

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

**PATENT OWNER'S OBJECTIONS TO EVIDENCE UNDER
37 C.F.R. 42.64(b)(1)**

Pursuant to 37 C.F.R. § 42.64(b)(1), provides the following objections to the Petitioner Reply (“Reply”) filed by Casper Sleep Inc. (“Petitioner”) on November 15, 2024. Petitioner reserves the right to present further objections as allowed by the applicable rules or other authority.

Exhibit 1031 - U.S. Patent No. 9,538,855 to Gross et al.

Exhibit 1031 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation).

Exhibit 1031 is not referenced in Petitioner’s Reply aside from the Table of Exhibits, and Petitioner is improperly trying to introduce additional prior art to this proceeding.

Exhibit 1037 – Gross Hand Drawing

Exhibit 1037 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as Mr. Gross did not opine on the Patent Owner manufacturing process, only the prior art and ‘301 Patent);

Mr. Gross was asked during his deposition to draw a cross section of the Patent Owner's pillow and explain the temperature of the cooling that occurs when the user places his head on the pillow. Exhibit 1037 is inadmissible as Mr. Gross did not opine about the GhostPillow manufacturing process or the cooling effect of the process and the exhibit is outside the scope of Mr. Gross' direct testimony.

Exhibit 1047 – David Perry, Purchases at the Top, BedTimes Magazine, July 27, 2022

Exhibit 1047 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data about purchase of pillows from brick and mortar stores versus online);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 901 (lack of authentication);
- FRE 1002/1003 (lack of original or duplicate recording).

Exhibit 1050 – Fortune Business Insights U.S. Pillow Market Size, 2023-2030

Exhibit 1050 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);

- FRE 702/703 (failure to provide underlying data and documentation; Exhibit 1050 is a summary, without the full report that requires purchase);
- FRE 901 (lack of authentication);
- FRE 1002/1003 (lack of original or duplicate recording).

Exhibit 1057 - Brooklyn Bedding Cooling Gel with PCM

Exhibit 1057 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 901 (lack of authentication);
- FRE 1002/1003 (lack of original or duplicate recording).

Petitioner is improperly trying to introduce additional prior art to this proceeding.

Exhibit 1058 - Fohm Pillow Kickstarter

Exhibit 1058 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 901 (lack of authentication);

- FRE 1002/1003 (lack of original or duplicate recording).

Petitioner is improperly trying to introduce additional prior art to this proceeding.

Exhibit 1059 - Fohm Pillow Shipment

Exhibit 1059 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 901 (lack of authentication);
- FRE 1002/1003 (lack of original or duplicate recording).

Petitioner is improperly trying to introduce additional prior art to this proceeding.

Exhibit 1075 (Second Declaration of Dr. Brienza)

Exhibit 1075 is inadmissible for at least the following reasons:

- FRE 702/703 (opinions are not sufficiently reliable because Dr. Brienza fails to set forth sufficient facts underlying his opinions);
- FRE 106; FRE 602; FRE 702/703; FRE 801/802/805; FRE 901; 37 C.F.R. § 42.65(a) (lack of foundation of Dr. Brienza's review of the Element testing results).

Exhibit 1076 (Declaration of Shiroff)

Exhibit 1076 is inadmissible for at least the following reasons:

- FRE 702/703 (opinions are not sufficiently reliable because Mr. Shiroff fails to set forth sufficient facts underlying his opinions);
- FRE 106; FRE 602; FRE 702/703; FRE 801/802/805; FRE 901; 37 C.F.R. § 42.65(b);
- Exhibit 1076 also relies on Exhibit 1075, the second declaration of Dr. Brienza, instead of Mr. Shiroff's personal observations and opinion.

Exhibit 1079 - (Video Exhibit) – <https://www.youtube.com/watch?v=vflxKFL24s4>

Exhibit 1079 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 901 (lack of authentication);
- FRE 1002/1003 (lack of original or duplicate recording)

Exhibit 1080 - Screenshots of Video Exhibit 1079

Exhibit 1080 (which was not provided with the Reply) is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 901 (lack of authentication);
- FRE 1002/1003 (lack of original or duplicate recording)

Exhibit 1081 - Boerstech Foam Pillow Drill 9101 Variable

Exhibit 1081 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 901 (lack of authentication);
- FRE 1002/1003 (lack of original or duplicate recording)

Exhibit 1083 - (Video Exhibit) <https://vimeo.com/111694480>

Exhibit 1083 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);

- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 901 (lack of authentication);
- FRE 1002/1003 (lack of original or duplicate recording)

Exhibit 1084 - Screenshots of Video Exhibit 1083

Exhibit 1084 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 901 (lack of authentication);
- FRE 1002/1003 (lack of original or duplicate recording)

Exhibit 1086 - Email string regarding ER-20

Exhibit 1086 is inadmissible for at least the following reasons:

- FRE 106 (lack of related statements);
- FRE 602 (lack of foundation as to underlying source of alleged data);
- FRE 702/703 (failure to provide underlying data and documentation);
- FRE 801 (lack of personal knowledge);
- FRE 901 (lack of authentication);

- FRE 1002/1003 (lack of original or duplicate recording).

November 22, 2024

Respectfully submitted,

Lead Counsel

/s Greg M. Popowitz

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CERTIFICATE OF SERVICE

The undersigned certifies that, in accordance with 37 C.F.R. § 42.6(e) and 37 C.F.R. § 42.205, service was made on Petitioner as detailed below.

<i>Date of Service</i>	November 22, 2024
<i>Manner of Service</i>	Email to mkoffsky@koffskyschwalb.com ; gserbin@koffskyschwalb.com
<i>Documents Served</i>	Patent Owner's Objections to Evidence under 37 C.F.R. § 42.64(b)(1)
<i>Persons Served</i>	Mark I. Koffsky Gary Serbin Koffsky Schwalb LLC 500 7th Ave, 8th Floor New York, NY 10018

Date: November 22, 2024

/Greg M. Popowitz/
Greg M. Popowitz