

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Casper Sleep Inc.,
Petitioner,

v.

Werner Media Partners, LLC,
Patent Owner.

U.S. Patent 10,842,301
IPR 2024-00474

**Petitioner's Response
to Patent Owner's Objections to Evidence
Under 37 C.F.R. § 42.64(b)(2)**

Pursuant to 37 C.F.R. § 42.64(b)(2), Casper Sleep Inc. (“Petitioner”) responds to Patent Owner’s November 22, 2024, evidentiary objections to Petitioner’s Reply (“Reply”) of November 15, 2024. Petitioner reserves the right to present further objections as allowed by the applicable rules or other authority.

Response to Patent Owner’s Objection to Exhibit 1031—U.S. Patent No. 9,538,855 to Gross et al.

The objection under FRE 106 should be overruled. Exhibit 1031 is referenced in Petitioner’s Exhibit 1074, which is a transcript of 10/29/2024 Deposition of Patent Owner’s technical Expert, Andrew Gross. The context of Mr. Gross deposition testimony concerning Exhibit 1031, with respect to knowledge of a Person of Ordinary Skill in the Art (“POSITA”), is referenced in Petitioner’s Exhibit 1075, which is a Second Declaration of Petitioner’s technical expert, David M. Brienza Ph.D. The Patent Owner had a full and fair opportunity to re-cross Mr. Gross concerning Exhibit 1031 at his 10/29/2024 deposition. The Patent Owner also had a full and fair opportunity to depose De. Brienza but chose not to.

The objection under FRE 602 should be overruled. Exhibit 1031 is referenced in Petitioner’s Exhibit 1074, which is a transcript of 10/29/2024 Deposition of Patent Owner’s technical Expert, Andrew Gross. Mr. Gross is listed as the first inventor on Exhibit 1031 and, as such, has personal knowledge about the content of the exhibit. The Patent Owner had a full and fair opportunity to re-

cross Mr. Gross concerning Exhibit 1031 at his 10/29/2024 deposition. Moreover, FRE 602 does not apply to expert testimony.

The objection under FRE 702/703 should be overruled. Exhibit 1031 is referenced in Petitioner's Exhibit 1074, which is a transcript of 10/29/2024 Deposition of Patent Owner's technical Expert, Andrew Gross. Mr. Gross is listed as the named inventor on Exhibit 1031 and, as such, has personal knowledge about the content of the exhibit. The context of Mr. Gross's deposition testimony concerning Exhibit 1031, with respect to knowledge of a Person of Ordinary Skill in the Art ("POSITA"), is referenced in Petitioner's Exhibit 1075, which is a Second Declaration of Petitioner's technical expert, David M. Brienza Ph.D. The Patent Owner had a full and fair opportunity to re-cross Mr. Gross concerning Exhibit 1031 at his 10/29/2024 deposition. The Patent Owner also had a full and fair opportunity to depose De. Brienza but chose not to.

Contrary to Patent Owner's allegation, Exhibit 1031 is not being introduced as an additional prior art. Instead, it is being introduced to support Petitioner's position about POSITA's general knowledge at the time of the invention of the 10,842,301 Patent ("the '301 Patent"). The Patent Owner had a full and fair opportunity to re-cross Mr. Gross concerning Exhibit 1031 at his 10/29/2024 deposition, and also had a full and fair opportunity to depose De. Brienza but chose not to.

Response to Patent Owner's Objection to Exhibit 1037—Gross Hand Drawing

The objection under FRE 106 should be overruled. Exhibit 1037 is referenced in Petitioner's Exhibit 1074, which is a transcript of 10/29/2024 Deposition of Patent Owner's technical Expert, Andrew Gross, concerning the '301 Patent, which was also the context of declaratory statements of Petitioner's technical expert, Dr. Brienza, in Dr. Brienza's First Declaration (Exhibit 1006) and Dr. Brienza's Second Declaration (Exhibit 1075). The Patent Owner had a full and fair opportunity to re-cross Mr. Gross concerning Exhibit 1037 at his 10/29/2024 deposition. The Patent Owner also had a full and fair opportunity to depose Dr. Brienza but chose not to.

