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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CARL ZEISS SMT GMBH

Petitioner

v.

NIKON CORPORATION

Patent Owner

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Case IPR2013-00362

Patent 7,348,575

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**PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO  
EXCLUDE EVIDENCE**

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b><u>Rules</u></b>	
Federal Rule of Evidence 401 .....	1
Federal Rule of Evidence 403 .....	5
Federal Rule of Evidence 406 .....	5

Patent Owner Nikon submits this Reply in Support of its Conditional Motion to Exclude Evidence (“Motion to Exclude”) and in response to Petitioner Zeiss’s Opposition to Patent Owner’s Conditional Motion to Exclude Evidence (“Opp’n”). As explained below, Petitioner has simply failed to show the relevance of Exhibits 1036 and 1038-1049 (“the Challenged Exhibits”) to this proceeding in the absence of Patent Owner’s Exhibits 2036-2039 (“Exhibits Demonstrating Inoperability”). In its Opposition, Petitioner does not (and cannot) dispute that the Exhibits Demonstrating Inoperability reveal the false impression created by the new lens designs described in the Challenged Exhibits.

Relevance is a fundamental requirement for the admissibility of all evidence under the Federal Rules of Evidence (“FRE”). Evidence is only relevant if it both “has any tendency to make a fact more or less probable than it would without the evidence” and “the fact is of consequence in determining the action.” FRE 401.

Petitioner relies heavily on a straw man argument by characterizing Patent Owner’s Motion to Exclude as solely an attack on the credibility of Petitioner’s expert, Mr. Juergens. Although this proceeding certainly places Mr. Juergens’ opinions in jeopardy, Patent Owner’s Motion to Exclude is focused on the fact that Mr. Juergens’ testimony and lens designs in the Challenged Exhibits are irrelevant to any issue in this proceeding – unless they are viewed in conjunction with the Exhibits Demonstrating Inoperability.

Mr. Juergens' analysis of his lens designs is studiously limited to the two most extreme field points in the field width. That analysis – without the benefit of the plots for the entire field width supplied in the Exhibits Demonstrating Inoperability – neither makes any fact more or less probable nor is helpful in determining the merits of this proceeding. Significantly, Petitioner appears to concede that Mr. Juergens' lens designs are unsuitable for a projection optical system to form an effective imaging area – a requirement of every claim under review. In fact, if Petitioner is correct that the *quality* of the images in the Challenged Exhibits was irrelevant to enablement, then it would not have felt compelled to submit the Challenged Exhibits in the first place because simply immersing the Terasawa lens design without further modifications would result in an immersed projection optical system, albeit one that is inoperable and could not form an effective imaging area, as claimed. Likewise, Petitioner would not have included the RMS wavefront error plots in the Challenged Exhibits unless it felt that the quality of the image was important to the issue of enablement.

Petitioner places great weight on Mr. Juergens' "appropriate" disabling of software features that were unavailable in 2003. But even if Mr. Juergens disabled the features functionality of CODE V that was not available in 2003, he had no way of knowing whether the functions that he did use, and that were available in 2003, were less, more, or equally as powerful in the 2013 version of the software.

However, Mr. Juergens had to admit that the features of CODE V that he used in the 2013 were improved over subsequent releases, including improvements to the optimization algorithms. (Ex. 2040, 23:6-17, 25:13-21, 30:12-15.) Thus, even if Mr. Juergens was able to disable exactly the right set of features that were not available in 2003, he had no way of knowing what improvements were made to the features in the 2013 software that he used.

Most of Petitioner's arguments with respect to relevance are based on the mistaken premise that Mr. Juergens "arrive[d] at the claimed invention." (Pet. Opp'n 8:1-3.) To the contrary, Mr. Juergens' lens designs described in the Challenged Exhibits utterly fail to modify the projection optical system of Terasawa (Ex. 1008) to arrive at the claimed invention. Specifically, even with the benefit of 2013 software, Mr. Juergens was unable to conjure a "projection optical system having an effective imaging area," as required by each of the challenged claims. (Ex. 1001, claim 1.) The Challenged Exhibits, when viewed without the benefit of the Exhibits Demonstrating Inoperability, do not make it more or less probable that the prior art was enabling or that POSITA would have had a reasonable expectation of success in combining Terasawa with the Immersion References to arrive at the claimed invention.

Further, Mr. Juergens admitted that he did not know whether testing only the innermost and outermost field points, as he did, was the standard way of measuring

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