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**POST-HEARING BRIEF OF PLAINTIFFS  
HÅKAN LANS AND UNIBOARD AKTIEBOLAG**

The evidentiary hearing, along with the depositions of Dr. Lans and Mr. Louis Mastriani and the exhibits, demonstrate two things:

- First, this is not an “exceptional case.” The Federal Circuit has never found a case such as this, in which an individual plaintiff filed an action in his personal capacity rather than in the name of his wholly-owned alter ego, to be exceptional. Nor was this a frivolous claim on a bogus patent. All the evidence shows that the patent was strong, including the Hitachi action in Germany, the licenses signed with IBM and other established computer companies, and the fact that the patent was issued to a serious, well-regarded inventor. Indeed, rather than burdening defendants with litigation, Mastriani’s errors in handling this case effectively conferred upon the computer company defendants the benefit of royalty free licenses to the ‘986 Patent.
- Second, Dr. Lans engaged in no misconduct. Dr. Lans had no reason to file the action in his own name. Two law firms with which he had no preexisting relationship importuned him to allow them to pursue infringers. Dr. Lans gave them all of the information pertinent to Uniboard and/or told them where to find it. Mastriani and his law firm ignored Dr. Lans and did no investigation into the facts related to Uniboard. Mastriani delegated all investigatory work to his Swedish counterparts at Delphi, and did not even require them to provide him with any reports of their efforts. In fact, the documentary record shows that AMS’ Swedish counterparts did no investigation into Uniboard’s interest in the ‘986 Patent until after Gateway filed its motion for summary judgment.

Furthermore, it was Mastriani, not Dr. Lans or Uniboard, who engaged in stonewalling during discovery.

## **I. THIS IS NOT AN EXCEPTIONAL CASE**

The evidence before the Court does not constitute clear and convincing evidence of an exceptional case.<sup>1</sup> *See* 38 U.S.C. § 385. An exceptional case can be demonstrated by “‘proof of actual wrongful intent . . . or of gross negligence,’ which requires ‘willful, wanton, or reckless misconduct, or evidence of ‘utter lack of all care.’” *Lans v. Gateway 2000, Inc. (Lans II)*, Nos. 97-2523, et al., Slip Op. at 6 (D.D.C. Sep. 6, 2001), citing *Bayer Aktiengesellschaft v. Duphar Int’l Research B.V.*, 738 F.2d 1237,1242 (Fed. Cir. 1984). An exceptional case also includes “misconduct during litigation, vexatious or unjustified litigation, or a frivolous suit.”<sup>2</sup> *Lans II* at 6, citing, *Machinery Corp. of America v. Gullifiber AB*, 774 F.2d 467, 470 (Fed. Cir. 1985).

Neither Dr. Lans nor Uniboard had any wrongful intention or motive to file the original action in the name of the wrong party. Neither Dr. Lans nor Uniboard were reckless. Dr. Lans gave his lawyers sufficient information to bring the action in the name of the correct party. It was the lawyers who made the decision to file initially in Dr. Lans’ name and not in Uniboard’s. The action was neither frivolous nor unjustified, and neither Dr. Lans nor Uniboard were responsible for their counsel’s discovery abuses.

### **A. Filing a Case in the Name of a Patent Owner’s Alter Ego Has Never Been Found To Be Exceptional**

Preliminarily, the Federal Circuit has never found a case to be exceptional because an individual plaintiff filed an action in his or her personal capacity rather than in the name of a

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<sup>1</sup> *See Stephens v. Tech International, Inc.*, 393 F.3d 1269, 1276 (Fed. Cir. 2004) (noting that “an exceptional case finding is not to be based on speculation or conjecture but clear and convincing evidence”).

<sup>2</sup> A frivolous suit is one “where the patentee know, or should have known by reasonable investigation, that the suit was groundless.” *Id.*

wholly-owned corporate alter ego which would have had standing. Indeed, the Federal Circuit found the related issue of notice to be a “difficult question,” “not previously encountered”:

Admittedly, this court has not previously encountered a situation, such as this case, where a party associated with the patentee notified alleged infringers. In other cases, this court addressed situations where notification came from someone associated with the alleged infringer and concluded that “notice of infringement must ... come from the patentee, not the infringer.” E.g., *Am. Med. Sys., Inc. v. Med. Eng’g Corp.*, 6 F.3d 1523, 1537 n. 18, 28 USPQ2d 1321, 1331 n. 18 (Fed.Cir.1993) (notice to the alleged infringer by its own counsel “is clearly not what was intended by the marking statute”). While the present case presents a more difficult question, the actual notice requirement of § 287(a) demands notice of the patentee’s identity as well as notice of infringement.

*Lans v. Digital Equipment Corporation*, 252 F.3d 1320, 1327 (Fed. Cir. 2001).

