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

Proceeding	91242534
Party	Plaintiff Sleep Number Corporation, f/k/a Select Comfort Corporation
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Sleep Number Corporation, f/k/a Select Comfort Corporation,	)	Opposition No. 91242534
	)	Mark: SUSTENA THE ORIGINAL NUMBER BED
Opposer,	)	
v.	)	Serial No. 87532370
Dires, LLC,	)	Filing Date: July 18, 2017
Applicant.	)	Publication Date: May 22, 2018

OPPOSER'S MOTION TO DISMISS OR STRIKE APPLICANT'S AMENDED COUNTERCLAIMS AND RELATED AFFIRMATIVE DEFENSES PURSUANT TO FED. R. CIV. P. 12(B)(6)

INTRODUCTION

Dires, LLC ("Applicant") previously filed several counterclaims and an affirmative defense seeking the extraordinary remedy of cancelling as generic Opposer Sleep Number Corporation f/k/a Select Comfort Corporation's ("Sleep Number") longstanding and incontestable Sleep Number trademark registrations. The counterclaims, however, were baseless and otherwise defective for a number of reasons: (1) they contained conclusory legal statements, couched as "facts," which were insufficient to support the claims; (2) they sought relief based on issues raised and rejected in an action in the United States District Court for the District of Minnesota ("Minnesota Action"); and (3) they sought cancellation of the entire registrations despite alleging that the mark is generic for only a portion of the goods identified in the registrations.

Sleep Number appropriately moved to dismiss Applicant's meritless counterclaims and affirmative defense. Rather than resist Sleep Number's motion, Applicant has attempted to replead its affirmative defenses and counterclaims. However, Applicant's amendments *weaken*, rather than strengthen, its allegations, by making it readily apparent exactly how similar Applicant's

claims before the T.T.A.B. are to Applicant's failed claims in the Minnesota Action. Further, Applicant appears to allege that Sleep Number is descriptive of a feature of some of the goods for which the marks are registered, but given that the marks are either incontestable or primarily derived from incontestable marks, these allegations are meritless.

Accordingly, Sleep Number respectfully requests that the Board dismiss Applicant's amended counterclaims, its First Affirmative Defense, and Subpart Two of its Second Affirmative Defense under Federal Rule of Civil Procedure 12(b)(6) and T.T.A.B Rules 503 and 506.

STATEMENT OF FACTS

1. Sleep Number's Trademarks.

Sleep Number is the owner of U.S. Trademark Registration No. 2753633 (the "'633 Registration"), issued on August 19, 2003, for the mark SLEEP NUMBER in connection with "beds, mattresses and pillows" in International Class 20 and "comforters and mattress pads" in International Class 24. (*See* 1 TTABVUE, Notice of Opposition, Ex. A.) Sleep Number is also the owner of U.S. Trademark Registration No. 2618999 (the "'999 Registration"), issued on September 10, 2002, for the mark SLEEP NUMBER in connection with "handheld remote control sold as an integral component of an adjustable air bed, that electronically controls the amount of air within the bed's air chamber" in International Class 20. (*See* 1 TTABVUE, Notice of Opposition, Ex. B.) Sleep Number is also the owner of U.S. Trademark Registration No. 2641045 (the "'045 Registration"), issued on October 22, 2002, for the mark SLEEP NUMBER in connection with "retail store services, on-line retail services, mail order services and telephone shop at home services, all featuring beds, mattresses, pillows, mattress pads, bed frames, furniture and accessories, namely, sheets and blankets" in International Class 35. (*See* 1 TTABVUE, Notice of Opposition, Ex. C.) Additionally, Sleep Number is the owner of U.S. Trademark Registration No. 2803624 (the "'624 Registration"), issued on January 6, 2004, for a double arrow in a circle

in connection with "beds, mattresses, bed frames, adjustable foundations for beds and mattresses, adjustable beds, pillows, bolsters, furniture and non-metal bed fittings" in International Class 20. (*See* Ex. 1.) The '633, '999, '045, and '624 marks are incontestable under Section 15 of the Lanham Act. *See* 15 U.S.C. § 1065.

Additionally, Sleep Number is the owner of U.S. Trademark Registration No. 4981013 (the "'013 Registration"), issued on June 21, 2016, for the mark SLEEP NUMBER & design in connection with: "beds, mattresses, mattress toppers, pillows, bed frames, adjustable bases for beds, modular bases for beds, and headboards" in International Class 20; "bedding, namely, mattress pads, bed sheets, pillow cases, blankets, comforters, bedspreads, comforter covers, bed covers, pillow protectors, and mattress protectors" in International Class 24; and "retail store services, on-line retail store services and telephone shop at home services, all featuring beds, mattresses, mattress toppers, pillows, bed frames, adjustable bases for beds, modular bases for beds, headboards, and bedding, namely, mattress pads, bed sheets, pillow cases, blankets, comforters, bedspreads, comforter covers, bed covers, pillow protectors, and mattress protectors" in International Class 35. (*See* 1 TTABVUE, Notice of Opposition, Ex. D.) Sleep Number is also the owner of U.S. Trademark Registration No. 5408945 (the "'945 Registration"), issued on February 20, 2018, for the mark SLEEP NUMBER 360 in connection with "[b]eds, mattresses, mattress toppers, bed frames, adjustable bases for beds, modular bases for beds, and bed headboards" in International Class 20. (*See* 1 TTABVUE, Notice of Opposition, Ex. F.)

2. <u>The Minnesota Action.</u>

On November 16, 2012, Sleep Number filed a complaint against Applicant in the United States District Court for the District of Minnesota. *See Select Comfort Corp. v. Dires, LLC*, Court File No. 0:12-cv-02899-DWF-SER, Dkt. 1 (D. Minn. Nov. 16, 2012) (hereinafter "Minnesota

Action").[1] After various amendments to the parties' pleadings, Applicant filed an answer and counterclaims in the Minnesota Action, including a Counterclaim III for cancellation of the '633, '999, and '045 Registrations based upon allegations that Sleep Number abandoned its Sleep Number mark by using it in a purportedly descriptive manner over time, therefore causing the mark to "become generic." (Minnesota Action, Dkt. 60.)

Shortly before trial, Applicant filed a brief in support of a *Daubert* motion to exclude Sleep Number's genericness expert in which Applicant stated that it "will **not** advance at trial" its genericness-by-abandonment claim and that "Defendants pled but have since abandoned" the claim. (Minnesota Action, Dkt. 285 at 2, 3 (emphasis in original).) On October 25, 2016, the court granted Sleep Number's motion for summary judgment on the claim, stating that "Defendants have withdrawn their abandonment claim" and that "Defendants no longer can state a claim for cancellation of 'Sleep Number.'" (Minnesota Action, Dkt. 332 at 5–10.) As a result, the court dismissed Counterclaim III "with prejudice." (*Id.* at 10.) Additionally, the court later denied Applicant's request for reconsideration of the order dismissing Counterclaim III and Applicant's motion for leave to amend Counterclaim III to add a generic *ab initio* claim. (Minnesota Action, Dkt. 510.)

