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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	01/09/2014
Attachments	BODIPEDIC Confidentiality Agreement for Protection of Overstock.com Information.pdf(101304 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.	)	

**CONFIDENTIALITY AGREEMENT**

Information disclosed by Overstock.com during this proceeding may be considered confidential. To preserve the confidentiality of the information so disclosed, the parties have agreed to be bound by the terms of this order. As used in this order, the term “information” covers both oral testimony and documentary material.

Agreement of the parties is indicated by the signatures of the parties’ attorneys at the conclusion of the order. Imposition of the terms by the Board is indicated by signature of a Board attorney or Administrative Trademark Judge at the conclusion of the order.

**1) Classes of Protected Information.**

The Rules of Practice in Trademark Cases provide that all inter partes proceeding files, as well as the involved registration and application files, are open to public inspection. Because it’s appropriate, however, Overstock.com, is entitled to protect the confidentiality of information by marking the information “**Confidential.**” Confidential material is material to be shielded by the Board from public access.

**2) Information Not to Be Designated as Protected.**

Information may not be designated as subject to any form of protection if it (a) is, or becomes, public knowledge, as shown by publicly available writings, other than through violation of the terms of this document; (b) is acquired by a non-designating party or non-party witness from a third party lawfully possessing such information and having no obligation to the owner of the information; (c) was lawfully possessed by a non-designating party or non-party witness prior to the opening of discovery in this proceeding, and for which there is written evidence of the lawful possession; (d) is disclosed by a non-designating party or non-party witness legally compelled to disclose the information; or (e) is disclosed by a non-designating party with the approval of the designating party.

**3) Access to Protected Information.**

Judges, attorneys, and other employees of the Board are bound to honor Overstock.com's designations of information as protected but are not required to sign forms acknowledging the terms and existence of this order. Court reporters, stenographers, video technicians or others who may be employed by the parties or their attorneys to perform services incidental to this proceeding will be bound only to the extent that the parties or their attorneys make it a condition of employment or obtain agreements from such individuals, in accordance with the provisions of paragraph 4.

- **Parties** are defined as including individuals, officers of corporations, partners of partnerships, and management employees of any type of business organization.
- **Attorneys** for parties are defined as including in-house counsel and outside counsel, including support staff operating under counsel's direction, such as paralegals or legal assistants, secretaries, and any other employees or independent contractors operating under counsel's instruction.
- **Non-party witnesses** include any individuals to be deposed during discovery or trial, whether willingly or under subpoena issued by a court of competent jurisdiction over the witness.

Parties and their attorneys shall have access to information designated as confidential or highly confidential. Non-party witnesses and any other individual not otherwise specifically covered by the terms of this order may be afforded access to confidential or highly confidential information in accordance with the terms that follow in paragraph 4.

#### **4) Disclosure to Any Individual.**

Prior to disclosure of protected information by any party or its attorney to any individual not already provided access to such information by the terms of this order, the individual shall be informed of the existence of this order and provided with a copy to read. The individual will then be required to certify in writing that the order has been read and understood and that the terms shall be binding on the individual. No individual shall receive any protected information until the party or attorney proposing to disclose the information has received the signed certification from the individual. A form for such certification is attached to this order. The party or attorney receiving the completed form shall retain the original.

#### **5) Depositions.**

Protected documents produced during the testimony deposition of a representative of Overstock.com shall be orally noted as such by Overstock.com during the testimony deposition. In addition, the documents must be prominently stamped or marked with the appropriate designation.

The transcript of the testimony deposition of the Overstock.com representative and all exhibits or attachments shall be considered protected for 30 days following the date of service of the transcript by the party that took the deposition. During that 30-day period, either party or a

representative of Overstock.com may designate the portions of the transcript, and any specific exhibits or attachments, that are to be treated as protected, by electing the appropriate designation from paragraph 1. Appropriate stampings or markings should be made during this time. If no such designations are made, then the entire transcript and exhibits will be considered unprotected.