**B. Neither Dr. Lans nor Uniboard Engaged in any Intentional or Reckless Misconduct**

Dr. Lans had no intention of deceiving anyone about the ownership of the ‘986 Patent; nor did he act recklessly. Dr. Lans had no motive to file the patent claims in his own name rather than in Uniboard’s. Dr. Lans fully informed his lawyers about Uniboard’s existence and its rights to the ‘986 patent. In fact, Dr. Lans asked his lawyers to change the U.S. patent registration to Uniboard so that Uniboard could be the party named in the lawsuits. Dr. Lans is not responsible for Mastriani’s willful failure to follow his client’s instructions.

**1. Dr. Lans Had No Motive to Bring the Underlying Litigation in his Own Name**

Dr. Lans had no motive to conceal Uniboard’s interest in the patent. (Day 1 at 21; Day 2 at 8-9)<sup>3</sup>. All of the licensing revenue collected from the ‘986 patent already went to Uniboard because it received more favorable tax treatment than Dr. Lans. (Day 1 at 10-11; Day 2. at 8-9; Day 2 at 180).

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<sup>3</sup> The “Day” references are to the Evidentiary Hearing March 24 and 25, 2005.

Furthermore, Dr. Lans told Mastriani that he wanted Uniboard to be the plaintiff in any suit. (Day 1 at 19-20, 29; Lans 6). Mastriani knew that Dr. Lans “[did] not have an interest in personally initiating litigation.” (AMS 1, Tab 7).<sup>4</sup> Mastriani also knew that Dr. Lans had been named personally in a German invalidity action brought by Hitachi that caused Dr. Lans great distress. (Day 1 at 19-20).

## **2. Dr. Lans Provided AMS with All Information Pertinent to Establishing Uniboard’s Interest in the Patent or the Location of All Such Information**

Dr. Lans provided Mastriani with all of the facts that he needed to investigate the ownership of the ‘986 Patent. Mastriani knew about the IBM-Uniboard License Agreement in December 1995 (AMS 1, Tab 9) and obtained a copy of the agreement by at least August 1996. (Day 2 at 58). That document on its face reveals Uniboard’s interest in the ‘986 patent.<sup>5</sup> In their September 1996 meeting, Dr. Lans answered Mastriani’s questions about the IBM-Uniboard License Agreement and informed Mastriani that Gunnar Berg had documents related to that agreement,<sup>6</sup> including agreements between Dr. Lans and Uniboard. (Day 1 at 21-22, 29; Day 2

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<sup>4</sup> See also AMS 1, Tab 8 (noting that Dr. Lans “[does] not wish to be directly involved” in securing license payments and possible suit).

<sup>5</sup> As part of the IBM-Uniboard License Agreement, Uniboard warranted that “it has the full right and power to grant the licenses, immunities and release set forth in” the agreement. Lans 7 at ¶ 7.1. The release is set forth in paragraph 4.1 which “irrevocably releases IBM” from any claim of infringement of the ‘986 patent that arose prior to the date of the agreement. Lans 7 at ¶ 4.1. Only the owner of the patent, not a licensee or even a co-owner, can grant such a release. See *Ethicon, Inc. v. United States Surgical Corp.*, 135 F.3d 1456, 1467 (Fed. Cir. 1998); *Schering Corp. v. Roussel-UCLAF SA*, 104 F.3d 341, 354 (Fed. Cir. 1997); *Minco, Inc. v. Combustion Eng’g, Inc.*, 95 F.3d 1109, 1116-17 (Fed. Cir. 1996). In fact, the Federal Circuit noted this rule as an underpinning of its notice ruling: “After all, only the patentee has authority to grant licenses or accept design changes to facilitate the purposes of the notification requirement.” *Lans v. Digital Equipment Corporation*, 252 F.3d at 1327.

<sup>6</sup> Dr. Lans did not remember the contents of the documents that he had signed. After Gateway filed its motion for summary judgment, Mastriani convinced Dr. Lans to sign a declaration stating that he “forgot” the document. Mastriani told Dr. Lans that, under American law, because Dr. Lans could not remember the contents of the document he had forgotten it. (Day 1 at 36).

at 16).<sup>7</sup> Furthermore, on February 19, 1997, Dr. Lans informed Mastriani in writing that he had transferred the '986 patent to Uniboard and asked Mastriani to record that transfer. (Lans 6). Mastriani referenced Dr. Lans' communication in his own notes as "Uniboard assignment." (AMS 30 at 007808).

If the ownership of the '986 Patent was unclear, Mastriani testified that it would have been a simple matter to clarify it with another assignment. (Mastriani Dep. Tr. at 214-15).<sup>8</sup>

### **3. Dr. Lans Asked Mastriani to Change the Registration of the Patent to Uniboard**

When Dr. Lans was named personally in a declaratory judgment action in Idaho, Dr. Lans asked Mastriani to change the registration of the '986 Patent to clarify that he had assigned the patent to Uniboard. (LANS 6). On February 19, 1996, Dr. Lans wrote to Mastriani:

As you know the licenses has been signed with a company (UNIBOARD AB) and not with me as an individual (the patent has been transferred to the company for many years ago and the agreement with IBM was made with UNIBOARD AB). The company has the same address as my private address. In order to make this clear, *I have signed a paper for changing registration at the US Patent office.* Dr. Bertil Greenberg will send you this document. I will not be in Sweden next week.