In September and October 2017, the Minnesota Action proceeded to trial, after which a jury reached a verdict. (Minnesota Action, Dkt. 575.) Notably, the jury found the Sleep Number trademark to be famous. (*Id.* at 6.) The court entered judgment in the Minnesota Action on May 9, 2018. (Minnesota Action, Dkt. 636.)

[1] A full copy of the docket for the Minnesota Action was attached as Exhibit A to Sleep Number's Motion to Suspend Proceeding Pending Disposition of a Civil Action. (6 TTABVUE, Motion, Ex. A.)

ARGUMENT

1. Standard.

To withstand a motion to dismiss before the Board, a party seeking cancellation of a registered trademark must allege such facts as would, if proven, establish that the petitioner is entitled to the relief sought; that is, that (1) the petitioner has standing to maintain the proceeding, and (2) a valid ground exists for cancelling an issued registration. *NSM Res. Corp. v. Microsoft Corp.*, 113 U.S.P.Q.2d 1029, 2014 WL 7206403, at *2 (T.T.A.B. Nov. 25, 2014) (first citing *Young v. AGB Corp.*, 152 F.3d 1377, 1380, 47 U.S.P.Q.2d 1752, 1754 (Fed. Cir. 1998); and then citing *Doyle v. Al Johnson's Swedish Rest. & Butik Inc.*, 101 U.S.P.Q.2d 1780, 1782 (T.T.A.B. 2012)). The counterclaims must allege sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (holding plausibility standard applies to all federal civil claims). Importantly, the Board is "not required to accept as true legal conclusions or unwarranted factual inferences." *NSM*, 2014 WL 7206403, at *2 (quoting *In re Bill of Lading Transmission and Processing Sys. Patent Litig.*, 681 F.3d 1323, 1331, 103 U.S.P.Q.2d 1045, 1051 (Fed. Cir. 2012)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Sun Hee Jung v. Magic Snow, LLC*, 124 U.S.P.Q.2d 1041, 2017 WL 4174422, at *1 (T.T.A.B. Sept. 20, 2017) (first quoting *Iqbal*, 556 U.S. at 678; and then citing *Twombly*, 550 U.S. at 555).

2. Applicant's Amended Counterclaim II Should Be Dismissed or Stricken.

Applicant spends the bulk of its amended pleading attempting to save its Counterclaim II, which seeks cancellation, in whole or in part, of the '633, '999, and '045 Registrations. However, the claim and issue preclusion created by the Minnesota Action bar this claim, and Applicant nonetheless continues to fail to provide any facts supporting the extreme remedy of cancellation.

(a) Applicant's Amended Counterclaim Is Inadequately Pleaded.

Applicant has attempted to provide additional factual assertions to save its woefully under-pleaded counterclaim. But, as a matter of law, Applicant's counterclaim continues to be based upon insufficiently-pled allegations and should be dismissed.

Applicant alleges that Sleep Number, through "its own course of conduct," abandoned its rights to the "Sleep Number" mark, which caused the mark "to become generic and otherwise lose its significance as a mark." (First Amend. Aff. Defs. & Countercls., ¶¶ 23–24.) As a result, Applicant continues, the "purchasing public understands the primary significance of the phrase 'sleep number' to be generic for adjustable air beds." (*Id.* ¶ 27.) Applicant's pleading goes on to provide several purported examples (which are inaccurately described) of Sleep Number's use of the phrase "Sleep Number" in a generic fashion (which, as discussed *infra*, are copy-and-pasted from Applicant's failed counterclaim in the Minnesota Action). (*Id.* ¶¶ 29–36.) But conspicuously absent from Applicant's counterclaim is any factual allegation—or any support whatsoever—relating to the public's perception of "Sleep Number." Applicant cites no facts showing what the public thinks or why, which is critical in a genericness claim. Instead, Applicant only provides a single, conclusory allegation that the public "understands" that "Sleep Number" is generic. This is a legal conclusion that the Board need not, and indeed should not, accept. *Sun Hee Jung*, 2017 WL 4174422, at *1 (noting Board does not accept conclusory, threadbare allegations); *NSM*, 2014 WL 7206403, at *2 (holding similarly). Further, at most, Applicant's allegations amount to a claim that Sleep Number is descriptive (not generic) of a feature of some of the goods identified in Sleep Number's registrations. *See* TMEP § 1209.01(b) ("A mark is considered merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods or services."). This is insufficient as a basis for cancellation of Sleep Number's incontestable registrations. *See Park 'N Fly, Inc. v. Dollar Park & Fly*, 469 U.S. 189, 205 (1985)

("The language of the Lanham Act . . . refutes any conclusion that an incontestable mark may be challenged as merely descriptive.").[2] Applicant's allegation that the "public understands the primary significance" of the phrase "Sleep Number" to be generic should be dismissed or stricken.

Applicant also provides threadbare and inconsistent allegations relating to the scope of cancellation sought for the '633 and '045 Registrations. Applicant initially alleges generally that "Sleep Number" has become generic "in connection with adjustable air bed mattress products and related services" or, in the alternative, has lost "its significance as a mark in connection with adjustable air beds." (First Amend. Aff. Defs. & Countercls., ¶¶ 23–24.) Later in its counterclaim, Applicant asks the Board (1) to cancel the *entire* '999 Registration based upon an unsupported, conclusory allegation that the goods in the Registration "would be perceived by the purchasing public as referring to an integral component of an adjustable air bed," and (2), as an alternative remedy, to cancel the *entire* '633 and '045 Registrations based upon an unsupported, conclusory allegation that the goods in the Registrations "would be perceived by the relevant public as referring to adjustable air bed mattress products and related services." (*Id.* ¶¶ 41–42, 44–45, 50–51.) These allegations are inconsistent and unsupported. First, Applicant has provided no factual basis from which to assert how each of the goods "would be perceived" by the public. Second, the Registrations do not cover just "adjustable air bed mattress products and related services": the '999 Registration covers a "handheld remote control" (1 TTABVUE, Notice of Opposition, Ex.

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[2] *In re Chippendales USA Inc.*, 622 F.3d 1346, 1353 (Fed. Cir. 2010) ("[O]nce a mark has achieved incontestable status under 15 U.S.C. § 1065, it is entitled to the benefits of section 1115(b), which precludes all but a limited number of challenges to a mark's validity or enforceability."); *Sunrise Jewelry Mfg. Corp. v. Fred S.A.*, 175 F.3d 1322, 1325 (Fed. Cir. 1999) ("[A]n incontestable mark cannot be challenged, for example, for mere descriptiveness, or on the basis that the mark lacks secondary meaning."); *Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 U.S.P.Q.2d 1458, 2014 WL 1390528, at *19 (T.T.A.B. Mar. 24, 2014) ("[A]n incontestable registration may not be challenged as invalid for mere descriptiveness.")

