

1 UNITED STATES PATENT AND TRADEMARK OFFICE

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3 BEFORE THE PATENT TRIAL AND APPEAL BOARD

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5 CASPER SLEEP INC.,

6 Petitioner,

7
8 v.

9 WERNER MEDIA PARTNERS, LLC,

10 Patent Owner.

11 -----

12 Case No. IPR2024-00474

13 Patent No. 10,842,301 B2

14
15 January 8, 2025

16 11:00 a.m. ET

17
18 Teleconference

19
20 BARRY L. GROSSMAN, JASON W. MELVIN, and

21 RYAN H. FLAX, Administrative Patent Judges

A P P E A R A N C E S:

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1 ADMINISTRATIVE PATENT JUDGE FLAX: As I
2 said, this is Judge Flax. And I'm joined today
3 on this call at the board by Judges Grossman
4 and Melvin. And we are here in Casper Sleep,
5 Inc. v. Werner Media Partners, LLC and
6 IPR2024-00474 concerning patent 10,842,301.

7 If any of that is incorrect or at odds
8 with what the parties understand, please speak
9 up. I think we're here on the right case.

10 Starting with Petitioner's counsel, if
11 everyone could introduce themselves and
12 identify who is here for the record, please.

13 MR. KOFFSKY: Petitioner's counsel, this
14 is Mark Koffsky, lead counsel for Petitioner,
15 Casper Sleep.

16 MR. SERBIN: Also for the Petitioner, Gary
17 Serbin from Koffsky Schwalb LLC for Casper
18 Sleep.

19 ADMINISTRATIVE PATENT JUDGE FLAX: Okay.
20 And who is here for Patent Owner?

21 MR. POPOWITZ: Thank you, Your Honor.
22 This is Greg Popowitz, lead counsel for the
23 Patent Owner, and I believe Wais Ali will be
24 observing as well.

25 MR. ALI: Hi, I'm here. This is Wais Ali.

1 I'm back-up counsel for Patent Owner.

2 ADMINISTRATIVE PATENT JUDGE FLAX: I'm not
3 having the actual record of who is admitted.
4 Everyone here is admitted on the record; is
5 that right?

6 MR. KOFFSKY: I believe so, Your Honor.

7 MR. POPOWITZ: Yes, Your Honor.

8 ADMINISTRATIVE PATENT JUDGE FLAX: Thank
9 you for confirming that.

10 We have had a lot of evidentiary filings
11 as of late in this case and I believe that is
12 primarily what this conference call concerns.
13 Going off of the e-mail that we got from
14 Petitioner that was requesting this conference
15 call, what we understand you all want to
16 discuss is whether Petitioner will be
17 authorized to file a second motion to strike in
18 this case concerning either part or all of
19 Patent Owner's recently filed Motion to
20 Exclude.

21 And on the opposite side of the coin, we
22 have Patent Owner who is requesting
23 authorization for entry of a substitute Motion
24 to Exclude that will comply with our rule
25 requirement to be limited to 15 pages. Have I

1 summarized everything correctly or is there
2 something else that we're going to discuss
3 today?

4 MR. KOFFSKY: Your Honor, this is Mark
5 Koffsky, counsel for the Petitioner.

6 I think our e-mail said we're seeking
7 guidance as to when the board might rule on the
8 first Motion to Strike the additional materials
9 that we believe were unauthorized in the Patent
10 Owner's surreply.

11 ADMINISTRATIVE PATENT JUDGE FLAX: Fair
12 enough. That's right.

13 MR. KOFFSKY: And --

14 ADMINISTRATIVE PATENT JUDGE FLAX: Let's
15 begin, unless Patent Owner has something else
16 they want to add to the discussion today.
17 Let's begin with Petitioner's position. Why
18 don't you go ahead? And then once you're
19 finished, Patent Owner will get a chance to
20 present their position.

