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-JLH **JURY TRIAL DEMANDED** **PUBLIC VERSION**
MASIMO CORPORATION, Counter-Claimant, v. APPLE INC., Counter-Defendant.	
APPLE INC., Plaintiff, v. MASIMO CORPORATION and SOUND UNITED, LLC, Defendants.	C.A. No. 22-1378-JLH **JURY TRIAL DEMANDED** **PUBLIC VERSION**
MASIMO CORPORATION and CERCACOR LABORATORIES, INC., Counter-Claimants, v. APPLE INC., Counter-Defendant.	

JOINT LETTER FOR MARCH 20, 2024 CASE MANAGEMENT CONFERENCE

APPLE 1075
Apple v. Masimo
IPR2024-00296

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TABLE OF EXHIBITS

Exhibit	Description
1	Tables summarizing the status of IPRs relating to Apple and Masimo patents
2	Email chain regarding Freedom watch
3	Deposition Transcript (Excerpted) of Joseph Kiani, Nov. 6, 2023
4	Transcript of Masimo Earnings Call held on Feb. 27, 2024, available at https://seekingalpha.com/article/4674014-masimo-corporation-masi-q4-2023-earnings-call-transcript
5	Table of pending motions
6	February 26, 2024 Hearing in the parties' Central District of California litigation

Dear Judge Hall:

Per the Court's Amended Scheduling Order, the parties respectfully submit this Letter.

I. Summary of claims and pending motions in the 1377 and 1378 cases

Apple filed the 1377 and 1378 cases on October 20, 2022, asserting that Masimo and Sound United willfully infringe four of Apple's design patents[1] and six of Apple's utility patents.[2] Apple alleges infringement through, *e.g.*, the sale of Masimo's W1 watch and its charger. Apple also accuses Masimo's Freedom watch and Health Module of infringing Apple's patents. Masimo denies Apple's claims. Among other defenses, Masimo contends that the accused products do not infringe the asserted patents, the patents are invalid, and the design patents are unenforceable for inequitable conduct. *See* 1377 Case, D.I. 31; 1378 Case, D.I. 15.

Masimo asserts counterclaims that Apple willfully infringed ten Masimo patents[3] by selling Apple Watch. *See* 1378 Case, D.I. 15. Masimo also asserts claims against Apple for antitrust violations, false advertising, deceptive trade practices, and unfair competition. (*See id.*) Apple denies Masimo's claims. Among other defenses, Apple contends Masimo cannot show that Apple engaged in anticompetitive conduct or that Masimo suffered any antitrust injury in a relevant market. Apple also contends that, to the extent the claims arise from misappropriation or infringement of Masimo's intellectual property, they are barred by res judicata. Apple also contends that Apple Watch does not infringe any Masimo asserted patent, that those patents are invalid, and that those patents are unenforceable for inequitable conduct.

The Court has not yet issued a *Markman* Order. *See* 1377 D.I. 273; 1378 D.I. 294, 295. Additionally, multiple motions are pending, as listed in Exhibit 5.

II. Summary of all pending disputes between the parties in other venues

The disputes between the parties outside of the 1377 and 1378 cases are as follows.

Central District of California. In January 2020, Masimo sued Apple in the Central District of California, asserting claims for patent infringement, trade secret misappropriation, and correction of ownership/inventorship of Apple patents. Masimo's patent infringement claims were stayed pending *inter partes* review ("IPR") proceedings filed by Apple and then subsequent appeals at the Federal Circuit. In April 2023, the court tried Masimo's trade secret misappropriation and patent ownership/inventorship claims. The trial ended in a mistrial when the jury could not reach a verdict. A retrial is scheduled to begin on October 31, 2024.

International Trade Commission. In June 2021, Masimo filed a complaint in the International Trade Commission ("ITC") against Apple for patent infringement. The ITC issued a Limited Exclusion Order and Cease and Desist Order against certain Apple Watch models with pulse oximetry. Those orders took effect on December 26, 2023, but were stayed by the Federal Circuit on December 27, 2023, and then reinstated on January 18, 2024. On December 26, 2023,

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[1] U.S. Patent Nos. D735,131, D883,279, D947,842, and D962,936.

[2] U.S. Patent Nos. 10,076,257, 10,627,783, 10,942,491, 10,987,054, 11,106,352, and 11,474,483.

[3] U.S. Patent Nos. 8,190,223, 10,687,743, 10,722,159, 10,736,507, and 10,984,911 (not stayed); U.S. Patent Nos. 7,761,127, 10,687,745, 10,912,501, 10,912,502, and 10,945,648 (stayed pursuant to 28 U.S.C. § 1659(a), *see* 1378 D.I. 25).

Apple filed its petition for review and notice of appeal of the Final Determination of the ITC, including all underlying orders. On January 12, 2024, the Exclusion Order Enforcement Branch of U.S. Customs and Border Protection approved a redesigned version, finding that Apple had disabled the Blood Oxygen feature. On January 18, 2024, the Commission's Limited Exclusion Order and Cease and Desist Order covering Apple products with the Blood Oxygen feature took effect, and on that same day, Apple began to sell its redesigned Apple Watch.

IPRs. Four tables summarizing the status of all IPRs between the parties, and related appeals, are attached as Exhibit 1.

III. Apple's position as to trial scope, timing, and sequence

These cases present three categories of claims: (1) Apple's claims for infringement of its design and utility patents—*i.e.*, the very first set of claims asserted in these cases—and Masimo's defenses to those same claims[4]; (2) Masimo's non-patent defenses and counterclaims, including its antitrust and false advertising counterclaims, and Apple's defenses to those counterclaims; and (3) Masimo's counterclaims on its own patents, and Apple's corresponding defenses. Apple respectfully submits that these three sets of claims will require three trials, and that the first trial—on the offensive / defensive patent issues related to the first set of claims asserted in these cases, namely, Apple's design and utility patents—should be held this summer. The second and third trials could be held later this year or next year, as the Court's schedule permits. Below, Apple provides more detail on its proposed structure for each trial.

Trial 1: Apple's claims for infringement of its design and utility patents should be tried first. These were the first-filed claims in these cases, and the number of patents—and Masimo's patent defenses—present ample complexity for a single trial. Apple may seek to enjoin Masimo from selling its W1 (both original design and "wave" design[5]) and from launching its forthcoming Freedom watch, while Masimo has no need for any injunctive relief. Masimo has positioned its Freedom watch as [redacted] Ex. 3 (Masimo CEO Tr.) 166:4-167:13, 168:2-169:10. And Masimo has repeatedly threatened that the Freedom's launch is imminent.[6] *Id.* 167:23-168:1; Ex. 4 ("We have three product launches planned for 2024" including "Freedom"). Thus, time remains of the essence for Apple's affirmative patent claims, and those claims are narrow enough to be tried expeditiously. At a minimum, the Court should set for trial Apple's patents that are not in any IPR. The Apple patents not in any IPR are D'131, D'279, D'842, D'936, '054, and '483.

