UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE PATENT TRIAL AND APPEAL BOARD
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APPLE INC.,
Petitioner,

v.

MASIMO CORPORATION,
Patent Owner.
_____

Case IPR2020-01523
Patent No. 8,457,703
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**PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO
EXCLUDE PETITIONER'S EVIDENCE**

Patent Owner's motion to exclude (Paper 25, hereinafter the "Motion") is simply an attempt to prevent the Board from considering relevant evidence, and should be denied.

I. Introduction

Exhibit 1038 is a copy of a webpage archived by The Wayback Machine, a well-known service operated by The Internet Archive. This is indicated by the text "The Wayback Machine" included at the top of the first page of the exhibit. *See* Ex. 1038, 1. The Uniform Resource Locator (URL) of the archived page is also included at the top of the first page, and at the bottom of all pages. *See id.*

Notably, Exhibit 1038 is cited in a single paragraph of Petitioner's Reply (Paper 18), and is only cited to corroborate disclosure from the Diab reference. *See* Paper 18, 10-11 (each citation to Ex. 1038 appears in a string cite after a citation to Diab (Ex. 1007)). Exhibit 1038 is not asserted as prior art against the claims of the '703 patent. *See id.*

II. Patent Owner's Authenticity Challenge Fails

Under Fed. R. Evid. 901, authentication requires production of "evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Evidence can be authenticated based on the "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Fed. R. Evid. 901(b)(4).

In this case, the "appearance, contents, [and] substance" of Exhibit 1038 all support a finding under Fed. R. Evid. 901(b)(4) that the document is what it purports to be: a copy of a webpage archived by The Wayback Machine. As stated above, Exhibit 1038 includes a header clearly indicating its source as The Wayback Machine. *See* Ex. 1038, 1. Notably, Patent Owner had no difficulty in identifying Exhibit 1038 as a copy of a webpage from The Wayback Machine in its Motion to Exclude. *See* Motion, 1 ("Exhibit 1038 appears to be a printout of a webpage from the Internet Archive's Wayback Machine.").

Exhibit 1038 also includes the URL at which the webpage can be accessed in the first page header and each page's footer. *See* Ex. 1038. This URL can be fetched using a web browser to verify that the webpage shown in Ex. 1038 is in fact present in the Internet Archive's records. *See SDI v. Bose*, IPR2013-00350, Paper 36 at 17 (PTAB Nov. 7, 2014).

Patent Owner does not allege that Exhibit 1038 has been altered or that it appears inauthentic in any way. Thus, Patent Owner's argument for exclusion "reduces to the contention that Petitioner has not provided an affidavit from Internet Archive attesting to its general procedures." *Id.*, 18. Other panels have found that "[s]uch an affidavit would not have added materially to the record," and the same is true here. Accordingly, Patent Owner's authenticity challenge to Exhibit 1038 should fail.

III. Patent Owner's Hearsay Challenge Fails

Patent Owner alleges that "the equations and variables used to compute the exponential smoothing filter" contained in Exhibit 1038 are hearsay. Motion, 3. But the "equations and variables used to compute the exponential smoothing filter" are included in the cited portions of Diab. *See e.g.,* Reply, 10-12 (citing Apple-1007 (Diab), 47:5-10, 48:2-3, 50:21-27, FIG. 20). Exhibit 1038 therefore merely corroborates the explicit disclosure of Diab.

With respect to the date of Exhibit 1038, the Reply never alleges a specific date for Exhibit 1038, as it is not relied on as prior art to the '703 patent, and remains relevant as corroboration to Diab regardless of its date.

IV. Patent Owner's Request Exclude Arguments from the Reply is Improper

In the Motion, Patent Owner requests that "the arguments based on Exhibit 1038 at pages 10-11 of Petitioner's Reply" be excluded. Motion, 4. This request is wholly improper. First, a motion to exclude evidence is not a proper vehicle to request exclusion of arguments. *See* 37 CFR § 42.64(c). Second, as noted above, the arguments of pages 10-11 of the Petitioner's Reply are not "based on" Exhibit 1038. In fact, all citations to Exhibit 1038 in the Reply accompany citations to Diab (Ex. 1007). Third, Petitioner is unaware of any rule or authority mandating exclusion of arguments in this manner, and Patent Owner provides none in its Motion. Thus, Patent Owner's request to exclude arguments is improper and

should be denied.

V. The Board is Well-Positioned to Assign the Evidence Appropriate Weight

As the Board has previously noted, it sits as "a non-jury tribunal with administrative expertise" and "is well-positioned to determine and assign appropriate weight to the evidence presented … without resorting to formal exclusion that might later be held reversible error." *Liberty Mututal v. Progressive*, CBM2012-00002, Paper 66 at 69 (PTAB Jan. 23, 2014). In the present case, the Board should consider and assign appropriate weight to Exhibit 1038 rather than resorting to formal exclusion. *See id.*

Respectfully submitted,

Dated: January 3, 2022

/Dan Smith/
W. Karl Renner, Reg. No. 41,265
Dan Smith, Reg. No. 71,278
Kim Leung, Reg. No. 64,399
Fish & Richardson P.C.
3200 RBC Plaza, 60 South Sixth Street
Minneapolis, MN 55402
T: 202-783-5553

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