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

Proceeding	92054201
Party	Plaintiff Dan Foam ApS
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Date	10/05/2012
Attachments	Combined Motion.pdf (34 pages)(306864 bytes)

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

DAN FOAM APS	)	
	)	
Petitioner,	)	
	)	Cancellation No. 92054201
v.	)	
	)	
SLEEP INNOVATIONS, INC.,	)	
	)	
Registrant.	)	

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Petitioner Dan Foam APS, by counsel, submits this reply in support of its motion for summary judgment.

Petitioner's Actual Confusion Evidence May Be Considered

Faced with unfavorable evidence, Respondent asks the Board to exclude actual confusion evidence in this case as a penalty for Petitioner's service of a subpoena six business days after its issuance.[1] Respondent has waived any right to object to this oversight and certainly was not prejudiced by the *de minimus* delay.

Respondent was provided a copy of the subpoena directed to Overstock.com and all of the documents produced by Overstock.com on February 14, 2012. Respondent did not object to the discovery of Overstock.com documents upon their receipt, nor at any time during the discovery period in the form of a motion to exclude, motion to quash the subpoena, or a motion for sanctions. After two extensions of time, the discovery period in this matter closed on June 10, 2012. Respondent waived its right to object to the service date of the subpoena by failing to

[1] Petitioner served its Subpoena on Overstock.com on February 2, 2012. It provided a copy of the subpoena to counsel for Respondent in February 14, 2012, six business days later.

raise any objection during discovery. *See* TBMP § 523.04 (a party cannot object to evidence that is failed to identify through a motion to compel discovery) and TBMP § 527.01(e)(procedure for motion to quash).

Respondent had ample opportunity to take a deposition of a representative of Overstock.com during the discovery period – specifically during the intervening four month period between disclosure of the Overstock.com documents and the close of discovery. It chose not to. Respondent claims, perhaps somewhat disingenuously, that it did not know that Petitioner would rely on the Overtsock.com documents in support of its arguments, but Petitioner specifically identified the evidence produced by Overstock as evidence in support of Petitioner's claims of actual confusion in its Answers to Registrant's First Set of Interrogatories served on Respondent on March 9, 2012. *See* Exhibit A.

Respondent also argues that Petitioner obtained a "secret" affidavit from a representative of Overstock.com attesting to the authenticity of the business records it produced. However, this declaration was used for the purpose of establishing authenticity and admissibility of documents, not as evidence. There are a number of methods through which a party may rely on documents produced in discovery in connection with a summary judgment motion. TBMP § 525.05(a)(1)(Documents that are admissible include affidavits and declarations). The acceptability of a declaration is addressed clearly in TBMP § 525.05(b).[2] There is no requirement that a declaration in support of a summary judgment motion be produced in discovery. The requirements for reliance on documents in support of summary judgment are

2 "Affidavits may be submitted in support of, or in opposition to, a motion for summary judgment provided that they (l) are made on personal knowledge; (2) set forth such facts as would be admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated therein. This is so even though affidavits are self-serving in nature, and even though there is no opportunity for cross-examination of the affiant. However, an adverse party may have an opportunity for direct examination of the affiant, if a Fed. R. Civ. P. 56(d) motion to take the discovery deposition of the affiant is made and granted." TBMP § 528.05(b).

different from the requirements for authenticating documents in support of a party's trial brief. Registrant itself has provided sworn declarations in support of its Response to Petitioner's Motion for Summary Judgment, which declarations were not produced in discovery.

The evidence Petitioner subpoenaed from Overstock.com and prdocued to Resgistrant during discovery speaks for itself and is overwhelming proof that consumers who encounter the BODIPEDIC & Reclining Figure Design are likely to believe, and in fact do believe, that those products emanate from or are associated with Petitioner and/or its TEMPUR-PEDIC & Reclining Figure Design mark. Respondent chose not to take a deposition of representatives of Overstock.com in an effort to impeach this evidence (perhaps for fear that the evidence developed through such a deposition would be more harmful than helpful) and thus waived any objection to its consideration by the Board.

Third-Party Registered Marks Support Petitioner's Position

Respondent identifies a number of registered marks that include ***either*** a reclining figure design ***or*** the word formative "PEDIC." Respondent does not identify a single mark that includes both a reclining figure element ***and*** the word formative "PEDIC."

Petitioner is not claiming the exclusive right to use or register either of these elements. Rather, it is claiming an exclusive right to use and register both of these elements together as part of its mark taken as a whole. Examples of third-party marks that share only one element of Petitioner's mark are not helpful to a determination of likely confusion. *Recot, Inc. v. Becton*, 54 USPQ2d 1894 (Fed. Cir. 2000); *China Healthways Institute, Inc. v. Wang*, 83 USPQ2d 1123 (Fed. Cir. 2007) ("The marks must be compared in their entirety, at least when the overall commercial impression is reasonably based on the entirety of the marks."). In fact, the lack of evidence showing registered marks sharing both elements not only undercuts Respondent's

contentions but also adds support to Petitioner's claim that its mark is strong. *See Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang,* 84 USPQ2d 1323, 1328 (TTAB 2007).

