IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPLE INC., Plaintiff, v. MASIMO CORPORATION and SOUND UNITED, LLC, Defendants.	)	C.A. No. 22-1377-MN **JURY TRIAL DEMANDED** **PUBLIC VERSION**
MASIMO CORPORATION, Counter-Claimant, v. APPLE INC., Counter-Defendant.	)	

DECLARATION OF KERRI-ANN LIMBEEK IN SUPPORT OF PLAINTIFF APPLE INC.'S MOTION FOR AN EXPEDITED TRIAL

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPLE INC.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 22-1377-MN
v.	)	
	)	**JURY TRIAL DEMANDED**
MASIMO CORPORATION and SOUND UNITED, LLC,	)	
	)	**PUBLIC VERSION**
Defendants.	)	
	)	
MASIMO CORPORATION,	)	
	)	
Counter-Claimant,	)	
	)	
v.	)	
	)	
APPLE INC.,	)	
	)	
Counter-Defendant.	)	

DECLARATION OF KERRI-ANN LIMBEEK IN SUPPORT OF PLAINTIFF APPLE INC.'S MOTION FOR AN EXPEDITED TRIAL

I, Kerri-Ann Limbeek, declare and state as follows:

1. I am an attorney and partner at the law firm Desmarais LLP, counsel of record for Plaintiff Apple Inc. ("Apple") in the above-captioned case. I am licensed to practice law by and in good standing with the Bar of the State of New York. I submit this declaration based on personal knowledge, and if called upon as a witness, could competently testify to the truth of each statement herein.

2. I submit this declaration in support of Apple's Motion for an Expedited Trial, submitted concurrently herewith.

3. Attached as **Exhibit A** is a copy of "Apple Expands Apple Watch Marketing Efforts With New Multi-Page Spread in Vogue Magazine" (Feb. 25, 2015), available at https://www.macrumors.com/2015/02/25/apple-watch-vogue-magazine-march/.

4. Attached as **Exhibit B** is a copy of "Medical Pioneer Masimo Announces the Full Market Consumer Release of the Masimo W1™, the First Watch to Offer Accurate, Continuous Health Data" (Aug. 31, 2022), available at https://investor.masimo.com/news/news-details/2022/Medical-Pioneer-Masimo-Announces-the-Full-Market-Consumer-Release-of-the-Masimo-W1-the-First-Watch-to-Offer-Accurate-Continuous-Health-Data/default.aspx.

5. Attached as **Exhibit C** is a copy of the Masimo W1 product webpage, available at https://www.masimopersonalhealth.com/products/masimo-w1 (last accessed Dec. 9, 2022).

6. Attached as **Exhibit D** is a copy of "Masimo (MASI) Q2 2022 Earnings Call Transcript" (Aug. 10, 2022), available at https://www.fool.com/earnings/call-transcripts/2022/08/10/masimo-masi-q2-2022-earnings-call-transcript/.

7. Attached as **Exhibit E** is a copy of "Masimo Closes Acquisition of Sound United" (Apr. 12, 2022), available at https://www.soundunited.com/news/Masimo%20Closes%20Acquisition%20of%20Sound%20United.

8. Attached as **Exhibit F** is a copy of "Masimo completes acquisition of Sound United" (Apr. 12, 2022), available at https://www.massdevice.com/masimo-completes-acquisition-of-sound-united/.

9. Attached as **Exhibit G** is a copy of "Masimo (MASI) Q1 2022 Earnings Call Transcript" (May 4, 2022), available at https://www.fool.com/earnings/call-transcripts/2022/05/04/masimo-masi-q1-2022-earnings-call-transcript/.

10. Attached as **Exhibit H** is a copy of "Masimo (MASI) Q4 2021 Earnings Call Transcript" (Feb. 15, 2022), available at https://www.fool.com/earnings/call-transcripts/2022/02/15/masimo-masi-q4-2021-earnings-call-transcript/.

11. Attached as **Exhibit I** is a copy of "Masimo Corporation Analyst/Investor Day" (Dec. 13, 2022), available at https://www.capitaliq.spglobal.com/apisv3/docviewer/documents?mid=197045029.

12. Attached as **Exhibit J** is a copy of Defendants Masimo Corporation and Sound United, LLC's Responses and Objections to Apple's Interrogatory No. 1, served on January 11, 2023.

