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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.

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Case IPR2020-01523

U.S. Patent 8,457,703

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**PATENT OWNER'S MOTION TO EXCLUDE PETITIONER'S EVIDENCE**

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**I. RELIEF REQUESTED**

Pursuant to 37 C.F.R. § 42.64(c) and the Scheduling Order (Paper 8) at 10, Patent Owner Masimo Corporation (“Patent Owner”) moves to exclude Exhibit 1038 and all arguments based thereon.

Exhibit 1038 appears to be a printout of a webpage from the Internet Archive’s Wayback Machine. Petitioner Apple Inc. (“Petitioner”) alleges in its table of exhibits that the printout reflects a sub-section of the “Engineering Statistics Handbook” that was captured on April 19, 2001. (Reply to POR (Paper 18) at v.) Petitioner argues that Exhibit 1038 accurately describes “the conventional equation” for an “exponential smoothing filter.” (*Id.*, 10-11.) Petitioner also relies on the date the Wayback Machine allegedly captured the webpage as evidence that a POSITA would have been familiar with the material in Exhibit 1038 as of the ’703 patent’s priority date.

The Board should exclude Exhibit 1038 for two reasons. First, the Board should exclude Exhibit 1038 pursuant to Federal Rule of Evidence (“FRE”) 901 because Petitioner failed to authenticate the exhibit. Second, the Board should exclude Exhibit 1038 pursuant to FRE 802 because the contents of Exhibit 1038 and the exhibit’s purported capture date are hearsay.

Patent Owner timely objected to Exhibit 1038 pursuant to FRE 802 and 901 on October 28, 2021 (Paper 19). Petitioner submitted no supplemental evidence in response to Patent Owner's objections.

## II. PETITIONER'S EXHIBIT 1038 IS INADMISSIBLE

### A. Petitioner Did Not Authenticate Exhibit 1038

Exhibit 1038 is inadmissible because Petitioner failed to establish its authenticity under FRE 901. Under FRE 901(a), the proponent of an exhibit must “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” “When offering a printout of a webpage into evidence to prove the website's contents, the proponent of the evidence must authenticate the information from the website itself, not merely the printout.” *Standard Innovation Corp., v. Lelo, Inc.*, IPR2014-00148, Paper 41, 10 (PTAB Apr. 23, 2015). “For this reason, the Board has stated that ‘to authenticate printouts from a website, the party proffering the evidence must produce some statement or affidavit from someone with knowledge of the website...for example a web master or someone else with personal knowledge would be sufficient.’” *Id.* (quoting *EMC Corp. v. Personalweb Techs., LLC*, IPR2013-00084, Paper 64 at 45 (PTAB May 15, 2014); *see also*, *Linear Tech. Corp. v. Micrel, Inc.*, 275 F.3d 1040, 1055-56 (Fed. Cir. 2001) (requiring personal knowledge of website); *Thompson v. Bank of America Nat'l Ass'n*, 783 F.3d 1022, 1027 (5th Cir. 2015) (same).

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