. That duplicative matter involved the '554 patent and its parent, U.S. Patent No. 6,804,848. After setbacks in both discovery and motions practice, Select Comfort moved to terminate that investigation based on its unilateral withdrawal of the complaint. *See Certain Air Mattress Bed Systems & Components Thereof*, Inv. No. 337-TA-999, Notice of Commission Determination Not to Review Initial Determinations Terminating the Investigation (Dec. 9, 2016).

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(indeed, the only support) for its arguments that Sizewise infringed "at least claims 12 and 16 of the '172 patent." (*Id.*). Importantly, Select Comfort suggests the Central District should apply preclusive weight to the Commission's determination. For example, in paragraph 40 of each complaint, Select Comfort contends the Central District should find willful and wanton infringement based solely on "Sizewise's [and American National's] active participation as Respondent in the prior ITC Investigation in which it failed to prove that at least claims 12 and 16 of the '172 patent were invalid and not infringed." (*Id.*).

II. ARGUMENT

In remanding the question of vacatur to the Commission, rather than vacating the determination itself, the Federal Circuit departed from its own well-established practice but did not address its reasoning or purport to overturn any precedent.[3] The Commission should therefore apply the relevant Federal Circuit precedent and vacate its determination on the '172 patent. Indeed, the Commission: (a) has consistently had its determinations in similar circumstances vacated by the Federal Circuit under that precedent; (b) has itself applied that precedent; and (c) has even argued for—and been granted—vacatur of a bankruptcy court decision under analogous circumstances. Accordingly, vacatur is in complete consonance with guiding precedent.

Furthermore, the equities overwhelmingly support vacatur to preserve the parties' rights and prevent prejudice in the pending district court litigation. The Federal Circuit's failure to vacate has already enabled Select Comfort to wield an unreviewed and potentially unreviewable determination against Sizewise in the district courts. If the Commission allows the determination

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[3] The Federal Circuit disclaimed this three-page order as "nonprecedential," clearly indicating that the court did not intend to overturn the longstanding precedent. (*Sizewise v. ITC*, Dkt. No. 17, p. 1).

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to stand, it would be permitting (and encouraging) Select Comfort to continue leveraging the Commission's unreviewed determination as the basis for its district court claims, which would force further appellate proceedings[4] or motions practice at the district court, all due to Select Comfort's curious (and in hindsight, suspicious) decision to file an ITC action on a patent that was guaranteed to expire before or shortly after issuance of any remedial order. In addition to the law, therefore, the public interest weighs heavily in favor of vacatur.

A. GOVERNING PRECEDENT SUPPORTS VACATUR OF THE COMMISSION'S DETERMINATION

1. Supreme Court and Federal Circuit Precedent Supports Vacatur

The longstanding precedent is clear: "[w]hen a case becomes moot on appeal, the 'established practice' is to vacate the decision below with a direction to dismiss." *Evans v. United States,* 694 F.3d 1377, 1381 (Fed. Cir. 2012) (quoting *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950)); *Texas Instruments Inc. v. U.S. Int'l Trade Comm'n*, 851 F.2d 342, 344 (Fed. Cir. 1988) (same). The Supreme Court has even gone so far as to state that "***it is the duty***" of the appellate court to set aside and remand a moot decree with directions to dismiss. *Duke Power Co. v. Greenwood Cty.,* 299 U.S. 259, 267 (1936). This practice "is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear,* 340 U.S. at 41; *Alvarez v. Smith*, 558 U.S. 87, 87 (2009) ("In moot cases, this Court normally vacates the lower court judgment, which clears the path for relitigation of the issues and preserves the rights of the parties, while prejudicing none by a preliminary decision.").

[4] Non-vacatur of the Commission's determination—which is currently being used against Sizewise in ongoing litigation—would make Sizewise "adversely affected" and may render the underlying decision appealable anew to the Federal Circuit, per 19 U.S.C. § 1337(c).

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