To the extent the Court does not enter summary judgment in Apple's favor on Masimo's counterclaim of inequitable conduct of Apple's design patents,[7] the inequitable conduct claim should be tried with or immediately following the trial on Apple's claims for infringement. *In re Innotron Diagnostics*, 800 F.2d 1077, 1084 (Fed. Cir. 1986) (denying mandamus petition seeking to overturn district court's decision to hold separate trials on patent issues, including inequitable conduct, underlying antitrust claim and non-patent related antitrust issues); *DriveCam, Inc. v.*

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[4] Apple does not waive its right to assert that a given issue should be tried to the bench, not jury.
[5] Masimo's assertion in its portion of this letter that it discontinued the original design is without support. Notably, throughout the past year Masimo's website advertised the "wave" design while shipping to customers only the original design. *See* D.I. 67; D.I. 529 at Ex. A46 ¶¶ 8-9.
[6] Recently, Masimo has refused to provide specific information about Freedom's launch. Ex. 2.
[7] Masimo asserts no claims of inequitable conduct against Apple's utility patents.

SmartDrive Sys., Inc., No. 11-CV-0997, 2012 WL 13175930, at *7 (S.D. Cal. Mar. 26, 2012) (bifurcating inequitable conduct from *Walker Process* claim because "[r]esolution of these issues will eliminate or reduce some of the proof necessary to ultimately decide the antitrust counterclaims") (citing *Innotron*); *SanDisk Corp. v. STMicroelectronics Inc.*, No. C 04-4379, 2009 WL 1404689, at *2 (N.D. Cal. May 19, 2009) ("a finding that SanDisk did not engage in inequitable conduct may moot ST's Walker Process claim") (bifurcating inequitable conduct from remaining *Walker Process* elements) (citing *Innotron*); *Implant Innovations, Inc. v. Nobelpharma AB*, No. 93 C 7489, 1996 WL 568791, at *3 (N.D. Ill. Oct. 2, 1996) (bifurcating inequitable conduct claims to be resolved with the "patent claims" from remainder of antitrust claims) (citing *Innotron*). Trying Masimo's inequitable conduct claim together with Apple's patent claims would reduce jury confusion. Inequitable conduct is a patent claim, sensibly tried together with other patent claims involving the same patents. The jury's decision would then be preclusive as to the related elements of Masimo's *Walker Process* claim in a later antitrust trial, greatly simplifying those proceedings. *See Innotron*, 800 F.2d at 1086 (separate jury trials on inequitable conduct and antitrust claims did not violate Seventh Amendment). By contrast, trying Masimo's inequitable conduct claim together with its antitrust claims would add another entirely distinct (and complex) body of law and set of facts to a claim that already spans antitrust law and false advertising, and risk needlessly confusing the jury. The Court should determine the appropriate form of any necessary trial on inequitable conduct—including whether it is tried to a jury or to the Court—after ruling on Apple's motion for summary judgment of no antitrust violation, and Apple reserves all rights as to the form of any such trial to be determined at the appropriate time. Trial 1 would take approximately 5-7 days, depending on the number of patents set for trial and whether inequitable conduct is in the case.

Masimo's assertion that a trial on Apple's design patents should be delayed based on Masimo's speculation that the Federal Circuit will change the standard for design patent obviousness is Masimo's third attempt at raising this issue, which the Court denied previously. *See* D.I. 341-1 (August 3, 2023 Hearing Transcript) at 57:2-58:6; D.I. 365. Masimo offers no change in circumstances that warrants Masimo yet again raising it. Finally, Masimo is wrong in arguing that Apple has no right to a jury trial on its patent infringement claims. Masimo filed its motion on that issue only yesterday, March 7, and Apple will oppose the motion in due course. Apple maintains its jury trial demand for all its infringement claims.

Trial 2: To the extent not resolved at summary judgment, the second trial should focus on Masimo's antitrust and false advertising counterclaims. Masimo has shown no reason these claims must be resolved expeditiously, Masimo's "kitchen sink" counterclaims cannot, as a practical matter, be tried this summer, and rushing those claims to trial would not serve judicial economy.

First, "[e]conomy is served because in the trial of the patent issues, the validity of the patent and [any] affirmative defenses," including inequitable conduct, "will be determined and will become law of the case and thus removed from trial on the … antitrust issues." *Innotron*, 800 F.2d at 1085. If the patents are valid, then the *Walker Process* claim is moot. If the patents were obtained by fraud, then the later trial can resolve only the "distinct and separable" issues of market definition and antitrust injury, consistent with the Seventh Amendment's jury trial guarantee, along with the other claims of anticompetitive conduct. *Id.* at 1086; *see also Masimo Corp. v. Philips Elecs. N. Am. Corp.*, 2010 WL 925864, at *2 (D. Del. Mar. 11, 2010) (granting Masimo's motion to bifurcate in part because "a trial on Masimo's patent claims will simplify some of [the] antitrust counterclaims"). *Second*, "[a]voidance of prejudice and confusion is served in trying first the

patent issues, without injecting the different counterclaim issues which require different proof and different witnesses." *Innotron*, 800 F.3d at 1085. Trying the patent claims before the antitrust and false advertising counterclaims will permit each jury to focus on a considerably less complex set of issues. *See Masimo*, 2010 WL 925864, at *2 (listing the "intricate factual and economic analyses" that would, in combination with the patent case, "pose a difficult task for even the most astute of juries"); *Innotron*, 800 F.3d at 1085 ("Convenience of all is served in trying the less complex patent issues first . . . ."). *Finally*, as explained above, "[e]xpedition is served because the patent issues on the present schedule will be ready for trial … before the antitrust issues can be made ready." *Innotron*, 800 F.3d at 1085. For these reasons, trying antitrust counterclaims after the original patent claims has remained the "common" approach for nearly 40 years. *Masimo*, 2010 WL 925864, at *1 & n.5; *see also DSM IP Assets, B.V. v. Honeywell Int'l, Inc.*, 2024 WL 639991, at *6 (D. Del. Feb. 15, 2024).

Apple respectfully submits that the Court should wait until after it has resolved the pending summary judgment motions to schedule the date for the second trial. The Court allowed Masimo to pursue its theories in discovery, despite reservations as to their validity, and discovery has proven them to be baseless. Judicial economy would be greatly served by resolving those motions before scheduling Trial 2. Trial 2 could take approximately 10-12 days—although again, the precise scope will depend on the outcome of, *e.g.*, the summary judgment process.

Trial 3: The third trial should focus on Masimo's counterclaims regarding its patents. Masimo did not include any of the five unstayed patents in its multiple other litigations against Apple. If there were any urgency associated with those claims, Masimo would have asserted them long ago. In any event, Masimo agrees its patents should not be tried until they can all be tried together, so any trial needs to wait until after the Federal Circuit rules on Apple's appeal from the ITC decision.[8] Trial would take around 7 days, but could vary depending on the number of patents.

IV. Masimo's position as to trial scope, timing, and sequence

The Court asked the parties to address how to efficiently try the parties' claims. Masimo submits that the most efficient way to divide the claims for trial is as follows:

- All of Masimo's patent claims (including patents asserted at the ITC) in a jury trial after the Federal Circuit rules on Apple's appeal from the ITC decision.
- Masimo's antitrust claims and false-advertising claims in a jury trial before Apple's patent claims are tried.
- Apple's utility- and design-patent claims together in a ***bench*** trial after (1) the en banc decision in *LKQ v. General Motors*, (2) completion of all IPRs, and (3) trial on Masimo's antitrust claims.

***Masimo's Patent Claims*:** Although Masimo is prepared to move forward on its patents that were not stayed, those patents cover the same accused products as the ITC patents and some of the patents share the same specification. Thus, the most efficient path would be to try all of

[8] Masimo proposes that discovery should begin with respect to the '501 patent, but that patent is stayed. While Masimo notes fact discovery on the '501 patent would substantially overlap with fact discovery on the two patents on which the ITC found a violation, that counsels in favor of holding any discovery until the Federal Circuit appeal is resolved so that discovery on all three patents can be conducted at once and avoid, *e.g.*, multiple depositions of the same witnesses.