The objection under FRE 602 should be overruled. Exhibit 1037 is referenced in Petitioner's Exhibit 1074, which is a transcript of 10/29/2024 Deposition of Patent Owner's technical Expert, Andrew Gross, concerning the '301 Patent, which was also the context of declaratory statements of Petitioner's technical expert, Dr. Brienza, in Dr. Brienza's First Declaration (Exhibit 1006) and Dr. Brienza's Second Declaration (Exhibit 1075). FRE 602 does not apply to expert testimony. Moreover, the Patent Owner had a full and fair opportunity to re-cross Mr. Gross concerning Exhibit 1037 at his 10/29/2024 deposition. The Patent Owner also had a full and fair opportunity to depose Dr. Brienza but chose not to.

Mr. Gross's testimony concerning Exhibit 1037 is not about the GhostPillow manufacturing process but about operation of the pillow described in the '301 Patent.

Response to Patent Owner's Objection to Exhibit 1047—David Perry, Purchases at the Top, Bed Times, Magazine, July 27, 2022

The objection under FRE 106 should be overruled. Exhibit 1047 is referenced in Petitioner's Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner's expert, Jeff Quinn. Exhibit 1047 is also referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff, who qualifies as a POSITA. Exhibit 1047 provides general data concerning the relevant market. Patent Owner's expert, Mr. Quinn, admitted at his deposition that the data in Exhibit 1047 was generated by a reliable source. The Patent Owner had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1047 at Mr. Quinn's 11/04/2024 deposition, and to cross-examine Mr. Shiroff at his deposition on 11/27/2024.

The objection under FRE 602 should be overruled. Exhibit 1047 is referenced in Petitioner's Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner's expert, Jeff Quinn. Exhibit 1047 is also referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff, who qualifies as a POSITA. Exhibit 1047 provides general data

concerning the relevant market. FRE 602 does not apply to expert testimony.

Moreover, the Patent Owner had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1047 at Mr. Quinn's 11/04/2024 deposition, and to cross-examine Mr. Shiroff at his deposition on 11/27/2024.

The objection under FRE 702/703 should be overruled. Exhibit 1047 provides general data concerning the relevant market. Patent Owner's expert, Mr. Quinn, admitted at his deposition that the data in Exhibit 1047 was generated by a reliable source. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1047 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1047 and did so. (See Patent Owner's Exhibit 2029.)

The objection under FRE 901 should be overruled. Exhibit 1047 provides publicly available general data concerning the relevant market. Patent Owner's expert, Mr. Quinn, admitted at his deposition that the data in Exhibit 1047 was generated by a reliable source. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1047 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1047 and did so. (See Patent Owner's Exhibit 2029.) "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility[;] [r]ather there need be only a prima facie

showing... of authenticity, not a full argument on admissibility." United States v. McGlory, 968 F.2d 309, 328-29 (3d Cir. 1992). 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).

The objections under FRE 1002/1003 should be overruled. Exhibit 1047 provides publicly available general data concerning the relevant market. It is a publicly available document, which is a printout of a webpage from a reliable source, as admitted Patent Owner's expert, Mr. Quinn, at his deposition. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1047 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1047 and did so. (See Patent Owner's Exhibit 2029.) Patent Owner fails to raise genuine issue about the authenticity of Exhibit 1047, and it is not unfair to admit Exhibit 1047 in this proceeding.

Response to Patent Owner's Objection to Exhibit 1050—Fortune Business Insights U.S. Pillow Market Size, 2023-2030

The objection under FRE 106 should be overruled. Exhibit 1050 is referenced in Petitioner's Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner's expert, Jeff Quinn. Exhibit 1050 is also referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David

Shiroff. The Patent Owner had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1050 at Mr. Quinn's 11/04/2024 deposition. Patent Owner also had a full and fair opportunity to cross-examine Mr. Shiroff at his deposition on 11/27/2024 and did so.

The objection under FRE 602 should be overruled. Exhibit 1050 is referenced in Petitioner's Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner's expert, Jeff Quinn. Exhibit 1050 is also referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. Rule 602 does not apply to expert testimony. Moreover, the Patent Owner had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1050 at Mr. Quinn's 11/04/2024 deposition, and to cross-examine Mr. Shiroff at his deposition on 11/27/2024 and did so.

The objection under FRE 702/703 should be overruled. Exhibit 1050 provides general data concerning the relevant market and is used by the Petitioner as a mere market guidepost. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1050 in his declaration. (See Exhibit 1076.) The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1050 and did so. (See Patent Owner's Exhibit 2029.)

