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Transcript of Carl G. Degen

Date: January 8, 2020

Case: American National Manufacturing Inc. -v- Sleep Number Corporation, et al.
(PTAB)

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WORLDWIDE COURT REPORTING & LITIGATION TECHNOLOGY

Transcript of Carl G. Degen
Conducted on January 8, 2020

<p style="text-align: center;">1</p> <p>1 UNITED STATES PATENT AND TRADEMARK OFFICE 2 ----- 3 BEFORE THE PATENT TRIAL AND APPEAL BOARD 4 ----- 5 AMERICAN NATIONAL MANUFACTURING, INC., 6 Petitioner 7 v. 8 SLEEP NUMBER CORPORATION 9 f/k/a SELECT COMFORT CORPORATION, 10 Patent Owner 11 ----- 12 Case IPR2019-00497, Patent No. 8,769,747 13 Case IPR2019-00500, Patent No. 9,737,154 14 Case IPR2019-00514, Patent No. 5,904,172 15 ----- 16 VIDEOTAPED DEPOSITION 17 OF 18 CARL G. DEGEN 19 January 8, 2020 20 21 Job No. 275013 22 Reported by: Amy L. Larson, RPR</p>	<p style="text-align: center;">3</p> <p>1 APPEARANCES: 2 On Behalf of Petitioner: 3 SPENCER FANE LLP 4 500 Granite Parkway 5 Suite 650 6 Plano, TX 75024 7 By: Mark Thornhill, Esq. 8 On Behalf of Patent Owner: 9 FOX ROTHSCHILD, LLP 10 222 South Ninth Street 11 Suite 2000 12 Minneapolis, MN 55402 13 By: Elizabeth Patton, Esq. 14 15 ALSO PRESENT: Jacob Arvold, Videographer 16 Matthew Lynde (via telephone) 17 18 19 20 21 22</p>
<p style="text-align: center;">2</p> <p>1 VIDEOTAPED DEPOSITION OF CARL G. DEGEN, taken on 2 this 8th day of January, 2020, commencing at 3 approximately 9:01 a.m., at the law offices of 4 Fox Rothschild, LLP, 222 South Ninth Street, 5 Suite 2000, Minneapolis, Minnesota. 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22</p>	<p style="text-align: center;">4</p> <p>1 INDEX: 2 EXAMINATION BY: PAGE 3 Mr. Thornhill.....6, 186 4 Ms. Patton.....173 5 EXHIBITS MARKED FOR IDENTIFICATION: 6 Exhibit 2027.....66 7 Declaration of Dr. John Abraham 8 No Bates 9 Exhibit 2029.....66 10 Declaration of George Edwards 11 No Bates 12 Exhibit 2030.....8 13 Declaration of Carl G. Degen 14 No Bates 15 Exhibit 2044.....38 16 Plaintiff's Amended Disclosure of 17 Asserted Claims and Infringement Contentions 18 No Bates 19 Exhibit 2052.....39 20 History of features and sales 21 No Bates 22 Exhibit 2057.....46 Thumb Drive - No Bates</p>

