

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE PATENT TRIAL AND APPEAL BOARD**

CASPER SLEEP INC.,
Petitioner,

Vs.

WERNER MEDIA PARTNERS, LLC.,
Patent Owner.

IPR 2024-00474
Patent 10,842,301 B2

**PATENT OWNER'S MODIFIED SUBSTITUTE MOTION TO EXCLUDE
PURSUANT TO 37 C.F.R. § 42.64(c) AND PAPER 45**

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I. STATEMENT OF THE PRECISE RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.64(c) and the Federal Rules of Evidence (FRE), Patent Owner respectfully moves to exclude Exhibits 1031, 1037, 1047, 1050, 1057, 1058, 1059, 1075, 1076, 1079, 1080, 1081, 1083, 1084, 1086 as inadmissible for violating 37 C.F.R. § 42 and the FRE.

Petitioner filed Exhibits 1031, 1037, 1047, 1050, 1057, 1058, 1059, 1075, 1076, 1079, 1080, 1081, 1083, 1084, 1086 on November 15, 2024, in connection with Petitioner's Reply to Patent Owner's Response to Petition ("Petitioner's Reply"). Specifically, Petitioner relied on these Exhibits in the Petitioner's Reply. Patent Owner timely objected to the exhibits on November 22, 2024 ("Reply Objections") under 37 C.F.R. § 42.64(b)(1).

II. STATEMENT OF REASONS FOR RELIEF REQUESTED

"[A] party may move to exclude evidence, whether as improper under the response-only regulation, under the Trial Practice Guide's advice, or on other grounds." *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1081 (Fed. Cir. 2015). Other bases for excluding exhibits exist in the Federal Rules of Evidence. See 37 C.F.R. § 42.62 ("[T]he Federal Rules of Evidence shall apply to a proceeding.").

For the reasons set forth below, Exhibits 1031, 1037, 1047, 1050, 1057, 1058, 1059, 1075, 1076, 1079, 1080, 1081, 1083, 1084, and 1086 are inadmissible under C.F.R. § 42 and FRE 106, 602, 702/703, 801-803, 901, 1002, and 1003.

III. SPECIFIC PETITIONER EXHIBITS SHOULD BE EXCLUDED

A. Exhibit 1031 Excluded Under FRE 106, 702, 703

Exhibit 1031 was objected to in Patent Owner's Reply Objections filed on November 22, 2024. Exhibit 1031 was used by Petitioner during the deposition of expert Andrew Gross, as shown in Exhibit 1074, page 65. Questions surrounding Mr. Gross' opinion of Exhibit 1031 were objected to during the deposition. See Exhibit 1074, pages 67-68.

The Federal Rules of Evidence apply to this proceeding: 37 C.F.R. § 42.62. Patent Owner seeks to exclude Exhibit 1031 based on FRE 106. Petitioner picked portions of Exhibit 1031 during the deposition of Mr. Gross (Exhibit 1074) without providing the full context of the portions of Exhibit 1031 cited to Mr. Gross. Moreover, Petitioner is attempting to add new prior art as a basis for its Petition.

Patent Owner seeks to exclude Exhibit 1031 based on FRE 702/703. Mr. Gross did not opine in his declaration (Exhibit 2001) about Exhibit 1031. As such, Petitioner's use of Exhibit 1031 with Mr. Gross during his deposition testimony is outside the scope of Mr. Gross' direct testimony.

The Federal Circuit has held that a petitioner may not attempt to add additional grounds for unpatentability in a Reply. *Intelligent Bio-Systems, Inc v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369-70 (Fed. Cir. 2016). Moreover, under 37

C.F.R. § 42.23(b), a “reply may only respond to arguments raised in the corresponding opposition...”

B. Exhibit 1037 Excluded under FRE 106 and 602

Exhibit 1037 was objected to in Patent Owner’s Reply Objections filed on November 22, 2024, and during Mr. Gross’ deposition (Exhibit 1074, starting on p. 211). Exhibit 1037 is a hand drawing created by Mr. Gross as requested by Petitioner during Mr. Gross’ deposition, as shown in Exhibit 1074, pages 211-218. Petitioner used Mr. Gross’ drawing (Exhibit 1037) during its questioning of Mr. Gross in Exhibit 1074, pages 211-218.

Patent Owner seeks to exclude Exhibit 1031 based on FRE 106. Mr. Gross did not opine in his declaration (Exhibit 2001) about Exhibit 1031 or the effect of the resulting air flow from the ‘301 Patent processes. Mr. Gross was asked to draw a cross section of the ‘301 Patent process air flow from the resulting product based on Mr. Gross’ understanding of the ‘301 Patent. However, Mr. Gross opined about the impact of prior art on the ‘301 Patent, not the result/impact of the ‘301 Patent process to provide a cooling effect to the user.

Patent Owner seeks to exclude Exhibit 1031 based on FRE 602. As such, there is no foundation under FRE 602 for Petitioner to use Exhibit 1037 and its related questioning of Mr. Gross during his deposition (Exhibit 1074) as to opinions outside the scope of Exhibit 2001.

C. Exhibit 1047 Excluded under FRE 106, 602, 702/703, 901, and 1002/1003

Exhibit 1047 was objected to in Patent Owner's Reply Objections filed on November 22, 2024. Petitioner uses Exhibit 1074 in its Reply (p. 24) and in Mr. Shiroff's declaration (Exhibit 1076 ¶ 68).

Patent Owner seeks to exclude Exhibit 1047 based on FRE 106. Exhibit 1047 is a Bed Times article that discloses survey information about sleep accessories. The survey in Exhibit 1047 provides no support for the survey data. Therefore, the article and is incomplete as to the source and data used to form the survey numbers. Petitioner attempts to rely on Exhibit 1047 in its Reply (p. 24) to point to the split in pillows purchased online versus in stores.

Patent Owner seeks to exclude Exhibit 1047 based on FRE 602. Neither Petitioner nor Mr. Shiroff have any personal knowledge as to the survey data represented in Exhibit 1047.

Patent Owner seeks to exclude Exhibit 1047 based on FRE 702/703. Mr. Shiroff used Exhibit 1047 in his declaration (Exhibit 1076 ¶ 68). However, Mr. Shiroff lacks sufficient expertise to opine about market surveys such as Exhibit 1047. See Exhibit 2029, 149:4-18; 156:9-21.

Patent Owner seeks to exclude Exhibit 1047 based on FRE 901.

Exhibit 1047 is a news article that is unauthenticated. Petitioner offered no evidence to support the data in Exhibit 1047.