The objection under FRE 901 should be overruled. Exhibit 1050 provides publicly available general data concerning the relevant market and is used by the

Petitioner to as a mere market guidepost. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1050 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1050 and did so. (See Patent Owner's Exhibit 2029.) "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility[;] [r]ather there need be only a prima facie showing... of authenticity, not a full argument on admissibility." *United States v. McGlory*, 968 F.2d 309, 328-29 (3d Cir. 1992). 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).

The objections under FRE 1002/1003 should be overruled. Exhibit 1050 provides publicly available general data concerning the relevant market. It is a publicly available document that is used as a mere market guidepost. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1050 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1050 and did so. (See Patent Owner's Exhibit 2029.) Patent Owner fails to raise genuine issue about the authenticity of Exhibit 1050, and it is not unfair to admit Exhibit 1050 in this proceeding.

Response to Patent Owner's Objection to Exhibit 1057—Brooklyn Bedding Cooling Gel with PCM

The objection under FRE 106 should be overruled. Exhibit 1057 is referenced in Petitioner's Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner's expert, Jeff Quinn. Exhibit 1057 is also referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. The Patent Owner had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1057 at Mr. Quinn's 11/04/2024 deposition. It also had a full and fair opportunity to cross-examine Mr. Shiroff at his deposition on 11/27/2024 and did so.

The objection under FRE 602 should be overruled. Exhibit 1057 is referenced in Petitioner's Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner's expert, Jeff Quinn. Exhibit 1050 is also referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. Rule 602 does not apply to expert testimony. Moreover, the Patent Owner had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1057 at Mr. Quinn's 11/04/2024 deposition, and to cross-examine Mr. Shiroff at his deposition on 11/27/2024 and did so.

The objection under FRE 702/703 should be overruled. Exhibit 1057 provides data concerning competitive products and is used by the Petitioner as a general presentation of earlier competing products in the relevant market. Both

parties' experts testified about Exhibit 1057. For example, Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1057 in his declaration. (See Exhibit 1076.) The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1057 and did so. (See Patent Owner's Exhibit 2029.)

The objection under FRE 901 should be overruled. Exhibit 1057 provides publicly available data concerning earlier competing products in the relevant market. Both parties' experts testified about Exhibit 1057. For example, Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1057 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1057 and did so. (See Patent Owner's Exhibit 2029.) "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility[;] [r]ather there need be only a prima facie showing... of authenticity, not a full argument on admissibility." *United States v. McGlory*, 968 F.2d 309, 328-29 (3d Cir. 1992). 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).

The objections under FRE 1002/1003 should be overruled. Exhibit 1057 provides publicly available general data concerning earlier competing products in

the relevant market. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1057 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1057 and did so. (See Patent Owner's Exhibit 2029.) Patent Owner fails to raise genuine issue about the authenticity of Exhibit 1057, and it is not unfair to admit Exhibit 1057 in this proceeding.

**Response to Patent Owner's Objection to Exhibit 1058—Fohm Pillow
Kickstarter**

The objection under FRE 106 should be overruled. Exhibit 1058 is referenced in Petitioner's Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner's expert, Jeff Quinn. Exhibit 1058 is also referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. The Patent Owner had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1058 at Mr. Quinn's 11/04/2024 deposition. It also had a full and fair opportunity to cross-examine Mr. Shiroff at his deposition on 11/27/2024.

The objection under FRE 602 should be overruled. Exhibit 1058 is referenced in Petitioner's Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner's expert, Jeff Quinn. Exhibit 1058 is also referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. Rule 602 does not apply to expert testimony. Moreover, the Patent Owner

had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1058 at Mr. Quinn's 11/04/2024 deposition, and to cross-examine Mr. Shiroff at his deposition on 11/27/2024.

The objection under FRE 702/703 should be overruled. Exhibit 1058 provides data concerning competitive products and is used by the Petitioner as a general presentation of earlier competing products in the relevant market. Both parties' experts testified about Exhibit 1058. For example, Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1058 in his declaration. (See Exhibit 1076.) The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1058.

