

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

SERTA SIMMONS BEDDING, LLC and  
DREAMWELL, LTD.

Plaintiffs,

v.

CASPER SLEEP INC.

Defendant.

**CIVIL ACTION NO. 1:17-cv-07468**

**DEFENDANT CASPER SLEEP INC.'S OPPOSITION  
TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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**TABLE OF ABBREVIATIONS**

Abbreviation	Document
'173 Patent	U.S. Patent No. 7,036,173 (filed Oct. 17, 2001) (issued May 2, 2006) (D.I. 10-4)
'763 Patent	U.S. Patent No. 7,424,763 (filed May 1, 2006) (issued Sep. 16, 2008) (D.I. 10-3)
'935 Patent	U.S. Patent No. 8,918,935 (filed July 12, 2012) (issued Dec. 30, 2014) (D.I. 10-5)
10/17/13 Office Action	October 17, 2013 Office Action from the prosecution file of U.S. Patent Appl. No. 13/548,081 (matured to U.S. Patent No. 8,918,935) (Ex. P)
10/26/17 Email	Email from K. Dominguez to P. Shoenhard, dated October 26, 2017 4:28:38 PM (Ex. V)
1/15/14 Amendment	January 15, 2014 Amendment from the prosecution file of U.S. Patent Appl. No. 10/548,081 (matured to U.S. Patent No. 8,918,935) (Ex. R)
11/10/17 Email	Email from K. Dominguez to P. Shoenhard, dated November 10, 2017 5:02:40 PM (Ex. W)
11/13/06 Amendment	November 13, 2006 Amendment from the prosecution file of U.S. Patent Appl. No. 11/415,816 (matured to U.S. Patent No. 7,424,763) (Ex. L)
1/8/14 Notice of References	January 8, 2014 Notice of References Cited from the prosecution file of U.S. Patent Appl. No. 13/207,569 (Ex. Q)
2002 Gladney Application	March 20, 2002 Information Disclosure Statement from the prosecution file of U.S. Patent Appl. No. 10/102,276 (Ex. A)
2004 Dreamwell Application	November 10, 2004 Notice of References Cited from the prosecution file of U.S. Patent Appl. No. 10/985,622 (Ex. F)
3/20/02 IDS	March 20, 2002 Information Disclosure Statement from the prosecution file of U.S. Patent Appl. No. 10/102,276 (Ex. B)
3/23/05 Notice of References	March 23, 2005 Notice of References Cited from the prosecution file of U.S. Patent Appl. No. 10/761,011 (Ex. G)
3/9/04 Office Action	March 9, 2004 Office Action from the prosecution file of U.S. Patent Appl. No. 10/274,441 (matured to U.S. Patent No. 7,036,173) (Ex. C)

Abbreviation	Document
7/14/09 IDS	July 14, 2009 Information Disclosure Statement from the prosecution file of U.S. Patent Appl. No. 11/805,097 (Ex. N)
7/2/14 Amendment	July 2, 2014 Amendment from the prosecution file of U.S. Patent Appl. No. 13/548,081 (matured to U.S. Patent No. 8,918,935) (Ex. S)
8/11/04 Amendment	August 11, 2004 Amendment from the prosecution file of U.S. Patent Appl. 10,274,441 (matured to U.S. Patent No. 7,036,173) (Ex. E)
8/11/06 Notice of References	August 11, 2006 Notice of References Cited from the prosecution of U.S. Patent Appl. No. 11/184,506 (Ex. I)
8/17/09 IDS	August 17, 2009 Information Disclosure Statement from the prosecution file of U.S. Patent Appl. No. 12/542,380 (Ex. O)
8/6/07 Amendment	August 6, 2007 Amendment from the prosecution file of U.S. Patent Appl. No. 11/415,816 (matured to U.S. Patent No. 7,424,763) (Ex. M)
8/7/06 Office Action	August 7, 2006 Office Action from the prosecution file of U.S. Patent Appl. No. 11/415,816 (matured to U.S. Patent No. 7,424,763) (Ex. H)
8/9/04 IDS	August 9, 2004 Information Disclosure Statement from the prosecution file of U.S. Patent Appl. No. 10/102,276 (Ex. D)
9/12/06 IDS	September 12, 2006 Information Disclosure Statement from the prosecution file of U.S. Patent Appl. No. 11/145,797 (Ex. J)
9/14/06 IDS	September 14, 2006 Information Disclosure Statement from the prosecution file of U.S. Patent Appl. No. 11/249,816 (matured to U.S. Patent No. 7,424,763) (Ex. K)
Antinori	United States Patent No. 6,223,371 (filed Apr. 15, 1999) (issued May 1, 2001) (produced at Bates CAS-00000446-CAS-00000452) (Ex. OO)
Bloomberg	Kyle Stock, "Will a Web-Only Mattress Startup Keep Serta and Sealy Up at Night?," Bloomberg News (Apr. 22, 2014) accessible at <a href="https://www.bloomberg.com/news/articles/2014-04-22/will-a-web-only-mattress-startup-keep-serta-and-sealy-up-at-night">https://www.bloomberg.com/news/articles/2014-04-22/will-a-web-only-mattress-startup-keep-serta-and-sealy-up-at-night</a> (Ex. Z)
Casper Blog	Alyse Borkan, "Casper: The Perfect Mattress for Everyone," Casper.com: Pillow Talk (Nov. 9 2015) accessible at <a href="http://blog.casper.com/casper-the-perfect-mattress-for-everyone/">http://blog.casper.com/casper-the-perfect-mattress-for-everyone/</a> (Ex. BB)
Casper Mattress Comparison	Comparison of Casper Mattresses, Casper.com/mattresses, printed Nov. 15, 2017 (Ex. II)

Abbreviation	Document
Casper Wave Website	The Wave Mattress, <a href="https://casper.com/mattresses/casper-wave/">https://casper.com/mattresses/casper-wave/</a> , printed Nov. 15, 2017 (Ex. HH)
Clift Decl.	Declaration of Matthew Clift, filed on September 29, 2017 (D.I. 10-23)
Clift Dep. Tr.	Excerpts from the November 2, 2017 Deposition Transcript of Matthew Clift (Ex. T)
Complaint	Complaint, <i>Serta Simmons Bedding, LLC v. Casper Sleep Inc.</i> , 17 Civ. 7468 (AKH) (AJP) (S.D.N.Y) (D.I. 1)
Dominguez Decl.	Declaration of Katherine Dominguez, filed concurrently herewith
Ex.	Exhibit to the Declaration of Katherine Dominguez, filed concurrently herewith
Fast Company	Jonathan Ringen, “How Cult Mattress Company Casper Plans to Get You Into Bed,” Fast Company (Feb. 13, 2017) accessible at <a href="https://www.fastcompany.com/3067484/how-cult-mattress-company-casper-plans-to-get-you-into-bed">https://www.fastcompany.com/3067484/how-cult-mattress-company-casper-plans-to-get-you-into-bed</a> (Ex. DD)
Fast Company Top 50	Fast Company Staff, “Announcing the 2017 World’s 50 Most Innovative Companies,” Fast Company (Feb. 13, 2017) accessible at <a href="https://www.fastcompany.com/3067756/announcing-th-2017-worlds-50-most-innovative-companies">https://www.fastcompany.com/3067756/announcing-th-2017-worlds-50-most-innovative-companies</a> (Ex. EE)
Fortune	Brittany Shoot, “This mattress company’s profits are nothing to snooze at,” Fortune (Oct. 22, 2014) accessible at <a href="http://fortune.com/2014/10/22/saatva-mattress/">http://fortune.com/2014/10/22/saatva-mattress/</a> (Ex. AA)
GB ’433	British Patent Specification No. 1 483 433 (filed Sept. 5, 1974) (produced at Bates CAS-00000185-CAS-00000189) (Ex. KK)
Hoffman Patent	United States Patent No. 6,061,856 (filed Nov. 6, 1998) (issued May 16, 2000) (produced at Bates CAS-00000439-CAS-00000445) (Ex. PP)
Holm Decl.	Declaration of David Holm, filed concurrently herewith.
Inc.	Liz Welch, “How Casper Became a \$100 Million Company in Less Than Two Years,” Inc.com (October 24, 2017), accessible at <a href="https://www.inc.com/magazine/201603/liz-welch/casper-changing-mattress-industry.html">https://www.inc.com/magazine/201603/liz-welch/casper-changing-mattress-industry.html</a> (Ex. GG)
Kennaway	PCT Application No. WO81/02384 (filed Feb. 19, 1981) (produced at Bates CAS-00000607-CAS-00000625) (Ex. MM)

Abbreviation	Document
Kuchel Decl.	Declaration of Bernhard Kuchel, filed concurrently herewith
Morgan Decl.	Declaration of Kenneth Morgan, filed September 29, 2017 (D.I. 10-24)
Morgan Decl. Ex. A	Exhibit A to the Declaration of Kenneth Morgan, filed September 29, 2017 (D.I. 10-25)
Morgan Decl. Ex. B	Exhibit B to the Declaration of Kenneth Morgan, filed September 29, 2017 (D.I. 10-26)
Morgan Decl. Ex. C	Exhibit C to the Declaration of Kenneth Morgan, filed September 29, 2017 (D.I. 10-27)
Morgan Dep. Tr.	Excerpts from the October 31, 2017 deposition transcript of Kenneth Reid Morgan (Ex. U)
Mot.	Memorandum of Law In Support of Plaintiffs' Motion for Preliminary Injunction, filed September 29, 2017 (D.I. 10-1)
Murphy Patent	U.S. Patent No. 4,706,313 (filed May 1, 1986) (issued Nov. 17, 1987) (produced at Bates CAS-00000296-CAS-00000303) (Ex. NN)
New York Times	Michael J. de la Merced, "Casper, Mattress Maker, Raises \$170 Million and Plans IPO," New York Times, June 18, 2017, available at <a href="https://www.nytimes.com/2017/06/18/business/dealbook/casper-mattress-target-investment-initial-public-offering.html?_r=1">https://www.nytimes.com/2017/06/18/business/dealbook/casper-mattress-target-investment-initial-public-offering.html?_r=1</a> (D.I. 10-18)
OED	Excerpt from the Paperback Oxford English Dictionary, Seventh Edition (2012) (Ex. X)
PR Newswire	"Tomorrow Sleep, Powered by Serta Simmons Bedding, Launches with Innovative Direct-to-Consumer Sleep System," PR Newswire (June 27, 2017) accessible at <a href="https://www.prnewswire.com/news-releases/tomorrow-sleep-powered-by-serta-simmons-bedding-launches-with-innovative-direct-to-consumer-sleep-system-300479973.html">https://www.prnewswire.com/news-releases/tomorrow-sleep-powered-by-serta-simmons-bedding-launches-with-innovative-direct-to-consumer-sleep-system-300479973.html</a> (Ex. FF)
Regan	U.S. Patent No. 4,161,045 (Filed Dec. 19, 1977) (Issued Jul. 19, 1979) (produced at Bates CAS-00000255-CAS-00000260) (Ex. LL)
Scheuch	European Patent Publication No. 1031302A2 (published Aug. 30, 2000), and a certified translation thereof (Ex. QQ)
Serta Website	Serta History, available at <a href="http://www.serta.com/history">www.serta.com/history</a> , printed November 15, 2017 (Ex. JJ)

Abbreviation	Document
Slate	Seth Stevenson, "Going to the Mattresses," Slate (Nov. 23, 2000) accessible at <a href="http://www.slate.com/articles/life/shopping/2000/11/going_to_the_mattresses.html">http://www.slate.com/articles/life/shopping/2000/11/going_to_the_mattresses.html</a> (Ex. Y)
TIME	TIME Staff, "The 25 Best Inventions of 2015," TIME (Nov. 19, 2015) accessible at <a href="http://time.com/4115398/best-inventions-2015/">http://time.com/4115398/best-inventions-2015/</a> (Ex. CC)

## INTRODUCTION

Plaintiffs’ motion for a preliminary injunction and the patent infringement allegations on which it is based are entirely devoid of merit. Indeed, Plaintiffs’ infringement allegations are so directly contrary to the plain language of the patents themselves, they cannot be made in good faith. Plaintiffs’ motion goes far beyond the bounds of zealous advocacy, and exposes this case for what it is: a sham litigation brought by a desperate behemoth to maintain its hegemony and stifle competition from an innovative startup revolutionizing the mattress industry. Plaintiffs’ preliminary injunction motion and this case generally constitute an anti-competitive misuse of Dreamwell’s patents and an abuse of the court system.

A preliminary injunction is an extraordinary remedy reserved for extreme cases, where there is a clear showing that the plaintiff is likely to succeed on the merits and is at risk of immediate and irreparable harm. Plaintiffs have not—and cannot—come close to meeting their heavy burden regarding either likelihood of success or irreparable harm.

***Likelihood of Success on the Merits:*** Plaintiffs cannot establish a likelihood of success for three separate reasons: (1) Casper does not infringe, (2) the patents are invalid, and (3) the patents are unenforceable. To defeat this motion, Casper need only raise a “substantial question” concerning any *one* of these issues. Casper has done far more than that.

First and foremost, Casper does not infringe. Plaintiffs’ allegations directly contradict the plain language of the patents, and are irreconcilable with the many binding statements Plaintiff Dreamwell made to the Patent Office to get the patents in the first place. The asserted claims of the ’763 patent require “channels” on “at least one of the top and bottom surfaces” of the mattress, but Casper’s mattress does *not* have channels on either surface. The asserted claims of the other two patents (the ’173 and ’935 patents) require creating channels by “assembling” multiple pieces of foam together in a manner that leaves a channel, but Casper does not do that

either, and instead creates channels *only* by cutting into a single piece of foam. It is impossible to overstate just how thoroughly Plaintiffs' infringement claims lack merit.

The asserted patents also are invalid. Casper has already identified numerous prior art patents that disclose each and every element of the claims. Even more striking and troubling is the fact that Plaintiff Dreamwell (and its inventor and counsel) *knew about* these prior art references, but never disclosed them to the Patent Office, as they were obligated to do. Dreamwell's deliberate withholding of material information constitutes inequitable conduct, and renders the patents unenforceable.

***Irreparable Harm:*** Plaintiffs have also utterly failed to demonstrate irreparable harm—let alone the “clear showing” needed for a preliminary injunction. Plaintiffs do not even show that *Plaintiffs* will be harmed at all, and instead allege harm to *non-party* affiliates, which is insufficient as a matter of law. And, the harms Plaintiffs do allege are purely speculative, unsupported by evidence, and entirely remediable by money damages. Plaintiffs refuse even to say whether the patents have been licensed, a critical issue in any patent injunction context. And, in any event, none of the harms Plaintiffs allege are caused by the alleged infringement. In fact, Plaintiffs' own declarant admitted that he has no evidence that the Wave has caused or will cause any harm at all to Plaintiffs, let alone irreparable harm.

***Balance of the Hardships:*** Plaintiffs' conclusory claim that the hardship to Casper “is minimal” and somehow outweighed by Plaintiffs' speculation that their affiliates *might* lose *some* sales to the Wave down the road is laughable—particularly in light of the fact that the Serta Simmons corporate family holds the largest market share in the industry (nearly 40 percent), while Casper is a young startup (with only a small fraction of the overall market) at a critical and formative juncture.

**Public Interest:** The public interest also strongly militates against a preliminary injunction. The public is best served by robust competition, especially by new market entrants, like Casper, challenging an entrenched market. The public also is affirmatively disserved by allowing patentees to misuse patents—as Plaintiffs do here—by filing meritless lawsuits whose obvious and only aim is to quash competition.

\* \* \*

In short, Plaintiffs have not met their burden on any one of the factors necessary for a preliminary injunction. That is hardly surprising considering that there is no good faith argument that the Wave infringes or that either Plaintiff will suffer irreparable harm. But, while Plaintiffs’ failure to meet their burden is unsurprising, their conduct in filing this baseless motion is deeply disturbing. This is a motion that should never have been filed in a case that should never have been brought. For now, at a minimum, Plaintiffs’ motion should be denied.

## **BACKGROUND**

### **A. Casper and the Wave**

**Casper:** Casper Sleep Inc. is a startup headquartered in New York City that designs, engineers, and sells innovative mattresses and sleep products. Launched in 2014, Casper was created to “reimagine sleep from the ground up”—including reinventing not only mattresses themselves, but the entire the customer experience within the sleep industry, including the way mattresses are designed, marketed and sold to consumers.

Before Casper’s launch, the mattress market was dominated by century-old incumbents who enjoyed massive profits, yet provided a terrible buying experience for customers. Fast Company (Ex. DD) at 3; Slate (Ex. Y) at 1. Customers faced innumerable, confusing mattress options, deliberately marketed so as to make comparison shopping nearly impossible (such as by giving identical products different names in different outlets, and advertising products as

perpetually “on sale”). Bloomberg (Ex. Z) at 1–2; Slate (Ex. Y) at 1 (“Mattress makers rename identical products for each different retail store. Different labels, exact same guts. Why? Obfuscation.”). To make matters worse, customers were expected to commit to these expensive, largely non-refundable purchases after testing a mattress out in a store for only a short time.

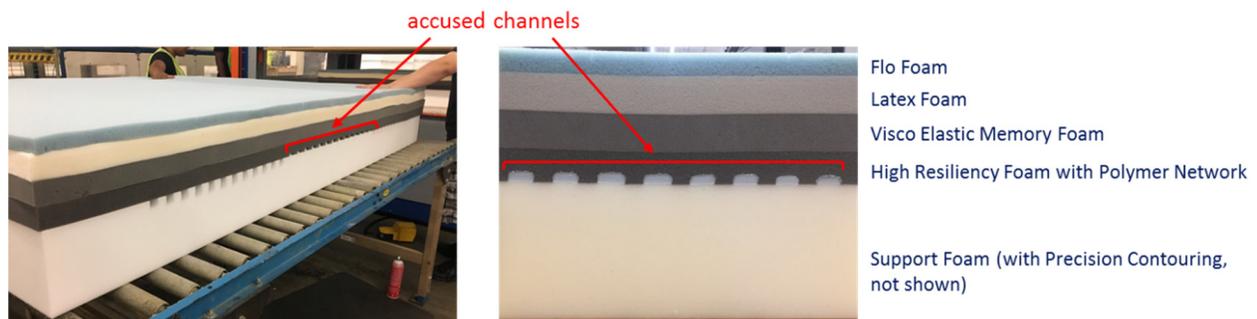
Casper revolutionized this industry by rethinking the entire model—from the design of the mattresses themselves, to the way they are made, sold, and marketed. Rather than selling through middleman retailers (with their significant markups), Casper opted to sell directly to consumers. Casper revamped the consumer experience by providing convenient shipping, lengthy in-home trial periods, and free, no-questions-asked return policies. Inc. (Ex. GG) at 1. Casper also introduced merciful simplicity by cutting through the thicket of options. After intensive research and development, Casper launched its business with just one mattress, known simply as the “Casper.” The “Casper”—which Plaintiffs concede is non-infringing—came in only one version and was marketed as “the perfect mattress for everyone.” Casper Blog (Ex. BB) at 1; Mot. at 23.

Casper’s innovative sales approach and its patented mattress design took the industry by storm. In 2015, the “Casper” was crowned one of TIME Magazine’s Best Inventions. TIME (Ex. CC) at 8. And in 2017, Casper was named by Fast Company as one of the 50 most innovative companies *in the world*, ranked number 2 in the retail category (behind Amazon), and number 36 overall. Fast Company Top 50 (Ex. EE) at 7. Although Casper currently captures a tiny sliver of the multi-billion dollar mattress market—which remains predominantly in the hands of traditional retailers and powerhouse-brand manufacturers—Casper has ambitious plans, and has begun considering an initial public offering (“IPO”), which was reported shortly before Plaintiffs filed this lawsuit and motion. New York Times at 1.