Masimo's patents together in a single jury trial. Because the ITC patents are stayed by statute, this could occur only after the Federal Circuit rules on Apple's appeal from the ITC investigation. In the meantime, the parties should conduct discovery on Masimo's '501 patent, which has completed all ITC proceedings. Fact discovery will substantially overlap with the fact discovery on the two patents in the ITC on which a violation was found. Thus, opening discovery on the '501 patent now would position the case for a more prompt trial once the Federal Circuit rules in the ITC case.

***Masimo's Antitrust Claims*:** Masimo submits that its antitrust and false-advertising claims should proceed together before Apple's claims for the following reasons:

First, Masimo's antitrust claims are based in part on a *Walker Process* theory, which shares factual issues with Masimo's inequitable-conduct defense. Thus, the *Walker Process* claims must be resolved by a jury before inequitable conduct is decided by the Court. *See Schering Corp. v. Mylan Pharms., Inc.*, 2010 WL 11474547 (D.N.J. June 10, 2010) (trying inequitable conduct before *Walker Process* would violate the Seventh Amendment because it would resolve "an equitable claim (the inequitable conduct defenses) prior to a legal claim (the *Walker Process* counterclaims), and said claims share common factual elements"); *Celgene Corp. v. Barr Labs., Inc.*, 2008 WL 2447354 (D.N.J. June 13, 2008) (bifurcating inequitable conduct and *Walker Process* "would violate [defendant's] Constitutionally-guaranteed right to trial by jury" and "must be denied" under *Beacon Theatres*).

Apple's cases cite back to *Innotron*, which merely denied a writ of mandamus after finding no abuse of discretion. Courts distinguish *Innotron* where the patent and antitrust cases are highly interwoven, for example, in claims involving "fraudulent procurement and enforcement of the patent." *See, e.g., Malibu Boats, LLC v. MasterCraft Boat Co., LLC*, 2016 WL 8317032, at *2 (E.D. Tenn. Oct. 28, 2016) (quoting *In re Theodor Groz & Sohne*, 972 F.2d 1352, (Fed. Cir. May 18, 1992) (nonprec)). Courts also distinguish *Innotron* where, as here, "discovery is complete and all of the issues will be ready for trial simultaneously." *Nortel Networks Inc. v. Foundry Networks, Inc.*, 2003 WL 26476584, at *13 (D. Mass. Mar. 24, 2003) (noting that, in *Innotron*, "the patent issues were ready for trial more than one year before the antitrust issues"). Thus, the Court should reject Apple's request to try inequitable conduct before the *Walker Process* claims. At a minimum, the Court should not entertain Apple's request without full briefing because granting that request would violate Masimo's Seventh Amendment right to a jury.

Second, Apple cannot obtain any relief on its design patents until the inequitable-conduct defense is resolved. Thus, trying the antitrust case first could increase efficiency in any subsequent trial of Apple's patent claims.

Third, Masimo's false-advertising claims overlap with Masimo's antitrust claims because false advertising is one category of alleged anticompetitive conduct. The false-advertising claims could also be tried efficiently with Masimo's patent claims.

***Apple's Claims*:** Masimo submits that Apple's utility and design patents should be tried to the bench after the en banc decision in *LKQ* and all IPRs are complete for the following reasons:

First, Apple's utility- and design-patent cases should be tried together. The patents address the same accused products: Masimo's W1 and other products that use Masimo's health module, such as Masimo's future Freedom watch. And because one of Apple's utility patents discloses the design claimed in the design patents, that utility patent is highly relevant to Masimo's functionality

defense to Apple's design patents. *Sport Dimension, Inc. v. Coleman Co.*, 820 F.3d 1316, 1322 (Fed. Cir. 2016); MPEP § 1504.01(c)(ii).

Second, nothing warrants squeezing a trial on Apple's claims into the Court's summer schedule. Apple began this case under the pretense that the ***back*** of Masimo's W1 watch renders the watch a "knock off" and "pirate" product. Apple feigned that Masimo—the company that Apple singled out and pursued as the world leader in pulse-oximetry technology—is a "Shenzhen" copyist. Those farfetched accusations are baseless.

Putting aside Apple's saber rattling, Apple has no need to pursue any claim against the original design in Apple's complaint. Masimo has discontinued the original design (below left) and replaced it with the "wave" design (below right). Masimo told Apple early in the case that it would do so. As to that discontinued product, Apple seeks only $250 in disgorgement and a moot injunction. And, as Masimo demonstrated in its summary judgment motion, Apple's claims against the new wave design are frivolous.

Original Design

Wave Design

Moreover, this summer, the parties will be preparing for an October 2024 trial in California. The Court indicated it will add Masimo patents (***stayed since 2020 at Apple's request*** pending Apple's IPRs and appeals) to that trial. *See* Ex. 6 at 10:14-17. Thus, the parties will be conducting fact discovery, claim construction, and expert discovery on those patents throughout the summer.

Third, Apple cannot obtain any relief on its design patents until Masimo's inequitable-conduct defenses are resolved.

Fourth, all of Apple's claims should be stayed. As Masimo explained in its pending motion to stay Apple's utility patents, the PTAB instituted IPRs on four of those six utility patents. -1378 D.I. 445 at 1. Apple itself frequently seeks to stay cases even when the Patent Office institutes an IPR only on a subset of the patents asserted in those cases. *Id*. at 13-14. Apple should be held to its positions. If Apple's design-patent claims were to survive summary judgment, those claims should be stayed until the en banc Federal Circuit rules in *LKQ*. As Masimo explained in its stay motion on Apple's design patents, by taking the case en banc, the Federal Circuit will most likely change the obviousness standard. -1377 D.I. 298 at 1-2. The Federal Circuit heard oral argument on February 5, 2024. Although the Court denied the motion at the time, the Court invited the parties to "reraise the issue of claim/issue sequencing" at the March 20, 2024 conference. -1377 D.I. 365. Masimo therefore reraises the issue. -1377 D.I. 298. The Court should not waste resources under a changing standard.

Fifth, because the parties have no right to a jury on Apple's infringement claims, those claims should be tried separately to the bench. Apple seeks only equitable remedies of an injunction and disgorgement for its design-patent claims under 35 U.S.C. § 289. It seeks no actual damages (available only under 35 U.S.C. § 284) for any of its patent claims. *See* Masimo's Motion for Bench Trial. -1377 D.I. 576.