#### **6) Filing Notices of Reliance.**

When a party or its attorney files a notice of reliance during the party's testimony period, the party or attorney is bound to honor designations made by the adverse party or attorney, or non-party witness, who disclosed the information, so as to maintain the protected status of the information.

#### **7) Briefs.**

When filing briefs, memoranda, or declarations in support of a motion, or briefs at final hearing, the portions of these filings that discuss protected information, whether information of the filing party, or any adverse party, or any non-party witness, should be redacted. The rule of reasonableness for redaction is discussed in paragraph 9 of this order.

#### **8) Handling of Protected Information.**

Disclosure of information protected under the terms of this order is intended only to facilitate the prosecution or defense of this case. The parties are obligated to maintain the confidentiality of the information and shall exercise reasonable care in handling, storing, using or disseminating the information.

#### **9) Redaction; Filing Material With the Board.**

When a party or attorney must file protected information with the Board, or a brief that discusses such information, the protected information or portion of the brief discussing the same should be redacted from the remainder. A rule of reasonableness should dictate how redaction is effected.

Redaction can entail merely covering a portion of a page of material when it is copied in anticipation of filing but can also entail the more extreme measure of simply filing the entire page under seal as one that contains primarily confidential material. If only a sentence or short paragraph of a page of material is confidential, covering that material when the page is copied would be appropriate. In contrast, if most of the material on the page is confidential, then filing the entire page under seal would be more reasonable, even if some small quantity of non-confidential material is then withheld from the public record. Likewise, when a multi-page document is in issue, reasonableness would dictate that redaction of the portions or pages containing confidential material be effected when only some small number of pages contain such material. In contrast, if almost every page of the document contains some confidential material, it may be more reasonable to simply submit the entire document under seal. Occasions when a whole document or brief must be submitted under seal should be very rare .

Protected information, and pleadings, briefs or memoranda that reproduce, discuss or paraphrase such information, shall be filed with the Board under seal. The envelopes or containers shall be prominently stamped or marked with a legend in substantially the following form:

**CONFIDENTIAL**

*This envelope contains documents or information that are subject to a protective order or agreement. The confidentiality of the material is to be maintained and the envelope is not to be opened, or the contents revealed to any individual, except by order of the Board.*

**10) Challenges to Designations of Information as Protected.**

If the parties, Overstock.com, or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith regarding the designation by the disclosing party. If the parties and Overstock.com are unable to resolve their differences, the party challenging the designation may make a motion before the Board seeking a determination of the status of the information.

A challenge to the designation of information as protected must be made substantially contemporaneous with the designation, or as soon as practicable after the basis for challenge is known. When a challenge is made long after a designation of information as protected, the challenging party will be expected to show why it could not have made the challenge at an earlier time.

The party or non-party witness designating information as protected will, when its designation is timely challenged, bear the ultimate burden of proving that the information should be protected.

**11) Board's Jurisdiction; Handling of Materials After Termination.**

The Board's jurisdiction over the parties and their attorneys ends when this proceeding is terminated. A proceeding is terminated only after a final order is entered and either all appellate proceedings have been resolved or the time for filing an appeal has passed without filing of any appeal.

The parties may agree that archival copies of evidence and briefs may be retained, subject to compliance with agreed safeguards. Otherwise, within 30 days after the final termination of this proceeding, the parties and their attorneys shall make a written statement that the protected information disclosed during the proceeding, and shall include any briefs, memoranda, summaries, and the like, which discuss or in any way refer to such information shall be destroyed.

**12) Other Rights of the Parties, Overstock.com and Attorneys.**

This order shall not preclude the parties, Overstock.com, or their attorneys from making any applicable claims of privilege during discovery or at trial. Nor shall the order preclude the filing

of any motion with the Board for relief from a particular provision of this order or for additional protections not provided by this order.

**By Agreement of the Following:**

s/Amy Sullivan Cahill  
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Date: January 8, 2014

Date: January 8, 2014

**By Order of the Board, effective** \_\_\_\_\_.

\_\_\_\_\_  
[print or type name and title of Board attorney  
or judge imposing order]