

NOTE: This disposition is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**CAP EXPORT, LLC,**  
*Plaintiff/Counterclaim Defendant-Appellee*

**ABRAHAM AMOUYAL,**  
*Third-Party Defendant-Appellee*

**4MODA CORP.,**  
*Third-Party Defendant*  
v.

**ZINUS, INC.,**  
*Defendant/Third Party Plaintiff/Counterclaimant-Appellant*

**DOES, 1 THROUGH 10, INCLUSIVE,**  
*Defendant*

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2021-2159

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Appeal from the United States District Court for the Central District of California in No. 2:16-cv-00371-JWH-MRW, Judge John W. Holcomb.

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Decided: September 22, 2022

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DAVID BEITCHMAN, Beitchman & Zekian, PC, Encino, CA, argued for Cap Export, LLC, Abraham Amouyal. Also represented by MILORD A. KESHISHIAN, Milord & Associates, PC, Los Angeles, CA.

MATTHEW WOLF, Arnold & Porter Kaye Scholer LLP, Washington, DC, argued for Zinus, Inc. Also represented by JIN-SUK PARK; RYAN M. NISHIMOTO, Los Angeles, CA.

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Before DYK, TARANTO, and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

This case comes to us on appeal for a third time. Zinus, Inc. appeals the United States District Court for the Central District of California's summary judgment of invalidity under the on-sale bar, 35 U.S.C. § 102(a)(1), (b)(1). Because there are material factual disputes regarding whether the on-sale product anticipates the asserted claims of U.S. Patent No. 8,931,123, we vacate the district court's summary judgment and remand.

#### BACKGROUND

Zinus is the current assignee of the '123 patent, which is directed to "[a]n assemblable mattress support [that] can be shipped with all of its components compactly packed into the headboard." '123 patent, Abstract. Claim 1 is representative:

1. A mattress support comprising:

a longitudinal bar with a first connector and a second connector;

a headboard with a compartment and a third connector; and

*a footboard with a fourth connector, wherein the first connector is adapted to attach to the third connector, wherein the second connector is adapted to*

*attach to the fourth connector*, wherein legs are attached to a bottom side of the footboard, wherein the longitudinal bar and the footboard fit inside the compartment of the headboard, wherein the first connector is directly connected to the third connector, and the second connector is directly connected to the fourth connector in an assembled state of the mattress support, wherein the first connector is not connected to the third connector, and the second connector is not connected to the fourth connector in a compact state of the mattress support, and wherein the longitudinal bar and the footboard are contained inside the compartment in the compact state of the mattress support.

*Id.* at col. 6 ll. 21–40 (emphasis added to highlight the disputed limitation on appeal).

The protracted history of this case goes back to at least 2016, when Cap Export, LLC filed a declaratory judgment action against Zinus, alleging that the '123 patent claims are invalid and not infringed. Zinus counterclaimed, alleging (among various state law counterclaims) that Cap Export infringed the '123 patent claims.

After two appeals to this court and multiple remands to the district court, Cap Export filed a motion for summary judgment of invalidity under the on-sale bar. Cap Export's invalidity theory is based on the sale of a particular bed-in-a-box product—the “Mersin” bed—sold by third party Woody Furniture to Zinus's then-president Colin Lawrie before the '123 patent's critical date. Although disputed at the district court, Zinus does not dispute on appeal that this sale was a commercial sale or that the bed was ready for patenting. Instead, the crux of the parties' dispute before the district court, as relevant on appeal, was whether the assembly instructions that accompanied the Mersin bed sold to Mr. Lawrie, which on their face indicate that

they were for the “Fusion” bed, also applied to the Mersin bed.

Zinus presented testimony suggesting the Fusion bed instructions might have been mistakenly included in the Mersin bed box. Specifically, in connection with its brief opposing summary judgment, Zinus provided a declaration from its former Director of Marketing, Cyndi Hunting. As part of her job, Ms. Hunting stated she “was responsible for monitoring upholstered platform bed offerings of the competition in the market, and specifically on the Internet.” J.A. 9054 (Hunting Decl. ¶ 5). Based on her experience working in the industry, Ms. Hunting explained that “it is not uncommon for assembly instructions for one version of a bed type to be put into the shipping boxes for another version of the bed type,” due to “a mistake, sloppiness, or a failure to update/correct the assembly instructions.” J.A. 9060 (Hunting Decl. ¶ 27).

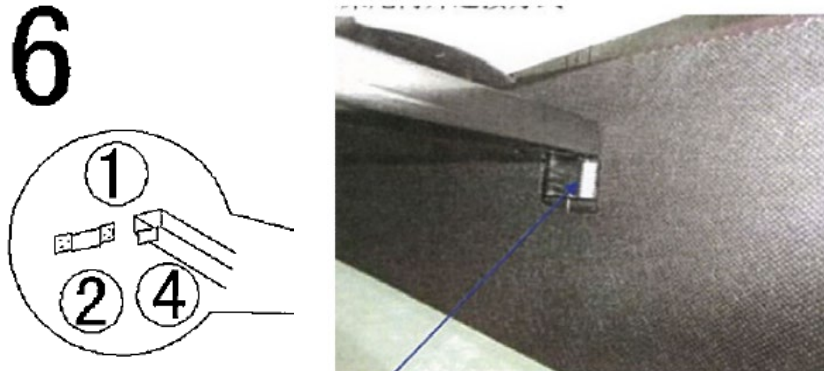
There is no dispute on appeal that the product disclosed in the Fusion bed assembly instructions would satisfy every element of claim 1. As shown in step 6 of the assembly instructions (reproduced below), a tab on a longitudinal bar 4 inserts into a bracket on the footboard (shown between 1 and 2). The parties dispute, however, whether the Mersin bed is constructed in the same way as the Fusion bed such that it satisfies every element of that claim—specifically, whether it has a “longitudinal bar” with a “second connector” that is “adapted to attach” to a “fourth connector” on the “footboard.” ’123 patent col. 6 ll. 21–40. Zinus presented evidence that it alleged shows that the as-sold Mersin bed does not include the connector shown in step 6 of the assembly instructions, including a photo of the as-sold Mersin bed taken from an inspection report. Step

CAP EXPORT, LLC v. ZINUS, INC.

5

6 of the instructions and the photo are reproduced side-by-side below:

J.A. 8424 (Fusion assembly instructions, excerpted);  
J.A. 8434 (photo of Mersin bed from inspection report, excerpted).



In her declaration on behalf of Zinus, Ms. Hunting discussed the Fusion bed assembly instructions, explaining that “the end of the rail (4) appears to have a downward oriented tab” that “appears to be fashioned to engage a bracket” located between (1) and (2). J.A. 9059–60 (Hunting Decl. ¶ 24). She further explained that, in contrast, the photograph of the Mersin bed shows “neither one of th[e] two structures (a tongue or a bracket)” that is shown in the Fusion assembly instructions. J.A. 9060 (Hunting Decl. ¶ 25). She continued: “What is pictured [in the photo] is most likely a hole. The rail does not appear to have any downward oriented tongue. The fabric is not bulging outward as would be the case if the wings of the bracket were underneath the fabric.” *Id.* She thus concluded that the Fusion bed and the as-sold Mersin bed are different.

She wasn’t the only one to come to this conclusion. Mr. Jayson Lee, a member of Zinus’s research and development team, explained that the cost of production for the Mersin bed shown in the inspection report was low. He suggested that this was due, in part, to the design of the

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