UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AMERICAN NATIONAL MANUFACTURING INC.,

Petitioner,

vs.

SLEEP NUMBER CORPORATION f/k/a SELECT COMFORT CORPORATION,

Patent Owner.

Case No. IPR2019-00497 (Patent 8,769,747 B2)

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

DEPOSITION OF JOSHUA W. PHINNEY, Ph.D., P.E.

New York, New York

Thursday, February 20, 2020

Reported by:

Shauna Stoltz-Laurie, CLR

JOB NO. 27004



	Page 2		Page 4
1		1	
2		2	JOSHUA W. PHINNEY ,
3		3	called as a witness, having been duly sworn
4		4	by a Notary Public, was examined and
5	February 20, 2020	5	testified as follows:
6	1:00 p.m.	6	EXAMINATION BY
7	1.00 p.m.	7	MR. MOORE:
8	Deposition of DR. JOSHUA W.	8	Q. Good afternoon, Dr. Phinney.
9	PHINNEY, Ph.D., P.E., held at the	9	A. Good afternoon.
10	offices of Fox Rothschild LLP, 101 Park	10	Q. Nice to see you again.
11	Avenue, New York, New York, pursuant to	11	A. Good to see you.
12	Notice, before Shauna Stoltz-Laurie, a	12	Q. So do you understand why we're here
13	Certified Realtime Reporter and Notary	13	today?
14	Public of the State of New York.	$\frac{13}{14}$	A. In part, I think.
15	rubile of the state of New Tork.	15	Q. And what would that be?
16		16	A. We'd be here to discuss my
17		17	supplemental or reply report I call it, and
18		18	perhaps the the report that I I wrote
19		19	about the Motion to Amend.
20		20	
21		21	Q. Okay. So how many times have you
22		22	been deposed before? A. I mean somewhere about 20.
23		23	
24		24	Q. Okay. How are you feeling today?
25		25 25	A. All right.
25	Page 3	25	Q. Is there any reason that you can't Page 5
	rage 3	_	
1	A B B E A B A M G E G	1	Phinney
2	APPEARANCES:	2	offer truthful answers to the questions
3	OPENICED FANELLD	3	today?
4	SPENCER FANE LLP	4	A. No.
5	Attorneys for the Petitioner	5	Q. And you understand that in an IPR,
6	5700 Granite Parkway - Suite 650	6	which is the proceeding we're in, that your
7	Plano, Texas 75024-6622	7	testimony is trial testimony.
8	BY: JASPAL SINGH HARE, ESQ.	8	A. Yes, I understand.
9	jhare@spencerfane.con	9	Q. So there will be times today when I
10	ZHONG LINI AWEDNII D	10	ask questions that are yes or no questions,
11	ZHONG LUN LAW FIRM LLP	11	and in those situations, you should provide a
12	Attorneys for the Patent Owner	12	yes or no answer. Do you understand that?
13	4322 Wilshire Boulevard - #200	13	A. Yes.
14	Los Angeles, California 90010	14	MR. HARE: Objection, form.
15 16	BY: STEVEN A. MOORE, ESQ.	15	Q. Do you have any devices on you that
16	stevemoore@zhonglun.com	16	allow to you communicate with others?
17	-AND-	17	A. I have a cellphone.
18	FOX ROTHSCHILD LLP	18	Q. Is that it on the table?
19	222 South Ninth Street - Suite 2000	19	A. No.
20	Minneapolis, Minnesota 55402-3338	20	Q. Okay. During the deposition
21	BY: LUKE TOFT, ESQ.	21	today, if you are going to communicate with
22	ltoft@foxrothschild.com	22	anyone that's outside of the room, would you
23		23	please let me know ahead of time.
24		24	A. I will.
25		25	Q. What did you do to prepare for your

2 (Pages 2 to 5)