**The Wave:** On August 15, 2017, Casper launched its second mattress: the Wave. This innovative new mattress is critical to Casper’s business plans. The Wave introduces a number of advanced new features over the original “Casper” mattress, *see, e.g.*, Casper Mattress Comparison (Ex. II), virtually none of which are accused of infringement by Plaintiffs. Rather, Plaintiffs’ allegations focus on one aspect of one layer of Casper’s multi-layer Wave mattress.

As pictured below, the Wave consists of five foam layers. Holm Decl. ¶ 3. Relevant here, one of the layers in the center of the Wave (the “high resiliency” foam layer) is cut to create contours (the accused “channels”); those channels are then filled with a polymer gel—Casper refers to the contours and polymer as the “polymer network.” This polymer network is the feature that Plaintiffs accuse of infringement.

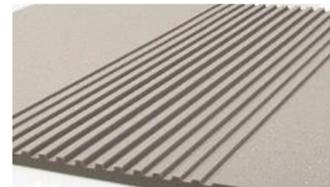
To construct the Wave, three different foam suppliers separately manufacture the five different foam layers in four different locations around the globe. Holm Decl. ¶¶ 3–11. Each different foam has unique properties that contribute to the comfort of the mattress; for example, the top “flo” foam layer provides plushness, while lower foams provide bounce, cooling,



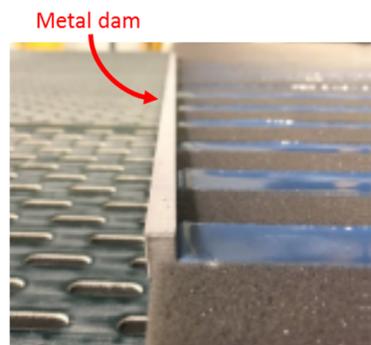
pressure relief, and support. *Id.* ¶ 16. The top “flo” foam layer is manufactured by Latexco in the state of Georgia; the next latex foam layer is also manufactured by Latexco, but in Belgium; the third viscoelastic (“memory foam”) layer is produced by Domfoam in Montreal; the fourth layer—the high-resiliency foam layer with the polymer network that Plaintiffs accuse—is made by FXI in Indiana; and the fifth (bottom) support foam layer is produced by Domfoam in

Montreal. *Id.* ¶¶ 3–11. Ultimately, all five layers are then shipped to yet another company, Jeffco, in Massachusetts, which assembles them all together to form the finished Wave mattress. *Id.* ¶¶ 12–15.

Each of the layers has different characteristics and is constructed in different ways. *Id.* ¶ 16. Because Plaintiffs’ allegations focus on the high-resiliency foam layer with the polymer network, for purposes of this motion, Casper focuses on the characteristics of, and the way that FXI produces, that layer, which is also described in more detail in the accompanying Holm Declaration. *Id.* ¶¶ 6–11. Briefly, FXI first produces high-resiliency foam, and then cuts it into 1.5-inch layers using a computerized saw. In the cutting process, the saw creates “contour-cuts” in the middle segment of each layer, creating depressions in the foam (seen in the photograph to the right). *Id.* ¶¶ 7–8. Thus, this cutting step produces a thin foam layer with channels cut out of the foam on one side of the thin layer. No further steps are performed to create the channels in the layer. The depressions cut by the saw into the foam are the accused channels in that layer.



Next, these channels are filled with a liquid polymer gel. *Id.* ¶¶ 9–11. Relevant here (and in contrast to the patents), FXI does not place “inserts” into the channels. Rather, using a robot, FXI pumps a hot, liquid gel into the channels (pictured to the right). *Id.* ¶ 9–10. Because the gel pumped in is in liquid



form, metal dams are placed at the edges of the channels to prevent the gel from spilling out. *Id.* After the liquid gel is poured into the channels, the layer is moved to a cooling unit to cure. *Id.* ¶ 11. As it cools, the liquid polymer gel eventually solidifies, so

that the end result is a thin foam layer with cut channels filled to the surface with a firm polymer gel—*i.e.*, the “polymer network.” This layer with the polymer network is then shipped off to Jeffco to be joined together with the other layers of the Wave. *Id.*

**B. Plaintiffs, the patents, and the allegedly competing mattresses**

Plaintiffs provide little information about either Plaintiff in their complaint or preliminary injunction motion.

***Dreamwell:*** Plaintiff Dreamwell Ltd. (“Dreamwell”) allegedly owns “all rights” to all three asserted patents. Complaint ¶¶ 11–13. The asserted patents are U.S. Patent Nos. 7,424,763 (“the ’763 patent”); 7,036,173 (“the ’173 patent”); and 8,918,935 (“the ’935 patent”).<sup>1</sup>

Dreamwell is a subsidiary of non-party SSB Manufacturing Company; that company is in turn a subsidiary of Plaintiff Serta Simmons Bedding, LLC. Complaint ¶ 4. Dreamwell is based out of a single suite in Las Vegas. *Id.* Dreamwell does not manufacture or sell any products. *See* Morgan Dep. Tr. (Ex. U) at 56:16–21.

Critically, neither Plaintiffs’ complaint nor its preliminary injunction motion state whether any of the asserted patents have been licensed—a critical issue for a preliminary injunction in the patent context. Despite repeated requests, Plaintiffs have refused even to state—yes or no—whether any of the patents have been licensed. Dominguez Decl. ¶ 26.

***Serta Simmons Bedding, LLC:*** Plaintiff Serta Simmons Bedding, LLC (“Serta Simmons”) is majority owned by the private equity firm Advent International. Morgan Dep. Tr. (Ex. U) at 51:7–19. Serta Simmons does not own any of the patents asserted in this action and

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<sup>1</sup> The asserted patents all have substantially identical specifications and identical figures, and are continuations of the same priority application.

does not purport to be a licensee of the asserted patents, claiming only that it “is the beneficial and equitable owner of” rights in the patents. Complaint ¶¶ 11–13.<sup>2</sup>

Through a network of subsidiaries, Serta Simmons is indirectly connected to two of the largest brands in the mattress industry, “Serta” and “Simmons.” Serta Website (Ex. JJ) at 2–3. Together, Serta Simmons’ subsidiary brands had an aggregate market share of nearly 40 percent in 2016—the largest market share of any bedding producer in the United States—and annual revenues of around \$3.5 billion. Morgan Dep. Tr. (Ex. U) at 76:21–23, 79:8–12, 80:18–25.

The record does not reflect whether Serta Simmons, itself, manufactures or sells mattresses. Neither the complaint nor the preliminary injunction motion indicates that it does, and Plaintiffs’ witness did not know one way or the other. *Id.* at 52:8–11. Nor is there any indication that Serta Simmons or any related entity practices the patents asserted here. *Id.* at 41:10–14.

**“Serta Simmons Brand” Mattresses:** Plaintiffs identify—and for irreparable harm rely entirely upon—two mattresses that they refer to as “Serta Simmons brands”: the iComfort and Tomorrow mattresses. Mot. at 20–21; Morgan Decl. ¶¶ 28, 29, 32. Despite Plaintiffs’ characterization, there is no evidence that either the iComfort or Tomorrow mattresses are (or have ever been) made or sold by Plaintiffs. To the contrary, as discussed below, the evidence indicates that both mattresses are sold by companies who are *not* parties to this case. The Tomorrow mattress is sold by Tomorrow Sleep, LLC, a separate, “independently run and

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<sup>2</sup> Plaintiff Serta Simmons has not met even its most basic burden to establish that it has standing to assert these patents. Instead, Serta Simmons concedes that it does not own the patents (*see* Complaint ¶¶ 11–13), and is not even an exclusive licensee under the patents. *See, e.g., Spine Sols., Inc. v. Medtronic Sofamor Danek USA, Inc.*, 620 F.3d 1305, 1317–18 (Fed. Cir. 2010) (parent corporation lacked standing where subsidiary corporation owned the asserted patent and there was no showing that parent was an exclusive licensee).

managed” company. PR Newswire (Ex. FF) at 1. While Plaintiffs provide no information regarding what company sells the iComfort mattress, there is no indication in the complaint or this motion that either Plaintiff does.

### C. Serta Simmons’ targeting of Casper

Casper’s early success—and its upending of the traditional mattress market—has not gone unnoticed by Serta Simmons, or the mattress industry generally. In fact, Serta Simmons’ Director of Consumer Insights testified that *before* Casper ever launched the allegedly infringing Wave, Serta Simmons felt it was “losing consumers to Casper.” Morgan Dep. Tr. (Ex. U) at 139:4–23; *see also id.* at 136:18–24, 137:6–10. And Serta Simmons recognized it was “losing consumers to Casper because consumers viewed Casper as new and different.” *Id.* at 139:24–140:1. Faced with Casper’s revolutionary approach and upward trajectory (which threatened Serta Simmons and the traditional mattress industry business model), Serta Simmons decided to try to compete with Casper by imitating Casper. Serta Simmons set out to develop a direct-to-consumer offering “as a direct competitor to, among others, the Casper mattress” (Morgan Decl. ¶ 34), but did not do so under the Serta Simmons name, because Serta Simmons recognized that consumers wanted something “new and different.” *Id.* at 139:4–9. So, Serta Simmons launched a new company, Tomorrow Sleep, LLC, to “create a perception of something that is truly new and different, which would have value to consumers.” *Id.* at 138:17–21, 39:4–9, 39:24–140:2. But Tomorrow has not been a success. Serta Simmons has found “competition within the direct-to-consumer channel [to be] much more fierce than what the Tomorrow managers believed it to be,” and Tomorrow has failed to meet its forecasts. *Id.* 141:13–142:4.

Serta Simmons then filed this suit.

## LEGAL STANDARD

A preliminary injunction is “a drastic and extraordinary remedy that is not to be routinely granted.” *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir. 1993); *accord Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 (2d Cir. 2005). Indeed, the “authority to issue an injunction is an extraordinary and powerful one that is to be used sparingly and cautiously and only in a ‘clear and plain’ case.” *Reynolds v. Giuliani*, 506 F.3d 183, 198 (2d Cir. 2007) (citation omitted). The Supreme Court has made clear that a preliminary injunction “may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis added). Thus, a “plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Id.* at 20 (collecting cases); *see also, e.g., ACLU v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015).

## ARGUMENT

Plaintiffs do not come close to meeting their burden on any one of the factors they must prove to establish entitlement to a preliminary injunction.

### **I. Plaintiffs Have Not Established A Likelihood of Success on the Merits.**

Plaintiffs have not established a likelihood of success. To defeat Plaintiffs’ showing on likelihood of success—and thereby defeat the motion itself—all Casper must do is raise a “substantial question” with respect to *any one* of its defenses (*i.e.*, non-infringement, invalidity, or unenforceability). As the Federal Circuit has repeatedly explained, if a defendant “raises a ‘substantial question’ concerning validity, enforceability, or infringement (*i.e.*, asserts a defense that [plaintiff] cannot show ‘lacks substantial merit’) the preliminary injunction should not issue.” *Genentech, Inc. v. Novo Nordisk A/S*, 108 F.3d 1361, 1364 (Fed. Cir. 1997); *see also*

*Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350–51 (Fed. Cir. 2001); *New England Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 883 (Fed. Cir. 1992). There is at least a “substantial question” on each of Casper’s defenses—indeed, much more than that.

The accused Casper Wave clearly does not infringe any claim of any of the asserted patents—and that alone precludes a preliminary injunction. In fact, as shown below and in the accompanying declaration of Bernhard Kuchel, a twenty-year veteran of the mattress industry, Plaintiffs’ infringement allegations are so clearly without merit, and conflict so directly with the patents themselves, that they are beyond the pale of reasonable advocacy.

All of the asserted claims in each of the asserted patents are also invalid—which, of course, is a separate and independent reason that Plaintiffs are not likely to succeed in this case. And, based on Plaintiffs’ infringement allegations, the patents are unenforceable because Plaintiff Dreamwell engaged in inequitable conduct by withholding invalidating prior art from the Patent Office—yet another reason Plaintiffs are not likely to succeed in this case.

**A. Casper does not infringe any asserted claim.**

“To prove literal infringement, the patentee must show that the accused device contains *each and every limitation* of the asserted claims.” *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1215 (Fed. Cir. 2014) (emphasis in original). There is no infringement if even one claim limitation is not present in the accused product or process, exactly as recited in the claim. *See id.*<sup>3</sup>

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<sup>3</sup> Importantly, Plaintiffs have alleged *only* literal infringement, *not* infringement under the doctrine of equivalents, and thus they cannot prevail if there is any difference whatsoever between the properly construed claim language and the Casper Wave. *See, e.g., Litton Systems, Inc. v. Honeywell, Inc.*, 140 F. 3d 1449, 1454 (Fed. Cir. 1996) (“Literal infringement requires that the accused device contain each limitation of the claim exactly; *any deviation* from the claim *precludes* a finding of literal infringement.”) (emphases added). Plaintiffs’ expert conceded that he had not conducted a doctrine of equivalents analysis. Clift Dep. Tr. (Ex. T) 68:8–20 (“I’m not sure what an equivalence analysis is.”). In any event, Plaintiffs would be estopped from relying

There are three asserted patents. The asserted claims of the '763 patent set forth requirements for the structure of a mattress; the asserted claims of the '173 and '935 patents set forth requirements for how a mattress is manufactured. To infringe, the Casper Wave must have exactly the structure required by the '763 claims, or must be manufactured in exactly the way required by the '173 and '935 claims. The Wave, however, is neither structured as required by the '763 claims, nor manufactured as required by the claims of the '173 and '935 patents.<sup>4</sup>

Thus, because Casper has raised much more than just “a substantial question” regarding infringement (all that is required to defeat this motion), a preliminary injunction cannot issue.

**1. Casper does not infringe the '763 patent.**

**a. The Wave does not have channels on the surface of the mattress.**

Casper does not infringe any of the asserted claims of the '763 patent (claims 1, 4, 6 and 7) because they require a mattress that has channels on its top or bottom surface—which the Casper Wave plainly does not have. Plaintiffs know that the Wave does not infringe, of course, but try to concoct an infringement theory by distorting the meaning of the claim term “body” to suggest that it can refer to any individual piece of the mattress, rather than the actual *mattress body*. Plaintiffs’ allegations are not only contrary to the claims, but to the entire patent disclosure and the explicit disclaimer Dreamwell made in prosecution—where, in order to avoid prior art, it told the Patent Office that the channels must be on the surface *of the mattress itself*. In fact, Plaintiffs’ allegations in this court are literally the opposite of—and legally precluded by—Dreamwell’s binding statements to the Patent Office. Plaintiffs do not mention to this Court

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on the doctrine of equivalents because of the disclaimers Dreamwell made in prosecution. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 734–35 (2002).

<sup>4</sup> The Casper Wave does not infringe the patents for numerous reasons, some of which are set forth in Mr. Kuchel’s declaration. For purposes of this motion, Casper focuses on just a few.

any of Dreamwell's statements to the Patent Office—let alone advise the Court that those statements are diametrically opposed to the infringement arguments Plaintiffs now make here.<sup>5</sup>

**(i) The Wave does not infringe the plain language of the claims.**

The text of the asserted claims of the '763 patent could not be more clear: every asserted claim recites a mattress body with channels on at least one of its top and bottom surfaces.

Independent claim 1, for example, recites “a mattress comprising: a body made of foam,” with “channels” on “at least one of the top and bottom surfaces”:

1. A mattress comprising:

a body made of foam having a mechanical characteristic, the body having a top surface, a bottom surface, a first and second side surfaces and a first and second end surfaces, *at least one of the top and bottom surfaces including a plurality of channels* extending into the body perpendicularly therefrom. . . .

'763 Patent at 6:8–14 (emphasis added). All the asserted claims have the same requirement of channels on “at least one of the top and bottom surfaces” of the mattress body.<sup>6</sup> Thus, to infringe, a mattress must have channels on either its top or bottom surface (or both). A mattress that does *not* have channels on the top or bottom surface *cannot* infringe the '763 patent.

As Plaintiffs are well aware, and as Plaintiffs' own expert admitted in deposition, the Casper Wave does *not* have channels on either the top or the bottom surface of the mattress. *See* Clift Dep. Tr. (Ex. T) at 127:4–12, 141:17–142:1. Thus, even though Plaintiffs accuse Casper of infringing claims that explicitly require “at least one of the top and bottom surfaces” of the

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<sup>5</sup> Plaintiffs' allegations regarding “body” also conflict with Plaintiffs' allegations for the other two asserted patents in this litigation, regarding which they argue that the five foam layers of the Casper Wave together are the “body” of the mattress. Mot. at 12, 15.

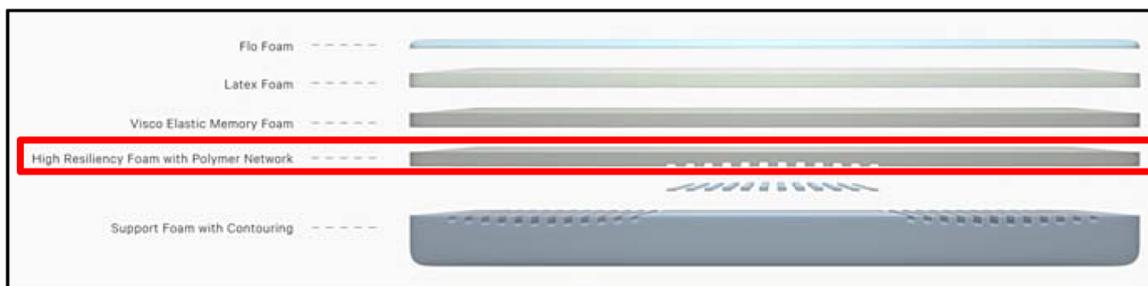
<sup>6</sup> Claims 4, 6, and 7 each depend from claim 1, and therefore incorporate all the requirements of claim 1. 35 U.S.C. § 112(d) (“A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers.”).

mattress body to include “a plurality of channels,” Plaintiffs do not even allege that the Wave mattress actually has channels on its top or bottom surface—because it clearly does not.

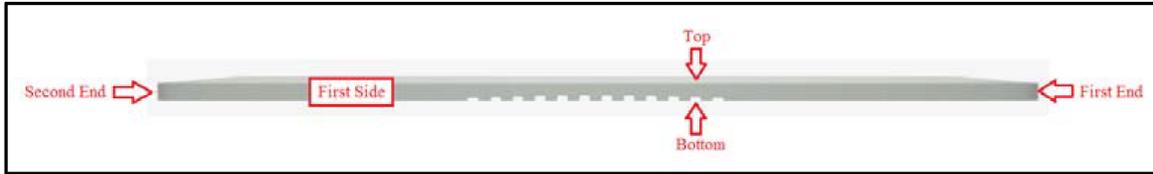
That is the end of the infringement inquiry for the ’763 patent: the claims require channels on the top or bottom surface of the mattress body; the Wave does not have channels on its top or bottom surface; therefore, the Wave cannot infringe.

To avoid the obvious and dispositive problem with their theory (*i.e.*, that the Wave has channels in the middle of the mattress, and not on the surface as required), Plaintiffs do something remarkable: they ignore the layers that *actually* are on the top and bottom surfaces of the Wave. Instead, Plaintiffs point to channels in the *middle* of the Wave —nowhere near, let alone actually on, the top or bottom surface—and claim that those channels somehow infringe the ’763 patent. But, those channels obviously cannot infringe because they are not on the top or bottom surface of the mattress body, as every single claim requires.