Respectfully,

/s/ David E. Moore

David E. Moore

DEM:nmt/11371453/12209.00051

Enclosures
cc: Clerk of Court (via hand delivery)
Counsel of Record (via electronic mail)

EXHIBIT 1

Table 1: Apple IPRs Challenging D. Del.-counter-asserted Masimo Patents

PTAB Docket No.	Masimo Patent No.	Petition Filed	Filing Date Accorded	POPR Deadline	Institution Decision Deadline
IPR2024-00290	8,190,**223**	12/12/23	12/28/23	3/28/24	6/28/24
IPR2024-00241	10,687,**743**	12/12/23	1/10/24	4/10/24	7/10/24
IPR2024-00242	10,687,**743**	12/12/23	1/10/24	4/10/24	7/10/24
IPR2024-00243	10,722,**159**	12/12/23	1/11/24	4/11/24	7/11/24
IPR2024-00244	10,722,**159**	12/12/23	1/11/24	4/11/24	7/11/24
IPR2024-00293	10,736,**507**	12/12/23	12/28/23	3/28/24	6/28/24
IPR2024-00294	10,736,**507**	12/12/23	12/28/23	3/28/24	6/28/24
IPR2024-00296	10,984,**911**	12/12/23	12/28/23	3/28/24	6/28/24

Table 2: Masimo IPRs Challenging D. Del.-asserted Apple Patents

PTAB Docket No.	Apple Patent No.	Petition Filed	Institution Decision Deadline	Oral Hearing Date	Final Written Decision Deadline
IPR2023-00634	10,627,**783**	2/27/23	Issued 9/25/23 (institution granted)	7/9/2024	9/25/2024
IPR2023-00635	10,987,**054**	2/27/23	Issued 9/18/23 (institution denied)	N/A	N/A
IPR2023-00664	11,106,**352**	3/6/23	Issued 9/21/23 (institution granted)	6/20/2024	9/21/2024
IPR2023-00745	10,076,**257**	3/22/23	10/16/23 (institution granted)	7/10/2024	10/16/2024
IPR2024-00071	10,076,**257**	10/19/23	4/29/24	TBD	TBD
IPR2023-00734	10,942,**491**	3/20/23	Issued 10/5/23 (institution granted)	7/9/24	10/5/24
IPR2023-00807	11,474,**483**	4/4/23	Issued 11/21/23 (institution denied)	N/A	N/A
IPR2023-00831	D735,**131**	4/11/23	Issued 11/21/23 (institution denied)	N/A	N/A
IPR2023-00774	D883,**279**	3/24/23	Issued 9/27/23 (institution denied)	N/A	N/A
IPR2023-00702	D947,**842**	3/9/23	Issued 9/27/23 (institution denied)	N/A	N/A
IPR2023-00728	D962,**936**	3/16/23	Issued 9/18/23 (institution denied)	N/A	N/A

Table 3: Apple IPRs Challenging ITC-asserted Masimo Patents

PTAB Docket No.	Masimo Patent No.	Petition Filed	Institution Decision Issued	Final Written Decision
IPR2022-01299	7,761,**127**	7/22/22	2/1/23 (institution)	Issued: 1/25/24 (finding all challenged claims unpatentable)
IPR2022-01291	10,687,**745**	7/22/22	2/1/23 (institution)	Issued: 1/30/24 (finding all challenged claims unpatentable)
IPR2022-01465	10,687,**745**	8/26/22	2/6/23 (institution)	Issued: 2/2/24 (finding claims 13 and 25 not unpatentable, and claims 2-6, 8, 10-12, 14, 17, 19, 21-24, and 26 unpatentable)
IPR2022-01271	10,912,**501**	7/15/22	1/24/23 (denial)	
IPR2022-01272	10,912,**501**	7/15/22	1/24/23 (denial)	
IPR2022-01273	10,912,**502**	7/15/22	1/24/23 (denial)	
IPR2022-01274	10,912,**502**	7/15/22	1/24/23 (denial)	
IPR2022-01275	10,945,**648**	7/15/22	1/30/23 (denial)	
IPR2022-01276	10,945,**648**	7/15/22	1/30/23 (denial)	

Table 4: Appeals of IPRs challenging C.D. Cal-asserted Masimo Patents

Patent	Appeal No.	Posture	Decision
10,258,265 (Poeze) IPR2020-01520	22-1631 *Lead appeal,* *Consolidated with* *-1632, -1633, -1634, -1635, -1636, -1637, -1638*	Apple is Appellee All challenged claims (1-4, 6-14, 16-30) unpatentable.	Issued: 9/12/23 (affirming all challenged claims are unpatentable except 14-18 of the '554 patent, which depend from non-asserted claim 13)
10,292,628 (Poeze) IPR2020-01521	22-1632 *Consolidated with* *-1631, -1633, -1634, -1635, -1636, -1637, -1638*	Apple is Appellee All challenged claims (1-30) unpatentable.	
10,631,765 (Poeze) IPR2020-01714	22-1633 *Consolidated with* *-1631, -1632, -1634, -1635, -1636, -1637, -1638*	Apple is Appellee All challenged claims (1-29) unpatentable.	
10,631,765 (Poeze) IPR2020-01715	22-1634 *Consolidated with* *-1631, -1632, -1633, -1635, -1636, -1637, -1638*	Apple is Appellee All challenged claims (1-29) unpatentable.	
10,588,553 (Poeze) IPR2020-01536	22-1635 *Consolidated with* *-1631, -1632, -1633, -1634, -1636, -1637, -1638*	Apple is Appellee All challenged claims (1-29) unpatentable.	
10,588,553 (Poeze) IPR2020-01537	22-1636 *Consolidated with* *-1631, -1632, -1633, -1634, -1635, -1637, -1638*	Apple is Appellee All challenged claims (1-29) unpatentable.	
10,588,554 (Poeze) IPR2020-01538	22-1637 *Consolidated with* *-1631, -1632, -1633, -1634, -1635, -1636, -1638*	Apple is Appellee All challenged claims (1-7, 20-28) unpatentable.	

Patent	Appeal No.	Posture	Decision
10,588,554 (Poeze) IPR2020-01539	22-1638 *Consolidated with* *-1631, -1632,* *-1633, -1634,* *-1635, -1636, -1637* *Companion with* *-1972, -1973,* *-1975, -1976*	Apple is Appellee Claims 1-28 challenged; all (1-12, 14-28) but one (13) unpatentable; Apple chose not to cross-appeal.	
8,457,703 IPR2020-01523	22-1890 *Companion with* *-1891, -1894, -1895*	Apple is Appellant All challenged claims (1-7, 9-18, 20-24) upheld.	Issued: 1/12/24 (affirming challenged claims are patentable)
10,433,776 IPR2020-01524	22-1891 *Companion with* *-1890, -1894, -1895*	Apple is Appellant All challenged claims (1-16) upheld.	Issued: 1/12/24 (affirming challenged claims are patentable)
6,771,994 (Lt. Block) IPR2020-01526	22-1894 *Companion with* *-1890, -1891, -1895*	Apple is Appellee All challenged claims (15) unpatentable.	Issued: 1/10/24 (affirming all challenged claims are unpatentable)
10,470,695 (Lt. Block) IPR2020-01722	22-1895 *Companion with* *-1890, -1891, -1894*	Apple is Appellee All challenged claims (1-6, 8, 9, 11-19, 21-30) unpatentable.	Issued: 1/10/24 (affirming all challenged claims are unpatentable)
10,624,564 (Poeze)	22-1972 *Consolidated with* *-1973, -1975,*	Apple is Appellee	Issued: 9/12/23 (affirming all challenged claims are unpatentable)

