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Transcript of William Messner, Ph.D.

Date: March 16, 2020

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

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Transcript of William Messner, Ph.D.
Conducted on March 16, 2020

1 (1 to 4)

1	3
1 UNITED STATES PATENT AND TRADEMARK OFFICE	1 I N D E X
2 BEFORE THE PATENT TRIAL AND APPEAL BOARD	2 WITNESS DIRECT CROSS REDIRECT RECROSS
3	3 WILLIAN MESSNER, Ph.D.
4 AMERICAN NATIONAL MANUFACTURING INC.	4 By Mr. Hare 5 186
5 Petitioners,	5 By Mr. Toft 166, 202
6 v.	6
7 SLEEP NUMBER CORPORATION	7 E X H I B I T S
8 f/k/a SELECT COMFORT CORPORATION	8 Number Description Page
9 Patent Owner	9 Exhibit 1 Application WO 2009/123641 46
10 -----	10 Exhibit 2 Declaration of Dr. William C.
11 Case No. IPR IPR2019-00497	11 Messner In Support of Patent
12 IPR2019-00500	12 Owner's Motions to Amend 52
13 U.S. Patent Nos. 8,769,747	13 Exhibit 3 Patent Owner's Revised Motion
14 9,737,154	14 to Amend 138
15 -----	15 Exhibit 4 Reply in Support of Patent
16 VIDEOTAPED DEPOSITION OF WILLIAM MESSNER, Ph.D.	16 Owner's Motion to Amend 138
17 Monday, March 16, 2018 8:07 a.m.	17 Exhibit 5 U.S. Patent Application No.
18 Hyatt Regency Boston Harbor	18 US 2007/0000559 146
19 101 Harborside Drive, Boston, MA 02128	19
20 Reported by:	20
21 Janet Sambataro, RMR, CRR, CLR	21
22 JOB NO. 292030	22
2	4
1 APPEARANCES:	1 P R O C E E D I N G S
2	2 THE VIDEOGRAPHER: We are now on the
3 REPRESENTING THE PETITIONER:	3 record at 8:07 a.m. Here begins disk labeled
4 SPENCER FANE LLP	4 No. 1 of the videotaped deposition of William
5 (By Jaspal Hare, Esquire)	5 Messner in the matter of American National
6 1000 Walnut Street, Suite 1400	6 Manufacturing, Inc. versus Sleep Number
7 Kansas City, Missouri 64106-2140	7 Corporation, et al., in the United States Patent
8 jhare@spencerfane.com	8 and Trademark Office, Cause Nos. PR2019-00514,
9	9 -00497, and -00500.
10	10 Today's date is March 16, 2020, and the
11 REPRESENTING THE PATENT OWNER:	11 time on the video monitor is 8:08 a.m. The
12 FOX ROTHSCHILD LLP	12 videographer today is Justin Murray, representing
13 (By Luke Toft, Esquire)	13 Planet Depos. This video deposition is taking
14 222 South 9th Street, Suite 2000	14 place at 101 Harborside Drive in Boston,
15 Minneapolis, Minnesota 55402	15 Massachusetts.
16 ltoft@foxrothschild.com	16 At this time, would counsel please
17	17 voice identify themselves and state whom they
18 ALSO PRESENT:	18 represent.
19 Justin Murray, Videographer	19 MR. HARE: This is Jaspal Hare for
20	20 petitioner, American National Manufacturing.
21	21 MR. TOFT: And Luke Toft of Fox
22	22 Rothschild for Sleep Number Corporation.

