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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RESMED LIMITED, RESMED INC., AND RESMED CORP.,

Petitioners,

v.

FISHER & PAYKEL HEALTHCARE LIMITED,

Patent Owner.

Case No. IPR2016-01719

U.S. Patent No. 6,398,197

**PATENT OWNER'S MOTION FOR OBSERVATIONS ON THE
CROSS-EXAMINATION OF ALEXANDER VIRR**

Pursuant to the Scheduling Order (Paper 13), Patent Owner Fisher & Paykel Healthcare Limited (“FPH”) submits the following observations on the October 11, 2017 cross-examination of Alexander Virr. A transcript of this cross-examination is filed concurrently herewith as Exhibit 2004.

OBSERVATIONS

A. Observation Relating to Hindsight Obviousness Analysis

Observation #A.1. In Exhibit 2004 at 12:3-9, Mr. Virr testified that in forming the opinions he expressed as to the validity of the claims of Patent Owner’s patent, he started by looking at the claim language and then looking to see if he could find those claim elements in the prior art. This testimony is relevant because it supports FPH’s arguments that Petitioners adopted an improper hindsight approach in assessing the alleged obviousness of the challenged claims. *See* Paper 14 at 29-30, 33, 44-48, 52 (arguing that Petitioners used improper hindsight in their obviousness assessment); *see also* Ex. 1026 at ¶¶ 4-36 (providing opinions that claims of Patent Owner’s U.S. Patent No. 6,398,197 are invalid for obviousness).

B. Observations Relating to U.S. Patent No. 5,953,763 to Gouget (Ex. 1006)

Observation #B.1. In Exhibit 2004 at 12:21-13:14, Mr. Virr testified that he did not place any constraints on the type of potential prior art he was willing to consider in forming his opinions and that he did not know the “legalities” of

determining the prior art he was permitted to consider as part of his invalidity opinions. In Exhibit 2004 at 12:10-20, Mr. Virr also testified that the references he considered as part of his analysis were provided by counsel. This testimony is relevant because it shows Mr. Virr's unfamiliarity with the relevant standard for determining whether a potential prior art reference is within the scope and content of the prior art that may be considered when assessing whether the claims of the '197 patent would have been obvious. The testimony undermines Petitioners' arguments that a person of ordinary skill in the art ("POSITA") would have considered the teachings of Gouget, titled "Safety Urinal," which is one of the references Petitioners rely upon to support their assertion that Claims 2, 3, and 13 of the '197 patent would have been obvious. *See* Ex. 1026 at ¶¶ 15-19, 32-34; Paper 17 at 11-15, 23-24.

Observation #B.2. In Exhibit 2004 at 20:7-18, Mr. Virr testified that column 1, lines 6-8 of the '197 patent (Ex. 1001), which states that "[t]he present invention relates to water chambers for gas humidification and in particular to water chambers for 'slide-on' humidifiers and CPAP machines," describes the field of invention of the '197 patent. This testimony is relevant because it supports FPH's argument that Gouget, which describes a urinal, is not in the same field of endeavor as the '197 patent and it undermines Petitioners' argument that a

POSITA would have considered Gouget to be analogous art to the '197 patent. *See* Paper 14 at 37-39; Paper 17 at 13-15, 23.

Observation #B.3. In Exhibit 1026 at ¶¶ 16 and 33, Mr. Virr testified that the '197 patent is purportedly directed to at least two problems: “(1) noise that results from air delivery to the water chamber (Ex. 1001, 1:17-42), and (2) spillage from tipping the water chamber (Ex. 1001, 1:24-34).” In Exhibit 2004 at 22:21-27:20, Mr. Virr testified that the portions of the '197 patent he relied upon to support the quoted statement from Paragraphs 16 and 33 of his declaration (Ex. 1026) are discussing noise and spillage in CPAP humidifier chambers. This testimony is relevant because it undermines Petitioners’ argument that the problems addressed by the '197 patent relate to noise and/or spillage in “water chambers” generally, and that a POSITA would have looked to the urinal described in Gouget to address a potential spillage problem in a CPAP water chamber. *See* Paper 17 at 13-15, 23; Ex. 1026 at ¶¶ 16-17, 33-34.

Observation #B.4. In Exhibit 2004 at 78:9-79:4, Mr. Virr testified that Gouget states in the Field of Invention section that it relates to the field of safety urinals, although he was “not sure of the legal significance of field.” This testimony is relevant because it undermines Petitioners’ argument that a POSITA would have considered Gouget, which relates to the field of safety urinals, to be analogous art to the '197 patent. *See* Paper 17 at 13-15, 23. The testimony is also

relevant because it demonstrates that Mr. Virr was unaware of the significance of the field to which Gouget relates and undermines his opinions that a POSITA addressing problems with a CPAP humidifier would have considered Gouget. Ex. 1026 at ¶¶ 17, 34.

