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UNITED STATES PATENT AND TRADEMARK OFFICE

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CARL ZEISS SMT GMBH,	)
	)Case IPR2013-00362
Petitioner,	)Patent 7,348,575
	)
v.	)
	)
NIKON CORPORATION,	)
	)
Patent Owner.	)
-----)	)

TELEPHONIC CONFERENCE CALL

Monday, July 7, 2014

Reported by:  
JOMANNA DeROSA, CSR  
JOB NO. 81938

1  
2 Monday, July 7, 2014  
3 1:00 p.m.  
4

5  
6 Telephonic Conference Call taken down  
7 by Jomanna DeRosa, a Certified Shorthand  
8 Reporter and Notary Public of the States of  
9 New York, New Jersey, California  
10 and Arizona.  
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2 A P P E A R A N C E S :  
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5 OBLON SPIVAK MCCLELLAND MAIER & NEUSTADT  
6 1940 Duke Street  
7 Alexandria, Virginia 22314  
8 BY: ROBERT MATTSON, ESQ.  
9 JOHN KERN, ESQ.  
10

11 FISH & RICHARDSON  
12 One Marina Park Drive  
13 Boston, Massachusetts 02110  
14 BY: MARC WEFERS, Ph.D.  
15

16 FISH & RICHARDSON  
17 601 Lexington Avenue  
18 New York, New York 10022  
19 BY: CHRISTOPHER BOWLEY, Ph.D.  
20

21 ALSO PRESENT:  
22 JUDGE MEDLEY  
23 JUDGE CLEMENTS  
24 JUDGE BLANKENSHIP  
25

1 CONFERENCE CALL

2 JUDGE MEDLEY: So, we understand  
3 that Petitioner requested this call to seek  
4 guidance as to how they could move to exclude  
5 evidence apparently they anticipate the Patent  
6 Owner is going to file with this Motion For  
7 Observation. So, we'll let the counsel for  
8 Petitioner explain the relief it is  
9 requesting.

10 Now I'm directing the question to  
11 counsel for Petitioner. And who is going to  
12 speak for Petitioner?

13 MR. WEFERS: This is Mark Wefers,  
14 Your Honor. I will speak for Petitioner.

15 JUDGE MEDLEY: Okay. Thank you,  
16 Mr. Wefers.

17 So, if you could just explain what  
18 the relief it is that Petitioner requests from  
19 the Board.

20 MR. WEFERS: If I may, can I  
21 provide some context first, Your Honor?

22 JUDGE MEDLEY: That's fine.

23 MR. WEFERS: Okay. So, Your Honor,  
24 as you may recall, we had a conference call in  
25 this proceeding on June 3rd to discuss the

1 CONFERENCE CALL

2 Patent Owner's Request For Authorization to  
3 Strike a Second Expert Declaration, Exhibit  
4 N-36 submitted with Petitioner's reply, and  
5 the Board denied that request.

6 During that call Patent Owner also  
7 requested an authorization to file a second  
8 expert declaration response to the declaration  
9 in Petitioner's reply, and the Board denied  
10 that request as well, although that was not  
11 mentioned in the paper summarizing the call,  
12 Paper 23.

13 What was discussed on that call was  
14 that Patent Owner could cross-examine  
15 Petitioner's expert on the second declaration  
16 and file a Motion For Observation.

17 That cross-examination took place  
18 on July 2nd, just last Wednesday.

19 JUDGE MEDLEY: Okay.

20 MR. WEFERS: During Patent Owner's  
21 cross-examination Patent Owner entered the  
22 documents attached in my e-mail requesting the  
23 call. They entered it as Nikon Exhibit 2036  
24 through 2039 and obtained testimony from  
25 Petitioner's Reply Declarant regarding those

## 1 CONFERENCE CALL

2 documents.

3 On the record I objected to the  
4 documents for at least the reason that they  
5 lacked foundation. For example, they purport  
6 to show the results of certain calculations  
7 using optical design software, and yet there's  
8 no foundation for who performed the  
9 calculations and how the calculations were  
10 performed.

11 The parties discussed, during the  
12 cross-examination, whether we should contact  
13 the Board, but given that this was not a  
14 privilege issue and consistent with the  
15 guidance we've seen from the Board, instead I  
16 put my objections in the record and we let the  
17 questioning continue.

18 And now we seek guidance as to how  
19 we can move to exclude these exhibits and the  
20 testimony derived from them, given that we'll  
21 only see Patent Owner's Motion For Observation  
22 on Due Date 5, which is also the deadline for  
23 filing the Motion to Exclude.

24 JUDGE MEDLEY: Is that Due Date 4  
25 you mean?

## 1 CONFERENCE CALL

2 MR. WEFERS: I'm sorry. Due Date  
3 4, the due date that is this Wednesday. And  
4 the oral hearing is scheduled for the  
5 following Thursday.

