

**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. 17-cv-7468-AKH

FILED UNDER SEAL

**PLAINTIFFS' REPLY IN FURTHER SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

- I. Introduction..... 1
- II. Serta Simmons Will Likely Establish Infringement 2
 - A. Casper Likely Infringes the Asserted Claims of the ’763 Patent..... 3
 - 1. The “High Resiliency Foam” Layer of the Casper Wave Mattress Is a “Body of Foam” 3
 - 2. The “Polymer Network” Is a Plurality of “Inserts” 8
 - B. Casper Likely Infringes the Asserted Claims of the ’173 and ’935 Patents 10
 - 1. Casper Practices the “Assembling” Limitations 10
 - 2. The Claimed Methods Do Not Prescribe an Order of Operations 12
 - 3. Casper “Affixes” “Inserts” Within Channels..... 13
 - 4. The Inserts Do Not Entirely Fill the Channels..... 13
- III. Serta Simmons’ Infringement Claims Will Likely Withstand Casper’s Challenges To the Validity and Enforceability of the Asserted Patents 13
 - A. Casper Fails to Assert Prior Art that Raises a Substantial Question of the Asserted Patents’ Invalidity, and Serta Simmons Demonstrates that Casper’s Assertions of Invalidity Lack Substantial Merit..... 14
 - 1. The Asserted Claims of the ’763 Patent Are Not Vulnerable..... 15
 - a. The Asserted Claims of the ’763 Patent are Not Vulnerable in View of Kennaway15
 - b. The Asserted Claims of the ’763 Patent are Not Vulnerable in View of ’GB 433.....19
 - c. The Asserted Claims of the ’763 Patent are Not Vulnerable in View of Regan20
 - d. The Asserted Claims of the ’763 Patent are Not Vulnerable in View of Antinori21

- 2. Casper Fails to Demonstrate that the Cited Prior Art Invalidates the '173 and '935 Patents 23
 - a. The Asserted Claims of the '173 and '935 Patents are Not Vulnerable in View of Scheuch23
 - b. The Asserted Claims of the '173 and '935 Patents are Not Vulnerable in View of Regan24
 - c. The Asserted Claims of the '173 and '935 Patents are Not Vulnerable in View of Antinori24
- B. Casper Fails to Proffer Sufficient Evidence to Support Its Assertion that Serta Simmons Committed Inequitable Conduct Before the Patent Office..... 25
- IV. Serta Simmons Will Be Irreparably Harmed Absent a Preliminary Injunction..... 26
 - A. Serta Simmons Has Identified Sufficient Evidence of Harm 26
 - B. Serta Simmons Has Shown that Money Damages Are Insufficient 32
 - C. Serta Simmons Has Demonstrated a Causal Nexus Between the Patented Technology and the Harm 34
- V. The Balance of Equities Weighs Strongly in favor of Serta Simmons..... 36
- VI. A Preliminary Injunction is in the Public Interest 38
- VII. Conclusion 40

TABLE OF AUTHORITIES

Cases	Pages
<i>Ist Media, LLC v. Electronic Arts, Inc.</i> , 694 F.3d 1367 (2012).....	26
<i>Acumed LLC v. Stryker Corp.</i> , 483 F.3d 800 (Fed. Cir. 2007).....	5, 11
<i>Apple Inc. v. Samsung Electronics Co., Ltd.</i> , 809 F.3d 633 (2015).....	30, 31,34,36, 39
<i>Atlanta Pharma AG v. Teva Pharms. USA, Inc.</i> , 566 F.3d 999 (Fed. Cir. 2009).....	15
<i>Aventis Pharma SA v. Hospira, Inc.</i> , 675 F.3d 1324 (Fed. Cir. 2012)	5
<i>Azure Networks, LLC v. CSR PLC</i> , 771 F.3d 1336 (Fed. Cir. 2014).....	5
<i>Cadence Pharms., Inc. v. Exela PharmSci Inc.</i> , 780 F.3d 1364 (Fed. Cir. 2015).....	15
<i>CCS Fitness, Inc. v. Brunswick Corp.</i> , 288 F.3d 1359 (Fed. Cir. 2002).....	4
<i>Douglas Dynamics, LLC v. Buyers Products Co.</i> , 717 F.3d 1336 (2013).....	31, 32, 33, 34, 38
<i>E-Pass Techs., Inc. v. 3Com Corp.</i> , 473 F.3d 1213 (Fed. Cir. 2007).....	12
<i>Empresa Cubana del Tabaco v. Culbro Corp.</i> , No. 97 Civ. 8399 (RWS), 2004 WL 925615 (S.D.N.Y. Apr. 30, 2004).....	33
<i>Erick Int’l Corp. v. Vutec Corp.</i> , 516 F.3d 1350 (Fed. Cir. 2008).....	15

Exergen Corp. v. Wal-Mart Stores, Inc.,
575 F.3d 1312 (2009).....25

Hoffman-LaRoche, Inc. v. Cobalt Pharma. Inc.,
No. 07-cv-4539, 2010 WL 4687839 (D.N.J. Nov. 10, 2010)37

i4i Ltd. Partnership v. Microsoft Corp.,
598 F.3d 831 (2010).....29

Interactive Gift Exp., Inc. v. Compuserve Inc.,
256 F.3d 1323 (Fed. Cir. 2001).....12

Kaneka Corp. v. Xiamen Kingdomway Grp. Co.,
790 F.3d 1298 (Fed. Cir. 2015).....12

Loral Fairchild Corp v. Sony Corp.,
181 F.3d 1313 (Fed. Cir. 1999).....12

Metalcraft of Mayville, Inc. v. The Toro Company,
848 F.3d 1358 (2017).....31, 37

Metalcraft of Mayville,
No. 16-C-544, 2016 WL 4076894 (E.D. Wis. Aug. 1, 2016), *aff'd sub nom. Metalcraft of
Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358 (Fed. Cir. 2017)37

Microsoft Corp. v. i4i Ltd. P'ship,
546 U.S. 91 (2011).....14

New Eng. Branding Co. v. A.W. Chesterton Co.,
970 F.2d 878 (Fed. Cir. 1992).....15

Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck,
90 F.3d 578 (2002).....32

Omega Eng'g, Inc. v. Raytek Corp.,
334 F.3d 1314 (Fed. Cir. 2003).....8

QBAS Co. v. C Walters Intercoastal Corp.,
 No. SACV 10-405 AG (MLGx), 2010 WL 7785955 (C.D. Cal. Dec. 16, 2010)..32, 38, 39

Robert Bosch LLC v. Pylon Mfg. Corp.,
 659 F.3d 1142 (2011).....29, 33, 37

Scripps Clinic & Research Found. v. Genetech, Inc.,
 927 F.2d 1565 (Fed. Cir. 1991).....25

Stiftung v. Renishaw PLC,
 945 F.2d 1173 (Fed. Cir. 1991).....5

Stein Indus., Inc. v. Jarco Indus., Inc.,
 934 F. Supp. 55 (E.D.N.Y. 1996)33

Summit 6, LLC v. Samsung Elecs. Co., Ltd.,
 802 F.3d 1283 (Fed. Cir. 2015).....4

Therasense, Inc. v. Becton, Dickinson & Co.,
 649 F.3d 1276 (Fed. Cir. 2011).....25

Veeco Instruments Inc. v. SGL Carbon, LLC,
 No. 17-CV-2217 (PKC), 2017 WL 5054711(E.D.N.Y. Nov. 2, 2017)34, 36

Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.,
 200 F.3d 795 (Fed. Cir. 2000).....5

Windsurfing Int’l, Inc. v. AMF, Inc.,
 782 F.2d 995 (Fed. Cir. 1986).....37

Statutes

35 U.S.C. § 282.....15

Pursuant to the Court's October 16, 2017 Order Setting Motion Schedule (D.I. 32) and Local Rule 7.1(b), Plaintiffs Serta Simmons Bedding, LLC ("SSB") and Dreamwell, Ltd. ("Dreamwell") (collectively, "Serta Simmons") hereby submit this reply memorandum of law in support of their motion to preliminarily enjoin Defendant Casper Sleep Inc. ("Casper") from making, marketing, offering for sale, or selling the infringing Casper Wave mattress.

II. INTRODUCTION

On August 15, 2017, Casper announced the Casper Wave mattress, which it touted as "the first mattress to thoughtfully complement your body's natural geometry." A major selling point, according to Casper's marketing: "A reinforced polymer network complements the curves of your back and hips for firmer support where you need it most."

Although Serta Simmons had previously welcomed (and continues to welcome) healthy competition from Casper, it quickly became apparent that Casper was no longer competing fairly. Instead, Casper was claiming Serta Simmons' patented technology as its own and trying to leverage that technology to wrongfully assume the position of an "innovator" in the highly-competitive mattress industry.

As explained in Serta Simmons' Brief¹ and below, Casper's marketing and sale of the Casper Wave mattress is causing and, if not enjoined, will continue to cause Serta Simmons irreparable harm in the form of at least loss of customers, loss of access to future customers, loss of market perception, and loss of market share. But even if Casper is enjoined from marketing and selling the Casper Wave mattress, Casper will likely continue to achieve tremendous success with its flagship mattress product, the Casper, which yielded approximately \$200 million in

¹ "Brief" refers to Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction (D.I. 10-1).

revenues in 2016 and is projected to nearly double those revenues in 2017.

Preliminary injunctive relief is both appropriate and necessary.

III. SERTA SIMMONS WILL LIKELY ESTABLISH INFRINGEMENT

In cases involving multiple claims, a patentee-plaintiff need only demonstrate the likely infringement of one valid claim. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001). Serta Simmons has done much more. As demonstrated in Serta Simmons' Brief, the Casper Wave likely satisfies or is manufactured by a process that satisfies at least claims 1, 4, 6, and 7 of the '763 Patent², claims 5 and 6 of the '173 Patent³, and claims 10 and 12 of the '935 Patent⁴ (collectively, "the Asserted Claims"). *See* Brief at 7-18.