B), the '633 Registration covers broader goods like "beds, mattresses and pillows" as well as "comforters and mattress pads" (1 TTABVUE, Notice of Opposition Ex. A), and the '045 Registration likewise covers broader goods like "pillows, mattress pads . . . furniture and accessories, namely, sheets and blankets" (1 TTABVUE, Notice of Opposition, Ex. C). Applicant fails to offer a single factual allegation relating to these additional goods, relying instead on legal conclusions that the Board should disregard. (First Amend. Aff. Defs. & Countercls., ¶¶ 41–42, 50–51.)

Moreover, it is improper to seek cancellation of an *entire* registration when the allegations relate only to a *portion* of the goods and/or services encompassed by the registration. *See Finanz St. Honore, B.V. v. Johnson & Johnson*, 85 U.S.P.Q.2d 1478, 2007 WL 1653586, at *2–3 (T.T.A.B. June 6, 2007). Thus, to the extent Applicant seeks cancellation of the entire Registrations, its counterclaim should be stricken or dismissed.

(b) Applicant's Amended Counterclaim Is Precluded by the Minnesota Action.

Furthermore, nothing in Applicant's amended pleading is sufficient to differentiate its Counterclaim II from the claim that Applicant already brought, and lost on, in the Minnesota Action. If anything, Applicant's new allegations make it even more apparent that it is impermissibly seeking to rehash claims that were already dismissed with prejudice in the Minnesota Action.

In the Minnesota Action, Applicant brought a counterclaim alleging that Sleep Number's purported descriptive use of the marks in the '633, '999, and '045 Registrations over time had rendered them generic. (Minnesota Action, Dkt. 60 at Counterclaim III, ¶¶ 28–48.) Applicant alleged that the phrase Sleep Number "when used in connection with . . . adjustable air bed mattress products has been abandoned by [Sleep Number] through its own course of conduct causing the mark to become generic," and that therefore the '633, '999, and '045 Registrations should be

cancelled in their entirety. (*Id.* at ¶ 31; *see also id.* at Prayer for Relief, ¶ C.) However, after the parties engaged in extensive discovery in the Minnesota Action relating to genericness, Applicant withdrew the claim. (*See* Minnesota Action, Dkt. 332, Order at 8–9.) In other words, Applicant abandoned its genericness claim and could no longer assert it in the Minnesota Action. The court then dismissed the claim with prejudice, reasoning: "[I]n light of the fact that [Applicant has] withdrawn [its] abandonment claim . . . Defendants no longer can state a claim for cancellation of 'Sleep Number.' Therefore, the Court dismisses Defendants' Counterclaim III with prejudice." (*See* Minnesota Action, Dkt. 332, Order at 10.) The court entered judgment in the Minnesota Action on May 9, 2018. (Minnesota Action, Dkt. 636.)

Now, Applicant has brought the same counterclaim seeking the same relief. Applicant's amended allegations make it all the more clear that the claim is precluded based on Applicant's nearly *identical* allegations in the Minnesota Action. Indeed, the following table depicts how Applicant's "new" allegations are copied almost verbatim from Applicant's allegations in the Minnesota Action:

Allegations in this Proceeding	**Allegations in the Minnesota Action**
"Opposer uses 'sleep number' generically in its own utility patents." (First Amend. Aff. Defs. & Countercls., ¶ 29.)	"Select Comfort uses 'sleep number' generically in its own utility patents." (Minnesota Action, Dkt. 60 at Countercl. III, ¶ 32.)
"Opposer explains to its own customers that a 'sleep number' is the key feature to its adjustable air bed mattress products." (First Amend. Aff. Defs. & Countercls., ¶ 30.)	"Select Comfort explains to its own customers that a 'sleep number' is the key feature to its adjustable air bed mattress products." (Minnesota Action, Dkt. 60 at Countercl. III, ¶ 33.)
"Opposer uses 'sleep number' generically in its own marketing campaigns." (First Amend. Aff. Defs. & Countercls., ¶ 31.)	"Select Comfort uses 'sleep number' generically in its own marketing campaigns." (Minnesota Action, Dkt. 60 at Countercl. III, ¶ 34.)
"Opposer's marketing campaigns communicate to consumers that 'sleep number' is a setting or feature of its adjustable	"Select Comfort marketing campaigns communicate to consumers that 'sleep number' is a setting or feature of its adjustable

Allegations in this Proceeding	Allegations in the Minnesota Action
air bed mattress products." (First Amend. Aff. Defs. & Countercls., ¶ 32.)	air bed mattress products." (Minnesota Action, Dkt. 60 at Countercl. III, ¶ 35.)
"Opposer has an official YouTube channel containing its own commercials for its adjustable air bed mattress products and retail services; Opposer uses the phrase 'sleep number' generically in these commercials including: '. . . your sleep number setting.'" (First Amend. Aff. Defs. & Countercls., ¶ 33.)	"Select Comfort has an official YouTube channel containing its own commercials for its adjustable air bed mattress products and retail services; Select Comfort uses the phrase 'sleep number' generically in these commercials including: 'The sleep number represents the firmness that you like on your half of the mattress." (Minnesota Action, Dkt. 60 at Countercl. III, ¶ 36.)
"Opposer's own website, www.sleepnumber.com, used to contain a video in which Opposer's Vice President for Sleep Innovation/Clinical Research repeatedly uses 'sleep number' generically, including: 'To find your ideal sleep number, it's important to experience the bed's full range of settings." (First Amend. Aff. Defs. & Countercls., ¶ 34.)	"Select Comfort's own website, www.sleepnumber.com, contains a video in which Select Comfort's Vice President for Sleep Innovation/Clinical Research repeatedly uses 'sleep number' generically, including: 'To find your ideal sleep number, it's important to experience the bed's full range of settings." (Minnesota Action, Dkt. 60 at Countercl. III, ¶ 37.)
"Opposer used 'sleep number' generically in its investor relationships materials. In Opposer's January 2013 Investor Presentation, Opposer listed each member of its executive management team followed by the phrase 'Sleep Number' and, presumably, the individual's preferred sleep number. For example, 'Shelly Ibach President & CEO Sleep Number 35." (First Amend. Aff. Defs. & Countercls., ¶ 35.)	"Select Comfort used 'sleep number' generically in its investor relationships materials. In Select Comfort's January 2013 Investor Presentation, Select Comfort listed each member of its executive management team followed by the phrase 'Sleep Number' and, presumably, the individual's preferred sleep number. For example, 'Shelly Ibach President & CEO Sleep Number 35." (Minnesota Action, Dkt. 60 at Countercl. III, ¶ 38.)
"Opposer used 'sleep number' generically in the bed assembly instructions available on its own website." (First Amend. Aff. Defs. & Countercls., ¶ 36.)	"Select Comfort uses 'sleep number' generically in the bed assembly instructions available on its own website." (Minnesota Action, Dkt. 60 at Countercl. III, ¶ 39.)