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<p style="text-align: center;">5</p> <p>1 P R O C E E D I N G S</p> <p>2</p> <p>3 THE VIDEOGRAPHER: Here begins</p> <p>4 Disk Number 1 in the videotaped deposition</p> <p>5 of Carl G. Degen in the matter of</p> <p>6 American National Manufacturing, Inc. vs.</p> <p>7 Sleep Number Corporation, before the</p> <p>8 Patent Trial and Appeal Board, United States</p> <p>9 Patent and Trademark Office, Case Numbers</p> <p>10 IPR2019-00497, dash 00500 and dash 00514.</p> <p>11 Today's date is January 8th, 2020. The time</p> <p>12 on the video monitor is 9:02 a.m.</p> <p>13 The videographer today is</p> <p>14 Jacob Arvold representing Planet Depos.</p> <p>15 This video deposition is taking place at</p> <p>16 222 South Ninth Street, Suite 2000,</p> <p>17 Minneapolis, Minnesota.</p> <p>18 Would counsel please voice identify</p> <p>19 themselves and state whom they represent.</p> <p>20 MR. THORNHILL: For</p> <p>21 American National Manufacturing,</p> <p>22 Mark Thornhill of the Spencer Fane law firm.</p>	<p style="text-align: right;">7</p> <p>1 Q. I'm Mark Thornhill representing</p> <p>2 American National Manufacturing. It's a</p> <p>3 pleasure to meet you.</p> <p>4 Sir, during the course of this</p> <p>5 deposition you understand that you're sworn</p> <p>6 to tell the truth, and you do understand</p> <p>7 that, don't you?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. You've given many depositions in the</p> <p>10 course of your career, haven't you, sir?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. So I'm assuming that you're familiar</p> <p>13 with the process. The only thing that I ask</p> <p>14 of you is that if I ask a question that you</p> <p>15 don't understand, please ask me to restate it</p> <p>16 or to clarify it, because otherwise I'm going</p> <p>17 to just accept that you do understand the</p> <p>18 question.</p> <p>19 Is that fair?</p> <p>20 A. Yes.</p> <p>21 Q. Good.</p> <p>22 MR. THORNHILL: So let's just mark</p>
<p style="text-align: center;">6</p> <p>1 MS. PATTON: Elizabeth Patton from</p> <p>2 Fox Rothschild representing the patent owner,</p> <p>3 Sleep Number Corporation.</p> <p>4 THE VIDEOGRAPHER: And also</p> <p>5 appearing by phone?</p> <p>6 MR. THORNHILL: Is Matthew Lynde,</p> <p>7 L-Y-N-D-E, of Cornerstone Consulting.</p> <p>8 THE VIDEOGRAPHER: The court</p> <p>9 reporter today is Amy Larson representing</p> <p>10 Planet Depos.</p> <p>11 Would the reporter please swear in</p> <p>12 the witness.</p> <p>13</p> <p>14 CARL G. DEGEN,</p> <p>15 a witness in the above-entitled action,</p> <p>16 after having been first duly sworn, was</p> <p>17 deposed and says as follows:</p> <p>18</p> <p>19 EXAMINATION</p> <p>20 BY MR. THORNHILL:</p> <p>21 Q. Good morning, Mr. Degen.</p> <p>22 A. Good morning.</p>	<p style="text-align: right;">8</p> <p>1 Mr. Degen's declaration as Exhibit 2030.</p> <p>2 (Exhibit 2030 marked.)</p> <p>3 BY MR. THORNHILL:</p> <p>4 Q. Mr. Degen, the court reporter has placed in</p> <p>5 front of you Exhibit 2030. Can you identify</p> <p>6 that as the declaration that you submitted in</p> <p>7 this case dated October 23, 2019?</p> <p>8 A. Yes, it appears to be a copy of that.</p> <p>9 Q. Right. And that represents your sworn</p> <p>10 testimony as of that date; isn't that</p> <p>11 correct?</p> <p>12 A. Yes.</p> <p>13 Q. In fact, the document has your signature at</p> <p>14 the last page of the text, isn't that so?</p> <p>15 A. That's correct, on page 19.</p> <p>16 Q. Right. And just above it says that you made</p> <p>17 those statements under penalty of perjury?</p> <p>18 A. Correct.</p> <p>19 Q. Okay. And, sir, is it -- you understand that</p> <p>20 there actually are three proceedings with the</p> <p>21 same controversy in this matter?</p> <p>22 A. Yes.</p>

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9	1 Q. And this sworn testimony was submitted for 2 all three -- all three proceedings, you did 3 not make a separate declaration for -- or a 4 different declaration for any of the three 5 proceedings? 6 A. I believe for one of the proceedings some of 7 the exhibit number references were changed, 8 but the exhibits are exactly the same, and 9 the text and opinions are exactly the same. 10 Q. Okay. The declaration, sir, Exhibit 2030, 11 includes a copy of your resume at Appendix A. 12 Do you see that? 13 A. Yes. 14 Q. And then immediately following the resume 15 there's a page titled, Deposition and Trial 16 Testimony. 17 Do you see that? 18 A. Yes. 19 Q. Is the resume still accurate as of today? 20 A. Yes. 21 Q. Is the statement of deposition and trial 22 testimony accurate as of today?	11	1 experience? 2 A. Correct. 3 Q. You've been a professional economist for how 4 many years approximately, 30, 40? 5 A. Forty-two. 6 Q. So is it okay with you then if we discuss 7 this generally in terms using the word 8 "commercial success" rather than going 9 through the words about secondary indicia, 10 et cetera? 11 A. Yes. 12 Q. Commercial success is a fair way to describe 13 the basic analysis that you were conducting? 14 A. It's -- it's broader than the analysis I've 15 conducted. I've looked at two specific 16 analyses that fall under the rubric of 17 commercial success. 18 Q. Fine. And one of those is whether there is 19 demand for the patented technologies; is that 20 correct? 21 A. Yes. 22 Q. And another -- and the second of those
10	1 A. Yes. 2 Q. Sir, in this case and through your sworn 3 testimony presented in Exhibit 2030, you talk 4 about secondary indicia of nonobviousness, is 5 that so? 6 A. I think -- yes, secondary indicia or 7 sometimes called secondary consideration, 8 yes. 9 Q. Okay. And in particular, you're talking here 10 about the concept of commercial success? 11 A. Specifically, yes. 12 Q. And just for reference purposes, I was 13 looking at paragraph 8 of your declaration. 14 That may be where you were looking. 15 A. Yes, it is. 16 Q. Okay. And you explain in paragraph 8, 17 "Commercial success relates to economic 18 considerations regarding the products at 19 issue"; is that correct? 20 A. I explain that that's my understanding, yes. 21 Q. Okay. All right. And that's your 22 understanding developed during your years of	12	1 analyses that you've prepared -- that you've 2 conducted, is the adoption rate of the 3 patented technologies; is that correct? 4 A. Yes. 5 Q. Now, sir, in cases previous to the case that 6 we're on here today, have you provided sworn 7 testimony in other patent cases on the 8 general topic of commercial success? 9 A. Commercial success comes under several of the 10 factors in Georgia-Pacific, so I would say in 11 a -- in a large number of cases where I've 12 given royalty opinions, commercial success, 13 including demand and adoption, would have 14 been included in my analyses, or at least 15 considerations within my analyses. 16 Q. In any other patent cases have you opined 17 about demand for patented technology? 18 A. Yes, I've looked at the sales of products 19 embodying the patented technology relative to 20 those that don't and how those have changed 21 over time. 22 Q. How would you compare and contrast those