Patent Owner seeks to exclude Exhibit 1047 based on FRE 1002/1003. The news article of Exhibit 1047 was timestamped on October 31, 2024, for an article on July 27, 2022.

D. Exhibit 1050 Excluded under FRE 106, 602, 702/703, 901, and 1002/1003

Exhibit 1050 was objected to in Patent Owner's Reply Objections filed on November 22, 2024. Petitioner uses Exhibit 1050 in its Reply (p. 24) and in Mr. Shiroff's declaration (Exhibit 1076 ¶ 70).

Patent Owner seeks to exclude Exhibit 1050 based on FRE 106. Exhibit 1050 is a summary of the pillow market. The full report was not provided by Petitioner, merely a summary of the report as found in Exhibit 1050.

Patent Owner seeks to exclude Exhibit 1050 based on FRE 602. Neither Petitioner nor Mr. Shiroff have any personal knowledge as to the market data represented in Exhibit 1050.

Patent Owner seeks to exclude Exhibit 1050 based on FRE 702/703. Mr. Shiroff used Exhibit 1047 in his declaration (Exhibit 1076 ¶ 70). However, Mr. Shiroff lacks sufficient expertise to opine about market surveys such as Exhibit 1050. See Exhibit 2029, 150:2-24.

Patent Owner seeks to exclude Exhibit 1050 based on FRE 901. Exhibit 1050 is a summary of a report that is unauthenticated.

Patent Owner seeks to exclude Exhibit 1050 based on FRE 1002/1003. The summary market study of Exhibit 1050 is not the full report.

E. Exhibits 1057, 1058, and 1059 Excluded under FRE 106, 602, 702/703, 901, and 1002/1003

Exhibits 1057, 1058, and 1059 were objected to in Patent Owner's Reply Objections filed on November 22, 2024. In its Reply, Petitioner uses Exhibit 1057 (p. 32), Exhibit 1058 (p. 31), and Exhibit 1059 (p. 31). Mr. Shiroff's declaration (Exhibit 1076) also relied on Exhibit 1057 (¶ 87), Exhibits 1058 and 1059 (¶ 86). Exhibit 1057 is a WayBack machine Amazon listing of a Brooklyn Bedding Cooling Pillow. Exhibit 1058 is a Kickstarter website for a Fohm pillow. Exhibit 1059 is a Fohm pillow shipment.

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 106. Exhibits 1057, 1058, and 1059 are snippets of websites of foam pillows. The actual pillows are not provided and the full website to show all the angles and content regarding the pillows at issue are not provided.

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 602. Petitioner and Mr. Shiroff do not have any personal knowledge as to Exhibits 1057, 1058, and 1059. Petitioner and Mr. Shiroff have never seen the products in Exhibits 1057, 1058, and 1059 or had the opportunity to examine the underlying pillows firsthand to ascertain the pillow features.

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 702/703. Mr. Shiroff used Exhibits 1057, 1058, and 1059 in his declaration (Exhibit 1076 ¶¶ 86, 87). However, Mr. Shiroff lacks sufficient expertise to opine about the pillows shown in Exhibits 1057, 1058, and 1059. See Exhibit 2029, 246:7-255:11.

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 901. Exhibits 1057, 1058, and 1059 are listings of pillows that are unauthenticated.

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 1002/1003. The pillows listed in Exhibits 1057, 1058, and 1059 are not available for inspection to learn about the qualities of the pillows and the manufacturing processes used to create the pillows. FRE 1002/1003 requires the original, which would have been the actual pillows.

F. Exhibit 1075 Excluded under FRE 801/802/805, 37 C.F.R. § 42.65(a)

Patent Owner seeks to exclude Exhibit 1075 ¶ 55 based on FRE 801/802/805. Petitioner is seeking to introduce the unsworn statement of a Japanese company about the characteristics of the ER-20 foam using Dr. Brienza's second declaration. Dr. Brienza simply relies on a statement of a Japanese supplier about a special-order foam product from over a decade prior that was discontinued. Petitioner, through Dr. Brienza, is trying to introduce this statement outside this proceeding and offers the statement to prove the truth of the statement asserted, i.e. that ER-20 is open cell foam. This is hearsay.

Moreover, pursuant to 37 C.F.R. § 42.65(a), Dr. Brienza fails to disclose the underlying facts and data to support his hypothetical examples of altering combined references. For example, in Exhibit 1075 ¶¶ 103-109, Dr. Brienza fails to provide any underlying facts or data to support his significant modifications to the Crawford process using the Lievestro rollers. Dr. Brienza did not give reasons as to why he arrived at the opinions in Exhibit 1075, nor did he state how the analysis was performed to support his opinions.

G. Exhibit 1076 Excluded under FRE 602, 702/703, 801/802/805, 37 C.F.R. § 42.65(a)

Exhibit 1076 was objected to in Patent Owner's Reply Objections filed on November 22, 2024. Exhibit 1076 is the declaration of David Shiroff, which was relied upon throughout Petitioner's Reply, specifically Section VI (p. 19) onward.

Patent Owner seeks to exclude Exhibit 1076 based on FRE 602. Exhibit 1076 should be excluded because it includes testimony for which the witness has no personal knowledge. FRE 602. Exhibit 2029 is the transcript of deposition testimony based on the declaration of David Shiroff (Exhibit 1076). Petitioner relied on this Exhibit in the Petitioner's Reply.

As highlighted in Mr. Shiroff's deposition transcript (Exhibit 2029), Mr. Shiroff's testimony in his declaration (Exhibit 1075) fails to show any personal knowledge of secondary considerations arguments raised in Patent Owner's Response and exhibits at issue. For example, Mr. Shiroff: did not recall witnessing

holes being punched in foam, a required step of the '301 Patent process (Exhibit 2029, 76:24-77:13); learned about compressing foam to form holes preparing for his declaration as he did not have prior knowledge (Exhibit 2029, 77:14-79); has never conducted his own survey or developed survey questions (Exhibit 2029, 156:9-16; 158:12-25); did not know what an adequate response rate would be for a market survey (Exhibit 2029, 159:3-9); understand a Likert scale for surveys (Exhibit 2029, 156:17-21).

Patent Owner seeks to exclude Exhibit 1076 based on FRE 702/703. Mr. Shiroff is not qualified as an expert witness given his lack of personal knowledge about the secondary considerations raised by Patent Owner. Mr. Shiroff's declaration (Exhibit 1076) is replete with conclusions that Mr. Shiroff lacks expertise to make, as shown in his deposition transcript (Exhibit 2029).