	Page 6		Page 8
1	Phinney	1	Phinney
2	deposition today?	2	footnote in one of your reports?
3	A. I met with Mr. Hare, and reviewed	3	A. I believe it was a footnote, yes.
4	my reports and the accompanying petitions or	4	Q. Were there any other errors?
5	what the lawyers worked on.	5	A. Nothing I can think of that
6	Q. How long did that meeting last?	6	wouldn't be like a typo.
7	A. About about five hours.	7	Q. So your education, training and
8	Q. Where was that meeting conducted?	8	work history, has that changed since we last
9	A. At Exponent's offices in New York.	9	spoke in deposition?
10	Q. So can you list the materials for	10	A. I don't think so.
11	me that you did review during that meeting?	11	Q. So we've spoken before; have we
12	A. The my report to for the	12	not?
13	Motion to Amend, my reply report, the	13	A. Yes, we have.
14	petition I'm not sure what to call it, the	14	Q. Our last deposition, you submitted
15	lawyer's work product that corresponded to	15	declarations as part of the petitioner's
16	the reply report	16	petition on the '154 and '747 patents; is
17	Q. Okay.	17	that true?
18	A and the patents.	18	A. I didn't hear the first part of
19	Q. Anything else?	19	your question. Sorry.
20	A. The Gifft reference, '172.	20	Q. So our prior deposition, we were
21	Q. Anything else?	21	speaking about the declarations that you
22	A. The Ebel reference and the Mittal	22	submitted to the Patent Trials and Appeals
23	reference.	23	Board for Petitioner's petitions for
24	Q. Did you review Pillsbury?	24	interparties review of the '154 and '747
25	A. Oh. Yes.	25	patents; is that true?
	Page 7		Page 9
1	Phinney	1	Phinney
2	Q. Anything else?	2	A. Yes.
3	A. I don't think so.	3	Q. And you understand that the Board
4	Q. While you were reviewing those	4	instituted those petitions.
5	Please go ahead.	5	A. Yes.
6	A. I'm sorry. I also saw the written	6	Q. Since that point in time American
7	transcript for Dr. Messner.	7	National has filed a number of briefs that
8	Q. While you were reviewing those	8	you have provided declarations for; have they
9	documents did you notice any errors in any of	9	not?
10	your declarations?	10	MR. HARE: Objection to form.
11	A. Not while I was reviewing those	11	A. Yeah. I'm not sure if they're
12	documents.	12	called briefs, but yeah. Yes.
13	Q. At any other documents have you	13	Q. So in our deposition last time we
14	noticed errors in your written product?	14	met, you had opined on your understanding of
15	A. Yes.	15	the law in your prior declarations; did you
16	Q. And what were those?	16	not?
17	A. There was an error in the voltage	17	A. Yes.
18	divider equation that I wrote in my opening	18	Q. Has that understanding changed in
19	report.	19	any material way between those declarations
20	Q. Is that error the subject matter of	20	and the declarations we are here to talk
21	footnote 2 on page 45 of your Declaration in	21	about today?
22	Support of the Patent Office Motion to Amend?	22	A. Not that I can think of.
23	A. I I I wouldn't know one way	23	Q. And you applied the same
24	or the other. It could be.	24	understanding of the legal principles that
25	Q. Did you document that error in a	25	you had in the previous briefs, in the

3 (Pages 6 to 9)



