

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AMERICAN NATIONAL MANUFACTURING INC.,

Petitioner,

vs.

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

Patent Owner.

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

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

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

New York, New York

Thursday, February 20, 2020

Reported by:

Shauna Stoltz-Laurie, CLR

JOB NO. 27004

TransPerfect Legal Solutions

February 20, 2020  
1:00 p.m.

Deposition of DR. JOSHUA W. PHINNEY, Ph.D., P.E., held at the offices of Fox Rothschild LLP, 101 Park Avenue, New York, New York, pursuant to Notice, before Shauna Stoltz-Laurie, a Certified Realtime Reporter and Notary Public of the State of New York.

JOSHUA W. PHINNEY , called as a witness, having been duly sworn by a Notary Public, was examined and testified as follows:

EXAMINATION BY MR. MOORE:

Q. Good afternoon, Dr. Phinney.

A. Good afternoon.

Q. Nice to see you again.

A. Good to see you.

Q. So do you understand why we're here today?

A. In part, I think.

Q. And what would that be?

A. We'd be here to discuss my supplemental or reply report I call it, and perhaps the -- the report that I -- I wrote about the Motion to Amend.

Q. Okay. So how many times have you been deposed before?

A. I mean somewhere about 20.

Q. Okay. How are you feeling today?

A. All right.

Q. Is there any reason that you can't

A P P E A R A N C E S :

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Phinney offer truthful answers to the questions today?

A. No.

Q. And you understand that in an IPR, which is the proceeding we're in, that your testimony is trial testimony.

A. Yes, I understand.

Q. So there will be times today when I ask questions that are yes or no questions, and in those situations, you should provide a yes or no answer. Do you understand that?

A. Yes.

MR. HARE: Objection, form.

Q. Do you have any devices on you that allow to you communicate with others?

A. I have a cellphone.

Q. Is that it on the table?

A. No.

Q. Okay. During the deposition today, if you are going to communicate with anyone that's outside of the room, would you please let me know ahead of time.

A. I will.

Q. What did you do to prepare for your

1 Phinney  
 2 deposition today?  
 3 A. I met with Mr. Hare, and reviewed  
 4 my reports and the accompanying petitions or  
 5 what the lawyers worked on.  
 6 Q. How long did that meeting last?  
 7 A. About -- about five hours.  
 8 Q. Where was that meeting conducted?  
 9 A. At Exponent's offices in New York.  
 10 Q. So can you list the materials for  
 11 me that you did review during that meeting?  
 12 A. The -- my report to -- for the  
 13 Motion to Amend, my reply report, the  
 14 petition -- I'm not sure what to call it, the  
 15 lawyer's work product that corresponded to  
 16 the reply report --  
 17 Q. Okay.  
 18 A. -- and the patents.  
 19 Q. Anything else?  
 20 A. The Gifft reference, '172.  
 21 Q. Anything else?  
 22 A. The Ebel reference and the Mittal  
 23 reference.  
 24 Q. Did you review Pillsbury?  
 25 A. Oh. Yes.

1 Phinney  
 2 Q. Anything else?  
 3 A. I don't think so.  
 4 Q. While you were reviewing those --  
 5 Please go ahead.  
 6 A. I'm sorry. I also saw the written  
 7 transcript for Dr. Messner.  
 8 Q. While you were reviewing those  
 9 documents did you notice any errors in any of  
 10 your declarations?  
 11 A. Not while I was reviewing those  
 12 documents.  
 13 Q. At any other documents have you  
 14 noticed errors in your written product?  
 15 A. Yes.  
 16 Q. And what were those?  
 17 A. There was an error in the voltage  
 18 divider equation that I wrote in my opening  
 19 report.  
 20 Q. Is that error the subject matter of  
 21 footnote 2 on page 45 of your Declaration in  
 22 Support of the Patent Office Motion to Amend?  
 23 A. I -- I -- I wouldn't know one way  
 24 or the other. It could be.  
 25 Q. Did you document that error in a

1 Phinney  
 2 footnote in one of your reports?  
 3 A. I believe it was a footnote, yes.  
 4 Q. Were there any other errors?  
 5 A. Nothing I can think of that  
 6 wouldn't be like a typo.  
 7 Q. So your education, training and  
 8 work history, has that changed since we last  
 9 spoke in deposition?  
 10 A. I don't think so.  
 11 Q. So we've spoken before; have we  
 12 not?  
 13 A. Yes, we have.  
 14 Q. Our last deposition, you submitted  
 15 declarations as part of the petitioner's  
 16 petition on the '154 and '747 patents; is  
 17 that true?  
 18 A. I didn't hear the first part of  
 19 your question. Sorry.  
 20 Q. So our prior deposition, we were  
 21 speaking about the declarations that you  
 22 submitted to the Patent Trials and Appeals  
 23 Board for Petitioner's petitions for  
 24 interparties review of the '154 and '747  
 25 patents; is that true?

