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 IPR2022-01465
U.S. Patent 10,687,745

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PETITIONER'S MOTION TO EXCLUDE

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64 and the Federal Rules of Evidence, Petitioner Apple Inc. moves to exclude Exhibits 2074, 2076-2086, and 2089-2090, and portions of Exhibits 2070 and 2100. Exhibits 2074, 2076-2086, and 2089-2090 contain inadmissible hearsay statements made outside of this proceeding submitted for the truth of the matter asserted. Exhibits 2070 and 2100 are declarations from Patent Owner's expert, Dr. Duckworth, that improperly rely on statements made outside of this proceeding for the truth of the matter asserted, and which constitute inadmissible hearsay.

Petitioner timely objected to these exhibits in Objections to Evidence filed on June 5, 2023 and Oct. 10, 2023. *See* Paper 31; Paper 51. For the reasons described below, Exhibits 2072-2074 and 2076-2092, and the identified portions of Exhibits 2070 and 2100 should be excluded from evidence in this proceeding.

II. ARGUMENT

A. Exhibits 2074, 2076-2086, and 2089-2090 Should be Excluded as Inadmissible Hearsay

Exhibits 2074, 2076-2086, and 2089-2090 constitute inadmissible hearsay as statements made outside of this proceeding submitted for the truth of the matter asserted, and should therefore be excluded under FRE 801. These exhibits were cited at, for example, pages 1-2, 30, 31-39, and 54 of the POR. With only some exceptions that are expressly included in the Federal Rules of Evidence, which are

not applicable here, hearsay statements are deemed unreliable and should not be admitted into evidence.

Exhibits 2074, 2076-2086, and 2089-2090 contain transcripts of testimony from witnesses in an ITC proceeding that is separate from the present proceeding. They are therefore statements made outside of the current trial and they are offered to prove the truth of the matter asserted in the statements, thereby meeting the definition of hearsay under FRE 801.

Patent Owner has identified no applicable hearsay exceptions, and indeed, the above identified exhibits also do not fall under any such exception. The "residual exception" of Federal Rule of Evidence 807 is illustrative, and does not apply here. The residual exception requires that a statement must: 1) have equivalent circumstantial guarantees of trustworthiness; 2) be offered as evidence of a material fact; 3) be more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and 4) be in the interests of justice to admit. Fed. R. Evid. 807. The Federal Circuit has been clear that the residual exception to the hearsay rule is to be reserved for "exceptional cases," and is not "a broad license on trial judges to admit hearsay statements that do not fall within one of the other exceptions." *See Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996), *as amended on reh'g in part* (Jan. 2, 1997) (internal quotations omitted). The hearsay statements in 2074, 2076-

2086, and 2089-2090 do not rise to this level of exceptionality and should be excluded.

B. Portions of Exhibit 2070 Should be Excluded

Paragraphs ¶¶ 22-28, 30-33, 53, 73 of Exhibit 2070 (Second Declaration of Dr. Duckworth) should be excluded under FRE 802 because they include testimony based on statements made outside of this proceeding that are relied upon for the truth of the matter asserted. These paragraphs of Exhibit 2070 were cited at, for example, pages 28, 30-31, 34-36, 38-39, and 54 of the POR. The statements are offered for the truth of the matter asserted. For example, these paragraphs include testimony from witnesses made in the course of a co-pending ITC proceeding, not the current IPR proceeding. With only some exceptions set forth in the Federal Rules of Evidence, but which are not applicable here, hearsay statements are deemed unreliable and should not be admitted into evidence. Consistent with this policy, paragraphs ¶¶ 22-28, 30-33, 53, 73 of Exhibit 2070 should be excluded.

C. Portions of Exhibit 2100 Should be Excluded

Paragraphs ¶¶ 9, 17, 19, 20, 23, 26, 28, 32, 33, 48, 49, 64, and 69-71 of Exhibit 2100 (Third Declaration of Dr. Duckworth) should be excluded under FRE 702 and 703 because they contain opinions that are conclusory, do not disclose supporting facts or data, are based on unreliable facts, data, or methods, and/or

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