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UNITED STATES PATENT AND TRADEMARK OFFICE  
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BEFORE THE PATENT TRIAL AND APPEAL BOARD  
- - - - -X

RESMED CORP.  
Petitioner  
v.  
CLEVELAND MEDICAL DEVICES, INC.  
Patent Owner

- - - - -X

Case IPR2023-00565  
U.S. Patent No. 10,076,269  
Issue Date: September 18, 2018  
Title: Devices and Methods for Sleep Disorder  
Diagnosis and Treatment

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Examination Before Trial of  
Dr. David Borkholder, the Expert Witness,  
taken by Garry J. Torres. Pursuant to  
Notice, held via Zoom videoconference,  
before Garry J. Torres, a Stenographer,  
and Notary Public of the State of New  
York, commencing at 11:07 a.m. (EST),  
September 26, 2024.

PAGES 1 - 84

|                                         |                                              |
|-----------------------------------------|----------------------------------------------|
| 1 APPEARANCES:                          | 1 EXHIBITS                                   |
| 2                                       | 2 PETITIONER'S DESCRIPTION PAGE              |
| 3 DLA PIPER, LLP                        | 3                                            |
| 4 Attorneys for Petitioner              | 4 Exhibit 2017 Declaration 9                 |
| 5 RESMED CORP.                          | 5 Exhibit 2020 Internet print dated 29       |
| 6 4365 Executive Drive, Suite 1100      | 6 07/28/24 from                              |
| 7 San Diego, California 92121           | 7 clevelandclinic.org                        |
| 8 TEL: Not provided                     | 8 Exhibit 2021 (not specified) 28            |
| 9 EMAIL: ed.sikorski@dlapiper.com       | 9 Exhibit 1026 U.S. patent Number 53         |
| 10 BY: EDWARD SIKORSKI, ESQ.            | 10 6644311 to the inventor                   |
| 11                                      | 11 Truitt, et al.                            |
| 12                                      | 12 Exhibit 1008 Ferral prior art 72          |
| 13 KRAMER LEVIN NAFTALIS & FRANKEL LLP  | 13                                           |
| 14 Attorneys for Patent Owner           | 14                                           |
| 15 CLEVELAND MEDICAL DEVICES, INC.      | 15 Attorney Mr. Sikorski from DLA Piper, LLP |
| 16 1177 Avenue of The Americas          | 16 has retained all exhibits.                |
| 17 New York, New York 10036             | 17                                           |
| 18 TEL: Not provided                    | 18                                           |
| 19 EMAIL: jprice@kramerlevin.com        | 19                                           |
| 20 BY: JEFFREY H. PRICE, ESQ.           | 20                                           |
| 21                                      | 21                                           |
| 22                                      | 22                                           |
| 23 CHARLES KELLER, ESQ.                 | 23                                           |
| 24 (Requested information not provided) | 24                                           |
| 25                                      | 25                                           |
| Page 2                                  | Page 4                                       |
| 1 INDEX                                 | 1 DAVID BORKHOLDER,                          |
| 2                                       | 2 having first been duly sworn by            |
| 3 WITNESS EXAMINATION BY PAGE           | 3 Garry J. Torres, the Notary                |
| 4 DR. DAVID BORKHOLDER MR. SIKORSKI 5   | 4 Public, was examined and                   |
| 5                                       | 5 testified as follows:                      |
| 6                                       | 6 EXAMINATION                                |
| 7                                       | 7 BY MR. SIKORSKI:                           |
| 8 RULINGS                               | 8 Q. Good morning, Dr. Borkholder.           |
| 9 Page Line                             | 9 A. Good morning.                           |
| 10 60 10                                | 10 Q. Can you please state and spell         |
| 11 60 18                                | 11 your name for the record?                 |
| 12 64 20                                | 12 A. David, D-A-V-I-D, Borkholder, B        |
| 13                                      | 13 as in bravo, O-R-K-H-O-L-D-E-R.           |
| 14                                      | 14 Q. You've been deposed before, yes?       |
| 15                                      | 15 A. Yes.                                   |
| 16                                      | 16 Q. About how many times?                  |
| 17                                      | 17 A. Once.                                  |
| 18                                      | 18 Q. And that was in the context of         |
| 19                                      | 19 the litigations that are related to this  |
| 20                                      | 20 IPR proceeding?                           |
| 21                                      | 21 A. That is -- district court              |
| 22                                      | 22 litigation yes, sir.                      |
| 23                                      | 23 Q. And that district court dispute        |
| 24                                      | 24 was between the same or similar parties,  |
| 25                                      | 25 Cleveland Medical on the one hand and     |
| Page 3                                  | Page 5                                       |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1 Resmed on the other?</p> <p>2 A. Yes, sir.</p> <p>3 Q. And that testimony also covered</p> <p>4 at least in part the '269 patent that's</p> <p>5 challenged in this proceeding, this IPR</p> <p>6 proceeding?</p> <p>7 A. That is correct.</p> <p>8 Q. Having been deposed before I'll</p> <p>9 just go through the -- some rules from --</p> <p>10 let's try to not speak over each other.</p> <p>11 It's sometimes difficult in a remote</p> <p>12 deposition like these because of inherent</p> <p>13 delays in communications. I'll try not to</p> <p>14 cut off your answer and just please wait</p> <p>15 until my question is complete. Okay?</p> <p>16 A. Yes.</p> <p>17 Q. And obviously you know to give</p> <p>18 verbal responses as opposed to shaking the</p> <p>19 head, yes?</p> <p>20 A. Yes.</p> <p>21 Q. Is there anything -- any reason</p> <p>22 why you can't give full and complete</p> <p>23 testimony today?</p> <p>24 A. No.</p> <p>25 Q. You're located where right now?</p> <p style="text-align: right;">Page 6</p>    | <p>1 A. Yes.</p> <p>2 Q. And the compensation you're</p> <p>3 being paid as set forth in your</p> <p>4 declaration is \$645 an hour; is that</p> <p>5 right?</p> <p>6 A. That is correct.</p> <p>7 Q. And that remains the hourly</p> <p>8 compensation you're getting for today's</p> <p>9 deposition?</p> <p>10 A. Yes, sir.</p> <p>11 Q. Any other compensation for any</p> <p>12 work either in the litigations or this</p> <p>13 IPR?</p> <p>14 A. I did work for the litigation</p> <p>15 and was compensated for my time at the</p> <p>16 same rate.</p> <p>17 Q. At the same rate you said?</p> <p>18 A. At the same rate. Yes, sir.</p> <p>19 Q. You indicated just for the</p> <p>20 readers at home that you have access to</p> <p>21 the IPR exhibits. We'll be using</p> <p>22 predominantly those exhibits, the exhibits</p> <p>23 that have already been marked and entered</p> <p>24 into the electronic records of this IPR</p> <p>25 proceeding, so if there's any hiccup in</p> <p style="text-align: right;">Page 8</p> |
| <p>1 A. Rochester, New York.</p> <p>2 Q. Is there anybody in the room</p> <p>3 with you?</p> <p>4 A. No, but I am at home so there's</p> <p>5 other people in the house and there is a</p> <p>6 dog.</p> <p>7 Q. That's fine. I can tell from</p> <p>8 the remote feeds that your counsel, Dr.</p> <p>9 (sic) Price, is located elsewhere. Other</p> <p>10 than being connected through the Internet</p> <p>11 to this deposition feed are you in contact</p> <p>12 with anyone who's not in the room with</p> <p>13 you?</p> <p>14 A. No.</p> <p>15 Q. And being under oath do you</p> <p>16 agree to refrain from any communications</p> <p>17 with anybody during the course of this</p> <p>18 deposition that might effect or influence</p> <p>19 your testimony today?</p> <p>20 A. I do.</p> <p>21 Q. Just as a baseline you</p> <p>22 understand that this deposition relates to</p> <p>23 IPR2023-565 which challenges the</p> <p>24 patentability of U.S. patent number</p> <p>25 10,076,269, yes?</p> <p style="text-align: right;">Page 7</p> | <p>1 accessing exhibits during the course of</p> <p>2 the deposition just let me know. We have</p> <p>3 auxiliary ways of getting those into your</p> <p>4 hand, but those will be basically the</p> <p>5 source of documents for today's questions.</p> <p>6 If you can access please,</p> <p>7 Dr. Borkholder, Exhibit 2017 which is your</p> <p>8 declaration in this IPR. Again, Exhibit</p> <p>9 2017.</p> <p>10 A. I have it open.</p> <p>11 Q. This is your declaration in this</p> <p>12 matter?</p> <p>13 A. It is.</p> <p>14 Q. And did you review the</p> <p>15 declaration Exhibit 2017 in advance of</p> <p>16 today's deposition?</p> <p>17 A. I did.</p> <p>18 Q. Any corrections that need to be</p> <p>19 made?</p> <p>20 A. No, sir.</p> <p>21 Q. Who drafted your declaration?</p> <p>22 A. It was a collaborative effort</p> <p>23 between myself and counsel for the</p> <p>24 plaintiff.</p> <p>25 Q. Which counsel? Do you remember</p> <p style="text-align: right;">Page 9</p>                                     |

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| <p>1 their name?</p> <p>2 A. So Jeffrey Price and CJ Keller.</p> <p>3 I don't know any of the paralegals that</p> <p>4 may have assisted.</p> <p>5 Q. Any nonattorney staff on your</p> <p>6 end that assisted with your declaration?</p> <p>7 A. No, sir.</p> <p>8 Q. What percentage of the report</p> <p>9 would you estimate was written by you as</p> <p>10 opposed to others?</p> <p>11 A. That is very difficult to say.</p> <p>12 I provided -- I provided input into the</p> <p>13 attorneys with arguments against each of</p> <p>14 the elements in the petitions and they</p> <p>15 then drafted it in the formal format and</p> <p>16 then we edited it back and forth.</p> <p>17 Q. So because of that collaborative</p> <p>18 effort it's hard to separate what the</p> <p>19 lawyers wrote from what you wrote, is that</p> <p>20 what you're saying?</p> <p>21 A. Yes, sir. That is correct.</p> <p>22 Q. Your signature on page 42 is</p> <p>23 dated as July 29, 2024. Is that the</p> <p>24 accurate date that you applied your</p> <p>25 signature to this declaration?</p> <p style="text-align: right;">Page 10</p> | <p>1 those documents as well?</p> <p>2 A. I did.</p> <p>3 Q. In preparing Exhibit 2017, your</p> <p>4 declaration, do you recall reviewing</p> <p>5 anything that you did not end up</p> <p>6 identifying in this declaration?</p> <p>7 A. I did not.</p> <p>8 Q. In other words, there was no</p> <p>9 document that you recall reviewing and</p> <p>10 said oops, better not put that in my</p> <p>11 declaration. It's either bad for my</p> <p>12 opinions or potentially useless?</p> <p>13 A. That's correct. There was</p> <p>14 nothing that I reviewed that I rejected</p> <p>15 because of the reasons that you state.</p> <p>16 Q. If you can flip to page 38 and</p> <p>17 review to yourself paragraph 78 in your</p> <p>18 declaration and then let me know when</p> <p>19 you're done?</p> <p>20 A. I'm done.</p> <p>21 Q. At the top of page -- excuse me.</p> <p>22 In the sentence bridging pages 38 to 39 in</p> <p>23 your declaration you included two words in</p> <p>24 quotation marks, surprising and</p> <p>25 unexpected, do you see that?</p> <p style="text-align: right;">Page 12</p>                                             |
| <p>1 A. Yes, it is.</p> <p>2 Q. And again you double checked all</p> <p>3 the opinions expressed in your declaration</p> <p>4 before you signed it?</p> <p>5 A. Yes, sir.</p> <p>6 Q. In paragraph one of your</p> <p>7 declaration, Exhibit 2017, if you can flip</p> <p>8 there and let me know when you're there?</p> <p>9 A. I am there.</p> <p>10 Q. So paragraph one of your</p> <p>11 declaration, Exhibit 2017, identifies</p> <p>12 several items that you say you reviewed.</p> <p>13 Among them the challenged '279 patent, its</p> <p>14 file history, the IPR petition, the P</p> <p>15 tab's decision to institute and the prior</p> <p>16 art cited in each of those documents, do</p> <p>17 you see that?</p> <p>18 A. I do.</p> <p>19 Q. Did you in fact review each of</p> <p>20 those documents for the purpose of</p> <p>21 preparing this declaration?</p> <p>22 A. I did.</p> <p>23 Q. The body of your declaration</p> <p>24 cites additional documents not listed here</p> <p>25 in paragraph one. Did you review each of</p> <p style="text-align: right;">Page 11</p>                                            | <p>1 A. I do.</p> <p>2 Q. Do you know why those two words</p> <p>3 are in quotation marks?</p> <p>4 A. Those are secondary</p> <p>5 considerations for obviousness.</p> <p>6 Q. So those terms, surprising and</p> <p>7 unexpected, are not found in the exhibits</p> <p>8 referenced in this paragraph, namely</p> <p>9 Exhibits 2010 and 2011, right?</p> <p>10 A. That is correct. That's why it</p> <p>11 says I believe these surprising and</p> <p>12 unexpected results.</p> <p>13 Q. Do you recall whether it was you</p> <p>14 who decided to put those terms into</p> <p>15 quotation marks or was it somebody else?</p> <p>16 A. I do not recall who decided to</p> <p>17 put them in quotation marks. I do recall</p> <p>18 discussion around this -- around this and</p> <p>19 it was my belief that those -- the results</p> <p>20 that are outlined there were surprising</p> <p>21 and unexpected.</p> <p>22 Q. What experience or knowledge do</p> <p>23 you have to judge whether increased</p> <p>24 adherence to sleep therapy as discussed in</p> <p>25 those two Exhibits 2010 and 2011 are</p> <p style="text-align: right;">Page 13</p> |

