

In The Matter Of:

Panasonic Corporation of North America

v.

Cellspin Soft, Inc.

Michael Foley VOL

September 19, 2019



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

PANASONIC CORPORATION OF NORTH AMERICA, et al.,
Petitioners,
vs.
CELLSPIN SOFT, INC.,
Patent Owner.

Deposition Upon Oral Examination Of
MICHAEL FOLEY

9 o'clock a.m.
September 19, 2019
701 Fifth Avenue
Seattle, Washington

REPORTED BY: Yvonne A. Gillette, CCR No. 2129.

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APPEARANCES

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MICHAEL FOLEY, being duly sworn, testified upon oath as follows:

EXAMINATION

BY MR. PEARCE:

Q Good morning.
A Good morning.
Q You have been deposed before; is that right?
A I have, yes.
Q So I'll just go over a few ground rules, which may be a refresher for you. Okay?
A Sounds good.
Q I'll be asking questions. If you don't understand any of my questions, then please let me know. And if you don't do that, I'll assume you do understand the question. Is that fair?
A I understand, yes.
Q If you need to discuss a question regarding privilege with counsel, then you can certainly do that. Otherwise, if you need a break, you can ask for a break at any time. I would just ask, if I have a question pending, that you answer the question before you break. Is that okay?
A That's fine.
Q And the rules in these IPR proceedings may

1 be a little different than some other jurisdictions.
2 During breaks in the deposition, you're not allowed to
3 discuss the substance of testimony you have given or
4 that you anticipate giving with anyone. Do you
5 understand that?
6 A I do.
7 Q You understand that you're testifying under
8 oath today, and that's the same oath you would be
9 required to give if you were testifying in a court of
10 law?
11 A I do.
12 Q Is there any reason why you cannot give
13 complete and truthful testimony today?
14 A None that I'm aware of.
15 Q You are not on any kind of medication or any
16 other impairments of any sort?
17 A I'm not.
18 Q Dr. Foley, you have been retained by
19 Cellspin Soft, Incorporated to serve as an expert
20 witness in this interparty proceeding; is that right?
21 A That's correct.
22 Q For ease of reference today, I'll refer to
23 Cellspin Soft, Inc. as Cellspin. And I'll refer to
24 the petitioners collectively as Panasonic. Is that
25 fair?

1 A That's fine.
2 Q You have, I understand, in front of you in a
3 binder a copy of what's been identified as Exhibit
4 2009 in the IPR proceeding, your declaration; is that
5 right?
6 A I'm not sure of the exact exhibit number.
7 It is Exhibit 2009.
8 Q Okay. And this is a declaration that you
9 signed on July 22nd, 2019?
10 A Yes, that's correct.
11 Q Are you aware of any errors or inaccuracies
12 in this declaration?
13 A I am not. I should also point out the
14 binder has a copy of the '698 Patent, if that's all
15 right.
16 Q And that is Exhibit 1003. Is that what it
17 says on the bottom right?
18 A That is, yes.
19 Q Does the declaration you have in front of
20 you, Exhibit 2009, accurately state all your opinions
21 in this proceeding with respect to the issues it
22 addresses?
23 A Could you repeat that?
24 Q Sure. Let me ask maybe a little bit
25 differently. Your declaration includes opinions you

1 have expressed with respect to the issues in this IPR
2 proceeding, right?
3 A Yes. It expresses my opinions, yes.
4 Q And does your declaration state all the
5 bases for those opinions?
6 A Yes, I believe so. At least the majority of
7 them, yes.
8 Q Let me ask it this way: Is there anything
9 material that's missing from your declaration material
10 to understanding your opinions in this case?
11 A Well, I have referenced materials such as a
12 Bluetooth specification and things like that that
13 aren't all incorporated in here and that some of those
14 background materials, you know, go into helping form
15 my opinion.
16 Q But there's nothing missing from the
17 declaration that you would add? This is a complete
18 statement of your opinions, understanding that it
19 references documents that aren't incorporated entirely
20 in the declaration. Is that fair to say?
21 A Yes. It definitely references other
22 documents that I used to help form my opinion. And
23 this definitely hits the main issues and the opinions
24 that I have formed. I wouldn't say it's a hundred
25 percent all inclusive of everything, every opinion I

