

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Carl Zeiss SMT GMBH
Petitioner

v.

Nikon Corporation
Patent Owner

Case IPR2013-00362
Patent 7,348,575

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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I. PRECISE RELIEF REQUESTED

Pursuant to 37 C.F.R. §§ 42.62 and 42.64(c), Petitioner Carl Zeiss SMT GmbH respectfully moves to exclude Exhibits 2036, 2037, 2038, and 2039 offered during the second cross examination of Petitioner's expert witness Richard C. Juergens ("the Challenged Exhibits") by Patent Owner Nikon Corporation, as well as those portions of Mr. Juergens' second cross examination (Exhibit 2040) directed to the Challenged Exhibits. Petitioner moves to exclude these materials (1) for lack of authentication under FRE 901, (2) as inadmissible hearsay under FRE 802, and (3) as untimely. Petitioner further respectfully requests that Patent Owner's reference to the Challenged Exhibits and associated testimony in its Motion for Observation Regarding Second Cross Examination of Richard C. Juergens (Paper No. 30) be similarly excluded. Finally, Petitioner respectfully requests that the Second Declaration of Dr. Jose Sasian be excluded to the extent Patent Owner relies on it to establish the truth of the matters stated within the Challenged Exhibits, or to cure those deficiencies raised by Petitioner's counsel during the second cross-examination of Mr. Juergens. Patent Owner should be precluded from using the Challenged Exhibits, and any associated testimony within Exhibit 2040, and Dr. Sasian's Second Declaration at any hearing, or in any paper such as, without limitation, a brief, motion, or observation on cross-examination. In light of this request, Petitioner asks that the Board disregard

sections B.3-B.8, C.4, and D.2 of Patent Owner's Motion for Observation Regarding Second Cross Examination of Richard C. Juergens (Paper No. 30).

II. BACKGROUND

A. The Challenged Exhibits and Related Testimony

Petitioner seeks exclusion *inter alia*, of the following Exhibits (collectively, the "Challenged Exhibits"):

- Exhibit 2036: entitled "Plots of Terasawa Example 2 in Table 2, Fig. 5"
- Exhibit 2037: entitled "Plots of Lens Design in Exhibit 1042"
- Exhibit 2038: entitled "Plots of Lens Design in Exhibit 1047"
- Exhibit 2039: entitled "Plots of Lens Design in Exhibit 1049"

Patent Owner Nikon Corporation introduced the Challenged Exhibits during the July 2, 2014 Second Cross Examination of Petitioner's expert Mr. Richard C. Juergens. On its face, each Challenged Exhibit appears to be a calculation of some kind, without any indication of the person(s) responsible for its creation, or the date(s) on which it was performed. While the documents appear to refer to Zemax optical modeling software, complete details of how the software was used to carry out the calculations and display them are plainly lacking.

In an effort to cure these facial deficiencies, at the time each Challenged Exhibit was marked, counsel for Patent Owner made representations as to their contents to Mr. Juergens, without providing any information as to the circumstances behind their

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