PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Tempur Sealy International, Inc., a corporation, and Mattress Firm Group Inc., a corporation, Respondents.	)	Docket No. 9433

SCHEDULING ORDER

August 27, 2024	-	Complaint Counsel serves preliminary proposed fact witness list (not including experts) with a brief summary of the proposed testimony.
September 4, 2024	-	Respondents serve preliminary proposed fact witness list (not including experts) with a brief summary of the proposed testimony.
September 6, 2024	-	Complaint Counsel serves proposed expert witness list.
September 13, 2024	-	Respondents serve proposed expert witness lists.
September 17, 2024	-	Deadline for parties to serve document requests, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.
October 4, 2024	-	Deadline for parties to serve requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of documents.
October 15, 2024	-	Close of discovery, except for discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
October 22, 2024	-	Complaint Counsel serves expert witness reports.

October 30, 2024	-	Complaint Counsel serves final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel's final proposed witness list shall include no more than twenty-five fact witnesses. Complaint Counsel provides the Administrative Law Judge (ALJ) with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
November 5, 2024	-	Respondents serve expert witness reports. Respondents' expert reports shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
November 6, 2024	-	Respondents serve final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents' final proposed witness lists shall include no more than twenty-five fact witnesses. Respondents provide the ALJ with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
November 7, 2024	-	Parties intending to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).[1]
November 15, 2024	-	Complaint Counsel to identify rebuttal expert witness(es) and serve rebuttal expert witness report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert witness

[1] Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within five days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten days' notice of the proposed use of such material. To resolve this apparent conflict, this Scheduling Order requires that the parties provide at least ten days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert witness report(s) or seeking leave to submit surrebuttal expert witness report(s) on behalf of Respondents).

November 18, 2024 - Deadline to file motions for *in camera* treatment of proposed trial exhibits. *See* Additional Provision 16.

November 19, 2024 - Deadline for parties to file motions *in limine* to preclude admission of evidence. *See* Additional Provision 17.

November 21, 2024 - Deadline for parties to depose expert witnesses (including rebuttal expert witnesses) and exchange expert-related proposed exhibits.

Parties exchange objections to final proposed witness lists and exhibit lists, serving courtesy copies on the ALJ. Parties are to review the Commission's Rules on the admissibility of evidence before filing objections to exhibits and only raise objections that are necessary and valid.

November 21, 2024 - Deadline for parties to file responses to motions for *in camera* treatment of proposed exhibits.

November 22, 2024 - Deadline for parties to file responses to motions *in limine* to preclude admission of evidence.

November 25, 2024 - Complaint Counsel files pretrial brief supported by legal authority.

November 26, 2024 - Parties exchange proposed stipulations as to law, facts, the admissibility of proposed exhibits, and the expertise of any expert witnesses.

December 2, 2024 - Respondents file pretrial brief supported by legal authority.

December 3, 2024 - Final prehearing conference to begin at 10:00 a.m. Eastern Time.

The parties shall meet and confer prior to the final prehearing conference regarding trial logistics and proposed stipulations as to law, facts, admissibility of exhibits, and expertise of any expert witnesses. To the extent the parties have agreed to stipulate to any issues of law, facts, admissibility of exhibits, and/or expertise of any expert witnesses, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the conference. At the final prehearing conference, the parties' list of stipulations shall be marked as

"JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed to by the parties.

Also at the final prehearing conference, the parties may present any objections to the final proposed witness lists and proposed exhibits. All proposed exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admissibility of proposed exhibits, the parties shall prepare a list identifying each proposed exhibit to which admissibility is stipulated, which shall be offered into evidence as a joint exhibit marked as "JX2" and signed by each party. No signature by the ALJ is required.

December 4, 2024 - Commencement of Hearing, to begin at 10:00 a.m. Eastern Time.

ADDITIONAL PROVISIONS

Filings

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Office of the Administrative Law Judges (OALJ) by email to: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to the OALJ directly and the FTC E-filing system shall not be used for this purpose. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110, Washington, DC, 20580 as the place of service. **The subject line of all electronic submissions to oalj@ftc.gov shall set forth the docket number, case name, and title of the submission**. The parties are not required to serve a courtesy copy on the OALJ in hard copy, except upon request. Discovery requests and discovery responses are to be exchanged between the parties and shall not be submitted to the OALJ.

2. The parties shall serve each other by email and shall include "Docket 9433" in the subject line. All attached documents shall be in .pdf format. In the event that service by email is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice.