Unsurprisingly, Casper argues that it does not infringe the Asserted Claims. But Casper only places a handful of claim limitations in dispute. With respect to the '763 Patent, Casper argues that (a) the Casper Wave does not have channels on the surface of the mattress and (b) the Casper Wave does not have "inserts" "affixed" within the channels. *Opp.*⁵ at 12, 23. With respect to the '173 and '935 Patents, Casper further argues that, in manufacturing the Casper Wave, Casper (a) does not form channels by assembling rectangular foam pieces, (b) does not perform the claimed steps in the required order, (c) does not "affix" any "inserts" in the accused channels, and (d) uses a polymer network that "fills the accused channels to the surface." *See id.* at 24, 32, 35, 36. Each of these arguments fails, and the Court should find that Serta Simmons will likely establish that Casper infringes each of the Asserted Claims.

² "'763 Patent" refers to U.S. Patent No. 7,424,763 (D.I. 10-3).

³ "'173 Patent" refers to U.S. Patent No. 7,036,173 (D.I. 10-4).

⁴ "'935 Patent" refers to U.S. Patent No. 8,918,935 (D.I. 10-5).

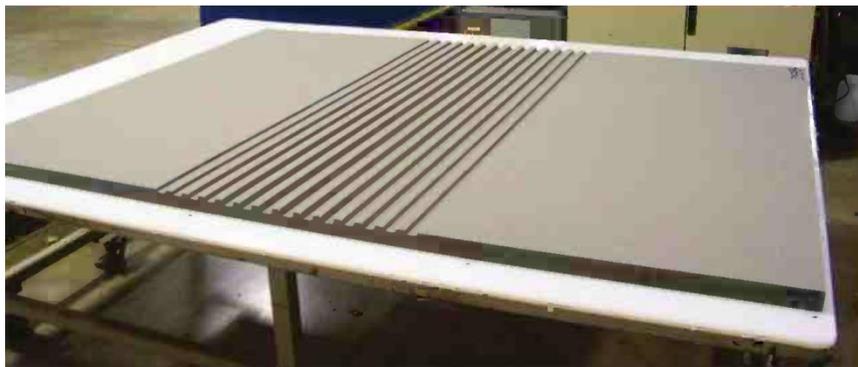
⁵ "Opp." refers to Defendant Casper Sleep Inc.'s Opposition to Plaintiffs' Motion for a Preliminary Injunction (D.I. 43).

A. Casper Likely Infringes the Asserted Claims of the '763 Patent

1. The “High Resiliency Foam” Layer of the Casper Wave Mattress Is a “Body of Foam”

As demonstrated in Serta Simmons’ Brief, the Casper Wave mattress comprises a high resiliency foam layer. *See* Brief at 5, 8 (discussing element 1.1a). Casper agrees. *See* Holm Decl.⁶ ¶ 6 (“The fourth layer of foam is a high-resiliency polyurethane foam”); Kuchel Decl.⁷ ¶¶ 28-30 (discussing the “High Resiliency Foam layer”); Opp. at 4 (“As pictured below, the Wave consists of five foam layers. Relevant here, one of the layers in the center of the Wave (the “high resiliency” foam layer) . . .”).

As further demonstrated in Serta Simmons’ Brief, the high resiliency foam layer of the Casper Wave mattress is “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.” *See* Brief at 8-9 (discussing elements 1.1a–1.1c). Casper’s declarant, David Holm, appears to agree, providing the following image of what he describes as “a contour-cut high resiliency foam layer,” Holm Decl. ¶ 8:



⁶ “Holm Decl.” refers to the Declaration of David Holm (D.I. 45).

⁷ “Kuchel Decl.” refers to Declaration of Bernhard Kuchel in Support of Defendant Casper Sleep Inc.’s Opposition to Plaintiffs’ Motion for Preliminary Injunction (D.I. 46).

Even a casual review of this image confirms that the “contour-cut high resiliency foam layer” is “a body made of foam” as those words are ordinarily understood.⁸ See *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002) (“Generally speaking, we indulge a ‘heavy presumption’ that a claim term carries its ordinary and customary meaning.”).

Nonetheless, Casper and its expert argue that the high resiliency foam layer somehow cannot be the claimed “body made of foam.” Although Casper does not offer any proposed construction for the term “body,” Casper argues that “[a]ll the asserted claims have the same requirement of channels on ‘at least one of the top and bottom surfaces’ of *the mattress body.*” Opp. at 13 (emphasis added). In doing so, Casper appears to be conflating “a body made of foam” with the entirety of the claimed “mattress.” Casper is incorrect.

First, as Mr. Clift noted in his deposition, the term “body” is not a specialized term of art in the mattress industry. See Clift Depo.⁹ at 100:20-101:3. Casper does not argue otherwise. To the contrary, Casper’s declarant Mr. Holm uses the same language put forward by Mr. Clift. See Holm Decl. ¶¶ 13-16 (referring to “layers” of foam which are assembled into a “core” to which a fire retardant sock and knit cover are added to complete the “mattress.”). Accordingly, the claim language will generally be interpreted as it is understood in ordinary usage. See *Summit 6, LLC v. Samsung Elecs. Co., Ltd.*, 802 F.3d 1283, 1291 (Fed. Cir. 2015) (affirming district court because it was not error to construe claim term that was “used in common parlance and has no special meaning in the art”).

⁸ Webster’s Third New International Dictionary defines “body” as “a mass or portion of matter, especially distinct in its totality from other masses.” See Second Declaration of Paul M. Schoenhard in Support of Plaintiffs’ Reply in Further Support of Plaintiffs’ Motion for Preliminary Injunction (“Schoenhard 2d Decl.”), Exhibit (“Ex.”) 27 at 6. Schoenhard 2d Decl. and corresponding exhibits are filed concurrently herewith.

⁹ “Clift Depo.” refers to the transcript of the November 2, 2017 Deposition of Matthew Clift, excerpts of which are filed as Schoenhard 2d Decl., Ex. 22.

Second, the patentee did not specially define “body” in the specification of the ’763 Patent. *See Azure Networks, LLC v. CSR PLC*, 771 F.3d 1336, 1349 (Fed. Cir. 2014) (“For a patentee to act as his own lexicographer and give a term something other than its well-established meaning, he must clearly set forth a definition of the disputed term. The lexicography must appear with reasonable clarity, deliberateness, and precision sufficient to narrow the definition of the claim term in the manner urged.” (internal quotation marks and citations omitted)). Accordingly, “body” should be understood in accordance with its ordinary and customary meaning. *See Aventis Pharma SA v. Hospira, Inc.*, 675 F.3d 1324, 1329 (Fed. Cir. 2012).

Third, the language of claim 1 of the ’763 Patent itself requires that the claimed “mattress” “compris[es]”¹⁰ more than just “a body made of foam.” Specifically, the claim requires that the claimed “mattress” further “compris[es]” “a plurality of inserts.” ’763 Patent, claim 1. And various dependent claims add that the claimed mattress may also comprise, *e.g.*, “a material that covers at least one of the channels, the material securing at least one of the inserts within one of the channels,” *id.*, claim 4; and “a mattress cover surrounding the mattress,” *id.*, claim 5.¹¹ Accordingly, the claim terms “mattress” and “body” are necessarily not the same; the claimed mattress comprises more than the claimed body.

¹⁰ The transition “comprising” is generally understood in patent law to signify that the claims do not exclude the presence in the accused apparatus or method of factors in addition to those explicitly recited. *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 811 (Fed. Cir. 2000) (explaining that a claim “which uses the term ‘comprising’ is an ‘open’ claim which will read on devices which add additional elements” (citing *Stiftung v. Renishaw PLC*, 945 F.2d 1173, 1178 (Fed. Cir. 1991))).

¹¹ Claim 4 is a dependent claim, which depends from independent claim 1. Accordingly, claim 1 is presumed to have a broader scope than claim 4. *See, e.g., Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 806 (Fed. Cir. 2007).

Fourth, consistent with the claim language, the specification of the '763 Patent contemplates that “body” may refer to a single, homogenous foam layer or may refer to a composition of multiple layers of various types of foam. *Id.* at col. 2:26-33; *see also* Clift Depo. at 102:11-103:3 (“So, again I looked at a body as being a—maybe it’s because I looked at the first patent first, but it’s a rectangular—3-D rectangular block of foam. That’s how I looked at it. And that could—as I went further, it could mean it’s a—it’s a rectangular block that’s one mattress that’s all one big block, or it could be the—or the stack of those blocks or it could be the individual blocks”). Moreover, the specification provides that additional foam layers may be added to the mattress in addition to the “body” in which the claimed channels are formed. *See* '763 Patent at col. 3:42–57 (“ . . . the insert **20** may be [. . .] held in the channel **19** [. . .] by a layer of additional material which might be added on top of the channel surface and cover the entire channel surface [. . .] . Such added material on the channel surface could be foam (identical to, or differing in mechanical characteristics from, the material of which the body **12** is made) [. . .] .”); *see also* Clift Depo. at 104:9-18.

Casper, however, asserts that the passage at Column 2, lines 26-33 of the '763 Patent (quoted above) means that “if the mattress is made up of multiple layers, the ‘body’ refers to all of the layers collectively, not any single layer.” Opp. at 19. But Casper’s conclusion is a non sequitur. That five layers of foam—once adhered together—may collectively be considered “a body made of foam,” does not exclude that each such layer of foam may also individually be considered “a body made of foam.” Indeed, with reference to Figure 8 of the '935 Patent (shown below), Casper’s expert agrees that “the existence of foam layer 44 in Figure 8 of the '935 patent does not preclude channel 19 from being understood as extending into the body from the top

surface 14 of the body.” Kuchel Depo.¹² at 53:23-54:3; *see also generally id.* at 52:11-54:10 (providing context).