Observation #B.5. In Exhibit 2004 at 81:13-82:4, Mr. Virr testified that the urinal described in Gouget is not a humidifier, is not intended to be used with a blower, and is not a respiratory device. This testimony is relevant because it undermines Petitioners' argument that a POSITA would have considered Gouget to be analogous art to the '197 patent. *See* Paper 17 at 13-15, 23.

Observation #B.6. In Exhibit 2004 at 86:6-90:1, Mr. Virr testified that Gouget teaches locating the tapered end of the anti-backflow element at the volumetric center of the urinal. In Exhibit 2004 at 94:8-12, Mr. Virr testified that he proposed modifying the water chamber shown in the HC200 Manual (Exs. 1012 and 1015), in view of Gouget, to add a tube that does not extend to the volumetric center of the water chamber. This testimony is relevant because it supports FPH's argument that Petitioners did not even apply Gouget's teachings in arriving at their modified design. Paper 14 at 41.

Observation #B.7. In Exhibit 2004 at 75:12-77:3, Mr. Virr testified that he was unaware that Gouget had been classified by the Patent Office in Class 4, which is for "Baths, Closets, Sinks, and Spittoons." *See also* Ex. 2003. This testimony is

relevant because it demonstrates that Mr. Virr did not fully consider the field to which Gouget is related and undermines Petitioners' argument that a POSITA would have considered Gouget to be analogous art to the '197 patent. *See* Paper 17 at 13-15, 23.

C. Observations Relating to U.S. Patent No. 6,135,432 to Hebblewhite (Ex. 1004)

Observation #C.1. In Exhibit 2004 at 34:9-20, Mr. Virr testified that Hebblewhite does not describe positioning a tube extending into the water chamber from the air inlet. This testimony is relevant because it supports FPH's argument that Hebblewhite does not teach or suggest an elongate flow tube extending into a water chamber from the inner periphery of a gases *inlet* as required by Claim 1 of the '197 patent. *See* Paper 14 at 18-19, 49-50.

Observation #C.2. In Exhibit 2004 at 37:12-39:14, Mr. Virr testified that he was unaware of issues addressed by the outlet tube described in Hebblewhite other than the particular wave splashing issue described in Hebblewhite at column 3, lines 34-40. In Exhibit 2004 at 43:2-5, Mr. Virr further testified that he was not aware of any description in Hebblewhite of splashing occurring at the air inlet. This testimony is relevant because it supports FPH's argument that Hebblewhite addressed a specific wave splashing issue associated with the air outlet of low-profile humidifiers, and a POSITA would not have combined Hebblewhite with

either the HC200 Manual (Exs. 1012 and 1015) or Netzer (Ex. 1010) to locate a tube at an air inlet. Paper 14 at 19-23, 50-51.

D. Observations Relating to Netzer (Ex. 1010)

Observation #D.1. In Exhibit 2004 at 100:18-101:10, Mr. Virr testified that a POSITA “can’t know very much about” the drain described in Netzer from the figures and that he did not recall Netzer describing the drain as being small in size. This testimony is relevant because it contradicts the statement in Mr. Virr’s declaration that Netzer describes a “small” drain that allegedly would be insufficient to drain water and prevent spillage if the water chamber were bumped and waves formed in the chamber and passed over the drain. Ex. 1026 at ¶ 25.

Observation #D.2. In Exhibit 2004 at 106:9-20, Mr. Virr testified that Figure 3 of Netzer shows the drain discharge line 21 located in the housing into which the water chamber is inserted, and not located in the water chamber itself. This testimony is relevant because it contradicts Mr. Virr’s testimony that the drainage system of Netzer was designed to prevent overfilling before installation of the chamber. Ex. 1026 ¶ 25. If that were the case, then the drain discharge line 21 would not have been located in the housing into which the water chamber is inserted.

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Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: October 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 37 C.F.R. § 42.6(e)(1) and agreement of the parties, a true and correct copy of **PATENT OWNER'S MOTION FOR OBSERVATIONS ON THE CROSS-EXAMINATION OF ALEXANDER VIRR** is being served via email on October 27, 2017, to counsel for ResMed Limited, ResMed Inc., and ResMed Corp at the email addresses below:

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