21 MR. KOFFSKY: Thank you, Your Honor.
22 Again, Mark Koffsky for Petitioner.

23 Your Honor, we'll just go back to the
24 first Motion to Strike just very clearly to set
25 the table because I think it does affect the

1 section motion -- I mean Rule 23(b) is very
2 clear. The Patent Owner surreply can only be
3 accompanied by cross-examination of deposition
4 transcripts of our experts and no new material.
5 It's a very clear rule. The Patent Owner, for
6 whatever reason, didn't even depose one of our
7 experts, but instead, put in 16 new pieces of
8 evidence, including 6 new declarations and 10
9 exhibits. Then, they filed a no response on
10 our Motion to Strike or the first time the
11 response was well, we're going to withdraw some
12 of those exhibits but not all, and they didn't
13 address whether their actual Patent Owner's
14 surreply, were they withdrawing those materials
15 as well to rely on withdrawn exhibits? They
16 didn't say that.

17 We're still left with 3 new declarations
18 and 6 new documents in this is complete Patent
19 Owner surreply in this case. The presence of
20 this improper material has an ongoing prejudice
21 to us in this case. It affects the evidentiary
22 issues we're discussing today as well. For
23 example, we knew we were only allowed 15 pages
24 on our Motion to Exclude. We were faced with
25 having to deal with what we believe were

1 voluminous, voluminous improperly filed
2 exhibits from Patent Owner and address those in
3 our Motion to Exclude out of an abundance of
4 caution. If we lost the Motion to Strike, we
5 still, of course, need to make our record that
6 the evidentiary issues that we believe are
7 improperly filed in those exhibits. So we were
8 limited 15 pages and we had to discard certain
9 arguments in our Motion to Exclude because of
10 that limitation, that's fine. The 15 pages, to
11 me, is the message the board sends. You want
12 to make your arguments short, and tight, to the
13 point, no problem there. I was particularly
14 surprised when Patent Owner continued to
15 disobey the rules and filed the 20-page Motion
16 to Strike last Friday, the 3rd. We requested a
17 next business Monday morning, last Monday, to
18 say you need to withdraw this. Instead, they
19 filed a motion to say, no, let us have the
20 15-page response. And we have a -- our
21 schedule is quite tight on the evidentiary
22 side.

23 Our Answer to this Motion to Exclude is
24 due Friday, two days from now. We don't know
25 which version we're going to respond to and we

1 don't know yet what the board believes about
2 the additional first Motion to Strike exhibit
3 that we believe should not be on the record.

4 We have these uncertainties that are
5 causing us increased expense and we also have
6 next week we're supposed to be exchanging
7 demonstratives for our oral presentation on the
8 24th of January. There's a lot up in the air.

9 We try to follow the rules. We believe
10 Patent Owner has not followed the rules
11 consistently, and we're just seeking relief
12 from the board, and guidance on what to do
13 next.

14 Thank you.

15 ADMINISTRATIVE PATENT JUDGE FLAX: Underst
16 and that summary.

17 So, Mr. Popowitz, I don't if it's you
18 that's going to be speaking today, but if so,
19 go ahead.

20 MR. POPOWITZ: Thank you, Your Honor.

21 With regard to the Motion to Exclude, that
22 was an inadvertent error on the page
23 limitation. When I reviewed the IPR guide, I
24 mistakenly saw the 25-page limit regarding the
25 Motion to Amend, and that was in my head, and

1 that was an inadvertent error on the Motion to
2 Exclude page limit. And when it was brought to
3 my attention on Monday morning, I immediately
4 said we will tone it down and comply with the
5 15 pages. That wasn't acceptable to the
6 Petitioner. They wanted to exclude it
7 completely, and we just more than likely didn't
8 file our Motion to Exclude, unfortunately, it
9 was over the page limit, which I freely admit.

10 We did file in the interest of timing to
11 the Petitioner, knowing that response deadline
12 is this Friday. Aside from asking the
13 permission, we did file the Motion to
14 Substitute so we could provide Petitioner with
15 the trimmed down version of the Amended Motion
16 to Exclude on Monday so that way they had a
17 copy. Whatever the board decides, we wanted to
18 make sure we had a copy and the petitioner was
19 aware of that amended copy.

