

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

**PATENT OWNER'S RESPONSE TO PETITIONER'S MOTION TO
EXCLUDE UNDER 37 C.F.R. § 42.64(c)**

Pursuant to 37 C.F.R. § 42.64(c) and the Board’s Scheduling Order for this IPR (Papers 8 and 45), Werner Media Partners, LLC (“Patent Owner”) respectfully files its Response to Petitioner’s Motion to Exclude Exhibits 2013, 2015, 2016, 2017, 2033, 2041, 2043, 2044, and 2045.

I. ALL CHALLENGED EXHIBITS ARE ADMISSIBLE UNDER FRE 702

A. Governing Law

Titled “Testimony by Expert Witnesses,” FRE 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

B. Petitioner Fails to Understand the Concept of a POSITA

To further prove that Mr. Quinn is POSITA, Patent Owner will evaluate the elements of FRE 702.

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Mr. Quinn has 27 years category experience in retail, international & domestic sourcing, manufacturing, marketing and product development and definition in the bedding industry. Mr. Quinn has firsthand knowledge and experience of marketing surveys, construction of marketing questions, analyzing product sales and defining products. Mr. Quinn, through his deposition (Exhibit 1078), provided marketing sales analysis as well as marketing survey questions that supported Patent Owner's secondary considerations arguments.

The trier of fact would find Mr. Quinn's analysis helpful because Mr. Quinn's specialized knowledge is relevant to the argument of secondary considerations. Mr. Quinn has a Bachelor of Arts degree from Stephen F. Austin State University, Bachelor of Arts in Communications and Marketing. Mr. Quinn has led major new product development initiatives throughout his career, at Elements Sleep as a Vice President, Sinomax as a Vice President of Business Development; and at Mattress Firm as an Executive Vice President. Mr. Quinn is the definition of a POSITA. A POSITA is not solely defined by schooling or number of degrees. A POSITA must have practical and hands-on experience in the relevant industry. There is a difference between theoretical and practical experience.

(b) the testimony is based on sufficient facts or data;

Mr. Quinn, as a part of his industry experience and knowledge, understands the value of not only proving his market share theory regarding the Patent Owner's product but also showing his analysis to a trier of fact by using industry accepted software. Mr. Quinn used third party software Jungle Scout in order to provide the trier of fact with objective substantive data regarding the marketing analysis as it pertains to Patent Owner's secondary consideration arguments. Mr. Quinn used the data and facts from the Patent Owner, such as sales figures and other important facts regarding the product and other competing brands, to generate a family of graphs that demonstrate his market analysis as it pertains to the Patent Owner's product. Mr. Quinn also crafted survey questions (which he has experience doing directly, juxtaposed to Petitioner's purported expert Mr. Shiroff; see Exhibit 2029, 156:9-21) that were sent to customers. The survey demonstrated that consumers were buying Patent Owner's product because of its claimed features. Mr. Quinn's testimony is based on objective evidence that will help the trier of fact understand marketing analysis and how it supports the secondary consideration argument that was made in Patent Owner's Response.

(c) the testimony is the product of reliable principles and methods;
and

Mr. Quinn analyzed all of the data as it pertains to the Patent Owner product based on the '301 Patent and provided his analysis of what, in his professional

opinion, he believed was the market share percentage of Patent Owner's GhostPillow compared to other similar products which share common features. In addition, Mr. Quinn offered a timeline which showed when Patent Owner's product was introduced to the market compared to competitors with similar product features. In addition, Mr. Quinn crafted marketing survey questions to customers in order to understand whether people were buying Patent Owner's product because of the features created from the '301 Patent processes. Mr. Quinn's testimony is the product of reliable principles and methods commonly used in the bedding industry. A specific example is how Mr. Quinn created certain marketing questions using a Likert Scale (which Mr. Shiroff had never of before reading Mr. Quinn's declaration; see Exhibit 2029, 156:17-21) which objectively showed that customers were buying Patent Owner's product because of the resulting features created by the '301 Patent. This information is all relevant and helpful to the tier of fact understand the secondary considerations argument made by Patent Owner.

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

As stated above in parts (b) and (c) above, Mr. Quinn used third party software that is recognized by the bedding industry to develop his analysis regarding Patent Owner's product relevant market share, as well as other secondary consideration effects, such as nexus between the claims in the '301 Patent and why customers where buying the Patent Owner's product created using the process of the '301

Patent. Mr. Quinn's opinions reflect a reliable application of the principles and methods to the facts of the case. Mr. Quinn demonstrated that his opinions were based on well understood and accepted marketing principles.