As seen in this image from Plaintiffs’ brief, Plaintiffs focus entirely on one small layer of foam (an inch and a half thick) from the *middle* of the Wave that does have channels:



Mot. at 8. Plaintiffs then strip away and erase all of the other layers of the mattress—including the top and bottom surface layers of the Wave—as seen in the next image from Plaintiffs’ brief (below). Plaintiffs then claim that the remaining *internal* layer that they single out is actually the mattress “body” itself, and label parts of that layer as “top” and “bottom” to make it appear as though there are channels on the bottom surface:



*Id.* Having white-washed out the *actual* top and bottom surface layers of the Wave—which indisputably *do not* have channels and which make the Wave not infringe—Plaintiffs incorrectly claim that the Wave *does* have channels on the “bottom surface” of its “body.”

Plaintiffs’ contention that a mattress that does not have channels on the surface can infringe a claim that requires channels on the surface—as long as the mattress has a *layer in the middle* with channels on that *layer’s* surface—is sophistry, and contradicts the plain language of the claims. Indeed, Plaintiffs’ infringement allegation depends entirely on a distortion of the term “body” to mean any piece of the mattress (such as an internal layer), and not the body of the mattress itself. But, that contrived construction of the claims (designed, of course, simply to cover the Wave) is contrary to the claims, which explicitly require channels on the “surface” of the mattress “body,” not on some layer plucked from the middle of the mattress. (As discussed below, Plaintiffs’ distortion of the claims also is precluded by the patent specification and Dreamwell’s statements to the Patent Office during prosecution.)

There can be no infringement of the ’763 claims if the mattress does not have channels on its top or bottom surface—and the Wave does not.

**(ii) Plaintiffs’ infringement allegations are contrary to—and precluded by—the totality of the intrinsic record.**

Plaintiffs’ infringement claim based on channels in the middle (but not on the surface) of the Wave contradicts not only the plain language of the claims, but the entirety of the intrinsic record, as well, including the patent specification and Dreamwell’s statements to the Patent Office during prosecution. In fact, the intrinsic record legally precludes Plaintiffs’ infringement

allegation. Incredibly, Plaintiffs do not even mention the prosecution history in their brief, let alone attempt to reconcile it with their contrary infringement positions. And they discuss the specification only briefly as “background,” later declaring that the claims “do not require express construction.” Mot. at 2–3, 7.

The fact that Plaintiffs advance an infringement theory antithetical to the entire intrinsic record is obviously inappropriate, but hardly surprising given that Plaintiffs evidently ignored it in their analysis. Indeed, Plaintiffs’ expert made the startling confession at his deposition that he never even considered the specification *or* the prosecution history in formulating his infringement position. *See* Clift Dep. Tr. (Ex. T) at 101:17–23.

Plaintiffs’ failure to consider the specification and prosecution history—both of which directly and conclusively preclude their infringement allegations—in applying the claims violates bedrock law.

This failure alone is reason to reject Plaintiffs’ motion, as the Federal Circuit has repeatedly explained that “‘claims *must* be read in view of the specification, of which they are a part,’” as well as the prosecution history. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc) (citation omitted) (emphasis added); *see also Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1309 (W.D. Wash. 2006) (plaintiff “failed to demonstrate a reasonable likelihood of success on the question of infringement” where it had “not presented sufficient evidence based on the specification and prosecution history to construe the claims.”). And the Court should decline to consider Plaintiff’s expert’s infringement opinion. He was required under clear Federal Circuit law to consider how the specifications and prosecution histories of the asserted patents bear on the meaning of the claim term “body,” and his failure to do so means that his opinion is necessarily based on an impermissible claim construction. *See, e.g., Liquid*

*Dynamics Corp. v. Vaughan Co., Inc.*, 449 F.3d 1209, 1224 n.2 (Fed. Cir. 2006) (affirming district court’s exclusion of expert testimony “based on an impermissible claim construction”).

Even worse, Plaintiffs’ expert admitted that he violated yet another bedrock principle in patent law. Not only did he ignore the intrinsic record, but he also admitted that he determined his understanding of the claim scope *by looking at the accused product* (the Wave). That is, Mr. Clift confessed that he came up with his opinion not by looking at the specification and the prosecution history, but by looking at the Wave—and then he construed the claims to cover it:

Q: When determining what constitutes a body of a mattress, *did you review the specifications* of the asserted patents?

A: *No*. I had -- I viewed the body as being those two areas. I drew that conclusion. That was how I looked at it, looking at *the design of specifically the Wave mattress*, so that’s how I looked at it.

Q: But as far as determining what the meaning of the word body was, did you ascertain that from just looking at the claims themselves?

A: Just looking at the -- the designs and -- you know, and then *looking at the product*. That’s how I determined what body was that they were referring to. That it could be either a multilayer, individual layers or a block. That’s the way I looked at it.

Clift Dep. Tr. (Ex. T) at 101:17–102:6 (emphases added); *see also id.* at 100:16–19. Mr. Clift’s approach of determining claim scope by looking at the accused product—which not surprisingly results in an opinion that the product infringes—violates case after case which has held that claim scope *must* be “determined without regard to the accused device.” *Optical Disc. Corp. v. Del Mar Avionics*, 208 F.3d 1324, 1333 (Fed. Cir. 2000); *see also Scripps Clinic & Research Found. v. Genentech, Inc.*, 927 F.2d 1565, 1580 (Fed. Cir. 1991).

Plaintiffs’ reliance on the accused product to determine claim scope and their failure to consider the specification and prosecution history—both of which preclude their infringement allegations based on channels on a layer in the middle of the mattress—not only violates the

governing law; it tells you everything you need to know about the merits of Plaintiffs’ case and the improper purpose for which they brought it.

**1) The specification precludes Plaintiffs’ infringement allegations.**

The specification is the “single best guide to the meaning of a disputed term,” and *must* be consulted to determine claim meaning. *Trs. of Columbia Univ. v. Symantec Corp.*, 811 F.3d 1359, 1362 (Fed. Cir. 2016). Here, had Plaintiffs’ expert considered the specification (as the Federal Circuit requires), he would have seen that the *entirety* of the patent makes clear that the claimed channels must be on the surface of the mattress (not on some layer in the middle). Nowhere in the patent—not in the text, not in any figure, and not in any claim—does the patent disclose or even suggest having channels anywhere but on the surface of the mattress body.

To the contrary, the patent discloses unequivocally and consistently that the channels must be on the surface of the mattress. The very first figure in the patents, for example, shows exactly that. Figure 1 provides “a top perspective of a mattress” according to the invention. ’763 Patent Fig. 1. As shown in Figure 1, the mattress “body” (12) constitutes the entire “mattress” (10). *Id.* Figure 1 also clearly shows the “channels” (19) on the top surface of the mattress, extending from the surface into the body. *Id.*

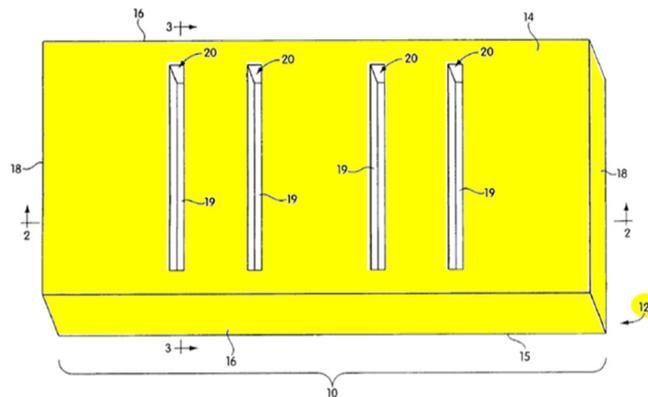


Fig. 1

Additional disclosures in the specification also makes clear that the term “body” must refer to the overall body of the mattress, and not merely some layer in the middle of the mattress.

In fact, the patent actually distinguishes between the mattress “body” and one of the “layers” that may make up the body. For example, the patent states:

While the embodiment in FIG. 1 [reproduced above] has a body 12 of homogenous construction, the body 12 could be formed of a combination of various types of foam with different mechanical characteristics. For example, *the body 12 could be composed of multiple layers of such material, varying in respective mechanical characteristics, progressing in layer upon layer from the top surface 14 to the bottom surface 15.*

*Id.* at 2:26–33 (emphases added). This explains that: (1) if the mattress is made up of multiple layers, the “body” refers to all of the layers collectively, not any single layer; and (2) the “top surface” and “bottom surface” of the body remain the *ultimate* top and bottom surfaces of the overall mattress body, regardless of how many layers compose the mattress body. *Id.*<sup>7</sup>

Thus, the patent makes clear that the “body” of the mattress is the mattress itself, not a random layer from the middle of the mattress, and that the channels must be on the surface of the mattress. The Wave indisputably lacks such surface channels, and does not infringe.

**2) Plaintiffs’ infringement allegations are precluded by the prosecution history.**

Plaintiffs’ infringement allegations (and their expert’s opinions) are also indefensible because they are directly inconsistent with—and legally prohibited by—Dreamwell’s own statements made during prosecution. As noted above, Plaintiffs’ expert admitted that he did not consider the prosecution history. *See* Clift Dep. Tr. (Ex. T) at 129:11–14. Like his failure to consider the specification, his failure to consider the prosecution history is disqualifying. *See, e.g., Hockerson-Halberstadt, Inc. v. Avia Grp. Int’l, Inc.*, 222 F.3d 951, 957 (Fed. Cir. 2000)

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<sup>7</sup> While the specification later explains that this “channel surface” can be covered by “a layer of additional material,” such as “a mattress topper or cushion-top,” *id.* at 3:44–57, the figures and specification all make clear that the “body” refers to the main body of the mattress—and that the channels must be on the top or bottom surface of the main body of the mattress. *See, e.g., id.* at Abstract (referring to the “mattress body”), 1:33, 2:67.

(prosecution history must be considered); *DocuSign*, 468 F. Supp. 2d at 1309. This is especially so here, considering that Plaintiffs’ allegations are irreconcilable with the prosecution history.

In fact, the very issue of whether the claimed channels must be on the surface of the mattress (or could be in the middle) was explicitly addressed when Dreamwell was trying to win issuance of the patent—and during that process, Dreamwell took *exactly the opposite position* Plaintiffs and their expert take now in this Court. Plaintiffs not only advance an infringement theory here that is totally inconsistent with, and legally precluded by, those admissions, but Plaintiffs mislead this Court by not even mentioning those dispositive statements.

Statements a patentee makes during prosecution can limit the scope of the claims—even if the language of the claims, on its own, is broader. *See, e.g., Springs Window Fashions LP v. Novo Indus., L.P.*, 323 F.3d 989, 995 (Fed. Cir. 2003). This doctrine—known as prosecution history disclaimer—ensures that a patentee does not tell the Patent Office one thing to obtain allowance of the patent, and then later assert in litigation that the claims are broader to show infringement. *Id.* “Claims may not be construed one way in order to obtain their allowance and in a different way against accused infringers.” *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1576 (Fed. Cir. 1995). As the Federal Circuit has explained:

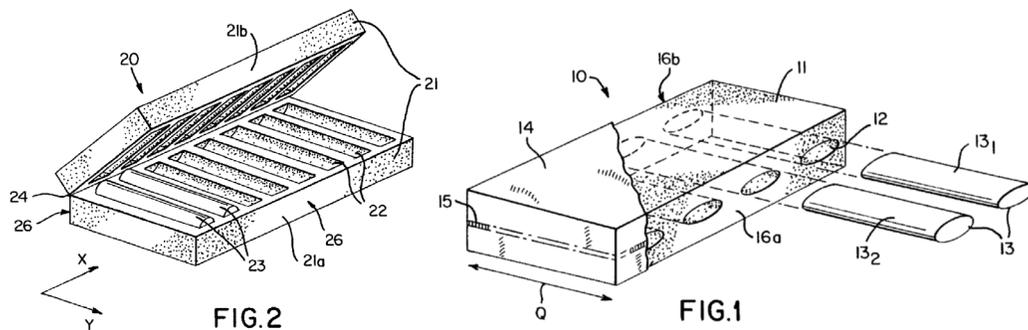
The public notice function of a patent and its prosecution history requires that a patentee be held to what he declares during the prosecution of his patent. A patentee may not state during prosecution that the claims do not cover a particular device and then change position and later sue a party who makes that same device for infringement.

*Springs Window Fashions*, 323 F.3d at 995; *Gillespie v. Dywidag Sys. Int’l*, 501 F.3d 1285, 1291 (Fed. Cir. 2007) (“patentee is held to what he declares during the prosecution of his patent”).

Here, in order to get the ’763 patent allowed, Dreamwell distinguished prior art that, like the Casper Wave, had channels in the middle—but not on the top or bottom surface—of the mattress. To overcome that prior art and to gain issuance of the patent, Dreamwell told the

Patent Office that its invention *required* the channels to be on the top or bottom surface *of the mattress*. Dreamwell told the Patent Office that the claims *do not cover* channels that are in the middle of the mattress. Thus, Plaintiffs are legally precluded from attempting to claim infringement now based on channels that are *not* on the surface of the mattress. *See Springs Window Fashions*, 323 F.3d at 994–95.

Specifically, during prosecution of the '763 patent, the claims were rejected as invalid in light of a prior United States patent issued to an inventor named Hoffman. 8/7/06 Office Action (Ex. H) at 4–5. The Hoffman patent disclosed a mattress that could be made of two layers (a top layer and a bottom layer), with channels cut into the surface of the layers and inserts placed into the channels. When the layers were joined together, the channels and inserts were internal to (not on the surface of) the overall body of the mattress, as depicted in the figures of the Hoffman patent:



Hoffman Patent (Ex. PP) Figs. 1 and 2. The Patent Office examiner rejected Dreamwell's pending claims in light of the Hoffman patent. 8/7/06 Office Action (Ex. H) at 4–5.

In response to the rejection, and in order to save its patent, Dreamwell amended its claims to add a new requirement, the very limitation at issue here. Plaintiffs added the requirement of “at least one of the top and bottom surfaces including a channel extending into the body.” 11/13/06 Amendment (Ex. L) at 2. Based on that new requirement of top or bottom surface channels, Dreamwell then explicitly distinguished the Hoffman patent, arguing that the channels

in Hoffman’s mattress were “*not on the top or bottom surface of the mattress.*” *Id.* at 6–7 (emphasis added). In so doing, Dreamwell clearly and unambiguously told the Patent Office (and the public at large) that its claimed mattress requires channels “on the top or bottom surface of the mattress.” *Id.* (emphasis added). The fact that the layers of the Hoffman mattress had channels on their top or bottom surfaces was not enough: according to Dreamwell, the channels had to be on the surface of the mattress as a whole.

Those statements that Dreamwell made in the Patent Office are literally the opposite of what Plaintiffs now assert in this Court. Incredibly, Plaintiffs do not mention to this Court any of Dreamwell’s statements to the Patent Office that are directly contrary to the infringement arguments Plaintiffs now make here. Plaintiffs’ expert, Mr. Clift, even quoted from the relevant prosecution history passage in his declaration, but misleadingly omitted the very sentence that disproves Plaintiffs’ entire infringement theory. *See* Clift Decl. ¶ 40 (beginning the block quote with the sentence *after* Dreamwell’s statement distinguishing Hoffman because the channels disclosed were “not on the top or bottom surface of the mattress”).

In any event, Dreamwell’s statements to the Patent Office are legally binding and preclude Plaintiffs’ infringement allegations, as a matter of law. *See Springs Window Fashions*, 323 F.3d at 994–95. In other words, Dreamwell’s statements to the Patent Office (*i.e.*, that the claims require channels on the surface of the mattress, not on the surface of some layer) preclude exactly the argument Plaintiffs are now making against the Wave (*i.e.*, that it infringes because it has channels on the surface of some internal layer, not on the surface of the mattress). Even if the claim language theoretically could be read to cover internal channels, therefore, Dreamwell disclaimed that claim scope, and the Wave cannot infringe. *Id.* at 994 (“It is well established that

‘the prosecution history limits the interpretation of claim terms so as to exclude any interpretation that was disclaimed during prosecution.’” (citations omitted)).<sup>8</sup>

\* \* \*

Because the Casper Wave does not have channels “on the top or bottom *surface of the mattress*”—as all the claims clearly require, the specification describes, and Dreamwell explicitly told the Patent Office was required—the Casper Wave cannot infringe, and Plaintiffs cannot establish a likelihood of success on the merits for any asserted claim of the ’763 patent.

**b. The Wave does not have “inserts” “affixed” within channels.**

The Casper Wave also does not infringe any of the asserted claims of the ’763 patent for an entirely different reason: it does not have “inserts” that are “affixed” within channels, as every asserted claim requires. All of the asserted claims require, in addition to channels on the surface of the mattress, “a plurality of inserts, each insert having a mechanical characteristic different from the mechanical characteristic of the foam and affixed within one of the plurality of channels, each insert reinforcing the body.” ’763 Patent at 6:15–18. The Wave does not meet this limitation.

The claims and patent specification make clear that the “inserts” are separate, preexisting constructions, which are “affixed” within the channels. *See, e.g., id.* at 3:20–24, 3:30–36, 6:15–18. The fact that the “inserts” are preexisting constructions is illustrated not only by the descriptions of the inserts in the specification, but also by the use of the word “affixed” in the claims to describe their insertion within the channels. To “affix” means to “attach or fasten something to something else.” OED (Ex. X) at 11. For something to be “affixed” to something

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<sup>8</sup> Indeed, if the “channels” in the Wave infringed, so too would Hoffman’s internal channels (on the top surface of “body” layer 21a and the bottom surface of “body” layer 21b), and the asserted claims would not have issued then or would be invalid now.

else, it must already exist. And Plaintiffs’ expert agreed that an “insert is an *object* . . . [that] is *placed* in a cavity.” Clift Dep. Tr. (Ex. T) at 142:2–15 (emphases added).

The Casper Wave does not have “inserts” that are “affixed” within the accused channels. Instead, channels are first cut into a layer of foam, and then a hot liquid gel is poured into the channels (as in the photograph to the right). Holm Decl.

¶¶ 7–10. The gel then cools to form the “polymer network” within the foam layer. *Id.* ¶ 11. No preexisting “inserts”



ever exist, let alone are ever “affixed” within the channels. Indeed, the polymer network is not “affixed,” because the gel molds itself into the high resiliency foam when it is in its liquid state, and then simply cools into a shape that remains secure within the layer of foam. *Id.* ¶¶ 10–11.

For this independent reason—*i.e.*, not having “inserts” that are “affixed” within channels as every claim requires—the Wave cannot infringe the ’763 patent.

## **2. Casper does not infringe the ’173 and ’935 patents.**

From the ’173 and ’935 patents, Plaintiffs assert method claims that cover particular steps for manufacturing a mattress. Casper does not infringe any claim from either of these patents because Casper does not make its mattresses in the manner required by the claims.

### **a. Casper does not form channels by assembling rectangular foam pieces.**

The claims of the ’173 and ’935 patents require that channels be formed in a mattress in a particular way: by assembling rectangular foam pieces. Casper uses an entirely different, non-infringing method to form channels in the Wave: Casper’s channels are formed by cutting the foam. Plaintiffs know that Casper forms the channels by cutting and not by assembly (as the claims require), Clift Dep. Tr. (Ex. T) at 89:17–25, but irresponsibly accuse Casper of

infringement anyway. Because Casper does not use the method claimed in the patents, Casper cannot infringe.

