

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 REPLY IN SUPPORT OF ITS
SUBSTITUTED MOTION TO EXCLUDE UNDER 37 C.F.R. § 42.64(c)**

I. EXHIBIT 1031 SHOULD BE EXCLUDED

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. 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.

II. EXHIBIT 1037 SHOULD BE EXCLUDED

Patent Owner seeks to exclude Exhibit 1037 based on FRE 106. Mr. Gross did not opine in his declaration (Exhibit 2001) about Exhibit 1037 or the effect of the resulting air flow from the '301 Patent processes. Mr. Gross opined about the feasibility 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 1037 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.

III. EXHIBITS 1047 AND 1050 SHOULD BE EXCLUDED

Patent Owner seeks to exclude Exhibit 1047 based on FRE 106. 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. Neither

Petitioner nor Mr. Shiroff have any personal knowledge as to the survey data represented in Exhibit 1047.

In addition, Patent Owner seeks to exclude Exhibit 1050 based on FRE 106. The full report was not provided by Petitioner, merely a summary of the report as found in Exhibit 1050. Neither Petitioner nor Mr. Shiroff have any personal knowledge as to the market data represented in Exhibit 1050. Mr. Shiroff lacks sufficient expertise to opine about market surveys such as Exhibit 1050. See Exhibit 2029, 150:2-24.

IV. EXHIBITS 1057, 1058, 1059, 1083, AND 1084 SHOULD BE EXCLUDED

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) and Exhibits 1058 and 1059 (¶ 86). 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. Petitioner uses Exhibits 1083 and 1084 in its Reply (p. 31) and in Mr. Shiroff's declaration (Exhibit 1076 ¶ 86). 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. Neither Petitioner nor Mr. Shiroff have personal knowledge as to the pillow in Exhibits 1083 and 1084.

V. ¶ 55 AND ¶¶ 103-109 OF EXHIBIT 1075 SHOULD BE EXCLUDED

Petitioner is not immune from hearsay. 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 offers the statement to prove the truth of the statement asserted, i.e. that ER-20 is open cell foam.

VI. EXHIBIT 1076 SHOULD BE EXCLUDED

Exhibit 1076 should be excluded under 37 C.F.R. § 42.63(b) because Mr. Shiroff failed to submit supporting technical data. Mr. Shiroff did not give reasons for arriving at the opinions in Exhibit 1076, nor state how the analysis was performed to support his opinions. He also did not have the required skills under FRE 702 to be an expert witness (See Exhibit 2029). Some examples provided by Mr. Shiroff were not supported by evidence or technical data, used to support his conclusions.

VII. EXHIBITS 1079, 1080, AND 1081 SHOULD BE EXCLUDED

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. 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.

VIII. EXHIBIT 1086 SHOULD BE EXCLUDED

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 dating back to 2011. The source of the statements about ER-20 is unknown from the email. Petitioner and Dr. Brienza have no personal knowledge of Exhibit 1086.

IX. PORTIONS OF MR. GROSS'S DEPOSITION TESTIMONY (EXHIBIT 1074) SHOULD BE EXCLUDED

Patent Owner made timely objections to specific questions by Petitioner of Mr. Gross during Mr. Gross' deposition (Exhibit 1074) as such questioning was outside the scope of Mr. Gross' direct testimony. For the reasons set forth above, the Board should grant Patent Owner's Motion to Exclude in all respects.

Dated: January 17, 2025

Respectfully submitted,

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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 17, 2025

Manner of Service Email

Document Served - This Patent Owner's Reply to Patent Owner's Motion to Exclude

Persons Served Mark I. Koffsky
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Dated: January 17, 2025

/s Greg M. Popowitz
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