13. Attached as **Exhibit K** is a copy of the Declaration of Eric Jue in Support of Apple Inc.'s Motion for an Expedited Trial, dated January 18, 2023, and exhibits thereto.

14. Attached as **Exhibit L** is a copy of the Declaration of Peter Russell-Clarke in Support of Apple Inc.'s Motion for an Expedited Trial, dated January 12, 2023.

15. Attached as **Exhibit M** is a copy of the Declaration of Alan D. Ball in Support of Apple Inc.'s Motion for an Expedited Trial, dated January 29, 2023, and exhibits thereto.

16. Attached as **Exhibit N** is a copy of the Declaration of Dr. Itamar Simonson in Support of Apple Inc.'s Motion for an Expedited Trial, dated January 27, 2023, and exhibits and appendices thereto.

17. Attached as **Exhibit O** is a copy of the Declaration of James Malackowski in Support of Apple Inc.'s Motion for an Expedited Trial, dated January 30, 2023, and appendices thereto.

EXHIBIT O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPLE INC., Plaintiff, v. MASIMO CORPORATION and SOUND UNITED, LLC, Defendants.	C.A. No. 1:22-1377-MN **DECLARATION OF JAMES MALACKOWSKI IN SUPPORT OF APPLE INC.'S MOTION FOR AN EXPEDITED TRIAL**
MASIMO CORPORATION, Counter-Claimant, v. APPLE INC., Counter-Defendant.	

of Masimo's overall sales. Indeed, W1 was just released to the public in the United States on August 31, 2022. As a result, W1 has not yet seen widespread adoption or entrenchment in the market, and thus Masimo need not rely on the sale of W1 for Masimo's operations. Accordingly, enjoinment of Masimo's sales of W1 post-trial is unlikely to cause significant hardship to Masimo's business.

VIII. APPLE WATCH'S PATENTED DESIGNS HAVE EXPERIENCED SIGNIFICANT COMMERCIAL SUCCESS AND INDUSTRY PRAISE.

143. As stated above, the versions of Apple Watch that practice one or more of the Asserted Patents were released on the following dates:

Apple Watch Version	Release Date
Apple Watch Series 4	September 21, 2018[184,185] (Discontinued)
Apple Watch Series 5	September 20, 2019[186]
Apple Watch Series 6	September 18, 2020[187]
Apple Watch Series 7	October 15, 2021[188]
Apple Watch Series 8	September 16, 2022[189]

[184] "Apple Watch Series 4: Beautifully redesigned with breakthrough communication, fitness and health capabilities," *Apple*, https://www.apple.com/newsroom/2018/09/redesigned-apple-watch-series-4-revolutionizes-communication-fitness-and-health/.

[185] "Apple discontinued last year's Apple Watch Series 4 after announcing its brand-new watch – here's how to decide between the Series 3 and Series 5, *Business Insider*, https://www.businessinsider.com/apple-watch-series-4-discontinued-series-5-vs-series-3-2019-9.

[186] "Apple unveils Apple Watch Series 5," *Apple*, https://www.apple.com/newsroom/2019/09/apple-unveils-apple-watch-series-5/.

[187] "Apple Watch Series 6 delivers breakthrough wellness and fitness capabilities," *Apple*, https://www.apple.com/newsroom/2020/09/apple-watch-series-6-delivers-breakthrough-wellness-and-fitness-capabilities/.

[188] "Apple Watch Series 7 orders start Friday, October 8, with availability beginning Friday, October 15," *Apple*, https://www.apple.com/newsroom/2021/10/apple-watch-series-7-orders-start-friday-october-8/.

[189] "Apple reveals Apple Watch Series 8 and the new Apple Watch SE," *Apple*, https://www.apple.com/newsroom/2022/09/apple-reveals-apple-watch-series-8-and-the-new-apple-watch-se/.