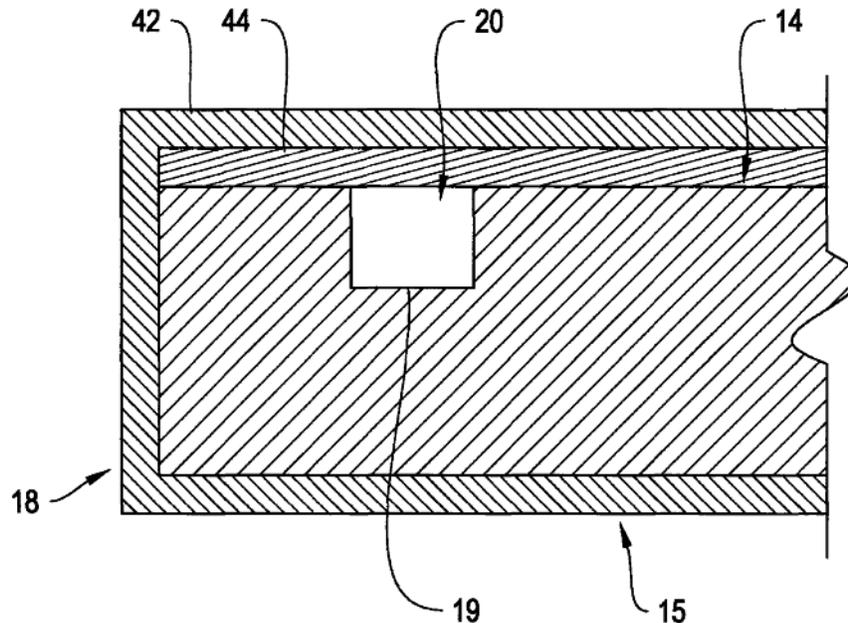


Fig. 8

Finally, the prosecution history does not limit the claims to embodiments in which the channels are in the top or bottom surface of the overall mattress, as Casper argues. *Cf. Opp.* at 19-23. During prosecution of the '763 Patent, the applicant distinguished an asserted prior art reference—Hoffman¹³—from the claimed invention on the grounds that the recesses disclosed in Hoffman do not “extend perpendicularly” from top or bottom surfaces and the inserts of Hoffman are not “affixed” within these top and/or bottom surface channels. *Id.* at 21-22 (citing August 7, 2006 Office Action from the prosecution file of U.S. Patent Appl. No. 11/415,815

¹² “Kuchel Depo.” refers to the transcript of the November 22, 2017 Deposition of Bernhard Kuchel, excerpts of which are filed as Schoenhard 2d Decl., Ex. 23.

¹³ “Hoffman” refers to U.S. Patent No. 6,061,856 (D.I. 44-8).

(D.I. 44-8) at 4-5; November 13, 2006 Amendment from the prosecution file of U.S. Patent Appl. No. 11/415,816 (D.I. 44-12)). While Applicant described Hoffman by reference to whether the overall assembly of Hoffman had channels in its top or bottom surface, this mere description of the prior art did not serve as the basis for distinguishing Hoffman and cannot now serve to limit the plain language of the claims. *See Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003).

2. The “Polymer Network” Is a Plurality of “Inserts”

As demonstrated in Serta Simmons’ Brief, the Casper Wave mattress comprises “a plurality of inserts, each insert having a mechanical property different from the mechanical characteristic of the foam and affixed within one of the plurality of channels, each insert reinforcing the body.” *See* Brief at 9 (discussing elements 1.2a-1.2d). Casper’s declarant, Mr. Holm, provides the following picture and explains that “[a]fter the foam layer has been contour-cut, a hot, liquid polymer gel compound is added,” Holm Decl. ¶¶ 9:



Even a casual review of this image confirms that the channels in the high resiliency foam layer each contain three gel polymer “inserts.”

Nonetheless, Casper argues that the “polymer network” in the Casper Wave mattress does not satisfy the “inserts” or “affixed” limitations of Claim 1 of the ’763 Patent. Specifically, according to Casper, the claimed “inserts” must be “separate, preexisting constructions” from the rest of the mattress, and the word “affixed” is limited to the three examples specifically identified in the ’763 Patent. But Casper’s claim interpretation arguments are unavailing.

More specifically, Casper argues that its polymer network is not “inserts” because Casper *molds* its inserts into the desired shape by a process in which “a hot liquid gel is poured into the channels.” Opp. at 24. But even Casper acknowledges that it introduces an exogenous material into the channels and that material “cools” into a solid form. *See id.* And Casper identifies no evidence, intrinsic or extrinsic, limiting how the claimed “inserts” must be made. Rather, Casper admits that the Asserted Claims of the ’763 Patent are drawn to products. *See* Opp. at 12 (“The asserted claims of the ’763 patent set forth requirements for the structure of a mattress.”). Accordingly, there is no real dispute regarding the “inserts” limitation.

Meanwhile, Casper further argues that the inserts of the Casper Wave mattress are not “affixed” in their channels “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.” Opp. at 24.

But Casper acknowledges that the Casper Wave’s inserts “remain[] secure within the layer of foam.” *Id.* Moreover, Casper’s expert agrees the inserts in the Casper Wave mattress are not removable. *See* Kuchel Decl. ¶ 42; Kuchel Depo. at 47:22-48:2 (“Q. Was the piece of polymer network you attempted to remove from the high resiliency foam sample you received readily removable? A. No. It was not. It was destructive to the HR foam layer itself.”). Indeed, Mr. Kuchel identifies two ways in which they are, in fact, affixed within the channels:

Q. Do you know why it is not possible to remove the gel polymer from the channels of the high resiliency foam layer without a destructive effect?

A. Yes. Well, there's two reasons. One is mechanical, and one is chemical. The mechanical is that the HR layer, being an open cell foam, is porous, and so as liquid polymer is poured into that foam, there is a degree, I'll call it, of mechanical engagement. It soaks into, if you will, the foam layer. Also in discussions with FXI, the manufacturer of both the HR layer and of the polymer—well, they don't manufacture the polymer but they pour the polymer into the HR foam. I understand there are some additives, chemical additives to the elastomer recipe that improve its bonding properties. So I believe there are two mechanisms in play.

Id. at 61:2-61:21.

There is thus no real dispute that the inserts in the high-resiliency foam layer of the Casper Wave mattress are “affixed.”¹⁴

B. Casper Likely Infringes the Asserted Claims of the '173 and '935 Patents

1. Casper Practices the “Assembling” Limitations

As demonstrated in Serta Simmons' Brief, the Casper Wave is manufactured by a process that includes one or more step(s) of “assembling a plurality of rectangular foam pieces into a mattress that includes the channel.” *See* Brief at 14. Casper does not appear to disagree. *Cf.* Holm Decl. ¶ 13 (describing the process of laminating the five foam pieces together to form a “core assembly”); Kuchel Decl. ¶ 49 (showing assembly of five layers into a mattress that includes channels); Opp. at 27 (“... the layer with the channels already fully formed (and with the alleged ‘inserts’ already formed in place) is ‘assembled’ together with four other layers of foam to form the complete multi-layered mattress.”).

Nonetheless, Casper argues that the step of “forming the channel[s]” during the manufacture of the Casper Wave does not “comprise[] assembling a plurality of rectangular

¹⁴ Webster's Third New International Dictionary defines “affix” as “to attach physically (as by nails or glue) or in any other way.” *See* Schoenhard 2d Decl., Ex. 27 at 5.

foam pieces.” To reach this conclusion, Casper interprets “forming” narrowly to be limited to what Casper characterizes as one of three methods disclosed in the specification. *See* Opp. at 25. Casper’s argument, however, depends on an overly narrow understanding of the word “forming.”¹⁵

First, Casper does not suggest that “forming” is a term of art in the mattress industry or that “forming” is specially defined in the ’173 Patent.

Second, the claims of the ’173 Patent require that “forming” must be understood broadly enough to include multiple steps such as at least “cutting foam out of the body,” as claimed in dependent claim 6, and “assembling a plurality of rectangular foam pieces into a mattress that includes the channel,” as claimed in claim 5. *See Acumed*, 483 F.3d at 806.

Casper’s view to the contrary appears to be based on a misunderstanding of Figures 3 and 4 of the Asserted Patents. In particular, Casper appears to believe that Figures 3 and 4 somehow depict two different methods of “forming” channels: (1) by cutting foam out of a solid block (Figure 3); or (2) by gluing two taller pieces of foam to one shorter one (Figure 4). *See* Opp. at 25. But Figures 3 and 4 show no such thing. Rather, whereas Figure 2 represents a cross-section of the disclosed mattress from end to end, Figures 3 and 4 represent cross-sections from side to side. *See* ’173 Patent at col. 3:54-4:24 (“FIG. 3 is a cross-sectional view of the mattress of FIG. 1. As shown in the embodiment set forth in FIG. 3, the channel and the insert do not extend to any of the surfaces other than the channel surface, in this embodiment the top surface.”). The taller blocks of foam depicted in Figure 4 do not form side walls of channels, as Casper appears

¹⁵ Although Casper characterizes its argument as applying to the “forming” steps of both the ’173 and ’935 Patents, Casper neglects to recognize that Claim 10 of the ’935 recites “assembling the rectangular foam pieces to form *the body*”, not the channel. Accordingly, Casper’s argument has no bearing on the issue of infringement of the ’935 Patent.

to believe, but rather they close off the ends of the channel where otherwise the channels would extend all the way to the sides of the mattress. *Id.* at col. 3:59-4:24. Although he said otherwise in his declaration, *see* Kuchel Decl. ¶ 47 (discussing Figs. 3 and 4), Casper’s expert agrees:

Q. Do you understand that the blocks of foam designated with the number 40 in Figure 4 of the ’763 patent are a way to block off the ends of a channel 19?

A. I think I just said that, and I believe that’s exactly what the patent says, but let me go back to the specification. (Witness reviewing document). Yes.

Kuchel Depo. at 33:15-33:23. Casper’s interpretation of the “wherein” clause of Claim 5 of the ’173 Patent as an attempt to claim the embodiment of Figure 4 is thus nonsensical.

2. The Claimed Methods Do Not Prescribe an Order of Operations

The methods of the Asserted Claims do not prescribe an order of operations. In arguing that they do, Casper ignores the general rule that method claims are interpreted not to require that the enumerated steps take place in a specific order unless the claims implicitly require an order. *Interactive Gift Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1342 (Fed. Cir. 2001) (citing *Loral Fairchild Corp v. Sony Corp.*, 181 F.3d 1313, 1322 (Fed. Cir. 1999)).

Casper argues that the Asserted Claims require such an order because each step refers to an element that is identified in the previous step. *Opp.* at 33 (citing, *inter alia*, *Kaneka Corp. v. Xiamen Kingdomway Grp. Co.*, 790 F.3d 1298, 1306 (Fed. Cir. 2015)). But *Kaneka* provides that “[a] method claim can also be construed to require the steps be performed in order where the claim implicitly requires order, for example, if the language of a claimed step refers to the *completed results [i.e., the output] of the prior step.*” *Kaneka Corp.*, 790 F.3d at 1306 (emphasis added) (citing *E-Pass Techs., Inc. v. 3Com Corp.*, 473 F.3d 1213, 1222 (Fed. Cir. 2007)).