On the basis of these nearly identical allegations, Applicant is seeking to cancel, in whole or in part, the '633, '999, and '045 Registrations, which are the same registrations Applicant attacked in the Minnesota Action. (*Compare* First Amend. Aff. Defs. & Countercls., ¶¶ 38–52; Prayer For Relief ¶ (c)–(i), *with* Minnesota Action, Dkt. 60, Prayer for Relief, ¶ C.) Therefore,

Applicant's amended counterclaim is nothing more than an attempt by Applicant to get a second bite at the apple on a genericness claim that has already been dismissed with prejudice in the Minnesota Action. The law does not allow this, and Applicant's counterclaim should be dismissed.

"Under the principles of issue preclusion or collateral estoppel a federal court determination of a trademark issue normally has a binding effect in subsequent proceedings before the Board involving the same parties and issues." *Gma Accessories, Inc. v. Dorfman-Pac. Co.*, Opp. No. 91196926, 2013 WL 5407289, at *3 (T.T.A.B.. June 7, 2013) (listing cases); *see also B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1305–06 (2015) ("When a district court, as part of its judgment, decides an issue that overlaps with part of the TTAB's analysis, the TTAB gives preclusive effect to the court's judgment."). There are two distinct branches of res judicata: issue preclusion and claim preclusion. *Hallco Mfg. Co., Inc. v. Foster*, 256 F.3d 1290, 1294 (Fed. Cir. 2001). Here, alternatively, either or both bar Applicant's Counterclaim II.

(i) Claim Preclusion.

"The general concept of claim preclusion is that when a final judgment is rendered on the merits, another action may not be maintained between the parties on the same "claim," and defenses that were raised or could have been raised in that action are extinguished." *Hallco*, 256 F.3d at 1294. For claim preclusion to apply, therefore, there must be: "(1) identity of parties (or their privies); (2) an earlier final judgment on the merits of a claim; and (3) a second claim based on the same set of transactional facts as the first." *Urock Network, LLC v. Sulpasso*, 115 U.S.P.Q.2d 1409, 2015 WL 4658976, at *3 (T.T.A.B. Jul. 17, 2015). Here, all of these factors exist.

First, the same parties here were involved in the Minnesota Action: Sleep Number was the plaintiff, and Applicant was a named defendant throughout the entirety of the litigation. (*See generally* Minnesota Action.)

Second, there was a final judgment on the merits of the claim in the Minnesota Action—the genericness counterclaim as to the '633, '999, and '045 Registrations was dismissed with prejudice, and the district court entered final judgment. (*See* Minnesota Action, Dkts. 332, 636.) *See Urock Network*, 2015 WL 4658976, at *4 (noting that "whether the judgment in the prior proceeding was the result of a dismissal with prejudice or even default, for claim preclusion purposes, it is a final judgment on the merits"); *Orouba Agrifoods Processing Co. v. United Food Imp.*, 97 U.S.P.Q.2d 1310, 2010 WL 5574283, at *4 (T.T.A.B. Dec. 28, 2010) (noting "even default judgments for failure to answer, or dismissals for failure to prosecute . . . can act as a bar under the doctrine of claim preclusion"); *Schering Corp. v. Diagnostic Test Group LLC*, Opp. No. 91179748, 2008 WL 2515108, at *3–6 (T.T.A.B. June 12, 2008) (holding similarly).[3]

Finally, the claims arise out of the same set of transactional facts—in fact, as shown by the comparison chart above of the allegations in this proceeding and in the Minnesota Action, the

[3] To the extent Applicant attempts to escape preclusion by arguing that there was no final judgment on the merits because it abandoned the claim in question, this attempt is meritless. It would run contrary to the purpose of preclusion to allow a party to raise a cause of action, to pursue it for the majority of litigation, to abandon it at the last moment, and then be permitted to raise the exact same cause of action again. *Casto v. Ark.-La. Gas Co.*, 597 F.2d 1323, 1325 (10th Cir. 1979) ("The abandonment of a cause of action may be implied from a plaintiff's acts, or from his omissions. In either event, the effect thereof (absent proper reservation of the claim by way of, for example, Rule 15 or Rule 41, Fed. R. Civ. P.) is that the cause of action is extinguished and any subsequent suit thereon precluded." (quotation omitted)); *Clark v. Yosemite Cmty. Coll. Dist.*, 785 F.2d 781, 786 (9th Cir. 1986) ("Having apparently abandoned a cause of action on that primary right in the state proceeding, Clark may not seek to raise it again in a federal action."). And regardless, claim preclusion applies even to claims and defenses *not* raised in the prior litigation if they *could* have been raised. Here, there can be no question that Applicant could have alleged genericness; after all, Applicant did so.

claims are demonstrably nearly identical. "Courts have defined 'transaction' in terms of a core of operative facts, the same operative facts, or the same nucleus of operative facts, and based on the same, or nearly the same, factual allegations." *Urock Network*, 2015 WL 4658976, at *6 (quotation omitted). Here, Applicant has offered essentially identical factual allegations, and is attacking the same registrations. Thus, both cases involve the same type of claims, are about the same marks, and will involve the analysis of similar facts. Accordingly, both cases involve the same transactional facts.

Because all three elements of claim preclusion apply here, Applicant's Counterclaim II should be dismissed or stricken on res judicata grounds.

(ii) Issue Preclusion.

Alternatively, Applicant's claims are barred by issue preclusion. Issue preclusion exists when four factors are present:

(1) identity of the issues in a prior proceeding;

(2) the issues were actually litigated;

(3) the determination of the issues was necessary to the resulting judgment; and,

(4) the party defending against preclusion had a full and fair opportunity to litigate the issues.

Jet, Inc. v. Sewage Aeration Sys., 223 F.3d 1360, 1366 (Fed. Cir. 2000); *see also Mother's Rest., Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983). All four factors are satisfied here.

First, there is an identity of issues between this matter and the Minnesota Action. In both cases, the issue is whether the term Sleep Number is generic for the goods and services in the registrations at issue. *Coyne v. Dervaes Inst.*, Cancellation No. 9205383, 2017 WL 1476299, at *4 (T.T.A.B. Mar. 22, 2017) ("There is an identity of issue between the California case and the

above-captioned proceeding. That is, both cases involve the issue of whether the term URBAN HOMESTEADING is generic for the services recited in involved Registration No. 3633366."). The identity of issues is supported by the fact that Applicant's "new" allegations are copy-and-pasted from Applicant's counterclaim in the Minnesota Action.

Second, as to the issue here having already been raised and litigated, Applicant in the Minnesota Action pleaded the claim, performed discovery into the claim, resisted summary judgment on the claim, and then abandoned the claim shortly before trial. (Minnesota Action, Dkt. 285 at 2, 3; Dkt. 332 at 10); *see Kelly Coyne,* 2017 WL 1476299, at *4 (concluding the "genericness issue was actually litigated in the briefing of, and decision on, the motion for summary judgment, and the District Court's decision on that issue was adequately deliberated and firm," therefore meeting the second element of issue preclusion). Therefore, the issue was clearly raised and litigated in the Minnesota Action. *Casto*, 597 F.2d at 1325.

