UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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LAM RESEARCH CORP.,

Petitioner

v.

DANIEL L. FLAMM,

Patent Owner

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U.S. Patent No. 6,017,221

Issued: January 5, 2000

Named Inventor: Daniel L. Flamm

Title: PROCESS DEPENDING ON PLASMA DISCHARGES SUSTAINED BY INDUCTIVE COUPLING

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Case IPR2015-01767
Patent 6,017,221

LAM RESEARCH CORP.'S REPLY TO FLAMM'S RESPONSE IN OPPOSITION TO THE MOTION TO EXCLUDE THE DECLARATION OF DANIEL L. FLAMM Sc.D.

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I. INTRODUCTION

In response to Flamm's Opposition, Paper 30, Lam reaffirms its motion to exclude Exhibit 2001 on the grounds stated in the Motion to Exclude, Paper 27 (the "Motion to Exclude").

II. REPLY ARGUMENT

A. Filing an Objection to Evidence

The purpose of filing an objection to evidence is to allow for correction in the form of supplemental evidence. *See* 37 C.F.R. § 42.64(b)(1). However, in this case, the objection would have been pointless because Flamm could not correct Flamm's bias by filing supplemental evidence.

As the sole owner of U.S. Patent No. 6,017,221 (the "'221 patent"), Flamm is not an independent expert. Indeed, due to pending and threatened patent litigations brought by Flamm against some of the largest semiconductor manufacturers in the world, Flamm has a huge financial stake in the outcome of this proceeding, calling into question the reliability of his expert declaration. Flamm could not overcome this bias by filing supplemental evidence while maintaining these litigations and pursuing parallel licensing efforts.

Moreover, the challenge based upon bias is readily foreseeable. Flamm and his attorneys could have and should have relied upon an expert with no financial stake in the outcome of this proceeding to address the issues in Flamm's expert

declaration, if any such expert were willing to so testify.

Judges are charged with a "gatekeeping" role to ensure the reliability of "expert" analysis. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) ("Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony ... is not only relevant, but reliable.'") (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)); *FURminator, Inc. v. Kim Laube & Co.*, 758 F. Supp. 2d 797, 807 (E.D. Mo. 2010) ("The initial question of whether expert testimony is sufficiently reliable is to be determined by the court, as part of its gatekeeper function.") (citing *Daubert*, 509 U.S. at 593). Unreliable "expert" analysis should be excluded under F.R.E. 702. *See, e.g., FURminator,* 758 F. Supp. 2d at 808 (Excluding unreliable expert testimony, and considering, among other things, "[w]hether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.").

Here, Flamm provided a declaration with "an obvious bias in favor" of preserving his huge financial stake in the outcome of this proceeding. He was not "as careful as he would be in his regular professional work outside his paid litigation consulting." As more fully set forth in Petitioner's Reply and the Motion to Exclude, Flamm's declaration includes many examples of unreliable testimony

that can be attributed to Flamm's underlying bias.

Under 37 C.F.R § 42.5(b), the Board has the authority to waive or suspend the requirement of part 42. When considering the evidence of bias and the fact that Flamm's bias is not curable by filing supplemental evidence, it would be in the interest of justice to waive the requirement of 37 C.F.R. § 42.64(b)(1). For these reasons, Lam respectfully requests the Board to exercise its authority to waive this requirement to file an objection to evidence.

B. Gate Keeper's Role of Excluding Unreliable Evidence Outweighs Public Availability of Unreliable Evidence.

Because of the unreliability of the Flamm Declaration due to Flamm's huge financial stake in the outcome of this proceeding, the Flamm Declaration and any arguments relying upon it should be excluded because such biased testimony is not helpful to the trier of fact. As pointed out above, Judges are charged with a "gatekeeping" role to ensure the reliability of "expert" analysis. Moreover, the Federal Rules of Evidence provide for this gatekeeping role. *See* Federal Rules of Evidence 702.

Flamm argues that the Board is precluded from following the Federal Rules of Evidence solely because an IPR is an administrative proceeding. Clearly, this is not the case because 37 C.F.R. § 42.62 specifically provides that the Federal Rules of Evidence shall apply to IPR proceedings. Federal Rule of Evidence 702

establishes the need to ensure the reliability of "expert" analysis and this need far outweighs the need to make available to the public unreliable and misleading information that is prejudicial.

Any prejudice that could be attributable to the Board excluding the Flamm Declaration is of Flamm's and his attorneys' own making. Due to the foreseeability of this challenge, Flamm and his attorneys could have and should have relied upon an expert with no financial stake in the outcome of this proceeding to address the issues in Flamm's declaration, if any such expert were willing to so testify. Flamm and his attorneys elected not to do so. Flamm and his attorneys should therefore not be permitted to now claim prejudice because of their inability or unwillingness to retain such an expert.

C. Flamm Does Not Dispute Bias Due to the Huge Financial Stake

Flamm argues that because of Flamm's experience and education, Flamm is qualified to offer opinion testimony. The issue is not Flamm's qualifications. The issue is Flamm's bias. Flamm does not dispute that he is the owner of the '221 patent. Flamm does not dispute that he is seeking to monetize the '221 patent by pursuing five pending lawsuits in district court proceedings as well as to seeking licensing agreements with numerous companies.

Moreover, Flamm does not dispute the examples of unreliable testimony listed in the Motion to Exclude. Nor does he dispute his declaration is biased in

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