1 formed on this case, but it's definitely the
2 substantive ones.
3 Q Okay. Did anyone assist you in drafting
4 this declaration?
5 A I had some people review the material and
6 give me feedback, so -- but the opinions, you know,
7 were mine that I drafted and put in the declaration.
8 Q And who were those people?
9 A The Cellspin attorney, as well as Bobby from
10 Cellspin is one of the authors of the patent.
11 Q Anyone else?
12 A I don't believe so.
13 Q Your declaration responds to Dr. Strawn's
14 declaration submitted on behalf of Panasonic; is that
15 right?
16 A Yes. I reviewed that declaration as well.
17 Q Okay. And it identified points which you
18 disagree with Dr. Strawn's analysis, correct?
19 A It does identify a number of cases where I
20 disagree, yes.
21 Q Okay. And your opinion in this case is that
22 the challenge claims of the '698 Patent are -- it's a
23 double negative -- not unpatentable; is that right?
24 A Could you repeat that? Double negatives
25 throw me, I believe.

1 Q Sure. Your opinion is that the challenge
2 claims of the '698 Patent are not unpatentable, right,
3 in light of the prior art?
4 A Perhaps we should say it the other way,
5 where my opinion is that I believe the claims are
6 patentable and hold.
7 Q Okay. And any points that you thought were
8 important to that conclusion on which you disagree
9 with Dr. Strawn are discussed in your declaration,
10 right?
11 A The key points, yes.
12 Q Okay. Did you consider any materials in
13 preparing your declaration that are not referenced in
14 the declaration?
15 A That's a difficult question, because I'm
16 not -- off the top of my head, I'm not a hundred
17 percent sure of everything that's referenced in there,
18 so I might have reviewed a document that wasn't
19 germane to the point I was making, so I didn't
20 reference it. And off the top of my head, it would be
21 hard to articulate all of those.
22 Q Okay. So sitting here today, are you aware
23 of any documents that you referenced specifically that
24 are not identified in the declaration?
25 A Well, if I reference them, they're

1 Q Okay. So the response is something you
2 considered, one of the materials you considered when
3 drafting your declaration; is that correct?
4 A I definitely reviewed that, yes.
5 Q Okay. And did you meet with anyone to
6 prepare for this deposition?
7 A I did, yes.
8 Q And besides Mr. Edmonds, did you meet with
9 anyone? Was it just him, or were there other people?
10 A In person, we were the only two.
11 Q Okay. Who else was present not in person?
12 A We made a couple of phone calls to Bobby
13 again.
14 Q And about how long did you spend preparing
15 for the deposition today?
16 A About ten hours.
17 Q About how long did you spend drafting your
18 declaration?
19 A This declaration? About 50 hours.
20 Q I'm going to hand you a document that has
21 been marked as Exhibit 2010 in the IPR.
22 (Exhibit No. 2010 referenced.)
23 Q Dr. Foley, this is a copy of your resume or
24 CV, whatever you want to call it.
25 A Yes.

1 identified in the declaration.
2 Q Are you aware, sitting here, of any
3 documents not identified in the declaration that you
4 considered in forming your opinions?
5 A I'm not aware of any. But, again, off the
6 top of my head, I don't recall every single document
7 that's referenced in here. So there may be a case
8 where that was true. But, again, if I don't reference
9 it in here, it wasn't germane to the point I was
10 making.
11 Q Have you reviewed the response that Cellspin
12 filed in the IPR proceeding, the document called
13 patent owner's response?
14 A Yes, I have.
15 Q And you're aware that your declaration to
16 that response are in many respects -- actually, let me
17 strike that.
18 You're aware that that response and your
19 declaration, many of the paragraphs are verbatim or
20 essentially verbatim between the two?
21 A I definitely referenced some material from
22 the response. My opinions definitely aren't verbatim
23 from that. But as I said, some of the material was
24 referenced from that, because I was making the same
25 point that was referenced there.