Survey Evidence is Not Required and is Unnecessary Here

Respondent makes much of the fact that Petitioner has not conducted a consumer survey to support its claims of likely confusion. However, a survey is never required and rarely provided in the context of an *inter partes* proceeding before the Board. As the Board noted in *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993), 27 USPQ2d at 1435-36:

> We appreciate the significant financial cost of surveys. Moreover, we obviously recognize the limited jurisdictional nature of Board proceedings, wherein only rights to federal registrability, not use, are determined. With these two thoughts foremost in our minds, we are not inclined to draw any negative inferences from a party's failure to offer survey evidence in a proceeding before the Board.

Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang, 84 USPQ2d 1323, 1328 (TTAB 2007).

For the forgoing reasons and those set forth in its motion, Petitioner respectfully requests that its Motion for Summary Judgment be granted and that Respondent's registration be cancelled.

Respectfully submitted,

s/Amy Sullivan Cahill
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on counsel for Registrant, this 5th day of October, 2012, by sending same via First Class Mail, postage prepaid, to:

Irene Hurtado
Robert W. Smith
MCCARTER & ENGLISH LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102

s/Amy Sullivan Cahill

DI65:42033:900386:1:LOUISVILLE

EXHIBIT A

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

In the Matter of Registration No. 3,916,902
For the Mark: BODIPEDIC (& Design)
Registration Date: February 8, 2011

DAN-FOAM APS

Petitioner,

v. Cancellation No. 92/054,201

SLEEP INNOVATIONS, INC.

Registrant.

PETITIONER DAN-FOAM APS'S OBJECTIONS AND ANSWERS TO
REGISTRANT SLEEP INNOVATIONS, INC.'S FIRST SET OF INTERROGATORIES

Pursuant to Rule 33, Fed. R. Civ. P. and Trademark Rule 2.120, Petitioner Dan-Foam ApS ("Petitioner"), by counsel, for its objections and responses to Sleep Innovations, Inc.'s ("Registrant) First Set of Interrogatories, states as follows:

GENERAL OBJECTIONS

The following General Objections are incorporated by reference in Petitioner's response to each and every Interrogatory below.

1. The specific responses set forth below are for the purposes of discovery only and Petitioner neither waives nor intends to waive any and all objections it may have to the relevance, competence, materiality, admission, admissibility or use at trial of any information, documents, things, or writing produced, identified or referred to herein, or to the introduction of any evidence at trial relating to the subjects covered by such response.

2. Petitioner expressly reserves its right to rely, at any time including trial, upon subsequently discovered documents and/or things or information as well as information omitted from the specific responses set forth below as a result of mistake, oversight or inadvertence.

3. The specific responses set forth below are based upon Petitioner's interpretation of

the language in the Interrogatories, and Petitioner reserves the right to amend or to supplement its responses in the event Registrant asserts an interpretation that differs from Petitioner's interpretation.

4. By making these responses Petitioner does not concede that it is in possession of any documents, things, or information responsive to any particular Interrogatory or that any response given or document or thing produced is relevant to this action.

5. Petitioner's failure to object to a particular Interrogatory or willingness to provide responsive documents, things, or information pursuant to an Interrogatory is not, and shall not be construed as, an admission of the relevance, or admissibility into evidence, of any such document, thing, or information, nor does it constitute a representation that any such document, thing, or information in fact exists.

6. Because Petitioner may not have discovered all the information, documents or things that are possibly within the scope of the Interrogatory, Petitioner expressly reserves its right to amend or to supplement these Answers and Objections with any additional information, documents or things that emerge through discovery or otherwise.

7. Petitioner objects to the Interrogatories to the extent that they request documents, things, or information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, the joint defense privilege or any other applicable privilege or immunity. Petitioner responds to the Interrogatories on the condition that the inadvertent response or production of information, documents or things covered by such privilege, rule, doctrine or immunity does not waive Petitioner's right to assert such privilege, rule, doctrine or immunity and that Petitioner may withdraw any such response, document or thing inadvertently made as soon as it is identified.

8. Petitioner objects to the Interrogatories to the extent that they seek proprietary, sensitive, or confidential information or information made confidential by law or any agreement

or that reflects trade secrets. Petitioner responds to the Interrogatories on the condition that the inadvertent responses or production of or regarding any proprietary, sensitive, or confidential information, document or thing without the proper designation for such does not waive any of Petitioner's rights and that Petitioner may withdraw any such response, document or thing inadvertently made or identified as soon as identified and that Registrant will return any such document or thing produced or made available for inspection for proper designation under the stipulated protective order.