The '173 and '935 patents explicitly describe that channels can be created in a foam mattress in three different ways: (1) cutting foam out of a foam block to create channels, (2) molding channels into the foam when the mattress is molded, or (3) assembling rectangular foam pieces in such an arrangement that channels are formed. The first method, cutting, is described across multiple columns in the specification. *See* '173 Patent at 4:52–56, 5:3–34; '935 Patent at 4:63–5:7, 5:13–44. After describing how to form a channel using a cutting instrument, the patents then describe the two “alternative” ways to form a channel (molding and assembling):

*As an alternative to cutting instruments, one or more channels 19 may be formed in the body 12 of a mattress 10 by molding the channels 19 into the foam of the body 12 as the body 12 itself is molded. Additionally, or instead, the body 12 may be formed of a number of rectangular foam sections assembled so that the assembled body 12 includes the channels 19.*

'173 Patent at 5:35–41; '935 patent at 5:45–51 (emphases added). Thus, the patents clearly distinguish between forming channels by cutting, molding, and assembling rectangular foam pieces.

The difference between the first two methods of forming a channel (cutting and molding) and the third method (“assembling” rectangular foam pieces) is also reflected in the patent figures. For instance, Figure 3 depicts a contiguous block of foam with a channel either cut from or molded into it; Figure 4, in contrast, depicts three separate rectangular pieces of foam that have been assembled together to form a channel. Kuchel Decl. ¶ 47; Clift Dep. Tr. (Ex. T) 165:19–25 (agreeing that “figure four show[s] an example of assembling rectangular foam pieces to form a channel”).

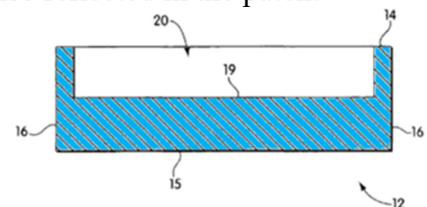


Fig. 3

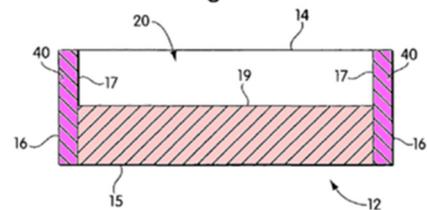


Fig. 4

**(i) Plaintiffs' infringement allegations contradict the claims.**

Every asserted claim of the '173 and '935 patents requires forming channels using the assembly method—that is, by assembling rectangular foam pieces to create a channel—as shown in figure 4 above. For example, claim 5 of the '173 patent requires that “forming the channel comprises assembling a plurality of rectangular foam pieces into a mattress that includes the channel.” '173 Patent at 6:25–30. Likewise, claim 10 of the '935 patent requires “assembling the rectangular foam pieces to form the body having a channel in the region.” *Id.* at 6:40–41.<sup>9</sup> Thus, to infringe, channels *must* be formed by assembling rectangular foam pieces.

As Plaintiffs well know, Casper does *not* form channels in its Wave mattress by assembling rectangular pieces, as required by both the '173 and '935 patents. Rather, the accused channels in the Wave are formed by *cutting* them out of a solid block of foam using a saw. Holm Decl. ¶ 7–8. Indeed, Plaintiffs admit that for the Wave, “channels are ‘cut’ into the foam.” Mot. at 13. Plaintiffs include a picture of the foam layer with what Plaintiffs admit are channels that have been “formed” by cutting, not “assembling” as required by the claims:

[5.3] forming a channel into the body within the region; and	Multiple channels are formed in the “High Resiliency Foam” layer and, consequently, in the mattress as a whole. In the video on its website, Casper states that the channels are “cut” into the foam. These channels are formed in the region where a person’s back and hips would rest.
	
	Brooks Decl., Ex. 7 at 3; <i>see also</i> Clift Decl. at ¶92.

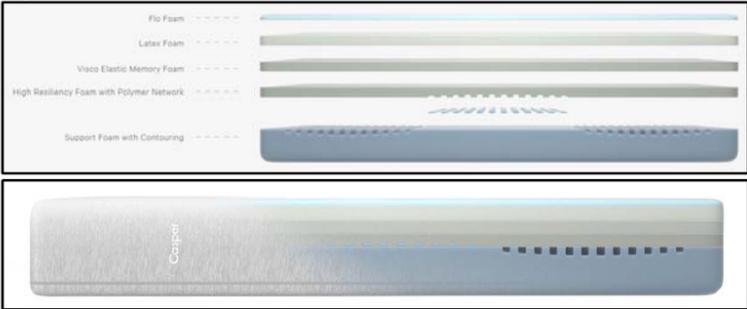
<sup>9</sup> Some claims also describe cutting in addition to assembling pieces, but none of the claims permit forming a channel by cutting alone. And the fact that claim 5 of the '173 patent recites forming channels by “assembling a plurality of rectangular foam pieces” and dependent claim 6 adds “cutting,” further demonstrates that assembly and cutting are distinct methods of forming channels. '173 Patent at 6:28–32; *Phillips*, 415 F.3d at 1315 (“[A] dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim.”).

*Id.* (highlighting added). In fact, the *only step* used to form channels in the Wave is cutting the foam with a saw. Holm Decl. ¶ 7. Once the channels have been cut into the foam—*i.e.*, once the channels have been formed by cutting the foam—they are done. *Id.* No other steps are ever performed by anyone to form the channels in the Wave. *Id.*

That is the end of the infringement inquiry for these two patents. They require channels to be formed by assembling rectangular pieces, not by cutting. Because channels in the Wave are indisputably formed by cutting—not by assembling foam pieces—Casper cannot infringe.

There is, in fact, no good faith basis for Plaintiffs’ infringement allegations. And, in order to create the appearance of a claim, Plaintiffs resort to an utterly misleading sleight-of-hand that is not only directly contradicted by the plain language of the claims, but also is precluded by the totality of the patents, and Dreamwell’s explicit statements to the Patent Office when it was prosecuting *both* the ’173 and ’935 patents.

Specifically, while Plaintiffs concede that channels in the Wave are formed by cutting in the “high resiliency foam” layer of the Wave, Plaintiffs argue that Casper can still infringe because *after the channels are formed by cutting*, the layer with the channels already fully formed (and with alleged “inserts” already formed in place) is “assembled” together with four other layers of foam to form the complete multi-layered mattress. Mot. at 13–14. But that process of assembling the different layers does not have anything to do with forming the channels. As Plaintiffs’ own claim charts show, *before* the five layers of the mattress are glued together (the *only* step Plaintiffs accuse as “assembling a plurality of rectangular foam pieces”), the channels are *already completely formed* in the high-resiliency foam layer (because they had previously been formed by cutting):

<p>[5.5] wherein forming the channel comprises assembling a plurality of rectangular foam pieces into a mattress that includes the channel.</p>	<p>Five rectangular foam pieces are assembled into a mattress that includes the channel. From top to bottom, the pieces are identified by Casper as: (1) “Flo Foam,” (2) “Latex Foam,” (3) “Visco Elastic Memory Foam,” (4) “High Resiliency Foam with Polymer Network,” and (5) “Support Foam with Contouring.”</p>  <p>Brooks Decl., Ex. 7 at 1, 3; <i>see also</i> Clift Decl. at ¶96.</p>
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*Id.* (highlighting added).

That is, even though (1) all the claims require forming channels by assembling rectangular pieces (like in Figure 4 of the patent depicted above), and (2) the accused channels are fully formed by cutting, not assembly, Plaintiffs claim that Casper can infringe because *after the channels are already formed*, other layers are added on top of the channels.

Plaintiffs allegations are nonsensical. The claims relate to how channels are formed, not to what then happens to a layer with channels *after the channels are complete*. Only *after the channels are fully formed by cutting* into the foam are other layers added to construct the Wave. The addition of the other layers is what Plaintiffs claim is the “assembling” recited in the claim. But, while the addition of the other layers may constitute assembling the whole mattress, assembling the layers has absolutely nothing to do with forming the channels—all of which are completely formed (and the accused “inserts” already in place) before any other layer is added. The accused channels are formed by cutting, not assembly, and thus cannot infringe.

**(ii) Plaintiffs' infringement allegations contradict the specification and the prosecution history.**

Plaintiffs' assertion that the claims of the '173 and '935 patents are met even though the channels are formed by cutting is especially egregious because it directly contradicts both the specification and multiple statements Dreamwell made to the Patent Office to get the patents.

As discussed above, the specification clearly distinguishes between forming channels by cutting and forming channels by assembling rectangular foam pieces. *See* '173 Patent at 5:35–41. And, the claims cover assembly.<sup>10</sup> The prosecution history also definitively establishes that the claimed channels in all the claims must be formed by assembling rectangular foam pieces, and *not* by cutting. Notably, Plaintiffs do not acknowledge the relevant prosecution history in their brief, and Plaintiffs' expert admitted that he did not even consider it. Clift Dep. Tr. (Ex. T) at 166:1–5.

During the prosecution of the '173 patent, the claims as originally drafted covered any method of forming channels (whether cutting, assembling or molding). The examiner rejected the claims over an earlier patent (Boyd) that disclosed forming channels, and stated that “[t]he method of forming the channels whether by cutting or molding is an obvious matter of design choice.” 3/9/04 Office Action (Ex. C) at 2. To overcome this rejection—and never disputing that forming channels by cutting or molding was obvious—Dreamwell amended the claims to require that the *specific way* the channels needed to be formed was by assembling rectangular pieces—no other way of making channels would be covered.

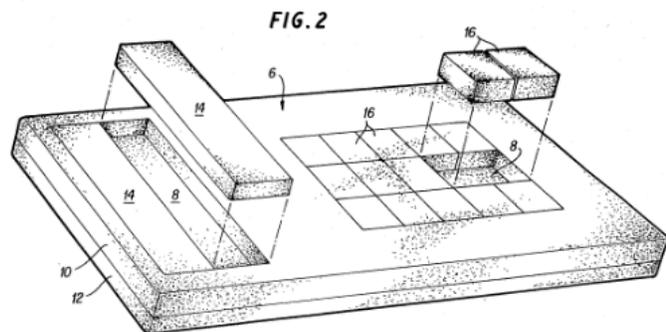
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<sup>10</sup> Indeed, the language of the specification describing the assembly method tracks precisely with the claims. *Compare* '173 Patent at 5:38–41 (“the body 12 may be formed of a number of rectangular foam sections assembled so that the assembled body 12 includes the channels 19”) *with* Cl. 5 (requiring “forming the channel comprises assembling a plurality of rectangular foam pieces into a mattress that includes the channel”) *and* Cl. 10 (requiring “assembling the rectangular foam pieces to form the body having a channel in the region”).

Specifically, Dreamwell added the following requirement: “forming the channel comprises assembling a plurality of rectangular foam pieces into a mattress that includes the channel.” 8/11/04 Amendment (Ex. E) at 2–3. In this way, Dreamwell amended the claims to require the *one* particular method (assembly) described in the asserted patents that the examiner had not said was obvious. Dreamwell then told the Patent Office that it had overcome the Boyd patent, because “[n]owhere does Boyd suggest a method of forming a channel that includes assembling a plurality of rectangular foam pieces.” *Id.* at 4–5. Thus, the “assembling” recited in the claims has to be assembly *to form a channel*, because adding this limitation was the only way Dreamwell was able to overcome the Patent Office’s rejection. 3/9/04 Office Action (Ex. C) at 2; 8/11/04 Amendment (Ex. E) at 2–3.

While this disclaimer alone would be enough to preclude Plaintiffs’ infringement claim, Dreamwell did not stop there. In prosecuting the ’935 patent, Dreamwell again told the Patent Office that the claimed channels must be formed by assembling rectangular foam pieces, and specifically explained that cutting channels and then assembling foam layers—*i.e.*, exactly the method used to produce the *Wave*—*does not satisfy the claims*.

During the ’935 prosecution, the examiner rejected the pending claims of the ’935 patent as anticipated by an earlier United States Patent (Murphy). 10/17/13 Office Action (Ex. P) at 2. The Murphy patent discloses channels in a mattress (referred to in Murphy as “recesses”). The Murphy patent discloses that the channels (numbered 8) are formed by cutting all the way through a top layer of foam (10), after which the top layer of foam (with the channels cut) is assembled together



with a bottom layer (12). *See* Murphy Patent (Ex. NN) at 3:55–62. This is depicted in Figure 2 (above). *Id.* Fig. 2.

In response, Dreamwell told the Patent Office that Murphy’s method of manufacturing—*i.e.*, cutting channels and then assembling foam layers—was *not* covered by the claims:

Murphy’s method for manufacturing its decubitus ulcer mattress generally includes forming a foam body of two layers. One layer, *i.e.*, *the top layer is cut through an entire thickness thereof to form recesses at selected locations*. The layers are then joined by an adhesive to form a unitary foam body in which the top surface of the bottom layer forms the bottom of each recess. *There is no disclosure or even suggestion of a method including . . . assembling the rectangular foam pieces to form the body having a channel in the region as claimed.*

1/15/14 Amendment (Ex. R) at 6–7 (emphases added). In other words, Dreamwell took the position—and forever disclaimed any argument otherwise—that cutting one layer of a mattress to form a channel and then assembling it with another layer does *not constitute* “assembling the rectangular foam pieces to form the body having a channel in the region.”

Yet, once again, the positions Plaintiffs take in this case are literally the opposite of what Dreamwell argued to the Patent Office to get its patents. The method Dreamwell explicitly disclaimed during prosecution—cutting to form a channel, followed by subsequent assembly of foam layers—is exactly how the Casper Wave is manufactured. *See* Kuchel Decl. ¶ 55.

In light of these disclaimers—which Plaintiffs do not acknowledge, and their expert ignores—Plaintiffs are legally precluded from accusing Casper of infringement through its practice of cutting channels. *Springs Window Fashions*, 323 F.3d at 995 (“[P]atentee may not state during prosecution that the claims do not cover a particular [method] and then change position and later sue a party who [uses] that same [method] for infringement.”).<sup>11</sup>

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<sup>11</sup> Disclaimers in the ’173 prosecution apply equally to the ’935 patent, and vice versa. *See, e.g., Microsoft Corp. v. Multi-Tech Sys., Inc.*, 357 F.3d 1340, 1349–50 (Fed. Cir. 2004)

**b. Casper does not perform the claimed steps in the required order.**

Casper does not infringe the asserted claims of the '173 or '935 patents for another, independent reason: Casper does not perform the accused manufacturing steps in the order required by the claims. *See Kaneka Corp. v. Xiamen Kingdomway Grp. Co.*, 790 F.3d 1298, 1306 (Fed. Cir. 2015) (where a “claim implicitly requires order,” the Court can construe it to require that the claimed steps be performed in the required order); *Loral Fairchild Corp. v. Sony Corp.*, 181 F.3d 1313, 1321 (Fed. Cir. 1999) (step’s reference to feature formed in a previous step requires steps be performed in order).

All of the asserted method claims include the following steps in the following order: (1) “providing” “a body of foam shaped and sized for use as a mattress,” (2) “locating a region” within that body of foam “where increased support is desired,” (3) “assembling” “rectangular foam pieces” to form a mattress that includes a “channel,” and (4) “affixing” an “insert” “into the channel.” For example, claim 10 of the '935 patent recites:

10. A method of manufacturing a mattress comprising:

[step 1] *providing* a plurality of rectangular foam pieces to form *a body of foam shaped and sized for use as a mattress*;

[step 2] *locating a region of the body* where increased support is desired;

[step 3] *assembling the rectangular foam pieces to form* the body having a *channel* in the region; and

[step 4] *affixing at least one insert* having planar top and bottom surfaces *into the channel*, wherein the channel has a physical shape configured to receive at least one insert, the insert having a different mechanical property than the body of the foam, and wherein the insert does not entirely fill the channel.

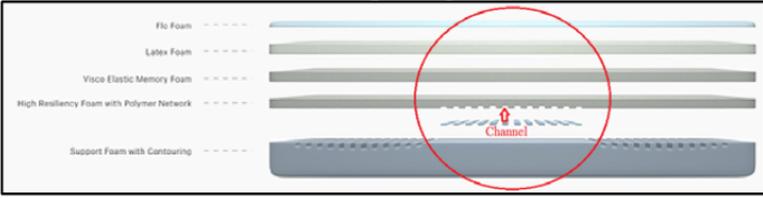
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(statements in prosecution of sibling patent were a “representation of [the patentee’s] own understanding of the inventions disclosed” in *all* sibling patents, including patents issued *before* the relevant statement was made); *Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1327, 1333–36 (Fed. Cir. 2003) (patentee’s disclaimer in prosecuting a parent application applied to similar limitations in two descendent patents).

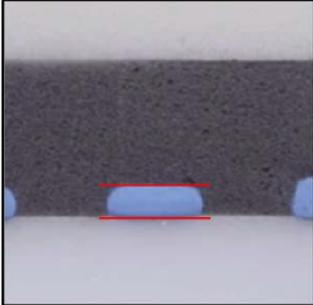
'935 Patent at 6:40–47 (emphases and step numbers added). The same is true of claim 5 of the '173 patent. *See* '173 Patent at 6:20–30. Because each step refers to an element that is introduced in the previous step, the steps must be performed in order. *See Kaneka Corp.*, 790 F.3d at 1306; *Loral Fairchild*, 181 F.3d at 1321; *see also* Kuchel Decl. ¶¶ 58–59, 69. Plaintiffs' expert agreed that certain claim steps—such as the third assembling step and the fourth affixing step—must be performed in order. *See* Clift Dep. Tr. (Ex. T) at 160:10–162:10, 163:10–25, 164:23–165:3.

But, under Plaintiffs' own infringement allegations (which, as discussed above, are meritless), Casper plainly does not perform the steps in the order required by the claims. None of the steps are performed in the order required, but for purposes of this motion, Casper focuses on the third and fourth steps—*i.e.*, the steps relating to (3) “assembling” rectangular foam pieces to form a mattress that includes a “channel,” and (4) “affixing” an “insert” “into the channel.” These two steps are clearly performed out of order in the accused process of manufacturing the Wave (accepting, for the sake of argument, that they are performed at all as Plaintiffs claim).

To satisfy the third “assembling” step, as shown in Plaintiffs' claim chart (reproduced below), Plaintiffs accuse the last stage in the process of manufacturing the Wave, wherein the five layers of the Wave are joined to form the mattress:

<p><b>[10.3]</b> assembling the rectangular foam pieces to form the body having a channel in the region; and</p>	<p>The five rectangular foam pieces are assembled into a mattress that includes channels in the identified “back and hips” region.</p> 
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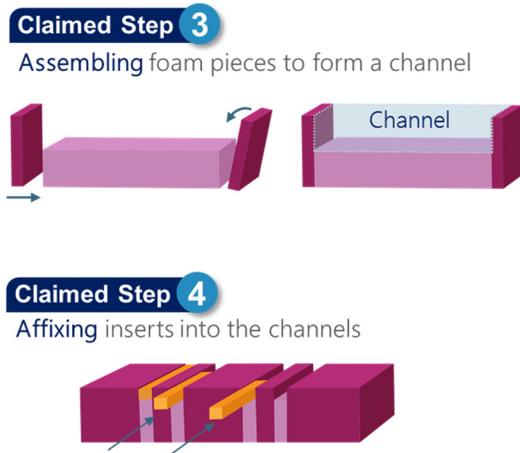
Mot. at 16; *id.* at 14 (element 5.5). But, to satisfy the fourth and final “affixing” step, Plaintiffs accuse the installation of the polymer network—*i.e.*, the addition of the polymer into the channels created by cutting, as seen in Plaintiffs’ claim chart below:

<p><b>[10.4a]</b> affixing at least one insert having planar top and bottom surfaces into the channel,</p>	<p>A “Polymer Network” of inserts is affixed into the channels in the “High Resiliency Foam” layer.</p>  <p>Further, the inserts have planar top and bottom surfaces.</p>  <p><i>See also</i> Clift Decl. at ¶¶ 110-11.</p>
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Mot. at 17; *id.* at 13 (element 5.4a).