20 As to the Motion to Strike that is
21 pending, the Petitioner raised numerous new
22 arguments that could've been raised in their
23 original petition and their reply. They opened
24 that door and Patent Owner should be permitted
25 to respond to those in kind. There are, as one

1 of the examples which are included in our
2 Response to a Motion to Strike, the Petitioner
3 laid out three examples of modifications to the
4 Vestro (ph.) and Crawford --

5 ADMINISTRATIVE PATENT JUDGE FLAX:
6 Counsel, this is Judge Flax. Can you hear me?

7 MR. POPOWITZ: Yes, sir.

8 ADMINISTRATIVE PATENT JUDGE FLAX: We
9 don't need you to argue on any of the merits
10 right now. We've got your brief on it. We
11 understand your positions.

12 I just want to know what you want to do
13 right now relating -- unless we need to talk
14 about the other motions -- relating to the
15 Motion to Exclude.

16 It's my understanding that you want to
17 substitute a shorter brief for the one that you
18 submitted; is that right?

19 MR. POPOWITZ: That's correct. And we
20 filed that. I know it was early, but we wanted
21 to give a copy of that to Petitioner so that
22 way they had it on file in anticipation of
23 their response on Friday.

24 ADMINISTRATIVE PATENT JUDGE FLAX: And you
25 have said that that substitute motion that's

1 shorter doesn't add anything new, it just
2 removes some words; is that right?

3 MR. POPOWITZ: That's correct. We removed
4 arguments and material to get it down to the 15
5 pages.

6 ADMINISTRATIVE PATENT JUDGE FLAX: Is that
7 the only thing you want to talk about today or
8 is there something else you need to talk about
9 in this conference call?

10 MR. POPOWITZ: On the Patent Owner side,
11 that was all we wanted to address.

12 ADMINISTRATIVE PATENT JUDGE FLAX: All
13 right. So starting with the question of how
14 quickly we can get you an order on the Motion
15 to Strike, without promising anything, I
16 believe we can get you an order on that before
17 the hearing.

18 On any Motions to Exclude, no promises
19 there. I don't believe that that will be ruled
20 upon before the final written decision, but
21 things could happen.

22 So having discussed this with the panel
23 before this conference call, what we propose is
24 that we would grant Patent Owner's request to
25 modify their Motion to Exclude to get within

1 the page limit; but in doing that, we would
2 insist upon Patent Owner providing a red-lined
3 version so that Petitioner has an opportunity
4 to compare what is entered as the official
5 motion and what was originally filed. With
6 that, we would like a certification that that
7 red line is accurate.

8 Understanding that the deadline for filing
9 oppositions to these motions is coming up in
10 just a couple of days, we would be willing to
11 grant extensions of that to Monday,
12 January 13th for both parties.

13 And relating to that, we need to know
14 whether the current due date or replies to
15 those, which would be the Friday of next week,
16 is sufficient or if you likewise need those
17 deadlines moved to January 20th, which would be
18 the Monday following.

19 So understanding this is what we intend to
20 do, Mr. Koffsky, is that -- do you need this
21 extension of deadline to Monday or do you want
22 to reply on Friday?

23 MR. KOFFSKY: We could certainly use the
24 extra time to Monday if that doesn't prejudice
25 the other side. I don't have a feeling one way

1 or the other on the reply, which I think is
2 five pages. We can leave that on the 17th, but
3 I think it would be appreciated if we could
4 have until the 13th to respond to the 15-page
5 version of the Motion to Exclude.

6 ADMINISTRATIVE PATENT JUDGE FLAX: You
7 have already seen it so --

8 MR. KOFFSKY: I --

9 ADMINISTRATIVE PATENT JUDGE FLAX: Seeing
10 that you don't need an extension to the reply,
11 and you are the party that we're worried about
12 because of this situation, we will not give
13 another extension for the reply date. That
14 will stay on the Friday. Does that sound fair,
15 Mr. Popowitz?

16 MR. POPOWITZ: Absolutely. And I
17 appreciate the panel's consideration of the
18 extension for Mr. Koffsky to Monday given the
19 issue, so I appreciate that.

20 ADMINISTRATIVE PATENT JUDGE FLAX: Okay.
21 So seeing that this is the course we're going
22 to take, no second Motion to Strike is
23 necessary; is that right, Mr. Koffsky.