3. Each pleading that cites to an unpublished opinion(s) or opinion(s) not available on LEXIS or WESTLAW shall include a copy of such opinion(s) as an exhibit.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred in good faith with opposing counsel

in an effort to resolve the issues raised by the motion, describing those efforts. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. By signing and presenting a pleading, written motion, or other filing, an attorney or *pro se* litigant certifies that either: (1) no portion of the filing was drafted by generative artificial intelligence ("AI") (such as ChatGPT, Microsoft Copilot, Harvey.AI, or Google Gemini), or (2) any language in the filing that was drafted by generative AI was checked for accuracy by human attorneys or paralegals using printed legal reporters and/or online legal databases. Any filing that fails to comply with these mandatory certification requirements may be stricken on that ground.

6. In relevant part, Rule 3.22(c) states:

> All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the ALJ, including those filed under Rule 3.38.

7. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

Discovery

8. Each party is limited to serving on each opposing party: fifty requests for production of documents, including all discrete subparts; twenty-five interrogatories, including all discrete subparts; and ten requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

9. If any federal court proceeding related to this administrative proceeding is initiated, any discovery obtained in this proceeding may be used in the related federal court litigation, and vice versa. Any discovery taken in this administrative proceeding shall be non-duplicative of the discovery taken in the federal court preliminary injunction proceeding. No individual or entity deposed in one action may be re-deposed in the other, except that expert witnesses may be re-deposed in this proceeding to the extent their reports in this proceeding include opinions not set forth in their reports from the federal court proceeding. The parties preserve all rights to object to the admissibility of evidence.

10. The parties will serve any objections to document requests within 10 business days of service of the request, and they will meet and confer to attempt to resolve any disputes and to discuss timing of production within 3 business days of the objections being served. The party responding to document requests will make a good-faith effort to produce responsive documents as expeditiously as possible, including by making productions on a rolling basis.

11. Compliance with the scheduled close of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off date and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion in this administrative proceeding to compel responses to discovery requests or to seek certification of a request for court enforcement of a non-party subpoena shall be filed within thirty days of service of the responses and/or objections to the discovery requests or within twenty days after the close of discovery, whichever first occurs; except that, where the parties have been engaging in negotiations over a discovery dispute, including negotiations with any non-party with regard to a subpoena, provided that such negotiations were initiated promptly and carried on in good faith the deadline for the motion to compel shall be within five business days of reaching an impasse.

12. One Rule 3.33(c) deposition notice of each Respondent shall be permitted. Depositions of all individuals designated as representatives for purposes of a 3.33(c) deposition notice shall count as one deposition for purposes of this paragraph, even if the noticed entity designates multiple individuals to provide testimony. The parties shall consult and coordinate the time and place of the deposition prior to confirming any deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate witness schedules. The deposition of any person may be recorded by video, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by video at least five days in advance of the deposition. Except as otherwise provided in this paragraph, no deposition, whether recorded by video or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the ALJ. The parties will stipulate to a remote deposition protocol, which stipulation shall be submitted to the ALJ for entry into the record of proceedings.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. Unless the parties otherwise agree, at the request of any party, the time and allocation for a non-party deposition that has been cross-noticed shall be divided evenly

between each side. If both Complaint Counsel and Respondents notice any non-party fact deposition (including any Rule 3.33(c) deposition), the seven hours of record time will be divided equally between the sides. Unused time in any side's allocation of deposition time shall not transfer to the other side. To the extent a deposition involves a non-party and is not cross-noticed, the party who did not notice the deposition will have 30 minutes available to them and the party seeking the deposition will have 6 hours and 30 minutes.

14. Every documentary subpoena to a non-party shall include a cover letter requesting that (1) the non-party Bates-stamp each document with a production number and any applicable confidentiality designation prior to producing it and (2) the non-party provide to the other parties copies of all productions at the same time as they are produced to the requesting party. If a non-party fails to provide copies of productions to both sides, within three business days of receiving the documents, the requesting party shall produce all materials received pursuant to the non-party subpoena, as well as all materials received voluntarily in lieu of a subpoena, including declarations or affidavits obtained from a non-party. If a party serves a non-party subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven (7) calendar days after the original return date for the document subpoena , unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

15. A party that obtains a declaration, note of support, or affidavit from a party or non-party witness will promptly produce it to the other party(ies), and in any event not later than (1) three business days before the party or non-party is scheduled to be deposed, and (2) seven calendar days before the end of fact discovery, absent a showing of good cause. Declarations, notes of support, or affidavits produced after this date shall not be admitted into evidence or used in the administrative proceeding except upon a showing of good cause. The parties reserve all rights and objections with respect to the use and/or admissibility of any declaration, note of support, or affidavit. No declaration, note of support, or affidavit will be admitted unless a fair opportunity was available to depose the declarant.

Motions

16. If a party intends to offer confidential materials of an opposing party or non-party into evidence at the hearing, in providing notice to such non-party, the party is required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial. 16 C.F.R. § 3.45; *In re Otto Bock Healthcare North American*, 2018 WL 3491602 at *1 (July 2, 2018); *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017). Motions must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr.4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the ALJ.