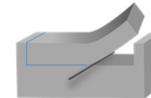
There is a glaring problem with Plaintiffs’ claim: if Plaintiffs’ infringement allegations are correct, the accused “assembling” step (the third step) and the accused “affixing” step (the fourth step) in the Wave manufacturing process are done in the *opposite* order. Specifically, after the accused channels are formed (by cutting), the polymer gel is pumped in and cooled to a solid form—that is what Plaintiffs erroneously call “affixing” the “inserts” into the channels (step 4). But, only then, *after* the “inserts” are allegedly “affixed” (step 4) is the layer shipped off to be assembled together with the other four layers of the Wave—what Plaintiffs claim is “assembling” pieces to form channels (step 3). Holm Decl. ¶¶ 11–15. Thus, if step 3 (assembly to form channels) takes place when the layers are all combined to form the mattress—as Plaintiffs contend—it takes place *after* step 4 (“affixing” the polymer network). *See* Kuchel Decl. ¶¶ 61, 70.

Dreamwell's Claimed Method:



Casper's Method:

Forming channel by cutting



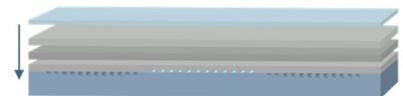
**Accused Step 4**

Filling channels with polymer gel (alleged to be "affixing an insert")



**Accused Step 3**

Assembling layers



Thus, manufacture of the Wave cannot infringe because Casper does not perform the steps in the order required—even assuming those steps are performed as Plaintiffs contend.

**c. Casper does not “affix” any “inserts” into the accused channels.**

Casper also does not infringe the asserted method claims because Casper does not practice the claimed step of “affixing” an “insert” into a channel. Similar to the mattress claims (discussed above), the method claims require a step of “affixing” a preexisting “insert” into a channel. The fact that the inserts must exist before they can be inserted is demonstrated not only by the use of the verb “affixing,” but also because in the method claims, the “insert” to be affixed is described as having certain physical characteristics—in the '935 claims, the insert must have “planar top and bottom surfaces,” while in the '173 claims, it must have “greater firmness than the body of foam.” '935 patent at 6:42–43; '173 Patent at 6:27.

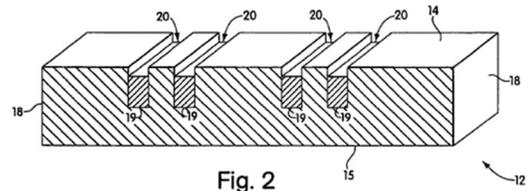
As discussed above, Casper does not affix inserts into the channels. The polymer network Plaintiffs accuse is not formed by “affixing” preexisting “inserts” within the channels. Instead, a liquid gel is pumped into the channels. Pumping a gel is totally different from “affixing” an “insert.” Moreover, the gel does not have the required properties of the asserted

claims: because it is liquid, it does not have “planar top and bottom surfaces,” nor does it have “greater firmness than the body of foam” into which it is poured. Kuchel Decl. ¶¶ 63–64, 72–73, 81–82. On the contrary, physical dams are required to keep the gel from spilling out before it cools. Holm Decl. ¶ 9.

Thus, because Casper does not practice the step of “affixing” an “insert” into a channel—and certainly not an “insert” with the physical properties required by the claims—Casper cannot infringe any one of the asserted method claims for these independent reasons.<sup>12</sup>

**d. The polymer network fills the accused channels to the surface.**

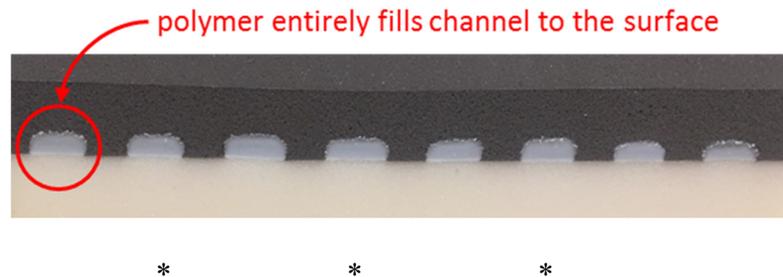
Casper also does not infringe the asserted claims of the '935 patent because the polymer network (the accused “inserts”) “entirely fill[s] the channel” within the meaning of the '935 patent. '935 Patent at 6:46–47. Yet, the claims require “affixing at least one insert . . . wherein the insert does *not* entirely fill the channel.” *Id.* (emphasis added). According to the specification and prosecution history of the '935 patent, this limitation refers to whether the insert fills the entire *depth* of the channel (not whether it extends to the ends of the channel). The specification explains that whether an insert “entirely fill[s] the channel” depends on whether it is “flush with the channel surface (in FIG. 2, the top surface 14).” *Id.* at 3:21–24. Consistent with the claims, Figure 2 (above) shows inserts that do *not* fill the channel because they are not flush with the surface.



<sup>12</sup> See *Combined Sys. v. Defense Tech. Corp.*, 350 F. 3d 1207, 1211-1212 (Fed. Cir. 2003) (“Furthermore, plainly as a matter of grammar, the recitation of ‘inserting said formed folds . . . into said projectile compartment’ forecloses — at least in the absence of compelling evidence to the contrary in the written description or prosecution history — a construction permitting the ‘folds’ to be formed after or during insertion of the projectile into the projectile compartment in the shotgun shell.”).

Dreamwell also told the Patent Office that the claim refers to whether the insert reaches the channel surface, not whether it reaches the ends of the channel. In fact, Dreamwell distinguished the prior art (Murphy) on the basis that its inserts filled the entire depth of the channel, stating that in “Murphy’s FIG. 1, the block bodies are shown completely filling the rectangular recess *as evidenced by the coplanar surface of the block body and the foam body.*” 7/2/14 Amendment (Ex. S) at 6 (emphasis added). Thus, the claim language “insert does not entirely fill the channel” requires that the insert does not fill the channel to the channel surface. Kuchel Decl. ¶¶ 74–80.

The Casper Wave does not infringe claim 10 of the ’935 patent because the accused polymer network does entirely fill the channel to the surface. Indeed, as seen below, the Polymer Network on the bottom of the High Resiliency Foam layer fills the entire depth of the channels. Kuchel Decl. ¶¶ 78–79.



For all of these reasons, Casper cannot infringe any of the asserted patents. At the very least, Casper has raised “substantial questions” regarding infringement, precluding a preliminary injunction.

**B. The asserted patents are invalid.**

Plaintiffs also fail to meet their burden to show a likelihood of success on the merits because the asserted claims are invalid. A claim is invalid as anticipated if all of the elements of the claim are disclosed in a single piece of prior art (such as an earlier patent). *See* 35 U.S.C.

§ 102; *Rockwell Int'l Corp. v. United States*, 147 F.3d 1358, 1363 (Fed. Cir. 1998). Even if not anticipated (because all claim elements are not disclosed in a single reference), a claim is nevertheless invalid if “the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.” 35 U.S.C. § 103(a).

Plaintiffs do not address the validity of the patents in their motion. But when seeking a preliminary injunction, “[w]hile it is not the patentee’s burden to prove validity, the patentee must show that the alleged infringer’s defense lacks substantial merit.” *New England Braiding*, 970 F.2d at 883. Plaintiffs do not and cannot do that here. In just the short time since Plaintiffs filed their motion, Casper has identified a number of prior art references—not considered by the Patent Office in the prosecution of the asserted claims—that independently disclose all of the elements of all of the asserted claims, and thus invalidate the asserted claims.

What is more, if the claims could somehow be stretched to cover the Casper Wave, as Plaintiffs contend for purposes of infringement, then the floodgates of invalidating prior art truly open. “A century-old axiom of patent law holds that a product ‘which would literally infringe if later in time anticipates if earlier.’” *Upsher-Smith Labs., Inc. v. Pamlab, L.L.C.*, 412 F.3d 1319, 1322 (Fed. Cir. 2005). If Plaintiffs are correct that mattresses with channels on an internal layer (as opposed to on the mattress itself) can infringe the claims, for example, countless additional references invalidate the claims. But that is not all: the public record actually shows that Dreamwell knew about some of these additional prior art references at the time it applied for the asserted patents, yet withheld them from the Patent Office.<sup>13</sup>

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<sup>13</sup> Dreamwell’s withholding of prior art constitutes inequitable conduct, rendering the patents unenforceable—another reason Plaintiffs’ motion should be denied, as discussed below.

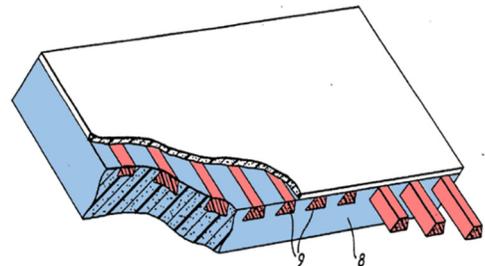
The references discussed below (which also are described in element-by-element claim charts in the Kuchel declaration) invalidate each of the asserted claims, and at a minimum raise a substantial question regarding invalidity, precluding a preliminary injunction.

**1. The asserted claims of the '763 patent are invalid.**

**a. The prior art discloses every limitation of the asserted claims, including channels on the surface of the mattress body.**

The critical and allegedly novel element that allowed Dreamwell to gain issuance of the '763 claims was the inclusion of channels on the surface of the mattress body. As discussed above, in prosecuting the '763 patent, Dreamwell was able to overcome rejections *only* by adding this surface-channel limitation and arguing that the prior art (in particular, the Hoffman reference) did not disclose it. *See* 11/13/06 Amendment (Ex. L) at 6–7. But the claims are invalid because that supposedly innovative feature was well known in the prior art, including in references not disclosed to the Patent Office.

***Kennaway:*** An international patent application by lead inventor Alexander Kennaway, published in September 1981 (Ex. MM), discloses all of the limitations of the asserted claims, including a plurality of channels on the top surface of a foam mattress body. *See* Kuchel Decl. at 34. These channels can be seen in Figure 4 of the Kennaway application (right, color added).



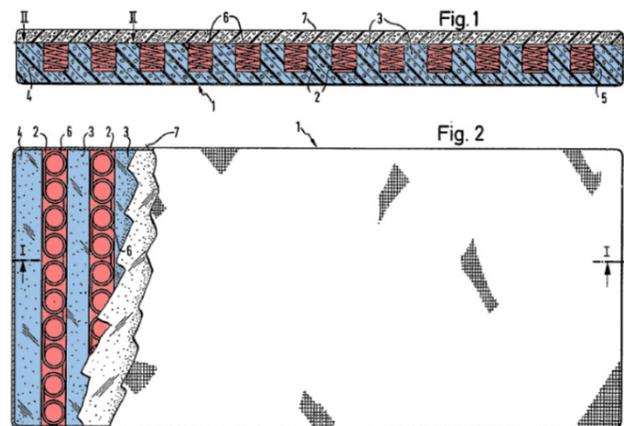
Kennaway was not before the examiner during prosecution of the '763 patent.

Kennaway also discloses every other element of the asserted claims of the '763 patent. Kuchel Decl. at 34–36, ¶¶ 94–95. For instance, Kennaway discloses the channels in “an internal body of foam” (numbered 8 in Figure 4). Kennaway (Ex. MM) at 9 (claim 8). The reference likewise discloses a “a plurality of foam insert sections of a different hardness from the main

section” (numbered 9 in Figure 4), *id.*, and that the “channel voids” are “filled by corresponding shaped” inserts so that the inserts reinforce the body, *id.* at 6—just as the ’763 patent recites “a plurality of inserts, each insert having a mechanical characteristic different from” the surrounding body, “each insert reinforcing the body.” ’763 Patent at 6:15–18.

**British Patent Specification ’433:** Similarly, British Patent Specification No. 1 483 433, filed September 2, 1975 (Ex. KK) (“GB ’433”), shows in Figures 1 and 2 a foam mattress body with channels extending from the top surface into the mattress body (below, color added).

Kuchel Decl. ¶ 96. Consistent with the teaching of the ’763 patent, the reference discloses that the channels are on the surface of the mattress body, with merely a mattress topper (numbered 7) covering the channel surface. ’763 Patent at 3:48–57.



The GB ’433 reference also discloses all of the other limitations of the asserted ’763 claims. Kuchel Decl. at 37–41, ¶ 97. For instance, the reference discloses “a body of foamed polymeric material,” GB ’433 (Ex. KK) at 1:96–2:5, with a plurality of “spring elements inserted into the channels in the foam which spring elements are held on two sides by the fixed foam webs,” *id.* at 2:85–88. Thus, the inserts have “a mechanical characteristic different from the mechanical characteristic of the foam . . . each insert reinforcing the body,” as recited in the ’763 claims, because the inserts are metal springs (as the ’763 patent discloses that they may be). *See* ’763 Patent at 6:15–20.

These (and other) references, which were not before the Patent Office during prosecution of the '763 patent, invalidate the claims of the '763 patent—and at a minimum, raise a substantial question regarding the validity of the claims. Kuchel Decl. ¶¶ 89–92, 94–97.

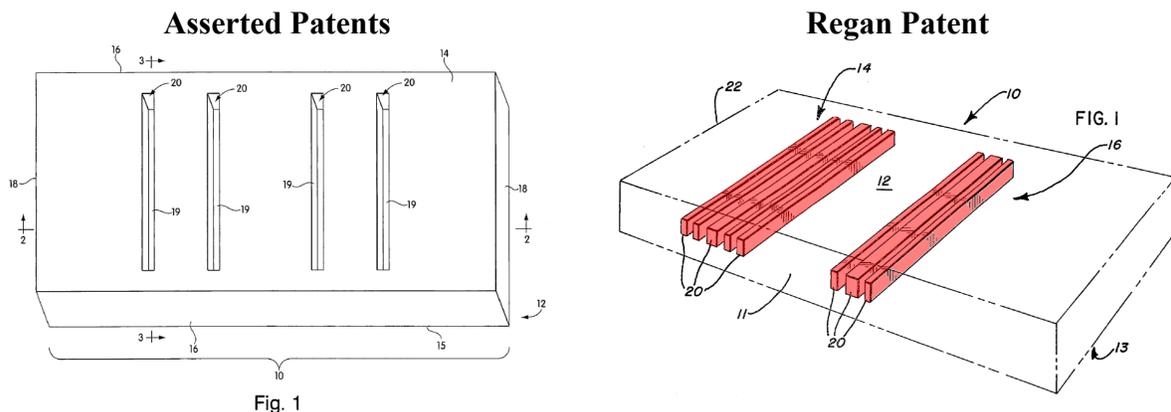
**b. If the '763 claims can be stretched to cover the Casper Wave, then countless additional references invalidate.**

As discussed above, the Wave does not infringe the claims of the '763 patent. But if the meaning of those claims are stretched so broadly as to be able to cover the Wave (as Plaintiffs contend for purposes of infringement), then countless additional references also invalidate.

These include not only references considered by the Patent Office, but also additional references Dreamwell knew about but did not disclose in prosecution, such as the two discussed below.

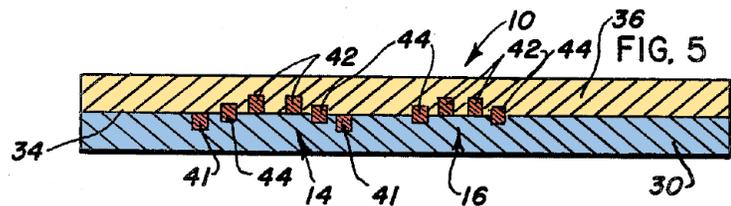
**U.S. Patent No. 4,161,045 (Regan):** U.S. Patent No. 4,161,045, issued to John Regan (Ex. LL) (“Regan”), was filed on December 19, 1977. Under the claim reading Plaintiffs urge for purposes of infringement, Regan anticipates all of the asserted claims of the '763 patent. Kuchel Decl. ¶¶ 119–20. Full, element-by-element claim charts showing how Regan discloses each element of each asserted claim are provided in Mr. Kuchel’s declaration. *Id.* at 78–84, ¶¶ 121–22.

As shown below, the mattress disclosed in the Regan patent bears a striking resemblance to the asserted patents:



'763 Patent Fig. 1; Regan (Ex. LL) Fig. 1 (color added). Regan discloses that the mattress is constructed “of a resilient material, such as molded foam,” with channels (“recesses”) and inserts (“ribs”) that are “less compressible than the material of the mattress” (*i.e.*, firmer) to provide “improved support.” Regan (Ex. LL) at Abstract, 2:19–20. Thus, Regan discloses a body made of foam, a plurality of channels, and a plurality of inserts affixed within, with each insert having a mechanical characteristic different from the body and reinforcing the body—just as in the asserted claims. '763 Patent at 6:8–18.

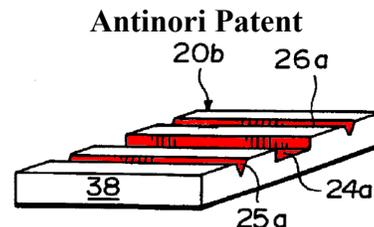
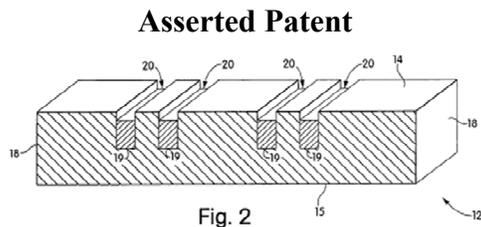
Under Plaintiffs’ view of the claims, Regan also discloses “the top and bottom surfaces including a plurality of channels extending into the body perpendicularly therefrom,” because Regan shows a two-layer mattress in which each layer has channels on either its top or bottom surface, extending perpendicularly into the layer. Figure 5 (below, color added) shows channels on the bottom surface of upper layer 36, and on the top surface of bottom layer 30. Thus, because



Regan also discloses all other elements of the asserted claims, if Plaintiffs are correct that channels on the surface of an internal layer satisfies the claims, Reagan clearly invalidates. *See* Kuchel Decl. ¶¶ 119–22, 126–27.

**U.S. Patent No. 6,223,371 (Antinori):** U.S. Patent No. 6,223,371, issued to Steven Antinori et al. (Ex. OO) (“Antinori”), was filed on April 15, 1999. Once again, if Plaintiffs’ infringement allegations with respect to the Wave are accepted, then Antinori also invalidates all of the asserted claims. Kuchel at ¶¶ 109–113. Element-by-element claim charts showing how Antinori discloses or renders obvious each element of each asserted claim are provided in Mr. Kuchel’s declaration. *Id.* at 57–64.

Just like the '763 patent, Antinori discloses a foam mattress with channels, so that the mattress firmness varies over the length of the mattress. As seen below, the channels in Antinori (right) bear a strong resemblance to the channels in the asserted patents (left).



'763 Patent Fig. 2; Antinori (Ex. OO) Fig. 3 (color added). Antinori further discloses “one or more inserts” with “a relatively high Indentation Load Deflection (ILD) value” (*i.e.*, firmer than the surrounding mattress) are affixed “in the central or medial recesses,” so that the “firmer insert 40 affords desired firmness in the postural region of a person . . . lying upon the completed mattress.” Antinori (Ex. OO) at 3:11–13, 4:18–31.