The objection under FRE 901 should be overruled. Exhibit 1058 provides publicly available data concerning earlier competing products in the relevant market. Both parties' experts testified about Exhibit 1058. For example, Mr. Quinn testified about Exhibit 1058 at his deposition. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1058 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1058. "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility[;] [r]ather there need be only a prima facie showing... of authenticity, not a full argument on admissibility." *United States v. McGlory*, 968

F.2d 309, 328-29 (3d Cir. 1992). 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).

The objections under FRE 1002/1003 should be overruled. Exhibit 1058 provides publicly available general data concerning earlier competing products in the relevant market. Petitioner’s expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1058 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1058. Patent Owner fails to raise genuine issue about the authenticity of Exhibit 1058, and it is not unfair to admit Exhibit 1058 in this proceeding.

Response to Patent Owner’s Objection to Exhibit 1059—Fohm Pillow Shipment

The objection under FRE 106 should be overruled. Exhibit 1059 is referenced in Petitioner’s Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner’s expert, Jeff Quinn. Exhibit 1058 is also referenced in Petitioner’s Exhibit 1076, which is a Declaration of Petitioner’s expert, David Shiroff. The Patent Owner had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1059 at Mr. Quinn’s 11/04/2024 deposition. It also had a full and fair opportunity to cross-examine Mr. Shiroff at his deposition on 11/27/2024.

The objection under FRE 602 should be overruled. Exhibit 1059 is referenced in Petitioner's Exhibit 1078, which is a transcript of 11/04/2024 Deposition of Patent Owner's expert, Jeff Quinn. Exhibit 1059 is also referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. Rule 602 does not apply to expert testimony. Moreover, the Patent Owner had a full and fair opportunity to re-cross Mr. Quinn concerning Exhibit 1058 at Mr. Quinn's 11/04/2024 deposition, and to cross-examine Mr. Shiroff at his deposition on 11/27/2024.

The objection under FRE 702/703 should be overruled. Exhibit 1059 provides data concerning competitive products and is used by the Petitioner as a general presentation of earlier competing products in the relevant market. Both parties' experts testified about Exhibit 1059. For example, Mr. Quinn testified about Exhibit 1059 at his deposition. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1059 in his declaration. (See Exhibit 1076.) The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1059.

The objection under FRE 901 should be overruled. Exhibit 1059 provides publicly available data concerning earlier competing products in the relevant market. Both parties' experts testified about Exhibit 1059. For example, Mr. Quinn testified about Exhibit 1059 at his deposition. Petitioner's expert, David

Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1059 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1059. "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility[;] [r]ather there need be only a prima facie showing... of authenticity, not a full argument on admissibility." *United States v. McGlory*, 968 F.2d 309, 328-29 (3d Cir. 1992). 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).

The objections under FRE 1002/1003 should be overruled. Exhibit 1059 provides publicly available general data concerning earlier competing products in the relevant market. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1059 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1059. Patent Owner fails to raise genuine issue about the authenticity of Exhibit 1058, and it is not unfair to admit Exhibit 1059 in this proceeding.

Response to Patent Owner's Objection to Exhibit 1075—Second Declaration of Dr. Brienza

The objection under FRE 702/703 should be overruled. Dr. Brienza's detailed expert opinions are reliable and there is no basis to exclude them in this

proceeding for any reason, including under the gatekeeping framework of *Daubert*. Moreover, the Patent Owner had a full and fair opportunity to depose Dr. Brienza concerning Exhibit 1075 but failed to do so.

The general objections “FRE 106; FRE 602; FRE 702/703; FRE 801/802/805; FRE 901; 37 C.F.R. §42.65(a)” should be rejected because they are generalized objections that lack particularity to allow Petitioner to meaningfully respond and, if necessary, correct.

Response to Patent Owner’s Objection to Exhibit 1076—Declaration of David Shiroff

The objection under FRE 702/703 should be overruled. Mr. Shiroff’s detailed expert opinions are reliable and there is no basis to exclude them in this proceeding for any reason, including under the gatekeeping framework of *Daubert*. Moreover, the Patent Owner had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1076.

The general objections “FRE106; FRE 602; FRE 702/703; FRE 801/802/805; FRE 901; 37 C.F.R. §42.65(a)” should be rejected because they are generalized objections that lack particularity to allow Petitioner to meaningfully respond and, if necessary, correct.

Mr. Shroff did not merely refer to Exhibit 1075, but to arrive at his opinion, in particular relating to Element testing, Mr. Shiroff personally discussed its content with the author of Exhibit 1075, Dr. Brienza.