C. Mr. Quinn's Reliance on the Element Tests was Proper Application of Principles and Methods to the Facts of this Case

Petitioner continuously fails to understand that Mr. Quinn did not perform any test conducted by established third party Element, who used accepted and standardized tests in the bedding industry. Mr. Quinn simply analyzed Element's test results to make qualified interpretations of the data, which are interpretations that would be made by anyone who has sufficient knowledge and experience in the bedding industry. Mr. Quinn did not go against the grain as it pertains to the interpretations of the tests performed and reported by Element. Mr. Quinn merely explained, based on his qualified experience, what was stated in the third-party Element test reports.

For example, the application of PCM on foam with holes provided by Patent Owner resulted in an unexpected high level of Qmax, which further demonstrates the effectiveness the '301 Patent process. Element conducted the testing and directly measured the unexpectedly high Qmax. Mr. Quinn opined that the measured Qmax value was higher than the improvement he would have expected with the introduction of PCM and holes. Mr. Quinn's expert opinion is based on his many years and experience in the industry, as highlighted in Mr. Quinn's deposition

(Exhibit 1078). The application of principles and methods of testing that the Petitioner is arguing about has not been set or defined by Mr. Quinn, but rather by Element using accepted testing procedures, who is an independent third-party testing house used by numerous companies in the bedding industry. Mr. Quinn merely interpreted what was already tested and reported by Element based on his vast knowledge and experience in the bedding industry.

D. FRE 702(b, c, d): Mr. Quinn’s Creation of a “Market” Is a Proper Application of Principles and Methods to the Facts of this Case

Petitioner continuously fails to fully understand or accept market share analysis and attacks the credibility of Mr. Quinn based on his objective findings, which are helpful to the trier of fact to determine the case on the merits. It should be noted that Petitioner summarily dismissed the topic of secondary considerations in the Petition. After reviewing Patent Owner’s numerous grounds of secondary consideration in the Response, Petitioner desperately attacks Patent Owner’s expert witness Mr. Quinn as well as the Element test results.

To determine the relevant market share, Mr. Quinn harvested data directly from Amazon with Jungle Scout, a credible third-party software that provides real-time and historical analysis of top-line sales, units, profitability, and first listing timeline (See Exhibit 2013, ¶ 25). Mr. Quinn chose the Amazon platform for his market share analysis because Amazon is the most significant selling platform for

companies conducting e-commerce and therefore provides the most reliable and relevant data set.

Once Mr. Quinn collected the data, he created a comparison chart illustrating the market penetration of the competing products and brands compared to the '301 Patent. The Patent Owner's product (GhostPillow), which is created using the process protected in the '301 Patent, belongs to a product group or classification which can be described as a "Molded Gel Memory Foam PCM pillow with punched holes." The defined market "Molded Gel Memory Foam PCM pillow with punched holes" is a phrase that Mr. Quinn used which accurately describes the market space of Patent Owner's product created using the '301 Patent process. Every term in "Molded Gel Memory Foam PCM pillow with punched holes" is a feature or element that accurately describes the product.

Mr. Quinn then compared other competing brands with the same features or elements as the Patent Owners' product to show the relative market share of the competing brands. Mr. Quinn endeavored to make an apples-to-apples comparison in creating these graphs. Notably, Mr. Shiroff arbitrarily defined the market as "memory foam pillows with cooling technology" despite testifying that there are 3 markets of pillows (foam, polyester, down). (Exhibit 2029, 94:16-97:21). Mr. Shiroff agreed that the "method of manufacturing in a market share analysis in a case like this, I think it was imperative." (Exhibit 2029, 106:2-9). Mr. Shiroff effectively agreed with Mr.

Quinn's defined market that limits the market to features created by the '301 Patent process.

Mr. Quinn applied an apples-to-apples comparison of products with related features. Contrary to Petitioner's position, it is not representative for a marketing analysis to include products that don't have the same or similar features. For example, a person analyzing the market share of Rolls Royce automobiles would look at other high-end vehicles, such as Bentley, Aston Martin, and Ferrari. A proper market share would not include minivans and semi-trucks. According to Petitioner's wide casting of a net, minivans and semitrucks would be included in the market, which is not an apples-to-apples comparison.

II. CONCLUSION

For the reasons set forth above, the Board should not exclude any of the exhibits challenge by Petitioner.

Dated: January 13, 2025

Respectfully submitted,

Lead Counsel

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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 Petitioner as detailed below.

Date of Service January 13, 2025

Manner of Service Email

Document Served - This Patent Owner's Response to Petitioner's Motion to Exclude

Persons Served Mark I. Koffsky
Gary Serbin
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Dated: January 13, 2025