The completed mattress is depicted in Antinori

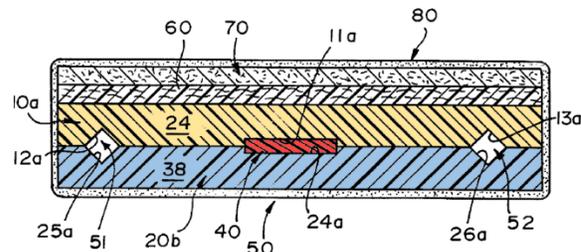


Figure 4 (above, excerpt, color added). *Id.* at 3:23–25. As seen in Figure 4, layers 10a and 12a include channels 24a, 25a, and 26a, with insert 40 (highlighted in red above) affixed in the central channel. *Id.* at 4:18–22.

Once again, if Plaintiffs are correct that the '763 claims are satisfied by internal channels on the surface of a layer of the mattress, then Antinori also discloses the claimed surface channels, because it discloses channels on the top surface of layer 12a and on the bottom surface of layer 10a, extending from the surface into the layer. Kuchel Decl. at 58, ¶ 109. Thus, if Plaintiffs' infringement read is accepted, Antinori invalidates because it explicitly discloses every element of the asserted claims. *See* Kuchel Decl. ¶¶ 109–113.

At a minimum, Regan and Antinori raise a substantial question regarding the validity of the asserted patents based on Plaintiffs' infringement assertions.

**2. The asserted claims of the '173 and '935 patents are invalid.**

**a. The prior art discloses every limitation of the asserted claims, including forming channels by assembling foam pieces.**

One of the key claim elements that allowed Dreamwell to gain issuance of the '173 and '935 claims was the step of forming channels by assembling foam pieces (as opposed to cutting or molding, which the examiner found to be obvious). As discussed above, in prosecuting the '173 and '935 claims, Dreamwell overcame prior art rejections by telling the Patent Office that the prior art did not disclose forming channels by assembling rectangular foam pieces. 8/11/04 Amendment (Ex. E) at 2–5; 1/15/14 Amendment (Ex. R) at 6–7. But once again, this supposedly novel element—along with every other claimed element—is disclosed in prior art that was not before the Patent Office.

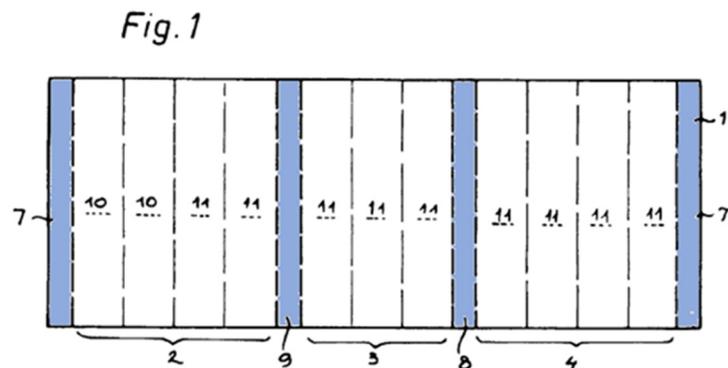
**Scheuch:** European Patent Publication No. 1031302A2 to Mario Scheuch, filed on February 22, 2000 (Ex. QQ), discloses forming channels in a mattress by assembling rectangular foam pieces, and was not considered

by the Patent Office during the prosecution of the asserted patents.

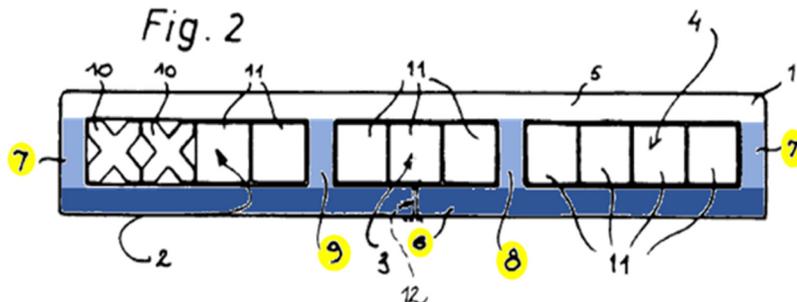
Scheuch describes a mattress comprised of foam pieces, as pictured

in Figure 1 (showing “a top view of a first embodiment of a mattress”) (above, color added).

Scheuch (Ex. QQ) at 0025. Scheuch, like the '173 and '935 patents, explains that one option for forming channels in the mattress is to assemble rectangular foam pieces (including “a base layer 6 and by webs 7, 8, 9”) that are then glued together. As Scheuch explains, “foam core 1 has

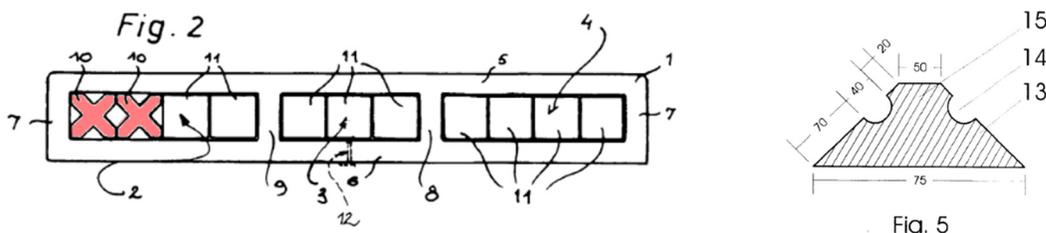


recesses 2, 3, 4, which are produced by forming operations during the manufacture of the core or from a structure made of a foam cover layer 5, a base layer 6 and by webs 7, 8, 9 that are glued in as intermediate spaces.” *Id.* (emphases added). Figure 2 (below, color added), which



provides a side view of the mattress, has numbering to indicate where the different foam pieces (6–9) would be if the channels were formed by the method of assembling foam pieces.

As set forth in Mr. Kuchel’s declaration, Scheuch also discloses all of the other elements of the asserted method claims. Kuchel Decl. at 42–46, 47–53. For example, Scheuch discloses locating a region where increased support is desired and forming the channels and affixing the inserts in that region, where the inserts have greater firmness than the surrounding body. As Scheuch explains, the “inserts can have different levels of hardness; as a result, an individual adaptation of the hardness or elasticity in the head, shoulder, back and pelvic regions is possible . . . .” Scheuch (Ex. QQ) at 0006. Scheuch also teaches inserts that have planar top and bottom surfaces and that do not entirely fill the channel to the surface, as shown by the inserts depicted in Figure 2 (numbered 10 below, color added) and the insert depicted by Figure 5 (below).

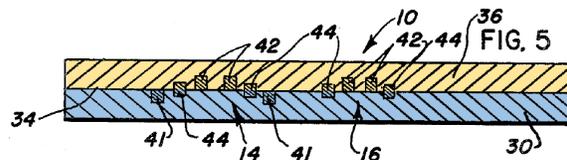


Accordingly, the asserted claims are invalid. Kuchel Decl. ¶¶ 98–105. At a minimum, the Scheuch reference, and others discussed in Mr. Kuchel’s declaration, raise a substantial question regarding the validity of the ’173 and ’935 patent claims.

**b. If the '173 and '935 claims can be stretched to cover the Casper Wave, then countless additional references invalidate.**

If the claims of the '173 and '935 patents could cover the Wave (as Plaintiffs contend), many additional references invalidate. Regan and Antinori are exemplary. Kuchel Decl. ¶¶ 109–10, 114–18, 119–28.

**Regan:** Just as in the asserted claims of the '173 and '935 patents, Regan discloses a “method of manufacturing a mattress.” Regan (Ex. LL) at 3:5–8. The method includes providing a body “of a resilient material, such as molded foam” shaped and sized for a mattress, and locating a region where increased support is desired: channels are “positioned within the mattress 10 to correspond to the areas of greatest weight of a user.” *Id.* at 2:35–37. Under Plaintiffs’ claim reading, Regan also teaches forming a channel by assembling rectangular foam pieces, because the method of manufacturing that Regan discloses “is to join two similar or dissimilar layers . . . as by an adhesive.” *Id.* at 3:5–9. As shown in Figure 5 (below, color added), the layers that are joined are rectangular

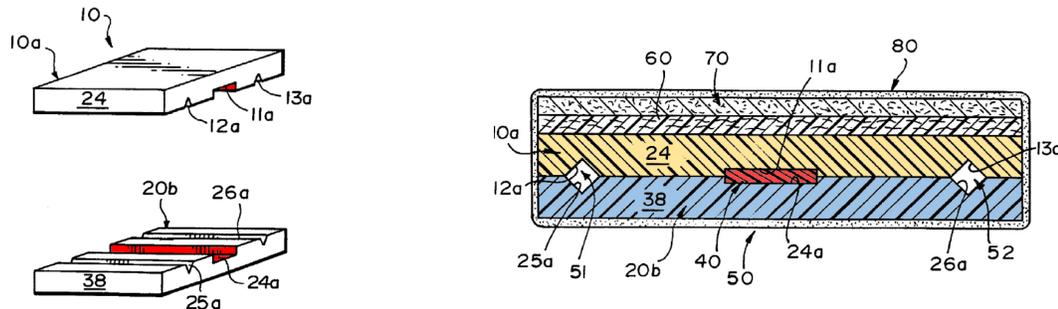


foam pieces with channels formed therein.

Regan also discloses affixing inserts into the channels, which it describes as “at least two sets of less compressible ribs disposed” between the layers. *Id.* Mr. Kuchel’s declaration provides element-by-element claim charts demonstrating how Regan anticipates or renders obvious every asserted claim of the '173 and '935 patents. Kuchel Decl. at 78–89. At a minimum, under Plaintiffs’ infringement read, Regan raises a substantial question regarding invalidity.

**Antinori:** Antinori likewise discloses a “method of manufacturing mattresses.” Antinori (Ex. OO) at Abstract. Antinori discloses providing a body of “foam latex” shaped and sized for use as a mattress and locating a region where increased support is desired: the “postural region of

a person” (in the center of the mattress) so as to provide “excellent postural support.” *Id.* at 4:27–31, 4:44–47, 5:1–7. Antinori further discloses that “channels are formed in the postural region where increased support is desired.” *Id.* at 4:5–14. Under Plaintiffs’ infringement read, the “assembling” limitations are met because rectangular layers are assembled together to form a mattress including channels:



*Id.* Figs. 3 & 4 (excerpts, color added). And Antinori teaches the step of affixing an insert into the channel when “insert 40 is inserted in the recess 24a of the layer portion 20b after the application of adhesive.” *Id.* at 4:18–27. Mr. Kuchel’s declaration provides element-by-element claim charts demonstrating how Antinori anticipates or renders obvious every asserted claim of the ’173 and ’935 patents under Plaintiffs’ infringement claim. Kuchel Decl. at 65–76.

\* \* \*

Each of the prior art references discussed above raises a substantial question regarding the validity of the asserted claims, thus defeating Plaintiffs’ motion. *See Amazon.com*, 239 F.3d at 1350–51; *Genentech*, 108 F.3d at 1364; *New England Braiding*, 970 F.2d at 883.

**C. The asserted patents are unenforceable in light of Plaintiffs’ infringement allegations and corresponding inequitable conduct.**

Plaintiffs cannot establish a likelihood of success for an additional reason: if Plaintiffs’ baseless infringement allegations are accepted, the patents are unenforceable due to inequitable conduct. Plaintiffs allege an impossibly broad claim scope in this Court, in order to stretch the

patent claims to cover the Wave. Their allegations are without merit, but if they were accepted (or even deemed reasonable)—that is, if the claims could be construed as broadly as Plaintiffs contend for infringement—then Dreamwell engaged in inequitable conduct because it knowingly withheld numerous invalidating prior art references from the Patent Office. Plaintiffs cannot have it both ways: either (1) the claims are not broad enough to cover the Wave, in which case there is no infringement, or (2) the claims *are* broad enough to cover the Wave, in which case they are unenforceable due to inequitable conduct.

“Applicants for patents have a duty to prosecute patent applications in the Patent Office with candor, good faith, and honesty.” *Honeywell Int’l Inc. v. Universal Avionics Sys. Corp.*, 488 F.3d 982, 999 (Fed. Cir. 2007). Under Patent Office rules, Dreamwell was required to disclose “all information known . . . to be material” to the patentability of claims under their “broadest reasonable construction.” 37 C.F.R. § 1.56(a); *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1291 (Fed. Cir. 2011) (en banc).<sup>14</sup> That duty of candor prohibits “affirmative misrepresentations of material facts, failure to disclose material information, or submission of false material information.” *Honeywell*, 488 F.3d at 999. Inequitable conduct can be established when a patent applicant “omitted material information with the specific intent to deceive the PTO.” *Therasense*, 649 F.3d at 1287. And “[b]ecause direct evidence of deceptive intent is rare, a district court may infer intent from indirect and circumstantial evidence.” *Id.* at 1290. Inequitable conduct renders the patents unenforceable. *Id.* at 1288.

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<sup>14</sup> While “district courts seek out the correct construction — the construction that most accurately delineates the scope of the claimed invention,” a different and broader standard applies in the Patent Office: the “broadest reasonable interpretation” of the claims. *PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, 815 F.3d 734, 740 (Fed. Cir. 2016). In this way, “the patent examiner is able to ‘reduce the possibility that, after the patent is granted, the claims may be interpreted as giving broader coverage than is justified.’” *Id.*

Thus, Dreamwell, Mr. Gladney, and their counsel had a duty to submit all prior art known to them which would be material under the broadest reasonable interpretation of the claims—which would necessarily include art that is material under the claim interpretations Plaintiffs urge in this Court (and initially urged in the Patent Office), if there is any argument at all that those interpretations are within reason. They violated this duty. Although Plaintiffs refused to produce the inventor of the patents, Mr. Gladney (a company employee), for a deposition absent a Court order (*see* 10/26/17 Email (Ex. V)), publicly available information shows that he, Dreamwell, and the prosecuting attorneys knew about multiple references that invalidate the asserted claims under Plaintiffs’ infringement contentions (including Antinori and Regan). Yet despite knowing about these references, Dreamwell withheld them from the Patent Office.<sup>15</sup>

Indeed, Dreamwell, Mr. Gladney, and the prosecuting attorneys not only knew about this material prior art, they had even disclosed it in connection with other patent applications filed *prior* to the asserted patent applications. For example, on March 20, 2002—over a year before applying for the earliest of the asserted patents—Dreamwell and Mr. Gladney applied for a different patent (the “2002 Gladney Application”), and disclosed the Antinori patent as part of the filing. 2002 Gladney Application (Ex. A) at 3. The very same law firm that prosecuted two of the asserted patents (Ropes & Gray) filed the 2002 Gladney Application. Dreamwell, through its attorneys at Ropes & Gray, continued to disclose Antinori to the Patent Office in the prosecutions of *three* continuation applications. 8/9/04 IDS (Ex. D) at 3; 7/14/09 IDS (Ex. N) at 4; and 8/17/09 IDS (Ex. O) at 4. In total, Dreamwell disclosed Antinori to the Patent Office at

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<sup>15</sup> Dreamwell also made numerous arguments that either were not true at the time, or demonstrate the falsity of Plaintiffs’ allegations in this Court. *See supra* Sections I.A.2.a(ii), I.A.2.d. Again, Plaintiffs cannot have it both ways.

least four times between 2002 and 2009—but *never* as part of the prosecution of the asserted patents.

The story is similar for the Regan patent. In November 2004, Dreamwell applied for another patent, also using Ropes & Gray as counsel (the “2004 Dreamwell Application”). In 2006, during the prosecution of the 2004 Dreamwell Application, the examiner identified Regan as a relevant prior art reference. 2004 Dreamwell Application (Ex. F) at 2. But despite learning of Regan in 2006, Dreamwell did not identify Regan during the prosecution of the ’763 patent (which was pending at the time) *or* during the subsequent prosecution of the ’935 patent.<sup>16</sup>

If Plaintiffs’ view of the claims for purposes of their infringement allegations is correct, Dreamwell, its prosecuting attorneys, and Mr. Gladney engaged in inequitable conduct by knowingly withholding these references while distinguishing prior art on bases contradicted by those very references. At the least, Dreamwell’s conduct raises at least a substantial question regarding the unenforceability of the patents, precluding a preliminary injunction.

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<sup>16</sup> Dreamwell’s pattern of withholding material references was not limited to Antinori and Regan. For example, U.S. Patent No. 4,449,261 (“Magnusson”)—a patent assigned to Simmons U.S.A. Corp. that discloses a mattress with a recess that can receive different foam inserts (*see* Kuchel Decl. ¶ 92)—was cited in the prosecutions of four different Dreamwell patent families, three of which were prosecuted by Ropes & Gray and the other by Cantor Colburn LLP, the firm that prosecuted the ’935 patent. 8/11/06 Notice of References (Ex. I) at 2; 9/14/06 IDS (Ex. K); 9/12/06 IDS (Ex. J) at 3; 1/8/14 Notice of References (Ex. Q). But Dreamwell never disclosed Magnusson while prosecuting the asserted patents. U.S. Patent No. 5,701,623 (“May”) was also cited in the prosecutions of two other Dreamwell patent families—including one with the same named inventor, Mr. Gladney, and also prosecuted by Ropes & Gray. 3/20/02 IDS (Ex. B) at 3; 3/23/05 Notice of References (Ex. G). May discloses a foam mattress formed by assembling rectangular foam pieces. *See* Kuchel Decl. ¶ 92. But May was *never* disclosed in the prosecutions of any of the asserted patents, even though Dreamwell, its counsel, and Mr. Gladney knew of the reference.

## II. Plaintiffs Have Failed to Show They Will Be Irreparably Harmed by the Alleged Infringement.

Plaintiffs also fail to prove that they are likely to suffer irreparable harm due to the alleged infringement. Plaintiffs' irreparable harm allegations fail in the first instance because Plaintiffs do not show that *they*, rather than non-party affiliates, will be harmed by the alleged infringement, let alone irreparably so. Irreparable harm to the party actually seeking relief is an essential requirement for a preliminary injunction—and it is entirely absent here.<sup>17</sup> In any event, the harms identified by Plaintiffs are entirely speculative and unsupported by evidence—and even if proven, not irreparable as they are easily remediable by monetary damages.

Plaintiffs' purported (but unproven) harms are also not even caused by Casper's alleged infringement—a critical requirement for a preliminary injunction in a patent case. Instead, Casper's sales are attributable to its award-winning innovation and revolutionary approach to the mattress industry. Indeed, Serta Simmons saw it was losing sales to Casper long *before* the Wave ever came on the market, and there is no evidence at all that Dreamwell's allegedly patented features will change that one way or the other.

### A. Plaintiffs have not established that they (rather than non-parties) will be irreparably harmed.

To prevail on this motion, Plaintiffs must establish that *they*—rather than some other entity (even an affiliated entity)—will be irreparably harmed by the alleged infringement. *See, e.g., ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1337–40 (Fed. Cir. 2012) (vacating injunction where alleged irreparable harm was to third party); *Voda v. Cordis Corp.*, 536 F.3d 1311, 1329 (Fed. Cir. 2008) (affirming denial of injunction where plaintiff

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<sup>17</sup> As noted above, it is unclear whether Serta Simmons, who does not own the patents and does not purport to be an exclusive licensee of the patents, even has standing to be a plaintiff in this suit. *See, e.g., Spine Sols., Inc.*, 620 F.3d at 1317–18.