4 (Pages 10 - 13)

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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1 surprising or unexpected?</p> <p>2 A. I think that -- so actually, can</p> <p>3 you repeat your question please, sir?</p> <p>4 Q. Sure. What experience or</p> <p>5 knowledge are you using to evaluate</p> <p>6 whether the increased adherence to sleep</p> <p>7 therapy discussed in Exhibits 2010 and</p> <p>8 2011 are either surprising or unexpected?</p> <p>9 A. I would point to more recent</p> <p>10 experience with Casana where we had --</p> <p>11 we're doing in-home monitoring of</p> <p>12 cardiovascular health and the discussions</p> <p>13 about the pros and cons about providing</p> <p>14 data to individuals, to patients, and so I</p> <p>15 think that that is a -- and we engaged</p> <p>16 with physicians in that discussion and I</p> <p>17 think that there are -- some people</p> <p>18 believe that providing data to patients</p> <p>19 helps with adherence and some people</p> <p>20 believe that it could lead to other</p> <p>21 behaviors that could be damaging so that's</p> <p>22 why -- that's why I thought that the</p> <p>23 results would be characterized as</p> <p>24 surprising and unexpected because they had</p> <p>25 such a significant change in the adherence</p> <p style="text-align: right;">Page 14</p> | <p>1 trade, right?</p> <p>2 A. My masters and Ph.D. are in</p> <p>3 electrical engineering, but all of my work</p> <p>4 from my masters Ph.D. onward, including</p> <p>5 industry and academia, has been biomedical</p> <p>6 in nature.</p> <p>7 Q. I'm sorry. Has been what?</p> <p>8 A. Biomedical in nature.</p> <p>9 Q. Just to be clear and go through</p> <p>10 your CV quickly, you have a bachelors</p> <p>11 degree in microelectronic engineering</p> <p>12 right?</p> <p>13 A. That is correct.</p> <p>14 Q. And your masters and PH.D., as</p> <p>15 you just indicated, are each in the fields</p> <p>16 of electrical engineering, yes?</p> <p>17 A. That is correct.</p> <p>18 Q. You're not a medical doctor,</p> <p>19 right?</p> <p>20 A. That is correct.</p> <p>21 Q. You're not qualified to diagnose</p> <p>22 sleep disorders?</p> <p>23 A. I would not be allowed to</p> <p>24 diagnose sleep disorders.</p> <p>25 Q. And you've actually never</p> <p style="text-align: right;">Page 16</p>                                 |
| <p>1 rates.</p> <p>2 Q. You testified just now that some</p> <p>3 people believe providing information helps</p> <p>4 at least in the cardiovascular space</p> <p>5 adherence to whatever it is the patient is</p> <p>6 asked to do. I guess your word selection</p> <p>7 implies that there are other people who do</p> <p>8 not believe that information provided to</p> <p>9 patients helps adherence proportions,</p> <p>10 right?</p> <p>11 A. That is correct.</p> <p>12 MR. PRICE: Objection to form to</p> <p>13 that last question.</p> <p>14 Q. You mentioned Casana. Can you</p> <p>15 just give a brief description as to what</p> <p>16 that is?</p> <p>17 A. Casana is a medical device</p> <p>18 company. It's an early stage company that</p> <p>19 has a toilet seat that monitors</p> <p>20 cardiovascular parameters in the home.</p> <p>21 Q. The cardiovascular parameters</p> <p>22 measured through a toilet seat, is that</p> <p>23 what you said?</p> <p>24 A. Yes.</p> <p>25 Q. You're an electrical engineer by</p> <p style="text-align: right;">Page 15</p>                                                                                                                                                                                    | <p>1 diagnosed a sleep disorder, correct?</p> <p>2 A. That is correct.</p> <p>3 Q. You've never diagnosed someone</p> <p>4 with sleep apnea, right?</p> <p>5 A. I have not.</p> <p>6 Q. You've never used a sensor to</p> <p>7 diagnosis a sleep disorder?</p> <p>8 A. I have not used a sensor to</p> <p>9 diagnosis a sleep disorder, but sensors</p> <p>10 that are utilized in CPAP machines I do</p> <p>11 have experience with both designing and</p> <p>12 using those said systems.</p> <p>13 Q. You're not qualified to treat</p> <p>14 sleep disorders either, right?</p> <p>15 A. That is correct. That would</p> <p>16 require an MD.</p> <p>17 Q. And you've never, in fact,</p> <p>18 treated anyone who has a sleep disorder,</p> <p>19 correct?</p> <p>20 A. I have not treated anyone with a</p> <p>21 sleep disorder.</p> <p>22 Q. You've never treated someone</p> <p>23 using a positive airway pressure or PAP</p> <p>24 device, right?</p> <p>25 A. I've not treated anyone but I</p> <p style="text-align: right;">Page 17</p> |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
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| <p>1 have used them.</p> <p>2 Q. How many such device have you</p> <p>3 used?</p> <p>4 A. This was part of the device</p> <p>5 inspections so I'm going from memory. On</p> <p>6 the order of three to four.</p> <p>7 Q. Just so its clear, these are</p> <p>8 inspections that were associated with the</p> <p>9 litigations between Cleveland Medical and</p> <p>10 Resmed?</p> <p>11 A. That is correct.</p> <p>12 Q. You've never researched apneas</p> <p>13 or other sleep disorders, correct?</p> <p>14 MR. PRICE: Objection.</p> <p>15 A. That has not been the focus of</p> <p>16 my research.</p> <p>17 Q. Never mind focus, have you ever</p> <p>18 researched apneas, hypopneas or other</p> <p>19 sleep disorders?</p> <p>20 MR. PRICE: Objection.</p> <p>21 A. I have researched it in the</p> <p>22 context of review of the materials for</p> <p>23 this case and I understand -- I understand</p> <p>24 the symptomology and how the sensors are</p> <p>25 used to analyze a symptomology.</p> <p style="text-align: right;">Page 18</p>                                       | <p>1 are used in the CPAP machines and</p> <p>2 integrating them into other products.</p> <p>3 Q. You've never written an</p> <p>4 algorithm for detecting sleep apneas,</p> <p>5 right?</p> <p>6 A. I have not.</p> <p>7 Q. You've never written an</p> <p>8 algorithm for detecting hypopneas, right?</p> <p>9 A. I have not, although for all of</p> <p>10 these algorithms it is clear what they are</p> <p>11 looking for and I believe I would have the</p> <p>12 capability and expertise to write such</p> <p>13 algorithms if I were asked to do so.</p> <p>14 Q. You would agree, would you not,</p> <p>15 that algorithms to detect sleep apnea were</p> <p>16 well-known before the priority date of the</p> <p>17 challenged '269 patent?</p> <p>18 MR. PRICE: Objection.</p> <p>19 Foundation.</p> <p>20 A. I believe that there were</p> <p>21 algorithms to detect sleep apneas and they</p> <p>22 were used primarily in the sleep lab.</p> <p>23 Q. And you'd agree, would you not,</p> <p>24 that algorithms to detect hypopneas were</p> <p>25 well known in the prior art before the</p> <p style="text-align: right;">Page 20</p> |
| <p>1 Q. I'm sorry. What were the final</p> <p>2 words in that answer? Just the audio --</p> <p>3 A. I am familiar with the</p> <p>4 symptomology and the way that the sensor</p> <p>5 systems are used to measure that</p> <p>6 symptomology.</p> <p>7 Q. You've never worked for a CPAP</p> <p>8 company, right?</p> <p>9 A. I have never worked for a CPAP</p> <p>10 company.</p> <p>11 Q. And you've never done any</p> <p>12 academic research specific to CPAP</p> <p>13 devices?</p> <p>14 A. I've done no academic research</p> <p>15 associated with CPAP devices.</p> <p>16 Q. You haven't worked, have you,</p> <p>17 for any company that develops devices to</p> <p>18 treat or cure sleep disorders?</p> <p>19 A. That is correct. I have not.</p> <p>20 Q. You've never been involved in</p> <p>21 developing a CPAP or other sleep disorder</p> <p>22 treatment device, right?</p> <p>23 A. Nothing involved in developing</p> <p>24 the CPAP systems. I have been involved in</p> <p>25 developing sensor systems like those that</p> <p style="text-align: right;">Page 19</p> | <p>1 priority date of the challenged '269</p> <p>2 patent?</p> <p>3 MR. PRICE: Objection.</p> <p>4 Foundation.</p> <p>5 A. Can you point me to an exhibit</p> <p>6 that was part of this case that would</p> <p>7 highlight that, please?</p> <p>8 Q. I'm just asking you whether you</p> <p>9 would agree that algorithms that detect</p> <p>10 hypopneas in patients were well known in</p> <p>11 the prior art before the priority date of</p> <p>12 the challenged '269 patent which is on or</p> <p>13 about November 4, 2005?</p> <p>14 A. Sleep studies --</p> <p>15 MR. PRICE: Same objection.</p> <p>16 A. Sleep studies were conducted</p> <p>17 prior to that date and they used</p> <p>18 algorithms to detect hypopneas.</p> <p>19 Q. But before being involved in the</p> <p>20 patent disputes, not only this IPR but</p> <p>21 also the ongoing litigations between</p> <p>22 Cleveland Medical and Resmed, what</p> <p>23 experience did you have with CPAPs or</p> <p>24 other sleep disorder treatments devices?</p> <p>25 A. I have not worked directly with</p> <p style="text-align: right;">Page 21</p>                          |