(Lans 6 [emphasis added]). Mastriani understood Dr. Lans' instructions to refer to the "Uniboard assignment" as demonstrated by his own notes. (AMS 30 at 007808). Mastriani did not carry out Dr. Lans' instructions.<sup>9</sup>

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<sup>7</sup> Mastriani never asked Dr. Lans to obtain those documents, nor did he request further detail about the documents. (Day 1 at 22). Mastriani claims that he asked Delphi to get the documents from Gunnar Berg (Day 2 at 150) but the evidence demonstrates that he did not do so until after Gateway filed its motion for summary judgment.

<sup>8</sup> As Dr. Lans' American counsel, it was his responsibility to clarify the ownership situation of the '986 Patent under U.S. law. Even Delphi seemed unclear as to whether, under American law, Dr. Lans or Uniboard owned the patent. Peter Utterström wrote to Mastriani: "the starting point is the fact that HL did ask us – the two firms – to represent him/Uniboard in the collection of licensing fees from the infringers." (AMS 16).

<sup>9</sup> Mastriani's reason for his failure to carry out Dr. Lans' request to clarify the ownership situation of the '986 patent varies depending on when he is telling the story. At his deposition, he claimed that he called Dr. Lans and that Dr. Lans could not explain what he meant by the fax. (Mastriani Dep. Tr. at

#### **4. AMS, Not Dr. Lans, Decided Who the Plaintiffs Would Be**

AMS' representation agreement with Dr. Lans stated that AMS had "sole and exclusive discretion" to pursue litigation (Lans 1) and AMS made the decision to file suit in Dr. Lans' name. (AMS 24). Dr. Lans did not even see the *Lans* complaint until after it was filed. (Day 1 at 31). Later, it was solely AMS' decision to file suit in Uniboard's name. Indeed, the suit was contrary to Dr. Lans' express wishes. (Day 1 at 28, 29; Lans 6).

#### **5. Neither Dr. Lans nor Uniboard Were Responsible for the Discovery Abuses**

Mastriani never consulted Dr. Lans as to which documents should be produced to the computer company defendants and which should be withheld. (Day 1 at 33). In fact, Dr. Lans suggested changing the response to Compaq's interrogatory regarding assignment of the '986 patent from "I am the sole owner of the '986 patent" to "The company Uniboard AB is the owner of the '986 patent rights but the patent is still registered in Mr. Hakan Lans' name." (AMS 18). Five days later, Mastriani misrepresented to the Court and to the computer company defendants that it was Dr. Lans, and not Uniboard, who licensed the '986 Patent to IBM. (AMS 29 at 14-15).<sup>10</sup>

Furthermore, Mastriani refused to produce the IBM-Uniboard License Agreement to the computer company defendants despite this Court's order to do so. Order, April 20, 1999. Mastriani's testimony to the Court that Defendants "never followed up" on obtaining the IBM-Uniboard License Agreement is false. (Day 2 at 137). After Mastriani made his argument that he did not have to produce license agreements, the Court ruled against him and the Defendants

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95-97). At the hearing, Mastriani claimed that Dr. Lans meant that he only wanted to change the address listed on the patent. (Day 2 at 81). Mastriani's inconsistent testimony about this document and his follow-on conversations reveal one uncontradicted fact: wherever there was any uncertainty or confusion about Dr. Lans' wishes or statements, Mastriani would ignore them.

<sup>10</sup> At the time Mastriani submitted this false statement, he knew that Uniboard had licensed the patent to IBM. (Day 2 at 147).

not only continued to seek the agreements but filed a motion for sanctions when Mastriani refused to produce them.<sup>11</sup>

**6. AMS Filed the Uniboard Complaint without First Obtaining Dr. Lans' Approval, and Belatedly Obtained That Approval Only by Ignoring Dr. Lans' Concerns**

The Court dismissed the *Lans* complaint on November 23, 1999 and AMS filed the *Uniboard* complaint on November 29, 1999, before these lawyers even informed Dr. Lans about the dismissal.<sup>12</sup> AMS, however, did not seek Dr. Lans' consent to the *Uniboard* action until December 17, 1999, nearly three weeks *after* it had been filed. (AMS 1, Tab 40).

**C. The Court Found This Case to be Exceptional Because It Was Not Provided all of the Relevant Facts**

In finding this to be an exceptional case, the Court relied on an affidavit by Mastriani that swore "I and other counsel to Mr. Lans have been repeatedly informed by Mr. Lans that no assignment had ever taken place with respect to the ['986] patent." *See Lans v. Gateway 2000, Inc. (Lans I)*, 84 F. Supp. 2d 112, 122 (D.D.C. 1999). The Court plainly concluded from Mastriani's statement that Dr. Lans had not informed AMS about Uniboard and that Uniboard had an interest in the '986 patent. *Lans I* at 114 (finding that Dr. Lans "chose to conceal all

