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

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AMERICAN NATIONAL MANUFACTURING, INC.,

Petitioner

v.

SLEEP NUMBER CORPORATION

f/k/a SELECT COMFORT CORPORATION,

Patent Owner

Case IPR2019-00497, Patent No. 8,769,747
Case IPR2019-00500, Patent No. 9,737,154
Case IPR2019-00514, Patent No. 5,904,172

VIDEOTAPED DEPOSITION

OF

CARL G. DEGEN

January 8, 2020

Job No. 275013
Reported by: Amy L. Larson, RPR

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VIDEOTAPED DEPOSITION OF CARL G. DEGEN, taken on this 8th day of January, 2020, commencing at approximately 9:01 a.m., at the law offices of Fox Rothschild, LLP, 222 South Ninth Street, Suite 2000, Minneapolis, Minnesota.

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APPEARANCES:

On Behalf of Petitioner:

SPENCER FANE LLP
500 Granite Parkway
Suite 650
Plano, TX 75024
By: Mark Thornhill, Esq.

On Behalf of Patent Owner:

FOX ROTHSCHILD, LLP
222 South Ninth Street
Suite 2000
Minneapolis, MN 55402
By: Elizabeth Patton, Esq.

ALSO PRESENT: Jacob Arvold, Videographer
Matthew Lynde (via telephone)

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P R O C E E D I N G S

THE VIDEOGRAPHER: Here begins Disk Number 1 in the videotaped deposition of Carl G. Degen in the matter of American National Manufacturing, Inc. vs. Sleep Number Corporation, before the Patent Trial and Appeal Board, United States Patent and Trademark Office, Case Numbers IPR2019-00497, dash 00500 and dash 00514. Today's date is January 8th, 2020. The time on the video monitor is 9:02 a.m.

The videographer today is Jacob Arvold representing Planet Depos. This video deposition is taking place at 222 South Ninth Street, Suite 2000, Minneapolis, Minnesota.

Would counsel please voice identify themselves and state whom they represent.

MR. THORNHILL: For American National Manufacturing, Mark Thornhill of the Spencer Fane law firm.

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MS. PATTON: Elizabeth Patton from Fox Rothschild representing the patent owner, Sleep Number Corporation.

THE VIDEOGRAPHER: And also appearing by phone?

MR. THORNHILL: Is Matthew Lynde, L-Y-N-D-E, of Cornerstone Consulting.

THE VIDEOGRAPHER: The court reporter today is Amy Larson representing Planet Depos.

Would the reporter please swear in the witness.

CARL G. DEGEN,

a witness in the above-entitled action, after having been first duly sworn, was deposed and says as follows:

EXAMINATION

BY MR. THORNHILL:

Q. Good morning, Mr. Degen.

A. Good morning.

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Q. I'm Mark Thornhill representing American National Manufacturing. It's a pleasure to meet you.

Sir, during the course of this deposition you understand that you're sworn to tell the truth, and you do understand that, don't you?

A. Yes.

Q. Okay. You've given many depositions in the course of your career, haven't you, sir?

A. Yes.

Q. Okay. So I'm assuming that you're familiar with the process. The only thing that I ask of you is that if I ask a question that you don't understand, please ask me to restate it or to clarify it, because otherwise I'm going to just accept that you do understand the question.

Is that fair?

A. Yes.

Q. Good.

MR. THORNHILL: So let's just mark

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Mr. Degen's declaration as Exhibit 2030.

(Exhibit 2030 marked.)

BY MR. THORNHILL:

Q. Mr. Degen, the court reporter has placed in front of you Exhibit 2030. Can you identify that as the declaration that you submitted in this case dated October 23, 2019?

A. Yes, it appears to be a copy of that.

Q. Right. And that represents your sworn testimony as of that date; isn't that correct?

A. Yes.

Q. In fact, the document has your signature at the last page of the text, isn't that so?

A. That's correct, on page 19.

Q. Right. And just above it says that you made those statements under penalty of perjury?

A. Correct.

Q. Okay. And, sir, is it -- you understand that there actually are three proceedings with the same controversy in this matter?

A. Yes.

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Q. And this sworn testimony was submitted for all three -- all three proceedings, you did not make a separate declaration for -- or a different declaration for any of the three proceedings?
A. I believe for one of the proceedings some of the exhibit number references were changed, but the exhibits are exactly the same, and the text and opinions are exactly the same.
Q. Okay. The declaration, sir, Exhibit 2030, includes a copy of your resume at Appendix A.
Do you see that?
A. Yes.
Q. And then immediately following the resume there's a page titled, Deposition and Trial Testimony.
Do you see that?
A. Yes.
Q. Is the resume still accurate as of today?
A. Yes.
Q. Is the statement of deposition and trial testimony accurate as of today?