9. Petitioner objects to the Interrogatories to the extent that they seek information, documents or things that are not relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible evidence.

10. Petitioner objects to the Interrogatories to the extent that they are vague, ambiguous and overbroad and therefore not susceptible to a response as propounded.

11. Petitioner objects to the Interrogatories to the extent that they exceed the requirements of the Federal Rules of Civil Procedure or the Trademark Rules of Practice.

12. Petitioner objects to the Interrogatories to the extent that they require Petitioner to undertake any investigation to ascertain information or locate documents or things not presently within its possession, custody or control on the grounds of undue burden and because information, documents and/or things from other sources are equally available to Registrant.

13. Petitioner objects to these Interrogatories to the extent that they require Petitioner to undertake such an extensive review that such Interrogatories are unduly burdensome and harassing.

14. Petitioner objects to the Interrogatories to the extent that they are not limited to use or intent to use and registration of the mark in issue in the United States.

15. Petitioner objects to the Interrogatories to the extent they seek information regarding Petitioner's "Mark" and Petitioner's "Products" to the extent these definitions are in

conflict with the Definitions provided by Registrant.

16. Petitioner objects to the definitions and instructions preceding the Interrogatories as overly broad and unduly burdensome, and as imposing greater obligations than those required by the Federal Rules of Civil Procedure and the Trademark Rules of Practice.

ANSWERS AND OBJECTIONS

INTERROGATORY NO. 1: Set forth the following information:

(a) The date and place where the Petitioner's business was founded and describe the nature of its legal status, whether corporate, partnership, joint venture, familial organization or otherwise.

(b) The address of the Petitioner's principal place of business and describe the general business activities which occur there.

(c) Identify by name and address each person who occupies or has occupied any executive or managerial position within Petitioner's organization for the past three (3) years relating in any way to products marketed or sold, or proposed to be marketed and sold under the Petitioner's Mark, and state the inclusive dates during which each such person held or is holding each such position, his or her title, responsibilities, and duties.

(d) Whether the Petitioner or its business is now or has ever been a division, subsidiary, or related company to any other company. If so, identify each other company, and for each company so identified, state the relationship between it and the Petitioner, and state the dates on which the relationship began and, if applicable, ended.

(e) State the address of each of the Petitioner's places of business which are, have been, or is intended to be involved in any way with the manufacture, sale, distribution, or advertising of the goods or services with which Petitioner's Mark has been or is associated.

(f) Identify the person or persons performing or intended to perform each of the following functions for Petitioner with respect to the goods or services associated with

Petitioner's Mark: sales manager, advertising manager, custodian of records and files, chief bookkeeper, accountant, and trademark manager.

ANSWER:

Petitioner objects to each of the subparts of this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states as follows:

(a) Petitioner was founded in the early 1990s by Robert Trussell, a Lexington, Kentucky businessman. Through a series of mergers and acquisitions, Dan-Foam ApS, a Danish corporation and wholly owned subsidiary of Tempur-Pedic Management, Inc., became the current owner of record of Petitioner's Mark.

(b) Petitioner maintains its principal place of business at Holmelund 43, Aarup DK-5560, Denmark. Petitioner is a wholly owned subsidiary of Tempur-Pedic Management, Inc., which maintains its principal place of business at 1713 Jaggie Fox Way, Lexington, Kentucky 40511. Petitioner engages in the manufacture, marketing, and distribution of bedding products in North America and internationally.

(c) The individual with the most information relevant to the issues in this proceeding is Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC. Dan Setlak has responsibility for marketing Petitioner's Products throughout North America.

(d) Dan-Foam ApS is a wholly owned subsidiary of Tempur-Pedic Management, Inc., which maintains its principal place of business at 1713 Jaggie Fox Way, Lexington, Kentucky 40511.

(e) Dan-Foam ApS
Holmelund 43
Aarup DK-5560, Denmark

Tempur-Pedic Management, Inc.
Tempur-Pedic International, Inc.

Tempur-Pedic North America
1713 Jaggie Fox Way
Lexington, Kentucky 40511

Tempur-Production USA, LLC
203 Tempur-Pedic Drive
Duffield, Virginia 24244

Tempur-Production USA LLC
12907 Tempur-Pedic Parkway
Albequerque, New Mexico 87120

(f) The individual with the most information relevant to the issues in this proceeding is Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC. Dan Setlak has responsibility for marketing Petitioner's products throughout North America.

INTERROGATORY NO. 2: Identify all individuals who participated in Petitioner's selection or adoption of Petitioner's Mark, and identify all other marks that were considered along with Petitioner's Mark for possible adoption and use by the Petitioner on or in connection with Petitioner's goods or services. Indicate when the other marks were not selected and the reason that such other marks were not selected.

