

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

**DECLARATION OF KYLE L. ELLIOTT IN SUPPORT OF
PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION FOR
ADDITIONAL DISCOVERY AND OTHER MISCELLANEOUS RELIEF**

WA 13784714.1

I, Kyle L. Elliott, declare and state as follows:

1. I am an attorney with the law firm of Spencer Fane LLP. I represent Petitioner, American National Manufacturing, Inc., in the above captioned proceeding. I make this Declaration in support of Petitioner's Opposition to Patent Owner's Motion for Additional Discovery and Other Miscellaneous Relief. I am above eighteen years of age, of sound mind, and if called to testify I could and would competently testify hereto. I make this declaration of my own personal knowledge.

2. Beyond this proceeding, I am also counsel for American National Manufacturing, Inc., and Sizewise Rentals, LLC in the underlying cases in the Central District of California where Patent Owner has sued American National Manufacturing and Sizewise Rentals under the three patents that are subject to these proceedings. Those cases are *Sleep Number Corporation v. Sizewise Rentals, LLC* (Case No. 5:18-cv-00356) and *Sleep Number Corporation v. American National Manufacturing* (Case No. 5:18-cv-00357). In connection with my role of counsel, I acquired personal knowledge regarding the filings in that proceeding, and the arguments and actions taken by both Plaintiffs and Defendants in that case.

3. On December 21, 2018, American National Manufacturing served its supplemental responses to Sleep Number Corporation's first set of interrogatories. The very first interrogatory that Sleep Number served sought information regarding

the nature and history of the consumer air controllers offered by American National Manufacturing. In response American National stated:

A summary of the history of ANM pumps is provided in the Pump History Document located at ANMI00133410 and at ANMI00133414-AMNI00133422. Generally speaking, the various pumps/blowers utilized by AMN in its consumer models had at various times different pumps, manifolds, and software depending on the year of production.

4. The Pump History Document was produced to Sleep Number contemporaneously with the Interrogatory response. A true and correct copy of the Pump History Document was filed by Sleep Number in IPR2019-00497 and IPR2019-00500 as Exhibit 2052. As Sleep Number's response in connection with IPR2019-00514 is not due at the time of this filing, we have filed the same Pump History Document as Exhibit 1051.

5. On September 12, 2019, Sleep Number sought to modify the protective order entered in the District Court cases. That protective order broadly prohibited the use of any confidential information in any other proceeding including the Inter Partes Review actions here. American National Manufacturing, Inc. and Sizewise Rentals broadly objected to the modification on various grounds, such as timeliness and need. One of the broad areas of concern we articulated was that the concern that several third parties had turned over source code to counsel for American National

Manufacturing and Sizewise with the understanding that the code would be kept under the strictest protections. In the case of all third parties this protection not only included preventing public disclosure, but barring Sleep Number from reviewing the code, *and* in the case of one third party, Medishpere, also prevent American National Manufacturing/Sizewise from examining the source code. At the time we articulated a concern to counsel for Sleep Number that the District Court would be violating the constitutional protections of procedural due process by adjudicating these entities' property rights, without an opportunity for these parties to be heard.

6. In apparent understanding of the gravity of this issue, Sleep Number proposed in its applications for modification that the third-party source code continue to be excluded for use in the IPR proceedings and that the code portions be submitted to PTAB fully redacted. This was *not* a proposal from American National but was a solution proposed *solely* by Sleep Number's counsel.

7. Attached to this declaration is Exhibit 1036 which is a true and correct copy of Plaintiff's Ex Parte Application to Modify the Protective Order filed on September 12, 2019. On pages 5 and 6 of their filing, Sleep Number's states this fact expressly, writing "Plaintiff further ensured that all citations to source code and other confidential information would be redacted from the contentions alleviating any confidentiality concerns."

8. Ultimately, the District Court issued an order modifying the protective order. A true and correct copy of that order was filed as Exhibit 2043 in IPR2019-00497 and IPR2019-00500. As Sleep Number's response in connection with IPR2019-00514 is not due at the time of this filing, we have filed the same District Court Order as Exhibit 1053. In that order, the Court noted the concerns about the third-party source code rights on page 7, finding them valid. The District Court then specifically ordered on page 9 that "In addition to the other provisions in the Stipulated Protective Order, as modified, any documents used in IPR must have private source code information from third parties redacted."

9. As part of the underlying District Court case, On January 25, 2019, Patent Owner filed revised infringement contentions in the District Court case where they stated what portions of the accused code supposedly infringed the patents in suit. This was the first time that Defendants were provided with meaningful information regarding the theories of infringement regarding the source code. Defendants did not serve any responsive contentions regarding non-infringement or expert reports regarding the same, because the Court entered a stay pending the outcome of the IPR proceedings on February 12, 2019.

10. Counsel for Patent Owner also laments the "withdraw" of an offer to use one version (Sizewise Medical Version) of the relevant source code without

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