“failed to show that [defendant’s] infringement caused *him* irreparable injury,” as opposed to irreparable injury to a third party). In their motion, however, Plaintiffs fail to identify any harm of any kind *to themselves*.

Plaintiffs do not even *allege* that Dreamwell—the owner of all three asserted patents—will suffer any harm absent an injunction. *See generally* Morgan Decl. (only asserting alleged harm to Serta Simmons Bedding, LLC). Indeed, neither Plaintiffs’ motion nor its declarant even *mentions* Dreamwell when discussing irreparable harm. Nor could Plaintiffs allege that Dreamwell will suffer any irreparable harm as Dreamwell does not make or sell any products. *See* Morgan Dep. Tr. (Ex. U) at 56:16–21.

While Plaintiffs do allege (but do not actually prove) harm to Plaintiff Serta Simmons, it appears really to be harm to non-parties. That alleged harm, even if proven, cannot establish the requisite likelihood of irreparable harm. *See, e.g., ActiveVideo*, 694 F.3d at 1337–40; *Voda*, 536 F.3d at 1329.

To demonstrate irreparable harm, Plaintiffs rely entirely on alleged competition between the Casper Wave and two other products: the iComfort and Tomorrow mattresses, which Plaintiffs repeatedly refer to as “Serta Simmons brands.” Mot. at 20–21; Morgan Decl. ¶¶ 28, 29, 32.<sup>18</sup> Plaintiffs allege that competition from the Wave will lead to lost sales of these two mattresses, resulting in a lost market share and customers. Mot. at 20–21.

Crucially, however, there is no evidence that either the iComfort or Tomorrow mattresses is (or has ever been) sold by Serta Simmons. Neither the complaint nor Plaintiffs’ motion states that either Plaintiff sells either mattress; and Plaintiffs’ declarant testified that he did not even

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<sup>18</sup> Although Plaintiffs’ declarant, Mr. Morgan, states that the Casper Wave competes with “several” Serta Simmons mattresses, he identifies only the Serta iComfort and the Tomorrow mattresses as direct competitors in his declaration. Morgan Decl. ¶¶ 28, 29, 32.

know if Serta Simmons made or sold any mattresses at all (he believed Dreamwell did not). Morgan Dep. Tr. (Ex. U) at 53:10–23, 56:16–21.

In fact, the evidence indicates that both of the iComfort and Tomorrow mattresses are sold by companies who are *not* parties to this case. The Tomorrow mattress is sold by Tomorrow Sleep, LLC, an entity that Serta Simmons describes as “independently run and managed.” PR Newswire (Ex. FF) at 1–2; Morgan Dep. Tr. (Ex. U) at 49:21–50:3, 50:14–51:6. The iComfort mattress evidently is offered by another non-party, Serta, Inc., whose majority shareholder is yet another non-party, National Bedding Company, L.L.C. Serta Website (Ex. JJ) at 2; Morgan Dep. Tr. (Ex. U) at 46:11–14, 47:25–48:3.

Thus, while Plaintiffs allege that they will be irreparably harmed through lost sales of the Tomorrow and iComfort mattresses, Plaintiffs have offered no evidence that *they* actually make or sell these (or any other) mattresses; the available evidence is that they do not.

The fact that the companies that evidently *do* make and sell the iComfort or Tomorrow mattresses (Serta, Inc. and Tomorrow Sleep, LLC) are related to Plaintiff Serta Simmons is irrelevant. Corporate entities “may not enjoy the advantages of their separate corporate structure and, at the same time, avoid the consequential limitations of that structure.” *Poly-Am., L.P. v. GSE Lining Tech., Inc.*, 383 F.3d 1303, 1311 (Fed. Cir. 2004). Thus, a preliminary injunction cannot issue where, as here, a plaintiff alleges irreparable harm only to a non-party subsidiary:

Plaintiffs cannot claim the benefits of their separate corporate identities for some reasons—and the Court does not speculate as to what those reasons are in this case—without accepting the burdens for other reasons—namely, the inability to claim for itself the potential lost market share of a non-party affiliate for purposes of establishing irreparable harm.

*Weeks Marine, Inc. v. TDM Am., LLC*, Civil Action Nos. 11-3850 (ES)(CLW),

11-4338(ES)(CLW), 2011 WL 6217799, at \*7 n.4 (D.N.J. Dec. 14, 2011); *see also Balsam*

*Brands Inc. v. Cinmar, LLC*, Case No. 15-cv-04829-WHO, 2015 WL 7015417, at \*5 (N.D. Cal.

Nov. 12, 2015) (no temporary restraining order where entity suffering irreparable harm different from those with rights to patent).

Here, because Plaintiffs have failed to show that they (as opposed to a non-party affiliate) would suffer any harm, let alone irreparable harm, Plaintiffs' motion should be denied.

**B. Plaintiffs cannot establish irreparable harm to anyone.**

Plaintiffs' claims of irreparable harm also fail because Plaintiffs have provided zero evidence of any actual irreparable harm to anyone—whether themselves or their affiliates.

**1. Plaintiffs have set forth no evidence that Plaintiffs have lost or will lose sales, market share, or customers.**

Plaintiffs allege that the “sale of the infringing Casper Wave mattress *will* result in at least loss of market share, loss of customers, and loss of access to potential customers.” Mot. at 19 (emphasis added). Plaintiffs cite only their declarant (Mr. Morgan) as evidence for that assertion, but Mr. Morgan says no such thing—not in his declaration and not in his deposition. Indeed, *all of the alleged harms* Plaintiffs identify assume that iComfort and Tomorrow mattresses will lose sales to the Casper Wave, but there is not a shred of evidence to show that such losses have occurred or are likely ever to occur.

To the contrary, Mr. Morgan—the person at Plaintiff Serta Simmons responsible for “studying and evaluating consumer purchase behavior”—conceded at his deposition that there is no evidence to support Plaintiffs' conclusory claims, admitting that he was not “aware of any evidence of actual sales of Casper Wave that would have gone to Serta if Casper Wave were off the market.” Morgan Dep. Tr. (Ex. U) at 24:3–9; 87:9–12.

The most Mr. Morgan was willing to say—which is not nearly enough to show irreparable harm—is that if the Wave were off the market, consumers who would have purchased the Wave “*might purchase*” a product of a Serta Simmons entity. *Id.* at 72:16–73:2

(emphasis added). And although Mr. Morgan says in his *declaration* that the Wave “competes directly” with iComfort and Tomorrow mattresses (Morgan Decl. ¶¶ 29, 32), Mr. Morgan abandoned that claim at his deposition. There, Mr. Morgan—the person at Plaintiff Serta Simmons responsible for “defining and quantifying market segments”—testified that, in reality, “the Casper Wave and the Tomorrow mattress are targeting different consumer segments,” and that two other unrelated third-party mattresses—not the Tomorrow or iComfort—are the Wave’s “primary and most prominent” competitors. Morgan Dep. Tr. (Ex. U) at 70:21–71:9, 73:18–20.<sup>19</sup>

In fact, the Wave was already on the market for more than six weeks when Plaintiffs filed their motion, and 11 weeks by the time their declarant, Mr. Morgan, was deposed, but Plaintiffs have not identified a single sale that they contend was lost as a result, let alone any loss of market share. Plaintiffs do not even provide evidence that consumers who purchase the Wave would otherwise purchase an iComfort or Tomorrow mattress if the Wave were off the market—*as they must do* to prove lost sales. *See EMC Corp. v. Zerto, Inc.*, C.A. No. 12-cv-956(GMS), 2016 WL 1291757, at \*13 (D. Del. Mar. 31, 2016).<sup>20</sup>

Plaintiffs’ bare speculation that consumers might choose their products if the Wave were off the market cannot demonstrate irreparable harm. To the contrary, “Plaintiffs must demonstrate that absent a preliminary injunction they will suffer ‘an injury that is neither remote

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<sup>19</sup> Mr. Morgan further contradicted Plaintiffs’ allegation that iComfort would lose sales and market share when he testified that he expected iComfort sales and revenues to *increase* by the end of 2017, despite the introduction of the Wave. Morgan Dep. Tr. (Ex. U) at 81:25–82:9.

<sup>20</sup> *Cf. Veeco Instruments, Inc. v. SGL Carbon, LLC*, No. 17-CV-2217 (PKC), 2017 WL 5054711, at \*12 (E.D.N.Y. Nov. 2, 2017) (injunction appropriate where plaintiff submitted evidence that “multiple customers ha[d] chosen to purchase” the infringing products “after competitive bidding and negotiations by both [the patentee] and [the infringer],” and customer “expressly informed [the patentee] that it planned to make all future . . . purchases from [the infringer]”).

nor speculative, but actual and imminent.”” *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005). As the Supreme Court has cautioned:

Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

*Winter*, 555 U.S. at 22. The “mere possibility of irreparable harm”—all that Plaintiffs allege here—“is insufficient to justify the drastic remedy of a preliminary injunction.” *Borey v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 934 F.2d 30, 34 (2d Cir. 1991).<sup>21</sup>

Indeed, in a patent case, lost market share must be shown with actual evidence to support a preliminary injunction, “because granting preliminary injunctions on the basis of speculative loss of market share would result in granting preliminary injunctions ‘in every patent case where the patentee practices the invention.’” *Automated Merch. Sys., Inc. v. Crane Co.*, 357 F. App’x 297, 301 (Fed. Cir. 2009).

Nor is Plaintiffs’ lack of evidence excused because the harms they allege are forward-looking. As the Federal Circuit has made clear, “neither the difficulty of calculating losses in market share, nor speculation that such [market share] losses might occur, amount to proof of special circumstances justifying the extraordinary relief of an injunction prior to trial.” *Nutrition 21 v. United States*, 930 F.2d 867, 871 (Fed. Cir. 1991).

Plaintiffs’ complete lack of evidence regarding any likelihood of lost sales is particularly problematic because of the heavily-crowded and highly-competitive mattress market. The mattress market is not a three-mattress market in which the sale of a Wave mattress would

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<sup>21</sup> See also *Helios & Matheson N. Am., Inc. v. Vegasoft Oy*, No. 07 Civ. 3600(PAC), 2007 WL 1541204, at \* 4 (S.D.N.Y. May 24, 2007) (denying plaintiff’s preliminary injunction motion where plaintiff offered only “speculative testimony” that it could lose business).

necessarily, or even likely, represent a lost sale of either iComfort or Tomorrow. Instead, there are countless competitors both in the mattress market as a whole (“more than a thousand,” according to Mr. Morgan), and in the direct-to-consumer market segment in which Casper operates (“more than a hundred,” according to Mr. Morgan). Morgan Dep. Tr. (Ex. U) at 58:25–59:18. In their motion, Plaintiffs do not acknowledge that there are other competitors to the Wave, let alone attempt to explain why the sale of a Wave would represent a lost sale for iComfort or Tomorrow rather than one of the thousands of other competitors on the market.

Not surprisingly, courts consistently refuse to find irreparable harm where, as here, there are third-party competitors (here, there are many), and the patentee fails to prove that the sale of an accused product represents a lost sale *for the patentee*, rather than for some other market participants. For example, in *EMC Corp. v. Zerto, Inc.*, even though the court found that “the record shows that EMC has lost customers to Zerto” and that “EMC also reports losing several sales opportunities,” the court held “that a preliminary injunction is not warranted” where, *inter alia*, “EMC has not shown that if Zerto had not made those sales, those customers would definitely have gone to EMC.” *EMC*, 2016 WL 1291757, at \*13 (citations omitted); *see also Nichia Corp. v. Everlight Ams., Inc.*, 855 F.3d 1328, 1342–43 (Fed. Cir. 2017) (affirming denial of injunction where plaintiff failed to establish it would have made lost sales in the absence of the alleged infringement); *Veeco Instruments*, 2017 WL 5054711, at \*28 (injunction appropriate where plaintiff and infringer were the only two manufacturers in market segment).

In these circumstances, because Plaintiffs cannot prove—and, at a minimum, have not proven—that the sale of a Wave mattress will represent a lost sale for Plaintiffs, they fail to prove that they have been or will be harmed at all, let alone irreparably.

**2. Plaintiffs provide no evidence that lost mattress sales lead to secondary harms.**

In order to create the impression of more expansive harm, Plaintiffs also allege a host of secondary “harms” that supposedly might flow from lost mattress sales, including lost sales to the same customer and relatives, and “lost sales of related products,” like mattress foundations and sheets. Mot. at 20. Plaintiffs even make the far-fetched (and totally unsupported) claim that the Wave “is expected to have a detrimental impact on Serta Simmons’ ability to maintain” its research and development and other expenditures “at current levels.” *Id.* at 21.

Plaintiffs cannot prove any of these harms, of course, because they have not proven that the Wave takes sales from Serta Simmons in the first place. But, even if Plaintiffs had provided evidence that the Wave would take such mattress sales, Plaintiffs have not proven that a lost mattress sale gives rise to any other injuries for Plaintiffs, and the meager support offered by Plaintiffs—both documentary and testimonial—collapses under even an ounce of scrutiny.

***Lost business due to repeat customers and referrals:*** Plaintiffs claim that lost mattress sales will be “compounded” by losses of future mattress sales from repeat customers and referrals. Mot. at 20. Plaintiffs do not provide any evidence about *actual* sales to support that claim. Despite claiming that consumers will buy mattresses from the same brand again, Plaintiffs provide no evidence regarding how often consumers *actually have* purchased the same brand again. Instead, Plaintiffs rely entirely on consumer surveys, but not only do those surveys not support the proposition, they disprove it. The surveys show that most consumers are *not* “very likely” to purchase the same brand again. For instance, among recent buyers in 2016, only 27 percent of respondents reported that they would be “Very” likely to purchase the same brand

again. Morgan Decl. Ex B at 75. Among prospective buyers in 2016, only 17 percent reported that they were “Very likely” to purchase the same brand again. *Id.* at 147.<sup>22</sup>

***Lost sales of related products:*** Plaintiffs also claim that lost mattress sales result in lost sales of related products, but Mr. Morgan—the sole source for Plaintiffs’ claim—admitted that he does not “have any evidence of actual sales of accessories that were lost because of sales of the Casper Wave.” Morgan Dep. Tr. (Ex. U) at 92:11–14. Further belying Plaintiffs’ claim that lost sales of accessories could inflict “irreparable harm,” Mr. Morgan conceded that “sales of accessories” are not “a significant portion of SSB’s revenues.” *Id.* at 91:25–92:2.

Moreover, while Plaintiffs’ moving papers provide no evidence regarding *actual* sales of related products, they are highly misleading with regard to the exhibits they do provide. For example, Plaintiffs assert that they will lose sales of other products when they lose sales of mattresses because “mattress buyers also tend to purchase related products.” Mot. at 20; *see also* Morgan Decl. ¶¶ 25–27. But that implies—and is only relevant if—buyers purchase other products of the *same brand* (such as Serta) as part of the same transaction. The surveys on which Plaintiffs and Mr. Morgan rely, however, say no such thing.

Based on one survey, for example, Mr. Morgan states that “over 70% of recent mattress buyers purchased a foundation/box spring *with* their last mattress purchase, and 78% of prospective mattress buyers expect to purchase a flat foundation or electric, automatic or adjustable foundation *with* their mattress purchase.” Morgan Decl. ¶ 26 (emphases added). But, Mr. Morgan just makes this up: the questions in the surveys he cites never ask whether

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<sup>22</sup> Similarly, while Mr. Morgan cites a finding that 42 percent of prospective buyers think a recommendation from a friend is “important,” only 15 percent of recent buyers reported that such a recommendation was actually a reason for their purchase. Morgan Decl. ¶ 24.

consumers purchased foundations *with* their mattresses, let alone whether consumers buy foundations of the same brand as their mattresses.<sup>23</sup> Mr. Morgan cites a second survey that not only shows low rates (15–32 percent) of purchases of related products, but says *nothing* to indicate that those purchases were even of the same brand as their mattress. Morgan Decl. ¶ 27; Morgan Decl. Ex. A at 66.

Mr. Morgan cites only one source for the proposition that customers who purchase an iComfort mattress *might* purchase iComfort branded accessories, but that is a prospective survey from early 2015—nearly three years ago—asking if consumers would be likely to buy accessories *if they were offered* by their mattress manufacturer. Morgan Decl. Ex. C at 39. Serta *does* offer iComfort branded accessories on its website, yet for reasons known only to Plaintiffs, they chose *not* to provide actual sales data regarding the rate at which consumers who purchase an iComfort mattress purchase accessories with it.

***Inability to maintain operational expenditures:*** Finally, Plaintiffs assert that lost sales from sales of the Wave will force them to reduce their operational expenditures (such as for R&D). Mot. at 21. That claim is not only completely unsupported, but was directly refuted by Mr. Morgan. Plaintiffs’ brief cites to three paragraphs of Mr. Morgan’s declaration, not one of which says anything about any expected change in Plaintiffs’ expenditures. *Id.* (citing Morgan Decl. ¶¶ 30, 35, 38). And, at his deposition, Mr. Morgan rejected the idea that the Wave would have any significant impact on Plaintiffs’ expenditures. Morgan Dep. Tr. (Ex. U) at 91:11–24.

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<sup>23</sup> The questions ask only “What type of foundation/box spring did you buy for the mattress you bought most recently?” and “What type of foundation/box spring are you most likely to buy next?” Morgan Decl. Ex. B at 84, 153.

**3. Plaintiffs' alleged harms can be remedied by monetary damages and are not irreparable.**

A finding of irreparable harm requires that the alleged injury “cannot be remedied by an award of monetary damages.” *Wright v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, 568 F. App’x 53, 54 (2d Cir. 2014) (internal quotation marks omitted). When “monetary damages may provide adequate compensation, a preliminary injunction should not issue.” *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995).

Plaintiffs allege three potential “losses” to support their allegation that they will be irreparably harmed: lost sales, lost market share, and lost customers. Mot. at 19. As discussed, Plaintiffs have not proven that any of those losses have occurred or are likely to occur. It would not matter if they had, however, because not one of the alleged harms is irreparable. Indeed, the losses Plaintiffs allege (sales, market share, customers) are all classic examples of injuries that are compensable by money damages. Further, Plaintiffs’ motion also is conspicuously silent on a critical issue regarding irreparable harm: whether the patents have ever been licensed.

**Lost Sales:** Although Plaintiffs have failed to show that they will lose any sales to Casper, “[l]ost sales (without more) are presumed to be compensable through damages,” and “do not require injunctive relief.” *Automated Merch. Sys.*, 357 F. App’x at 301. The Federal Circuit has rejected the notion that lost sales demonstrate irreparable harm because otherwise there would be “irreparable harm to every manufacturer/patentee, regardless of circumstances.” *Abbott Labs. v. Andrx Pharm., Inc.*, 452 F.3d 1331, 1348 (Fed. Cir. 2006) (internal quotation marks omitted). Plaintiffs’ potential lost sales can be compensated by money damages just like in every other patent case.