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| <p>1 CPAPs prior to this case. As I said, I<br/>2 have a biomedical background. I read and<br/>3 understand the literature well and am very<br/>4 familiar and have used many of the sensor<br/>5 systems that are part of the CPAP device.<br/>6 Q. In some of your recent answers<br/>7 you were talking about sensors or excuse<br/>8 me, your use of sensors -- strike that.<br/>9 In some of your answers you were<br/>10 referencing your knowledge of sensors that<br/>11 are used in CPAP systems. Have you worked<br/>12 with pulse oximeters?<br/>13 A. I have worked with pulse<br/>14 oximeters and -- actually, one of their<br/>15 device that's integrated into the toilet<br/>16 seat of the Casana.<br/>17 Q. Other than the toilet seat of<br/>18 the Casana business, have you worked with<br/>19 pulse oximeters?<br/>20 A. I have. So I taught biomedical<br/>21 classes at RIT in the EE department we had<br/>22 a biomedical option and we ran labs using<br/>23 commercial pulse oximeters as well. I<br/>24 also have taught on the functioning of<br/>25 pulse oximeters and how you extract out</p> <p style="text-align: right;">Page 22</p> | <p>1 Q. Is there a physical difference<br/>2 that you can briefly explain between what<br/>3 I understand is a very general term<br/>4 pneumotachograph and the specific sensor<br/>5 you mentioned spirometer?<br/>6 A. The spirometer -- actually -- I<br/>7 actually don't think that there is a<br/>8 significant difference between those two<br/>9 and I'm going off of memory. I would have<br/>10 to look up benefits for both to be<br/>11 competent that there is no subtle<br/>12 difference between them.<br/>13 Q. If there's no substantive<br/>14 difference between a pneumotachograph and<br/>15 spirometer why might they be given<br/>16 different words, different labels?<br/>17 A. A spirometer I believe is<br/>18 referring to the sensor element itself<br/>19 where the pneumotachograph would be the<br/>20 system that is producing an output --<br/>21 output graph of the respiration wave form<br/>22 but you can use a spirometer to generate a<br/>23 similar respiration wave form.<br/>24 Q. You're saying the same sensor<br/>25 used to detect respiration is called a</p> <p style="text-align: right;">Page 24</p>                                     |
| <p>1 the blood oxygen levels from the signals.<br/>2 Q. Have you worked with a sensor<br/>3 that has several different names<br/>4 pneumotach, pneumotachometer or<br/>5 pneumotachograph?<br/>6 A. I have worked with spirometers<br/>7 and actually taught a lab where students<br/>8 built their own spirometer for the purpose<br/>9 of measuring respiration which is the<br/>10 purpose of a pneumotachograph.<br/>11 Q. Do you mind spelling that. The<br/>12 audio is a little bit mushy?<br/>13 A. P-N-E-U-N-O --<br/>14 M-O-T-A-C-H-O-G-R-A-P-H. Hopefully I got<br/>15 that right.<br/>16 Q. My bad. Maybe it's the audio.<br/>17 You -- in your answer you said that you<br/>18 have used pneumotachographs?<br/>19 A. The word is probably spirometer<br/>20 that you were looking for<br/>21 S-P-I-R-O-M-E-T-E-R which is basically an<br/>22 air flow sensor and in that lab we used it<br/>23 specifically to monitor respiration and I<br/>24 was saying that that is a similar function<br/>25 to the pneumotachograph.</p> <p style="text-align: right;">Page 23</p>                                                                                   | <p>1 pneumotachograph and when used in fields<br/>2 other than respiration you at least<br/>3 personally would refer to that sensor as a<br/>4 spirometer; is that right?<br/>5 MR. PRICE: Objection.<br/>6 Mischaracterizes his testimony.<br/>7 A. The pneumotachograph does not<br/>8 refer, I believe, to the specific sensor<br/>9 that is used to develop that respiration<br/>10 wave form. So one way -- a different way<br/>11 to think about this is when I say we had a<br/>12 lab where the students developed a<br/>13 spirometer, they were developing a flow<br/>14 sensor that they then integrated into a<br/>15 system that in the lab we do not call it a<br/>16 pneumotachograph, but they would breathe<br/>17 through that apparatus and generate a<br/>18 graphical output of flow versus time which<br/>19 based on the respiration, right? That is<br/>20 what I think is referred to as a<br/>21 pneumotachograph or pneumotachogram. And<br/>22 again, I'd be happy to look up specific<br/>23 definitions if this is a -- if this is a<br/>24 key point. I'm going off of memory.<br/>25 Q. Well, you've provided a</p> <p style="text-align: right;">Page 25</p> |

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| <p>1 declaration where you provide commentary<br/>2 on some of these terms or some of these<br/>3 sensors so that's why we're going through<br/>4 these questions?<br/>5 MR. PRICE: Objection. Form.<br/>6 A. I'm sorry, sir. Was there a<br/>7 question for me?<br/>8 Q. There wasn't. I don't know why<br/>9 the objection came. I was just telling<br/>10 you why we're talking about pneumotachs.<br/>11 That term is already in your declaration<br/>12 so there you have it.<br/>13 Other than pulse oximeters and<br/>14 pneumotachs, what other sensors were you<br/>15 thinking of when you said you had<br/>16 experience working with some of the<br/>17 sensors that are employed in CPAP systems?<br/>18 A. Pressure sensors,<br/>19 electrocardiograms can be employed,<br/>20 electroencephalograms can be employed in<br/>21 sleep studies. Those can be employed.<br/>22 And then you've got in many of the<br/>23 exhibits they talk about measurement of<br/>24 those ailments electroretinogram.<br/>25 Q. And in your opinion your work</p> <p style="text-align: right;">Page 26</p>       | <p>1 declaration you cite Exhibits 2020 and<br/>2 2021, do you see that, it's towards the<br/>3 bottom of page 22?<br/>4 A. I do.<br/>5 Q. And in parentheses you<br/>6 reference images of CPAP machines, right?<br/>7 A. I do.<br/>8 Q. Do you have Exhibits 2020 and<br/>9 2021 handy?<br/>10 A. I do. Let me open them up.<br/>11 Q. Let's start with 2020.<br/>12 A. Okay.<br/>13 Q. You reviewed Exhibit 2020 in the<br/>14 context of preparing this declaration,<br/>15 right?<br/>16 A. I did.<br/>17 Q. And you appear to cite<br/>18 Exhibit 20 and 21 -- excuse me. Let me --<br/>19 strike that.<br/>20 Your declaration appears to cite<br/>21 Exhibits 2020 and 2021 to support your<br/>22 statement in paragraph 45 that a person of<br/>23 ordinary skill would recognize that a<br/>24 breathing hose extends between the CPAP<br/>25 machine and the mask rather than being</p> <p style="text-align: right;">Page 28</p>                                                                       |
| <p>1 with sensors such as spirometers, pressure<br/>2 sensors, etcetera outside of the CPAP<br/>3 context, in your opinion those help<br/>4 qualify you as a person of ordinary skill<br/>5 for this IPR proceeding?<br/>6 A. The definition of a person of<br/>7 ordinary skill does not require that --<br/>8 actually, I know that we have a<br/>9 definition -- definition, I know that it<br/>10 is not specific with respect to the<br/>11 particular sensors. I believe the<br/>12 language is something -- something like<br/>13 diagnostic sensor systems, but if you can<br/>14 point me to where that is in my<br/>15 declaration I'm happy to go there and<br/>16 refresh my memory, but a person of<br/>17 ordinary skill does not require a specific<br/>18 expertise with those sensors.<br/>19 Q. Do you have your declaration<br/>20 handy? Exhibit 2017. If you can please<br/>21 flip to paragraph 45, review it and let me<br/>22 know when you're done. Again, paragraph<br/>23 45.<br/>24 A. Are you done?<br/>25 Q. In paragraph 45 of your</p> <p style="text-align: right;">Page 27</p> | <p>1 internal to the machine; am I right?<br/>2 A. That is correct.<br/>3 Q. Exhibit 2020 is an Internet<br/>4 printout dated July 28, 2024, from a<br/>5 website whose URL includes<br/>6 clevelandclinic.org, right?<br/>7 A. That is correct.<br/>8 Q. Now, did someone refer you to<br/>9 this URL or did you find it by yourself?<br/>10 A. I believe that this was provided<br/>11 by counsel as part of the materials for me<br/>12 to review.<br/>13 Q. Do you know the association, if<br/>14 any, between Cleveland clinic and the<br/>15 patent owner in this dispute Cleveland<br/>16 Medical?<br/>17 A. I do not.<br/>18 Q. Now, page two of exhibit 2020<br/>19 has an artist's rendering of a -- entitled<br/>20 it CPAP machine, right?<br/>21 A. That is correct.<br/>22 Q. And in that artist's rendering<br/>23 we see a patient connected to what's<br/>24 labelled a CPAP machine while lying at<br/>25 let's call it an incline in some sort of</p> <p style="text-align: right;">Page 29</p> |

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| <p>1 bed, right?</p> <p>2 A. I think that's accurate.</p> <p>3 Q. Now, was the -- this image is --</p> <p>4 this image is what you were referring the</p> <p>5 reader of your declaration to, right?</p> <p>6 I'll ask that again.</p> <p>7 Is the artist's rendering on</p> <p>8 page two of exhibit 2020 something that</p> <p>9 you wanted the reader of your declaration</p> <p>10 to look at after reviewing your paragraph</p> <p>11 45?</p> <p>12 A. I wanted the reader to look at</p> <p>13 that image and the bullet list that</p> <p>14 extends on to page three, specifically the</p> <p>15 top bullet on page three, a tube that</p> <p>16 connects the mask to the machine's motor.</p> <p>17 Q. The artist's rendering on page</p> <p>18 two shows a corrugated tube in white. Is</p> <p>19 that what you believe to be the tube</p> <p>20 referenced at the bullet at the top page</p> <p>21 three in Exhibit 2020?</p> <p>22 A. That is correct.</p> <p>23 Q. The next bullet, the second</p> <p>24 bullet that is on page three of</p> <p>25 Exhibit 2020 says, quote, a motor that</p> <p style="text-align: right;">Page 30</p> | <p>1 in this IPR proceeding if I understand</p> <p>2 your testimony correctly that you would</p> <p>3 agree that the motor that blows air,</p> <p>4 whether it's a turbine or some other</p> <p>5 pressure generator, that is housed within</p> <p>6 the CPAP device's housing, yes?</p> <p>7 A. Yes.</p> <p>8 Q. The illustration on page two of</p> <p>9 Exhibit 2020 has an arrow labelled air</p> <p>10 flow, do you see that?</p> <p>11 A. I do.</p> <p>12 Q. That, it goes without saying, is</p> <p>13 the air flow created by the pressure</p> <p>14 generator we've just been discussing, yes?</p> <p>15 A. I believe that that arrow is</p> <p>16 representing the air flow from that</p> <p>17 pressure generator. The air flow can be</p> <p>18 modulated by the respiration and it</p> <p>19 depends on the setup of the system where</p> <p>20 it has the exhaust port.</p> <p>21 Q. By modulated you mean, correct</p> <p>22 me if I'm wrong, the air flow is always</p> <p>23 flowing in the direction indicated by the</p> <p>24 arrow on page two of Exhibit 2020 but that</p> <p>25 air flow might increase or decrease in</p> <p style="text-align: right;">Page 32</p> |
| <p>1 blows air into the tube, end quote, do you</p> <p>2 see that?</p> <p>3 A. I do.</p> <p>4 Q. You would agree, would you not,</p> <p>5 that this motor is contained within the</p> <p>6 housing of the machine shown in the</p> <p>7 illustration on page two of Exhibit 2020,</p> <p>8 right?</p> <p>9 A. In general, the motor which</p> <p>10 generates the pressure is located within</p> <p>11 the machine.</p> <p>12 Q. Why do you qualify your answer</p> <p>13 as in general?</p> <p>14 A. Every CPAP system that I have --</p> <p>15 I looked at and the associated prior art</p> <p>16 and exhibits relative to this case have it</p> <p>17 within the housing. That doesn't mean</p> <p>18 that you couldn't create such a system</p> <p>19 that had it external to the CPAP machine.</p> <p>20 That's why I qualify my answer because I'm</p> <p>21 not purporting to have knowledge of every</p> <p>22 potential implement that's ever been done</p> <p>23 for a CPAP machine.</p> <p>24 Q. But at least as to the prior art</p> <p>25 that's at issue or should I say being used</p> <p style="text-align: right;">Page 31</p>     | <p>1 accordance with the patient's inhalation</p> <p>2 and exhalation, right?</p> <p>3 A. If the patient, for example, had</p> <p>4 an apnea event and stopped breathing and</p> <p>5 there were no leaks in the system, the air</p> <p>6 flow could go to zero so I don't know that</p> <p>7 I would characterize it as always flowing</p> <p>8 in the direction of the arrow.</p> <p>9 Q. But the mask has like an</p> <p>10 exhalation vent, doesn't it?</p> <p>11 MR. PRICE: Objection.</p> <p>12 Foundation.</p> <p>13 A. Many do.</p> <p>14 Q. If there's no exhalation vent on</p> <p>15 the mask then it's your opinion, but</p> <p>16 correct me if I'm wrong, the air flow</p> <p>17 indicated by the arrow on page two of</p> <p>18 Exhibit 2020 could go to zero, is that</p> <p>19 what you're saying?</p> <p>20 A. I'm saying that if there were a</p> <p>21 system that was completely sealed, there</p> <p>22 were no mask leaks and the person stops</p> <p>23 breathing, then air flow could go to zero.</p> <p>24 I don't believe that most CPAP machines</p> <p>25 are designed that way. I think in general</p> <p style="text-align: right;">Page 33</p>              |