ANSWER:

Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that Petitioner's Mark was developed approximately twenty years ago by Fagerdala World Foams AB, the predecessor in interest to owner of Petitioner's parent company. Information regarding the selection and adoption of Petitioner's Mark, as well as other marks that may have been considered along with Petitioner's Mark, is no longer available. Petitioner's Reclining Figure Design was updated in 2007. The artwork associated with the updates to Petitioner's Reclining Figure Design was created by Envisioning Business, Inc., formerly known as O & J

Designs, and rights therein transferred to Petitioner by assignment. Information regarding the updated artwork associated with Petitioner's Reclining Figure design will be produced if it can be located.

INTERROGATORY NO. 3: Identify the person or persons who are most knowledgeable about:

(a) the decision to attempt to register Petitioner's Mark in the United States Patent and Trademark Office;

(b) any search reports, opinions and/or investigations prepared which concern Petitioner's Mark or any variations thereof;

(c) the preparation, filing and maintenance of any and all U.S. trademark and/or service mark applications and/or registrations which include Petitioner's Mark, or variations thereof;

(d) the development, distribution and proliferation of any advertising or promotional materials for any goods in connection with which Petitioner's Mark is utilized;

(e) the advertising, promotion, marketing and sales of goods and/or services bearing Petitioner's Mark or any variations thereof;

(f) the goods presently and/or previously offered in connection with and/or bearing Petitioner's Mark;

(g) the channels of trade through which goods bearing or offered in connection with Petitioner's Mark are sold and have been sold.

ANSWER:

Petitioner objects to each subpart of this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s),

Petitioner states that Petitioner's Mark was developed approximately twenty years ago by Fagerdala World Foams AB, the predecessor in interest to the owner of Petitioner. Information regarding those with direct knowledge about the selection or adoption of Petitioner's Mark may no longer be available. In 2007, an updated version of Petitioner's Mark was created. Those persons with the most knowledge regarding the decision to register Petitioner's Mark are no longer employed by Petitioner or its related companies.

(a) Anita Nesser and Tracy Cooke have knowledge regarding the decision to register Petitioner's Mark that is the subject of U.S. Registration No. 3,900,919 with the U.S. Patent and Trademark Office. Neither Ms. Nesser nor Ms. Cooke are currently employed by Petitioner or its related companies. Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC, also has relevant knowledge regarding the decision to register the updated version of Petitioner's Mark that is the subject of U.S. Registration No. 3,900,919.

(b) Petitioner is not aware of any search reports, opinions and/or investigations prepared which concern Petitioner's Mark or any variations thereof.

(c) Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC, has relevant knowledge regarding the maintenance of Petitioner's Mark; and U.S. trademark and/or service mark applications and/or registrations which include Petitioner's Mark, or variations thereof.

(d) Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC, has relevant knowledge regarding the development, distribution and proliferation of advertising and promotional materials for goods in connection with which Petitioner's Mark is utilized.

(e) Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC, has relevant knowledge regarding the advertising, promotion, marketing and sales of goods bearing Petitioner's Mark.

(f) Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC, has

relevant knowledge regarding the goods presently and/or previously offered in connection with and/or bearing Petitioner's Mark.

(g) Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC, has relevant knowledge regarding the channels of trade through which goods bearing or offered in connection with Petitioner's Mark are sold and have been sold.

INTERROGATORY NO. 4: Describe each product or service that has been sold or offered by Petitioner in the United States under Petitioner's Mark by stating for each product or service:

(a) the generic name of the product or service;

(b) the date the product or service was first sold or provided in interstate or in commerce with the United States, and the circumstances surrounding each first use, such as the materials upon which the mark was affixed and the manner in which the goods in connection with which the marks are utilized were disseminated;

(c) the geographic area in which each such product or service has been sold or provided by Petitioner;

(d) the location of United States manufacturing facilities for each such product or service;

(e) the ports of entry into the United States for each such product or service; the date or dates when the sale of the product or service was discontinued, and the reasons for such discontinuance;

(f) any other marks or names under which each of Petitioner's Products has been sold by Petitioner; and

(g) whether Petitioner's use of Petitioner's Mark in connection with each product or service listed above has been continuous. If such use has not been continuous, state the dates on which such use ceased and the date on which such use resumed or will resume.

ANSWER:

Petitioner objects to each subpart of this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states as follows:

(a) The generic names for the products at issue are mattresses, pillows, and cushions.

(b) Priority is not an issue in this matter. *Interlego AG v. Abrams/Gentile Entertainment Inc.,* 63 USPQ2d 1862 (TTAB 2002). However, Petitioner can trace its date of first use of Petitioner's Mark in the United States in connection with mattresses to the mid-1990s.

(c) Petitioner's Products have been sold throughout the United States.

(d) Petitioner maintains manufacturing facilities for its mattress and pillow products in the United States in Duffield, Virginia and Albuquerque, New Mexico.