**Lost market share and loss of customers:** Courts also routinely find that loss of market share and loss of customers are remediable by monetary damages. *See, e.g., ActiveVideo*, 694

F.3d at 1338 (“[L]oss [of customers] is certainly not irreparable. Straight-forward monetary harm of this type is not irreparable harm.”); *Altana Pharma AG v. Teva Pharm. USA, Inc.*, 566 F.3d 999, 1010–11 (Fed. Cir. 2009) (affirming district court’s findings that “price erosion, loss of market share, loss of profits, loss of research opportunities and possible layoffs” were “not irreparable”).<sup>24</sup>

The few cases relied upon by Plaintiffs do not support a different conclusion here. Plaintiffs’ reliance on *Grand River* is inapt because there the Second Circuit *affirmed* a finding that there was *no irreparable harm*. *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 63 (2d Cir. 2007). Although the court acknowledged that “loss of current or future market share *may* constitute irreparable harm” in some circumstances, the one case it cited that actually found lost market share to constitute irreparable harm (*Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*) shows just how narrow those circumstances are. *Id.* at 67. In *Novartis*, the products were the two primary competing antacids on the market (Maalox and Mylanta), which consumers buy again and again (to treat heartburn) from the same brand, and the sale of Mylanta “had already had a measurable effect on Maalox’s market share.” 290 F.3d 578, 596 (3d Cir. 2002). Not one of those circumstances is present here.

Moreover, Plaintiffs’ claim that the “long-term durability” of mattresses—*i.e.*, the fact that consumers purchase new mattresses infrequently—somehow converts lost sales into irreparable harm has no basis in law. *See* Mot. at 19. Plaintiffs rely on *Trebro Manufacturing, Inc. v. Firefly Equipment, LLC*, 748 F.3d 1159 (Fed. Cir. 2014), but there the patentee only made

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<sup>24</sup> *See also Am. Cyanamid Co. v. U.S. Surgical Corp.*, 833 F. Supp. 92, 122 (D. Conn. 1992) (“Lost market share, however, is not in the Court’s view irreparable harm. . . .”); *Caldwell Mfg. Co. N. Am., LLC v. Amesbury Grp., Inc.*, No. 11-CV-6183T, 2011 WL 3555833, at \*3 (W.D.N.Y. Aug. 11, 2011) (“[P]roof of lost market share and lost sales alone are insufficient to establish irreparable harm.” (internal quotation marks omitted)).

*eight* sales a year, and the loss of each was so significant as to force the patentee to lay off employees. *Id.* at 1164. In contrast, the Serta Simmons corporate conglomerate sells *millions* of mattresses annually. Morgan Dep. Tr. (Ex. U) at 86:6–25. There is no evidence that sales of the Wave would make a dent in Plaintiffs’ market share, let alone cause irreversible harm.

Plaintiffs also cite *Cordelia Lighting, Inc. v. Zhejiang Yankon Group Company, Ltd.*, but that case only shows how deficient Plaintiffs’ claim is here. In *Cordelia*, the sale of the accused product had already caused a significant (22 percent) price drop for the plaintiff’s competing product, and the industry was one in which it was difficult to raise prices again. Case No. EDCV 14-881 JGB (SPx), 2015 WL 12656241, at \*8 (C.D. Cal. Apr. 27, 2015). In addition, “in a single year after the introduction of the accused products, Cordelia ha[d] already lost approximately one-third of its market share.” *Id.* Those “sharp losses” were also “likely exacerbated by the fact that Cordelia and Yankon [were] the only two players” in the market, and because the defendant was a foreign entity, the plaintiff “would face significant difficulty in collecting damages even if it prevailed at trial.” *Id.* at 8–9. Again, not one of those circumstances is present here.

***Licensing of the Asserted Patents:*** As noted above, Plaintiffs’ complaint and motion are silent regarding whether Plaintiffs have licensed or tried to license the asserted patents. Licenses undermine a patentee’s assertion that money damages are inadequate compensation, because they show the patentee’s willingness to accept monetary compensation in lieu of exercising its right to exclude. *See ActiveVideo*, 694 F.3d at 1339–40 (in light of patentee’s past licensing, “no fact finder could reasonably conclude that [patentee] would be irreparably harmed by the payment of a royalty”). Mr. Morgan testified that he knew nothing about whether the patents may have been licensed. *See* Morgan Dep. Tr. (Ex. U) at 103:1–3. Casper repeatedly asked

Plaintiffs to provide information, explaining: “The extent to which any of the asserted patents may have been licensed is obviously relevant to the preliminary injunction motion, which is conspicuously silent on this issue.” 11/10/17 Email (Ex. W) at 1. To date, Plaintiffs have refused to answer this simple and critically relevant question. Dominguez Decl. ¶ 26.

**C. Plaintiffs fail to show a causal nexus between the patented technology and the alleged harm.**

Even if Plaintiffs could have shown evidence of irreparable harm due to sales of the Wave, that would not be enough. In a patent case, the patentee must prove that the alleged harms have a “causal nexus” to the alleged infringement—in other words, “there must be proof that *the infringement causes* the harm.” *Apple Inc. v. Samsung Elecs. Co. (Apple IV)*, 809 F.3d 633, 639 (Fed. Cir. 2015) (emphasis added). Importantly, showing that “the infringement causes the harm” is different from showing that *sales of an infringing product* cause harm. For example, if a plaintiff accuses a car that infringes because it employs a patented radiator hose, but there is no evidence that customers purchase the car *because of* the radiator hose, there is no causal nexus between the alleged infringement and the harm—*i.e.*, the infringement did not cause the harm—even though sales of the infringing car may well harm the plaintiff.

Thus, Plaintiffs’ assertion that there is “a causal nexus between Casper’s infringement—*e.g.*, sale and manufacturing of the Casper Wave mattress—and the irreparable harm” gets the standard entirely wrong. Mot at 22. The question is *not* whether the “sale and manufacturing of the Casper Wave mattress” causes Plaintiffs harm. Instead, Plaintiffs must “show that the patented features impact consumers’ decisions to purchase the accused devices.” *Apple IV*, 809 F.3d at 642. That is because sales “lost to an infringing product cannot irreparably harm a patentee if consumers buy that product for reasons other than the patented feature.” *Apple, Inc. v. Samsung Elecs. Co. (Apple I)*, 678 F.3d 1314, 1324 (Fed. Cir. 2012).

Here, Plaintiffs must show more than that consumers buy the Wave and that it infringes; Plaintiffs must show that consumers buy the Wave because of the accused features and manufacturing steps. *Id.* Plaintiffs have no evidence that consumers are even aware of Dreamwell’s patented features, much less that those features have any impact on consumer purchasing decisions. To the contrary, as explained both above and below, Casper’s success is largely driven by factors completely unrelated to the Wave’s polymer network. Plaintiffs’ failure to show a causal nexus between their alleged harm and Casper’s alleged infringement is yet another independent fatal deficiency in their motion. *See Apple IV*, 809 F.3d at 642.<sup>25</sup>

**1. Consumers are not driven by alleged inventions in the ’763 patent.**

The ’763 patent requires that one of the top or bottom surfaces of the mattress includes channels with inserts affixed within the channels. There is no dispute that channels with inserts in a mattress was well known long before Dreamwell applied for its patents. *See* Kuchel Decl. ¶¶ 89–127. Thus, to determine whether there is a causal nexus between the patented feature and the harms Plaintiffs have alleged, “the salient question” is not whether channels and inserts *generally* are important, but rather “whether any customers want[] [*Dreamwell’s*] way” of implementing channels and inserts. *Integra Lifesciences Corp. v. Hyperbranch Med. Tech., Inc.*, No. CV 15-819-LPS-CJB, 2016 WL 4770244, at \*21 (D. Del. Aug. 12, 2016) (discussing

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<sup>25</sup> Plaintiffs’ failure to show that the patented inventions drive consumer demand is not surprising considering that Plaintiffs do not claim that any Serta Simmons entity uses the patents. If Plaintiffs believed that consumers cared about the patented technology—and that it would drive sales—they would undoubtedly incorporate it into their own products, but there is no suggestion that they do. Morgan Dep. Tr. (Ex. U) at 41:10–42:4.

*Marine Travelift, Inc. v. ASCOM SpA*, No. 14-C-443, 2014 WL 4215925, at \*16–17 (E.D. Wis. Aug. 25, 2014)) (emphasis added).<sup>26</sup>

Plaintiffs provide no evidence regarding the “salient question” of whether customers demand—or are even aware of—Dreamwell’s approach to channels and inserts, as claimed in the ’763 patent. *Id.* Mr. Morgan admitted that he has no “evidence that the specific technology has driven purchasing behavior,” “that consumers are aware of the patented technology independent of what Casper says about the Casper Wave,” or that anyone has even considered “the impact of patented technology on consumer purchasing decisions.” Morgan Dep. Tr. (Ex. U) at 95:8–18, 95:19–96:7, 97:4–14. There is “not even a hint of testimony or evidence that any customer view[s]” Dreamwell’s approach to channels and inserts “*rather than generic*” channels and inserts “as even a factor in the purchasing decision.” *Marine Travelift*, 2014 WL 4215925, at \*17 (emphasis added).

While there is no evidence at all that the Wave’s polymer network drives sales, there is evidence that Casper’s sales are driven by factors completely unrelated to the polymer network. Indeed, Mr. Morgan conceded that consumers are drawn to Casper because it is “seen as new and different,” and that Serta Simmons’ own research showed that the “primary” reason consumers purchase Casper is *convenience*—not a polymer network. Morgan Dep. Tr. (Ex. U) at 139:4–9, 141:4–8. Further, Plaintiffs’ own evidence proves that a host of factors unrelated to the patented technology (and unrelated to mattress technology at all) drive sales of mattresses generally.<sup>27</sup>

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<sup>26</sup> See also *Marine Travelift*, 2014 WL 4215925, at \*17 (no causal nexus where no evidence customers viewed plaintiff’s patented implementation of carousel steering as “different from carousel technology more generally” and plaintiff “wrongly equated consumer demand for carousel technology with demand for its specific method of providing carousel technology”).

<sup>27</sup> See, e.g., Morgan Decl. (D.I. 10-24) ¶ 7; Morgan Dep. Tr. (Ex. U) at 59:19-66:20 (reciting a laundry list of factors that have nothing to do with the patented technology); Morgan Decl. Ex. A

The *only* argument Plaintiffs make to suggest the polymer network drives sales is the (false) suggestion that Casper “prominently relies on Serta Simmons’ patented channel cut technology” in its marketing materials. Mot. at 21–22. But, Mr. Morgan contradicted Plaintiffs, conceding that he is “not aware . . . of any evidence that demand for the Casper Wave is driven by the polymer network as advertised by Casper.” Morgan Dep. Tr. (Ex. U) at 97:17–22. Moreover, Casper’s public statements about the Wave refer as much (or more) to the many features that have nothing to do with the channels and inserts Plaintiffs accuse of infringement.<sup>28</sup> If these non-infringing features drive sales of the Wave, those sales cannot be said to be caused by the alleged infringement. Because Plaintiffs’ evidence fails to establish that consumers are driven by the polymer network, and in fact establishes that Casper’s success is driven by factors completely unrelated to the polymer network, Plaintiffs cannot show that there is any nexus between any alleged infringement and any alleged harm.

**2. Consumers are not driven by alleged inventions in the ’173 and ’935 patents.**

Plaintiffs do not even attempt to establish the requisite causal nexus with respect to two of the three patents at issue here: the ’173 and ’935 patents. These patents claim particular steps for a method of manufacturing (*e.g.*, “assembling” rectangular foam pieces to form a mattress that includes a channel, and then “affixing” an insert “into the channel). Plaintiffs must thus show a causal nexus not to any feature of the end product, but to the particular *method of*

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(D.I. 10-25) at 59–61 (ranking customer service, salespeople, retail environment, price, variety of options, and reputation as top purchase drivers in the mattress market).

<sup>28</sup> Casper touts many non-accused features, including the hollow “precision contouring” under the shoulders that Casper explains “relieves pressure and aids in proper spine alignment,” the “dreamy new top layer” that “melts away” as the user settles in, and the use of “open-cell foams to divert heat away.” See Casper Wave Website (Ex. HH) at 3, 6.

*manufacturing the product—i.e.*, that customers buy the Wave because it is allegedly manufactured in the way claimed in the '173 and '935 patents.

Plaintiffs make no attempt to show a causal nexus for these patents. Nor could they: there is no plausible claim that consumers are aware of—much less driven by—the particular way a mattress is manufactured (as opposed to features it may have). Mr. Morgan admitted that he has no evidence at all that “consumers make purchasing decisions at least, in part, on the way that channels and inserts are manufactured.” Morgan Dep. Tr. (Ex. U) at 96:20–97:3.

\* \* \*

The deficiencies in Plaintiffs’ claim of irreparable harm are almost too numerous to catalog. Quite apart from the fact that Plaintiffs impermissibly rely on purely speculative harm to non-parties instead of proven likely harm to themselves, Plaintiffs provide no evidence that any harm cannot be remedied by money damages or is even caused by the alleged infringement.

### **III. The Balance of Equities Weighs Strongly Against a Preliminary Injunction.**

Plaintiffs assert that the effect of an injunction on Casper will be “minimal,” because “Casper has only recently introduced the Casper Wave” and “ceasing sales and manufacturing” of the Casper Wave—a mattress that has already been on the market for three months—will somehow “maintain the status quo.” Mot. at 22–23. Plaintiffs have it backwards: Serta Simmons, the dominant player in a universe of more than a thousand competitors, stands to suffer far less from sales of the Wave than Casper does from a preliminary injunction.

In considering the balance of hardships, a court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24. In balancing the hardships to determine whether a preliminary injunction should issue, courts consider “the parties’ sizes, products, and revenue sources.” *i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 862 (Fed. Cir. 2010), *aff’d*, 564 U.S. 91 (2011).

Serta Simmons is a massive conglomerate with countless product lines. Morgan Dep. Tr. (Ex. U) at 51:7–52:1, 115:3–14, 134:21–135:14. In 2016, the Serta Simmons-related brands had an estimated market share of nearly 40 percent, and annual revenues of around \$3.5 billion. *Id.* at 79:8–12, 80:18–25. By contrast, Casper’s revenues in the same period were approximately \$200 million—roughly 5% of Serta Simmons’ revenues and a tiny fraction of the overall market. Compl. ¶ 22. And while nearly all consumers are familiar with Serta Simmons, only a tiny minority have ever even *heard* of Casper yet, let alone purchased a Casper mattress. Morgan Decl. Ex. B at 25–26 (consumer awareness for Serta at 87%, Simmons at 81%, and Casper at 7%).

Plaintiffs’ assertion that allowing the Wave to remain on the market will “place[] substantial hardship” on Serta Simmons and “undermin[e] Serta Simmons’ position” in the marketplace (Mot. at 22–23) is simply not credible. Even assuming Serta were to suffer a small loss of sales and market share as a result of competition with the Casper Wave while this case proceeds (an assumption Serta has not come close to proving), *and* assuming that such losses were attributable to the alleged infringement (another unproven assumption), those losses would be but a blip for the Serta Simmons conglomerate, who sells millions of mattresses, annually. Morgan Dep. Tr. (Ex. U) at 86:6–25.

For Casper, a relatively new startup enterprise wading into a legacy industry, the threat is existential. As the Federal Circuit has recognized, the “hardship on a preliminarily enjoined manufacturer who must withdraw its product from the market before trial can be devastating.” *Ill. Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 683 (Fed. Cir. 1990). That is especially so here given that Casper is a small startup and the Wave is one of only three mattresses it sells. Just three years old, Casper does not have the nearly 100-year-old reputation enjoyed by Serta

Simmons. Serta Website (Ex. JJ) at 1–2. An injunction against the Wave, Casper’s most significant undertaking since the company launched, and the highest-priced mattress of only three total mattresses, would likely cause severe financial hardship to the company. An injunction also would likely irreparably damage Casper’s reputation and thus its commercial relationships and access to capital.

Plaintiffs know all of this, of course. Disrupting Casper’s business, its reputation, and its future plans is the reason Plaintiffs filed this meritless lawsuit and this bogus motion in the first place. It is certainly no coincidence, for example, that Plaintiffs filed this lawsuit just as Casper is attracting significant investor interest, and has announced its consideration of an IPO. *New York Times* at 1. The balance of hardships strongly weighs against an injunction.

#### **IV. The Public Interest Weighs Strongly Against a Preliminary Injunction.**

A plaintiff seeking a preliminary injunction must also establish that an injunction is in the public interest. *Winter*, 555 U.S. at 20. The entirety of Plaintiffs’ public interest argument boils down to the basic point that “the public interest is served by enforcing valid patent rights and encouraging innovation.” *Mot.* at 23. But that interest, present in *every* patent case, does not justify a preliminary injunction. *Cf. Reebok Int’l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1558–59 (Fed. Cir. 1994). Moreover, that public interest can be served by awarding money damages, if the asserted patents were infringed and valid. *See, e.g., SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc.*, No. 99 Civ. 9214 (DCo.), 1999 WL 1243894, at \*6 (S.D.N.Y. Dec. 22, 1999), *aff’d*, 211 F.3d 21 (2d Cir. 2000) (explaining that “the public’s interest in the protection of copyrights can be vindicated to some degree by an award of money damages,” and dissolving preliminary injunction even though “money damages [were] not likely to fully compensate SmithKline for its injuries”).

Further, Plaintiffs are incorrect that “there is no critical public interest that would be injured by the grant of preliminary relief.” Mot. at 23. The public interest is served by market competition. *Canon, Inc. v. GCC Int’l Ltd.*, 263 F. App’x 57, 62 (Fed. Cir. 2008) (explaining that the “public benefits from lower prices resulting from free market competition”). Indeed, this Court has held that in considering whether to issue a preliminary injunction, “any reduction in competition must be considered against the public interest.” *Dellwood Foods, Inc. v. Kraftco Corp.*, 420 F. Supp. 424, 428 (S.D.N.Y. 1976). Here, Serta Simmons and Tempur-Pedic already hold a duopoly in the mattress manufacturer market. Fortune (Ex. AA) at 2. And with nearly 40 percent of the market, Serta Simmons “has the largest market share of any bedding producer in the United States.” Morgan Dep. Tr. (Ex. U) at 76:21–23, 79:8–12. Competition from Casper benefits the public interest not only by providing market competition, but by challenging the very way these incumbents do business—improving quality, options, and customer service, all to the benefit of consumers.

Thus, enjoining Casper’s Wave mattress would reduce competition, to the public’s detriment. The “powerfully anti-competitive repercussions which [a preliminary injunction] can bring about in a patent infringement litigation setting is aptly illustrated in this case, in which [Plaintiffs] seek[] to invoke the court’s power, prior to a determination on the merits, to preclude a potential direct competitor” from offering a new product line, “thereby permitting [Serta Simmons] to solidify its already dominant position.” *Pass & Seymour, Inc. v. Hubbell Inc.*, 532 F. Supp. 2d 418, 431–32 (N.D.N.Y. 2007).

In any event, the very premise of Plaintiffs’ public interest claim is wrong: while the public interest may be “served by enforcing valid patent rights,” Mot. at 23, that is not what Plaintiffs are doing here. To the contrary, Plaintiffs are asserting patents against a product they

know does not infringe, patents that they also know are invalid. The public interest is certainly *not* served by allowing competitors to abuse the coercive power of the courts, through assertion of invalid and unenforceable patents that also are amenable to no reasonable infringement theory. *Abbott Labs*, 452 F.3d at 1348 (given the lack of likelihood of success on the merits, the “public interest is best served by denying the preliminary injunction.”). The public interest would be affirmatively disserved by allowing market incumbents to abuse the legal system—and misuse the monopoly power of their patents—to bludgeon upstart competitors.

### CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for a preliminary injunction should be denied.

Respectfully submitted,

Dated: November 17, 2017

/s/Katherine Q. Dominguez

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**CERTIFICATE OF SERVICE**

I certify that the foregoing document was electronically filed with the Clerk of the Court on November 30, 2017, via the Court's CM/ECF system and has been served on all counsel of record who have consented to electronic service.

Dated: November 30, 2017

/s/Katherine Q. Dominguez

Katherine Q. Dominguez