Patent	Appeal No.	Posture	Decision
IPR2020-01713	*-1976* *Companion with* *-1631 through -1638 and -1973, -1975, -1976*	All challenged claims (1-30) unpatentable.	
10,702,194 (Poeze) IPR2020-01716	22-1973 *Consolidated with* *-1972, -1975,* *-1976* *Companion with* *-1631 through -1638 and -1972, -1975, -1976*	Apple is Appellee All challenged claims (1-30) unpatentable.	
10,702,195 (Poeze) IPR2020-01733	22-1975 *Consolidated with* *-1972, -1973,* *-1976* *Companion with* *-1631 through -1638 and -1972, -1973, -1976*	Apple is Appellee All challenged claims (1-17) unpatentable.	
10,709,366 (Poeze) IPR2020-01737	22-1976 *Consolidated with* *-1972, -1973,* *-1975* *Companion with* *-1631 through -1638 and -1972, -1973, -1975*	Apple is Appellee All challenged claims (1-27) unpatentable.	
10,299,708 (Poeze) IPR2021-00193	22-2069 *Consolidated with* *-2070, -2071, -2072* *Companion with* *-1631 through -1638, -1972, -1973, -1975, and -1976*	Apple is Appellee All challenged claims (1-29) unpatentable.	Issued: 9/12/23 (affirming all challenged claims are unpatentable)

Patent	Appeal No.	Posture	Decision
10,376,190 (Poeze) IPR2021-00195	22-2070 *Consolidated with* *-2069, -2071, -2072* *Companion with* *-1631 through -1638, -1972, -1973, -1975, and -1976*	Apple is Appellee All challenged claims (1-14, 16-30) unpatentable.	
10,258,266 (Poeze) IPR2021-00208	22-2071 *Consolidated with* *-2069, -2070, -2072* *Companion with* *-1631 through -1638, -1972, -1973, -1975, and -1976*	Apple is Appellee All challenged claims (1-6, 8-16, 18, 19) unpatentable.	
10,376,191 (Poeze) IPR2021-00209	22-2072 *Consolidated with* *-2069, -2070, -2071* *Companion with* *-1631 through -1638, -1972, -1973, -1975, and -1976*	Apple is Appellee All challenged claims (1-6, 8-16, 18, 19) unpatentable.	

EXHIBIT 2

[redacted]

From: Kendall Loebbaka
To: Benjamin Luehrs; Apple Masimo Service; whmasimoantitrustservice@wilmerhale.com; Knobbe.MasimoDE; Jack Phillips; Megan C. Haney; Palapura, Bindu A.; Moore, David E.
Subject: [Ext] RE: Apple v Masimo (DE) - Commercial production of Masimo accused products
Date: Thursday, February 29, 2024 6:49:29 PM

****EXTERNAL EMAIL** This email originated from outside the company. Do not click on any link unless you recognize the sender and have confidence the content is safe.**

Ben,

The W1 watches with wave electrode Masimo sent in [redacted]. Informing Apple that the three W1s were available to take into Apple's possession, and then sending those watches in [redacted] exceeded Masimo's duty, as the Court ordered Masimo to merely inform Apple that it had begun producing watches and then confer.

As I said in my last email, [redacted].

Finally, we do not understand your question about the health module, which was not subject to Apple's motion to compel. The W1 watches we produced in [redacted], and the watch Apple purchased in February, had a health module with the wave design.

I can also clarify that Masimo no longer manufactures or sells any product with the original "arc-shaped" electrodes, and it has no plans to do so in the future. Going forward, all W1 watches manufactured and sold will have the wave design. [redacted].

Best regards,
Kendall

Kendall Loebbaka
Partner
949-721-7687 **Direct**
Knobbe Martens

From: Benjamin Luehrs <BLuehrs@desmaraisllp.com>
Sent: Wednesday, February 28, 2024 7:21 PM
To: Kendall Loebbaka <Kendall.Loebbaka@knobbe.com>; Apple Masimo Service <AppleMasimoService@desmaraisllp.com>; whmasimoantitrustservice@wilmerhale.com;

Knobbe.MasimoDE <Knobbe.MasimoDE@knobbe.com>; Jack Phillips <JCP@PMHDELaw.com>; Megan C. Haney <mch@PMHDELaw.com>; Palapura, Bindu A. <bpalapura@potteranderson.com>; Moore, David E. <dmoore@potteranderson.com>
Subject: Re: Apple v Masimo (DE) - Commercial production of Masimo accused products

Kendall,

Following up on this.

Sincerely,
Ben

Ben Luehrs | Desmarais LLP
230 Park Avenue | New York, NY 10169
T: (212) 808-2952| M: (203) 962-6557
E: bluehrs@desmaraisllp.com

From: Benjamin Luehrs <BLuehrs@desmaraisllp.com>
Sent: Wednesday, February 28, 2024 12:08 PM
To: Kendall Loebbaka <Kendall.Loebbaka@knobbe.com>; Apple Masimo Service <AppleMasimoService@desmaraisllp.com>; whmasimoantitrustservice@wilmerhale.com <WHMasimoAntitrustService@wilmerhale.com>; Knobbe.MasimoDE <Knobbe.MasimoDE@knobbe.com>; Jack Phillips <JCP@PMHDELaw.com>; Megan C. Haney <mch@PMHDELaw.com>; Palapura, Bindu A. <bpalapura@potteranderson.com>; Moore, David E. <dmoore@potteranderson.com>
Subject: RE: Apple v Masimo (DE) - Commercial production of Masimo accused products

Kendall,

The Court ordered Masimo "to let Apple know within five calendar days of starting commercial production" of W1s with the wave design "that it has started commercial production[.]" *See* Exhibit A at 11. Masimo did not do that. Masimo violated the Court's order. Your email, and Masimo's prior email, confirm that. Exhibit B (Masimo stating that it will "notify Apple ***when commercial production begins pursuant to the Court's Order***."). Masimo's discussion of the motion that led to the Court's order, or Masimo's production of physical samples, is irrelevant as it does not provide Apple information about the commercial production of Masimo's products like the Court required.

Your email also does not answer the questions in mine, and therefore Masimo is still failing to comply with the Court's order. Has Masimo started commercial production of W1s that include the wave design? When did Masimo begin commercial production? When is the Freedom watch and Health Module going to be commercially produced? When will Masimo send physical samples of those products?

If Masimo is refusing to provide this information please let me know, and please provide your

availability to meet and confer on Thursday or Friday, so that we can inform the Court about Masimo's refusal.

Sincerely,
Ben

From: Kendall Loebbaka <Kendall.Loebbaka@knobbe.com>
Sent: Tuesday, February 27, 2024 8:50 PM
To: Benjamin Luehrs <BLuehrs@desmaraisllp.com>; Apple Masimo Service <AppleMasimoService@desmaraisllp.com>; whmasimoantitrustservice@wilmerhale.com; Knobbe.MasimoDE <Knobbe.MasimoDE@knobbe.com>; Jack Phillips <JCP@PMHDELaw.com>; Megan C. Haney <mch@PMHDELaw.com>; Palapura, Bindu A. <bpalapura@potteranderson.com>; Moore, David E. <dmoore@potteranderson.com>
Subject: [Ext] RE: Apple v Masimo (DE) - Commercial production of Masimo accused products

****EXTERNAL EMAIL** This email originated from outside the company. Do not click on any link unless you recognize the sender and have confidence the content is safe.**

Ben,

Masimo did not violate the Court's Order, which addressed Apple's motion to compel Masimo to produce three samples of accused products that Masimo "provided commercially" to customers. 22-1377 D.I. 142 at 1-2, Ex. B (RFP 26).

You wrongly allege that "there have been no subsequent communications between counsel about the timing of commercial production of the W1 with the wave electrode" since [redacted]. On [redacted], Masimo informed Apple that it had samples of the W1 with the wave electrode design available for inspection. Apple inspected those samples on [redacted]. Then, on [redacted], Masimo told Apple it had the three units of the W1 with the wave electrode to produce to Apple. Apple received those watches on [redacted] (FedEx Tracking No. [redacted]). This was what Apple sought in its motion to compel.