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| <p>1 you're going have air flow that flows in<br/>2 that direction.</p> <p>3 Q. Going back to your paragraph 45,<br/>4 below the figure you state, quote, as a<br/>5 person of ordinary skill in the art would<br/>6 recognize this hose extends between the<br/>7 CPAP machine and the mask rather than<br/>8 being internal to the machine, end quote.</p> <p>9 You see that?</p> <p>10 A. I do.</p> <p>11 Q. Is it your opinion that the air<br/>12 flow house, the corrugated hose in the<br/>13 image on page two of Exhibit 2020,<br/>14 connects to some sort of connector on the<br/>15 external wall of the CPAP device's<br/>16 housing?</p> <p>17 A. That is my understanding and<br/>18 that's consistent with the CPAP machines<br/>19 that I reviewed.</p> <p>20 Q. Aside from the CPAP machines<br/>21 that you reviewed, do you believe that an<br/>22 air hose connector would have been well<br/>23 known to exist on the external wall of a<br/>24 CPAP device's housing before the prior<br/>25 date of the challenge '269 patent?</p> <p style="text-align: right;">Page 34</p>                                          | <p>1 illustration on page 2 Exhibit 2020, was<br/>2 it to -- strike that.</p> <p>3 Exhibit 2020 is a printout dated<br/>4 very recently in 2024, right?</p> <p>5 A. It is.</p> <p>6 Q. Was your purpose in citing it to<br/>7 reflect an illustration of a typical CPAP<br/>8 system that existed before the priority<br/>9 date of the '269 patent?</p> <p>10 A. The intent was to show where the<br/>11 tubing was projecting between the machine<br/>12 and the mask and I do believe that<br/>13 these -- this illustration is consistent<br/>14 with a CPAP from that time period other<br/>15 than perhaps a large display.</p> <p>16 Q. If you can grab the challenged<br/>17 '269 patent. Let me know when you have<br/>18 it.</p> <p>19 A. I have it.</p> <p>20 Q. In the specification at column 2<br/>21 -- I thought I heard something. I'll<br/>22 start again.</p> <p>23 Dr. Borkholder, the challenged<br/>24 '269 patent at column 2, line 17 discusses<br/>25 some admitted prior art saying again,</p> <p style="text-align: right;">Page 36</p>                                                    |
| <p>1 MR. PRICE: Objection to form.</p> <p>2 A. My understanding is that the<br/>3 hose is a separate part of the system that<br/>4 connects to the CPAP machine and it<br/>5 connects to the mask and there's obvious<br/>6 reasons why that makes sense. It can make<br/>7 cleaning easier, etcetera so a connector,<br/>8 I think you used the term connector, I<br/>9 think that there's -- I don't know that<br/>10 it's a -- I guess you would have to define<br/>11 connector but I think there's certainly<br/>12 some attachment point that's certainly on<br/>13 the CPAP machine that the hose connects<br/>14 to.</p> <p>15 Q. One would expect that attachment<br/>16 point to be in the external wall of the<br/>17 CPAP device's housing, right?</p> <p>18 A. Yes.</p> <p>19 MR. PRICE: Objection.</p> <p>20 Q. Before I switch it another topic<br/>21 why don't we take a ten-minute break?<br/>22 (Whereupon, a recess was taken.)</p> <p>23 Q. Dr. Borkholder, before we say<br/>24 goodbye to Exhibit 20 I just wanted to ask<br/>25 you, was the purpose of referencing the</p> <p style="text-align: right;">Page 35</p> | <p>1 starting in line 17, quote, the most<br/>2 common method of treating the sleeping<br/>3 disorder of sleep apnea is by applying a<br/>4 continuous positive gas pressure to the<br/>5 patients airway which has the effect of<br/>6 forcing the patient to breathe through<br/>7 application of the pressure, end quote?</p> <p>8 Do you see that? I obviously<br/>9 fixed one minor typo but do you see that?</p> <p>10 A. I do.</p> <p>11 Q. You accept that statement as<br/>12 true, don't you?</p> <p>13 A. I do.</p> <p>14 Q. And you have no reason to<br/>15 dispute that statement, right?</p> <p>16 A. I do not. Other than forcing<br/>17 the patient to breathe. I think that a<br/>18 more accurate description is that when the<br/>19 airway closes the higher pressure is<br/>20 actually enabling the airway to remain<br/>21 open so it's sort of splinting it which<br/>22 then allows the patient to breathe. So I<br/>23 don't know that forcing the patient to<br/>24 breathe is the terminology that I would<br/>25 use but it is said here.</p> <p style="text-align: right;">Page 37</p> |

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| <p>1 Q. '269 continues its discussion of<br/>2 admitted prior art in column 2, line 21 by<br/>3 saying quote, more advanced, but still<br/>4 very basic devices have been developed<br/>5 that adjust this continuous positive gas<br/>6 pressure through sensors built into the<br/>7 device for creating the positive gas<br/>8 pressure which measure gas flow through<br/>9 the device, end quote.<br/>10 Do you see that?<br/>11 A. I do.<br/>12 MR. PRICE: I think objection to<br/>13 form.<br/>14 MR. SIKORSKI: Did I read that<br/>15 incorrectly, Jeff?<br/>16 MR. PRICE: I think there were a<br/>17 couple of words that were missed.<br/>18 MR. SIKORSKI: Let me start<br/>19 again.<br/>20 Q. The '269 patent continues its<br/>21 discussion of admitted prior art at column<br/>22 2, line 20 by saying, quote, more<br/>23 advanced, but still very basic devices<br/>24 have been developed that adjust this<br/>25 continuous positive gas pressure through</p> <p style="text-align: right;">Page 38</p>               | <p>1 specification to understand the meaning of<br/>2 device as its used here.<br/>3 Q. This is just a discussion of the<br/>4 admitted prior art though, right, section<br/>5 two, technical background?<br/>6 A. It is.<br/>7 Q. And you would agree that it<br/>8 states with no uncertain terms that<br/>9 sensors are built into the device for<br/>10 creating the positive gas -- excuse me,<br/>11 sensors are built into the device for<br/>12 creating positive gas pressure etcetera,<br/>13 right?<br/>14 A. It's saying that sensors are<br/>15 built into the device to allow you to<br/>16 adjust the continuous positive gas<br/>17 pressure.<br/>18 Q. Right. Thank you.<br/>19 Now, in your declaration,<br/>20 paragraph 35, I'll give you a moment to<br/>21 flip there. Let me know when you found<br/>22 it.<br/>23 A. I'm there.<br/>24 Q. Paragraph 35 of your declaration<br/>25 refers to an embodiment described in the</p> <p style="text-align: right;">Page 40</p>                                                                                                           |
| <p>1 sensors built into the device for creating<br/>2 the positive gas pressure which measure<br/>3 gas flow through the device, end quote.<br/>4 Do you see that?<br/>5 A. I do.<br/>6 Q. You accept that treatment as --<br/>7 strike that.<br/>8 You accept that statement as<br/>9 true, don't you?<br/>10 A. At this time there were devices<br/>11 that would adjust the gas pressure based<br/>12 on the respiration flow, yes.<br/>13 Q. And you have no reason to<br/>14 dispute that statement, right?<br/>15 A. I don't other than where it says<br/>16 built into the device I believe here<br/>17 they're using device broadly to mean the<br/>18 CPAP system which would be inclusive of<br/>19 the mask.<br/>20 Q. And what's your basis for that?<br/>21 It just says the word device.<br/>22 A. My reading of other prior art,<br/>23 and I can't recollect a specific one now,<br/>24 but -- a specific exhibit to point to, but<br/>25 we'd have to read through the full</p> <p style="text-align: right;">Page 39</p> | <p>1 '269 patent that uses a pneumotachograph,<br/>2 right?<br/>3 A. That is correct.<br/>4 Q. And that pneumotachograph is<br/>5 specifically used in this embodiment as an<br/>6 air flow sensor, right?<br/>7 A. Air flow sensor that is directly<br/>8 measuring respiration.<br/>9 Q. And what do you mean by that<br/>10 adverb "directly" in the context of<br/>11 directly measuring respiration?<br/>12 A. So if you read in paragraph 35<br/>13 in this embodiment the pneumotachograph<br/>14 consists of a standard oxygen and nasal<br/>15 cannula or a face mask respectively<br/>16 connected to pressure transducer and<br/>17 placed in the nares. So I would need to<br/>18 go back and look in the '269 patent at the<br/>19 referenced column 7, 61 to 63, but my<br/>20 recollection is that the pressure<br/>21 transducers are actually measuring flow<br/>22 based on flow at the mask. That's my<br/>23 recollection, but I would need to go back<br/>24 and read again to be confident.<br/>25 Q. Well, by all means let's go back</p> <p style="text-align: right;">Page 41</p> |