Exhibit 1076 should be excluded under 37 C.F.R. § 42.63(b) because Mr. Shiroff failed to submit supporting technical data. In addition, Mr. Shiroff did not give reasons for arriving at the opinions in Exhibit 1076, nor did he state how the analysis was performed to support his opinions. Some examples provided by Mr. Shiroff were not supported by evidence or technical data, which were used to support his conclusions.

Patent Owner seeks to exclude Exhibit 1076 based on FRE 801/802/805. Mr. Shiroff admitted that he has no experience with the Element testing

techniques/data and simply spoke to Dr. Brienza and adopted Dr. Brienza's findings as his own. (Exhibit 2029, 19:19-21:3; 199:12-200:7). Mr. Shiroff's adoption of Dr. Brienza's findings is hearsay.

H. Exhibits 1079, 1080, 1081 Excluded under FRE 106, 602, 702/703, 901, 1002/1003

Exhibits 1079, 1080, and 1081 were objected to in Patent Owner's Reply Objections filed on November 22, 2024. Petitioner uses Exhibits 1079, 1080, and 1081 in its Reply (p. 22) and in Mr. Shiroff's declaration (Exhibit 1076 ¶¶ 49, 50). Exhibits 1079, 1080, and 1081 depict a Boers Technik drilling machine for pillows.

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 106. Exhibits 1079, 1080, and 1081 are pictures and websites of a Boers Technik drilling machine.

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 602. Neither Petitioner nor Mr. Shiroff have any personal knowledge as to the Boers Technik drilling machine represented in Exhibits 1079, 1080, and 1081. Petitioner and Mr. Shiroff have never seen, inspected, or used the Boers Technik drilling machine represented in Exhibits 1079, 1080, and 1081. –See Exhibit 2029, 72:2-75:10. Mr. Shiroff's purported personal knowledge about the Boers Technik drilling machines derived from his communications with the Boers Technik company, which is hearsay under FRE 801.

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 702/703. Mr. Shiroff references Exhibits 1079, 1080, and 1081 in his declaration (Exhibit 1076 ¶¶ 49, 50). However, Mr. Shiroff lacks sufficient expertise to opine about the Boers Technik drilling machines shown in Exhibits 1057, 1058, and 1059. See Exhibit 2029, 72:2-75:10.

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 901. Exhibits 1079, 1080, and 1081 are pictures and listings of Boers Technik drilling machines that are unauthenticated.

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 1002/1003. The Boers Technik drilling machines shown in Exhibits 1079, 1080, and 1081 are not available for inspection.

I. Exhibits 1083 and 1084 Excluded under FRE 106, 602, 702/703, 901, 1002/1003

Exhibits 1083 and 1084 were objected to in Patent Owner's Reply Objections filed on November 22, 2024. Petitioner uses Exhibits 1083 and 1084 in its Reply (p. 31) and in Mr. Shiroff's declaration (Exhibit 1076 ¶ 86). Exhibits 1083 and 1084 depict a video regarding a Fohm memory foam pillow.

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 106. Exhibits 1083 and 1084 are pictures and a video of a Fohn memory foam pillow. The full specifications of the Fohm memory foam pillow are not provided or known,

such as whether the foam pillow is surface coated with PCM, or simply memory foam infused with a gel.

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 602. Neither Petitioner nor Mr. Shiroff have any personal knowledge as to the Fohm pillow represented in Exhibits 1083 and 1084. Petitioner and Mr. Shiroff have never seen or inspected the pillow represented in Exhibits 1083 and 1084.

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 702/703. Mr. Shiroff references Exhibits 1083 and 1084 in his declaration (Exhibit 1076 ¶ 86). However, Mr. Shiroff lacks sufficient expertise to opine about the characteristics of the Fohm pillows shown in Exhibits 1083 and 1084. See Exhibit 2029, 240:7-243:23.

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 901. Exhibits 1083 and 1084 are pictures and a video of Fohm pillows that are unauthenticated.

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 1002/1003. The Fohm pillows shown in Exhibits 1083 and 1084 are not available for inspection and how they compare to the processes disclosed in the '301 Patent.

J. Exhibit 1086 Should be Excluded under FRE 106, 602, 702/703, 801, 901, 1002/1003

Exhibit 1086 was objected to in Patent Owner's Reply Objections filed on November 22, 2024. Petitioner uses Exhibit 1086 in Dr. Brienza's second

declaration (Exhibit 1075 ¶ 55). Exhibits 1086 is an email between Dr. Brienza and a Japanese manufacturer about a foam product ER-20 dating back to 2011. The manufacturer received information from an undisclosed “maker” about the “special product”.

Patent Owner seeks to exclude Exhibit 1086 based on FRE 106. Exhibit 1086 is an email from a Japanese company about ER-20 foam with commentary from an undisclosed third party about a special foam product from 2011. The source of the statements about ER-20 being open cell polyurethane dating back to 2008 and 2011 is unknown from the email.

Patent Owner seeks to exclude Exhibit 1086 based on FRE 602. Petitioner and Dr. Brienza have no personal knowledge of Exhibit 1086.

Patent Owner seeks to exclude Exhibit 1086 based on FRE 702/703. Dr. Brienza references Exhibit 1086 in his declaration (Exhibit 1075 ¶ 55). However, Dr. Brienza lacks sufficient expertise to opine about the nature of the ER-20 foam from a Japanese supplier that he has never seen or inspected. Dr. Brienza simply relies on a statement of a Japanese supplier about a special-order foam product from over a decade prior that was discontinued.

Patent Owner seeks to exclude Exhibit 1086 based on FRE 801. Petitioner is seeking to introduce the unsworn statement of a Japanese company about the characteristics of the ER-20 foam. Petitioner is trying to introduce this statement

outside this proceeding and offer the statement to prove the truth of the statement asserted, i.e. ER-20 is open cell foam. This is hearsay.

Patent Owner seeks to exclude Exhibit 1086 based on FRE 901. Exhibit 1086 is an unauthenticated email from a Japanese supplier.

K. Portions of Mr. Gross' Deposition Testimony Excluded under FRE 611

Patent Owner made timely objections to specific questions by Petitioner of Mr. Gross during Mr. Gross' deposition (Exhibit 1074).

<u>Page:Lines</u>	<u>Issue</u>
26:2-7	Asks for legal opinion as to infringement
31:3-9	Incorrect assumption that the file history includes reasons for allowance
32:22-33:2	Did not opine about the merit of claim 1
33:4-28:19	Did not opine about the file history and reasons for allowance, and Examiner actions
41:16-42:13, 43:7-11	Did not opine about the Board's claim construction
47:20-48:1	Did not opine about claim construction in declaration
50:7-13, 50:24-51:23	Did not opine about foam requirements in the '301 Patent
77:24-78:15	Did not opine on product resulting from claimed process
101:9-102:13	Speculation; foundation

195:1-196:15	Did not opine about the GhostPillow Werner manufacturing process
198:6-13	Foundation
210:9-218:21	Did not opine about the manufacturing process; Mr. Gross did not test the GhostPillow product for air flow.