Apple Watch Ultra	September 23, 2022[190]

144. I understand that each of those versions of Apple Watch that practice one or more of the Asserted Patents, except Apple Watch Series 4, are currently available for sale, including at national retailers like Best Buy.[191] However, I understand that Apple Watch Series 5 is only being sold as a refurbished product.[192]

145. Apple's success in innovation and design has resulted in Apple Watch repeatedly ranking as the highest selling smartwatch. Indeed, since Apple Watch released Apple Watch Series 4 in 2018, Apple has had the highest percentage of the global smartwatch shipments each year, making Apple Watch the most popular smartwatch ever.[193]

146. Accordingly, in my opinion, the versions of Apple Watch that practice one or more Asserted Patents, including at least Apple Watch Series 4, Apple Watch Series 5, Apple Watch Series 6, Apple Watch Series 7, Apple Watch Series 8, and Apple Watch Ultra, have experienced significant commercial success.

147. Additionally, Apple Watch's designs, including the design of Apple Watch Series 4 – 8 and Apple Watch Ultra, which practice the Asserted Patents, have received industry praise in numerous publications.[194]

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[190] "Introducing Apple Watch Ultra," *Apple*, https://www.apple.com/newsroom/2022/09/introducing-apple-watch-ultra/.

[191] "Apple Watch Series 5 Search Results, *Best Buy*, https://www.bestbuy.com/site/searchpage.jsp?id=pcat17071&st=apple+watch+series+5.

[192] "Apple Watch Series 5 Search Results, *Best Buy*, https://www.bestbuy.com/site/searchpage.jsp?id=pcat17071&st=apple+watch+series+5.

[193] "Quarterly smartwatch unit shipment share worldwide from 2018 to 2022, by vendor," *Statista*, https://www.statista.com/statistics/910862/worldwide-smartwatch-shipment-market-share.

[194] *See supra* ¶¶ 34-35.

148. Further, Apple's commercial success and industry praise is directly related, in part, to the patented designs in the Asserted Patents.

149. I understand that Dr. Simonson's surveys included questions regarding the materiality of the design of the back of Apple Watches in relation to consumer purchasing decisions, and the impact of the design on consumer purchasing decisions.[195] Specifically, I understand that Dr. Simonson's surveys included assessment of Apple Watch Series 5 and Apple Watch Series 8, which, as shown above in **Figures 5–6**, addresses all versions of Apple Watch that practice the Asserted Patents because Apple Watch Series 4 and Series 5 have the same back design and Apple Watch Series 6, Apple Watch Series 7, Apple Watch Series 8, and Apple Watch Ultra have the same back design.

150. I understand that, of the 198 respondents surveyed, 28.3 percent stated that the design of the back of Apple Watch Series 5 would impact their purchasing decision and of the 195 respondents surveyed, 31.8 percent stated that the design of the back of Apple Watch Series 8 would impact their purchasing decision.[196] I understand that those numbers increase to 32.1 percent and 33.3 percent, respectively, when focusing on respondents who are familiar with smartwatches. While respondents also identified other features as impactful to their purchasing decision, I understand that a patented feature need not be the only feature that drives consumer purchasing decisions to show a nexus to commercial success and industry praise. Moreover, the results show that the design of the back of Apple Watch was selected approximately twice more frequently than "Two Time Zone Display," further evidencing the impact of the design of the back of Apple Watch to its commercial success and industry praise.

[195] Declaration of Itamar Simonson dated Jan. 27, 2023 at ¶¶ 19-34.

[196] Declaration of Itamar Simonson dated Jan. 27, 2023 at ¶ 33, Fig. 4.

151. In addition, and as stated above in relation to the nexus between Masimo's use of the patented designs in the Asserted Patents and Apple's likely lost product market share, relevant industry publications identified above show the importance of design to the smartwatches generally,[197] and that general importance of design applies equally to the design of the back of Apple Watch. Indeed, the back of the watch constitutes a substantial portion of the surface area of smartwatches that a smartwatch provider can design. Clearly, consumers' focus on the beautiful "design" of smartwatches is not limited to only one side of a smartwatch (e.g., the front of the watch). Indeed, the general importance of the design of the back of smartwatches is further supported by Mr. Jue's and Mr. Russell-Clarke's statements regarding Apple's thoughtful design of the back of Apple Watch.[198]

152. Accordingly, Apple's commercial success and industry praise for Apple Watch is directly related to the patented designs in the Asserted Patents.

Date: January 30, 2023

Respectfully submitted,

James E. Malackowski

[197] Section V.A, *supra*.

[198] Section V.C, *supra*.