

Filed on behalf of Valencell, Inc.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.

VALENCELL, INC.,
Patent Owner.

Case IPR2017-00317
U.S. Patent No. 8,989,830

**PATENT OWNER'S OBJECTIONS TO EVIDENCE
UNDER 37 C.F.R. § 42.64(B)(1)**

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Patent Owner Valencell, Inc. (“Patent Owner” or “Valencell”) hereby files the following objections to evidence under the Federal Rules of Evidence (“FRE”) and 37 C.F.R. § 42.62(b)(1) to the admissibility of the following evidence submitted by Apple Inc. (“Petitioner” or “Apple”) in support of its Petition for *Inter Partes* Review. Valencell files and serves Apple with these objections to provide notice that Valencell may move to exclude the challenged exhibits under 37 C.F.R. § 42.64(c).

These objections are made within 10 business days from the June 5, 2017 filing of Institution Decision (Paper 7). Patent Owner objects to and intends to seek the denial of the admission and consideration of the following documents:

Exhibit No.	Description
1003	Declaration of Dr. Brian W. Anthony in Support of Petition for <i>Inter Partes</i> Review of U.S. Patent No. 8,989,830 (“Anthony Declaration”)
1004	<i>Curriculum Vitae</i> of Dr. Brian W. Anthony
1005	Asada, H. <i>et al.</i> “Mobile Monitoring with Wearable Photoplethysmographic Biosensors,” IEEE Engineering in Medicine and Biology Magazine, May/June 2003; pp. 28-40 (“Asada”)
1018	Declaration of Gerard P. Grenier in support of Asada, H. <i>et al.</i> “Mobile Monitoring with Wearable Photoplethysmographic Biosensors,” IEEE Engineering in Medicine and Biology Magazine, May/June 2003; pp. 28-40 (“Grenier Declaration”)
1011	U.S. Patent Application Publication No. 2007/0123763 to Al-Ali <i>et al.</i> titled “Optical Sensor Including Disposable and Reusable Elements,” published May 31, 2007 (“Al-Ali”)

1012	Excerpt from Merriam Webster's Collegiate Dictionary, Eleventh Edition, 2008; p. 828 ("Merriam Webster")
1013	Mendelson, Y. <i>et al.</i> , "Skin Reflectance Pulse Oximetry: In Vivo Measurements from the Forearm and Calf," <i>Journal of Clinical Monitoring</i> , Vol. 7, No. 1, January 1991; pp. 7-12 ("Mendelson 1")
1014	Konig, V. <i>et al.</i> , "Reflectance Pulse Oximetry – Principles and Obstetric Application in the Zurich System," <i>Journal of Clinical Monitoring and Computing</i> , Vol. 14, No. 6, August 1998; pp. 403-412 ("Konig")
1015	Mendelson, Y. <i>et al.</i> "A Wearable Reflectance Pulse Oximeter for Remote Physiological Monitoring," <i>Proceedings of the 28th IEEE EMBS Annual International Conference</i> , New York City, New York, August 30-September 3, 2006; pp. 912-915 ("Mendelson 2")
1016	U.S. Patent No. 6,608,562 to Kimura <i>et al.</i> titled "Vital Signal Detecting Apparatus," issued August 19, 2003 ("Kimura")
1017	Tremper, K. <i>et al.</i> , "Pulse Oximetry," <i>Medical Intelligence Article, Anesthesiology</i> , Vol. 70, No. 1, January 1989; pp. 98-108 ("Tremper")

Patent Owner's specific objections are provided below.

Exhibit 1003 – Anthony Declaration

Patent Owner objects to the Anthony Declaration as lacking foundation under FRE 702 and 705. For example, Dr. Anthony's testimony about obviousness, in paragraphs 80-81, 94-95, 101 and 106, which purportedly shows the disclosures and motivations to combine the various prior art references, is conclusory and therefore inadmissible. Patent Owner likewise objects to the Anthony Declaration under FRE 705 for failure to disclose any underlying facts or data for his conclusory statements.

Patent Owner further objects to conclusory paragraphs (e.g., ¶¶ 80-81, 94-95, 101 and 106) under FRE 403 because the conclusory nature of the statements makes their probative value substantially outweighed by the danger of unfair prejudice, confusing the issues, unduly delay, wasting time, or needlessly presenting cumulative evidence.

Exhibit 1004 – *Curriculum Vitae* of Dr. Brian W. Anthony

Patent Owner objects to the *Curriculum Vitae* of Dr. Brian W. Anthony as inadmissible because it constitutes improper incorporation by reference under 37 C.F.R. § 42.6(a)(3).

Exhibit 1005 – Asada

Patent Owner objects to Asada as inadmissible hearsay under FRE 801 and 802 that does not fall under any hearsay exception, including those of FRE 803, 804, 805, or 807.

Patent Owner objects to Asada as not properly authenticated under FRE 901. The only evidence purporting to authenticate Asada is a Declaration (Exhibit 1018) that is not made on personal knowledge of the attested facts, and there is no evidence that the document is self-authenticating under FRE 902.

Patent Owner objects to Asada under FRE 401-403 because its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, unduly delay, wasting time, or needlessly presenting cumulative evidence.

For example, Asada used to suggest the knowledge of one having ordinary skill in the art, yet it is clear that Asada represents knowledge of one having extraordinary skill in the art. For the same reasons, Patent Owner objects to Asada as irrelevant under FRE 401 and thus inadmissible under FRE 402. Patent Owner further objects to Asada as irrelevant under FRE 401 and thus inadmissible under FRE 402 to the extent that Asada is used as prior art, because Petitioner has produced no evidence that Asada was publicly available before the priority date of the '830 Patent.

Exhibit 1018 – Grenier Declaration (including attached exhibit)

Patent Owner objects to the Grenier Declaration under FRE 602 because no evidence has been introduced to show the declarant had personal knowledge of the attested facts.

Patent Owner objects to the Grenier Declaration as inadmissible hearsay under FRE 801 and 802 that does not fall under any hearsay exception, including those of FRE 803, 804, 805, or 807.

Patent Owner objects to the Grenier Declaration as not properly authenticated under FRE 901. There is no evidence that the Grenier Declaration is authentic nor that the document is self-authenticating under FRE 902.

Patent Owner objects to the Grenier Declaration under 1002 because it is not the best evidence of the content of the article that it seeks to support (Asada). Rather, the Asada article itself (Ex. 1005) is the best evidence of its own content.

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