Given the history of the dispute and discussion at the hearing, it should have been clear to Apple that the three watches Masimo produced were responsive to the order on Apple's motion to compel. Masimo was therefore surprised and disappointed that Apple alleged in its summary judgment opposition that Masimo violated the Court's Order. Worse, Apple did so without acknowledging Masimo's [redacted] production, thereby misleading the court.

[redacted]

Finally, your email asks about the Masimo Health module. Apple's motion to compel did not cover the module, and Apple has been purchasing W1 watches with the module.

Best regards,
Kendall

Kendall Loebbaka
Partner
949-721-7687 **Direct**
Knobbe Martens

From: Benjamin Luehrs <BLuehrs@desmaraisllp.com>
Sent: Friday, February 23, 2024 3:11 PM
To: Kendall Loebbaka <Kendall.Loebbaka@knobbe.com>; Apple Masimo Service <AppleMasimoService@desmaraisllp.com>; whmasimoantitrustservice@wilmerhale.com; Knobbe.MasimoDE <Knobbe.MasimoDE@knobbe.com>; Jack Phillips <JCP@PMHDELaw.com>; Megan C. Haney <mch@PMHDELaw.com>; Palapura, Bindu A. <bpalapura@potteranderson.com>; Moore, David E. <dmoore@potteranderson.com>
Subject: Apple v Masimo (DE) - Commercial production of Masimo accused products

Counsel,

At the discovery hearing held on July 7, 2023, the Court ordered Masimo "to let Apple know within five calendar days of starting commercial production" of the W1 with the wave design "that it has started commercial production[.]" *See* Exhibit A at 11. [redacted]." *See* Exhibit B. On [redacted], counsel for Masimo informed counsel for Apple that Masimo in fact "did not start commercial production of the W1 with the wave electrodes and has not yet started. ***We will notify Apple when commercial production begins pursuant to the Court's Order***." *Id*. There have been no subsequent communications between counsel about the timing of commercial production of the W1 with the wave electrode.

Apple's counsel recently purchased a W1 and received a watch with the wave design. Please promptly: (1) confirm whether Masimo has in fact started commercial production of W1s that include the wave design; (2) identify when such commercial production began; (3) provide the reason(s) Masimo violated the Court's July 7 order; (4) provide the commercial production statuses of the Freedom watch and the Masimo Health Module (and confirm which rear design those products will include); and (5) identify when Masimo will produce to Apple physical samples of those products. To the extent Masimo refuses to comply with any of those requests, please provide your availability to meet and confer next week.

Sincerely,
Ben

Ben Luehrs | Desmarais LLP
230 Park Avenue | New York, NY 10169
T: (212) 808-2952| M: (203) 962-6557
E: bluehrs@desmaraisllp.com

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EXHIBIT 3

[redacted]

THIS EXHIBIT HAS BEEN REDACTED IN ITS ENTIRETY

EXHIBIT 4

Seeking Alpha
Symbols, Analysts, Keywords
ABOUT PREMIUM
UPGRADE
Home
Analysis
News
Market Data
INVESTING GROUPS
Explore Investing Groups
PORTFOLIOS
Create Portfolio
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EPS of $1.25 beats by $0.30 | Revenue of $548.90M (-11.04% Y/Y) beats by $3.21M

Masimo Corporation (NASDAQ:MASI) Q4 2023 Earnings Conference Call February 27, 2024 4:30 PM ET

Company Participants

Eli Kammerman - Vice President, Business Development & Investor Relations

Joe Kiani - Chairman & Chief Executive Officer

Micah Young - Executive Vice President & Chief Financial Officer

Conference Call Participants

Marie Thibault - BTIG

Mike Polark - Wolfe Research

Mike Matson - Needham & Company

Jason Bednar - Piper Sandler

Dino Weinstock - Wells Fargo

Operator

Good afternoon, ladies and gentlemen, and welcome to Masimo's Fourth Quarter and Fiscal Year 2023 Earnings Conference Call. The company's press release is available at www.masimo.com. At this time, all lines have been placed on mute to prevent any background noise. After the speakers' remarks, there will be a question-and-answer session.

I'm pleased to introduce Eli Kammerman, Masimo's Vice President of Business Development and Investor Relations.

Eli Kammerman

Hello, everyone. Joining me today are Chairman and CEO, Joe Kiani; and Executive Vice President and Chief Financial Officer, Micah Young. This call will contain forward-looking statements which reflect management's current judgment, including certain of our expectations regarding fiscal year 2024 financial performance. However, they are subject to risks and uncertainties that could cause actual results to differ materially. Risk factors that could cause our actual results to differ materially from our projections and forecasts are discussed in detail in our periodic filings with the SEC. You will find these in the Investor Relations section of our website.

Also, this call will include a discussion of certain financial measures that are not calculated in accordance with generally accepted accounting principles or GAAP. We generally refer to these as non-GAAP financial measures. In addition to GAAP results, these non-GAAP financial measures are intended to provide additional information to enable investors to assess the company's operating results in the same way management assesses such results.

Management uses non-GAAP measures to budget evaluate and measure the company's performance and sees these results as an indicator of the company's ongoing business performance. The company believes that these non-GAAP financial measures increase transparency and better reflect the underlying financial performance of the business. Therefore, the financial measures we will be covering today will be primarily on a non-GAAP basis unless noted otherwise. Please note we have updated our non-GAAP definitions to exclude all legal expenses associated with our ongoing litigation with Apple.

Further, we will also be referencing pro forma financial measures which include historical results for Sound United prior to the acquisition date of April 11, 2022. In our presentation today, we will once again be referring to this business as our non-healthcare segment. Reconciliation of these measures to the most directly comparable GAAP financial measures are included within the earnings release and supplementary financial information on our website. Investors should consider all of our statements today together with our reports filed with the SEC including our most recent Form 10-K and 10-Q in order to make informed investment decisions. In addition to the earnings release issued today, we have posted a quarterly earnings presentation within the Investor Relations section of our website to supplement the content we will be covering this afternoon.

I'll now pass the call to Joe Kiani.

Joe Kiani

Thank you, Eli. Good afternoon, and thank you for joining us for Masimo's 2023 year-end earnings call. We exited 2023 with growing momentum driven by record contract wins for the year in our healthcare business,

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About MASI Stock

Symbol	Last Price	% Chg
MASI	132.92	2.51%

1D 5D 1M 6M 1Y 5Y 10Y

Market Cap	$6.86B
PE (FWD)	36.80
Yield (TTM)	-
Rev Growth (YoY)	0.60%
Short Interest	-
Prev. Close	$129.67

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Masimo down 6% despite quarterly beats, updated 2024 guidance
Masimo Non-GAAP EPS of $1.25 beats by $0.30, revenue of $548.9M beats by $3.21M
Masimo Q4 2023 Earnings Preview
Masimo Corporation: Logical Expansion To Leverage Its Existing Portfolio
Waterside Insight

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important FDA clearances for innovative new products and strong growth in our hearables business. With stabilization of hospital census and operations post-pandemic our healthy contract backlog and our cutting-edge innovations in growing markets Masimo is well positioned for 2024.

In addition to sensor utilization having stabilized, our hospital contract wins have more than doubled from four years ago within our target markets, which has resulted in meaningful gains in market share. The engine of our growth continues to be innovation. And in Q4, we received numerous FDA clearances for innovative products to improve outcomes and reduce the cost of care some of which I will discuss later.