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A. Yes.
Q. Sir, in this case and through your sworn testimony presented in Exhibit 2030, you talk about secondary indicia of nonobviousness, is that so?
A. I think -- yes, secondary indicia or sometimes called secondary consideration, yes.
Q. Okay. And in particular, you're talking here about the concept of commercial success?
A. Specifically, yes.
Q. And just for reference purposes, I was looking at paragraph 8 of your declaration. That may be where you were looking.
A. Yes, it is.
Q. Okay. And you explain in paragraph 8, "Commercial success relates to economic considerations regarding the products at issue"; is that correct?
A. I explain that that's my understanding, yes.
Q. Okay. All right. And that's your understanding developed during your years of

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experience?
A. Correct.
Q. You've been a professional economist for how many years approximately, 30, 40?
A. Forty-two.
Q. So is it okay with you then if we discuss this generally in terms using the word "commercial success" rather than going through the words about secondary indicia, et cetera?
A. Yes.
Q. Commercial success is a fair way to describe the basic analysis that you were conducting?
A. It's -- it's broader than the analysis I've conducted. I've looked at two specific analyses that fall under the rubric of commercial success.
Q. Fine. And one of those is whether there is demand for the patented technologies; is that correct?
A. Yes.
Q. And another -- and the second of those

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analyses that you've prepared -- that you've conducted, is the adoption rate of the patented technologies; is that correct?
A. Yes.
Q. Now, sir, in cases previous to the case that we're on here today, have you provided sworn testimony in other patent cases on the general topic of commercial success?
A. Commercial success comes under several of the factors in Georgia-Pacific, so I would say in a -- in a large number of cases where I've given royalty opinions, commercial success, including demand and adoption, would have been included in my analyses, or at least considerations within my analyses.
Q. In any other patent cases have you opined about demand for patented technology?
A. Yes, I've looked at the sales of products embodying the patented technology relative to those that don't and how those have changed over time.
Q. How would you compare and contrast those

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previous testimonies about demand for patented -- patented technologies from the undertaking that you have made in this case?
A. I would say they're very similar.
Q. Have you opined in patent cases before about adoption rate of patented technologies?
A. Yes.
Q. And were those also in the context of royalty cases?
A. Yes, I believe one of the Georgia-Pacific factors directs me to consider the extent of use. And in a number of those cases I've looked at how the accused technology was adopted throughout the product line.
Q. And in those other cases, have you -- did your sworn testimony include calculations of demand on units sold caused by the patented technologies?
A. Yes.
Q. And did they include opinions and calculations about the adoption rate of patented technologies?

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A. I'm sure many of them have looked at the rate of adoption. I don't know whether I've always calculated the -- calculated the adoption rate in explicit percentage terms, but the -- how widespread it was over time, how it changed over time was certainly considered in many of the cases I've testified in.
Q. You are -- you used the word "considered," and I just want to --
A. Yeah.
Q. -- make sure that we're using the same vernacular here.
I'm asking whether you have given sworn testimony which specifically relates to calculations of demand for patented technology in a patent case and is -- is that yes or no?
A. I believe it's yes. I've testified in a lot of cases, and I'm hard-pressed to identify a particular one. But certainly in some cases I've calculated it. In other cases there's

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been testimony that it's widespread or that it's a hundred percent, so there was no need to do calculations.
Q. I see. And is that also -- so now I want to move to the adoption rate issue.
A. Yes.
Q. And, again, I'm just asking because you used the word "considered," I'm trying to understand what you really mean here.
So to be clear, what I'm asking is whether in any previous patent cases you have given sworn testimony regarding your calculations of adoption rates of patented technologies?
A. Yes. So I'm -- I'm a little confused. In terms of previous patent cases, I have testified in a previous IPR case involving patents that included explicit calculations of demand and adoption --
Q. Okay.
A. -- and other things.
Beyond that, in cases involving a

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reasonable royalty calculation, I have also calculated demand and adoption rates and considered them in many more.
Q. Okay. Well, let's talk about the IPR case, okay?
A. Okay.
Q. That would be a case then before the PTAB?
A. Yes.
Q. Okay. And can you tell me the -- the parties to that case?
A. Yes, it's the fourth case listed on the page 24 of Exhibit 2030, Polygroup Limited.
Q. Oh, Polygroup Limited, okay.
A. Versus Willis Electric Company.
Q. Is that the only PTAB case in which you have given sworn testimony?
A. As far as I can remember, yes.
Q. In the Polygroup case, were you providing expert opinions on behalf of Willis Electric?
A. Yes.
Q. And was this a challenge -- who was the

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