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<sup>11</sup> After the Court's ruling, in the Gateway action alone, the exchanges between Gateway and AMS included a letter from Gateway's counsel Michele E. Moreland to Mastriani on June 11, 1999 regarding the discovery dispute; Steven Adkins responded on behalf of AMS to Ms. Moreland's letter on June 14, 1999; Ms. Moreland responded to Adkins' letter on June 14, 1999; Adkins responded to Ms. Moreland's letter on June 15, 1999; Adkins and Ms. Moreland participated in a meet and confer teleconference on June 18, 1999; Gateway moved for sanctions against Dr. Lans for, *inter alia*, failure to produce the license agreements on June 18, 1999; Adkins sent a letter to all defendants trying to resolve a discovery dispute on June 30, 1999; AMS filed its opposition to Gateway's motion to dismiss on July 1, 1999; Gateway submitted its reply on July 8, 1999; AMS filed a supplemental declaration from Mastriani on July 19, 1999; AMS submitted a motion to file a surreply and a proposed surreply on July 21, 1999; Adkins sent a letter to all defendants on July 27, 1999; Gateway filed a motion to file a reply to AMS's surreply and a proposed reply on August 8, 1999; and Gary Richty sent a reply to Adkins' July 27, 1999, letter on August 9, 1999. The letters are attached as Exhibit A to the Declaration of William DeVinney, filed herewith.

<sup>12</sup> Dr. Lans did not learn about the dismissal order until December 3, 1999, and did not send Dr. Lans a copy of the order until December 6, 1999. (AMS 1, Tab 41 [first e-mail in chain]).

information about the assignment, possibly even from his attorneys, until confronted with irrefutable evidence that the assignment had occurred.”); *see also Lans I* at 122 (noting that Dr. “Lans should have told his attorneys about the assignment to IBM”); *Lans II*, at 10 (finding that Dr. Lans “should have been more forthcoming with his attorneys”).

Mastriani testified at the hearing that if he intended to convey such a conclusion to the Court, he would have testified falsely. (Day 2 at 179-80).<sup>13</sup> But if this was not the message

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<sup>13</sup> This is not the only instance in which Mastriani misled the Court as to his knowledge of any questions surrounding the ownership of the ‘986 Patent. For example, on direct examination, Mastriani was asked, “When was the first time, the very first time, that you learned, that AMS learned, that someone claimed that Uniboard was the owner of the patent,” to which Mastriani replied, “When we received the Gateway motion for summary judgment for lack of standing in August of 1999.” (Day 2 at 97). On cross examination, when Mastriani was asked whether the computer companies were seeking the IBM license agreement because there was a dispute as to the ownership of the patent, he testified that “no such thing had ever been said, as far as I can recall, at this date. It was the only time that that came up was in the August 1999 summary judgment motion by Gateway.” (Day 2 at 2).

In fact, in a March 3, 1999, telephonic hearing, counsel for Compaq stated

I’d also like to make the point that there has been a dispute over the ownership of the patent, and this revolves around the fact of some title problems, some issue that we believe that Mr. Lans may not be the proper owner, and may not be the proper plaintiff in this case. . . . [R]ecently we were produced a copy of the IBM License which showed another entity that was the licensor to the patent in suit, so we need to see these license agreements to try to clarify this issue.

(AMS 29 at 45-46). Mastriani responded that

This issue that Mr. Baker raised with regard to a dispute over the ownership of the patent is just mystifying. There’s no dispute – there’s no dispute – certainly, I don’t know who the dispute is with. Compaq may be raising some type of counts for litigation purposes, but the ‘986 patent is the property of Hakan Lans, his name appears on the face thereon as issued by the U.S. Patent and Trademark Office.

\* \* \*

The reference to Uniboard in the IBM license, as Compaq well knows, it’s a matter of public record, Uniboard AB is the sole proprietorship owned by Mr. Lans.

(AMS 29 at 51). Mastriani’s testimony to the Court was false.

Mastriani intended to convey, when he read how the Court interpreted his statement, he had an obligation to correct the Court's misperception. Either way, Mastriani misled the Court, and did so intentionally.

## **II. AMS AND MASTRIANI BEHAVED IMPROPERLY BY IGNORING THEIR CLIENT, THE FACTS PROVIDED BY THEIR CLIENT, AND THE LAW**

AMS and Mastriani acted improperly by ignoring Dr. Lans and the facts he provided to them, ignoring the relevant patent law, concealing Uniboard's interest from the computer company defendants, and then misleading the Court by blaming Dr. Lans for their own negligence. To compound their misconduct, AMS and Mastriani failed to inform Dr. Lans that they had a conflict of interest in their protecting the firm's interest at his expense. As a final ironic stamp to their unethical behavior, AMS and Mastriani base their entire defense in this hearing on a document written in the main by their Swedish correspondent counsel, Delphi<sup>14</sup> – a document Dr. Lans would never have sent them had he been advised, as he should have been, to retain independent counsel.