Response to Patent Owner's Objection to Exhibit 1079—Video Exhibit
(<https://www.youtube.com/watch?v=vflxKFL24s4>)

The objection under FRE 106 should be overruled. Exhibit 1079 provides publicly available data concerning an alternative manufacturing process that is available to make competing products. Exhibit 1079 is referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. The Patent Owner had a full and fair opportunity to cross-examine Mr. Shiroff concerning this exhibit, which is a YouTube video, at his deposition on 11/27/2024. Relevant visual excerpts of the video were included in Mr. Shiroff's declaration, Exhibit 1076. The timestamped references provide additional background about the relevant portions of Exhibit 1079. As discussed below, Exhibit 1079 is authenticated, and therefore admissible.

The objection under FRE 602 should be overruled. Exhibit 1079 provides publicly available data concerning an alternative manufacturing process that is available to make competing products. Exhibit 1079 is referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. Rule 602 does not apply to expert testimony. Moreover, the Patent Owner had a full and

fair opportunity to cross-examine Mr. Shiroff at his deposition on 11/27/2024 concerning the exhibit.

The objection under FRE 702/703 should be overruled. Exhibit 1079 provides publicly available data concerning an alternative manufacturing process that is available to make competing products. Exhibit 1079 is referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. The Patent Owner had a full and fair opportunity to cross-examine Mr. Shiroff concerning this exhibit, which is a YouTube video, at his deposition on 11/27/2024. Relevant visual excerpts of the video were included in Mr. Shiroff's declaration, Exhibit 1076. The timestamped references provide additional background about the relevant portions of Exhibit 1079. As discussed below, Exhibit 1079 is authenticated, and therefore admissible.

The objection under FRE 901 should be overruled. Exhibit 1079 provides publicly available data concerning an alternative manufacturing process that is available to make competing products. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1079 in his declaration, Exhibit 1076. Exhibit 1079 should be considered authenticated based on Mr. Shiroff's declaration. Mr. Shiroff identified the URL for Exhibit 1079 in his declaration, discusses what is shown in the video, provides timed screenshots with time stamps. The video is available for access on YouTube. Patent Owner has not disputed that

the video is anything but what Mr. Shiroff stated in his declaration. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1079 "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility[;] [r]ather there need be only a prima facie showing... of authenticity, not a full argument on admissibility." United States v. McGlory, 968 F.2d 309, 328-29 (3d Cir. 1992). 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).

The objections under FRE 1002/1003 should be overruled. Exhibit 1079 Exhibit 1079 provides publicly available data concerning an alternative manufacturing process that is available to make competing products. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1079 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1079. Patent Owner fails to raise genuine issue about the authenticity of Exhibit 1079, and it is not unfair to admit Exhibit 1079 in this proceeding.

Response to Patent Owner's Objection to Exhibit 1080—Screenshots of Video Exhibit 1079

Exhibit 1080 constitutes screenshots from Exhibit 1079 and was incorporated in full in Mr. Shiroff's expert declaration, Exhibit 1076. Petitioner hereby incorporates by reference each of Petitioner's responses to Patent Owner's objections to Exhibit 1080.

Response to Patent Owner's Objection to Exhibit 1081—Boerstech Foam Pillow Drill 9101 Variable

The objection under FRE 106 should be overruled. Exhibit 1081 provides publicly available data concerning a machine for an alternative manufacturing process that is available to make competing products. Exhibit 1081 is referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. The Patent Owner had a full and fair opportunity to cross-examine Mr. Shiroff concerning this exhibit at his deposition on 11/27/2024. Relevant visual excerpts of the exhibit were included in Mr. Shiroff's declaration, Exhibit 1076. As discussed below, Exhibit 1081 is authenticated, and therefore admissible.

The objection under FRE 602 should be overruled. Exhibit 1081 provides publicly available data concerning a machine for an alternative manufacturing process that is available to make competing products. Exhibit 1081 is referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. Rule 602 does not apply to expert testimony. Moreover, the Patent Owner

had a full and fair opportunity to cross-examine Mr. Shiroff at his deposition on 11/27/2024 concerning the exhibit.

