

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AMERICAN NATIONAL MANUFACTURING INC.,
Petitioner,

v.

SLEEP NUMBER CORPORATION
f/k/a SELECT COMFORT CORPORATION,
Patent Owner.

Case No. IPR2019-00500
Patent No. 9,737,154 B2

**DECLARATION OF ELIZABETH A. PATTON
IN SUPPORT OF PATENT OWNER'S MOTION
FOR ADDITIONAL DISCOVERY**

Sleep Number Corp.
EXHIBIT 0074

I, Elizabeth A. Patton, declare as follows:

1. I am a partner at the law firm Fox Rothschild LLP, and I am one of the attorneys representing Sleep Number Corporation f/k/a Select Comfort Corporation (herein “Sleep Number”) in the above matter initiated by American National Manufacturing, Inc. (“ANM”).

2. I have first-hand knowledge of the information stated in this Declaration, which I submit in support of Patent Owner’s Motion for Additional Discovery.

3. I am a senior member of the team representing Patent Owner in the following IPR proceedings: IPR2019-00497 (U.S. Pat. No. 8,769,747), IPR2019-00500 (U.S. Pat. No. 9,737,154), and IPR2019-00514 (U.S. Pat. No. 5,904,172) (“IPR proceedings”). I am also a senior member of the team representing Patent Owner in the following related district court cases (“District Court Case”): *Sleep Number Corporation v. American National Manufacturing Inc.*, 5:18-cv-00357(AB)(SPx) (C.D. Cal. 2018) and *Sleep Number Corporation v. Sizewise Rentals, LLC*, 5:18-cv-00356(AB)(SPx) (C.D. Cal. 2018).

4. During the District Court Case, ANM made various versions of source code (“Source Code”) available for inspection voluntarily and without a motion to compel. That inspection occurred at ANM’s counsel’s offices under strict procedures set forth in the District Court Protective Order (“DCPO”). For example,

Sleep Number's counsel and expert witnesses were required to travel to counsel's office in another state to review the code under opposing counsel's supervision, could only inspect the code on a specific non-internet accessible computer, and could only print a limited number of pages of code onto bates-numbered pages.

5. Following inspection, Sleep Number drafted and served Infringement Contentions that refer to nine versions of ANM and Sizewise's Source Code, including ANM's versions 1.8, 1.9, 1.92, 1.97, and 2.0 source code and Sizewise's Platinum and Medisphere source code. The references to Source Code in Sleep Number's Infringement Contentions consist of line numbers, variables, and functions, and the Infringement Contentions explain how the Source Code satisfies certain claim limitations of the patents at issue in the District Court Case and these IPR proceedings.

6. On September 5, 2019, the parties attended a telephone conference with the Board related to Sleep Number's first request to file a motion for additional discovery in these IPR proceedings. During that call, the Board provided guidance that Sleep Number should follow the "fairly straightforward" procedure of requesting modification of the DCPO in order to produce relevant District Court Case documents in these IPR proceedings. Sleep Number decided to follow that guidance in requesting from the District Court use of all District Court Case documents (including Source Code) in these IPR proceedings.

7. Via email from September 5–11, 2019, Sleep Number’s counsel met and conferred with ANM’s counsel in advance of filing an *ex parte* application to modify the DCPO. Additionally, on September 9, 2019, myself and co-counsel, Lukas Toft, met and conferred on the phone with ANM’s counsel, Jaspal Hare and Kevin Tuttle. During that phone call, ANM’s counsel stated that they would not agree to a “wholesale” modification of the DCPO to allow all documents in the District Court Case to be used in these IPR Proceedings, but that they would be willing to consider a specific list of documents. In response, Sleep Number’s counsel provided ANM’s counsel with such an initial list of documents referenced in ANM’s interrogatory answers. Sleep Number’s counsel also later asked to use Sleep Number’s Infringement Contentions from the District Court Case. ANM’s counsel refused to allow use of any of the foregoing documents or stipulate to any modification of the protective order.

8. As a result, Sleep Number filed an *ex parte* application to modify the DCPO to allow use of all District Court Case documents (including Source Code) in these IPR proceedings. ANM opposed that application. One of the reasons ANM opposed the application was because of third-party Source Code. Specifically, ANM referenced a single third party and asserted that Sleep Number’s motion could not be granted because it had not “Given Third-Party Medisphere Notice and Right to

be Heard in this Proceeding.” Exhibits 2072 is a true and correct copy of ANM’s opposition to Sleep Number’s *ex parte* application.

9. On September 26, 2019, the District Court issued a ruling modifying the DCPO to allow use of District Court documents in this IPR proceeding, but held that Sleep Number must redact third-party source code from the documents it uses in this IPR proceeding. Exhibit 2043 is a true and correct copy of the District Court’s September 26, 2019 order.

10. Thus, the District Court held that Sleep Number could not use third-party source code or provide it to the Board. At the time, Sleep Number believed (and assumed the District Court believed) that this was a compromise that would only require redaction of the Medisphere source code, which is only one of nine versions of Source Code referenced in Sleep Number’s Infringement Contentions. In other words, Sleep Number believed that it would be allowed to use all eight other versions, which includes all of the five ANM versions, of Source Code in this IPR proceeding. At that time, Sleep Number decided not to seek relief from the Board because it believed it was going to be able to use the vast majority of the Source Code, including all of ANM’s Source Code, in this IPR proceeding.

11. Thereafter, the parties began meeting and conferring to formulate a stipulated protective order for this IPR proceeding. During an October 10, 2019 meet and confer call, only 13 days prior to Due Date 1 for Sleep Number’s Patent

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