Third, the resolution of the claim in the Minnesota Action was necessary to the district court's summary judgment ruling in which it, among other things, dismissed the genericness counterclaim with prejudice. (Dkt. 332 at 10.) *See Kelly Coyne*, 2017 WL 1476299 at *4 ("The determination of the issue of genericness was necessary to the November 5, 2015 decision in which the District Court granted summary judgment on the genericness claim.").

Finally, there is no question that Applicant had a full and fair opportunity to litigate genericness in the Minnesota Action. In fact, it did so—Applicant raised the genericness counterclaim in its pleadings, conducted discovery, resisted summary judgment, and ultimately abandoned the claim before trial. (Minnesota Action, Dkt. 285 at 2, 3; Dkt. 332 at 10.) It should not be permitted to unnecessarily institute litigation, drive up costs, and get a second bite at the apple now.

Because all four elements of issue preclusion apply here, Applicant's Counterclaim II should be dismissed or stricken on res judicata grounds.

3. Counterclaim I Should Be Dismissed or Stricken.

Applicant's Amended Counterclaim I also remains meritless. Applicant seeks to cancel two registrations through its Counterclaim I: the '045 Registration, and the '013 Registration. (*See generally* First Amend. Aff. Defs. & Countercls., Countercl. I.) These marks differ little from Sleep Number's incontestable marks at issue in the Minnesota Action and which Applicant attacks in its Counterclaim II. Indeed, the former marks are just the latter, incontestable marks with the addition of (1) a double arrow in a circle—which is itself incontestable (*see* Exhibit 1 hereto)—in between the words in the mark "Sleep Number" (the '013 Registration), or (2) the number "360" added to the mark "Sleep Number" (the '945 Registration). Applicant's Counterclaim I lacks any factual support, remains an improper attempt to seek cancellation of the incontestable Sleep Number marks, and is otherwise clearly barred by claim and issue preclusion.

As an initial matter, the very first allegation in Applicant's pleading is nonsensical. Applicant alleges that a jury found that Sleep Number holds no trademark rights in the phrase Number Bed, and that somehow this supports the allegation that Sleep Number "is merely descriptive of the goods and services" claimed in the '013 and '945 Registrations. (First Amend. Aff. Defs. & Countercls., ¶¶ 1, 13.) This is nonsense. First, nothing about the jury's finding with respect to Number Bed impacts whether Sleep Number operates as a trademark, and it certainly has no bearing on the marks at issue in the '013 and '945 Registrations. Moreover, the jury did not even reach the question of whether Number Bed is descriptive or generic; the jury instead found (Sleep Number believes incorrectly) that Sleep Number does not have trademark rights in Number Bed. (*See* First Amend. Aff. Defs. & Countercls., Ex. A at 66.) Second, when determining whether a mark is descriptive or generic, the entire mark must be evaluated. *See*

DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd., 695 F.3d 1247, 1252 (Fed. Cir. 2012) ("When determining whether a mark is merely descriptive, the Board must consider the commercial impression of a mark as a whole. Because a mark must be considered as a whole, the Board may not 'dissect' the mark into isolated elements."). In other words, the registrations at issue must be reviewed as a whole, not broken down into individual components. Yet, Applicant seems to ask that the Board do exactly that—to make the illogical leap that because "Number Bed" is not a Sleep Number registered trademark, that therefore "Sleep Number" is not either. This makes no sense, as Sleep Number stands on its own (and is already incontestable). Were Applicant's theory correct, the fact that "electric grid" or "electric car" are generic would mean that General Electric is generic. Applicant's reasoning fails and should be rejected.

In an equally odd argument, Applicant also alleges that Sleep Number "immediately conveys merely descriptive information about the business name of Opposer, namely, Sleep Number Corporation.'" (First Amend. Aff. Defs. & Countercls., ¶ 11.) This is not the law. Indeed, *every* company name is descriptive of that company's name, but that does not prevent Apple from being a trademark, nor Target, nor 3M. *In Re Unclaimed Salvage & Freight Co., Inc.*, 192 U.S.P.Q. 165, 1976 WL 21118, at *2 (T.T.A.B. May 27, 1976) ("[T]he name of a company can be registered under the current trademark law if it is used in a trademark or service mark manner so as to identify goods or services rendered by the company as distinguished from or in addition to identifying the company or business entity. Thus, a corporation or business trade designation may function as a trademark or service mark, or as a trade name, or as both, depending upon the manner in which the name or designation is used in any particular case."); *In Re Texaco Inc.*, 143 U.S.P.Q. 364, 1964 WL 8010, at *2 (T.T.A.B. Nov. 30, 1964) ("[I]t is well established that the name of a

company may be a trademark, a trade name or both."). Again, Applicant's argument fails and should be rejected.

Moreover, Applicant is still largely basing its counterclaim for descriptiveness on the dominant portion of the marks which has obtained incontestable status—Sleep Number. As detailed above, Sleep Number's rights in the term "Sleep Number," as registered in the '633, '999, and '045 Registrations, and its rights in the double arrow in a circle, as registered in the '624 Registration, are incontestable and therefore cannot be attacked as descriptive. *See* 15 U.S.C. § 1065; *Park 'N Fly, Inc.*, 469 U.S. at 196–97; *see also supra* n.2. But that is precisely what Applicant has done with its counterclaim related to the '013 and '945 Registrations. Applicant's attempt to challenge trademarks as being descriptive when they have already obtained incontestable status fails. *See In Re the Am. Sail Training Ass'n*, 230 U.S.P.Q. 879, 880, 1986 WL 83616, at *2 (T.T.A.B. July 23, 1986) (holding that where the term to be disclaimed is identical to the mark in a prior incontestable registration, the requirement for a disclaimer for mere descriptiveness is a collateral attack on such prior registration and is not permitted); *Jarrow Formulas, Inc. v. Ford Albritton, IV*, Opp. Nos. 91186397, 91186980, 2012 WL 2166312, at *2 (T.T.A.B. May 16, 2012) (holding challenger's claim that SUSTAIN mark is merely descriptive was "untenable" considering that trademark holder held incontestable registrations for ALPHA LIPOIC SUSTAIN and JOINT SUSTAIN for the same goods and services (first citing *Am. Sail Training*, 230 U.S.P.Q. at 880; and then citing *In Re Strategic Partners, Inc.*, 102 U.S.P.Q.2d 1397, 2012 WL 1267930, at *3–4 (T.T.A.B. Mar. 28, 2012))).[4]