As such, the above portion of Mr. Gross' testimony should be excluded from these proceedings.

IV. CONCLUSION

For the foregoing reasons, Patent Owner respectfully requests that the Board exclude the above evidence.

Dated: January 8, 2025,

Lead Counsel

/s/ Greg M. Popowitz

Greg M. Popowitz (Reg. No. 60,061)

Assouline & Berlowe, P.A.

Miami Tower

100 SE 2nd St., Suite 3105

Miami, FL 33131

gmp@assoulineberlowe.com

patent@assoulineberlowe.com

Respectfully submitted,

Backup Counsel

Loren D. Pearson (Reg. No. 42,987)

Loren Donald Pearson, P.A.

333 SE 2nd Avenue, Suite 2000

Miami, FL 33131

ldp@pearsonip.com

Additional Backup Counsel

Edward C. Schewe

(Reg. No. 34,246)

ed@cotmanlaw.com

Wais Ali

(Patent Agent No. 80,945)

wais@cotmanlaw.com

281 East Colorado Blvd. #2630

Pasadena, CA 91102

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.

Date of Service January 8, 2025

Manner of Service Email to mkoffsky@koffskyschwalb.com;
gserbin@koffskyschwalb.com

Documents Served This Modified Substitute Motion to Exclude

Persons Served Mark I. Koffsky
Gary Serbin
Koffsky Schwalb LLC
500 7th Ave, 8th Floor
New York, NY 10018

Date: January 8, 2025

/Greg M. Popowitz/
Greg M. Popowitz

CERTIFICATION OF COMPLIANCE

I, Greg Popowitz, on behalf of Patent Owner, certify that pursuant to the Order of the Board during the January 8, 2025 conference call (Paper 45) the above modified substitute motion to exclude contains no new content or arguments. The amended motion to exclude (included in Paper 43) was redline compared to the original motion to exclude (Paper 41). A “compare and merge” function was performed using Microsoft Word, which was then used to manually redline (mark-up) the original motion to exclude. The redline original motion to exclude is attached hereto per Paper 45.

/s Greg M. Popowitz
Greg M. Popowitz

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE PATENT TRIAL AND APPEAL BOARD**

CASPER SLEEP INC.,
Petitioner,

Vs.

WERNER MEDIA PARTNERS, LLC.,
Patent Owner.

IPR 2024-00474
Patent 10,842,301 B2

**PATENT OWNER'S AMENDED MOTION TO EXCLUDE
PURSUANT TO 37 C.F.R. § 42.64(c)**

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<i>CBS Interactive Inc. v. Heflerich Patent Licensing, LLC</i> , IPR2013-00033, Paper 79, 2013 WL 8699189 (P.T.A.B. Aug. 9, 2013)	2
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1002.....	1, 5, 6, 7, 11, 12
1003.....	1, 5, 6, 7, 11, 12
602.....	1, 3, 4, 5, 6, 8, 10, 12, 13
702.....	1, 2, 4, 5, 7, 9, 11, 12, 13
703.....	1, 2, 4, 5, 7, 9, 11, 12, 13
801.....	1, 7, 9, 13
802.....	7, 9
805.....	7, 9
901.....	1, 4, 5, 7, 11, 12, 14
FRE 106.....	1, 2, 3, 4, 5, 6, 10, 11, 13

Rules

FRE 106.....	2, 3, 4, 5, 7, 8, 12, 14, 16
FRE 602.....	2, 4, 5, 7, 8, 10, 13, 15, 16
FRE 611.....	17
FRE 702.....	2, 3, 5, 7, 9, 11, 13, 15, 16
FRE 703.....	2, 3, 5, 7, 9, 11, 13, 15, 16
FRE 801.....	2, 9, 12, 17
FRE 802.....	9, 12
FRE 805.....	9, 12
FRE 901.....	2, 6, 7, 9, 13, 15, 17
FRE 1002.....	2, 6, 7, 9, 14, 15, 17
FRE 1003.....	2, 6, 7, 9, 14, 15, 17

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TABLE OF EXHIBITS TO EXCLUDE

Exhibit No.	Description
~~1031~~	~~U.S. Patent No. 9,538,855 to Gross et al~~
~~1037~~	~~Gross Hand Drawings~~
~~1047~~	~~David Perry, Purchases at the Top, BedTimes Magazine, July 27, 2022~~
~~1050~~	~~Fortune Business Insights U.S. Pillow Market Size, 2023-2030~~
~~1057~~	~~Brooklyn Bedding Cooling Gel with PCM~~
~~1058~~	~~Fohm Pillow Kickstarter~~
~~1059~~	~~Fohm Pillow Shipment~~
~~1075~~	~~CONFIDENTIAL Second Declaration of David M. Brienza, Ph.D.~~
~~1076~~	~~CONFIDENTIAL Declaration of David Shiroff~~
~~1079~~	~~(Video Exhibit https://www.youtube.com/watch?v=vflxKFL24s4~~
~~1080~~	~~Screenshots of Video Exhibit 1079~~
~~1081~~	~~Boersteech Foam Pillow Drill 9101 Variable (https://www.boersteech.eu/-foam-pillow-drill-9101-variable-)~~
~~1083~~	~~(Video Exhibit) https://vimeo.com/111694480~~
~~1084~~	~~Screenshots of Video Exhibit 1083~~
~~1086~~	~~Email string regarding ER-20~~

I. STATEMENT OF THE PRECISE RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.64(c) and the Federal Rules of Evidence (FRE), Patent Owner respectfully moves to exclude Exhibits 1031, 1037, 1047, 1050, 1057, 1058, 1059, 1075, 1076, 1079, 1080, 1081, 1083, 1084, 1086 as inadmissible for violating 37 C.F.R. § 42 and the FRE. ~~In particular, the above exhibits violate FRE~~

~~106, 602, 702/703, 901, 1002, 1003 and 801-803/805 because they lack related statements, lack foundation as to underlying source of alleged data, fail to provide underlying data and documentation, lack authentication, lack the original, and are out of proceeding statements offered to establish the truth of the matter asserted.~~

Petitioner filed Exhibits 1031, 1037, 1047, 1050, 1057, 1058, 1059, 1075, 1076, 1079, 1080, 1081, 1083, 1084, 1086 on November 15, 2024, in connection with Petitioner's Reply to Patent Owner's Response to Petition ("Petitioner's Reply"). Specifically, Petitioner relied on these Exhibits in the Petitioner's Reply. Patent Owner timely objected to the exhibits on November 22, 2024 ("Reply Objections") ~~within 10 days of Petitioner's Reply by filing objections to the evidence~~ under 37 C.F.R. § 42.64(b)(1).