(e) Petitioner's mattresses are manufactured in the United States and therefore do not enter U.S. commerce via a port of entry. Petitioner's Products at issue in this proceeding have been sold continuously since the date of their first sale.

(f) Petitioner's Products have been sold under a variety of marks in addition to the mark at issue. Petitioner will rely on rights arising in connection with its TEMPUR-PEDIC (&Reclining Figure) design in its original and updated versions.

(g) Petitioner's use of Petitioner's Mark in connection with the products at issue in this proceeding has been continuous.

INTERROGATORY NO. 5: Identify Petitioner's customers that have purchased each product sold in connection with Petitioner's Mark. If Petitioner has more than twenty-five (25) customers, please list, Petitioner's top twenty-five (25) customers in order by dollar amount purchased, for each product sold in connection with Petitioner's Mark.

ANSWER:

Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Petitioner objects to this interrogatory on grounds that Petitioner is not required to disclose the names of its customers, even subject to a protective order. *See Johnston Pump/General Valve Inc. v. Chromalloy American Corp*., 10 USPQ2d 1671, 1675 (TTAB 1988) (party need not reveal names of customers including dealers). Subject to the General Objections and the forgoing specific objection(s), Petitioner states that it sells its products to retail customers throughout the United States, to furniture and bedding retailers, to medical facilities including hospitals, nursing homes, and through healthcare professionals.

INTERROGATORY NO. 6: Describe in detail the trade channels for each product or service of Petitioner which has been sold, offered for sale or provided, in the United States under Petitioner's Mark.

ANSWER:

Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that Petitioner sells Petitioner's Products under the Petitioner's Mark through furniture and bedding retailers, through direct response telephone sales directly to consumers, via the Internet, through company-owned stores, and through third-party healthcare professionals, and medical retailers.

INTERROGATORY NO. 7: Identify by type each end user that has used or uses each product or service of Petitioner which has been or is sold or offered for sale in the United States under Petitioner's Mark.

ANSWER:

Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that end-users of Petitioner's products are individual consumers.

INTERROGATORY NO. 8: Identify each type of retail or other business outlet in the United States which currently sells or offers for sale to the public or trade, each product or service of Petitioner under Petitioner's Mark.

ANSWER:

Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states in addition to Petitioner's own direct sales to consumers via telephone and Internet, Petitioner's Products are sold via furniture and bedding retailers, and through third-party healthcare professionals and medical retailers.

INTERROGATORY NO. 9: Identify each media currently being used by Petitioner to promote products bearing Petitioner's Mark and identify all advertisers or promoters for such media.

ANSWER:

Subject to the General Objections and the forgoing specific objection(s), Petitioner states

that Petitioner promote products bearing Petitioner's Mark through national television advertisements, Internet advertising, print advertising, and direct mail pieces.

INTERROGATORY NO. 10: For each year, beginning with the date Petitioner's Mark was first used in the United States, set forth the total amount of money that Petitioner and/or any third party has spent on advertising, promotion and/or marketing of goods and/or services in connection with which Petitioner's Mark is utilized.

ANSWER: Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that that representative information for advertising spending will be provided separately in Petitioner's HIGHLY CONFIDENTIAL – ATTORNEYS EYES ONLY Answers to Interrogatories.

INTERROGATORY NO. 11: Identify any and all distributors to whom Petitioner has sold goods or products bearing or sold under Petitioner's Mark.

ANSWER:

Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner refers to documents produced in connection with Petitioner's Objections and Responses to Respondent's First Request for Production of Documents from which information responsive to this interrogatory may be reasonably ascertained pursuant to Federal Rule of Civil Procedure 33(d). These documents have been designated HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY pursuant to the Stipulated Protective Order entered in this matter.

INTERROGATORY NO. 12: State Petitioner's actual and proposed projected yearly dollar and unit volume of sales in the United States for each of its products or services sold under Petitioner's Mark, from the date of first use in the United States up to the present time. For each such year or accounting period identify all documents relating to such volume of sales.

ANSWER:

Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that that representative information reflecting dollar and unit sales of Petitioner's Products will be provided separately in Petitioner's HIGHLY CONFIDENTIAL – ATTORNEYS EYES ONLY Answers to Interrogatories.

INTERROGATORY NO. 13: Identify each advertising, public relations or marketing agency, or any other outside firm used by Petitioner, or which Petitioner plans to use, in connection with their advertising, promotion, distribution and sale in the United States of each product or service that has been sold or offered for sale by Petitioner under Petitioner's Mark, and identify the person at such agency in charge of Petitioner's account by name, address and title; and the inclusive dates during which Petitioner used or has used such agency.