1 Phinney 2 previous declarations; you applied that same 3 analysis and your understanding in this set 4 of briefs; is that true? 5 MR. HARE: Objection to form. 6 A. And so what do you mean by "this 7 set of briefs" in the last part of that 8 question? 9 Q. I go back to the first, one of the 10 first questions I asked, do you know what 11 we're here to talk about today, and your 12 response was a couple of declarations that 13 you've submitted. Is that true? 14 A. Yes. 15 Q. Okay. So when I say these briefs, 16 I mean the ones that we're here to talk about 17 today. Did you apply the same analysis and 18 legal standards to these briefs that you did 19 to the opening declarations? 20 MR. HARE: Objection, form. 21 A. Yes. 22 Q. Thank you. 23 So has your understanding of the 24 law of anticipation changed since the prior 2 A. (Perusing document) Yes. 3 Q. What is this document? 4 A. This is what I was referring to 5 previously as my reply report. 6 Q. And the front page of this 6 Q. And the front page of this 6 Dr. Joshua Phinney, Ph.D., P.E. in Support of 9 Petitioner's Reply to Patent Owner's 11 A. Yes. 12 Q. And this is a declaration that you submitted in support of Petitioner's Reply to 14 A. Yes. 15 Q. Okay. So when I say these briefs, 16 I mean the ones that we're here to talk about 17 today. Did you apply the same analysis and 18 legal standards to these briefs that you did 19 to the opening declarations? 20 MR. HARE: Objection, form. 21 A. Yes. 22 Q. Thank you. 23 So has your understanding of the 24 law of anticipation changed since the prior	
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analysis and your understanding in this set of briefs; is that true? MR. HARE: Objection to form. A. And so what do you mean by "this set of briefs" in the last part of that question? Q. I go back to the first, one of the first questions I asked, do you know what we're here to talk about today, and your cresponse was a couple of declarations that you've submitted. Is that true? A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Petitioner's Petition. A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Petitioner's Petition. A. Yes. Q. How many paragraphs is this document? A. This is what I was referring to previously as my reply report. Q. And the front page of this document, it's entitled "Declaration of Dr. Joshua Phinney, Ph.D., P.E. in Support of Petitioner's Reply to Patent Owner's Response"; is it not? A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Petitioner's Petition. A. Yes. Q. How many paragraphs is this declaration? A. It has 24 paragraphs. Q. And you submitted this in both the A. Yes. Q. And you submitted this in both the Od497 proceeding and the 00500 proceeding did you not? A. Yes.	
4 of briefs; is that true? 5 MR. HARE: Objection to form. 6 A. And so what do you mean by "this 7 set of briefs" in the last part of that 8 question? 9 Q. I go back to the first, one of the 10 first questions I asked, do you know what 11 we're here to talk about today, and your 12 response was a couple of declarations that 13 you've submitted. Is that true? 14 A. Yes. 15 Q. Okay. So when I say these briefs, 16 I mean the ones that we're here to talk about 17 today. Did you apply the same analysis and 18 legal standards to these briefs that you did 19 to the opening declarations? 20 MR. HARE: Objection, form. 21 Q. Thank you. 22 Q. Thank you. 23 So has your understanding of the 4 A. This is what I was referring to previously as my reply report. Q. And the front page of this document, it's entitled "Declaration of Dr. Joshua Phinney, Ph.D., P.E. in Support of Petitioner's Reply to Patent Owner's Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Petitioner's Petition. A. Yes. Q. How many paragraphs is this declaration? Q. How many paragraphs. Q. And you submitted this in both the Q. And you submitted this in both the Q. And you not? Q. Thank you. Q. Thank you. A. Yes.	
MR. HARE: Objection to form. A. And so what do you mean by "this of set of briefs" in the last part of that question? Q. And the front page of this document, it's entitled "Declaration of Dr. Joshua Phinney, Ph.D., P.E. in Support of Petitioner's Reply to Patent Owner's Response"; is it not? In go back to the first, one of the petitioner's Reply to Patent Owner's Response was a couple of declarations that pour's response was a couple of declaration that you submitted. Is that true? A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Petitioner's Reply to the Patent Owner's Response to the Petitioner's Petition. I mean the ones that we're here to talk about to day. Did you apply the same analysis and legal standards to these briefs that you did late legal standards to these briefs that you did late legal standards to these briefs that you did late legal standards to these briefs that you did late of the opening declarations? MR. HARE: Objection, form. MR. HARE: Objection, form. A. Yes. C. And you submitted this in both the late of the proceeding and the 00500 proceeding did you not? A. Yes. A. Yes. A. Yes. A. Yes. A. Yes.	