II. STATEMENT OF REASONS FOR RELIEF REQUESTED

"[A] party may move to exclude evidence, whether as improper under the response-only regulation, under the Trial Practice Guide's advice, or on other grounds." *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1081 (Fed. Cir. 2015). Other bases for excluding exhibits exist in the Federal Rules of Evidence. See 37 C.F.R. § 42.62 ("[T]he Federal Rules of Evidence shall apply to a proceeding."). ~~Exercising its discretion, the Board may "exclude the ... evidence in their entirety, or alternatively, decline to consider the ... related evidence." *CBS Interactive Inc. v.*~~

Helperich Patent Licensing, LLC, IPR2013-00033, Paper 79, at 3, 2013 WL 8699189 (P.T.A.B. Aug. 9, 2013).

For the reasons set forth below, Exhibits 1031, 1037, 1047, 1050, 1057, 1058, 1059, 1075, 1076, 1079, 1080, 1081, 1083, 1084, and 1086 are inadmissible under C.F.R. § 42 and FRE 106, 602, 702/703, 801-803, 901, 1002, and 1003.

III. SPECIFIC PETITIONER EXHIBITS SHOULD BE EXCLUDED

A. Exhibit 1031 ~~Should Be~~ Excluded Under FRE 106, 702, 703

Exhibit 1031 was objected to in Patent Owner's Reply Objections filed on November 22, 2024. Exhibit 1031 was used by Petitioner during the deposition of expert Andrew Gross, as shown in Exhibit 1074, page 65. Questions surrounding Mr. Gross' opinion of Exhibit 1031 were objected to during the deposition. See Exhibit 1074, pages 67-68.

The Federal Rules of Evidence apply to this proceeding: 37 C.F.R. § 42.62. Patent Owner seeks to exclude Exhibit 1031 based on FRE 106. ~~"When an incomplete writing or recorded statement is introduced in a trial by one party, the adverse party may require the introduction of any other parts or any other writing or recorded statement."~~ FRE 106. Petitioner ~~cherry~~-picked portions of Exhibit 1031 during the deposition of Mr. Gross (Exhibit 1074) without providing the full context of the portions of Exhibit 1031 cited to Mr. Gross. Moreover, Petitioner is attempting to add new prior art as a basis for its Petition.

Patent Owner seeks to exclude Exhibit 1031 based on FRE 702/703. Mr. Gross did not opine in his declaration (Exhibit 2001) about Exhibit 1031. As such, Petitioner's use of Exhibit 1031 with Mr. Gross during his deposition testimony is outside the scope of Mr. Gross' direct testimony ~~and should be excluded.~~

The Federal Circuit has held that a petitioner may not attempt to add additional grounds for unpatentability in a Reply. *Intelligent Bio-Systems, Inc v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369-70 (Fed. Cir. 2016). Moreover, under 37 C.F.R. § 42.23(b), a "reply may only respond to arguments raised in the corresponding opposition..." ~~See also Consolidated Trial Practice Guide (2019) at 74 ("Respond, in the context of C.F.R. §§42.23(b), does not mean proceed in a new direction with a new approach as compared to the positions taken in a prior filing.") Likewise, a petitioner may not introduce a new claim construction for the first time in a Reply. See Cisco Systems, Inc., et al v. Oyster Optics, LLC, IPR2017-01719, Paper 31 at 21-25, 2019 WL 328734, at *10 (P.T.A.B. Jan 24, 2019).~~

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B. Exhibit 1037 ~~Should be~~ Excluded under FRE 106 and 602

Exhibit 1037 was objected to in Patent Owner's Reply Objections filed on November 22, 2024, and during Mr. Gross' deposition (Exhibit 1074, starting on p. 211). Exhibit 1037 is a hand drawing created by Mr. Gross as requested by Petitioner during Mr. Gross' deposition, as shown in Exhibit 1074, pages 211-218. Petitioner

used Mr. Gross' drawing (Exhibit 1037) during its questioning of Mr. Gross in Exhibit 1074, pages 211-218.

Patent Owner seeks to exclude Exhibit 1031 based on FRE 106. Mr. Gross did not opine in his declaration (Exhibit 2001) about Exhibit 1031 or the effect of the resulting air flow from the '301 Patent processes. Mr. Gross was asked to draw a cross section of the '301 Patent process air flow from the resulting product based on Mr. Gross' understanding of the '301 Patent. However, Mr. Gross opined about the impact of prior art on the '301 Patent, not the result/impact of the '301 Patent process to provide a cooling effect to the user.

Patent Owner seeks to exclude Exhibit 1031 based on FRE 602. ~~Mr. Gross did not opine in his declaration (Exhibit 2001) about Exhibit 1037 or the resulting air flow impact from the '301 Patent process.~~ As such, there is no foundation under FRE 602 for Petitioner to use Exhibit 1037 and its related questioning of Mr. Gross during his deposition (Exhibit 1074) as to opinions outside the scope of ~~Mr. Gross' direct testimony~~ (Exhibit 2001).

C. Exhibit 1047 ~~Should be~~ Excluded under FRE 106, 602, 702/703, 901, and 1002/1003

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Exhibit 1047 was objected to in Patent Owner's Reply Objections filed on November 22, 2024. Petitioner uses Exhibit 1074 in its Reply (p. 24) and in Mr. Shiroff's declaration (Exhibit 1076 ¶ 68).

Patent Owner seeks to exclude Exhibit 1047 based on FRE 106. Exhibit 1047 is a Bed Times article that discloses survey information about sleep accessories. The survey in Exhibit 1047 provides no support for the survey data, ~~such as survey questions used, sample size, response rate, and similar metrics. As such~~ Therefore, the article is incomplete as to the source and data used to form the survey numbers. Petitioner attempts to rely on Exhibit 1047 in its Reply (p. 24) to point to the split in pillows purchased online versus in stores.

Patent Owner seeks to exclude Exhibit 1047 based on FRE 602. Neither Petitioner nor Mr. Shiroff have any personal knowledge as to the survey data represented in Exhibit 1047. ~~The author of the article, David Perry, would be the proper person to opine about the merits of the survey data (and underlying source data).~~

Patent Owner seeks to exclude Exhibit 1047 based on FRE 702/703. Mr. Shiroff used Exhibit 1047 in his declaration (Exhibit 1076 ¶ 68). However, Mr. Shiroff lacks sufficient expertise to opine about market surveys such as Exhibit 1047. See Exhibit 2029, 149:4-18; 156:9-21.