6 And, you know, it seems that this  
7 is an end run around the Board's refusal  
8 during an earlier call to allow the Patent  
9 Owner to submit a second expert declaration.

10 I mean, if you look at those  
11 exhibits as I attached to my e-mail, they're  
12 clearly some kind of optical modeling software  
13 involved and they need someone who is  
14 sophisticated enough to use an optical  
15 modeling software.

16 I can only presume they were done  
17 by Patent Owner's expert, but given where we  
18 are in the schedule, clearly we don't have an  
19 opportunity to cross-examine whoever did those  
20 calculations.

21 So, I'm at a loss as to what we can  
22 do. I mean, ideally we'd like a ruling on  
23 this call that those should be excluded  
24 because on their face you can just look at  
25 them and see that they lack foundation.

## 1 CONFERENCE CALL

2 But failing that, again, we're  
3 looking for guidance as to how we can, in the  
4 record, move to exclude for that reason.

5 JUDGE MEDLEY: Okay. But the  
6 questioning went to these exhibits, which is  
7 part of the cross-examination. Correct?

8 MR. WEFERS: The questioning went  
9 to these exhibits, which is part of the  
10 cross-examination, true, but those were  
11 exhibits that the expert had never seen  
12 before.

13 And, again, we don't know where  
14 they come from. We don't know what they are,  
15 who did them, what went into making the  
16 calculations that are purportedly shown in  
17 them.

18 JUDGE MEDLEY: Okay. All right.  
19 Who will speak for Patent Owner?

20 MR. MATTSON: This is Robert  
21 Mattson, Your Honor.

22 JUDGE MEDLEY: Okay. And so, first  
23 of all, I guess we need to find out will you  
24 file a Motion For Observation?

25 MR. MATTSON: Yes.

## 1 CONFERENCE CALL

2 JUDGE MEDLEY: And do you plan on  
3 entering into the record the Exhibit 2036  
4 through 2039?

5 MR. MATTSON: Yes, we do.

6 JUDGE MEDLEY: Okay. So, you see  
7 the conundrum here is that parties tried to  
8 work out something like perhaps move due dates  
9 up until tomorrow or maybe Date 5 to the next  
10 day.

11 I mean, obviously -- I'm sorry, not  
12 Due Date 5. To move the second part of Due  
13 Date 4 to the next day.

14 Have the parties had a chance to  
15 talk about adjusting the schedule in any way  
16 to accommodate Petitioner's request?

17 MR. MATTSON: No, Your Honor.

18 JUDGE MEDLEY: Okay. So, I'm going  
19 to throw that one out there.

20 Is it possible for the Patent Owner  
21 to file their Motion For Observation tomorrow?

22 MR. MATTSON: That might be cutting  
23 it a little close, Your Honor. I have to be  
24 in Chicago for a deposition. Perhaps a better  
25 solution would be to move the Motion to

## 1 CONFERENCE CALL

2 Exclude Evidence back a day.

3 JUDGE MEDLEY: Okay. So, if we do  
4 that, that would be on Friday?

5 MR. MATTSON: Right. I think the  
6 Petitioner can anticipate what to say in the  
7 Motion to Exclude Evidence already, based on  
8 the objections they've already made.

9 JUDGE MEDLEY: Right. And you  
10 don't plan to cure in any way. Is that what I  
11 understand?

12 MR. MATTSON: I don't think we have  
13 to. I mean, I suppose we could submit an  
14 authentication declaration just saying I  
15 plugged these numbers in, and these graphs are  
16 what the program spit out.

17 JUDGE MEDLEY: Well, I think that  
18 would be what the Petitioner is worried about,  
19 that she might try to backdoor the Declaration  
20 that you couldn't have to begin with.

21 MR. MATTSON: Well, I guess -- if I  
22 may, we can go back and put this in a little  
23 more context. What we had originally planned  
24 to do with the Declaration, if we had been  
25 permitted to submit one, is to attack the

## 1 CONFERENCE CALL

2 assumptions that Petitioner's expert was  
3 making when he tried to optimize a prior art  
4 reference using modern design software.

5 All we've done here is take the  
6 results of the prescription table that the  
7 Petitioner's expert came up with using  
8 software. And all we've done is just plotted  
9 additional points.

10 If it were a simple algebraic  
11 equation, we could have just had Petitioner's  
12 expert do it at the deposition. But instead  
13 you have to drop these points into some very  
14 sophisticated software, and the software spits  
15 out the plot for you.

16 JUDGE MEDLEY: Okay. So, you would  
17 propose perhaps submitting a declaration  
18 saying that's what you did to get those  
19 values?

20 MR. MATTSON: Yes. Submitting a  
21 one-page declaration. The Petitioner's expert  
22 knew exactly what these graphs were, and  
23 testified that they could easily be generated  
24 by a person having ordinary skill in the art.

25 We included the data points, but

## 1 CONFERENCE CALL

2 we're actually using Petitioner's own expert's  
3 bottle. So, we've not created anything new.  
4 We've just plugged in additional points to be  
5 plotted.

