

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CASPER SLEEP INC.,
Petitioner,

v.

WERNER MEDIA PARTNERS, LLC,
Patent Owner.

IPR 2024-00474
Patent 10,842,301 B2

Before BARRY L. GROSSMAN, JASON W. MELVIN,
and RYAN H. FLAX, *Administrative Patent Judges*.

FLAX, *Administrative Patent Judge*

PATENT OWNER'S RESPONSE TO PETITIONER'S
OBJECTIONS PURSUANT TO 37 C.F.R. 42.64(b)(2)

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(b)(2), Werner Media Partners, LLC (“Patent Owner”) responds to Petitioner’s August 30, 2024 objections to Patent Owner’s evidence.¹

Patent Owner Response page 45.

Petitioner’s FRE 408 objection should be overruled. The referenced statement in Patent Owner’s Response: “Starting in 2024, Petitioner revised their mattress models in an attempt to design around the process protected by the ‘301 Patent” is based on publicly available information about Petitioner’s bedding products. This includes publicly available samples of Petitioner’s bedding products and bedding products presented by Petitioner at a January 2024 trade show that occurred after mediation concluded. Thus, FRE 408 and the settlement and mediation privileges do not apply to publicly available information.

¹ Patent Owner has also provided supplemental evidence directly to Petitioner as indicated herein.

Exhibit 2001 (Declaration of Andrew Gross)

The objection under FRE 702/703 should be overruled. Mr. Gross's opinions are reliable and the use of terms such as "may," "could," "assuming," and "likely" are not a basis to exclude Mr. Gross's opinions under the gatekeeping framework established by the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

The general objections "FRE 106; FRE 602; FRE 702/703; FRE 801/802/805; FRE 901 and FRE 1001/1002" should be overruled. These general objections lack particularity that would allow Patent Owner to meaningfully respond and supplement.

To the extent Petitioner's objections are based on Exhibit 2009 (the YouTube video), the objections should be overruled. As stated in Patent Owner's Response, the YouTube video was not available for download outside of the YouTube portal and the presenter of the video did not respond to a request for a copy of the video for submission. Relevant visual excerpts of the YouTube were included in Mr. Gross' declaration (Exhibit 2001, ¶¶ 63, 64). The timestamped references provide additional audio background about reticulated foam in support of Mr. Gross' opinions. As discussed below for Exhibit 2009, Exhibit 2009 is authenticated and therefore is admissible.

Exhibit 2009 Foam Equipment, by Wayne Bowman (Video Presentation to Polyurethane Foam Association)

The objections “FRE 106; FRE 602; FRE 702/703; FRE 801/802/805; FRE 901 and FRE 1002/1003” should be overruled because these generalized objections lack reasonable particularity and do not allow Patent Owner to meaningfully respond and correct.

Petitioner’s objection to the “Wayne Bowman” designation should be overruled because the YouTube video displays the Name “Wayne Bowman.”

First, Patent Owner is amenable to trying to obtain a FRE 902(11) certification from a Google custodian of records for Exhibit 2009.

Second, please consider that Exhibit 2009 is authenticated by Mr. Gross in his declaration. Proper authentication requires only that the proponent of the evidence make out a prima facie case that the proffered evidence is what it purports to be. *United States v. Belfast*, 611 F.3d 783, 819 (11th Cir. 2010). Evidence may be authenticated by its “appearance, contents, substance, internal patterns, or other distinctive characteristics . . . taken together with all the circumstances.” FRE 901(b)(4).

Here, Mr. Gross identifies the URL for Exhibit 2009 in his declaration (Exhibit 2011, ¶ 62), identifies what is depicted in the video, displays a first screenshot from the video with a time stamp (Exhibit 2001, ¶ 63), and displays a

second screenshot also with a time stamp (Exhibit 2001, ¶ 64). By accessing the video through the URL, the date of the video is displayed as March 16, 2018 under the “Wayne Bowman” name.

Thus, this circumstantial evidence supports a finding that Exhibit 2009 is what Patent Owner claims it is as required under FRE 901(a) and Exhibit 2009 is authenticated by its appearance, contents and distinctive characteristics under FRE 901(b)(4). Petitioner has not stated the YouTube video is anything but what Mr. Gross stated in his declaration.

Exhibit 2013 (Declaration of Jeff Quinn)

The objection under FRE 702/703 should be overruled. Mr. Quinn’s opinions are reliable and the use of terms such as “likely” are not a basis to exclude Mr. Gross’ opinions under the gatekeeping framework in *Daubert*.

The general objections “FRE 106; FRE 602; FRE 702/703; FRE 801/802/805; and FRE 901” should be overruled because these generalized objections lack particularity that would allow Patent Owner to meaningfully respond and correct.

The objections to Exhibits 2015, 2016 and 2017 should be overruled for the reasons discussed below and because Patent Owner has advised Petitioner that Patent Owner will provide or has already provided any underlying data it has in its control or possession, as requested.

Exhibit 2015 Jeff Quinn Presentation of Secondary Considerations

The general objections under FRE 106, FRE 602, FRE 702/703, FRE 801/802/805 and FRE 901 should be overruled. These generalized objections lack particularity that would allow Patent Owner to meaningfully respond and correct.

The objection based on the request for underlying data should be overruled. Patent Owner has advised Petitioner that Patent Owner will provide any underlying data it has in its control or possession, as requested. Mr. Quinn manually input the data he researched through Jungle Scout. Mr. Quinn did not save screenshots of the data he used within the graphs provided. Mr. Quinn is running new search requests from Jungle Scout and saving the exported data so Petitioner can see what Mr. Quinn used generally for his analysis. The Jungle Scout data is on a rolling basis so the new data provided will be about a month removed from the actual data used by Mr. Quinn.

Exhibit 2016 Market Survey Summary of Results Data

The general objections under FRE 106, FRE 602, FRE 702/703, FRE 801/802/805 and FRE 901 should be overruled because these generalized objections lack particularity that would allow Patent Owner to meaningfully respond and correct.

The objection based on the request for underlying data should be overruled. Patent Owner has provided the raw Excel file with the market survey results to

Petitioner (Exhibit 2018). Patent Owner advised Petitioner that Patent Owner will provide any underlying data it has in its control or possession, as requested.

Exhibit 2017 Element Materials Technology, Test Results

The objections under FRE 106, FRE 602, FRE 702/703, FRE 801/802 and FRE 901 should be overruled. These generalized objections lack particularity that would allow Patent Owner to meaningfully respond and correct.

The objection based on the request for underlying data should be overruled and the objection to the lack of an affidavit under 37 C.F.R. § 42.65(b) should be overruled. Patent Owner provided the documents that Patent Owner received from third party testing facility Element Materials Technology, which Mr. Quinn used in his analysis (Exhibit 2013). Element signed the test results provided. Patent Owner has no objection if Petitioner wants to contact Element and learn more about the specific tests run according to established ASTM standards and Element's reports. Patent Owner has advised Petitioner that it will send the tested samples, currently in the possession of Element, to Petitioner upon receipt of an address and contact person.

Patent Owner further advised Petitioner that if Petitioner wants new, identical samples from Patent Owner for Petitioner's own use/testing, Petitioner will need to pay for those samples and for shipping absent any authority to the contrary. Patent

Owner has no objection to providing the materials to Petitioner generally and coordinating such delivery of identical samples to Petitioner.

September 12, 2024

Respectfully submitted,

Lead Counsel

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