### **A. Dr. Lans Gave Mastriani Adequate Information About Uniboard's Interest in the '986 Patent Before The Lawsuits Were Filed And Mastriani Ignored That Information**

As discussed above, Dr. Lans informed Mastriani about Uniboard at the beginning of their relationship. (Day 1 at 29). Mastriani obtained a copy of the Uniboard-IBM agreement by at least August 1996, (Day 2 at 58), and Dr. Lans answered Mastriani's questions about the IBM-Uniboard License Agreement in their September 1996 meeting.

In February 1997, well before the lawsuits were filed, Dr. Lans wrote to Mastriani: "the patent has been transferred to the company for many years ago and the agreement with IBM was made with UNIBOARD AB." (Lans 6). Standing alone, Dr. Lans' February 1997

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<sup>14</sup> Delphi is the empty chair. AMS could have obtained some corroboration of Mastriani's statements from Delphi, but has offered none.

communication to Mastriani about the assignment of the '986 patent to Uniboard required more than the cursory and dismissive treatment Mastriani gave it. Taken together with what Mastriani knew about the IBM agreement, the existence of Uniboard's corporate records and AMS negotiations with IBM, the evidence shows that, at best, AMS recklessly avoided the truth.

If Mastriani knew anything about patent law, he knew enough about Uniboard's interest in the '986 patent either to file the lawsuits in Uniboard's name or to fix the ambiguity with a new assignment.

**B. Dr. Lans Told Mastriani about Gunnar Berg and his Role in Negotiating the IBM-Uniboard Agreement**

Mastriani knew where to look for the document evidencing Uniboard's rights under the '986 Patent. Dr. Lans informed Mastriani that his counsel in negotiating the IBM-Uniboard License Agreement was Gunnar Berg. (Day Hearing Tr. at 22). Dr. Lans also told Mastriani that Berg had in his files documents relating to the IBM-Uniboard License Agreement including agreements between Dr. Lans and Uniboard. (Day 1 at 21-22; Day 2 at 16). Mastriani, however, never attempted to contact Berg himself. Mastriani testified that he delegated the task to Delphi and that Delphi conducted its investigation in 1996.<sup>15</sup> This is not an adequate investigation.<sup>16</sup> Even if it were, there is no evidence that Delphi ever made any effort to contact Gunnar Berg or that Delphi even considered doing so until after Gateway filed its motion to dismiss. (LANS 24; Day 1 at 24; Day 2 at 150-51, 153-54).

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<sup>15</sup> Mastriani originally told the Court that he asked Delphi to contact the *widow* Berg in September 1996 and that Delphi did so but found no files. (AMS 1, Tab 1 at ¶ 13; Day 2 at 150-51). When, at his deposition, Mastriani was confronted with the fact that Gunnar Berg was alive in September 1996, Mastriani testified that he "had been told that he was deceased." (Mastriani Dep. Tr. at 46). In his testimony before the Court, however, Mastriani explained his affidavit by testifying that he "misremembered" when Gunnar Berg had died. (Day 2 at 252).

<sup>16</sup> See *Pavelic & LeFlore v. Marvel Entertainment*, 493 U.S. 120, 126 (1989) (holding that attorneys that sign pleadings or other papers have a "personal, nondelegable responsibility . . . to validate the truth and legal reasonableness of the papers.")

### C. Mastriani Ignored the Plain Language of the IBM Agreement

IBM agreed to pay to UNIBOARD \$1,000,000 promptly after it received “*documentary* evidence of UNIBOARD’s right[s].” Lans 7 at ¶ 6.1 (emphasis added). Mastriani knew “that some documentary evidence may have been shown to IBM” and that IBM did make the \$1,000,000 payment. (Day 2 at 148). Dr. Lans also told Mastriani that he had signed an agreement between himself and Uniboard in connection with the IBM-Uniboard License Agreement. (Day 2 at 21-22; Day 2 at 16). Despite that knowledge, Mastriani did not ask IBM for a copy of the documentary evidence referenced in paragraph 6.1. (Day 2 at 159).

As part of the IBM-Uniboard License Agreement, Uniboard “irrevocably release[d] IBM” from any claim of infringement of the ‘986 patent that arose prior to the date of the agreement. Lans 7 at ¶ 4.1. Only the owner of the patent can grant a release from claims for prior infringement. *See Ethicon, Inc.*, 135 F.3d at 1467; *Schering Corp.*, 104 F.3d at 354; *Minco, Inc.*, 95 F.3d at 1116-17. (“After all, only the patentee has authority to grant licenses or accept design changes to facilitate the purposes of the notification requirement.” *Lans v. Digital Equipment Corporation*, 252 F.3d at 1327.) As an experienced patent litigator, (Day 2 at 20, 231), Mastriani had an obligation to know this law, but admitted he did not. (Day 2 at 230-36). At a minimum, Mastriani should have concluded from reading the IBM-Uniboard License Agreement (as did other counsel in the case<sup>17</sup>) that there was a question as to whether Uniboard had an ownership interest in the ‘986 patent.<sup>18</sup>

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<sup>17</sup> Both Compaq’s counsel and Klaus Vorwerk, German counsel retained by AMS on behalf of Uniboard, concluded from reading the IBM-Uniboard License Agreement that Uniboard owned the ‘986 patent. (AMS Ex. 29; AMS Ex. 15). Similarly, once Gateway read the IBM-Uniboard License Agreement, it requested, and received, the documents referenced in ¶ 6.1 from IBM.

