UNITED STATES PATENT AND TRADEMARK OFFICE

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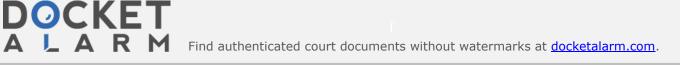BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AMERICAN NATIONAL MANUFACTURING INC.,
Petitioner,

v.

SLEEP NUMBER CORPORATION
f/k/a SELECT COMFORT CORPORATION,
Patent Owner.

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Case No. IPR2019-00514
Patent No. 5,904,172

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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 five (5) 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 adequately 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 1041 – "Screen Capture of Sleep Number Corporation Financial Profile from Dun & Bradstreet"

Sleep Number objects to Exhibit 1041 as lacking authentication as required under Fed. R. Evid. 901–902. Rule 901 requires that the "proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." ANM provides no evidentiary foundation for this document or attempt to authenticate it. Accordingly, this testimony is irrelevant, misleading, unduly prejudicial, and confusing under Fed. R. Evid. 401–403.

Sleep Number further objects to Exhibit 1041 as inadmissible hearsay under Fed. R. Evid. 801–802. ANM's proffered testimony meets the definition of inadmissible hearsay because it offers the statement of Dun & Bradstreet, an out of

court declarant, to prove the truth of the matter asserted, that Sleep Number made a revenue of approximately $1.5 billion in 2018. Such testimony meets the definition of hearsay under Fed. R. Evid. 801, and because no exception applies, it is inadmissible under Fed. R. Evid. 802.

Exhibit 1042 – "Screen Capture of American National Manufacturing, Inc. Financial Profile from Dun & Bradstreet"

Sleep Number objects to Exhibit 1041 as lacking authentication as required under Fed. R. Evid. 901–902. Rule 901 requires that the "proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." ANM provides no evidentiary foundation for this document or attempt to authenticate it. Accordingly, this testimony is irrelevant, misleading, unduly prejudicial, and confusing under Fed. R. Evid. 401–403.

Sleep Number further objects to Exhibit 1041 as inadmissible hearsay under Fed. R. Evid. 801–802. ANM's proffered testimony meets the definition of inadmissible hearsay because it offers the statement of Dun & Bradstreet, an out of court declarant, to prove the truth of the matter asserted, that ANM made a revenue of approximately $21 million in 2018. Such testimony meets the definition of hearsay under Fed. R. Evid. 801, and because no exception applies, it is inadmissible under Fed. R. Evid. 802.

Exhibit 1043 – "Plaintiff's First Supplemental Responses to Defendants'

First Set of Interrogatories (Nos. 1–9)"

Sleep Number objects to Exhibit 1043 as irrelevant under Fed. R. Evid. 401. ANM introduces Exhibit 1043 to support its assertion that Sleep Number failed to identify any secondary indicia or commercial success in the related District Court action. However, ANM did not request any such identification. Further, Exhibit 1043 relates to a different proceeding, and as a result of ANM's IPR petitions and the resulting stay, discovery in the District Court action was immediately halted in its early stages—shortly after ANM served its first invalidity contentions, before ANM served its last supplemental invalidity contentions pursuant to the parties' meet and confer efforts, and before Sleep Number could meaningfully have an opportunity to review ANM's contentions and identify any evidence of secondary considerations in response.

Sleep Number further objects to Exhibit 1043 because its probative value is substantially outweighed by a danger of prejudice and confusion pursuant to Fed. R. Evid. 403. ANM's use of Exhibit 1043 of purported evidence of discovery deficiencies only misleads and confuses the issues, as the discovery process was ongoing when ANM petitioned for IPR and requested a stay. Sleep Number's purported burden to identify secondary considerations could have arisen only right as the District Court action stay was commencing. A patent owner's burden to produce evidence of secondary considerations only arises when a case of obviousness has been established. *See Ormco Corp. v. Align Tech., Inc.*, 463 F.3d

1299, 1311 (Fed. Cir. 2006) (noting that secondary considerations are considered only after a prima facie case of obviousness is shown). Such a case cannot be established until, at minimum, invalidity contentions are served. ANM served its last supplemental invalidity contentions pursuant to the parties' various meet and confer efforts 10 days after the District Court action's stay. As such, any purported burden of Sleep Number's to identify secondary considerations had only just begun, would have been ongoing, and was suspended in light of the stay. Accordingly, citing Exhibit 1043 for the proposition that Sleep Number failed to identify any secondary indicia or commercial success is misleading, confuses the issues, and is unduly prejudicial to Sleep Number under Fed. R. Evid. 401–403.

Exhibit 1044 – "Stipulation to Use ITC 971 Discovery"

Sleep Number objects to Exhibit 1044 as irrelevant, misleading, and confusing under Fed. R. Evid. 401–403. Because ANM cites Exhibit 1044 for the proposition that Sleep Number could have, pursuant to the parties' Stipulation, used discovery from the ITC case in the District Court action to identify secondary considerations, Sleep Number incorporates herein its objections to Exhibit 1043 detailed above. As with Exhibit 1044, citing Exhibit 1043 for the proposition that Sleep Number failed to identify any secondary indicia or commercial success is misleading, confuses the issues, and is unduly prejudicial to Sleep Number under Fed. R. Evid. 401–403.

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