3. Casper “Affixes” “Inserts” Within Channels

As discussed in Serta Simmons’ Brief, and above, there should be no real dispute that inserts are affixed in the channels of the high resiliency foam layer of the Casper Wave mattress during the manufacturing process.

4. The Inserts Do Not Entirely Fill the Channels

Casper further argues that the inserts of the Casper Wave mattress “fill the accused channels to the surface” and thus do not satisfy the requirement of Claim 10 of the ’935 Patent that an insert “not entirely fill the channel.” *See* Opp. at 36-37. But Casper provides the following image, which purports to show the “finished layers with the polymer network”:



Holm Dec. ¶ 11. As the above photograph plainly shows, gaps exist between the right- and left-hand inserts within each of the channels in the high resiliency foam body. The inserts clearly do not entirely fill the channels.

Accordingly, Serta Simmons will likely establish infringement of at least one, if not all, of the Asserted Claims.

IV. SERTA SIMMONS’ INFRINGEMENT CLAIMS WILL LIKELY WITHSTAND CASPER’S CHALLENGES TO THE VALIDITY AND ENFORCEABILITY OF THE ASSERTED PATENTS

As explained in Serta Simmons’ Brief, the Asserted Patents are presumed valid and

enforceable. *See* Brief at 7; *see also Microsoft Corp. v. i4i Ltd. P’ship*, 546 U.S. 91, 95 (2011) (“Under § 282 of the Patent Act of 1952, ‘[a] patent shall be presumed valid’ and ‘[t]he burden of establishing in-validity of a patent or any claim thereof shall rest on the party asserting such invalidity.’” (alterations in original) (quoting 35 U.S.C. § 282)). In order to overcome this presumption, Casper must present clear and convincing evidence demonstrating invalidity and/or unenforceability. It has not and is not likely to do so. Indeed, at the time Serta Simmons filed its Motion for Preliminary Injunction (D.I. 10), and up until last Friday, November 17, Casper had not answered the Complaint or otherwise identified any defenses to Serta Simmons’ claims of infringement. And even now, those issues have not been developed or fully joined by the parties.

Nonetheless, even the brief review that has so far been afforded to Serta Simmons reveals that Casper’s cited prior art fails to raise a substantial question as to the validity of the Asserted Patents, and, even if the cited art does raise substantial questions as to the validity of the Asserted Patents, Serta Simmons’ arguments contained herein display Casper’s arguments lack substantial merit.¹⁶

Accordingly, Serta Simmons’ infringement claims will likely withstand any challenge to validity and enforceability.

A. Casper Fails to Assert Prior Art that Raises a Substantial Question of the Asserted Patents’ Invalidity, and Serta Simmons Demonstrates that Casper’s Assertions of Invalidity Lack Substantial Merit

A defendant asserting the defense of patent invalidity cannot succeed unless invalidity is demonstrated by clear and convincing evidence because of the presumption that all patents are

¹⁶ Serta Simmons expressly reserves its rights to further develop its responses to Casper’s defenses in due course, including its rights to identify additional responsive arguments and to rely on additional evidence including but not limited to the testimony of witnesses.

valid and enforceable. *See Cadence Pharms., Inc. v. Exela PharmSci Inc.*, 780 F.3d 1364 (Fed. Cir. 2015); *see also* 35 U.S.C. § 282. As a result, a defendant’s invalidity defense shall not defeat a preliminary injunction motion unless the defendant puts forth “a substantial question of invalidity to show that the claims at issue are vulnerable” or else it cannot be held that defendants are likely to overcome the presumption of patent validity or carry their burden of proving invalidity. *See Erick Int’l Corp. v. Vutec Corp.*, 516 F.3d 1350, 1356 (Fed. Cir. 2008). Even if defendants demonstrate vulnerability of the asserted claims, a patentee is still entitled to a finding of a likelihood of success on the merits if the patentee can show that the defendant’s invalidity defense lacks substantial merit. *See Atlanta Pharma AG v. Teva Pharms. USA, Inc.*, 566 F.3d 999, 1006 (Fed. Cir. 2009). This requires the district court to consider rebuttal evidence presented by the patentee prior to making an initial determination as to the likelihood of defendant’s success on the invalidity defense. *See New Eng. Branding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 882-83 (Fed. Cir. 1992).

1. The Asserted Claims of the ’763 Patent Are Not Vulnerable

Casper is unlikely to establish that any asserted claim of the ’763 Patent is invalid. Specifically, Casper relies on four prior art references: (1) Kennaway¹⁷, (2) GB ’433¹⁸, (3) Regan¹⁹, and (4) Antinori²⁰—none of which individually teaches or renders obvious each and every limitation of any of the asserted claims of the ’763 Patent.

a. The Asserted Claims of the ’763 Patent are Not Vulnerable in View of Kennaway

Casper first challenges the asserted claims of the ’763 Patent on the basis of Kennaway.

¹⁷ “Kennaway” refers to PCT App. No. WO81/02384 (D.I. 44-39).

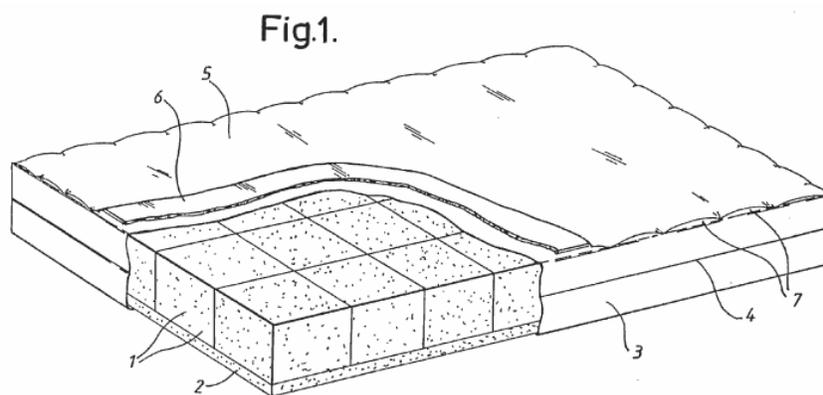
¹⁸ “GB ’433” refers to British Patent Specification No. 1 483 433 (D.I. 44-37).

¹⁹ “Regan” refers to U.S Patent No. 4,161,045 (D.I. 44-38).

²⁰ “Antinori” refers to U.S. Patent No. 6,223,371 (D.I. 44-41).

But Kennaway is directed to an entirely different concept than the Asserted Patents and fails to disclose critical limitations of the Asserted Claims.

More specifically, Kennaway is directed to “a mattress which has *adjustable* resilience and which is relatively cheap and simple to manufacture.” Kennaway at 2:20-21 (emphasis added); *see also id.* at 2:10-18. To achieve its aims, Kennaway discloses a primary embodiment comprising a plurality of cubic blocks of foam of differing hardnesses, wherein “[t]he blocks are interchangeable so that the arrangement can be altered to suit various different patients.” *Id.* at 3:1-7. This embodiment is depicted in Figure 1 of Kennaway:



Notably, this embodiment has nothing to do with channels or inserts. And Casper does not appear to argue otherwise.

Instead, Casper relies on an alternative embodiment of Kennaway, which is depicted in Figure 4:

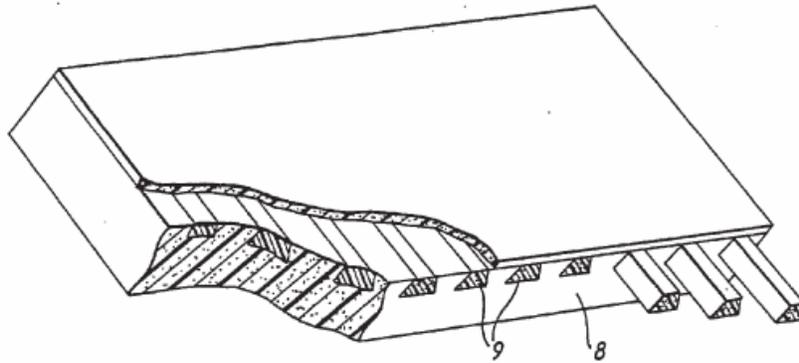


Fig.4.

But, significantly, the disclosed “insert sections” are not each “affixed” within a channel, as required by Claim 1 of the ’763 Patent. Rather, Kennaway discloses that the insert sections are “removable.” *Id.* at 6:27. And, indeed, “[i]n Figure 4, three of the insert sections are shown partly removed.” *Id.* at 6:28-29. Casper’s expert agrees. *See* Kuchel Depo. at 55:18-20. (“Q. Kennaway teaches that the inserts depicted in Figure 4 are removable, correct? Q. Yes.”).

Additionally, the disclosed insert sections do not “each reinforce[e] the body,” as required by Claim 1 of the ’763 Patent. Rather, Kennaway discloses that the insert sections are “of different hardnesses.” *Id.* at 6:22. This statement does not teach that *any* of the insert sections reinforces the body, much less that *each* does so. If anything, Kennaway teaches away from introducing insert sections that would reinforce the body by discussing alternative solutions that aim to “reduce the hardness” of a body of foam: “It is also known to *reduce the hardness* of a foam mattress by making perforations which extend through the mattress from top to bottom, but such a mattress can only be made to suit some patients and cannot be altered to suit others.” *Id.* at 2:13-18 (emphasis added).

Moreover, the disclosed “voids” into which the insert sections may be placed do not “extend[] into the body perpendicularly [from a top or bottom surface],” as required by Claim 1

of the '763 Patent. Rather, as depicted in Figure 4, the voids extend into the body at a significant angle so as to accommodate removable inserts that are generally trapezoidal. Casper's expert agrees. *See* Kuchel Depo. at 68:8-12 ("Q. . . . [W]ould you agree that the channels depicted in figure 4 of Kennaway do not extend perpendicularly [into the body]? A. As depicted, I would agree."). Indeed, on redirect at Mr. Kuchel's deposition, Casper's counsel elicited the following testimony:

Q. In your opinion does Kennaway teach a plurality of channels extending into the body perpendicularly therefrom?

MR. SCHOENHARD: Objection. Leading.