6 MR. WEFERS: For the record, there  
7 are many things there. I don't want to  
8 interrupt, but I just note that while I  
9 respect what my colleague is saying, there are  
10 points we would dispute in what he said.

11 JUDGE MEDLEY: Well, my  
12 understanding, when you object on the record  
13 like that during a deposition you're supposed  
14 to try to fix it at the deposition, but I  
15 think that would have been the time to try to  
16 cure, but I'm not 100 percent sure about that.

17 Okay. So, back to the date issue.  
18 Is that something that would be amenable to  
19 Petitioner if the Motion to Exclude, you could  
20 file that the following day?

21 MR. WEFERS: The proposal, as we  
22 see the Motion For Observation on Wednesday --

23 JUDGE MEDLEY: So, on July 9th --  
24 today is the 7th. So, on the 9th, that's when  
25 the Motion For Observation would be due.

## 1 CONFERENCE CALL

2 So, given that -- right. That's  
3 the question to Mr. Wefers, is if you feel  
4 like you could file your Motion to Exclude the  
5 following day. That seems like a solution to  
6 your problem.

7 MR. WEFERS: Yes, Your Honor, we  
8 could do that, although, you know, given the  
9 compressed schedule, I'd ask that we get to  
10 the 11th, which is the Friday.

11 JUDGE MEDLEY: Okay. All right.  
12 So, then the 14th is when Due Date 5 is due,  
13 and that would be when the Patent Owner's  
14 opposition to that Motion to Exclude will take  
15 place.

16 MR. WEFERS: Correct.

17 JUDGE MEDLEY: So, Patent Owner,  
18 are you amenable to that, Mr. Mattson?

19 MR. MATTSON: Yes, Your Honor.

20 JUDGE MEDLEY: Okay. So, what  
21 we'll do is we'll reschedule just Portion B of  
22 Due Date 4, which is Motion to Exclude  
23 Evidence.

24 However, in Portion B of Due Date 4  
25 it also states that you can request oral

## 1 CONFERENCE CALL

2 argument. We would prefer that that come on  
3 the 9th. So, I'll put that all in an order.

4 Okay. Is there anything else on that issue?

5 MR. WEFERS: No, Your Honor. Thank  
6 you.

7 MR. MATTSON: Nothing further, Your  
8 Honor.

9 JUDGE MEDLEY: Okay. Thank you,  
10 Mr. Mattson.

11 Okay. We'd like to deviate here  
12 for a minute. This isn't to catch you off  
13 guard, but it should be a fairly easy thing to  
14 discuss.

15 We received a related IPR363. In  
16 that case the Patent Owner requested oral  
17 argument, but Petitioner did not. In light of  
18 Patent Owner's indication that it does not  
19 request oral argument -- I'm sorry --  
20 Petitioner's indication that it does not  
21 request oral argument, we would like to know  
22 if Patent Owner maintains its request for oral  
23 argument in that case.

24 MR. MATTSON: Yes, we maintain our  
25 request.

## 1 CONFERENCE CALL

2 JUDGE MEDLEY: Okay. And we take  
3 it that you would request oral argument in  
4 this case as well, the 362 case?

5 MR. MATTSON: Yes, Your Honor.

6 JUDGE MEDLEY: Okay. We're just  
7 trying to look ahead and plan because it is  
8 just a few weeks away.

9 Okay. Are there any questions or  
10 concerns?

11 MR. WEFERS: No, Your Honor.

12 Just to clarify, the due date is  
13 next week, not several weeks away, right, for  
14 the oral argument?

15 JUDGE MEDLEY: It is the 17th.  
16 Correct?

17 MR. WEFERS: Correct.

18 JUDGE MEDLEY: Okay. So, that's a  
19 week from this Thursday. Sorry. I apologize.  
20 Yes, you are correct. July 17th.

21 Okay. Any other issues or  
22 questions?

23 MR. MATTSON: None for Patent  
24 Owner, Your Honor.

25 MR. WEFERS: None for Petitioner.

## 1 CONFERENCE CALL

2 JUDGE MEDLEY: Okay. Thank you  
3 very much then. We are adjourned.  
4 (Time Ended: 1:35 p.m.)

## 1 CERTIFICATE

2 STATE OF NEW YORK )

3 )ss:

4 COUNTY OF NEW YORK)

5 I, JOMANNA DeROSA, a Certified  
6 Shorthand Reporter and Notary Public within  
7 and for the States of New York, New Jersey,  
8 California and Arizona, do hereby certify:

9 That such telephonic conference is a  
10 true record of the proceedings.

11 I further certify that I am not  
12 related to any of the parties to this action  
13 by blood or marriage, and that I am in no  
14 way interested in the outcome of this  
15 matter.

16 In witness whereof, I have hereunto  
17 set my hand this 7th day of July, 2014.

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# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.