Outside of healthcare, we are investing in the Masimo consumer brand and intend to realize rapid growth for hearables and wearables, as we launch a steady stream of unique products containing our proprietary technologies, a few of which I'll talk about later. In fact, starting this quarter we are providing visibility into our hearables and wearables revenue so that you can see how we are performing in these strategic growth categories.

For our financial performance in fiscal year 2023 consolidated revenues exceeded $2 billion with healthcare revenues reaching $1.28 billion the non-healthcare segment exceeded $770 million in revenues for the year.

The challenges of 2023 have forged a stronger more resilient Masimo and we have a bright future ahead. We are making a positive impact for healthcare across the world and improving Masimo's long-term position.

In the past six months, I toured many parts of the world visiting our customers and meeting our team. I can tell you resoundingly that our customers love what we are doing and where we are taking non-invasive monitoring. Our team is proud and excited to contribute to these bold efforts.

With that I'll pass it to Micah to review our fourth quarter and full year results in more detail and provide an update on our 2024 financial guidance.

Micah Young

Thank you, Joe and good afternoon, everyone. For the fourth quarter, our consolidated revenue was $549 million. Our healthcare revenues were $340 million which was near the upper end of our guidance range and represent a 4% decline on a constant currency basis versus Q4 2022.

Our consumable and service revenues grew 1% partially offset by a 24% reduction in capital equipment and other revenues versus the prior-year period. More importantly, our healthcare revenues increased 10% sequentially driven by expected seasonal increases and improved sensor volumes.

Further our strong hospital conversions in 2023 have resulted in unrecognized contract revenue increasing 4% sequentially and 16% over the prior year to reach $1.5 billion. This gives us confidence in our growth outlook for the healthcare business.

For our non-healthcare segment fourth quarter revenues were $209 million down 23% on a constant currency basis versus prior year. This business segment increased sequentially due to the holiday season, but declined year-on-year due primarily to challenging macroeconomic conditions including high interest rates which weighed on consumer spending.

Now moving down the P&L. For the fourth quarter of 2023 we reported consolidated non-GAAP gross margin of 50%. This included gross margins of 61% for our healthcare business and 32% for our non-healthcare business. For our consolidated business, our non-GAAP operating profit was $92 million and our non-GAAP earnings per share was $1.25 for the fourth quarter.

Finally through focused improvement in working capital and optimizing cash flow, we generated significant operating cash of $77 million, which allowed us to pay down a portion of our debt.

Overall, 2023 was a year marked by uneven financial performance as we address shifting environments for both business segments. However, we made significant progress strengthening our market position which gives us confidence for 2024 and beyond. We also had significant new customer wins and a growing contract backlog in healthcare that positions us well for growth this year.

Now I'd like to provide more detail on our full year 2024 financial guidance that we initially outlined in our pre-announcement in January. For the full year 2024, we are projecting a consolidated revenue range of $2.045 billion to $2.165 billion. For our healthcare segment, we are projecting revenues of $1.345 billion to $1.385 billion representing 6% to 9% constant currency growth.

For the non-healthcare segment, we are projecting revenues of $700 million to $780 million representing a 4% decline at the midpoint in constant currency. We believe gross margins will steadily improve throughout the year.

For fiscal 2024 we are projecting consolidated non-GAAP gross margin of 52% comprised of 62% for our healthcare segment and 33% to 35% for our non-healthcare segment. We are intensely focused on improving our gross margin as the largest driver of earnings leverage for us.

Our plan to transition a large portion of our sensor manufacturing to Malaysia is well underway and we expect to reap the benefits of increased efficiencies and lower production costs over the next few years. We are also projecting consolidated non-GAAP operating profit of $307 million to $322 million. We expect to benefit from the improvements in gross margin and disciplined spending partially offset by the return of performance-based compensation to normalized levels.

Moving further down the P&L we are now projecting non-operating expense of $51 million, a tax rate of 26% to 27% and weighted average shares outstanding of 55 million. Based on these assumptions, we are projecting a non-GAAP EPS range of $3.44 to $3.60.

Turning briefly to our first quarter outlook. We are projecting consolidated

revenue of $476 million to $501 million, non-GAAP operating profit of $63 million to $69 million and non-GAAP earnings per share of $0.67 to $0.74. Please reference the earnings presentation on our investor website for further details.

In summary, our outlook for 2024 assumes a rebound in revenue growth for our healthcare segment. There are many reasons to be positive about our prospects this year. Over the past-- over the last two quarters, we have gained a better understanding of the shift in customer ordering patterns and have confidence that sensor volumes have stabilized. We have a strong contract backlog thanks to a record year for converting new customers and expanding our footprint with existing customers.

With that, I'll turn the call back to Joe.

Joe Kiani

Thank you, Micah. With deeper understanding of post-pandemic market conditions and a strong start to the year for our healthcare business, we are confident in our guidance and look forward to reestablishing our track record of consistency and predictability. Besides strong sensor orders, our record customer conversions in 2023, provide the foundation for that confidence and show how our commitment to delivering innovative technologies into the marketplace sustains not only our long-term future but the short-term growth potential.

I'd like to share a few new highlights on products that we have gotten approval by the FDA in late 2023 that we expect to contribute to growth over the next few years. The US approval and launch in October of our Oxygen Reserve Index or ORI was an important milestone that will add to the growth of our rainbow products.

ORI has already gained significant traction outside the US with ORI-equipped sensors becoming the routine option for pulse oximetry monitoring in some countries and now accounts for approximately 20% of rainbow sales. ORI gives our customers the ability to see declines in oxygen before pulse oximetry can detect some changes, which is important in the OR.

It is just as important to know when the patient has been given more oxygen than they need, and ORI can help them determine that. For our business, not only ORI is yet another clear differentiator but every pulse oximetry sensor conversion to a rainbow ORI-equipped sensor adds a price premium of at least 30% per sensor depending on whether customers deploy ORI with our 4-LED rainbow sensor or with our 8 or 12-LED rainbow sensors.

Another important FDA clearance for us last year was for the medical version of our W1, watch which was cleared in November. We can now promote W1 to US healthcare institutions for use with patients before and after surgery as well as for long-term monitoring of chronic conditions.

As we've shared in the past, we see great market potential for these applications and have received multiple indications of interest from hospitals. Hospital-at-home initiatives continue to gain traction with healthcare systems which see large opportunities to reduce costs and improve outcomes. We view our remote monitoring technologies as unique key enablers for these programs to deliver care safely and efficiently.

We also received FDA clearance in December for our Stork baby monitor with alarms and alerts functions to be activated based on the physician's prescription. Stork is the only product to help parents monitor SpO2 pulse rate and temperature for sick and healthy babies. In addition, the optional AI-based camera already helps detect babies who roll over on their stomach with many more applications to come.

Outside of healthcare, we are leveraging our core healthcare technologies and signal-processing capabilities to deliver differentiated products that will profitably take share in the large and growing markets for hearables and wearables. Our hearables category grew 115% last year due to the combination of focused investment and the launch of new products. For example last fall, we launched a Denon PerL earbuds with AAT, adaptive acoustic technology. Masimo AAT enables customization of the sound spectrum for an individual's unique hearing profile and provides a truly optimized listening experience. As I mentioned earlier, hearables and wearables are strategic growth categories for Masimo as we undertake our hospital-to-home initiative.