Patent Owner seeks to exclude Exhibit 1047 based on FRE 901. ~~Under FRE 901, “the proponent [of documents] must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” With respect to print-outs from websites, “the proponent must offer evidence that: (1) the printout accurately~~

~~reflects the computer image of the web page as of a specified date; (2) the website where the posting appears is owned or controlled by a particular person or entity; and (3) the authorship of the web posting is reasonably attributable to that person or entity.” *Estate of Konell v. Allied Prop. & Cas. Ins. Co.*, 2014 WL 11072219, at *1 (D. Or. Jan. 28, 2014).~~

Exhibit 1047 is a news article that is unauthenticated. Petitioner offered no evidence to support the data in Exhibit 1047, ~~including the undisclosed underlying data, is authentic and can be relied upon.~~

Patent Owner seeks to exclude Exhibit 1047 based on FRE 1002/1003. The news article of Exhibit 1047 was timestamped on October 31, 2024, for an article on July 27, 2022. ~~Petitioner has not provided any support that the article has not changed or is the original as published on July 27, 2022.~~

D. Exhibit 1050 ~~Should be~~ Excluded under FRE 106, 602, 702/703, 901, and 1002/1003

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Exhibit 1050 was objected to in Patent Owner’s Reply Objections filed on November 22, 2024. Petitioner uses Exhibit 1050 in its Reply (p. 24) and in Mr. Shiroff’s declaration (Exhibit 1076 ¶ 70).

Patent Owner seeks to exclude Exhibit 1050 based on FRE 106. Exhibit 1050 is a summary of the pillow market. The full report was not provided by Petitioner,

merely a summary of the report as found in Exhibit 1050. ~~The complete report should have been provided as opposed to an incomplete summary.~~

Patent Owner seeks to exclude Exhibit 1050 based on FRE 602. Neither Petitioner nor Mr. Shiroff have any personal knowledge as to the market data represented in Exhibit 1050. ~~The source of Exhibit 1050 would be the proper party to opine about the merits of the market data and the full report, which was not provided.~~

Patent Owner seeks to exclude Exhibit 1050 based on FRE 702/703. Mr. Shiroff used Exhibit 1047 in his declaration (Exhibit 1076 ¶ 70). However, Mr. Shiroff lacks sufficient expertise to opine about market surveys such as Exhibit 1050. See Exhibit 2029, 150:2-24.

Patent Owner seeks to exclude Exhibit 1050 based on FRE 901. Exhibit 1050 is a summary of a report that is unauthenticated. ~~Petitioner offered no evidence to show support for the findings in Exhibit 1050, including the full report, is authentic and can be relied upon.~~

Patent Owner seeks to exclude Exhibit 1050 based on FRE 1002/1003. The summary market study of Exhibit 1050 is not the full report. ~~FRE 1002/1003 requires the original, which would have been the full study, not simply the summary provided in Exhibit 1050.~~

E. Exhibits 1057, 1058, and 1059 ~~Should be~~ Excluded under FRE 106, 602, 702/703, 901, and 1002/1003

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Exhibits 1057, 1058, and 1059 were objected to in Patent Owner's Reply Objections filed on November 22, 2024. In its Reply, Petitioner uses Exhibit 1057 (p. 32), Exhibit 1058 (p. 31), and Exhibit 1059 (p. 31). Mr. Shiroff's declaration (Exhibit 1076) also relied on Exhibit 1057 (¶ 87), Exhibits 1058 and 1059 (¶ 86). Exhibit 1057 is a WayBack machine Amazon listing of a Brooklyn Bedding Cooling Pillow. Exhibit 1058 is a Kickstarter website for a Fohm pillow. Exhibit 1059 is a Fohm pillow shipment.

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 106. Exhibits 1057, 1058, and 1059 are snippets of websites of foam pillows. The actual pillows are not provided and the full website to show all the angles and content regarding the pillows at issue are not provided.

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 602. Petitioner and Mr. Shiroff do not have any personal knowledge as to ~~the pillows represented in~~ Exhibits 1057, 1058, and 1059. Petitioner and Mr. Shiroff have never seen the products ~~illustrated~~ in Exhibits 1057, 1058, and 1059 or had the opportunity to examine the underlying pillows firsthand to ascertain the pillow features.

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 702/703. Mr. Shiroff used Exhibits 1057, 1058, and 1059 in his declaration (Exhibit 1076 ¶¶ 86, 87). However, Mr. Shiroff lacks sufficient expertise to opine about the pillows shown in Exhibits 1057, 1058, and 1059. See Exhibit 2029, 246:7-255:11.

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 901. Exhibits 1057, 1058, and 1059 are listings of pillows that are unauthenticated.

~~Petitioner offered no evidence to show that the products are representative of the '301 Patent and its processes, are authentic, and can be relied upon.~~

Patent Owner seeks to exclude Exhibits 1057, 1058, and 1059 based on FRE 1002/1003. The pillows listed in Exhibits 1057, 1058, and 1059 are not available for inspection to learn about the qualities of the pillows and the manufacturing processes used to create the pillows. FRE 1002/1003 requires the original, which would have been the actual pillows, ~~not snippets from a website listing, as found in Exhibits 1057, 1058, and 1059.~~

F. Exhibit 1075 ~~Should be~~ Excluded under FRE 801/802/805, 37 C.F.R. § 42.65(a)

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Patent Owner seeks to exclude Exhibit 1075 ¶ 55 based on FRE 801/802/805. Petitioner is seeking to introduce the unsworn statement of a Japanese company about the characteristics of the ER-20 foam using Dr. Brienza's second declaration. Dr. Brienza simply relies on a statement of a Japanese supplier about a special-order foam product from over a decade prior that was discontinued. Petitioner, through Dr. Brienza, is trying to introduce this statement outside this proceeding and offer the statement to prove the truth of the statement asserted, i.e. that ER-20 is open cell foam. This is ~~classic~~ hearsay.

Moreover, pursuant to 37 C.F.R. § 42.65(a), Dr. Brienza fails to disclose the underlying facts and data to support his hypothetical examples of altering combined references. For example, in Exhibit 1075 ¶¶ 103-109, Dr. Brienza fails to provide any underlying facts or data to support his significant modifications to the Crawford process using the Lievestro rollers. Dr. Brienza did not give reasons as to why he arrived at the opinions in Exhibit 1075, nor did he state how the analysis was performed to support his opinions. ~~The conclusions in Exhibit 1075 are merely speculative and carry no evidentiary weight.~~

G. Exhibit 1076 ~~Should be~~ Excluded under FRE 602, 702/703, 801/802/805, 37 C.F.R. § 42.65(a)

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Exhibit 1076 was objected to in Patent Owner's Reply Objections filed on November 22, 2024. Exhibit 1076 is the declaration of David Shiroff, which was relied upon throughout Petitioner's Reply, specifically Section VI (p. 19) onward.