A. Yes, it does.

Q. Can you point me to anywhere in the specification where that limitation is taught?

A. (Witness reviewing document). I guess I can't. At least I am not coming across that exact wording.

Q. When the specification discusses Figure 4—

A. Yes.

Q. —does it disclose any particular shape of the insert?

A. No. It simply refers to them as filled by foam insert sections of different hardnesses.

Q. *In your opinion does that disclose a channel extending into the body perpendicularly therefrom?*

A. No

MR. SCHOENHARD: Objection. Leading.

A. *No, it doesn't.* I mean it goes on to say that the channels will be filled by correspondingly shaped removable inserts, in essence. Paraphrasing there. So the

shape of the channel and the shape of the insert would, presumably, match. So therefore, *a perpendicular limitation does not seem to be described*.

Id. at 64:18-66:3 (emphasis added).

Accordingly, Casper has failed to raise a substantial question as to the validity of the '763 Patent based on Kennaway.

b. The Asserted Claims of the '763 Patent are Not Vulnerable in View of 'GB 433

Casper next challenges the Asserted Claims of the '763 Patent on the basis of GB '433. But GB '433 is also directed to an entirely different concept than the Asserted Patents.

More specifically, GB '433 is directed to an improvement on a foam mattress having a spring core that provides increased breathability and moisture absorption in a mattress having less weight and produced at a lower cost. *See* GB '433 at 1:59-62, 1:80-85. To achieve this aim, GB '433 discloses the placement of springs in channels of a foam mattress, so as to “offer[] the same comfort as a pure foam mattress, but with the additional advantage in that it avoids the condensation and absorption of body perspiration.” *Id.* at 2:63-67.

Significantly, each of the disclosed “plurality of springs” is not “affixed” within a channel, as required by Claim 1 of the '763 Patent. Instead, GB '433 teaches “a plurality of springs, which *lie* adjacent to one another within each said channel, the ends of said springs *resting* respectively against the base of said channel and said layer of padding without exerting substantial force thereon.” *Id.* at 1:75-80 (emphasis added). GB '433 further teaches that “it is necessary only for the continuous wire spring elements to be *put into the channels*.” *Id.* at 2:115-16 (emphasis added). And the springs are “advantageously disposed so that they are *supported* by the webs, thereby preventing them from yielding laterally.” *Id.* at 2:71-74

(emphasis added).²¹

Additionally, the disclosed “plurality of springs” do not “each reinforce[e] the body,” as required by Claim 1 of the ’763 Patent. Rather, GB ’433 discloses that “[w]ith the correct choice of foam material, a foam mattress with channels like this offers *the same comfort as a pure foam mattress*. *Id.* at 2:61-64. Further, GB ’433 teaches that the “foam webs” that make up the channel walls “act as an additional reinforcement due to the different elastic properties of the springs and foam web material.” *Id.* at 2:88-95. In other words, in GB ’433 the body of foam reinforces the springs—not the other way around, as would be required by Claim 1 of the ’763 Patent.

Accordingly, Casper has failed to raise a substantial question as to the validity of the ’763 Patent based on GB ’433.

c. The Asserted Claims of the ’763 Patent are Not Vulnerable in View of Regan

Casper next challenges the Asserted Claims of the ’763 Patent on the basis of Regan. But, like the Hoffman patent distinguished during prosecution of the ’763 Patent, Regan is focused on the placement of inserts either entirely inside a body of foam or between two bodies of foam—not “affixed within” channels that “extend[] into the body perpendicularly [from a top or bottom surface].”

First, Regan does not disclose that each insert is “affixed” in a channel, as required by Claim 1 of the ’763 Patent. Instead, as Mr. Kuchel, Casper’s expert, states, “Ribs (i.e., inserts) ‘lie[] in [the] recess[es] within the lower layer 30.’” Kuchel Decl. at 80 (quoting Regan at 3:17-21).

²¹ By way of contrast, the “padding layer” of the disclosed mattress is “glue[d] on.” GB ’433 at 2:117.

Second, Regan does not disclose that each insert “reinforc[es]” the body, as required by Claim 1 of the ’763 Patent. Although Regan discloses in the context of the Figure 4 embodiment that “the ribs 20 are less compressible than the upper layer 36 in order to provide enhanced localized support,” Regan at 3:26-28, Regan is silent regarding whether, if at all, any inserts reinforce the layer 30, which Mr. Kuchel identifies as “the body.” *See* Kuchel Decl. at 78. Indeed, Regan discloses that “each rib 20 may be molded from the lower layer 30 as a unitary component thereof.” Regan at 3:19-21.

d. **The Asserted Claims of the ’763 Patent are Not Vulnerable in View of Antinori**

Casper next challenges the Asserted Claims of the ’763 Patent on the basis of Antinori. But, like the alternative embodiment of Hoffman, Antinori is directed to the placement of an insert between two layers of a mattress.

Significantly, like Hoffman, Antinori does not disclose that each insert is affixed “within” a channel, as required by Claim 1 of the ’763 Patent. Instead, Antinori discloses that the insert is sandwiched between two layer portions, 24 and 38:

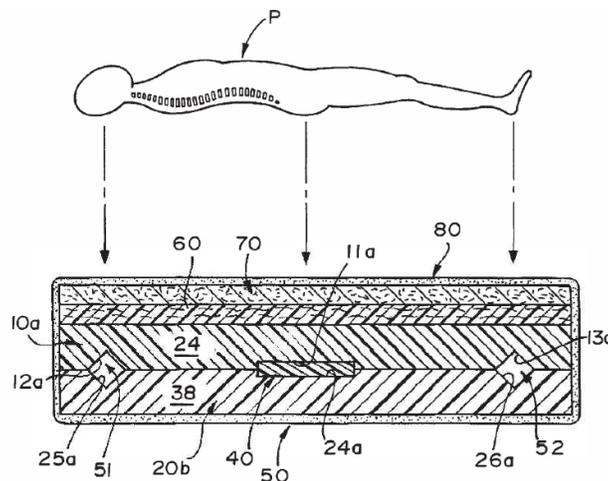


FIG. 4

As clearly depicted in Figure 4 (above) and described at 4:22-27, insert 40 is not “within” either recess 11a or recess 24a.²²

Moreover, Antinori discloses that the insert is placed in a “recess,” not a “channel,” as required by Claim 1 of the ’763 Patent.²³ Indeed, Antinori expressly teaches the cutting of “grooves, channels or recesses” in a foam layer, but only discloses placement of an insert in a “recess.” *See* Antinori at 4:5-8.

Additionally, the disclosed insert is not “affixed” within a channel, as required by Claim 1 of the ’763 Patent. Instead, Antinori discloses that the insert is merely “placed” or “inserted” in a recess. *See id.* at 2:39 (“placed”); *id.* at 3:12 (“placed”); 4:20-22 (“inserted”). The three passages cited by Casper’s expert, Mr. Kuchel, do not teach otherwise. Rather, they teach only that adhesive is used to bond the opposing *surfaces* of layer portions 10a and 20b, not to bond anything into the recesses 11a and 24a. *See id.* at 3:13-14 (disclosing “adhesively bonding the 24 ILD value layer portion to the 38 ILD value layer portion”); 4:23-25 (disclosing “application of adhesive to either or both of the opposing surfaces (unnumbered) of the layer portions 10a, 20b”).

Antinori further does not disclose “a plurality of inserts,” each of which is affixed in a channel and reinforces the body. Rather, Antinori’s references to a plural number of “inserts” appear to be made with respect to Antinori’s disclosed method of “cross assembl[y]” of two mattresses. *See id.* at 2:39-51, 4:15-36. To the extent a second insert could be placed in the mattress disclosed in Antinori, it is unknown where it would be placed or what impact

²² Webster’s Third New International Dictionary defines “within” as “inside the bounds of a place or region.” *See* Schoenhard 2d Decl., Ex. 27 at 4.

²³ Webster’s Third New International Dictionary defines “channel” as a “long gutter, groove, or furrow.” *See* Schoenhard 2d Decl., Ex. 27 at 7.

(reinforcing or otherwise) it would have on the mattress.

And Antinori does not disclose an insert that is “substantially flush with the at least one of the top and bottom surfaces,” as required by Claim 6 of the ’763 Patent. Instead, as discussed above, Antinori both depicts and describes an insert that extends above the top surface of layer 38.

Accordingly, Casper has failed to raise a substantial question as to the validity of the ’763 Patent based on Antinori.

2. Casper Fails to Demonstrate that the Cited Prior Art Invalidates the ’173 and ’935 Patents

Casper is also unlikely to establish that any asserted claim of the ’173 and ’935 Patents is invalid. Casper relies on three prior art references: (1) Scheuch²⁴, (2) Regan, and (3) Antinori. But none teaches each and every claimed limitation of the ’173 or ’935 Patents.

a. The Asserted Claims of the ’173 and ’935 Patents are Not Vulnerable in View of Scheuch

Casper challenges the asserted claims of the ’173 and ’935 Patents on the basis of Scheuch. But Scheuch does not disclose channels, much less the affixing of inserts in channels in regions of the body where additional support is desired.

Scheuch teaches a mattress having a base layer and a cover layer, “which are kept at a distance from one another by webs, which are preferably glued in, wherein the hollow intermediate spaces form the recess or recesses for the inserts.” Scheuch at [0009]. The disclosed “recesses” are not “channels,” but rather large hollow voids occupying significant portions of the total volume of the mattress. Additionally, even if the disclosed “recesses” could be understood to be “channels,” they are not formed “into the body [made of foam],” as required

²⁴ “Scheuch” refers to European Patent Publication No. 1031302A2 (D.I. 44-43).

by Claim 5 of the '173 Patent. Rather, the “recesses” are the voids that remain when several bodies of foam are glued together.²⁵

Additionally, the inserts in Scheuch are not “affixed” because they are easily removable and replaceable. Specifically, Scheuch describes as an advantage of its claimed mattress the ability to easily clean it because the “[d]irt collects predominantly in the enlarged, exposed surfaces of the inserts inside the mattress so that cleaning is substantially facilitated when *said inserts are removed.*” Scheuch at [0013].