17. Motions *in limine* are strongly discouraged. Motion *in limine* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the

evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (Apr. 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Id*. (citing *Hawthorne Partners v. AT&T Technologies, Inc*., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *SEC v. U.S. Environmental, Inc*., 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the ALJ is capable of assigning appropriate weight to evidence.

Witnesses

18. The final proposed witness lists shall represent counsel's good faith designation of all potential witnesses who the parties reasonably expect may be called upon in their case-in-chief. A general designation that a party reserves the right to call anyone on the opposing party's witness list is insufficient. A party shall promptly notify the opposing party of changes to witness lists to facilitate completion of discovery within the dates of this Scheduling Order. The final proposed witness lists may not include additional witnesses not listed in the preliminary proposed witness lists or who have not been deposed or submitted affidavits/declarations, unless by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

19. If any party wishes to offer a rebuttal witness other than a rebuttal expert witness, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and (d) shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

20. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

21. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

22. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other parties:

(i) Materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) Transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert witness report is produced, the producing party shall provide to the other parties all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of paragraph (g) below, except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the ALJ, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert witness report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon by the expert witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert witness who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert witness reports, a party shall provide opposing counsel:

(i) A list of all commercially-available computer programs used by the expert witness in the preparation of the report;

(ii) A copy of all data sets used by the expert witness, in native file format and processed data file format; and

(iii) All customized computer programs used by the expert witness in the preparation of the report or necessary to replicate the findings on which the expert witness' report is based.

(g) Expert witnesses' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) Any form of communication or work product shared between any of the parties' counsel and their expert witness(es), or between any of the expert witnesses themselves;

(ii) Any form of communication or work product shared between an expert witness and persons assisting the expert witness;

(iii) An expert witness' notes, unless they constitute the only record of a fact or an assumption relied upon by the expert witness in formulating an opinion in this case;

(iv) Drafts of expert witness reports, analyses, or other work product; or

(v) Data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert witness in the opinions contained in the expert witness' report.

23. If the expert witness reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert witness report(s) in accordance with Additional Provision 7 of this Scheduling Order and 16 C.F.R. § 3.45(e).

24. An expert witness's testimony is limited to opinions contained in that expert witness' report provided to the opposing party. No opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness shall provide opinion testimony. Expert testimony is not considered for the purpose of establishing the underlying facts of the case.

Proceedings

25. In the event that the evidentiary hearing in this matter is conducted remotely by video conference:

(a) The parties are encouraged, in advance of the hearing, to take expert depositions for the purpose of perpetuating trial testimony (i.e., a trial deposition) and to submit such trial testimony as an exhibit in lieu of presenting the expert's live testimony at the hearing. This trial deposition may be conducted in addition to any deposition of an expert witness for purposes of discovery (discovery deposition). Although a party may submit trial depositions in lieu of live video testimony at trial for all expert witnesses in the case, a party may elect to conduct trial depositions for all or fewer than all experts.

(b) The parties may, in advance of the hearing, take trial depositions of fact witnesses who have been deposed before the close of discovery and to submit such trial deposition testimony (as video and/or transcript of trial deposition testimony) as an exhibit in lieu of presenting the fact witness' live testimony at the hearing. Although a party may submit trial depositions in lieu of live video testimony at trial for all fact witnesses, a party may elect to conduct trial depositions for fewer than all fact witnesses.

26. The final exhibit lists shall represent counsel's good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final exhibit lists only by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

27. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the ALJ.

28. The parties shall provide to one another, the ALJ, and the court reporter at least forty-eight hours in advance, not including weekends and holidays, a good faith list of all witnesses to be called on each day of the hearing, subject to possible delays or unforeseen circumstances.

Exhibits

29. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) twenty-four hours before they are used with a witness.

30. Complaint Counsel's exhibits shall bear the designation "PX," Respondents' exhibits shall bear the designation "RX," and joint exhibits shall bear the designation "JX," or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation "PXD," Respondents' demonstrative exhibits shall bear the designation "RXD," or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number or some other consecutive page number.

31. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. To that end, the parties shall agree in advance of the final prehearing conference to the identification of joint exhibits. Counsel shall contact the court reporter regarding submission of exhibits.

Page Limitations

32. Pretrial briefs shall not exceed seventy-five pages per side, post-trial initial briefs shall not exceed seventy-five pages per side, post-trial reply briefs shall not exceed fifty pages per side, and post-trial initial findings of fact and conclusions of law shall not exceed 125 pages per side, unless otherwise agreed to by the parties or ordered by the ALJ.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 19, 2024