ANSWER:

Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that that it has used the following outside advertising agencies in connection with advertising and promotion of Petitioner's Products during the past five years:

Acme Idea Company (http://acmeidea.com)

Icon Marketing Communications (http://www.iconmc.com/)

INTERROGATORY NO. 14: Identify each license or assignment agreement into which Petitioner has entered involving the use of Petitioner's Mark by stating for each:

(a) the name and address of each person who is or was a party to such agreement or license;

(b) the inclusive dates of any such agreement or license;

(c) the marks and the products that are the subject of any such agreement or license; and

(d) the purpose of the license or agreement.

ANSWER:

Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner refers to documents produced in connection with Petitioner's Objections and Responses to Respondent's First Request for Production of Documents from which information responsive to this interrogatory may be reasonably ascertained pursuant to Federal Rule of Civil Procedure 33(d). Responsive documents have been designated CONFIDENTIAL – ATTORNEYS EYES ONLY pursuant to the Stipulated Protective Order entered in this matter.

INTERROGATORY NO. 15: With respect to trade or professional shows, identify all documents relating to the Petitioner's past, current and prospective advertising and/or promotion of Petitioner's Mark on or in connection with the Petitioner's goods or services. State with respect to each such advertisement or promotion:

(a) its location, time and duration and sponsor;

(b) the identity of all individuals involved in the preparation and/or participation of Petitioner in the show;

(c) a brief description of the exhibits or other advertising used or to be used at the show;

(d) the location and identification of all exhibits used or to be used at the show;

(e) a description of the attendees of each show.

ANSWER:

Petitioner objects to each subpart of this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner refers to documents produced in connection with Petitioner's Objections and Responses to Respondent's First Request for Production of Documents from which information responsive to this interrogatory may be reasonably ascertained pursuant to Federal Rule of Civil Procedure 33(d).

(a) Las Vegas Market Show, held for five days twice annually.

(b) Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC..

(c) Various free-standing exhibits and "sizzle reels" have been used at the Las Vegas Market Show in recent years.

(d) Exhibits and materials used at the Las Vegas Market Show are in the custody of Petitioner and will be produced in representative form to the extent relevant to this proceeding.

(e) Bedding and furniture stores and buyers; industry watchers; and third-party media outlets.

INTERROGATORY NO. 16: Identify each trademark search, clearance or other inquiry conducted by or on behalf of Petitioner or of which Petitioner has otherwise become aware that referred to or related to any designation comprising or incorporating the design component of Petitioner's Mark and/or the silhouette of a reclining person of any kind by stating for each such search or other inquiry:

(a) the date, or if not possible, the approximate date of such trademark search, clearance or other inquiry;

(b) the name, address, title and employer of the person who conducted such trademark search, clearance or other inquiry;

(c) the name, address, title and employer of the person who authorized such trademark search, clearance or other inquiry; and

(d) each mark, name or designation cited in each such trademark search, clearance or other inquiry, the owner or apparent owner thereof, and the goods, services, businesses, or apparent goods, services or businesses associated or connected therewith.

ANSWER:

Petitioner objects to each subpart of this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner refers to documents produced in connection with Petitioner's Objections and Responses to Respondent's First Request for Production of Documents from which information responsive to this interrogatory may be reasonably ascertained pursuant to Federal Rule of Civil Procedure 33(d). Petitioner states that Petitioner's Mark was selected approximately twenty years ago and that much if not all of the information regarding the selection or adoption of Petitioner's Mark sought by this interrogatory's subparts (a) – (d) is no longer available. Petitioner's Reclining Figure Design was updated in 2007. The artwork associated with the

updates to Petitioner's Reclining Figure Design was created by Envisioning Business, Inc., formerly known as O & J Designs, and rights therein transferred to Petitioner by assignment. Information regarding the updated artwork associated with Petitioner's Reclining Figure design will be produced if it can be located.

INTERROGATORY NO. 17: Identify each survey, market research investigation or other inquiry in the United States conducted by or on behalf of Petitioner or of which Petitioner has otherwise become aware that refers or relates to any designation comprising or incorporating the term TEMPUR-PEDIC or the Petitioner's Mark by stating for such inquiry:

(a) the nature and purpose of such inquiry;

(b) the date or, if not possible, the approximate date such inquiry was conducted;

(c) the name, address, and employer of such person who conducted or authorized the conduct of such inquiry; and

(d) the results of such inquiry.

ANSWER: Subject to the General Objections and the forgoing specific objection(s), Petitioner states that Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner refers to documents produced in connection with Petitioner's Objections and Responses to Respondent's First Request for Production of Documents from which information responsive to this interrogatory may be reasonably ascertained pursuant to Federal Rule of Civil Procedure 33(d). Responsive documents have been designated HIGHLY CONFIDENTIAL – ATTORNEYS EYES ONLY pursuant to the Stipulated Protective Order entered in this matter.