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5	<p>1 And if I can just make a note for the</p> <p>2 record. You said that this deposition included</p> <p>3 IPR 2019-00514, but the notice is only for the</p> <p>4 -497 and -500 proceedings, so that is not part of</p> <p>5 this deposition.</p> <p>6 THE VIDEOGRAPHER: Okay. Thank you for</p> <p>7 that.</p> <p>8 At this time, will the court reporter</p> <p>9 please swear in the witness.</p> <p>10 WILLIAN MESSNER, PH.D.,</p> <p>11 having been duly sworn, after presenting</p> <p>12 identification in the form of a driver's license,</p> <p>13 deposes and says as follows:</p> <p>14 DIRECT EXAMINATION</p> <p>15 BY MR. HARE:</p> <p>16 Q. Good morning, Dr. Messner.</p> <p>17 A. Good morning.</p> <p>18 Q. Could you spell your full name for the</p> <p>19 record, please?</p> <p>20 A. Sure. It's William, W-I-L-L-I-A-M,</p> <p>21 Messner, M, as in Mary, -E-S-S-N, as in Nancy,</p> <p>22 -E-R.</p>	7	<p>1 Q. I'll try to ask questions in plain</p> <p>2 English, but if you don't understand my question,</p> <p>3 let me know, okay?</p> <p>4 A. I will do that.</p> <p>5 Q. If you ever answer a question and you</p> <p>6 think of a document that would help -- be</p> <p>7 helpful, also let me know, because we might have</p> <p>8 that document.</p> <p>9 A. Will do.</p> <p>10 Q. I usually like to take breaks every 45</p> <p>11 minutes to an hour and 15 minutes. If you need</p> <p>12 one, let me know --</p> <p>13 A. Okay.</p> <p>14 Q. -- okay?</p> <p>15 A. Yes.</p> <p>16 Q. And I wanted to ask you -- I'd ask that</p> <p>17 you just finish the question we're on -- finish</p> <p>18 answering the question that we're on.</p> <p>19 A. Sure.</p> <p>20 Q. Is there a reason you can't testify</p> <p>21 fully and accurately today?</p> <p>22 A. No reason.</p>
6	<p>1 Q. And what's your current address?</p> <p>2 A. It's 8 West Winkley Street,</p> <p>3 W-I-N-K-L-E-Y, Amesbury, Massachusetts. Amesbury</p> <p>4 is spelled A-M-E-S-B-U-R-Y.</p> <p>5 Q. Okay. Do you understand that you need</p> <p>6 to speak up so that the court reporter can record</p> <p>7 your answers and also so that the mic can</p> <p>8 translate your audio to me?</p> <p>9 A. Yes. Am I not -- can you hear me okay?</p> <p>10 Q. Yes. I'll let you know if I can't.</p> <p>11 A. Okay.</p> <p>12 Q. And the same with me.</p> <p>13 Do you understand that you need to keep your</p> <p>14 answers clear and verbal, as nods, shakes, and</p> <p>15 such cannot be recorded by the court reporter?</p> <p>16 A. Yes.</p> <p>17 Q. Do you understand that you're under</p> <p>18 oath?</p> <p>19 A. I do.</p> <p>20 Q. Okay. Do you understand that oath</p> <p>21 requires you to answer my questions?</p> <p>22 A. Yes.</p>	8	<p>1 Q. Are you on any drugs or alcohol that</p> <p>2 could affect your testimony?</p> <p>3 A. No.</p> <p>4 Q. Do you have any questions about the</p> <p>5 procedure we're going to follow today?</p> <p>6 A. No. I've been deposed many times, so</p> <p>7 hopefully it will be the same as before.</p> <p>8 Q. Okay. I just want to get a little bit</p> <p>9 of background at a high level of what's on your</p> <p>10 resume. So kind of the level of where did you go</p> <p>11 to high school, where did you go to college, what</p> <p>12 did you do next.</p> <p>13 A. Okay.</p> <p>14 Q. So let's just start, where did you grow</p> <p>15 up? Where did you go to high school?</p> <p>16 A. So I grew up in the town in which I</p> <p>17 live right now, Amesbury, Massachusetts. I</p> <p>18 attended Amesbury High School.</p> <p>19 Following that, I attended the Massachusetts</p> <p>20 Institute of Technology, graduated in 1985 with a</p> <p>21 bachelor's degree in mathematics.</p> <p>22 I worked for a couple of years in Newport,</p>

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<p style="text-align: right;">9</p> <p>1 Rhode Island, for a company called BBN 2 Laboratories. That was a field office. It's 3 based in Cambridge. They do a lot of business 4 with the Navy. It's a -- there's a Navy facility 5 down there in Middletown, Rhode Island. 6 In 1987, I started attending the University 7 of California at Berkeley, and I studied 8 mechanical engineering. I received a master's 9 degree in 1989 and my Ph.D. in 1992. 10 Q. What did you do after that? 11 A. Sure. After that, I joined Carnegie 12 Mellon University as an assistant professor in 13 January of 1993. I was promoted to associate and 14 full professor. In 2001, I received tenure. 15 And I remained there until August of 2012, 16 when I moved to Tufts University. I was the 17 chair there for three years. And I was at Tufts 18 University until May of last year, when I stepped 19 down after a two-year phaseout. 20 Q. What have you been doing for the last 21 two years, then -- or you said May of last year? 22 A. Yeah, May of 19- -- sorry, May of 2019.</p>	<p style="text-align: right;">11</p> <p>1 Q. What makes you believe you're qualified 2 to testify as an expert in this case -- 3 A. Well, my -- 4 Q. -- if you do believe so. 5 A. Sure. Well, my understanding is that 6 an expert is a person with specialized knowledge 7 that can assist, well, the Court or, in this 8 case, the Patent Trials and Appeals Board in 9 rendering a correct decision. 10 I have extensive experience in controls, 11 extensive background in mechanical engineering, 12 in design, in automatic control systems, all of 13 which are relevant to this case. 14 MR. HARE: I apologize. This is 15 directed to the court reporter. 16 Do we have a live feed of the 17 transcript? 18 COURT REPORTER: Can we go off for one 19 moment? 20 MR. HARE: Sure. 21 THE VIDEOGRAPHER: We are now off the 22 record at 8:17 a.m.</p>
<p style="text-align: right;">10</p> <p>1 Q. Okay. Gotcha. 2 A. Yeah. So -- well, I've been doing this 3 work, quite a bit of -- quite a bit of expert 4 witness work. 5 I care for my mother, who lives with me. 6 I've been still continuing to informally advise 7 some students at Tufts. Also trying to 8 commercialize some work on robotic assistance for 9 activities of daily living for people with spinal 10 cord injury. 11 I've also started doing a number of science, 12 technology, engineering, and mathematics 13 demonstrations. I've done that at various camps, 14 schools, and just any old person who happens to 15 walk through my door. 16 Q. Gotcha. 17 I didn't hear that you have any kind of 18 experience with air mattresses in that discussion 19 that you just provided me. 20 Is that correct? 21 A. Other than maybe using them. I was not 22 employed, I did not do research on them, no.</p>	<p style="text-align: right;">12</p> <p>1 (A recess was taken.) 2 THE VIDEOGRAPHER: We're back on the 3 record at 8:20 a.m. 4 MR. HARE: All right. We're back on 5 the record; correct? 6 COURT REPORTER: Yes. 7 BY MR. HARE: 8 Q. Dr. Messner, have you heard of the 9 phrase "Daubert" or "Daubert motion"? 10 A. Yes, I've heard of those. I believe it 11 has something to do with -- 12 Q. Okay. 13 A. Yeah. It has something to do with -- 14 how do I say it? -- basically, one side asserts 15 that the expert shouldn't be an expert, he's not 16 qualified to be an expert. 17 Q. Gotcha. 18 Do you also understand it can refer to just 19 excluding certain testimony, as well? 20 A. No, I didn't know that. 21 Q. Okay. With the understanding that I 22 just described, have you ever been subject to a</p>