The objection under FRE 702/703 should be overruled. Exhibit 1081 provides publicly available data concerning a machine for an alternative manufacturing process that is available to make competing products. Exhibit 1081 is referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. The Patent Owner had a full and fair opportunity to cross-examine Mr. Shiroff concerning this exhibit at his deposition on 11/27/2024. Relevant visual excerpts of the video were included in Mr. Shiroff's declaration, Exhibit 1076. As discussed below, Exhibit 1079 is authenticated, and therefore admissible.

The objection under FRE 901 should be overruled. Exhibit 1081 provides publicly available data concerning an alternative manufacturing process that is available to make competing products. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1081 in his declaration, Exhibit 1076. Exhibit 1081 should be considered authenticated based on Mr. Shiroff's declaration. Mr. Shiroff identified the URL for Exhibit 1081 in his declaration, discusses what is shown in the exhibit. The exhibit is available for access on the Web. Patent Owner has not disputed that the exhibit is anything but what Mr. Shiroff stated in his declaration. The Patent Owner also had a full and fair

opportunity to depose Mr. Shiroff concerning Exhibit 1081 "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility[;] [r]ather there need be only a prima facie showing... of authenticity, not a full argument on admissibility." United States v. McGlory, 968 F.2d 309, 328-29 (3d Cir. 1992). 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).

The objections under FRE 1002/1003 should be overruled. Exhibit 1081 provides publicly available data concerning a machine for an alternative manufacturing process that is available to make competing products. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1081 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1081. Patent Owner fails to raise genuine issue about the authenticity of Exhibit 1081, and it is not unfair to admit Exhibit 1081 in this proceeding.

Response to Patent Owner's Objection to Exhibit 1083—Video Exhibit
(<https://vimeo.com/111694480>)

The objection under FRE 106 should be overruled. Exhibit 1083 provides data concerning competitive products and is used by the Petitioner as a general presentation of earlier competing products in the relevant market. Exhibit 1083 is

referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. The Patent Owner had a full and fair opportunity to cross-examine Mr. Shiroff concerning this exhibit, which is a YouTube video, at his deposition on 11/27/2024. Relevant visual excerpts of the video were included in Mr. Shiroff's declaration, Exhibit 1076. The timestamped references provide additional background about the relevant portions of Exhibit 1083. As discussed below, Exhibit 1079 is authenticated, and therefore admissible.

The objection under FRE 602 should be overruled. Exhibit 1083 provides publicly available data concerning competitive products and is used by the Petitioner as a general presentation of earlier competing products in the relevant market. Exhibit 1083 is referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. Rule 602 does not apply to expert testimony. Moreover, the Patent Owner had a full and fair opportunity to cross-examine Mr. Shiroff at his deposition on 11/27/2024 concerning the exhibit.

The objection under FRE 702/703 should be overruled. Exhibit 1083 provides publicly available data concerning competitive products and is used by the Petitioner as a general presentation of earlier competing products in the relevant market. Exhibit 1083 is referenced in Petitioner's Exhibit 1076, which is a Declaration of Petitioner's expert, David Shiroff. The Patent Owner had a full and fair opportunity to cross-examine Mr. Shiroff concerning this exhibit, which is

a video, at his deposition on 11/27/2024. Relevant visual excerpts of the video were included in Mr. Shiroff's declaration, Exhibit 1076. The timestamped references provide additional background about the relevant portions of Exhibit 1083. As discussed below, Exhibit 1083 is authenticated, and therefore admissible.

The objection under FRE 901 should be overruled. Exhibit 1083 provides publicly available data concerning competitive products and is used by the Petitioner as a general presentation of earlier competing products in the relevant market. Petitioner's expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1083 in his declaration, Exhibit 1076. Exhibit 1083 should be considered authenticated based on Mr. Shiroff's declaration. Mr. Shiroff identified the URL for Exhibit 1083 in his declaration, discusses what is shown in the video, provides timed screenshots with time stamps. The video is available for access on the Web. Patent Owner has not disputed that the video is anything but what Mr. Shiroff stated in his declaration. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1083. "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility[;] [r]ather there need be only a prima facie showing... of authenticity, not a full argument on admissibility." *United States v. McGlory*, 968 F.2d 309, 328-29 (3d Cir. 1992). 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).