Accordingly, Casper has failed to raise a substantial question as to the validity of the '173 and '935 Patents based on Scheuch.

b. The Asserted Claims of the '173 and '935 Patents are Not Vulnerable in View of Regan

Casper next challenges the asserted claims of the '763 Patent on the basis of Regan. But, again, as discussed above, Regan fails to disclose an insert that is “affixed” within a channel. Moreover, with respect to the '173 Patent, Regan fails to disclose an insert that is of a “greater firmness than” the body, as required by Claim 5, consistent with the discussion of the “reinforcing the body” limitation of Claim 1 of the '763 Patent above. Accordingly, Casper has failed to raise a substantial question as to the validity of the '173 and '935 Patents based on Regan.

c. The Asserted Claims of the '173 and '935 Patents are Not Vulnerable in View of Antinori

Finally, Casper challenges the asserted claims of the '173 and '935 Patents on the basis of Antinori. But, again, as discussed above, Antinori fails to disclose an insert that is “affixed” “within” a “channel.” Moreover, with respect to the '935 Patent, Antinori fails to disclose an

²⁵ Casper’s contrary view appears to be based on its misinterpretation of Figure 4 of the Asserted Patents as discussed above.

insert that “does not entirely fill the channel.” Accordingly, Casper has failed to raise a substantial question as to the validity of the ’173 and ’935 Patents based on Antinori.

B. Casper Fails to Proffer Sufficient Evidence to Support Its Assertion that Serta Simmons Committed Inequitable Conduct Before the Patent Office

Casper further argues that Plaintiffs’ Asserted Patents are unenforceable as a result of inequitable conduct. But Casper has failed to properly plead inequitable conduct much less to demonstrate a likelihood of success in supporting its defense.²⁶ Specifically, in order to succeed on a defense of inequitable conduct, a defendant must show by clear and convincing evidence that a patent applicant had (1) actual knowledge of (2) a prior art reference that was “material,” and (3) “made a deliberate decision to withhold it.” *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1280 (Fed. Cir. 2011) (en banc). The concepts of intent and materiality *are distinct and separate inquiries*—a change in the law under *Therasense Inc.* rejecting a “sliding scale” approach to inequitable conduct. *See id.* at 1290-92. A district court, therefore, is required to analyze intent independently of its analysis of materiality.

Here, Casper fails to clearly address intent and materiality as two independent inquiries—a process mandated by the Federal Circuit in *Therasense*. And on the merits, Casper fails to recognize that Antinori and Regan are cumulative to art—such as Hoffman—that was already considered by the Patent Office. *Scripps Clinic & Research Found. v. Genetech, Inc.*, 927 F.2d

²⁶ Serta Simmons also reserves the right to move to strike the affirmative defense of inequitable conduct for failing to satisfy the heightened pleading requirements to allege fraud under Fed. R. Civ. P. 9(b). *See Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1319, 1328-29 (“[P]leading inequitable conduct under 9(b) must include sufficient allegations of underlying facts from which a court may reasonably infer that a specific individual (1) knew of the withheld material information . . . and (2) withheld or misrepresented this information with a *specific intent to deceive the PTO.*” (emphasis added)); *see also Therasense*, 649 F.3d at 1305 (Bryson, C.J., dissenting) (citing *Exergen* and asserting that Fed. R. Civ. P. 9(b) will be a useful deterrent to baseless counterclaims while noting the Patent Office supports the heightened requirement of intent as to discourage “over-disclosure” of references that burden the examination process).

1565, 1582 (Fed. Cir. 1991) (“[A] reference that is simply cumulative to other references does not meet the threshold of materiality.”). Nor does Casper demonstrate that Serta Simmons (1) knew of the references; (2) knew they were material; and (3) made a “deliberate decision to withhold [them].” *See Ist Media, LLC v. Elec. Arts, Inc.*, 694 F.3d 1367, 1374 (Fed. Cir. 2012). To the contrary, Casper’s expert testified that, in his experience at Simmons in the relevant timeframe, Simmons engineers (like Mr. Gladney) worked closely with Ed Kelly at Ropes & Gray LLP to develop known prior art, to identify additional prior art, and to determine whether a new idea was, in fact, patentable. *See* Kuchel Depo. at 39:8-41:14.

Accordingly, Casper has failed to sufficiently establish that the “single most reasonable inference” to explain the non-citation of Antinori and Regan was to deceive the Office with specific intent as to the patentability of the Asserted Patents.²⁷ The Court should reject Casper’s defense.

V. SERTA SIMMONS WILL BE IRREPARABLY HARMED ABSENT A PRELIMINARY INJUNCTION

A. Serta Simmons Has Identified Sufficient Evidence of Harm

As demonstrated in Serta Simmons’ Brief, Casper’s introduction and 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. These losses are not quantifiable. *See* Brief at 18-22. Accordingly, absent a preliminary injunction, Serta Simmons is likely to suffer irreparable harm.

Nonetheless, Casper argues that the harm identified by Serta Simmons is somehow not being experienced by SSB. Casper contends that the harm identified by Serta Simmons is

²⁷ Casper claims that Serta Simmons “refused” to make the inventor of the Asserted Patents available for deposition. Not so. Although the parties had a disagreement regarding the timing of Casper’s request for a deposition and failure to explain the need for a deposition at this stage of this case, Serta Simmons did not refuse to proceed. Casper dropped the issue. *See* Schoenhard 2d Decl. ¶ 6.

instead attributable to SSB's subsidiaries National Bedding Company, L.L.C. ("NBC") and Tomorrow Sleep, Inc. ("Tomorrow Sleep"). Not so.

As confirmed by the declaration of Ron Richmond, the Vice President of Taxation for SSB, SSB is the "parent company *and operating entity* responsible for all operations of Serta Simmons." Richmond Decl.²⁸ ¶ 2 (emphasis added). And whereas Casper argues (without basis or support) that Serta Simmons does not sell the iComfort®-brand, Tomorrow™-brand, or other mattresses, Mr. Richmond's declaration establishes otherwise.

All iComfort®-branded mattresses and accessories sold in NBC's territories (including New York) are sold by SSB, not NBC. Richmond Decl. ¶¶ 17-19. All revenues from those sales are realized directly by SSB. *Id.* And all such mattresses are manufactured in facilities under SSB's control. *Id.* Accordingly, SSB directly experiences the loss of sales, loss of prospective customers, and loss of market share associated with the Casper Wave's wrongful competition against iComfort®-brand mattresses. *See* Morgan Depo.²⁹ at 70:21-71:5.

Similarly, all Beautyrest®-branded hybrid mattresses and accessories are sold by SSB. Richmond Decl. ¶¶ 32-33. All revenues from those sales are realized directly by SSB. *Id.* And all such mattresses are manufactured in facilities under SSB's control. *Id.* Accordingly, SSB directly experiences the loss of sales, loss of prospective customers, and loss of market share associated with the Casper Wave's wrongful competition against Beautyrest®-branded hybrid mattresses. *See* Morgan Depo. at 70:21-71:5.

²⁸ "Richmond Decl." refers to the Declaration of Ron Richmond in Support of Plaintiffs' Reply in Further Support of Plaintiffs' Motion for Preliminary Injunction (D.I. 50), filed concurrently herewith.

²⁹ "Morgan Depo." refers to the transcript of the October 31, 2017 Deposition of Kenneth Reid Morgan, excerpts of which are filed as Schoenhard 2d Decl., Ex. 21.

SSB is also harmed by sales of Tomorrow™-branded hybrid mattresses lost to the Casper Wave. The Tomorrow™-branded hybrid mattress and accessories are manufactured in a facility under SSB's control. Richmond Decl. ¶ 25. All revenues from the sales of the Tomorrow™-branded hybrid mattresses and accessories flow directly to SSB. *Id.* ¶ 26. Although the Tomorrow™ brand mattress does not compete in the same primary market segment as the Casper Wave, it does compete in the direct-to-consumer market with all Casper products. *See* Morgan Depo. at 73:19-74:2, 136:23-24, 139:4-8. As explained by Kenneth R. Morgan, Vice President of Consumer Insights for SSB, the Casper Wave will have a "halo effect" on Casper's brand as a whole, which will negatively impact Tomorrow Sleep's bottom line. Morgan Decl.³⁰ ¶ 28; Morgan Depo. at 160:19-162:20.

Casper also argues that the harm to Serta Simmons is not irreparable because Serta Simmons has not set forth sufficient evidence of actual irreparable harm. Casper contends that Serta Simmons relies on nothing more than "bare speculation" to support its contention of lost sales, market share, and customers. *See* Opp. at 55. In fact, however, Serta Simmons' claims are supported by the results of three national surveys and the testimony of a consumer research professional with ten years of experience in the mattress industry and over twenty-five years of experience in the consumer research industry. *See* Morgan Decl. ¶¶ 1, 8-10; Morgan Depo. at 18:2-5, 105:1-3.

Casper attempts to discount Serta Simmons' evidence simply because it is circumstantial. However, the Federal Circuit has explained that a showing of irreparable harm does not require *direct* evidence of lost sales, market share, or customers. Rather, "[w]hile the party seeking an

³⁰ "Morgan Decl." refers to the Declaration of Kenneth R. Morgan in Support of Plaintiffs' Motion for Preliminary Injunction (D.I. 10-24).

injunction bears the burden of showing lost market share, *this showing need not be made with direct evidence.*” See *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1154 (Fed. Cir. 2011) (emphasis added) (holding that the party seeking a permanent injunction “made a prima facie showing of loss market share” by offering “circumstantial evidence”); *i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 862 (Fed. Cir. 2010) (finding that “the district court properly considered strong circumstantial evidence” that infringement caused lost market share).