1 Phinney  
 2 A. Yes.  
 3 Q. And you understand that the Board  
 4 instituted those petitions.  
 5 A. Yes.  
 6 Q. Since that point in time American  
 7 National has filed a number of briefs that  
 8 you have provided declarations for; have they  
 9 not?  
 10 MR. HARE: Objection to form.  
 11 A. Yeah. I'm not sure if they're  
 12 called briefs, but yeah. Yes.  
 13 Q. So in our deposition last time we  
 14 met, you had opined on your understanding of  
 15 the law in your prior declarations; did you  
 16 not?  
 17 A. Yes.  
 18 Q. Has that understanding changed in  
 19 any material way between those declarations  
 20 and the declarations we are here to talk  
 21 about today?  
 22 A. Not that I can think of.  
 23 Q. And you applied the same  
 24 understanding of the legal principles that  
 25 you had in the previous briefs, in the

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1                   Phinney  
2    previous declarations; you applied that same  
3    analysis and your understanding in this set  
4    of briefs; is that true?  
5           MR. HARE: Objection to form.  
6           A.   And so what do you mean by "this  
7    set of briefs" in the last part of that  
8    question?  
9           Q.   I go back to the first, one of the  
10   first questions I asked, do you know what  
11   we're here to talk about today, and your  
12   response was a couple of declarations that  
13   you've submitted. Is that true?  
14           A.   Yes.  
15           Q.   Okay. So when I say these briefs,  
16   I mean the ones that we're here to talk about  
17   today. Did you apply the same analysis and  
18   legal standards to these briefs that you did  
19   to the opening declarations?  
20           MR. HARE: Objection, form.  
21           A.   Yes.  
22           Q.   Thank you.  
23                So has your understanding of the  
24   law of anticipation changed since the prior  
25   analysis?

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1                   Phinney  
2           A.   No.  
3           Q.   Has your understanding of the law  
4   of obviousness changed since your prior  
5   declarations?  
6           A.   Not in any material way.  
7           Q.   In any way at all?  
8           A.   I have had the opportunity to look  
9   at like summaries of the law of obviousness  
10   in the last -- in the last months.  
11           Q.   Did that change your analysis that  
12   you applied in your -- in the declarations  
13   we're here to speak about today?  
14           A.   No.  
15           MR. HARE: Objection to form.  
16           Q.   (Handing).  
17           A.   Thank you.  
18           Q.   Dr. Phinney, I'm handing you what  
19   we'll mark as [Phinney] Exhibit 1 (sic).  
20                ([Phinney] Exhibit 1 mistakenly  
21   marked for identification.)  
22           MR. MOORE: And it bears  
23   "EXHIBIT 1061" from IPR 2019-00497.  
24           Q.   (Continuing) Dr. Phinney, have you  
25   seen this document before?

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1                   Phinney  
2           A.   (Perusing document) Yes.  
3           Q.   What is this document?  
4           A.   This is what I was referring to  
5   previously as my reply report.  
6           Q.   And the front page of this  
7   document, it's entitled "Declaration of  
8   Dr. Joshua Phinney, Ph.D., P.E. in Support of  
9   Petitioner's Reply to Patent Owner's  
10   Response"; is it not?  
11           A.   Yes.  
12           Q.   And this is a declaration that you  
13   submitted in support of Petitioner's Reply to  
14   the Patent Owner's Response to the  
15   Petitioner's Petition.  
16           A.   Yes.  
17           Q.   How many paragraphs is this  
18   declaration?  
19           A.   It has 24 paragraphs.  
20           Q.   And you submitted this in both the  
21   00497 proceeding and the 00500 proceeding;  
22   did you not?  
23           A.   Yes.  
24                I believe it's identical in both  
25   proceedings.