24 MR. KOFFSKY: Yes, Your Honor.

25 ADMINISTRATIVE PATENT JUDGE FLAX: All

1 right. I think that takes care of all of your
2 questions.

3 Now, with the understanding that we have a
4 court reporter here who is transcribing this
5 call, I would ask that the transcript of this
6 call be entered as an exhibit in this
7 proceeding immediately. I don't know how
8 quickly she can get you your copy of it. But
9 as soon as you can file that, please do.

10 MR. KOFFSKY: Yes, Your Honor. We'll --
11 sorry.

12 ADMINISTRATIVE PATENT JUDGE FLAX: That's
13 fine. What we'll do is enter an actual order
14 today modifying the scheduling order so that
15 Monday will be the due date for oppositions to
16 these Motions to Exclude. That will be the
17 schedule change. And it will also grant the
18 Patent Owner's request to file the modified
19 Motion to Exclude, which you should file as an
20 actual paper today and provide the red-lined
21 copy today to opposing counsel and enter it as
22 an exhibit with the certification that nothing
23 new is added.

24 I think that covers everything.

25 Judges Grossman and Melvin, are we

1 overlooking anything?

2 JUDGE GROSSMAN: I think you covered it
3 all. Thank you.

4 JUDGE MELVIN: I agree.

5 ADMINISTRATIVE PATENT JUDGE FLAX: Unless
6 you all have something else that needs to be
7 discussed today, then we can call this
8 conference call adjourned, but I'll ask you
9 that first.

10 MR. KOFFSKY: Your Honor, it's Mark
11 Koffsky.

12 If I understood correctly then, we should
13 not anticipate a ruling on the first Motion to
14 Strike and we should prepare for oral argument
15 as if all the material is in the record. Is
16 that my understanding?

17 ADMINISTRATIVE PATENT JUDGE FLAX: No. I
18 think we will get an order on that first Motion
19 to Strike before the hearing. When, I can't
20 tell you what day. I don't know what day
21 because it hasn't been prepared yet.

22 MR. KOFFSKY: Okay. The issue is -- and
23 I'm just bringing this up and if I say too bad,
24 that's fine, of course -- we're supposed to
25 exchange demonstratives to the other side by

1 next Tuesday, so we really have to get working
2 on oral argument basically now. If there's
3 some give there and if you know when the order
4 is going to be issued and what it's going to
5 say, or you might just tell me it is what it
6 is, and of course either way is fine.

7 ADMINISTRATIVE PATENT JUDGE FLAX: I mean
8 it is what it is.

9 MR. KOFFSKY: Okay.

10 ADMINISTRATIVE PATENT JUDGE FLAX: Focus
11 on your other arguments first, make sure all
12 that's covered, and then work on the things
13 that are covered by your Motion to Strike last
14 as you're working through things would be my
15 advice, but that's just my personal advice.
16 You can do whatever you want, but I can't
17 promise you what day we're going to get that
18 order out.

19 MR. KOFFSKY: Thank you, Your Honor.

20 ADMINISTRATIVE PATENT JUDGE FLAX: Well,
21 if that is everything, we'll call this
22 conference call adjourned. If other relief is
23 needed from the board prior to our final oral
24 argument, please do meet-and-confer which you
25 have been doing, which we appreciate, and then

1 reach out to the board if you need our input.
2 Hopefully, we won't need that, but we're here
3 if you need us.

4 Other than that, we will see the relative
5 filings by the parties and we will see you on
6 the 24th -- is that our final hearing?

7 MR. POPOWITZ: Yes, it is.

8 MR. KOFFSKY: That's correct.

9 ADMINISTRATIVE PATENT JUDGE FLAX: We will
10 see you then.

11 MR. KOFFSKY: Thank you.

12 MR. POPOWITZ: Thank you, Your Honor.

13 (Time noted: 11:18 a.m.)
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C E R T I F I C A T I O N

I, ESTAMARIE CASTELLI-VELEZ, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify the foregoing to be a true and accurate transcript to the best of my knowledge and ability.

I further certify that I am not related to any of the parties to this action by blood or by marriage and that I am in no way interested in the outcome of this matter.



ESTAMARIE CASTELLI-VELEZ

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