INTERROGATORY NO. 18: Identify, by stating the name, address and business affiliation, each expert who has been retained, employed, consulted or whose opinions or views have been sought by on behalf of Petitioner, whether or not such expert is expected to testify during Petitioner's testimony period, concerning Petitioner's Mark or Registrant's Mark or any aspect of this proceeding, and state the inclusive dates of such consultation and the area of expertise of such expert or experts.

ANSWER:

Subject to the General Objections, Petitioner states that it has not yet selected and expert to testify on behalf of Petitioner in this matter. Petitioner reserves the right to supplement this Answer.

INTERROGATORY NO. 19: State the date and circumstances under which Petitioner first became aware of Registrant's use of Registrant's Mark.

ANSWER:

Petitioner objects to this request on the grounds that it seeks information protected by the attorney-client privilege, the work product doctrine, the joint defense privilege or any other applicable privilege or immunity. Such information will not be provided. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that it first became aware of Registrant's Mark upon Registrant's filing of an application to register the mark with the U.S. Patent and Trademark Office based on an intent to use the mark in the future in or around July 2010.

INTERROGATORY NO. 20: Describe all instances of actual or possible consumer confusion, mistake or association of any kind of which Petitioner is aware, between Registrant or Registrant's Mark and Petitioner, Petitioner's Mark and/or Petitioner's Products.

ANSWER:

Petitioner objects to this request on the grounds that it seeks documents and things that are not within the custody or control of Petitioner. Subject to the General Objections and to the forgoing specific objection, Petitioner states that it is aware of multiple instances of actual confusion between Registrant or Registrant's Mark on one hand and Petitioner, Petitioner's Mark and/or Petitioner's Products on the other. Petitioner refers to documents produced in response to Petitioner's subpoena for documents directed to Overstock.com. Petitioner reserves the right to supplement its answer to this interrogatory should additional information be produced during discovery.

INTERROGATORY NO. 21: State the basis for Petitioner's allegation that Registrant's Mark is "so similar" to Petitioner's Mark "as to create a likelihood of confusion, or to cause mistake, or to deceive."

ANSWER:

Subject to the General Objections, Petitioner states that Registrant's Mark is confusingly similar to Petitioner's Mark in sight, sound, and commercial impression when used in connection with the goods of Registrant's challenged Registration. Petitioner reserves the right to supplement its answer to this interrogatory.

INTERROGATORY NO. 22: Identify any policy or practice with respect to retention and/or destruction of documents used by Petitioner. If your answer is other than an

unqualified negative, describe that policy or practice in detail and identify all documents evidencing, recording, summarizing, referring or relating thereto.

ANSWER: Subject to the General Objections and the forgoing specific objection(s), Petitioner states that Petitioner objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner refers to documents produced in connection with Petitioner's Objections and Responses to Respondent's First Request for Production of Documents from which information responsive to this interrogatory may be reasonably ascertained pursuant to Federal Rule of Civil Procedure 33(d). Responsive documents have been designated CONFIDENTIAL pursuant to the Stipulated Protective Order entered in this matter.

INTERROGATORY NO. 23: Identify any other marks (including applications, registrations, and marks used on a common law basis) owned by Petitioner, including marks currently used and marks no longer in use, that consist of or include the term TEMPUR-PEDIC, and for each mark list: (a) all goods and/or services sold in connection with the mark; (b) the dates of first use and first use in commerce of the mark; (c) all channels of trade in which such products are sold; (d) the person in Petitioner's employ with the most knowledge regarding Petitioner's use of the mark; (e) for any marks that are no longer in use by Petitioner, state the date upon which Petitioner ceased use of such mark(s) and the reasons that Petitioner ceased use of such mark(s).

ANSWER:

Petitioner objects to each subpart of this interrogatory on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s),

Petitioner states that it is the owner of the following registered trademarks that include the term "Tempur-Pedic." This list is not exhaustive but is representative and reasonable given the issues in this proceeding. Information regarding dates of first use are available through the U.S. Patent and Trademark Office web site.

Mark	Reg. No.	Reg. Date	Goods
TEMPUR-PEDIC	1,853,088	Sept. 6, 1994	Mattresses, Cushions and Furniture Pads Made of Viscous Foam
THE ADVANTAGEBED BY TEMPUR-PEDIC	3,700,051	Oct. 20, 2009	Seating and Couching Mats in the Nature of a Pillow or Seat Liner, Pillows, Cushions, Mattresses, Top Mattresses, Bolsters and Chair Pads
THE ALLURABED BY TEMPUR-PEDIC	3,509,218	Sept. 30, 2008	Seating and Couching Mats in the Nature of a Pillow or Seat Liner, Pillows, Cushions, Mattresses, Top Mattresses, Bolsters and Chair Pads
THE BELLAFINA BED BY TEMPUR-PEDIC	3,700,052	Oct. 20, 2009	Seating and Couching Mats in the Nature of a Pillow or Seat Liner, Pillows, Cushions, Mattresses, Top Mattresses, Bolsters and Chair Pads
THE CELEBRITYBED BY TEMPUR-PEDIC	3,456,803	July 1, 2008	Seating and Couching Mats in the Nature of a Pillow or Seat Liner, Pillows, Cushions, Mattresses, Top Mattresses, Bolsters and Chair Pads
THE CLASSICBED BY TEMPUR-PEDIC	3,446,640	Jun. 10, 2008	Mattresses