[4] *See also Sturgis Motorcycle Rally, Inc. v. Mortimer*, No. 2:14-CV-00175-WCO, 2015 WL 11439078, at *3 n.1 (N.D. Ga. June 11, 2015) ("Defendant's challenge to the '171 and '703 registrations for STURGIS BIKE WEEK® fails because the registrations–although not incontestable–overlap with the incontestable '955 registration."); *Cottonwood Fin. Ltd. v. Cash Store Fin. Servs., Inc.*, 778 F. Supp. 2d 726, 744 n.21, 752 (N.D. Tex. 2011) (holding marks

For similar reasons, because Applicant is barred by claim preclusion from seeking cancellation of any "Sleep Number" trademark registrations on the basis of a genericness claim (which Applicant has and continues to base on purported descriptive use), it certainly should not be allowed to seek the cancellation of other, similar trademark registrations containing the mark. For example, in *Miller Brewing Co. v. Coy Int'l Corp.*, the Board determined that the applicant was barred by claim preclusion from registering a new mark that "evolved out of the original design" for a mark that the applicant had previously abandoned its attempt to register. 230 U.S.P.Q. 675, 1986 WL 83607, at *4 (T.T.A.B. Jan. 15, 1986). The Board reasoned that "the mark sought to be registered herein and the previous mark which was involved in the prior proceeding constitute a transaction or a series of transactions" under claim preclusion. *Id.* (reasoning the "new design adds the terminology 'Cask No. 32' . . . and includes additional sheaves of grain outside the oval design" and therefore the two marks "create substantially the same commercial impression and the minor alterations do not rise to the level of a new mark sufficient . . . to allow applicant to seek registration herein"). The Board there did "not wish to encourage losing parties to insignificantly modify their marks after an adverse ruling and thereby avoid the res judicata effect of the prior adjudication." *Id.*

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that "technically lack incontestable status" were nevertheless "functionally incontestable" because they contained the same language as trademark holder's incontestable mark); *Serv. Merch. Co. v. Serv. Jewelry Stores, Inc.*, 737 F. Supp. 983, 992 (S.D. Tex. 1990) ("Defendants are precluded from asserting that the two non-incontestable 'Service Merchandise' marks are merely descriptive. Although the three marks are composed of slightly different designs and one has the additional phrase 'your store' appended to it, the relevant phrase of 'Service Merchandise' is common to each mark. It would be illogical to allow Defendants to claim that the phrase 'Service Merchandise' is merely descriptive with respect to the non-incontestable marks while the law conclusively presumes that the same phrase is not merely descriptive with respect to the incontestable mark.").

More recently, in *Annie Sloan Interiors, Ltd. v. Studio Van Gogh*, the Board determined that the petitioner in a cancellation proceeding was barred by claim preclusion from asserting claims of descriptiveness and genericness because of an earlier opposition proceeding between the parties. Cancellation No. 92056853, 2015 WL 9906321, at *2, *5 (T.T.A.B. June 15, 2015). Although the cancellation proceeding and earlier opposition involved different registrations, claim preclusion was appropriate because "the marks create[d] substantially the same commercial impression." *Id.* at *5. The Board also noted that "each proceeding involves the same or highly similar goods . . . [and] involves claims of descriptiveness and genericness." *Id.* ("In short, the evidence necessary to prove descriptiveness and genericness in the [prior] opposition would establish descriptiveness and genericness in the current cancellation. Said another way, the '306 opposition and this cancellation are based on the same, or nearly the same, factual allegations."). Similarly, here, the Board should not allow Applicant, after losing on an attempt to cancel one set of trademark registrations, to then turn around and challenge other, extremely similar marks on similar grounds—this would simply perpetuate litigation and waste valuable judicial and administrative resources.

Applicant does not plead its way around this barrier in its amended counterclaim, nor could it. Instead, Applicant offers mere legal conclusions which must be rejected. For example, Applicant alleges, in conclusory fashion, that the issues in its Counterclaim I do not meet the requirements for preclusion. (First Amend. Aff. Defs. & Countercls., ¶¶ 2–6.) These preemptive legal conclusions, offered without explanation or factual support, should be rejected.

Because Applicant has already attacked the registrations at issue on descriptiveness and genericness grounds and because the '013 and '945 Registrations are based upon the incontestable

Sleep Number marks, Applicant's Counterclaim I should be dismissed. *Sun Hee Jung*, 2017 WL 4174422, at *1.

4. Applicant's First Affirmative Defense and Subpart Two of Its Second Affirmative Defense Should Be Dismissed or Stricken.

Applicant asserts an affirmative defense that Sleep Number "fails to state a claim upon which relief can be granted because the '633 Registration, the '999 Registration, and the '045 Registration are generic for at least a portion of the goods and/or services for adjustable air bed mattress products and services, and the '013 Registration and '945 Registration are merely descriptive and lack secondary meaning for at least a portion of the goods and/or services, and thus are not protectable." (First Amend. Aff. Defs. & Countercls., First Aff. Def.) Applicant also asserts another affirmative defense that there is "no likelihood of confusion" because "(2) at least some of the SLEEP NUMBER Marks are either generic, merely descriptive, lack secondary meaning and/or not distinctive." (*Id.*, Second Aff. Def.) But allegations as to descriptiveness or genericness of the term "Sleep Number" in the relevant marks are an improper attack on incontestable marks and are otherwise barred by claim or issue preclusion as discussed above. Therefore, for the same reasons detailed above, the allegations of Applicant's First Affirmative Defense and Subpart Two of Applicant's Second Affirmative Defense fail and should be dismissed or stricken.

CONCLUSION

Applicant's attempt to save its claims by amendment further highlights their weakness. They are under-pleaded and legally wrong, and Applicant has already lost on them once. The Board should dismiss or strike Applicant's amended counterclaims, First Affirmative Defense, and Subpart Two of Applicant's Second Affirmative Defense.

Respectfully submitted,

Dated: November 1, 2018

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ATTORNEYS FOR OPPOSER
SLEEP NUMBER CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2018, I served a true copy of the foregoing *Opposer's Motion to Dismiss or Strike Applicant's Amended Counterclaims and Related Affirmative Defenses Pursuant to Fed. R. Civ. P. 12(b)(6)* on counsel for Applicant by sending the same via e-mail to:

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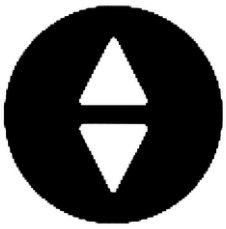
Devonia Engle

EXHIBIT 1

Generated on: This page was generated by TSDR on 2018-09-28 11:52:24 EDT

Mark:



US Serial Number:	78125243	**Application Filing Date:**	Apr. 30, 2002
US Registration Number:	2803624	**Registration Date:**	Jan. 06, 2004
Register:	Principal		
Mark Type:	Trademark, Service Mark		
Status:	The registration has been renewed.		
Status Date:	Jan. 16, 2014		
Publication Date:	Feb. 11, 2003	**Notice of Allowance Date:**	May 06, 2003

Mark Information

Mark Literal Elements:	None
Standard Character Claim:	No
Mark Drawing Type:	2 - AN ILLUSTRATION DRAWING WITHOUT ANY WORDS(S)/ LETTER(S)/NUMBER(S)
Description of Mark:	The mark consists of a blue circle containing two arrows; the circle is blue.
Color(s) Claimed:	Color is not claimed as a feature of the mark.
Lining and Stippling Statement:	The drawing is lined for the color blue and the color is claimed as a feature of the mark.
Design Search Code(s):	24.15.10 - Arrows, more than one; More than one arrow 24.15.25 - Other arrows 26.01.21 - Circles that are totally or partially shaded.