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1                   Phinney  
2           Q.   What did you review in preparation  
3   of this document?  
4           A.   I saw Dr. Messner's report and  
5   Respondent's Reply to Petitioner's Petition.  
6           Q.   You don't reference anything in  
7   this document that you consulted, did you?  
8           A.   I believe that's correct.  
9           Q.   So the documents that you just  
10   stated were Dr. Messner's report and the  
11   respondent's reply, but you don't detail how  
12   you used those in the preparation of this  
13   document, do you?  
14           MR. HARE: Objection to form.  
15           A.   (Reading) Yes, that is correct.  
16           Q.   Is this intended to be a rebuttal  
17   to Dr. Messner?  
18           MR. HARE: Objection to form.  
19           A.   No.  
20           Q.   Is it intended to be a rebuttal to  
21   Dr. Edwards?  
22           MR. HARE: Objection, form.  
23           A.   No.  
24           Q.   Or to any other witness in this  
25   proceeding?

1 Phinney  
 2 MR. HARE: Objection to form.  
 3 A. I think I'd have the same answer:  
 4 No.  
 5 Q. So this document was submitted with  
 6 a document from the petitioner; was it not?  
 7 A. Yes. That's my understanding.  
 8 Q. And did you review that document?  
 9 MR. HARE: Objection to form and  
 10 foundation.  
 11 A. I don't believe in its final form.  
 12 Q. Are you aware if the contents of  
 13 your declaration support arguments made in  
 14 that document?  
 15 A. Yes. That's my understanding.  
 16 Q. And do you agree with those  
 17 arguments?  
 18 MR. HARE: Objection to form.  
 19 Objection to foundation.  
 20 A. I don't know if I can answer that  
 21 yes or no.  
 22 Q. Anything that you disagree with?  
 23 MR. HARE: Objection to form.  
 24 Objection to foundation.  
 25 A. I -- I'm not aware of something

1 Phinney  
 2 of a number of claim terms; do you not?  
 3 MR. HARE: Objection, form.  
 4 A. (Perusing document) I don't know  
 5 that I'd put it that way. So --  
 6 Q. In what way would you put it?  
 7 A. You know, I'm just merely offering  
 8 my opinion about some claim language versus  
 9 others vis-à-vis the support that I found in  
 10 the -- in the patent specifications.  
 11 Q. So one of the differences that we  
 12 noticed between your prior declarations and  
 13 this one is "desired pressure setpoint"  
 14 versus in the earlier declaration it was  
 15 "pressure setpoint." Do those two phrases  
 16 have any different meaning to you?  
 17 MR. HARE: Objection, form and  
 18 foundation.  
 19 A. I'm sorry. Can you repeat that?  
 20 Q. In your first declaration, you  
 21 opined about the meaning of "pressure  
 22 setpoint." In this declaration, you opined  
 23 about the meaning of "desired pressure  
 24 setpoint." Is there a difference between  
 25 those two meanings?

1 Phinney  
 2 that I disagree with. I --  
 3 Q. Are you aware that portions of that  
 4 document bear substantial similarities to  
 5 portions of the declaration that's in front  
 6 of us?  
 7 MR. HARE: Objection to form.  
 8 Objection to foundation and relevance.  
 9 A. No, I'm not aware of that, because  
 10 I don't believe I've seen the petitioner's  
 11 reply in its final form.  
 12 Q. Did you prepare the report?  
 13 A. Yes.  
 14 Q. Did you have help from attorneys in  
 15 the preparation of Exhibit 1?  
 16 A. They --  
 17 MR. HARE: Objection, relevance.  
 18 A. -- provided edits to citations, but  
 19 the text of the paragraphs was -- was what I  
 20 drafted.  
 21 Q. So in Exhibit 1, you seek  
 22 construction of a number of claim terms; do  
 23 you not?  
 24 A. I'm sorry. I didn't hear it.  
 25 Q. In Exhibit 1, you seek construction

1 Phinney  
 2 MR. HARE: Same objections.  
 3 A. One has the word "desired."  
 4 Q. Do you import any meaning into  
 5 that?  
 6 MR. HARE: Same objections.  
 7 A. (Reading) I'm not sure I can give  
 8 you a yes or no answer, but I could explain  
 9 if you permit.  
 10 Q. So in paragraph seven here, you  
 11 state "a setpoint that is commensurate with a  
 12 pressure reading" -- do you not? -- in the  
 13 second sentence of paragraph 7.  
 14 A. Yes.  
 15 Q. What do you mean by "commensurate"?  
 16 A. Well, commensurate quantities, for  
 17 instance, can be compared to one another, and  
 18 they're on the same scale.  
 19 Q. Do you know if that terminology is  
 20 found in either of the patents in the case?  
 21 MR. HARE: Objection, relevance.  
 22 A. I -- I don't believe it is.  
 23 Q. So the last sentence of that  
 24 paragraph states that "The desired pressure  
 25 setpoint must also be with pressure, namely a

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