Patent Owner seeks to exclude Exhibit 1076 based on FRE 602. Exhibit 1076 should be excluded because it includes testimony for which the witness has no personal knowledge. FRE 602. Exhibit 2029 is the transcript of deposition testimony based on the declaration of David Shiroff (Exhibit 1076). Petitioner relied on this Exhibit in the Petitioner's Reply.

As highlighted in Mr. Shiroff's deposition transcript (Exhibit 2029), Mr. Shiroff's testimony in his declaration (Exhibit 1075) fails to show any personal knowledge of secondary considerations arguments raised in Patent Owner's

Response and exhibits at issue. For example, Mr. Shiroff: did not recall witnessing holes being punched in foam, a required step of the '301 Patent process (Exhibit 2029, 76:24-77:13); learned about compressing foam to form holes preparing for his declaration as he did not have prior knowledge (Exhibit 2029, 77:14-79); has never conducted his own survey or developed survey questions (Exhibit 2029, 156:9-16; 158:12-25); did not know what an adequate response rate would be for a market survey (Exhibit 2029, 159:3-9); understand a Likert scale for surveys (Exhibit 2029, 156:17-21).

Patent Owner seeks to exclude Exhibit 1076 based on FRE 702/703. Mr. Shiroff is not qualified as an expert witness given his lack of personal knowledge about the secondary considerations raised by Patent Owner. Mr. Shiroff's declaration (Exhibit 1076) is replete with conclusions that Mr. Shiroff lacks expertise to make, as shown in his deposition transcript (Exhibit 2029). ~~See excerpts cited above in the FRE 602 analysis. Pursuant to 37 C.F.R. § 42.65(a), Mr. Shiroff lacks the expertise to provide opinions on market surveys, market share, defined market, and testing given his admitted lack of experience (See Exhibit 2029 excerpts detailed above).~~

Exhibit 1076 should be excluded under 37 C.F.R. § 42.63(b) because Mr. Shiroff failed to submit supporting technical data. In addition, Mr. Shiroff did not give reasons for arriving at the opinions in Exhibit 1076, nor did he state how

the analysis was performed to support his opinions. Some examples provided by Mr. Shiroff were not supported by evidence or technical data, which were used to support his conclusions. ~~The conclusions in his declaration (Exhibit 1076) are merely speculative and are unsupported.~~

Patent Owner seeks to exclude Exhibit 1076 based on FRE 801/802/805. Mr. Shiroff admitted that he has no experience with the Element testing techniques/data and simply spoke to Dr. Brienza and adopted Dr. Brienza's findings as his own. (Exhibit 2029, 19:19-21:3; 199:12-200:7). Mr. Shiroff's adoption of Dr. Brienza's findings is hearsay.

H. Exhibits 1079, 1080, 1081 ~~Should be~~ Excluded under FRE 106, 602, 702/703, 901, 1002/1003

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Exhibits 1079, 1080, and 1081 were objected to in Patent Owner's Reply Objections filed on November 22, 2024. Petitioner uses Exhibits 1079, 1080, and 1081 in its Reply (p. 22) and in Mr. Shiroff's declaration (Exhibit 1076 ¶¶ 49, 50). Exhibits 1079, 1080, and 1081 depict a Boers Technik drilling machine for pillows.

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 106. Exhibits 1079, 1080, and 1081 are pictures and websites of a Boers Technik drilling machine. ~~The full capabilities and specifications of the Boers Technik drilling machine are not provided.~~

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 602. Neither Petitioner nor Mr. Shiroff have any personal knowledge as to the Boers

Technik drilling machine represented in Exhibits 1079, 1080, and 1081. Petitioner and Mr. Shiroff have never seen, inspected, or used the Boers Technik drilling machine represented in Exhibits 1079, 1080, and 1081. ~~Mr. Shiroff testified that he has never seen a Boers Technik drilling machine used in production, he merely watched videos and contacted the Boers Technik company directly.~~ See Exhibit 2029, 72:2-75:10. Mr. Shiroff's purported personal knowledge about the Boers Technik drilling machines derived from his communications with the Boers Technik company, which is hearsay under FRE 801. ~~As such, Mr. Shiroff has no personal knowledge of the Boers Technik drilling machines.~~

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 702/703. Mr. Shiroff references Exhibits 1079, 1080, and 1081 in his declaration (Exhibit 1076 ¶¶ 49, 50). However, Mr. Shiroff lacks sufficient expertise to opine about the Boers Technik drilling machines shown in Exhibits 1057, 1058, and 1059. See Exhibit 2029, 72:2-75:10.

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 901. Exhibits 1079, 1080, and 1081 are pictures and listings of Boers Technik drilling machines that are unauthenticated. ~~Petitioner offered no evidence from Boers Technik representatives as to the authenticity of the pictures, videos, and websites that can be relied upon.~~

Patent Owner seeks to exclude Exhibits 1079, 1080, and 1081 based on FRE 1002/1003. The Boers Technik drilling machines shown in Exhibits 1079, 1080, and 1081 are not available for inspection ~~to learn about the actual manufacturing processes used to drill the pillows. FRE 1002/1003 requires the original, not snippets from a website listing, video, or pictures, as found in Exhibits 1079, 1080, and 1081.~~

I. Exhibits 1083 and 1084 ~~Should be~~ Excluded under FRE 106, 602, 702/703, 901, 1002/1003

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Exhibits 1083 and 1084 were objected to in Patent Owner's Reply Objections filed on November 22, 2024. Petitioner uses Exhibits 1083 and 1084 in its Reply (p. 31) and in Mr. Shiroff's declaration (Exhibit 1076 ¶ 86). Exhibits 1083 and 1084 depict a video regarding a Fohm memory foam pillow.

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 106. Exhibits 1083 and 1084 are pictures and a video of a Fohn memory foam pillow. The full specifications of the Fohm memory foam pillow are not provided or known, such as whether the foam pillow is surface coated with PCM, or simply memory foam infused with a gel.

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 602. Neither Petitioner nor Mr. Shiroff have any personal knowledge as to the Fohm

pillow represented in Exhibits 1083 and 1084. Petitioner and Mr. Shiroff have never seen or inspected the pillow represented in Exhibits 1083 and 1084.