Goods and Services

Note: The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [..] indicate deleted goods/services;
- Double parenthesis ((..)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks *..* identify additional (new) wording in the goods/services.

For: Beds, mattresses, [box springs,] bed frames, [headboards, footboards,] adjustable foundations for beds and mattresses, adjustable beds, [sofa beds,] pillows, bolsters, furniture, and non-metal bed fittings

International Class(es):	020 - Primary Class	**U.S Class(es):**	002, 013, 022, 025, 032, 050
Class Status:	ACTIVE		
Basis:	1(a)		
First Use:	Aug. 2002	**Use in Commerce:**	Aug. 2002

For: Bedroom accessories, namely, mattress pads, bed sheets, pillow cases, blankets, comforters, bedspreads, comforter covers, bed covers, pillow protectors, and mattress protectors

International Class(es):	024 - Primary Class	**U.S Class(es):**	042, 050

Class Status: ACTIVE

Basis: 1(a)

First Use: Jan. 2003 **Use in Commerce:** Jan. 2003

For: Retail store services, on-line retail services, mail order services and telephone shop at home services, all featuring beds, mattresses, [box springs,] bed frames, [headboards, footboards,] adjustable foundations, adjustable beds, [sofa beds,] furniture, pillows, bed fittings, and bedroom accessories, namely, mattress pads, bed sheets, pillow cases, blankets, comforters, bedspreads, comforter covers, bed covers, pillow protectors, and mattress protectors

International Class(es): 035 - Primary Class **U.S Class(es):** 100, 101, 102

Class Status: ACTIVE

Basis: 1(a)

First Use: Jun. 01, 2002 **Use in Commerce:** Jun. 01, 2002

Basis Information (Case Level)

Filed Use:	No	**Currently Use:**	Yes	**Amended Use:**	No
Filed ITU:	Yes	**Currently ITU:**	No	**Amended ITU:**	No
Filed 44D:	No	**Currently 44D:**	No	**Amended 44D:**	No
Filed 44E:	No	**Currently 44E:**	No	**Amended 44E:**	No
Filed 66A:	No	**Currently 66A:**	No		
Filed No Basis:	No	**Currently No Basis:**	No		

Current Owner(s) Information

Owner Name: SLEEP NUMBER CORPORATION

Owner Address: 1001 THIRD AVE S
MINNEAPOLIS, MINNESOTA 55404
UNITED STATES

Legal Entity Type: CORPORATION **State or Country Where Organized:** MINNESOTA

Attorney/Correspondence Information

Attorney of Record

Attorney Name: Barbara J. Grahn **Docket Number:** 8929-2041

Attorney Primary Email Address: bgrahn@oppenheimer.com **Attorney Email Authorized:** Yes

Correspondent

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Correspondent e-mail: bgrahn@oppenheimer.com ipdocket@oppenheimer.com **Correspondent e-mail Authorized:** Yes

Domestic Representative - Not Found

Prosecution History

Date	Description	Proceeding Number
Feb. 28, 2018	ASSIGNMENT OF OWNERSHIP NOT UPDATED AUTOMATICALLY	
Jan. 24, 2018	AUTOMATIC UPDATE OF ASSIGNMENT OF OWNERSHIP	
Sep. 23, 2015	ASSIGNMENT OF OWNERSHIP NOT UPDATED AUTOMATICALLY	
Apr. 22, 2014	NOTICE OF SUIT	
Jan. 16, 2014	NOTICE OF ACCEPTANCE OF SEC. 8 & 9 - E-MAILED	
Jan. 16, 2014	REGISTERED AND RENEWED (FIRST RENEWAL - 10 YRS)	66607

Jan. 16, 2014	REGISTERED - SEC. 8 (10-YR) ACCEPTED/SEC. 9 GRANTED	66607
Jan. 06, 2014	REGISTERED - COMBINED SECTION 8 (10-YR) & SEC. 9 FILED	66607
Jan. 16, 2014	CASE ASSIGNED TO POST REGISTRATION PARALEGAL	66607
Jan. 06, 2014	TEAS SECTION 8 & 9 RECEIVED	
Apr. 02, 2013	NOTICE OF SUIT	
Jan. 03, 2013	ATTORNEY/DOM.REP.REVOKED AND/OR APPOINTED	
Jan. 03, 2013	TEAS REVOKE/APP/CHANGE ADDR OF ATTY/DOM REP RECEIVED	
Jan. 10, 2010	REGISTERED - SEC. 8 (6-YR) ACCEPTED & SEC. 15 ACK.	70619
Jan. 10, 2010	CASE ASSIGNED TO POST REGISTRATION PARALEGAL	70619
Jan. 06, 2010	TEAS SECTION 8 & 15 RECEIVED	
Jun. 18, 2008	ASSIGNMENT OF OWNERSHIP NOT UPDATED AUTOMATICALLY	
Jan. 06, 2004	REGISTERED-PRINCIPAL REGISTER	
Nov. 04, 2003	ALLOWED PRINCIPAL REGISTER - SOU ACCEPTED	
Nov. 04, 2003	ASSIGNED TO EXAMINER	73730
Nov. 03, 2003	CASE FILE IN TICRS	
Oct. 23, 2003	STATEMENT OF USE PROCESSING COMPLETE	
Oct. 16, 2003	USE AMENDMENT FILED	
Oct. 16, 2003	TEAS STATEMENT OF USE RECEIVED	
May 06, 2003	NOA MAILED - SOU REQUIRED FROM APPLICANT	
Feb. 11, 2003	PUBLISHED FOR OPPOSITION	
Jan. 22, 2003	NOTICE OF PUBLICATION	
Nov. 07, 2002	APPROVED FOR PUB - PRINCIPAL REGISTER	
Nov. 06, 2002	EXAMINER'S AMENDMENT MAILED	
Sep. 18, 2002	ASSIGNED TO EXAMINER	73730
Sep. 09, 2002	ASSIGNED TO EXAMINER	70703

Maintenance Filings or Post Registration Information

Affidavit of Continued Use: Section 8 - Accepted

Affidavit of Incontestability: Section 15 - Accepted

Renewal Date: Jan. 06, 2014

TM Staff and Location Information

TM Staff Information - None

File Location

Current Location: GENERIC WEB UPDATE **Date in Location:** Jan. 16, 2014

Assignment Abstract Of Title Information

Summary

Total Assignments: 7 **Registrant:** Select Comfort Corporation

Assignment 1 of 7

Conveyance: SECURITY AGREEMENT

Reel/Frame: 3793/0815 **Pages:** 11

Date Recorded: Jun. 11, 2008

Supporting Documents: assignment-tm-3793-0815.pdf

Assignor

Name: SELECT COMFORT CORPORATION **Execution Date:** May 30, 2008

Legal Entity Type: MINNESOTA CORP. **State or Country Where Organized:** No Place Where Organized Found

