Filed: November 13, 2023

Filed on behalf of:
Patent Owner Masimo Corporation
By: Brian C. Claassen (Reg. No. 63,051)
Carol Pitzel Cruz (Reg. No. 61,224)
Daniel Kiang (Reg. No. 79,631)
Jeremiah S. Helm, Ph.D. (admitted *pro hac vice*)

KNOBBE, MARTENS, OLSON & BEAR, LLP
2040 Main Street, Fourteenth Floor
Irvine, CA 92614
Tel.: (949) 760-0404
Fax: (949) 760-9502
E-mail: AppleIPR745-3@knobbe.com

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,

Petitioner,

v.

MASIMO CORPORATION,

Patent Owner.

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

PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE

I. EX1009, EX1010, and EX1014-EX1016 Are Irrelevant

EX1009, EX1010, and EX1014-EX1016 are irrelevant because Apple did not identify any issue for which Anthony analyzed or relied on them. FRE 401, 402.

II. EX1039 and EX1041 Were Not Authenticated

Apple's Opposition admits that Apple did not previously provide information regarding the source and content of EX1039 and EX1041 sufficient to authenticate them. Apple now argues that information allegedly provided by Dr. Warren can be found in the ITC Initial Determination and Apple's own ITC brief to explain these exhibits. Opp'n, 2. But Apple did not raise this information in response to Masimo's objections. Instead, Apple waited until after all substantive papers were submitted. And Warren is not a witness in this proceeding and did not authenticate the source and content of EX1039 and EX1041. Thus, the Board should exclude the exhibits for lack of authenticity.

Apple's allegations that these exhibits are "evidence that Dr. Warren experimented with measuring pulse oximetry on the wrist with his students at Kansas State University in 2002" (*Id*. citing EX1033, 114) are untimely, improper, and importantly, do not tell the whole story. Apple submitted EX1039 and EX1041 in the ITC in response to Masimo's evidence that a POSITA would not have expected to successfully measure blood oxygen in a wristwatch. EX1033 at 115-117. After hearing Warren's live testimony and reviewing Apple's exhibits and briefing, the

ALJ found Warren "provided no testimony regarding the results of those measurements [at the wrist]." *Id*. at 117. The ALJ also found that EX1039 (RX-0504) "does not identify measurements of oxygen saturation at the wrist." *Id*. If Apple wishes the Board to consider these exhibits "for the sake of completeness," (Opp'n at 4), then it should also consider the ALJ's findings regarding these exhibits.

Apple also argues EX1039 and EX1041 are admissible under FRE 703 as information Anthony relied upon and to "corroborate his assessment regarding the state of the art." Opp'n, 4. But Anthony did not analyze EX1039 and EX1041 at all. EX1042, ¶33 n.5. The Board should reject Apple's belated attempt to supplement the record. Because Anthony did not analyze these exhibits, they should be disregarded as irrelevant or afforded little to no weight. FRE 401, 402.

III. EX1056 and Paragraph 31 of EX1042 Should Be Excluded

Apple incorrectly argued, without legal authority, that it had no burden to prove EX1056's public accessibility. Apple represented that EX1056 is a "prior art reference[]" and is "relevant to informing the state of the art of pulse oximetry." 1465 Reply, 14, Opp'n, 5. As the proponent of EX1056, Apple bore the burden to prove that it is what Apple said it is. FRE 901. Apple did not.

No record evidence supports Apple's and Anthony's claim that WPI published EX1056 in April 2013. Instead, Apple improperly directs the Board to a webpage URL in its Reply that allegedly "evidences that APPLE-1056 was

published on April 24, 2013." Opp'n, 6. But that webpage is not in evidence, was not served as supplemental evidence, and thus cannot be considered. 37 C.F.R. § 42.64(b)(2). Even if the Board were to consider the webpage, the Board should also evaluate the additional "File Details" on that page for the file "Final_MQP_Report.pdf" (https://digital.wpi.edu/concern/parent/6969z2326/file_sets/70795903r). FRE 106. The "File Details" indicate "**Date Uploaded:** 2020-01-15" and "**Date Modified:** 2020-01-15." Thus, Apple's citation to the webpage does not clarify the date EX1056 was allegedly available.

Apple also alleges that EX1056 and paragraph 31 of EX1042 are admissible under FRE 401-402 as relevant to the state of the art. But EX1056 is undated and Apple does not dispute that it is unsigned and not peer-reviewed. Apple offers no evidence of the reliability of EX1056. Apple has not established EX1056 as prior art (*see* Paper 56, 7-8). Thus, EX1056 and EX1042, ¶31 do not have "any tendency to make a fact more or less probable than it would be without the evidence" and therefore should be excluded as irrelevant. FRE 401, 402.

Apple argues that EX1056 is admissible because Anthony stated it is something an "expert would rely upon" and "can be disclosed to the factfinder as long as the probative value of the evidence substantially outweighs its prejudicial effect." Opp'n, 7. Because Apple failed to demonstrate that EX1056 is prior art or an authentic document with the hallmarks of reliability, it is irrelevant and without

probative value. Apple asserts the objection goes "at most, to the weight of the evidence." Opp'n, 7 (citing *Hamilton Techs. & Whittington*). But unlike those cases, there is no evidence that EX1056 was ever available during the relevant time, or, indeed, even an authentic copy of any document available before 2020. Nor did Apple establish that an expert can reasonably rely on undated, unauthenticated documents to assess the state of the art. *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1373-74 (Fed. Cir. 2021) (affirming exclusion of unauthenticated source code and expert opinions relying on such code because proffering party did not establish experts reasonably rely on unauthenticated code).

Masimo also moved to exclude EX1042, ¶31 for lack of foundation. Mot., 4-6. Apple's Opposition did not respond to that objection. Opp'n 5-8. Apple thus conceded the testimony lacks foundation and should be excluded.

IV. Paragraphs 27, 31, and 33-34, 40-50, and 61-64 of EX1042 and EX1054, EX1058, EX1063-1066 Should Be Excluded

Apple's Reply does not cite any specific portion of EX1054, EX1058, EX1063-EX1066 or explain their relevance. 1465 Reply, 13-15. Instead, the Reply states "Anthony reviewed these references," and that Anthony "explained how they further demonstrate" reasonable expectation of success. *See id.* (relying exclusively on EX1042, ¶¶27, 31, 33-34). Apple suggests that Anthony's declaration is "supporting the arguments made in the Petitioner's Reply, not stand-alone arguments." Opp'n, 8. But Anthony's declaration is the ***only*** place where these

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