1 Q And this is up-to-date?
2 A Yes. I believe it was submitted six to
3 twelve months ago. I forget the exact timeframe, but
4 nothing really has changed in that time.
5 Q Okay. I want to go down on the first page
6 where it says expert witness.
7 A Yes.
8 Q You list a number of companies. These are
9 clients on whose behalf you have provided expert
10 witness services; is that right?
11 A That is correct, yes.
12 Q And which of these were matters involving
13 patents?
14 A Nintendo was. Fujifilm was. Apple, each
15 time I have represented them, they have. The Ryobi
16 one has. Zepp Labs was. Eight Bit Studios was not.
17 And Cellspin is.
18 Q Okay. Have you served as an expert witness
19 on any other patent matters not listed here?
20 A No, but it may be a little confusing,
21 because I have represented Apple in two different
22 issues, so they technically could be listed twice.
23 But since it's the same company, I only list them
24 once.
25 Q In these matters, were you -- was your

1 client the patent owner or a party accused of
2 infringement or both? What was the role of your
3 client in these matters?
4 A It's been different in each one. Would you
5 like me to go through and list them?
6 Q Sure.
7 A Okay. Nintendo was not the patent owner.
8 Fujifilm was the patent owner. The ones with Apple,
9 each side had patents, so they were the owner and not
10 the owner of other ones. Ryobi was not the patent
11 owner. Zepp Labs was the patent owner. Cellspin is
12 the patent owner.
13 Q And did you submit an expert report in each
14 of these matters or expert declaration?
15 A Not in each of them, no.
16 Q Could you let me know in which matters you
17 did have a report or declaration?
18 A The ones I did?
19 Q Yes.
20 A The Ryobi, the Zepp Labs, and the
21 declaration in Cellspin.
22 Q Okay. Were you deposed in Ryobi or Zepp
23 Labs matters?
24 A Ryobi, yes. Zepp Labs, yes.
25 Q Okay. Did you testify at a hearing or trial

1 And Zepp Labs, similar thing. It had mobile
2 applications with a user interface. And that
3 application -- basically the case was whether that
4 application, you know, used the technology in the
5 patent.
6 Q In either of those cases, Ryobi or Zepp
7 Labs, do you know if there was any challenge to your
8 testimony, the admissibility of it or otherwise?
9 A Not that I'm aware of, no.
10 Q You have in front of you, I understand, a
11 copy of the '698 Patent in your binder, right, Exhibit
12 1003?
13 A '698. Exhibit 1003, yes, I do have a copy
14 of that.
15 Q Can you turn to column 9 on the patent
16 starting at line 42?
17 A Yes, I'm there.
18 Q Okay. Do you see that it states here -- and
19 I'm quoting, exemplar, the method and system disclosed
20 herein may be implemented in technologies that are
21 pervasive, flexible, and capable enough of
22 accomplishing the desired tasks of a method and
23 system. What do you understand "pervasive" to mean in
24 this context?
25 A Widely available and used.

1 in either of those matters?
2 A The Ryobi one, there was hearing and trial.
3 Q Have you previously in the Ryobi or Zepp
4 Labs matters -- strike that.
5 In the Ryobi or Zepp Labs matters, did you
6 offer an opinion on the validity or invalidity of
7 patents?
8 A Yes.
9 Q And in the Ryobi matter, did you offer an
10 invalidity opinion?
11 A That is correct, yes.
12 Q And in the Zepp Labs, a validity opinion?
13 A That is correct.
14 Q Did either of those matters involve
15 Bluetooth?
16 A Zepp Labs did, yes. Ryobi did not.
17 Q Did either of those matters involve GUIs?
18 When I say GUIs, I mean graphical user interface. Is
19 that understood?
20 A Yes, that is understood. In Ryobi, the case
21 did, because it had a mobile phone app was part of it,
22 and the user interfaced with that. Although the
23 patent -- that wasn't part of the patent, but it was
24 part of how the patent was used, if that makes any
25 sense.

1 Q Pervasive technologies would have been
2 well-known to a person of ordinary skill in the art at
3 the time, would you agree?
4 MR. EDMONDS: Objection. Vague.
5 A But I can answer? Okay. A pervasive
6 technology would be well-known to -- I forget how you
7 phrased it -- somebody -- did you say -- with
8 reasonable in the art, a POSITA type person?
9 Q Yes, a person of ordinary skill in the art
10 at the time is what I said.
11 A Okay. They should be aware of a pervasive
12 technology.
13 Q And you just used the term, POSITA. Is that
14 shorthand for a person of ordinary skill in the art?
15 A Yes.
16 Q Okay. So I'll probably use that term as
17 well today, just so you understand that's what I mean.
18 A Okay. Very good.
19 Q And you're familiar with the concept of a
20 POSITA in patent law; is that right?
21 A Yes, I am.
22 Q What's your understanding of POSITA?
23 A It's usually a, I guess, a hypothetical
24 person that would understand the art and have a
25 general background on it and would be able to

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