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<p style="text-align: right;">13</p> <p>1 Daubert motion to exclude a portion of your 2 opinions or the entirety? 3 A. My understanding is that there was such 4 a motion in one of the cases I was in maybe five 5 years ago. I was unaware of it until this case, 6 and somebody brought it up to me. 7 Q. Gotcha. 8 What's your understanding of those 9 circumstances? 10 A. My understanding is that in that 11 instance, it wasn't that -- necessarily that my 12 opinions were incorrect, but, rather, they were 13 not included in a declaration I had made, and so 14 the other side moved to exclude the testimony. 15 Q. Do you recall any other Daubert motions 16 or similar motions related to your opinions? 17 A. You know, honestly, I don't. 18 Q. Okay. Thank you. 19 How much are you getting paid to be here 20 today? 21 A. My customary rate, which is \$575 an 22 hour.</p>	<p style="text-align: right;">15</p> <p>1 or seven hours with Mr. Toft, and then I think I 2 spent another hour -- hour or two rereading some 3 documents afterwards. So eight to -- no, seven 4 to nine hours. No, that would be -- something 5 like that. Eight to ten hours. 6 Q. With respect to -- are you familiar 7 with the motions to amend in this case? These 8 cases, I should say. 9 A. I read the motions to amend, so to that 10 extent, I'm familiar. I've provided a 11 declaration related to the motions to amend. 12 Q. Just to summarize so we're all on the 13 same page, there was an original round of motions 14 to amend filed -- I'm going to give you a date. 15 I believe that -- both of those were filed on 16 October 23, 2019. 17 Do you recall that being correct? 18 A. I don't recall the dates. I recall 19 that there was an initial set of motions to 20 amend, and I understand that in at least one of 21 them, there was a modified motion to amend -- I 22 can't recall what they called it -- amended</p>
<p style="text-align: right;">14</p> <p>1 Q. Did you do anything to prepare for your 2 deposition today? 3 A. Yes. 4 Q. Can you please describe your 5 preparation? 6 A. I reviewed my declaration. I reviewed 7 some of the patents. I met with Mr. Toft 8 yesterday for a few hours. 9 Q. Approximately how long did you meet 10 with Mr. Toft? 11 A. It was probably around six hours, maybe 12 seven hours, something like that. 13 Q. Was anybody else present, either -- 14 COURT REPORTER: I'm sorry, the screen 15 froze. Could you repeat the question? "Was 16 anybody else present," and then the screen froze. 17 Q. Was anybody else present, either 18 physically or via telephone or other means? 19 A. No. 20 Q. Approximately how much would you say 21 your total time spent preparing was? 22 A. For this deposition, there were the six</p>	<p style="text-align: right;">16</p> <p>1 motion to amend. 2 Q. If I represent to you October 23, 2019, 3 is the date those motions were filed and 4 served -- and by that, I mean the original 5 motions to amend -- do you have any reason not to 6 believe me? 7 A. I have no reason one way or another. 8 Q. Okay. 9 A. As far as I know, that's correct. 10 Q. I represent to you that date is 11 correct. 12 MR. HARE: And, Counsel, if you want to 13 correct me, but I believe that is correct. 14 Q. So just for -- to get the terminology 15 straight, if we refer to that set as the original 16 motion -- 17 THE WITNESS: Could we just stop for a 18 second? There's a -- a screen came up on the -- 19 and it's going to be -- I think we need to touch 20 the touch pad. 21 Okay. There we go. Thank you. Okay. 22 We're all set now.</p>

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