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 702/703. Mr. Shiroff references Exhibits 1083 and 1084 in his declaration (Exhibit 1076 ¶ 86). However, Mr. Shiroff lacks sufficient expertise to opine about the characteristics of the Fohm pillows shown in Exhibits 1083 and 1084. See Exhibit 2029, 240:7-243:23.

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 901. Exhibits 1083 and 1084 are pictures and a video of Fohm pillows that are unauthenticated. ~~Petitioner offered no evidence from the producers of the Fohm pillows or news agency making the video as to the authenticity of the pictures and video that can be relied upon.~~

Patent Owner seeks to exclude Exhibits 1083 and 1084 based on FRE 1002/1003. The Fohm pillows shown in Exhibits 1083 and 1084 are not available for inspection ~~to learn about the actual characteristics of the Fohm pillows~~ and how they compare to the processes disclosed in the '301 Patent. ~~FRE 1002/1003 requires the original, not snippets from a video or pictures as found in Exhibits 1083 and 1084.~~

J. Exhibit 1086 Should be Excluded under FRE 106, 602, 702/703, 801, 901, 1002/1003

Exhibit 1086 was objected to in Patent Owner's Reply Objections filed on November 22, 2024. Petitioner uses Exhibit 1086 in Dr. Brienza's second declaration (Exhibit 1075 ¶ 55). Exhibit 1086 is an email between Dr. Brienza and a Japanese manufacturer about a foam product ER-20 dating back to 2011. The manufacturer received information from an undisclosed "maker" about the "special product".

Patent Owner seeks to exclude Exhibit 1086 based on FRE 106. Exhibit 1086 is an email from a Japanese company about ER-20 foam with commentary from an undisclosed third party about a special foam product from 2011. The source of the statements about ER-20 being open cell polyurethane dating back to 2008 and 2011 is unknown from the email.

Patent Owner seeks to exclude Exhibit 1086 based on FRE 602. Petitioner and Dr. Brienza have no personal knowledge ~~as to the history of the ER-20 material discussed in Exhibit 1086. The manufacturer purports to have such knowledge.~~

Patent Owner seeks to exclude Exhibit 1086 based on FRE 702/703. Dr. Brienza references Exhibit 1086 in his declaration (Exhibit 1075 ¶ 55). However, Dr. Brienza lacks sufficient expertise to opine about the nature of the ER-20 foam from a Japanese supplier that he has never seen or inspected. Dr. Brienza simply relies on a statement of a Japanese supplier about a special order foam product from over a decade prior that was discontinued.

Patent Owner seeks to exclude Exhibit 1086 based on FRE 801. Petitioner is seeking to introduce the unsworn statement of a Japanese company about the characteristics of the ER-20 foam. Petitioner is trying to introduce this statement outside this proceeding and offer the statement to prove the truth of the statement asserted, i.e. ER-20 is open cell foam. This is ~~classic~~ hearsay.

Patent Owner seeks to exclude Exhibit 1086 based on FRE 901. Exhibit 1086 is an unauthenticated email from a Japanese supplier. ~~There is no evidence that the evidence is authentic or whether the statements provided by the Japanese supplier was from firsthand knowledge or speculation.~~

~~Patent Owner seeks to exclude Exhibit 1086 based on FRE 1002/1003. Petitioner has not provided the original email for inspection, only a PDF without any header.~~

K. Portions of Mr. Gross' Deposition Testimony (Exhibit 1074) Should be Excluded under FRE 611

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Patent Owner made timely objections to specific questions by Petitioner of Mr. Gross during Mr. Gross' deposition (Exhibit 1074). ~~The questions were outside the scope of Mr. Gross' direct testimony in Exhibit 2001 and should be excluded under FRE 611. A listing of the portions of Mr. Gross' testimony that should be excluded from Exhibit 1074 is provided below, which includes a timely objection to the question:~~

<u>Page:Lines</u>	<u>Issue</u>
26:2-7	Asks for legal opinion as to infringement
31:3-9	Incorrect assumption that the file history includes reasons for allowance
32:22-33:2	Did not opine about the merit of claim 1
33:4-28:19	Did not opine about the file history and reasons for allowance, and Examiner actions
41:16-42:13 ~~43:7-11~~	Did not opine about the Board's claim construction
~~43:7-11~~	~~Did not opine about the Board's claim construction~~
47:20-48:1	Did not opine about claim construction in the declaration
~~50:7-13~~	~~Did not opine about foam requirements in the '301 Patent~~
<u>50:7-13</u> , 50:24-51:23	Did not opine about foam requirements in the '301 Patent
77:24-78:15	Did not opine on product resulting from claimed process
101:9-102:13	Speculation; foundation
195:1-196:15	Did not opine about the GhostPillow Werner manufacturing process
198:6-13	Foundation
210:9-218:21	Did not opine about the manufacturing process; Mr. Gross did not test the GhostPillow product for air flow.

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As such, the above portion of Mr. Gross' testimony should be excluded from these proceedings.

IV. CONCLUSION

For the foregoing reasons, Patent Owner respectfully requests that the Board exclude the above evidence.

Dated: January ~~6~~3, 2025

Respectfully submitted,

Lead Counsel

/s/ Greg M. Popowitz

Greg M. Popowitz (Reg. No. 60,061)

Assouline & Berlowe, P.A.

Miami Tower

100 SE 2nd St., Suite 3105

Miami, FL 33131

~~Phone: (305) 567-5576~~

~~Fax: (305) 567-9343~~

gmp@assoulineberlowe.com

patent@assoulineberlowe.com

Backup Counsel

Loren D. Pearson (Reg. No. 42,987)

Loren Donald Pearson, P.A.

333 SE 2nd Avenue, Suite 2000

Miami, FL 33131

~~Phone: (305) 709-0750~~

ldp@pearsonip.com

Additional Backup Counsel

Edward C. Schewe

(Reg. No. 34,246)

ed@cotmanlaw.com

Wais Ali

(Patent Agent No. 80,945)

wais@cotmanlaw.com

281 East Colorado Blvd. #2630

Pasadena, CA 91102

~~Phone: (626) 405-1413~~

~~Fax: (626) 316-7577~~

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.

Date of Service January ~~6~~3, 2025

Manner of Service Email to mkoffsky@koffskyschwalb.com; gserbin@koffskyschwalb.com

Documents Served This Amended Motion to Exclude

Persons Served Mark I. Koffsky
Gary Serbin
Koffsky Schwalb LLC
500 7th Ave, 8th Floor
New York, NY 10018

Date: January ~~6~~3, 2025

/Greg M. Popowitz/

Greg M. Popowitz

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