The objections under FRE 1002/1003 should be overruled. Exhibit 1083 provides publicly available data concerning competitive products and is used by the Petitioner as a general presentation of earlier competing products in the relevant market. Petitioner’s expert, David Shiroff, who qualifies as a POSITA, testified concerning Exhibit 1083 in his declaration, Exhibit 1076. The Patent Owner also had a full and fair opportunity to depose Mr. Shiroff concerning Exhibit 1083. Patent Owner fails to raise genuine issue about the authenticity of Exhibit 1083, and it is not unfair to admit Exhibit 1083 in this proceeding.

Response to Patent Owner’s Objection to Exhibit 1084—Screenshots of Video Exhibit 1083

Exhibit 1084 constitutes screenshots from Exhibit 1083 and was incorporated in full in Mr. Shiroff’s expert declaration, Exhibit 1076. Petitioner hereby incorporates by reference each of Petitioner’s responses to Patent Owner’s objections to Exhibit 1083.

Response to Patent Owner’s Objection to Exhibit 1086—Email string regarding ER-20

The objection under FRE 106 should be overruled. Exhibit 1086 is referenced in Petitioner’s Exhibit 1074, which is Petitioner technical expert’s email

correspondence with a distributor of a product cited in the Ohta reference, Exhibit 1009 and constitutes Dr. Brienza's investigation into the subject matter. It was provided to address Patent Owner's technical expert's, Mr. Gross's, declaratory statements concerning the Ohta reference. Patent Owner had a full and fair opportunity to depose Dr. Brienza but chose not to.

The objection under FRE 602 should be overruled. Exhibit 1086 is referenced in Petitioner's Exhibit 1074, which is Petitioner technical expert's email correspondence with a distributor of a company that made the product cited in the Ohta reference, Exhibit 1009 and constitutes Dr. Brienza's investigation into the subject matter. Patent Owner had a full and fair opportunity to depose Dr. Brienza but chose not to. Moreover, FRE 602 does not apply to expert testimony.

The objection under FRE 702/703 should be overruled. Exhibit 1086 is referenced in Petitioner's Exhibit 1074, which is Petitioner technical expert's, Dr. Brienza's, email correspondence with a distributor of a company that made the product cited in the Ohta reference, Exhibit 1009 and constitutes Dr. Brienza's investigation into the subject matter. The Patent Owner also had a full and fair opportunity to depose De. Brienza but chose not to.

The objection under FRE 801 should be overruled. Exhibit 1086 is referenced in Petitioner's Exhibit 1074, which is Petitioner technical expert's email correspondence with a distributor of a company that made the product cited in the

Ohta reference, Exhibit 1009 and constitutes Dr. Brienza's personal investigation into the subject matter.

The objection under FRE 901 should be overruled. Exhibit 1086 is referenced in Petitioner's Exhibit 1074, which is Petitioner technical expert's, Dr. Brienza's email correspondence with a distributor of a company that made the product cited in the Ohta reference, Exhibit 1009, and constitutes Dr. Brienza's investigation into the subject matter. The Patent Owner also had a full and fair opportunity to depose Dr. Brienza but chose not to. "[T]he showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility[;] [r]ather there need be only a prima facie showing... of authenticity, not a full argument on admissibility." *United States v. McGlory*, 968 F.2d 309, 328-29 (3d Cir. 1992). 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).

Respectfully submitted,

Dated: December 9, 2024

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CERTIFICATE OF SERVICE

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

<i>Date of Service</i>	December 9, 2024
<i>Manner of Service</i>	Email to patent@assoulineberlowe.com , contact@pearsonip.com , wais@cotmanlaw.com , ed@cotmanlaw.com
<i>Document Served</i>	Petitioner's Response to Patent Owner's Objections to Evidence Under 37 C.F.R. § 42.64(b)(2)
<i>Persons Served</i>	Lead Counsel Greg M. Popowitz (Reg. No. 60,061) Assouline & Berlowe, P.A. Miami Tower 100 SE 2nd St., Suite 3105 Miami, FL 33131 Backup Counsel Loren D. Pearson (Reg. No. 42,987) Loren Donald Pearson, P.A. 333 SE 2nd Avenue, Suite 2000 Miami, FL 33131 Backup Counsel Wais Ali (Patent Agent No. 80,945) Backup Counsel Edward C. Schewe (Reg. No. 34,246) Cotman IP Law Group, APLC 281 East Colorado Blvd. #2630 Pasadena, CA 91102

Dated: December 9, 2024 /Mark I. Koffsky/
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