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| <p>1 to the '269 patent column 7, line 61 to 63<br/>2 so you can make sure of your testimony.<br/>3 A. Yeah, so here it says nasal<br/>4 cannula or face mask can be used to<br/>5 measure the subject's respiratory air<br/>6 flow, so the measurement of the air flow<br/>7 is happening at the mask.<br/>8 Q. Right. So are you saying that<br/>9 the only location in a CPAP system where<br/>10 respiration can be measured quote/unquote<br/>11 directly is via a nasal cannula or face<br/>12 mask?<br/>13 MR. PRICE: Objection.<br/>14 A. I believe that some systems will<br/>15 also do measurement in the hose located<br/>16 near the face mask.<br/>17 Q. And they do so using a<br/>18 pneumotachograph?<br/>19 A. The pneumotachograph is that<br/>20 measurement of respiration.<br/>21 Q. Yep. So correct me if I'm<br/>22 wrong, but earlier today you said --<br/>23 strike that.<br/>24 Correct me if I'm wrong, but<br/>25 earlier I thought you testified that a</p> <p style="text-align: right;">Page 42</p>                                                            | <p>1 Q. So a very simple sensor that the<br/>2 readers at home can probably envision is a<br/>3 vane or propeller sitting within an air<br/>4 stream. Would that simplistic type of<br/>5 device qualify as a pneumotachograph if<br/>6 its measuring a person's breathing?<br/>7 MR. PRICE: Objection.<br/>8 Foundation.<br/>9 A. So there are numerous sensors.<br/>10 Most of these I believe use a flow sensor<br/>11 that's measuring air flow directly or an<br/>12 indirect measure of air flow like with a<br/>13 differential pressure, but I think it<br/>14 is -- if it is measuring respiration,<br/>15 inhalation, exhalation directly then it is<br/>16 called a pneumotachograph.<br/>17 Q. And other than your opinion<br/>18 expressed in your declaration I didn't see<br/>19 any documentary evidence that backs that<br/>20 opinion up. Did I miss something? Any<br/>21 exhibits in your declaration that support<br/>22 that view that the term pneumotachograph<br/>23 is what you just said it was?<br/>24 A. I don't believe that we pointed<br/>25 to a document that described the</p> <p style="text-align: right;">Page 44</p>     |
| <p>1 pneumo -- the term pneumotachograph and<br/>2 its related spellings pneumotachogram,<br/>3 etcetera relate to a sensor that measures<br/>4 respiration; is that right?<br/>5 A. It relates to the measurement of<br/>6 respiration.<br/>7 Q. And I believe your testimony<br/>8 earlier was that the term pneumotachograph<br/>9 is not specific to any particular type of<br/>10 sensor; is that right?<br/>11 A. There are -- my understanding is<br/>12 there are different types of sensors that<br/>13 could be used to provide a<br/>14 pneumotachograph, so that measurement of<br/>15 respiration.<br/>16 Q. Is there like a -- can you<br/>17 describe to me what qualifies a sensor as<br/>18 a pneumotachograph as opposed to something<br/>19 else?<br/>20 A. It's the direct measurement of<br/>21 respiration, right? So my Latin is not<br/>22 very good, but I think if look at -- if we<br/>23 broke pneumotachograph into its respective<br/>24 parts we're going to see that that is a<br/>25 measurement of respiration.</p> <p style="text-align: right;">Page 43</p> | <p>1 pneumotachograph because terms are given<br/>2 their plain and ordinary meaning.<br/>3 Q. So just as an example, if you<br/>4 put the same sensor that you believed to<br/>5 be properly called a pneumotachograph, but<br/>6 if you put that sensor at the opposite end<br/>7 of the breathing hose let's say at or<br/>8 within the, what did you call it, the<br/>9 attachment point for the breathing hose,<br/>10 would that still retain the term<br/>11 pneumotachograph or would you,<br/>12 Dr. Borkholder, call it something<br/>13 different?<br/>14 A. I would call it something<br/>15 different because you need to add in<br/>16 additional calculations that relate to the<br/>17 characteristics of that tubing and system.<br/>18 So what you measure with your sensor would<br/>19 actually be different than what you would<br/>20 measure with that sensor at the mask and<br/>21 so you have to characterize the system and<br/>22 essentially do something like a transfer<br/>23 function that would estimate what the<br/>24 respiration is.<br/>25 Q. It would still act as an air</p> <p style="text-align: right;">Page 45</p> |

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| <p>1 flow sensor, would it not, if located at<br/>2 the connection point between the hose and<br/>3 the CPAP device?<br/>4 A. Whether it's considered an air<br/>5 flow sensor depends on the sensor at the<br/>6 location.<br/>7 Q. So is that a yes?<br/>8 A. So a sensor -- sensor is a<br/>9 sensor. A sensor -- if I have an<br/>10 anemometer that measures air flow, that<br/>11 measures air flow independent of where it<br/>12 is. The key question is, does an air flow<br/>13 represent directly the respiration profile<br/>14 of the individual.<br/>15 Q. But I think you said earlier<br/>16 that in reference to the artist's drawing<br/>17 in figure 2 of Exhibit 2020 that the air<br/>18 flow through the breathing tube modulates<br/>19 up and down, but is likely still going in<br/>20 one direction, right?<br/>21 A. It can modulate so it all<br/>22 depends on what venting they have in the<br/>23 mask, etcetera. It depends on the details<br/>24 of the system.<br/>25 Q. Right. And the modulation</p> <p style="text-align: right;">Page 46</p>                                                                  | <p>1 36, let me know when you're there.<br/>2 A. I'm there.<br/>3 Q. Paragraph 36 of your declaration<br/>4 describes as least parts of the '269<br/>5 patent and below the figure you use terms<br/>6 such as, quote, novel construction of the<br/>7 '269 patent, end quote, you reference the,<br/>8 quote, structure, end quote, of the<br/>9 invention and then you go on to describe<br/>10 an air flow sensor 320 and a pressure<br/>11 sensor 322 being located within the PAP<br/>12 device, right?<br/>13 A. That is correct.<br/>14 Q. And then you describe this in<br/>15 your words as, quote, novel construction,<br/>16 end quote, in conjunction with a citation<br/>17 to figure 7 here in paragraph 6 -- 36,<br/>18 right?<br/>19 A. That is correct.<br/>20 Q. Now, you would agree with me,<br/>21 would you not, that figure 7 is described<br/>22 in the '269 patent as being conventional,<br/>23 right? If you want to flip to column 22,<br/>24 line 47 in the '269 patent it says as<br/>25 much.</p> <p style="text-align: right;">Page 48</p> |
| <p>1 reflects the person's breathing, right?<br/>2 A. I think you used the right<br/>3 terminology. It reflects the person's<br/>4 breathing. It is not a direct measure of<br/>5 that breathing. So it's correlated, but<br/>6 it is not a direct measure and that's why<br/>7 you'd have to characterize the systems so<br/>8 you can estimate what the true respiration<br/>9 is rather than existing a correlation to<br/>10 the respiration.<br/>11 Q. But bottom line I think the<br/>12 sentiment you're trying to express in your<br/>13 declaration is that a pneumotachograph is<br/>14 only a pneumotachograph if it's adjacent<br/>15 the person's nose and/or mouth, right?<br/>16 A. If it is a direct measure of<br/>17 that respiration.<br/>18 Q. And again, other than your<br/>19 opinion you didn't cite any documents to<br/>20 support or back that up, right?<br/>21 A. I do not have recollection of<br/>22 citing a specific document that provides<br/>23 justification for that opinion.<br/>24 Q. If you turn to the next<br/>25 paragraph in your declaration, paragraph</p> <p style="text-align: right;">Page 47</p> | <p>1 MR. PRICE: Objection. Form.<br/>2 Q. As Dr. Borkholder is looking for<br/>3 column 22.<br/>4 MR. SIKORSKI: Mr. Price, what<br/>5 was that objection about?<br/>6 MR. PRICE: I said objection to<br/>7 form.<br/>8 MR. SIKORSKI: Why?<br/>9 MR. PRICE: Why did I object to<br/>10 the form of that question?<br/>11 MR. SIKORSKI: If I can clear it<br/>12 up I'd like to, so what's the<br/>13 objection?<br/>14 MR. PRICE: I worry that if I<br/>15 give the full reason for the objection<br/>16 on the record it will be seen as<br/>17 leading the witness. If you want to<br/>18 have him step out of the room and I<br/>19 can explain it then we can do that.<br/>20 MR. SIKORSKI: No. I don't<br/>21 quite follow, but okay.<br/>22 Q. Doctor --<br/>23 MR. PRICE: Well, if you want,<br/>24 my answer is, there is considerable<br/>25 discussion of figure 7 that is not</p> <p style="text-align: right;">Page 49</p>                                                                                                                                      |

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| <p>1 described as conventional. That's --</p> <p>2 MR. SIKORSKI: Okay.</p> <p>3 MR. PRICE: That's all.</p> <p>4 MR. SIKORSKI: That's fine.</p> <p>5 Q. Dr. Borkholder, have you found</p> <p>6 column 22 --</p> <p>7 A. I have.</p> <p>8 Q. -- line 47?</p> <p>9 A. I have.</p> <p>10 Q. And you see that that sentence</p> <p>11 begins, quote, this conventional pressure</p> <p>12 support system 310 shown in figure 7</p> <p>13 includes, end quote, and then it proceeds</p> <p>14 with the further description, right?</p> <p>15 A. I see that.</p> <p>16 Q. I mean you've provided expert</p> <p>17 reports in the litigation that address the</p> <p>18 fact that figure 7 is a conventional</p> <p>19 system, haven't you?</p> <p>20 A. So the -- I'm going on my</p> <p>21 recollection here from probably months ago</p> <p>22 because this is not an element that --</p> <p>23 strike that.</p> <p>24 I don't know if I can strike</p> <p>25 something or not, but my recollection was</p> <p style="text-align: right;">Page 50</p>                                                                                                                                                                                                                 | <p>1 Q. And this traditional CPAP device</p> <p>2 is illustrated in figure 7 is it not?</p> <p>3 MR. PRICE: Objection.</p> <p>4 A. The -- that sentence shows -- it</p> <p>5 says that the conventional pressure</p> <p>6 support system shown in figure 7 includes,</p> <p>7 and it includes a list of things that are</p> <p>8 part of a conventional pressure support</p> <p>9 system.</p> <p>10 Q. Right. But -- so your</p> <p>11 declaration says immediately after your</p> <p>12 citation of figure 7 you refer to, quote,</p> <p>13 the novel construction, end quote,</p> <p>14 including, quote, structure, end quote, of</p> <p>15 the invention, but -- we're going to see</p> <p>16 the true reference in a minute, but you</p> <p>17 would agree that figure 7 copied in your</p> <p>18 paragraph 36 has elements found in the</p> <p>19 prior art, right?</p> <p>20 A. Figure 7 which is part of the</p> <p>21 paragraph 36 definitely has elements that</p> <p>22 are found in the prior art. Each of those</p> <p>23 as I read this sentence out of the '269</p> <p>24 patent it listed those elements that are</p> <p>25 all part of a traditional system and if</p> <p style="text-align: right;">Page 52</p> |
| <p>1 that the novelty is integrating those</p> <p>2 sensors together within with the claim</p> <p>3 structure of the '269 patent. I think</p> <p>4 that CPAP machines can measure flow within</p> <p>5 the system and you could measure -- you</p> <p>6 can measure pressures within the system.</p> <p>7 It's a question of how those are -- how</p> <p>8 those are used and I think that this</p> <p>9 actually, and again, I'm caveating this</p> <p>10 with it's been a long time since the</p> <p>11 litigation piece, that the CPAP if I can</p> <p>12 read it this conventional pressure part</p> <p>13 system 310 includes a pressure generator,</p> <p>14 a blower, a piston or bellows that</p> <p>15 receives the supply of gas from a gas</p> <p>16 source such as ambient atmosphere as</p> <p>17 indicated by arrow A or pressurized gas</p> <p>18 tanks not shown increase a flow of</p> <p>19 breathing gases indicated by arrow C</p> <p>20 having a pressure greater than the ambient</p> <p>21 atmospheric pressure.</p> <p>22 So I think the definition of</p> <p>23 conventional all of those pieces that are</p> <p>24 part of that sentence are part of a</p> <p>25 traditional CPAP device.</p> <p style="text-align: right;">Page 51</p> | <p>1 you read the full paragraph it involves</p> <p>2 both structure and functionality of the</p> <p>3 invention so you have these sensors that</p> <p>4 are located in the PAP device to measure</p> <p>5 respiratory air flow and then the</p> <p>6 processor generates a level of severity of</p> <p>7 sleep disorder systems in transfer of that</p> <p>8 to a remote location.</p> <p>9 So I think it's -- the challenge</p> <p>10 here is extracting out part of my</p> <p>11 paragraph in isolation because the</p> <p>12 rationale for the terms that we use are</p> <p>13 further explained in the rest of my</p> <p>14 paragraph.</p> <p>15 Q. Let's give the exhibit sharing</p> <p>16 system a try here. There's a little delay</p> <p>17 on my end so bear with me.</p> <p>18 A. These will go in marked -- I</p> <p>19 can't read it.</p> <p>20 (Whereupon, an off-the-record</p> <p>21 discussion was held.)</p> <p>22 Q. Dr. Borkholder, through the</p> <p>23 exhibit system I'm sharing with you, and I</p> <p>24 think you now have possession of exhibit</p> <p>25 I'll call it 1026 in the IPR proceeding.</p> <p style="text-align: right;">Page 53</p>                                                     |