A. And so what do you mean by "this set of briefs" in the last part of that question? Q. I go back to the first, one of the first questions I asked, do you know what we're here to talk about today, and your response was a couple of declarations that you've submitted. Is that true? A. Yes. Q. Okay. So when I say these briefs, today. Did you apply the same analysis and legal standards to these briefs that you did legal standards to these briefs that you did A. Yes. MR. HARE: Objection, form. A. And so what do you mean by "this document, it's entitled "Declaration of Dr. Joshua Phinney, Ph.D., P.E. in Support of Petitioner's Reply to Patent Owner's Response "; is it not? A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Petitioner's Petition. A. Yes. Q. How many paragraphs is this declaration? A. It has 24 paragraphs. Q. And you submitted this in both the O0500 proceeding did you not? A. Yes. Q. Thank you. So has your understanding of the	
set of briefs" in the last part of that question? Q. I go back to the first, one of the first questions I asked, do you know what we're here to talk about today, and your response was a couple of declarations that you've submitted. Is that true? A. Yes. Q. Okay. So when I say these briefs, I mean the ones that we're here to talk about today. Did you apply the same analysis and legal standards to these briefs that you did mR. HARE: Objection, form. A. Yes. Response"; is it not? A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Petitioner's Petition. A. Yes. Q. How many paragraphs is this declaration? A. It has 24 paragraphs. Q. And you submitted this in both the Outper of Petitioner's Reply to the Patent Owner's Petition. A. Yes. Q. How many paragraphs is this declaration? A. It has 24 paragraphs. Q. And you submitted this in both the Outper of Petitioner's Petition. A. Yes. Q. How many paragraphs is this declaration? A. It has 24 paragraphs. Q. And you submitted this in both the Outper of Petitioner's Petition. A. Yes. A. Yes. A. Yes. A. Yes. A. Yes. A. It has 24 paragraphs. A. It has 24 paragraphs. A. Yes. A. Yes. A. Yes. A. Yes.	
question? Q. I go back to the first, one of the first questions I asked, do you know what we're here to talk about today, and your response was a couple of declarations that you've submitted. Is that true? A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Petitioner's Petition. A. Yes. I mean the ones that we're here to talk about today. Did you apply the same analysis and legal standards to these briefs that you did legal standards to these briefs that you did to the opening declarations? MR. HARE: Objection, form. A. Yes. Q. And this is a declaration that you the Patent Owner's Response to the Petitioner's Petition. A. Yes. Q. How many paragraphs is this declaration? A. It has 24 paragraphs. Q. And you submitted this in both the O0497 proceeding and the 00500 proceeding did you not? A. Yes. A. Yes. A. Yes.	
9 Q. I go back to the first, one of the 10 first questions I asked, do you know what 11 we're here to talk about today, and your 12 response was a couple of declarations that 13 you've submitted. Is that true? 14 A. Yes. 15 Q. Okay. So when I say these briefs, 16 I mean the ones that we're here to talk about 17 today. Did you apply the same analysis and 18 legal standards to these briefs that you did 19 to the opening declarations? 20 MR. HARE: Objection, form. 21 A. Yes. 22 Q. And this is a declaration that you 23 So when I say these briefs, 24 Let Patent Owner's Response to the 25 Petitioner's Petition. 26 Petitioner's Petition. 27 Petitioner's Reply to 28 A. Yes. 29 And you submitted in support of Petitioner's Reply to 29 Petitioner's Reply to 20 And you submitted in support of Petitioner's Reply to 20 A. Yes. 21 Q. How many paragraphs is this 22 declaration? 23 A. It has 24 paragraphs. 24 Q. And you submitted this in both the 25 Q. And you submitted this in both the 26 Q. And you not? 27 A. Yes. 28 A. Yes. 29 A. Yes. 20 A. Yes.	
first questions I asked, do you know what we're here to talk about today, and your response was a couple of declarations that you've submitted. Is that true? A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Q. Okay. So when I say these briefs, I mean the ones that we're here to talk about today. Did you apply the same analysis and legal standards to these briefs that you did to the opening declarations? MR. HARE: Objection, form. A. Yes. Q. How many paragraphs is this declaration? A. It has 24 paragraphs. Q. And you submitted this in both the 00497 proceeding and the 00500 proceeding did you not? A. Yes.	