<sup>18</sup> The IBM-Uniboard License Agreement also states that “UNIBOARD shall not assign any of the Licensed Patents (Licensed Patents includes the ‘986 patent. Lans 7 at ¶ 1.1) unless such assignment is made subject to the terms and conditions of this Agreement.” (Lans 7 at ¶ 9.2). Mastriani testified that “assignment” in the patent context means “ownership, and ownership only.” (Day 2 at 94). Under

**D. AMS Represented Uniboard in a Dispute over the Extent of the IBM-Uniboard License Agreement**

AMS and Mastriani represented Uniboard in connection with a dispute over the scope of the IBM-Uniboard License Agreement<sup>19</sup> (AMS 10) and communicated with IBM several times on behalf of Uniboard. (AMS 11, AMS 12). Mastriani could have obtained Dr. Lans' assignment to Uniboard from IBM.<sup>20</sup> But just as Mastriani never bothered to talk to Berg, he never bothered to ask IBM for its "satisfactory evidence" document, even though he was in regular contact with IBM.

**E. Mastriani Knew about Uniboard's Corporate Records, Which Referenced Uniboard's Ownership**

Mastriani knew that Uniboard had corporate documents which he allegedly requested Delphi to research and report back to him. (Day 2 at 169-70). Mastriani understood that "in the 1990 annual report the Swedish word 'ager' means 'own', which also places the wording in the 1989 report in such a posture that *any reasonable person would conclude that ownership of the patent is likely.*" (AMS 24 [emphasis added]).<sup>21</sup>

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Mastriani's own understanding of "assignment," therefore, paragraph 9.2 was superfluous unless Uniboard owned the '986 Patent.

<sup>19</sup> After AMS sent notice letters to potential infringers of the '986 patent, Cirrus Logic sent letters to its customers claiming that Cirrus Logic's products were licensed pursuant to the IBM-Uniboard License Agreement because they were produced by MiCrus, a joint venture between Cirrus Logic and IBM.

<sup>20</sup> Gateway read the IBM-Uniboard License Agreement and requested, and received, the documents referenced in ¶ 6.1 from IBM.

<sup>21</sup> When confronted with his e-mail on cross-examination, Mastriani testified falsely, stating that "the definitions being given here were by someone who was not an expert, namely myself, using a dictionary." (Day 2 at 174). Mastriani was not relying on a dictionary as he testified but on translations by two Swedish citizens, Dr. Lans and Peter Utterström. *See* E-mail from L. Mastriani to H. Lans, dated Aug. 1, 2001 (attached as DeVinney Dec. Exhibit B) (stating that "we have now *confirmed from you and Peter [Utterström] that the 1989 annual report says that Uniboard 'acquired' the patent and the 1990 annual report says that Uniboard 'owns' the patent*").

Mastriani claimed that Delphi had obtained Uniboard's annual reports, which were in Swedish, and informed AMS of their contents some time in 1996 or 1997 before filing the complaint. (Day 2 at 169-70). The testimony was false.

Delphi, however, did not obtain the Uniboard annual reports until September 1999. On September 8, 1999, Tal Lindstrom of Delphi wrote to Mastriani stating that he did not have the Uniboard annual reports referenced in Gateway's motion to dismiss and asked Mastriani to fax copies to him right away. *See* E-mail from T. Lindstrom to L. Mastriani, dated Sept. 8, 1999 (attached as Exhibit B). Lindstrom also said that he would obtain the full reports from the PRV.<sup>22</sup> *Id.* Eight days later, Lindstrom wrote to Mastriani stating that he had obtained the Uniboard annual reports but had not translated them because Mastriani had not instructed him to do so. *See* E-mail from T. Lindstrom to L. Mastriani, dated Sept. 16, 1999 (attached as DeVinney Dec. Exhibits C and D).

**F. Mastriani Ignored Dr. Lans' Efforts to Explain Uniboard's Interest in the '986 Patent to the Computer Company Defendants**

Dr. Lans again reminded Mastriani that Uniboard had an interest in the '986 patent on January 29, 1999. (AMS 18). Dr. Lans sent an e-mail to Mastriani and suggested that an interrogatory regarding any assignment of the '986 patent should be changed from "I am the sole owner of the '986 patent" to "The company Uniboard [sic] AB is the owner of the '986 patent rights but the patent is still registered in Mr. Hakan Lans name." (AMS 18). At the time that Dr. Lans sent that e-mail, the parties were engaged in a dispute over whether license agreements should be produced. Mastriani did not reveal Uniboard's interest in the patent as Dr. Lans suggested, and continued to refuse to produce the IBM agreement, which would have revealed Uniboard's interest.

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<sup>22</sup> The PRV is the Patent-och registreringsverket, or the Swedish Patent and Registration Office, a Swedish governmental authority.

