

Filed: November 6, 2023

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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 IPR2022-01291  
U.S. Patent 10,687,745

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



## I. INTRODUCTION

Apple's Motion seeks to exclude evidence that the ITC found persuasive in upholding the validity of the '745 Patent claims. During the ITC Investigation, Apple elicited sworn testimony from its *own* engineers about the challenges developing a device that could determine oxygen saturation at the wrist. Apple's *own* documents demonstrate that a POSITA would not have had a reasonable expectation of successfully measuring oxygen saturation at the wrist, reflect skepticism of measuring oxygen saturation at the wrist, failed attempts to measure oxygen saturation, and show the long-felt need for oxygen saturation determinations at the wrist.

Apple did not address this evidence in its Petition. Apple instead embarked on a strategy at both the Patent Office and ITC to prevent Masimo from introducing that evidence during these IPRs. The Board granted Masimo's Motion for Additional Discovery (Paper 23), allowing Masimo to present the evidence that the ITC considered and relied on in finding the '745 Patent claims valid.

Apple now renews its attempt to keep this highly probative evidence from consideration. Apple argues the Board should exclude sworn testimony from Apple's *own* witnesses as "unreliable" hearsay. Petitioner's Motion to Exclude ("Mot."), 1-2. But that testimony, and the related documents, are opposing party statements being offered against Apple and therefore *not* hearsay under FRE

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801(d)(2). But even if such testimony were hearsay, it would still be admissible because Apple’s attorneys elicited that testimony from Apple’s witnesses under oath. Such evidence is both highly probative and reliable. And regardless, numerous hearsay exceptions apply.

Apple also seeks to exclude portions of Dr. Duckworth’s opinions for relying on Apple’s engineers’ testimony and Apple’s internal documents, and for opinions that Apple alleges were “conclusory” or “presented without citation to evidence.” Mot., 3-4. At best, Apple’s objections go to the weight, not the admissibility, of the evidence and should be denied for that independent reason. But, on the substance, Apple’s Motion offers no explanation for how the objected-to paragraphs contain “conclusory” or unsupported statements because those paragraphs include citations to exhibits and Dr. Duckworth thoroughly explained his reasoning. In contrast, Apple’s expert had no idea that his declaration copied portions of Apple’s ITC briefing verbatim, and accordingly could not even say what documents he relied on because the declaration did not even change the ITC citations. *See* POPR 52-53 (comparing EX2052, 175 *with* EX1003, ¶76).

## II. ARGUMENT

### A. EX2074, EX2076-2086, and EX2089-2090 Are Not Hearsay

Apple characterizes EX2074, EX2076-2086, and EX2089-2090 as merely “testimony from witnesses in an ITC proceeding that is separate from the present

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proceeding.” Mot. 2. That is incorrect. The ITC proceeding involves the same parties and the same patent as this proceeding. Moreover, the exhibits Apple seeks to exclude are sworn testimony by *Apple’s witnesses* in the ITC proceeding (EX2076-EX2082), representations by *Apple’s counsel* during opening statements in the ITC hearing (EX2074), and *Apple’s documents* regarding its development of the oxygen saturation feature in the Apple Watch that were authored by *Apple’s engineers* (EX2083-2086, EX2089-2090). These are opposing party statements offered against that party, and therefore not hearsay. FRE 801(d)(2).

FRE 801(d)(2) excludes from the definition of hearsay a statement that is “offered against an opposing party” and “(A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; **or** (E) was made by the party’s coconspirator during and in furtherance of the conspiracy.” FRE 801(d)(2)(A)-(E). (emphasis added). All of the objected-to exhibits fall under one or more of these exclusions from the definition of hearsay.

EX2074 is an excerpt from *Apple’s opening statements* in the ITC evidentiary hearing, delivered by Apple’s ITC lead trial counsel, Joseph Mueller, regarding the scope of the ’745 Patent’s claims. *See* EX2074; *see also* EX2008, 39-71 (Apple’s

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opening statement). They are unquestionably statements “made by a person whom [Apple] authorized to make a statement on the subject,” and thus are not hearsay. FRE 801(d)(2)(C). Moreover, because these are trial arguments advanced by Apple’s counsel, they are also statements that Apple “manifested that it adopted or believed to be true.” FRE 801(d)(2)(B). *See, e.g., Apple Inc. v. Smartflash LLC*, CBM2015-00131, Paper 33 at 32-33 (Nov. 10, 2016) (prior testimony by party’s expert was not hearsay when offered against that party because the party authorized that expert to provide testimony on the subject and also adopted or believed the testimony to be true).

EX2076-2079 are trial transcripts of sworn testimony from *Apple’s engineers* in the ITC Investigation. Apple chose those specific engineers to testify on its behalf in the ITC. *See* EX2008, 39:3-40:13 (Apple’s opening statement introducing Apple’s witnesses). *See* FRE 801(d)(2)(C). Moreover, EX2076-2082, which includes both the trial and deposition transcripts, are Apple’s engineers’ testimony about their efforts in developing the oxygen saturation feature for the Apple Watch Series 6. All of those engineers were employed by Apple and were testifying on matters within the scope of their employment at Apple, namely their work on the Apple Watch. *See* EX2076, 952:15-18, 954:23-955:9 (Land employed by Apple to work on Apple Watch); EX2077, 993:17-20, 996:25-997:8 (Mannheimer employed by Apple to work on Apple Watch); EX2078, 918:22-919:8 (Waydo employed by

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