we're here to talk about today, and your response was a couple of declarations that you've submitted. Is that true? A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Reply to the Patent Owner's Response to the Petitioner's Petition. I mean the ones that we're here to talk about today. Did you apply the same analysis and legal standards to these briefs that you did to the opening declarations? MR. HARE: Objection, form. MR. HARE: Objection, form. A. Yes. Q. And this is a declaration that you submitted in support of Petitioner's Response to the Petitioner's Petition. A. Yes. Q. How many paragraphs is this declaration? A. It has 24 paragraphs. Q. And you submitted this in both the O0497 proceeding and the 00500 proceeding did you not? A. Yes. A. Yes.	
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you've submitted. Is that true? 13 submitted in support of Petitioner's Reply to 14 A. Yes. 15 Q. Okay. So when I say these briefs, 16 I mean the ones that we're here to talk about 17 today. Did you apply the same analysis and 18 legal standards to these briefs that you did 19 to the opening declarations? 10 MR. HARE: Objection, form. 21 A. Yes. 22 Q. Thank you. 23 Over the patent Owner's Response to the 14 the Patent Owner's Response to the 15 Petitioner's Petition. 16 A. Yes. 17 Q. How many paragraphs is this 18 declaration? 19 A. It has 24 paragraphs. 20 Q. And you submitted this in both the 21 Q. Thank you. 22 did you not? 23 A. Yes.	
14 A. Yes. 15 Q. Okay. So when I say these briefs, 16 I mean the ones that we're here to talk about 17 today. Did you apply the same analysis and 18 legal standards to these briefs that you did 19 to the opening declarations? 10 MR. HARE: Objection, form. 21 A. Yes. 22 Q. Thank you. 23 So has your understanding of the 24 the Patent Owner's Response to the 25 Petitioner's Petition. 26 A. Yes. 27 Q. How many paragraphs is this declaration? 28 A. It has 24 paragraphs. 29 Q. And you submitted this in both the did you not? 20 A. Yes. 21 O0497 proceeding and the 00500 proceeding did you not? 22 A. Yes. 23 A. Yes.	
Q. Okay. So when I say these briefs, I mean the ones that we're here to talk about today. Did you apply the same analysis and legal standards to these briefs that you did to the opening declarations? MR. HARE: Objection, form. MR. HARE: Objection, form. A. Yes. O. How many paragraphs is this declaration? A. It has 24 paragraphs. Q. And you submitted this in both the O0497 proceeding and the 00500 proceeding did you not? So has your understanding of the A. Yes. A. Yes.	
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legal standards to these briefs that you did to the opening declarations? MR. HARE: Objection, form. MR. HARE: Objection, form. A. Yes. Q. And you submitted this in both the 00497 proceeding and the 00500 proceeding Q. Thank you. So has your understanding of the 18 declaration? Q. And you submitted this in both the 00497 proceeding and the 00500 proceeding 22 did you not? 23 A. Yes.	
to the opening declarations? MR. HARE: Objection, form. A. Yes. Q. Thank you. So has your understanding of the 19 A. It has 24 paragraphs. Q. And you submitted this in both the output of the	
MR. HARE: Objection, form. 20 Q. And you submitted this in both the 21 A. Yes. 22 Q. Thank you. 23 So has your understanding of the 20 Q. And you submitted this in both the 21 00497 proceeding and the 00500 proceeding 22 did you not? 23 A. Yes.	
A. Yes. Q. Thank you. So has your understanding of the 21 00497 proceeding and the 00500 proceeding did you not? A. Yes. 22 did you not? A. Yes.	
Q. Thank you. 22 did you not? 23 So has your understanding of the 22 A. Yes.	
So has your understanding of the 23 A. Yes.	
24 law of anticipation changed since the prior 24 I believe it's identical in both	
25 analysis? 25 proceedings.	
Page 11 Pag	13
1 Phinney 1 Phinney	
2 A. No. 2 Q. What did you review in preparation	
3 Q. Has your understanding of the law 3 of this document?	
4 of obviousness changed since your prior 4 A. I saw Dr. Messner's report and	
5 declarations? 5 Respondent's Reply to Petitioner's Petition.	
6 A. Not in any material way. 6 Q. You don't reference anything in	
7 Q. In any way at all? 7 this document that you consulted, did you?	
8 A. I have had the opportunity to look 8 A. I believe that's correct.	
9 at like summaries of the law of obviousness 9 Q. So the documents that you just	
in the last in the last months. 10 stated were Dr. Messner's report and the	
Q. Did that change your analysis that respondent's reply, but you don't detail how	
you applied in your in the declarations 12 you used those in the preparation of this	
we're here to speak about today? 13 document, do you?	
14 A. No. 14 MR. HARE: Objection to form.	
MR. HARE: Objection to form. 15 A. (Reading) Yes, that is correct.	
Q. (Handing). 16 Q. Is this intended to be a rebuttal	
17 A. Thank you. 17 to Dr. Messner?	
Q. Dr. Phinney, I'm handing you what 18 MR. HARE: Objection to form.	
19 we'll mark as [Phinney] Exhibit 1 (sic). 19 A. No.	
20 ([Phinney] Exhibit 1 mistakenly 20 Q. Is it intended to be a rebuttal to	
21 marked for identification.) 21 Dr. Edwards?	
22 MR. MOORE: And it bears 22 MR. HARE: Objection, form.	
23 "EXHIBIT 1061" from IPR 2019-00497. 23 A. No.	
Q. (Continuing) Dr. Phinney, have you 24 Q. Or to any other witness in this	
25 seen this document before? 25 proceeding?	

