

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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ECOBEE TECHNOLOGIES ULC  
Petitioner

v.

ECOFACTOR, INC.  
Patent Owner

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Case No. IPR2022-00969  
Patent No. 8,596,550

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**REPLY DECLARATION OF DAVID M. AUSLANDER**

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## **I. INTRODUCTION**

1. My name is David M. Auslander. I have been retained for the purpose of providing opinions with respect to the subject matter recited in the claims of U.S. Patent No. 8,596,550 (“’550 patent”). I have previously provided a declaration in this matter (Ex. 1002; “Original Declaration”), which addresses claims 17-23. This Reply Declaration responds to opinions in the declaration of John A. Palmer (Ex. 2006).

2. I have no financial interest in either party or in the outcome of this proceeding. I am being compensated for my work as an expert on an hourly basis, for all tasks involved. My compensation is not dependent on the outcome of these proceedings or on the content of my opinions.

## **II. QUALIFICATIONS**

3. My qualifications are set forth in my Original Declaration.

## **III. MATERIALS REVIEWED**

4. In addition to the materials listed in my Original Declaration, I have also considered the following materials:

- Ex. 2006 (Declaration of Dr. Palmer); and
- Ex. 1022 (the deposition of Dr. Palmer).

## **IV. LEGAL STANDARDS**

5. In forming my opinions and considering the subject matter of the ’550

patent and its claims in light of the prior art, I am relying on certain legal principles that counsel explained to me. My understanding of these concepts is set forth in my Original Declaration. Ex. 1002, ¶¶10-27.

## V. THE PERSON OF ORDINARY SKILL IN THE ART

6. Dr. Palmer asserts that “a POSITA would have a bachelor’s degree in engineering, computer science, or a comparable field, with 2-3 years’ experience in temperature controls, embedded control systems, electronic thermostats, or HVAC controls, or similarly relevant industry experience, with relevant experience substituting for education and vice versa.” Ex. 2006, ¶26. Regarding my description of the POSITA, Dr. Palmer disagrees with the reliance on experience in building energy management and controls. Ex. 1002, ¶24. Specifically, Dr. Palmer also asserts that:

*“a building energy management system, as the phrase is generally applied, describes a complex implementation of multiple sensors, processors, actuators, and other components and devices integrated into a large commercial building or multiplicity of buildings such as on a campus. The building energy management system will generally control not only the HVAC system but also other power consumers such as elevators, escalators, lighting, and other equipment. By contrast, the subject matter of the ‘550 patent is focused on residential and similar smaller-scale structures that do not require*

*the sophistication of controls that are integral to typical building energy management systems.”*

Ex. 2006, ¶28 (emphasis added). Thus, Dr. Palmer appears to argue that the field I used in connection with defining the POSITA is more complex than the field of the '550 patent. Ex. 1022, 14:14-16:7 (explaining that the field he assumes for the '550 patent is “less complicated to understand, for sure, and arguably, less complicated to design as well”).

7. The opinions offered in my Original Declaration would not change if Dr. Palmer’s definition of the POSITA was accepted. In particular, while my definition calls for 5 years of experience, that is for a definition of the field that Dr. Palmer deems more complicated than necessary. Thus, having less experience (2-3 years instead of 5 years) pertaining to technology that involves less “sophistication” would balance out. Put another way, where Dr. Palmer admits that the field of the '550 patent is not complicated, it follows that it would take little experience to realize that the subject matter recited in the claims is obvious.

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