Serta Simmons has put forth strong circumstantial evidence of lost sales and market share, demonstrating the likelihood that a Casper Wave customer would otherwise buy a Serta Simmons product.³¹ Casper argues that Mr. Morgan testified that there are over 1,000 competitors in the mattress market as a whole and over 100 in the direct-to-consumer market segment. But these numbers, as offered by Casper, are misleading. Mr. Morgan clarified that the *primary* market segment that the Casper Wave is targeting is not the direct-to-consumer market segment,³² but rather the market segment containing “the consumer who is experiencing sleep issues related to—potentially related to a health problem” and that the “primary and most prominent” competitors in that segment are the iComfort®, Beautyrest® hybrid, Tempur-Pedic, Sleep Number, Sealy Optimum, and Sealy Hybrid. See Morgan Depo. at 69:14-70:8, 70:21-9. Casper implies that there are hundreds of competitors in the primary marketing segment that the

³¹ Serta Simmons’ offering of circumstantial evidence is a consequence of the speed at which Serta Simmons instituted this action. The Casper Wave was launched in mid-August and Serta Simmons filed its complaint and motion for preliminary injunction simultaneously in September. See Complaint (D.I. 1); Plaintiffs’ Notice of Motion for Preliminary Injunction (D.I. 10). As Mr. Morgan explained in his testimony, “To date, the Casper Wave has not been on the market long enough that we have identified through the course of our typical surveys any specific Casper Wave customers.” Morgan Depo. at 88:2-7. Serta Simmons’ immediate filing reflects the urgency of the motion and Serta Simmons should be applauded, not punished, for filing expeditiously, rather than delaying.

³² Mr. Morgan’s testimony is consistent with Casper’s decision to introduce the Casper Wave into the traditional retail environment. See Schoenhard 2d Decl., Ex. 25.

Casper Wave targets, when there may only be a handful—two of which are SSB brands. Thus, the probability that a Casper Wave customer would otherwise buy a Serta Simmons product is much higher than Casper acknowledges.

Serta Simmons has also offered strong circumstantial evidence of loss of customers and access to potential customers. Two surveys offered by Serta Simmons—which were separately conducted in different years—demonstrate that existing customers are likely to purchase the same brand of mattress again. According to the 2016 Multi-sponsor Survey³³ prepared by Multi-sponsor Surveys, Inc. in July 2016, 64% of recent buyers reported that they were “[l]ikely”—either “[v]ery” or “[s]omewhat”—to purchase the same brand again. *See* Multi-sponsor Survey at 75. And, in the 2015 Serta Satisfaction Report³⁴ prepared by Serta and GfK in February 2015, 25% of iComfort buyers indicated that they would replace their current mattress with another Serta product. *See* 2015 Serta Satisfaction Report at 32; Morgan Depo. at 168:15-169:3. Both surveys reflect that existing customers are likely to purchase the same brand of mattress again.

Evidence put forth by Serta Simmons indicates that the loss of customers can translate to loss of additional potential customers as well. The 2016 Multi-sponsor Survey found that 42% of prospective buyers were “[e]xtremely/[v]ery” likely to rely on recommendations from a friend or relative when purchasing a mattress, and an *additional* 16% were “[e]xtremely” likely to do so. *See* Multi-sponsor survey at 173. The same survey also indicates that 15% of buyers bought their mattress because a friend or relative had recommended it. *See id.* at 89. These losses are difficult to quantify, but also weigh in favor of a showing of irreparable harm. *See Apple Inc. v. Samsung Elecs. Co.* (“*Apple IV*”), 809 F.3d 633, 645 (“[I]ndividual customers have a ‘network

³³ “2016 Multi-sponsor Survey” refers to The 2016 Study of the Consumer Mattress Market: Top-Line Findings Volume (D.I. 10-26).

³⁴ “2015 Serta Satisfaction Report” refers to 2015 Mattress Satisfaction Research (D.I. 27).

effect,’ by which they advertise Apple’s products to their friends, family, and colleagues. Thus, the loss by Apple of a single smartphone or tablet customer may have a far-reaching impact on Apple’s future revenues. Because of its variable and uncertain nature, this loss is very difficult to calculate.”); *see also Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358, 1368 (Fed. Cir. 2017) (“[T]he loss by Scag of customers may have far-reaching, long-term impact on its future revenues, and the sales lost by Scag are difficult to quantify due to the ‘ecosystem’ effect, where one company’s customers will continue to buy that company’s products and recommend them to others.” (quoting *Apple IV*, 809 F.3d at 641, 645)).

Additionally, Mr. Morgan indicated that Serta Simmons consistently expends significant resources on research and development, and spent ██████████ on research and development costs in 2015 and ██████████ in 2016. Morgan Decl. ¶ 16. Mr. Morgan testified that may have to significantly reduce its research and development spend in the long term if Casper Wave remains on the market. Morgan Depo. at 91:11-92:2.

In addition to evidence of lost sales, market share, and customers, Serta Simmons has also offered evidence of reputational harm caused by the introduction of the Casper Wave. *See Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1344 (Fed. Cir. 2013) (“Irreparable injury encompasses different types of losses that are often difficult to quantify, including lost sales and erosion in reputation and brand distinction.”). The introduction of the Casper Wave mattress threatens to strip SSB of its reputation as an innovator. As explained by Mr. Morgan, “Casper is using the Casper Wave to position Casper as an innovative mattress company.” Morgan Decl. ¶ 28. The “halo effect” created by the Casper Wave mattress—a phenomenon that occurs both within and outside of the mattress industry—gives Casper a reputation as a technologically-advanced company, which “put[s] another brand out there on par

with Serta Simmons in the consumer’s mindset.” *Id.*; Morgan Depo. at 160:19-162:20; *see Douglas Dynamics, LLC*, 717 F.3d at 1344-45 (“Douglas’s reputation as an innovator will certainly be damaged if customers found the same ‘innovations’ appearing in competitors’ snowplows, particularly products considered less prestigious and innovative.”).

SSB will also suffer reputational harm through the loss of market exclusivity. Dreamwell—through SSB, which controls the enforcement of the patent rights related to the Asserted Patents—does not grant and has never granted rights in the Asserted Patents to any parties other than SSB or its subsidiaries. Richmond Decl. ¶ 10; *see Douglas Dynamics, LLC*, 717 F.3d at 1345 (“Douglas had never licensed the infringed patents, and intentionally chose not to, so that it could maintain market exclusivity. Exclusivity is closely related to the fundamental nature of patents as property rights. It is an intangible asset that is part of a company’s reputation, and here, Douglas’s exclusive right to make, use, and sell the patented invention is under attack by Buyer’s infringement.”). While not quantifiable, the multiple forms of reputational harm to Serta Simmons support a finding of irreparable harm.

B. Serta Simmons Has Shown that Money Damages Are Insufficient

Casper alleges that loss of customers and loss of market share are compensable by money damages. However, courts have held that both can in fact be irreparable. *See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (“In a competitive industry where consumers are brand-loyal, we believe that loss of market share is a potential harm which cannot be redressed by a legal or an equitable remedy following a trial.” (citation and internal quotation marks omitted)); *QBAS Co. v. C Walters Intercoastal Corp.*, No. SACV 10-405 AG (MLGx), 2010 WL 7785955, at *13 (C.D. Cal. Dec. 16, 2010) (“In today’s modern retail world, with a vast array of models and brands for any given

product, a customer is likely to stick with a brand that the customer knows and trusts Therefore, Plaintiffs' inability to develop a consistent and loyal customer base due to Defendants' competing product also shows irreparable harm."); *Empresa Cubana del Tabaco v. Culbro Corp.*, No. 97 Civ. 8399 (RWS), 2004 WL 925615, at *2 (S.D.N.Y. Apr. 30, 2004) ("In the context of a preliminary injunction, loss of goodwill as well as market share has been held to constitute irreparable harm."); *Stein Indus., Inc. v. Jarco Indus., Inc.*, 934 F. Supp. 55, 58 (E.D.N.Y. 1996) ("[L]oss of a product's market amounts to irreparable harm because the market share is not easily recovered."). Additionally, reputational harm is irreparable and cannot be remedied by money damages. *See Douglas Dynamics, LLC*, 717 F.3d at 1345 ("This court finds remedies at law inadequate to compensate Douglas for at least the reputation loss Douglas has suffer from Buyers's infringement.").

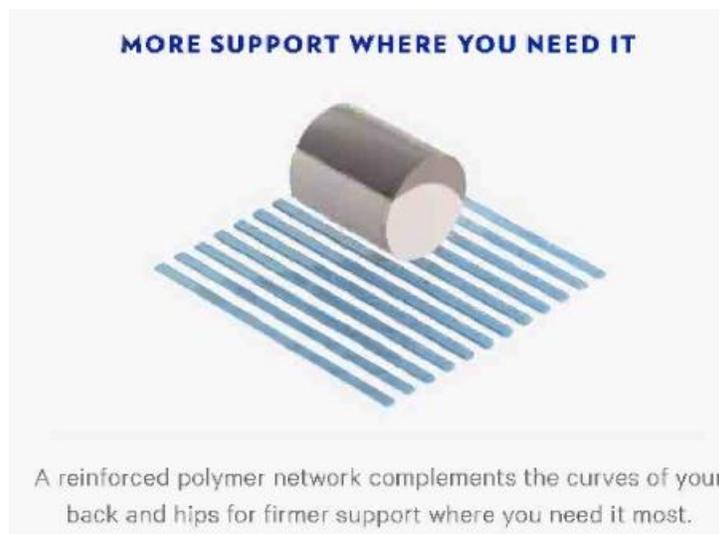
In support of its contention, Casper argues that the harm to Serta Simmons are not irreparable because SSB as a whole sells millions of mattresses per year and because Mr. Morgan testified that he expected the iComfort® sales and revenues to increase in 2017. However, Casper's argument is flatly contradicted by Federal Circuit precedent. In *Robert Bosch LLC*, the Federal Circuit explained, "As other courts have concluded, the fact that an infringer's harm affects only a portion of a patentee's business says nothing about whether that harm can be rectified. Injuries that affect a 'non-core' aspect of a patentee's business are equally capable of being irreparable as the ones that affect more significant operations." 659 F.3d at 1152. And in *Douglas Dynamics, LLC*, the Federal Circuit reasoned, "Simply because a patentee manages to maintain a profit in the face of infringing competition does not automatically rebut a case for irreparable injury . . . [T]his court disagrees with the district court that Douglas should

suffer some penalty for managing through great effort to maintain market share in the face of infringing competition.” 717 F.3d at 1344-45.