**G. Mastriani Ignored Dr. Lans' Concerns about Filing the *Uniboard* Action**

Dr. Lans expressed concern about the propriety of filing the *Uniboard* complaint. Dr. Lans asked Mastriani, "Can you get a guaranty from Judge Penn that it is correct that Unibord AB [sic] owns the patent and that I am now free to sign such document? I don't like to do something I believe – as a non-legal expert – is wrong." (AMS 1, Tab 42).<sup>23</sup> When Dr. Lans expressed his hesitancy, Mastriani called Dr. Lans and pressured him to sign an agreement indicating his consent. (Day 2 at 39-40).

**III. MASTRIANI'S LACK OF CREDIBILITY AND LACK OF ANY CORROBORATING EVIDENCE**

Mastriani is not a credible witness. He has made misstatements regarding everything from critical facts to minor details.<sup>24</sup> Mastriani misled the Court and the defendants as to who licensed the '986 Patent to Uniboard (*see supra* at I.B.5) misled the Court about his efforts to conceal the IBM-Uniboard License Agreement from Defendants (*see supra* at I.B.5 & n. 11), misled the Court as to the extent of his knowledge of Uniboard (*see supra* at I.C & n. 13), misled the Court as to his investigation of Gunnar Berg's files (*see supra* at II.B), misled the Court as to his investigation of the Uniboard's annual reports and his statements regarding those reports (*see supra* at II.E & n.21) and has given inconsistent explanations regarding Dr. Lans' February 19, 1997, fax (*see supra* at I.B.3 & n. 9) and his May 10, 2004, affidavit (*see supra* at II.B & n. 15).

One falsehood is particularly glaring and galling. Mastriani testified:

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<sup>23</sup> At the time that Dr. Lans sent the e-mail he was unaware that AMS had already filed the complaint.

<sup>24</sup> On a minor but still telling point, Mastriani testified on direct examination that Dr. Lans' recollection of the September 1996 meetings was faulty, in part, because Dr. Lans referred to taking "a boat trip in the Stockholm Archipelago." (Day 1 at 21). Mastriani testified that that boat trip had actually occurred in July 1998. (Day 2 at 40). In fact, Mastriani wrote a memo to Peter Utterström and Tal Lindstrom upon his return from the September 1996 meeting in Sweden and thanked them for their hospitality, and that he "especially appreciated the boat trip among the archipelago islands off Saltsjobaden." September 11, 1996 Memorandum from L. Mastriani to P. Utterström and T. Lindstrom (attached as Exhibit D).

1 A I have it.

2 Q Looking at paragraph 3 [of AMS 2], did you intend to  
3 convey to the Court that until Gateway filed its  
4 motion to dismiss, you didn't know anything about  
5 Uniboard?

6 A No, not at all.

7 Q Because if you had intended to convey that  
8 message to the Court, that would have been false;  
9 correct?

10 A That we did not -- we had not heard about  
11 Uniboard?

12 Q Uniboard, yes.

13 A Prior to August let's say 10th or 13th,  
14 1999? No. I was not trying to convey that to the  
15 Court.

16 Q If you had tried to convey that, it would  
17 have been false, wouldn't it?

18 A That's correct.

It is difficult to read Mastriani's sworn statement without concluding that his deception was deliberate – now that the facts are known:

Inasmuch as I and other counsel to Mr. Lans have been repeatedly informed by Mr. Lans that no assignment had ever taken place with respect to the Lans patent, we are investigating the circumstances surrounding the referenced Assignment.

AMS 2. The Court certainly concluded that Dr. Lans had withheld information about Uniboard from AMS, and Mastriani did nothing to correct this misperception.

**A. Mastriani Provided No Corroboration for his Story**

As for the rest of Mastriani's story that AMS properly investigated the ownership of the '986 Patent and that Dr. Lans somehow misled them, there is complete absence of any corroboration – from any document or from Delphi.

- Mastriani claims that Dr. Lans insisted that the *Lans* complaint be filed in his name (Day 2 at 75). No document supports the claim and Utterström contradicts it. (AMS 20.)

- Mastriani claims that Dr. Lans insisted that the notices of infringement be issued in his name (Day 2 at 67). No document supports the claim.
- Mastriani claims that he asked Delphi to try to obtain Gunnar Berg's files relating to the IBM-Uniboard License Agreement before filing the complaint and that Delphi did so without success (Day 2 at 150). No document supports the statement and Utterström contradicts it. (Lans 24.)
- Mastriani claims that Delphi obtained Uniboard's annual reports and informed him of the contents of those reports before AMS filed the *Lans* complaint (Day 2 at 169-70). No document supports the statement and the correspondence between Delphi and AMS in September 1999 (attached to the DeVinney Declaration, filed with this memorandum.)
- Mastriani claims that he asked Delphi to search Dr. Lans' accountants' files and that Delphi did so (Day 2 at 186). No corroboration, including nothing from Delphi confirming or commenting upon the supposed search.
- Mastriani claims that Dr. Lans saw the *Lans* complaint before it was filed (Day 2 at 206). No confirmation, including not even a cover letter.
- Mastriani claims that he called both Dr. Lans and Dr. Grennberg after receiving Dr. Lans' February 19, 1997 fax and neither one knew what Dr. Lans meant by that fax (Day 2 at 81-82). No corroboration, including no production of the billing records Mastriani mentioned at the hearing (Day 2 219:2-10).
- Mastriani claims that Dr. Lans approved filing the *Uniboard* complaint before it was filed (Day 2 at 205). The documentary record shows that Mastriani never

asked Dr. Lans for his approval until after AMS filed the *Uniboard* complaint (AMS 1, Tab 40).

