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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.

Petitioner,

v.

MASIMO CORPORATION,

Patent Owner.

Case IPR2020-01523
U.S. Patent 8,457,703

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

Petitioner's opposition does not establish the admissibility of Exhibit 1038. Petitioner does not respond to the Board and Federal Circuit precedent identified in the Motion requiring the party proffering evidence from a website to "produce some statement or affidavit from someone with knowledge of the website." *Standard Innovation, v. Lelo, Inc.*, IPR2014-00148, Paper 41,¹ 10 (PTAB Apr. 23, 2015). Likewise, Petitioner does not respond to Federal Circuit precedent finding printouts retrieved from the Wayback Machine admissible "where the proponent provided one of two types of supporting evidence: one, a witness that testified regarding how the Wayback Machine worked and how reliable its contents were, or two, a witness having personal knowledge that printouts were authentic." *Id.* at 11 (citing *U.S. v. Bansal*, 663 F.3d 634, 667-68 (Fed. Cir. 2011)). Petitioner does not dispute that it provided no affidavit or other evidence from a knowledgeable witness regarding Exhibit 1038.

Petitioner's argument that "Exhibit 1038 includes a header clearly indicating its source as The Wayback Machine" is not responsive to the evidentiary objections. (Opp. 2.) Petitioner has not demonstrated that the proffered webpage

¹ The PTAB's End to End website makes the document available for download under the heading "Paper 42." However, the face of the document states "Paper 41."

accurately depicts and reflects the alleged sub-section of the Engineering Statistics Handbook as the sub-section appeared at the relevant time or that the date of capture by The Wayback Machine is accurate. Identifying The Wayback Machine as the source of the document does not remedy these deficiencies.

Petitioner's cites *SDI v. Bose* as allegedly supporting admissibility of Exhibit 1038. (Opp. 2.) However, *SDI v. Bose* is distinguishable. In that case, the Petitioner identified indicia on the webpage to show that the purported date of publication "is self-authenticating." *SDI v. Bose*, IPR2013-00350, Paper 36 at 17 (PTAB Nov. 7, 2014); *see also id.* at 18 ("Petitioner shows that the date on the Irman Web Page facially appears authentic and is authenticated further by accessing the website."). Here, Petitioner has not identified any indicia on Exhibit 1038 that purportedly corroborates the alleged date of availability or publication.

Petitioner's argument that "the Reply never alleges a specific date for Exhibit 1038" is also unresponsive. (Opp. 3.) In the Reply, Petitioner argues that Exhibit 1038 reflects a POSITA's knowledge as of the earliest priority date of the '703 patent, stating:

As apparent from this equation *and as known by a POSITA*, the speed at which older values are dampened is the function of α . *Id.*, *APPLE-1038, 2*. When α is close to 1, dampening is fast, and when α is close to 0, dampening is slow. *Id.* Accordingly, *a POSITA would*

have understood Diab’s disclosure that “[i]f motion is large, this filter is slowed down” to refer to the filter dampening being slowed down by selecting α that is close to 0. *Id.*; APPLE-1007, 50:23-27.

(Petitioner’s Reply [Paper 18] 10-11 (emphasis added).) However, as explained above, Petitioner has failed to identify any indicia indicating that Exhibit 1038 was published and would have been available to a POSITA at the relevant time. Moreover, as shown by the above quotation, Petitioner’s argument that “the arguments of pages 10-11 of the Petitioner’s Reply are not ‘based on’ Exhibit 1038” is inconsistent with the Reply, which repeatedly cites Exhibit 1038 as the basis for the allegations. (Opp. 3.)

For these reasons, in addition to those provided in the Motion, the Board should exclude Exhibit 1038 and the arguments based on Exhibit 1038 under Federal Rules of Evidence 802 and 901.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: January 10, 2022

/Jacob L. Peterson/

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IPR2020-01523

Apple Inc. v. Masimo Corporation

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 37 C.F.R. § 42.6(e) and with the agreement of counsel for Petitioner, a true and correct copy of **PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE PETITIONER'S EVIDENCE** is being served electronically on January 10, 2022, to the e-mail addresses shown below:

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