C. Serta Simmons Has Demonstrated a Causal Nexus Between the Patented Technology and the Harm

In addition, Serta Simmons demonstrated a causal nexus between the patented technology and the harm to Serta Simmons. To prove a causal connection between the patented technology between the patented technology and the harm, Serta Simmons need only prove “some connection” between the patented technology and the demand for the Casper Wave. *See Veeco Instruments Inc. v. SGL Carbon, LLC*, No. 17-CV-2217 (PKC), 2017 WL 5054711, at *28 (E.D.N.Y. Nov. 2, 2017) (“The Federal Circuit has made clear that a ‘causal nexus,’ for purposes of injunctive relief, requires only a showing that ‘there is ‘some connection’ between the patented features and the demand for [the infringing rival’s] products.” (alteration in original) (quoting *Apple IV*, 809 F.3d at 642)). Serta Simmons easily does so here.

During his deposition, Mr. Morgan testified that “[c]onsumers are demanding technology to help solve the sleep quality problems that they have.” Morgan Depo. at 97:21-22. And it is the patented technology that is marketed to potential Casper Wave consumers. For example, the Casper website introduces the Casper Wave as “[t]he first mattress to thoughtfully complement your body’s natural geometry.” *See* D.I. 44-34 at 2. The website states that “[a] reinforced polymer network complement the curves of your back and hips for firmer support where you need it most:”



Id. at 3.

These assertions are the primary selling points of the Casper Wave (evidenced by their prominent placement on the Casper Wave web page) and relate directly to the patented technology. Additionally, Mr. Morgan testified that the “primary marketing focus of Casper’s marketing of the Casper Wave mattress” is “[t]hat they have developed a technology and inserted it into their mattress for the purposes of providing additional support to consumers with particular health issues.” Morgan Depo. at 163:12-18. Casper’s marketing focus relates directly to “Supports your back,” which is the second-most important feature to consumers in a mattress, according to 2016 Better Sleep Council Report³⁵ prepared for the Better Sleep Council by Fluent Research in October 2016. *See* 2016 Better Sleep Council Report at 18; Morgan Depo. at 163:19-164:2. It is Serta Simmons’ patented technology—the channels and inserts—that are “marketed as providing such back support.” *Id.* at 164:3-7.

Nonetheless, Casper contends that other non-accused features of the Casper Wave, which may *also* drive the sales of the Casper Wave, destroy the causal nexus between the patented

³⁵ “2016 Better Sleep Council” refers to Consumer Research (D.I. 10-25).

technology and the irreparable harm. *See* Opp. at 64, 65, 67 n.28. But the Federal Circuit has explained that the causal nexus evaluation “is a flexible analysis, as befits the discretionary nature of the four-factor test for injunctive relief.” *Apple IV*, 809 F.3d at 641. To demonstrate a causal nexus, Serta Simmons need not demonstrate that the patented technology is the *only reason* that consumers purchase the Casper Wave, but rather the patented technology is *one of the reasons* that consumers purchase the Casper Wave. *See Apple Inc. v Samsung Elecs. Co.* (“*Apple III*”), 735 F.3d 1352, 1364 (Fed. Cir. 2013) (“[T]hese principles do not mean Apple must show that a patented feature is the one and only reason for consumer demand. Consumer preferences are too complex—and the principles of equity too flexible—for that to be the correct standard.” (citation and internal quotation marks omitted)); *Veeco Instruments Inc.*, 2017 WL 5054711, at *28 (“The patented features of the product need not be the ‘sole’ cause of the irreparable harm, nor even the ‘predominant’ cause. Rather, the patent owner need only show that that the patented feature had a significant impact [on] consumers’ decisions to purchase’ the product incorporating the infringing feature.” (quoting *Apple IV*, 809 F.3d at 641–42)).

VI. THE BALANCE OF EQUITIES WEIGHS STRONGLY IN FAVOR OF SERTA SIMMONS

As demonstrated in Serta Simmons’ Brief, the balance of equities weighs strongly for a preliminary injunction. *See* Brief at 22-23. Nevertheless, Casper alleges that an injunction would burden Casper more than Serta Simmons because “Casper is a small startup and the Wave is one of only three mattresses it sells.” Opp. at 69. It contends that “[an] injunction against the Wave, Casper’s most significant undertaking since the company launched, and highest-priced mattress of only three total mattresses, would likely cause severe financial hardship to the company.” *Id.* at 70.

The Federal Circuit rejected this exact argument in *Robert Bosch LLC*, wherein Pylon, the infringer, argued that Bosch, the patentee, was an “international conglomerate with a diverse product base,” whereas Pylon was “a small, domestic corporation that focuses on the manufacture and sale of wiper blades” and that “the parties’ respective size and business models demonstrate[d] that an injunction would burden Pylon more than the absence of an injunction would harm Bosch.” 659 F.3d at 1156 (internal quotation marks omitted). The Federal Circuit was not persuaded by the argument, reasoning that “[a] party cannot escape an injunction simply because it is smaller than the patentee or because its primary product is an infringing one.” *Id.*; *see also Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986) (“One who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the product so elected.”); *Hoffman-LaRoche, Inc. v. Cobalt Pharma, Inc.*, No. 07-cv-4539, 2010 WL 4687839, at *12 (D.N.J. Nov. 10, 2010) (“Cobalt points to Roche’s size and profitability, and the small impact the likely harms would have on Roche’s overall profitability. That says nothing about whether such harms are irreparable.”) Rather, in *Robert Bosch LLC*, the Federal Circuit explained that “requiring Bosch to compete against its own patented invention, with the resultant harms described above, places a substantial hardship on Bosch.” 659 F.3d at 1156; *see also Metalcraft of Mayville*, No. 16-C-544, 2016 WL 4076894, at *4 (E.D. Wis. Aug. 1, 2016), *aff’d sub nom. Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358 (Fed. Cir. 2017) (“Exclusivity is closely related to the fundamental nature of patents as property rights [and] is an intangible asset that is part of a company’s reputation’ Therefore, when ‘two companies are in direct competition against one another, the patentee suffers the harm—often irreparable—of being forced to compete

against products that incorporate and infringe its own patented inventions.” (quoting *Douglas Dynamics, LLC*, 717 F.3d at 1345)).

Furthermore, Casper admitted that its revenues were approximately \$200 million in 2016.³⁶ *See* Opp. at 69. Those earnings were entirely related to mattresses that Serta Simmons does not contend infringe the Asserted Patents. Therefore, a preliminary injunction would have no impact on those sales numbers. Casper also admitted that it is considering an initial public offering. *See* Opp. at 4. And Casper recently opened fourteen retail stores in major metropolitan areas, which will further expand its retail footprint. *See* Schoenhard 2d Decl., Ex. 25. Casper is thus highly unlikely to be significantly harmed by a preliminary injunction.

Regardless, Serta Simmons, as the holder of the Asserted Patents, has the right to exclude and suffers irreparable harm by being forced to compete against its own patents. The potential harm to Casper does not negate or detract from the substantial burden imposed upon Serta Simmons, and Casper cannot dodge a preliminary injunction simply because it is smaller and offers fewer products.

Thus, the balance of equities weighs in favor of Serta Simmons.

VII. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

As demonstrated in Serta Simmons’ Brief, a preliminary injunction is also in the public interest. *See* Brief at 23; *see also, e.g., QBAS Co.*, 2010 WL 7785955, at *15 (C.D. Cal. Dec. 16, 2010) (“[I]ssuing a preliminary injunction here actually favors the public interest. Intellectual

³⁶ Casper is not the David to Serta Simmons’ Goliath that it portrays itself to be in its opposition. In fact, Casper has sued three separate online mattress review websites simply because they gave Casper bad reviews. When one of the websites did not immediately agree to settle (and take down the unfavorable reviews), Casper financed an acquisition of the website. The unfavorable reviews of Casper no longer appear on any of the three websites. *See* Schoenhard 2d Decl., Ex. 24.

property rights are a means of encouraging experimentation and creation. Although there are limits to the benefits of strong intellectual property rights, the assurance that inventions are protected from likely infringers allows researchers to spend and innovate, confident that they will be able to reap the benefits of their work.”).

Casper argues that the public interest in protecting property rights is outweighed by the public interest in promoting competition. But there is a keen distinction between fair and honest competition—which Serta Simmons welcomes—and unfair competition through the marketing and sale of infringing products. This exact point was recognized by the Federal Circuit in *Apple IV*:

Samsung is correct—the public often benefits from healthy competition. However, the public generally does not benefit when that competition comes at the expense of a patentee’s investment-backed property right. To conclude otherwise would suggest that this factor weighs against an injunction in every case, when the opposite is generally true. We base this conclusion not only on the Patent Act’s statutory right to exclude, which derives from the Constitution, but also on the importance of the patent system in encouraging innovation. Injunctions are vital to this system. As a result, ***the public interest nearly always weighs in factor of protecting property rights in the absence of countervailing factors***

809 F.3d at 647 (emphasis added)).

Moreover, preventing Casper from selling an infringing mattress is not the type of critical public interest contemplated by courts. *See id.* (“Apple does not seek to enjoin the sale of lifesaving drugs, but to prevent Samsung from profiting from the unauthorized use of infringing features in its cellphones and tablets.”); *QBAS Co.*, 2010 WL 7785955, at *14 (“While temporarily shutting down, for example, a major transportation or communications company due to patent infringement may have a devastating impact on the American public, this concern is not

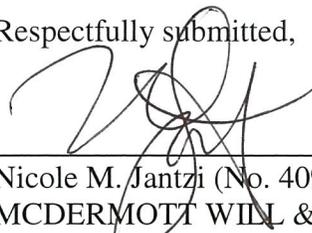
present here. Instead, a preliminary injunction here would merely prevent Defendants from selling a product that will still be available to the public from Plaintiff after any injunction is granted.”).

Thus, Casper has not demonstrated that a critical public interest will be injured and thus the public interest weighs in favor of preliminary relief for Serta Simmons.

VII. CONCLUSION

For the foregoing reasons, Serta Simmons respectfully requests that the Court issue a preliminary injunction barring Casper, its officers, agents, servants, employees, attorneys, and any persons in active concert or participation with them, who receive actual notice of the Court’s order by personal service or otherwise, from making, marketing, offering for sale, or selling the Casper Wave mattress and any mattress of substantially the same design, pending the outcome of this proceeding.

Respectfully submitted,



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November 22, 2017

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court on November 22, 2017, via the Court's CM/ECF system and to be served on all counsel of record who have consented to electronic service.

/s/ Michael W. Nemith
Michael W. Nemith