Mark	Reg. No.	Reg. Date	Goods
THE GRANDBED BY TEMPUR-PEDIC	3,567,704	Jan. 27, 2009	Seating and Couching Mats in the Nature of a Pillow or Seat Liner, Pillows, Cushions, Mattresses, Top Mattresses, Bolsters and Chair Pads
TEMPUR-PEDIC and Design	3,900,919	Jan. 4, 2011	Seating and Couching Mats in the Nature of a Pillow or Seat Liner, Pillows, Cushions, Mattresses, Top Mattresses, Bolsters, and Chair Pads
THE DELUXEBED BY TEMPUR-PEDIC	3,921,145	Feb. 15, 2011	Mattresses

The person with the most knowledge regarding Petitioner's use of the marks above is Dan Setlak, Vice-President of Marketing, Tempur-Pedic North America, LLC.

INTERROGATORY NO. 24: For each of Petitioner's Products, describe all actions taken by Petitioner that support Petitioner's bona fide intent to use Petitioner's Mark in commerce.

ANSWER:

Petitioner objects to this request on the grounds that the information sought is not relevant, nor is the request reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 25: Explain the significance of the term TEMPUR-PEDIC in Petitioner's Mark as applied to the Petitioner's Products.

ANSWER:

Subject to the General Objections, Petitioner states that upon information and belief, the trademark TEMPUR-PEDIC is arbitrary and has no significance other than as a trademark owned by Petitioner.

INTERROGATORY NO. 26: Identify each type of product sold in connection with Petitioner's Mark (including model/style name and description of type of product) and state the date on which Petitioner first sold each style of product in connection with Petitioner's Mark.

ANSWER:

Petitioner objects to this request on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that Petitioner will rely on its rights in Petitioner's Mark used with the goods recited in its Petition for Cancellation: namely, seating and couching mats in the nature of a pillow or seat liner; pillows; cushions; mattresses; top mattresses; bolsters; and chair pads. Because priority is not an issue in this proceeding, Petitioner will not provide information regarding the date of first use of Petitioner's Mark in connection with each of the listed goods, however Petitioner can establish that use of its mark dates back to at least the mid-1990s.

INTERROGATORY NO. 27: Identify by stating the name, address, employer and position of employment, each person who supplied information used in the preparation of the answers to these interrogatories, and set forth by number each interrogatory in which that person supplied all or part of the answer to that interrogatory.

ANSWER:

Petitioner objects to this request on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that the following individuals had primary responsibility for supplying and gathering information used in the preparation of the answers to these interrogatories.

Mark Wilkinson

Corporate Counsel - Intellectual Property
Tempur-Pedic Management, Inc.

Melissa Fannin
Assistant to Legal Department
Tempur-Pedic Management, Inc.

Dan Setlak
Vice-President of Marketing
Tempur-Pedic North America, LLC.

These individuals work in Lexington, Kentucky and may be contacted through Petitioner's counsel.

INTERROGATORY NO. 28: Identify all persons who assisted in the collection of documents in response to Registrant's First Request for Production of Documents, indicating for each such person, each separate request for which he or she assisted in the collection of documents.

ANSWER:

Petitioner objects to this request on the grounds that it is overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to the General Objections and the forgoing specific objection(s), Petitioner states that the following person primarily assisted in the collection of documents in response to Registrant's First Request for Production of Documents.

Melissa Fannin
Assistant to Legal Department
Tempur-Pedic Management, Inc.

Ms. Fannin works in Lexington and may be contacted through Petitioner's counsel.

Respectfully Submitted,

s/Amy Sullivan Cahill

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Attorney for Petitioner

VERIFICATION

I hereby declare under penalty of perjury that I have read the foregoing and the factual statements contained in the responses are true and correct to the best of my knowledge and belief

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By (signature): _____

Printed Name: J. Mark Wilkinson

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2012 a copy of the PETITIONER'S OBJECTIONS AND RESPONSES TO REGISTRANT'S FIRST SET OF INTERROGATORIES TO PETITIONER was served on counsel for Registrant, via first class mail, postage prepaid to:

Irene Hurtado
ihurtado@mccarter.com
Robert W. Smith
rsmith@mccarter.com
100 Mulberry Street
Four Gateway Center
Newark, New Jersey 07102
Direct: 973-848-5371
Fax: 973-297-3761

s/Amy S. Cahill/
Amy S. Cahill

867104:2:LOUISVILLE