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<p>13</p> <p>1 previous testimonies about demand for 2 patented -- patented technologies from the 3 undertaking that you have made in this case? 4 A. I would say they're very similar. 5 Q. Have you opined in patent cases before about 6 adoption rate of patented technologies? 7 A. Yes. 8 Q. And were those also in the context of royalty 9 cases? 10 A. Yes, I believe one of the Georgia-Pacific 11 factors directs me to consider the extent of 12 use. And in a number of those cases I've 13 looked at how the accused technology was 14 adopted throughout the product line. 15 Q. And in those other cases, have you -- did 16 your sworn testimony include calculations of 17 demand on units sold caused by the patented 18 technologies? 19 A. Yes. 20 Q. And did they include opinions and 21 calculations about the adoption rate of 22 patented technologies?</p>	<p>15</p> <p>1 been testimony that it's widespread or that 2 it's a hundred percent, so there was no need 3 to do calculations. 4 Q. I see. And is that also -- so now I want to 5 move to the adoption rate issue. 6 A. Yes. 7 Q. And, again, I'm just asking because you used 8 the word "considered," I'm trying to 9 understand what you really mean here. 10 So to be clear, what I'm asking is 11 whether in any previous patent cases you have 12 given sworn testimony regarding your 13 calculations of adoption rates of patented 14 technologies? 15 A. Yes. So I'm -- I'm a little confused. In 16 terms of previous patent cases, I have 17 testified in a previous IPR case involving 18 patents that included explicit calculations 19 of demand and adoption -- 20 Q. Okay. 21 A. -- and other things. 22 Beyond that, in cases involving a</p>
<p>14</p> <p>1 A. I'm sure many of them have looked at the rate 2 of adoption. I don't know whether I've 3 always calculated the -- calculated the 4 adoption rate in explicit percentage terms, 5 but the -- how widespread it was over time, 6 how it changed over time was certainly 7 considered in many of the cases I've 8 testified in. 9 Q. You are -- you used the word 10 "considered," and I just want to -- 11 A. Yeah. 12 Q. -- make sure that we're using the same 13 vernacular here. 14 I'm asking whether you have given 15 sworn testimony which specifically relates to 16 calculations of demand for patented 17 technology in a patent case and 18 is -- is that yes or no? 19 A. I believe it's yes. I've testified in a lot 20 of cases, and I'm hard-pressed to identify a 21 particular one. But certainly in some cases 22 I've calculated it. In other cases there's</p>	<p>16</p> <p>1 reasonable royalty calculation, I have also 2 calculated demand and adoption rates and 3 considered them in many more. 4 Q. Okay. Well, let's talk about the IPR case, 5 okay? 6 A. Okay. 7 Q. That would be a case then before the PTAB? 8 A. Yes. 9 Q. Okay. And can you tell me the -- the parties 10 to that case? 11 A. Yes, it's the fourth case listed on the 12 page 24 of Exhibit 2030, Polygroup Limited. 13 Q. Oh, Polygroup Limited, okay. 14 A. Versus Willis Electric Company. 15 Q. Is that the only PTAB case in which you have 16 given sworn testimony? 17 A. As far as I can remember, yes. 18 Q. In the Polygroup case, were you providing 19 expert opinions on behalf of 20 Willis Electric? 21 A. Yes. 22 Q. And was this a challenge -- who was the</p>

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