Assignee

Name: JPMORGAN CHASE BANK, N.A., AS AGENT

Legal Entity Type: UNKNOWN

State or Country Where Organized: No Place Where Organized Found

Address: 131 S. DEARBORN
CHICAGO, ILLINOIS 60603

Correspondent

Correspondent Name: LAURA KONRATH

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35 W. WACKER DR.
CHICAGO, IL 60601

Domestic Representative - Not Found

Assignment 2 of 7

Conveyance: SECURITY INTEREST

Reel/Frame: 4176/0289

Pages: 30

Date Recorded: Mar. 30, 2010

Supporting Documents: assignment-tm-4176-0289.pdf

Assignor

Name: SELECT COMFORT CORPORATION

Execution Date: Mar. 26, 2010

Legal Entity Type: CORPORATION

State or Country Where Organized: MINNESOTA

Name: SELECT COMFORT RETAIL CORPORATION

Execution Date: Mar. 26, 2010

Legal Entity Type: CORPORATION

State or Country Where Organized: MINNESOTA

Name: SELECT COMFORT CANADA HOLDING INC.

Execution Date: Mar. 26, 2010

Legal Entity Type: CORPORATION

State or Country Where Organized: MINNESOTA

Name: SELECTCOMFORT.COM CORPORATION

Execution Date: Mar. 26, 2010

Legal Entity Type: CORPORATION

State or Country Where Organized: MINNESOTA

Assignee

Name: WELLS FARGO BANK, NATIONAL ASSOCIATION

Legal Entity Type: A NATIONAL BANKING ASSOCIATION

State or Country Where Organized: UNITED STATES

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Correspondent

Correspondent Name: SUSAN CARLSON

Correspondent Address: 90 SOUTH 7TH ST STE 2200
MINNEAPOLIS, MN 55402

Domestic Representative - Not Found

Assignment 3 of 7

Conveyance: RELEASE BY SECURED PARTY

Reel/Frame: 4182/0194

Pages: 8

Date Recorded: Apr. 08, 2010

Supporting Documents: assignment-tm-4182-0194.pdf

Assignor

Name: JPMORGAN CHASE BANK, N.A., AS COLLATERAL AGENT

Execution Date: Mar. 26, 2010

Legal Entity Type: NATIONAL ASSOCIATION

State or Country Where Organized: UNITED STATES

Assignee

Name: SELECT COMFORT CORPORATION

Legal Entity Type: CORPORATION
State or Country Where Organized: MINNESOTA

Address: 9800 59TH AVE NORTH
MINNEAPOLIS, MINNESOTA 55442

Correspondent

Correspondent Name: SUSAN CARLSON

Correspondent Address: 90 SOUTH 7TH ST STE 2200
MINNEAPOLIS, MN 55402

Domestic Representative - Not Found

Assignment 4 of 7

Conveyance: RELEASE BY SECURED PARTY

Reel/Frame: 4810/0125
Pages: 7

Date Recorded: Jun. 28, 2012

Supporting Documents: assignment-tm-4810-0125.pdf

Assignor

Name: WELLS FARGO BANK, NATIONAL ASSOCIATION
Execution Date: Jun. 04, 2012

Legal Entity Type: A NATIONAL BANKING ASSOCIATION
State or Country Where Organized: UNITED STATES

Assignee

Name: SELECT COMFORT CORPORATION

Legal Entity Type: CORPORATION
State or Country Where Organized: MINNESOTA

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PLYMOUTH, MINNESOTA 55442

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Correspondent Name: SUSAN ORPEN

Correspondent Address: 222 SOUTH NINTH STREET
CAMPBELL MITHUN TOWER, SUITE 2000
MINNEAPOLIS, MN 55402-3338

Domestic Representative - Not Found

Assignment 5 of 7

Conveyance: SHORT FORM INTELLECTUAL PROPERTY SECURITY AGREEMENT

Reel/Frame: 5621/0893
Pages: 12

Date Recorded: Sep. 11, 2015

Supporting Documents: assignment-tm-5621-0893.pdf

Assignor

Name: SELECT COMFORT CORPORATION
Execution Date: Sep. 09, 2015

Legal Entity Type: CORPORATION
State or Country Where Organized: MINNESOTA

Assignee

Name: KEYBANK NATIONAL ASSOCIATION

Legal Entity Type: NATIONAL BANKING ASSOCIATION
State or Country Where Organized: OHIO

Address: 127 PUBLIC SQUARE
ATTN: INSTITUTIONAL BANKING
CLEVELAND, OHIO 44114

Correspondent

Correspondent Name: DAVID D. THOMAS, ESQ.

Correspondent Address: 127 PUBLIC SQUARE
3900 KEY CENTER
CLEVELAND, OH 44114-1291

Domestic Representative - Not Found

Assignment 6 of 7

Conveyance: CHANGE OF NAME

Reel/Frame: 6237/0368 **Pages:** 6

Date Recorded: Dec. 27, 2017

Supporting Documents: assignment-tm-6237-0368.pdf

Assignor

Name: SELECT COMFORT CORPORATION **Execution Date:** Dec. 14, 2017

Legal Entity Type: CORPORATION **State or Country Where Organized:** MINNESOTA

Assignee

Name: SLEEP NUMBER CORPORATION

Legal Entity Type: CORPORATION **State or Country Where Organized:** MINNESOTA

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Correspondent

Correspondent Name: BARBARA J GRAHN

Correspondent Address: 222 SOUTH NINTH ST
SUITE 2000
MINNEAPOLIS, MN 55402

Domestic Representative - Not Found

Assignment 7 of 7

Conveyance: ASSIGNMENT OF SHORT FORM INTELLECTUAL PROPERTY SECURITY AGREEMENT

Reel/Frame: 6273/0827 **Pages:** 13

Date Recorded: Feb. 15, 2018

Supporting Documents: assignment-tm-6273-0827.pdf

Assignor

Name: KEYBANK NATIONAL ASSOCIATION, AS RETIRING AGENT **Execution Date:** Feb. 14, 2018

Legal Entity Type: NATIONAL BANKING ASSOCIATION **State or Country Where Organized:** UNITED STATES

Assignee

Name: U.S. BANK NATIONAL ASSOCIATION, AS SUCCESSOR AGENT

Legal Entity Type: NATIONAL BANKING ASSOCIATION **State or Country Where Organized:** UNITED STATES

Address: 800 NICOLLET MALL, 3RD FLOOR
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Correspondent Name: DUSAN CLARK, ESQ.

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