4 (Pages 10 to 13)



Phinney Phinney R. HARE: Objection to form. A. I think I'd have the same answer: A. Ves. That's my understanding. A. I don't believe in its final form. C. A. Yes. That's my understanding. A. I that'document' A. Yes. That's my understanding. A. I my orn' delaration. A. I that'document' A. I my orn' delaration, you opined about the meaning of "desired pressure setpoint		Page 14		Page 16
A. I think I'd have the same answer: A. O. So this document was submitted with a adocument from the petitioner; was it not? A. Yes. That's my understanding. B. Q. And didy our reiver that document? A. I don't believe in its final form. C. Are so unware if the contents of your declaration support arguments made in that document? A. Yes. That's my understanding. C. Are you aware if the contents of your declaration support arguments made in that document? A. Yes. That's my understanding. C. And didy ou agree with those arguments? A. Yes. That's my understanding. C. And do you agree with those arguments? A. Yes. That's my understanding. C. And do you agree with those arguments? A. I don't know if I can answer that yes or no. C. And that's content in the article delaration it was been depicted to the provided about the meaning of "desired pressure setpoint." In this declaration, you opined about the meaning of "pressure setpoint." In this declaration, you opined about the meaning of "desired pressure setpoint." In this declaration, you opined about the meaning of "desired pressure setpoint." In this declaration, you opined about the meaning of "desired pressure setpoint." In this declaration, you opined about the meaning of "desired pressure setpoint." In the set of the paragraph seven the petitioner's reply in its final form. A. One has the word "desired." A. Yes. A. Yes. A. Yes. A. The yor add you man by "commensurate with a pressure reading" - do you not? - in the secondarion of taxlibit I; you seek C. Did you prepare the report? A. The yor add you man by "commensurate with a pressure reading" - do you not? - in the secondarion of a number of claim terms; do Q. So in Exhibit I, you seek C. So in Ex	1	Phinney	1	Phinney
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