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| <p>1 The document itself my be inadvertently<br/>2 marked as 1001, but for the record it's<br/>3 U.S. Patent Number 6,644,311 to the<br/>4 inventor Truitt, et al. Do you have that<br/>5 up, sir?<br/>6 A. I do have it up now, yes.<br/>7 Q. Now, you've seen this document<br/>8 before, correct?<br/>9 A. I have.<br/>10 Q. If you could flip to figure 1 in<br/>11 the Truitt reference Exhibit 1026. Let,<br/>12 me know when you're there.<br/>13 A. I am there.<br/>14 Q. Now, we were just looking at<br/>15 figure 7 of the challenge '269 patent and<br/>16 you would agree would you not that figure<br/>17 7 of the '269 patent bears a striking<br/>18 resemblance to figure 1 in Truitt, yes?<br/>19 A. Yes.<br/>20 Q. And Truitt was filed in the year<br/>21 2001 and became a patent in 2003 so it<br/>22 predates the '269 patent by at least a<br/>23 couple of years, right?<br/>24 A. Yes.<br/>25 Q. And Truitt, in fact, labels its</p> <p style="text-align: right;">Page 54</p>                                                                                                                                         | <p>1 Truitt's patent illustrate its air flow<br/>2 sensor and pressure sensor within the CPAP<br/>3 machine's housing, right?<br/>4 A. It does. The '269 patent I<br/>5 believe is specifying that it is for<br/>6 measuring respiratory air flow to then be<br/>7 used for determining level of severity of<br/>8 disorders. The Truitt Exhibit 1026 is<br/>9 measuring the flow pressure of gas passing<br/>10 in the patient's circuit. That where they<br/>11 measure it may be different than<br/>12 respiratory air flow.<br/>13 Q. Figure 7 in the '269 patent has<br/>14 the air flow sensor 320 in the conduit or<br/>15 breathing tube in the path of the conduit<br/>16 or breathing tube 314, right?<br/>17 A. It does.<br/>18 Q. So are you saying that --<br/>19 A. It's in the conduit. It's<br/>20 actually part of the enclosure, yes.<br/>21 Q. Yeah. And it's measuring<br/>22 respiratory air flow, right?<br/>23 A. That is what in the '269 patent<br/>24 they are doing, yes.<br/>25 Q. But wouldn't it be doing the</p> <p style="text-align: right;">Page 56</p>                      |
| <p>1 figure 1 as prior art; you see that?<br/>2 A. I do.<br/>3 Q. So as best we can discern, the<br/>4 Truitt inventors I guess believe that the<br/>5 system shown in figure 1 was prior art<br/>6 even before its filing date in 2001, fair?<br/>7 A. Yes.<br/>8 MR. PRICE: Objection.<br/>9 Q. Now, you're free to reference<br/>10 the description of figure 1 which begins<br/>11 in column 1, line 44, but you'll agree<br/>12 that Truitt's prior art figure 1 has an<br/>13 air flow sensor 20 and a pressure sensor<br/>14 22 both of which are illustrated within<br/>15 the CPAP device's housing, right?<br/>16 A. Yeah, at the top of column 2 it<br/>17 says, devices include a flow sensor 20, a<br/>18 pressure sensor 22 or both that monitor<br/>19 the flow and/or pressure of gas passing in<br/>20 a patient's circuit so it's monitoring<br/>21 flow and/or pressure at those locations.<br/>22 Q. And since you referenced figure<br/>23 7 and '269 as illustrating the flow -- air<br/>24 flow sensor and pressure sensor being<br/>25 within the CPAP housing so too does</p> <p style="text-align: right;">Page 55</p> | <p>1 same? Wouldn't air flow sensor 20 in<br/>2 Truitt be doing the same, IE, measuring<br/>3 respiratory air flow?<br/>4 A. It's measuring flow and I would<br/>5 need to refresh on Truitt. It's been a<br/>6 while since I read this one, but I think<br/>7 that whether or not it represents<br/>8 respiratory flow depends on what<br/>9 additional characterization you do of that<br/>10 system, right. So it will give you a<br/>11 flow, but whether or not it gives you<br/>12 respiratory flow we would need to look at<br/>13 the details of that.<br/>14 Q. Is there a reason why your<br/>15 declaration doesn't inform the reader that<br/>16 figure 7 is listed from the Truitt<br/>17 reference?<br/>18 MR. PRICE: Objection.<br/>19 A. The purpose of paragraph 36 in<br/>20 my declaration was to contrast what's in<br/>21 the '269 patent with Ferral's design. The<br/>22 intent was not to give a history of where<br/>23 figure 7 came from.<br/>24 Q. And you felt it wasn't important<br/>25 to the reader to understand that figure 7</p> <p style="text-align: right;">Page 57</p> |

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| <p>1 was from the Truitt reference?</p> <p>2 MR. PRICE: Objection.</p> <p>3 A. The -- I believe I stated this</p> <p>4 before, my objective was to respond to the</p> <p>5 petition and ailments in the petition so</p> <p>6 in -- I frankly didn't remember that this</p> <p>7 came from the Truitt reference. It's been</p> <p>8 so long since I worked on that. I</p> <p>9 focussed on the review of the specific</p> <p>10 materials that were presented in the</p> <p>11 petition and the background so it wasn't</p> <p>12 an intentional omission. It's just --</p> <p>13 that was not the focus here.</p> <p>14 Q. And the IPR counsel didn't</p> <p>15 remind you -- didn't go so far as to</p> <p>16 remind you that figure 7 has a striking</p> <p>17 resemblance to figure 1 in the Truitt</p> <p>18 prior art?</p> <p>19 MR. PRICE: Objection.</p> <p>20 A. When you say the IPR counsel,</p> <p>21 you mean the lawyers for the patent owner?</p> <p>22 Q. The attorneys you identified</p> <p>23 earlier as assisting you in preparing this</p> <p>24 declaration, Mr. Keller and forgive me, CJ</p> <p>25 I forgot his last name. Sorry. I'm</p> <p style="text-align: right;">Page 58</p> | <p>1 communication between counsel and</p> <p>2 Dr. Borkholder.</p> <p>3 MR. SIKORSKI: On what basis?</p> <p>4 He's not your client and you said</p> <p>5 attorney/client privilege. There's no</p> <p>6 privilege there.</p> <p>7 MR. PRICE: Not attorney/client</p> <p>8 privilege. This is work product</p> <p>9 privilege.</p> <p>10 MR. SIKORSKI: There's no</p> <p>11 litigation.</p> <p>12 MR. PRICE: What do you mean</p> <p>13 there's no litigation?</p> <p>14 MR. SIKORSKI: We're talking</p> <p>15 about an IPR proceeding where he's a</p> <p>16 testifying witness.</p> <p>17 MR. PRICE: This is a litigation</p> <p>18 before the patent office.</p> <p>19 MR. SIKORSKI: Well, okay. I'll</p> <p>20 reserve my objection to your</p> <p>21 objection. I think it's ill founded.</p> <p>22 Q. Dr. Borkholder, did you -- were</p> <p>23 you informed in the process of preparing</p> <p>24 your declaration that figure 7 was or bore</p> <p>25 striking resemblance to the prior art</p> <p style="text-align: right;">Page 60</p>                                                   |
| <p>1 sorry. Mr. Keller and Mr. Price.</p> <p>2 A. Okay. Can you repeat again</p> <p>3 please, sir?</p> <p>4 Q. Sure. You don't recall the</p> <p>5 lawyers involved in this IPR proceeding,</p> <p>6 specifically Mr. Price and Mr. Keller</p> <p>7 because they're the ones that assisted you</p> <p>8 with your declaration you don't recall</p> <p>9 them reminding you that figure 7 has a</p> <p>10 striking resemblance to the prior art</p> <p>11 Truitt reference?</p> <p>12 MR. PRICE: I will instruct the</p> <p>13 witness not to divulge any</p> <p>14 conversations that were had over the</p> <p>15 preparation of the declaration to the</p> <p>16 extent that they are privileged.</p> <p>17 MR. SIKORSKI: He's not your</p> <p>18 client. There's no privilege.</p> <p>19 Dr. Borkholder is not your client.</p> <p>20 There's no attorney/client privilege</p> <p>21 between your communications. You'll</p> <p>22 have to find something else to lean</p> <p>23 on.</p> <p>24 MR. PRICE: I disagree that you</p> <p>25 are entitled to the contents of the</p> <p style="text-align: right;">Page 59</p>                                                                                | <p>1 figure 1 in the Truitt reference?</p> <p>2 MR. PRICE: Again, I'm going to</p> <p>3 instruct the witness not to divulge, I</p> <p>4 mean, the contents of any</p> <p>5 communications between himself and</p> <p>6 counsel that go to the preparation of</p> <p>7 this declaration.</p> <p>8 Q. You're going to follow that</p> <p>9 advice, sir?</p> <p>10 A. I believe I will. Yes, sir.</p> <p>11 Q. You can return to your</p> <p>12 declaration paragraph 35. Let me know</p> <p>13 when you're there.</p> <p>14 A. I'm there.</p> <p>15 Q. In this paragraph 35 of your</p> <p>16 declaration you're talking about certain</p> <p>17 embodiments of the '269 patent and, excuse</p> <p>18 me, in the third sentence you refer to a</p> <p>19 more sophisticated pressure support device</p> <p>20 described with respect to figure 7. Do</p> <p>21 you see that, sir?</p> <p>22 A. I do.</p> <p>23 Q. Now, you cite as support of this</p> <p>24 quote/unquote more sophisticated pressure</p> <p>25 support device, end quote, to the '269</p> <p style="text-align: right;">Page 61</p> |