- Mastriani claims that he discussed the risks of filing the *Uniboard* complaint with Dr. Lans (Day 2 207-08). No corroboration. Surely lawyers put such things in writing.
- Mastriani claims that he discussed paragraph 3 of his August 13, 1999, affidavit, which states that Dr. Lans “repeatedly” informed him that no transfer of the patent had taken place, and that Dr. Lans raised no objection. (Day 2 at 107-08). No corroboration and the statement is flatly inconsistent with Dr. Lans’ February 19, 1997 fax (Lans 6), not to mention the IBM agreement itself.

**B. AMS’ Sole Documentary Evidence (Lans Exhibit 9) Does Not Undermine the Undisputed Record Exonerating Dr. Lans and Uniboard**

Aside from Mastriani’s uncorroborated and inconsistent testimony, AMS relies solely upon a document (Lans 9) that never would have been written if AMS had revealed to Dr. Lans that the firm had a conflict of interest in trying to blame their client for the firm’s mistakes.<sup>25</sup>

The document is an argument as to why Dr. Lans owns the ‘986 Patent and the case should not

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<sup>25</sup> *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452 (2<sup>nd</sup> Cir. 1988). Defendants sought attorney fees from both the plaintiff and his counsel, primarily for a “facsimile claim” in a copyright infringement case. There was a question as to whether the client or the attorney was responsible for the claim. Fees were assessed against both the lawyer and the client. The client filed a *pro se* appeal that was dismissed because of lack of prosecution. The Second Circuit took an extraordinary step: “*Sua sponte*, we reinstate Calloway’s appeal with regard to Rule 11 sanctions. LeFlore and his firm had a blatant conflict of interest and should have withdrawn as Calloway’s counsel in defending the motions for sanctions. Because of this representation, no argument was made on Calloway’s behalf that LeFlore was solely responsible for pursuit of the facsimile claim, notwithstanding considerable evidence supporting that view. Nor was an argument made that even if sanctions should be imposed on Calloway, LeFlore and his firm should be jointly and severally liable for them.” 854 F.2d at 1456. *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) reversed the Second Circuit’s finding that a lawfirm can be sanctioned under Federal Rule of Civil Procedure 11. The 1993 amendments to Rule 11, however, removed this restriction.

have been dismissed. Dr. Lans provided some material to AMS co-counsel Utterström, and Utterström transformed them.<sup>26</sup> (Day 2 Hearing 5:8-21.) Whatever the document says (and whoever the author might have been), it does not undermine the facts showing what AMS knew before filing suit in Dr. Lans' name, what they should have known under the law, and the investigation these facts should have required them to perform.

#### IV. CONCLUSION

This is not an exceptional case. Dr. Lans and Uniboard did not act with “actual wrongful intent” or “gross negligence.” *Bayer Aktiengesellschaft v. Duphar Int’l Research B.V.*, 738 F.2d at 1242. Neither Dr. Lans nor Uniboard engaged in any “misconduct during litigation.” *Machinery Corp. of America v. Gullifiber AB*, 774 F.2d 467, 470 (Fed. Cir. 1985). Dr. Lans had no motive to mislead the Court. He had no more ability to decide how to investigate and proceed with patent litigation in the United States<sup>27</sup> than a layman could diagnose and perform open heart surgery on himself.

If there was fault, it was solely in AMS failure and refusal to investigate. Dr. Lans told AMS about Uniboard, about Uniboard's interest in the '986 Patent, about the IBM agreement (that revealed Uniboard's interest), and about Gunnar Berg, the lawyer who had Lans' IBM files. AMS failed to contact Gunnar Berg; failed to look at Uniboard's corporate records (that, at the least, suggest that Uniboard owns “ager” the Patent); and failed to ask IBM for the document mentioned in the IBM license agreement, even though AMS was in close communication with IBM on Uniboard's behalf.

When Gateway moved to dismiss the complaint, and later moved for fees, AMS had an obligation to bring all these facts to the Court's attention. *Calloway v. Marvel Entertainment*

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<sup>26</sup> Neither the language nor the format of Lans 9 is anything like Dr. Lans' other documents.

<sup>27</sup> Litigation he did not seek, but AMS importuned him to file.

*Group, supra*, 854 F.2d 1452. Instead, AMS and Mastriani misled the Court into believing that Dr. Lans had kept them in the dark about Uniboard.

Dated: April 29, 2005

/s/

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