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| <p>1 patent column 23, lines 7 to 17, right?</p> <p>2 A. I do.</p> <p>3 Q. Let's go look at that. Do you</p> <p>4 have the '269 patent column 23 in front of</p> <p>5 you, Dr. Borkholder?</p> <p>6 A. I do.</p> <p>7 Q. And do you see the paragraph</p> <p>8 that begins at line 7 of column 23?</p> <p>9 A. I do.</p> <p>10 Q. Read that to yourself and let me</p> <p>11 know when you're done with that paragraph.</p> <p>12 A. (Pause.) I'm done.</p> <p>13 Q. Can you now grab the Truitt</p> <p>14 reference Exhibit 1026 in the IPR</p> <p>15 proceeding column 2, line 1?</p> <p>16 A. Okay. I have that.</p> <p>17 Q. I'm not sure if it's easy for</p> <p>18 you to do, but if you compare the first</p> <p>19 paragraph in column 2 of the Truitt</p> <p>20 reference to column 23, lines 7 and</p> <p>21 ongoing in the '269 patent you'll see once</p> <p>22 again a striking resemblance, yes?</p> <p>23 A. I'm doing that comparison now</p> <p>24 (pause.) Yes, I see that.</p> <p>25 (Pause in proceedings.)</p> <p style="text-align: right;">Page 62</p>                                                                     | <p>1 quote, in paragraph 35 of your</p> <p>2 declaration, mainly column 23, lines 7 to</p> <p>3 17, bear a striking resemblance to the</p> <p>4 language found in the Truitt reference at</p> <p>5 column 2, lines 1 to 10 or so, yes?</p> <p>6 A. Yes.</p> <p>7 Q. Is there a reason that you</p> <p>8 didn't call that out in your declaration,</p> <p>9 by that I mean the striking resemblance of</p> <p>10 this passage in the '269 patent to the</p> <p>11 Truitt prior art?</p> <p>12 A. As I said, the Truitt prior art</p> <p>13 was not part of the petition to my</p> <p>14 recollection and my focus was really on</p> <p>15 direct replies to those elements. And</p> <p>16 while I've see this before it was at least</p> <p>17 eight months ago and I frankly didn't</p> <p>18 remember that this was -- that figures</p> <p>19 were similar or that there's any</p> <p>20 overlapping text.</p> <p>21 Q. And again, in the context of</p> <p>22 preparing the declaration counsel didn't</p> <p>23 advise you to or remind you that the</p> <p>24 Truitt reference has a very similar</p> <p>25 passage?</p> <p style="text-align: right;">Page 64</p> |
| <p>1 (Whereupon, a portion of the</p> <p>2 record was read back.)</p> <p>3 "QUESTION. I'm not sure if it's</p> <p>4 easy for you to do, but if you compare</p> <p>5 the first paragraph in column 2 of the</p> <p>6 Truitt reference to column 23, lines 7</p> <p>7 and ongoing in the '269 patent you'll</p> <p>8 see once again a striking resemblance,</p> <p>9 yes?</p> <p>10 ANSWER: I'm doing that</p> <p>11 comparison now (pause.) Yes, I see</p> <p>12 that?</p> <p>13 Q. Forgive me, Dr. Borkholder. If</p> <p>14 you're still making the comparison that's</p> <p>15 fine. I'm just waiting for your -- the</p> <p>16 result of your comparison.</p> <p>17 A. I apologize. I said yes, I see</p> <p>18 that. I couldn't understand the last part</p> <p>19 that you said, Garry, but my answer was</p> <p>20 yes, I see that in reference to the</p> <p>21 similarity. I apologize.</p> <p>22 Q. Just to cover it again, you</p> <p>23 agree that the portion of the '269 patent</p> <p>24 that you cite for the quote/unquote more</p> <p>25 sophisticated pressure support device, end</p> <p style="text-align: right;">Page 63</p> | <p>1 MR. PRICE: Again, I'm</p> <p>2 instructing the witness not answer to</p> <p>3 the extent it calls for privileged</p> <p>4 communications.</p> <p>5 MR. SIKORSKI: Once again, I</p> <p>6 don't see any privilege there so we'll</p> <p>7 move on. I said despite not being a</p> <p>8 privilege I'm forced to move on.</p> <p>9 Q. In Truitt he has an illustration</p> <p>10 in figure 2 of an element that measures</p> <p>11 air flow, do you see that?</p> <p>12 A. I see figure 2. I would need to</p> <p>13 review the elements that are described</p> <p>14 here. I don't remember the details of</p> <p>15 figure 2 on what the intent was.</p> <p>16 Q. It's a pretty basic operation.</p> <p>17 Feel free to read column 2, lines 12 or so</p> <p>18 in Truitt. He provides a pretty succinct</p> <p>19 explanation of what figure 2 is up to,</p> <p>20 what it's doing.</p> <p>21 A. Okay. Yes, sir. They are</p> <p>22 measuring flow.</p> <p>23 Q. Figure 2 has an arrow D, do you</p> <p>24 see that?</p> <p>25 A. I do.</p> <p style="text-align: right;">Page 65</p>                                                                              |

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| <p>1 Q. And assuming that's the<br/>2 direction of air flow that air flow is<br/>3 passing through some kind of restricter<br/>4 plate, I'm sure it has other terms, Number<br/>5 30, right?<br/>6 A. Yes.<br/>7 Q. And by virtue of passing through<br/>8 that obstacle, so to speak, a differential<br/>9 pressure is created between P1 and P2,<br/>10 right?<br/>11 A. I think the intent -- there is a<br/>12 pressure differential that is created and<br/>13 I assume that 30 is to increase the<br/>14 fluidic resistance so that that pressure<br/>15 difference was larger and easier to<br/>16 measure.<br/>17 Q. And the differential pressures<br/>18 or individual pressures, what have you,<br/>19 are measured using taps 34 and 36?<br/>20 A. That's correct.<br/>21 Q. Now, would this sensor<br/>22 illustrated in Truitt's figure 2 directly<br/>23 measure air flow in your opinion? And I'm<br/>24 emphasizing the adverb directly.<br/>25 A. This is a sensor system that</p> <p style="text-align: right;">Page 66</p>                                                                                                                | <p>1 things in order to get an estimate of that<br/>2 flow.<br/>3 Q. There's a variation of figure 2<br/>4 that Truitt describes where he uses<br/>5 element 32 prime which I'll describe<br/>6 simply as a smaller detour for some of the<br/>7 air. He refers to it as a side stream.<br/>8 I'm not sure if you read that portion in<br/>9 column 2 starting line 27.<br/>10 A. Okay. I see that, yes.<br/>11 Q. That embodiment he uses<br/>12 something that Truitt refers to as a mass<br/>13 flow sensor 32 prime. Do you see that in<br/>14 lines 32 and 33?<br/>15 A. I do.<br/>16 Q. Do you know what that sensor is,<br/>17 how it works?<br/>18 A. Off the top of my head I do not<br/>19 recall the details of how a mass flow<br/>20 sensor works.<br/>21 Q. Truitt as well as the asserted<br/>22 or, excuse me, the challenged '269 patent<br/>23 and maybe some of the other pieces of<br/>24 prior art in this IPR proceeding used<br/>25 pressure sensors, right?</p> <p style="text-align: right;">Page 68</p>                                                |
| <p>1 would -- it is -- it is -- it is a<br/>2 indirect measure of flow based on basic<br/>3 equations and known characteristics of the<br/>4 system, right. So if you think of a pipe<br/>5 and it has fluid flowing through it you're<br/>6 going to have a pressure differential,<br/>7 right. So they're not measuring flow, the<br/>8 flow velocity directly, but they're<br/>9 measuring a pressure differential that<br/>10 develops as a result of that flow so<br/>11 they're able to get an estimate of what<br/>12 the air flow is shown at arrow D by that<br/>13 differential pressure measurement and<br/>14 knowledge of how the sensor is<br/>15 constructed.<br/>16 Q. And whoever designed this<br/>17 particular sensor illustrated in figure 2<br/>18 no doubt has knowledge of the dimensions<br/>19 of the plate 30 as well as the dimensions<br/>20 of the conduit through which the air is<br/>21 flowing, right?<br/>22 MR. PRICE: Objection.<br/>23 A. I would assume that anyone that<br/>24 was developing a flow rate sensor with<br/>25 this construction would need to know those</p> <p style="text-align: right;">Page 67</p> | <p>1 A. Yes.<br/>2 Q. And the pressure sensors that<br/>3 are at issue here are electronic, are they<br/>4 not, they received power from some source?<br/>5 A. I would assume they receive<br/>6 power. Yes, sir.<br/>7 Q. And they output some sort of<br/>8 electrical signal, yes?<br/>9 A. That would be my assumption is<br/>10 they're opening an electrical signal, yes.<br/>11 Q. So in other words, in order to<br/>12 employ a pressure sensor in the asserted<br/>13 -- strike that.<br/>14 So in order to employ a pressure<br/>15 sensor in the challenged '269 patent or<br/>16 any of these pieces of prior art that<br/>17 we've been analyzing in this IPR<br/>18 proceeding, the pressure sensor has a<br/>19 couple of wires dangling from it, right?<br/>20 I mean if you were to purchase and hold<br/>21 one in your hand it would have wires<br/>22 sticking out, right?<br/>23 A. I would presume that it has<br/>24 wires. It might be integrated into a<br/>25 sheath to make a clean cable, but I would</p> <p style="text-align: right;">Page 69</p> |

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| <p>1 presume that they need power. Yes, sir.<br/> 2 Q. Right. Now, whether you look at<br/> 3 the figure 7 in the challenged '269 patent<br/> 4 or figure 1 in the Truitt reference<br/> 5 Exhibit 1026 you see that the pressure<br/> 6 sensor 322 or 22 depending on which<br/> 7 document you're looking at has illustrated<br/> 8 along with it a tubular pressure tap,<br/> 9 right?<br/> 10 A. I'm sorry. Can you repeat the<br/> 11 last part? A tubular.<br/> 12 Q. A pressure tap.<br/> 13 A. Tap, T-A-P?<br/> 14 Q. Yes.<br/> 15 A. Yes, sir. I see that.<br/> 16 Q. To pick figure 7 of the<br/> 17 challenged '269 patent the pressure sensor<br/> 18 in figure 7 is illustrated at reference<br/> 19 numeral 322 and extending to the right and<br/> 20 upward is this hollow tube illustrated by<br/> 21 two parallel lines, right?<br/> 22 A. Yes.<br/> 23 Q. And an analogous hollow tube is<br/> 24 used in or shown I should say in figure 1<br/> 25 of the Truitt reference extending from</p> <p style="text-align: right;">Page 70</p> | <p>1 Q. Understood. Thank you.<br/> 2 If you have access to<br/> 3 Exhibit 1008 the Ferral prior art. Do you<br/> 4 mind grabbing that in front of you,<br/> 5 please?<br/> 6 A. I have that. I'm just trying to<br/> 7 keep my screen relatively clear. Should I<br/> 8 retain Exhibit 1026 and the '269 patent?<br/> 9 Q. For now just Ferral 1008. It is<br/> 10 all you need.<br/> 11 A. Okay. Thank you. I have it up.<br/> 12 Q. Figure 1 in the Ferral prior art<br/> 13 Exhibit 1008 has an illustration of a<br/> 14 bunch of elements, but I want to direct<br/> 15 your attention towards the top of that<br/> 16 figure. Let me know when you're there.<br/> 17 A. I'm there.<br/> 18 Q. Ferral has a hollow tube 14<br/> 19 extending between the mask and housing of<br/> 20 the CPAP device, right?<br/> 21 A. I see 14 labeled. Could we go<br/> 22 to the relative portion in this<br/> 23 specification to see how 14 is described,<br/> 24 please?<br/> 25 Q. Absolutely. It's mentioned at</p> <p style="text-align: right;">Page 72</p>                                                                                                                                                  |
| <p>1 pressure sensor 22, right?<br/> 2 A. Yes.<br/> 3 Q. What's the purpose of that<br/> 4 hollow tube?<br/> 5 A. I presume that that tube is<br/> 6 allowing a connection between the sensor<br/> 7 itself and the point where they wish to<br/> 8 measure the pressure.<br/> 9 Q. I'll use a loose analogy like<br/> 10 the drinking straw, a pressure experienced<br/> 11 in the breathing hose is carried so to<br/> 12 speak to the location of the actual<br/> 13 pressure transducers itself; is that<br/> 14 right?<br/> 15 A. It is and you may have -- you<br/> 16 may have slight differences depending on<br/> 17 that system, but presumably you would do<br/> 18 something that doesn't have a lot of wall<br/> 19 motion with changes in pressure and you<br/> 20 keep the volume relatively small so the<br/> 21 intent would be that your sampling the<br/> 22 pressure at that location.<br/> 23 Q. I'm sorry. Did you use the word<br/> 24 wall motion?<br/> 25 A. Wall of the tube.</p> <p style="text-align: right;">Page 71</p>       | <p>1 least at the bottom of page five into page<br/> 2 six and possibly elsewhere.<br/> 3 A. Okay. I see that.<br/> 4 Q. The purpose of that sense tube,<br/> 5 as Ferral calls it, Number 14, is just as<br/> 6 we saw in figure 7 of the '269 patent and<br/> 7 figure 1 of Truitt to relay the pressure<br/> 8 at the mask to the location of the<br/> 9 pressure transducers, right?<br/> 10 A. So is the -- in the -- at the<br/> 11 bottom of page five going to top of page<br/> 12 six in Ferral it says the sense tube 14 is<br/> 13 connected to the main housing, the blower<br/> 14 to the mask that allows the apparatus to<br/> 15 sense the oxygen concentration and<br/> 16 pressure levels in the mask. So it<br/> 17 appears that it's going from the mask to<br/> 18 the main housing of the blower and if it's<br/> 19 measuring -- if it's measuring -- they<br/> 20 call it a sense tube so my assumption is<br/> 21 that's it's a -- what we described<br/> 22 previously so it's a connection.<br/> 23 Q. And it's fair to say that the<br/> 24 pressure sensor used by Ferral is within<br/> 25 the housing of the CPAP device, right?</p> <p style="text-align: right;">Page 73</p> |

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| <p>1 A. So my recollection is that<br/>2 Ferral actually isn't explicit on that,<br/>3 but in that drawing it appears that it is<br/>4 going at least -- the pressure sensor is<br/>5 at least at the main housing of the<br/>6 blower.<br/>7 Q. When you say at the housing of<br/>8 the blower what do you mean?<br/>9 A. So it says there's a sense tube<br/>10 14 connected to the main housing of the<br/>11 blower and so presumably the pressure<br/>12 sensor is located at the main housing of<br/>13 the blower.<br/>14 Q. Still with regard to Ferral you<br/>15 have that in front of you, sir?<br/>16 A. I do.<br/>17 Q. On page 5 of Ferral Exhibit 1008<br/>18 the top paragraph begins a description of<br/>19 the invention. Go ahead and read that top<br/>20 paragraph on page five and let me know<br/>21 when you're done.<br/>22 A. I'm scrolling back and forth<br/>23 between the photograph and the figure.<br/>24 Q. Take your time. Take your time.<br/>25 I know it's difficult to bop back and</p> <p style="text-align: right;">Page 74</p> | <p>1 device.<br/>2 Q. And you would read that as being<br/>3 a similar device or let's say a device<br/>4 other than a pneumotachograph to derive an<br/>5 air flow signal F sub T, right?<br/>6 A. Let's see. Can you repeat your<br/>7 question again, sir?<br/>8 MR. SIKORSKI: Garry, can you<br/>9 read that back, please?<br/>10 (Whereupon, a portion of the<br/>11 record was read back.)<br/>12 "QUESTION. And you would read<br/>13 that as being a similar device or<br/>14 let's say a device other than a<br/>15 pneumotachograph to derive an air flow<br/>16 signal F sub T, right?"<br/>17 A. So your question is could they<br/>18 use something other than a<br/>19 pneumotachograph?<br/>20 Q. My question more accurately is<br/>21 Ferral explicitly says you can use<br/>22 something other than a pneumotachograph to<br/>23 derive an air flow signal, right?<br/>24 A. So he says or similar device and<br/>25 I've worked on a lot of patents.</p> <p style="text-align: right;">Page 76</p>                       |
| <p>1 forth when on a computer screen so just<br/>2 take your time.<br/>3 A. (Pause.) I'm done.<br/>4 Q. Okay. On page 5 starting at<br/>5 line 5 in Ferral Exhibit 1008 he refers to<br/>6 a couple different embodiments among them<br/>7 the potential use of a pneumotachograph;<br/>8 you see that?<br/>9 MR. PRICE: Objection to form.<br/>10 A. I see that he talks about a flow<br/>11 sensor and/or pressure sensor may be<br/>12 utilized in which case mass flow may be<br/>13 measured using a pneumotachograph.<br/>14 Q. And earlier today we were<br/>15 talking about your views of what is or is<br/>16 not of a pneumotachograph; you remember<br/>17 that?<br/>18 A. I do.<br/>19 Q. Now, you would agree that Ferral<br/>20 is not limited to the use of a<br/>21 pneumotachograph. In fact, he goes<br/>22 further in that sentence by saying you can<br/>23 use a similar device to derive a flow<br/>24 signal F sub T, right?<br/>25 A. I see that he says or similar</p> <p style="text-align: right;">Page 75</p>                                | <p>1 Sometimes you put in language because you<br/>2 want to keep things open for things you<br/>3 don't know today so essentially unless<br/>4 there's another location in the<br/>5 specification where he talks about these<br/>6 other devices it's difficult to discern<br/>7 what Ferral was intending by including<br/>8 that, if he had an idea for other devices<br/>9 or if he was just -- didn't want to lock<br/>10 himself into known devices to do it if<br/>11 that makes sense.<br/>12 MR. SIKORSKI: We've been going<br/>13 for a bit. I know it's a little<br/>14 early, but let's take a break.<br/>15 (Whereupon, a recess was taken.)<br/>16 Q. Dr. Borkholder, I have no more<br/>17 other questions. I appreciate your time<br/>18 today.<br/>19 MR. PRICE: Okay. Let's take<br/>20 ten and come back on the record then.<br/>21 (Whereupon, a recess was taken.)<br/>22 MR. PRICE: We have no questions<br/>23 on redirect.<br/>24<br/>25 (Whereupon, the Examination</p> <p style="text-align: right;">Page 77</p> |

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| <p>1 Before Trial of Dr. David Borkholder,<br/>2 the Expert Witness, conducted via Zoom<br/>3 videoconference concluded at 1:43 p.m.<br/>4 on Thursday, September 26, 2024.)<br/>5<br/>6<br/>7<br/>8<br/>9<br/>10<br/>11<br/>12<br/>13<br/>14<br/>15<br/>16<br/>17<br/>18<br/>19<br/>20<br/>21<br/>22<br/>23<br/>24<br/>25</p> <p style="text-align: right;">Page 78</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <p>1 The filing of the original of<br/>2 this deposition is waived.<br/>3 IT IS FURTHER STIPULATED, a copy<br/>4 of this examination shall be furnished to<br/>5 the attorney for the witness being<br/>6 examined without charge.<br/>7 * * *<br/>8<br/>9<br/>10<br/>11<br/>12<br/>13<br/>14<br/>15<br/>16<br/>17<br/>18<br/>19<br/>20<br/>21<br/>22<br/>23<br/>24<br/>25</p> <p style="text-align: right;">Page 80</p>                                                                                                                                                                                                                                                                                                                                                                     |
| <p>1 STIPULATIONS<br/>2<br/>3 IT IS HEREBY STIPULATED, by and<br/>4 between the attorneys for the respective<br/>5 parties hereto, that:<br/>6 All rights provided by the C.P.L.R.,<br/>7 and Part 221 of the Uniform Rules for the<br/>8 Conduct of Depositions, including the<br/>9 right to object to any question, except as<br/>10 to form, or to move to strike any<br/>11 testimony at this examination is reserved;<br/>12 and in addition, the failure to object to<br/>13 any question or to move to strike any<br/>14 testimony at this examination shall not be<br/>15 a bar or waiver to make such motion at and<br/>16 is reserved to, the trial of this action.<br/>17 This deposition may be sworn to by the<br/>18 witness being examined before a Notary<br/>19 Public other than the Notary Public before<br/>20 whom this examination was begun but the<br/>21 failure to do so or to return the original<br/>22 of this deposition to counsel, shall not<br/>23 be deemed a waiver of the rights provided<br/>24 by Rule 3116, C.P.L.R. and shall be<br/>25 controlled thereby.</p> <p style="text-align: right;">Page 79</p> | <p>1 CERTIFICATION<br/>2<br/>3 I, Garry J. Torres, a Notary Public<br/>4 for and within the State of New York, do<br/>5 hereby certify:<br/>6 That, Dr. David Borkholder, the<br/>7 witness whose testimony as herein set<br/>8 forth, was duly sworn by me; and that the<br/>9 within transcript is a true record of the<br/>10 testimony given by said witness.<br/>11 I further certify that I am not<br/>12 related to any of the parties to this<br/>13 action by blood or marriage, and that I am<br/>14 in no way interested in the outcome of<br/>15 this matter.<br/>16 IN WITNESS WHEREOF, I have hereunto<br/>17 set my hand this 7th day of October, 2024.<br/>18<br/>19<br/>20<br/>21<br/>22 GARRY J. TORRES<br/>23<br/>24<br/>25</p> <p style="text-align: right;">Page 81</p> |

21 (Pages 78 - 81)

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| <p>1 JEFFREY H. PRICE, ESQ.<br/> 2 jprice@kramerlevin.com<br/> 3 October 7, 2024<br/> 4 RE: Resmed Corp. v. Cleveland Medical Devices, Inc.<br/> 5 9/26/2024, Dr. David Borkholder (#6913216)<br/> 6 The above-referenced transcript is available for<br/> 7 review.<br/> 8 Within the applicable timeframe, the witness should<br/> 9 read the testimony to verify its accuracy. If there are<br/> 10 any changes, the witness should note those with the<br/> 11 reason, on the attached Errata Sheet.<br/> 12 The witness should sign the Acknowledgment of<br/> 13 Deponent and Errata and return to the deposing attorney.<br/> 14 Copies should be sent to all counsel, and to Veritext at<br/> 15 (production-ca@veritext.com).<br/> 16 Return completed errata within 30 days from<br/> 17 receipt of testimony.<br/> 18 If the witness fails to do so within the time<br/> 19 allotted, the transcript may be used as if signed.<br/> 20<br/> 21<br/> 22 Yours,<br/> 23 Veritext Legal Solutions<br/> 24<br/> 25</p> <p style="text-align: right;">Page 82</p> | <p>1 Resmed Corp. v. Cleveland Medical Devices, Inc.<br/> 2 Dr. David Borkholder (#6913216)<br/> 3<br/> 4 ACKNOWLEDGEMENT OF DEPONENT<br/> 5<br/> 6 I, Dr. David Borkholder, do hereby declare that I<br/> 7 have read the foregoing transcript, I have made any<br/> 8 corrections, additions, or changes I deemed necessary as<br/> 9 noted above to be appended hereto, and that the same is<br/> 10 a true, correct and complete transcript of the testimony<br/> 11 given by me.<br/> 12<br/> 13 _____<br/> 14 Dr. David Borkholder Date<br/> 15<br/> 16 *If notary is required<br/> 17<br/> 18 SUBSCRIBED AND SWORN TO BEFORE ME THIS<br/> 19 _____ DAY OF _____, 20____.<br/> 20<br/> 21<br/> 22 _____<br/> 23 NOTARY PUBLIC<br/> 24<br/> 25</p> <p style="text-align: right;">Page 84</p> |
| <p>1 Resmed Corp. v. Cleveland Medical Devices, Inc.<br/> 2 Dr. David Borkholder (#6913216)<br/> 3<br/> 4 E R R A T A S H E E T<br/> 5 PAGE____ LINE____ CHANGE_____<br/> 6 _____<br/> 7 REASON_____<br/> 8 PAGE____ LINE____ CHANGE_____<br/> 9 _____<br/> 10 REASON_____<br/> 11 PAGE____ LINE____ CHANGE_____<br/> 12 _____<br/> 13 REASON_____<br/> 14 PAGE____ LINE____ CHANGE_____<br/> 15 _____<br/> 16 REASON_____<br/> 17 PAGE____ LINE____ CHANGE_____<br/> 18 _____<br/> 19 REASON_____<br/> 20 PAGE____ LINE____ CHANGE_____<br/> 21 _____<br/> 22 REASON_____<br/> 23 _____<br/> 24 _____<br/> 25 Dr. David Borkholder Date</p> <p style="text-align: right;">Page 83</p>                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

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[idea - know]

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[know - masters]

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[materials - objection]

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**[objection - patent]**

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[patent - pressure]

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[pressure - quote]

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