In 2023, we increased our revenues for these products by more than 90% to reach $90 million. With products such as STORK, OTC pending FDA clearance, W1 and PerL with AAT, along with other new product introductions, we expect to see significant growth in this category in 2024 and beyond.

We have three product launches planned for 2024 to celebrate our 35th anniversary, Freedom, H1 and the next-generation version of our Root Connectivity platform. We are excited about what the Freedom biosensing watch and the H1 hearing-enhancement device will do for consumer health and what our next-generation Root platform will do for healthcare in terms of improving patient care as well as hospital finances.

In closing, our ability to translate our core technologies and competencies into products that deliver better outcomes for consumers, patients and providers continue to be the engine for long-term growth across all our businesses.

With that, we'll open the call to questions. Operator?

Question-and-Answer Session

Operator

[Operator Instructions] Our first line of question on from Marie Thibault with BTIG. Please go ahead.

Marie Thibault

Hi. Thank you. Good afternoon. Thanks for taking the question. Wanted to start here, I think, on the standard one on guidance. I just want to understand what's included on the high and low end of the guidance

ranges for both healthcare and non-healthcare. And if you can help us think about the Q1 cadence, the quarterly cadence throughout the year, that would help me understand, particularly on the non-healthcare side, if you can.

Micah Young

Absolutely. Yeah. So Marie, for the -- start with the healthcare business, the $1.345 billion to $1.385 billion. If you look at the low end of the range, we'll start there, that assumes 0% census as far as any contribution from inpatient admissions. And it also assumes the weak capital environment that we're seeing. We're seeing good strength in our consumables products, but the capital has continued to be a very difficult environment for us as well as others.

If you look at the higher end of the range, that assumes more of closer to a 1% census growth, and it also assumes that we see improvement in -- coming from a lot of the installations that we expect throughout the year as we continue to gain new customers and win new customers. And it also assumes that we're going to have some improvement in the capital environment at the high end of the range. We also have stripped out any large orders, so those would be upside to the guidance for this year. Those were completely stripped out of that range.

If I turn to the non-healthcare business, probably the best way to describe that is we expect the hearables growth to continue, that we expect to be at least 50% growth off of this year after a very strong growth last year. So that implies that the range of $700 million to $780 million, at the low end of the range, it would imply high teens decline in the core audio business and the upper end of the range, it would imply a mid-single-digit decline in the upper end of that range. So again, the hearables strength in that business has now become over 10% of the revenues for non-healthcare, continues to grow, offsetting softness in the quarter.

Marie Thibault

Okay. So that hearables strength is disguising a bit some of the softness you're expecting in consumer. And then as a follow-up on that the Q1 cadence for consumer maybe a little bit lighter than we were looking for. Can you help us understand kind of the seasonality of that business, as you understand it today?

Micah Young

Yes. So, we went back and looked historically, with the team and just tried to understand kind of their seasonality prior to the acquisition and kind of back in more normalized years and that seasonality is about 21%. It can hover between 21% and 22% of revenues for the full year. That guidance is in that zone for Q1. And typically, one-third of the revenue is coming in Q4 with a stronger holiday season. So, that's how we're thinking about both businesses kind of getting back onto that normal seasonality. And again, we're growing the we're getting into new channels, in new markets with the hearables so that's going to continue to be growth throughout the year that gives us more confidence in that guidance range for non-healthcare.

Marie Thibault

Okay. That's really helpful, Micah. If I can ask a question here for more detail on the healthcare side, I want to understand what you're seeing today on the hospital census on some of the dynamics you've discussed in the past like the shift to ambulatory, surgical centers and patients reusing sensors. What are kind of the latest that you're seeing on some of those trends that we know impacted results last year?

Micah Young

Yes. I think what we're seeing now and I think that that's what's being seen out there in the broader market is, those inpatient trends and census trends are probably around that 1% to 2% kind of hovering in that zone. So if that continues that will be a positive for us in 2024. And then in terms of just sensor utilization for the business, we see that back and stabilized. We think that the -- any inventory destocking is behind us and that gives us confidence. It's why we came out early in January to provide that guidance as we start to see those trends heading in the right direction in the second half of the year.

Marie Thibault

All right. Very good to hear. Thanks for taking the questions.

Micah Young

You're welcome.

Operator

Our next question comes from the line of Mike Polark with Wolfe Research. Please go ahead.

Q -- Mike Polark

Good afternoon. Thank you for taking the question. I want to drill down on this capital commentary Micah. And Joe, you just mentioned maybe kind of a little choppy soft. Is this -- what's going on here? Is this still working through kind of the exceptional capital placements you had during COVID, and we're coming off of that sugar high and there's just time for that to work its way through? Is there something else? And I guess, I'll lead you here obviously, as you probably know one of your competitors -- your key competitors decided to keep the monitoring business and they called out a change in competitive position as a reason for choosing that. Have you seen any different behavior out of your key competitor? And do you agree with their assessment about the landscape?

Joe Kiani

Yes. Let me maybe try to address that high level then maybe Micah, if you have anything to add. So first of all yes, I think we're getting over the sugar high of capital purchases during COVID. The good thing, we're not a capital business because it would be really rough. For some companies you've seen it. It's really stopped them in their tracks. But the good news is, for us because we're getting so much of our growth from new conversions,

from new hospitals switching to Masimo and for us to almost exclusively keep all of our customers, the only time we've lost any is when they were purchased by a larger system that was our competitor's account. So for those reasons, our outlook is very positive regardless of the capital.

And then as far as our a competitor, I heard that they're saying they're keeping monitoring because it's competitive. They're probably competing well in our leftovers because in the markets that we're targeting, we are winning. That's really strongly the order of magnitude more than we lose. So yes there are markets that we're not focusing on. And those are the low-end markets where the countries can't afford the kind of performance, and technologies that we have. But in Americas, US, Canada in Europe, Japan, Korea, Middle East we are just taking market share in about 2x the rate of our normal. So, while I don't know what they're doing, I'm glad they're full on our leftovers.

Mike Polark

Helpful. Follow-up on margin, nice to see the guide kind of smooth out here at 15%. Obviously, a lot of puts and takes in there. The incentive comp reset is a limiting factor year-on-year. The question is beyond 2024 kind of, how do you feel about margin? What's the direction of it? Do you feel like margin expansion is a core part of the algorithm as you kind of restart the growth here? And specifically on Mexico to Malaysia, kind of how impactful is that, I'm curious, for any quantification and timing of that benefit? Thank you so much.

Micah Young

Yeah. Thanks, Mike. Great question. Gross margin leverage is a key area for us as well as just overall operating margin leverage over the coming years. We still want to drive -- and I'll really hit on the healthcare side here. Our focus is to get up -- back up in the high 60s margin again. We've got a very good path to get to the mid-60s just with things we're doing in Malaysia, with some of the key product cost-reduction efforts that we're undertaking right now and the focus by our engineering and manufacturing teams. We also will see leverage in our equipment placements that where we're -- we have a heavy amount of equipment placements right now due to all these customer conversions that we have that will leverage over time.

So, between those things, we feel good about getting up in that mid-60s margin over the next few years. And then we just got to continue that path and leverage the business and get back up into the high 60s. So that's going to be a great lever for us as we move forward and really deliver additional growth in earnings as well.

Eli Kammerman

Operator, next question, please.

Operator

Yes. Our next question comes from the line of Mike Matson with Needham & Company. Please go ahead.

Mike Matson

Yeah. Thanks. So I wanted to ask one. Joe, you mentioned you were launching the H1 hearing-enhancement product this year. And I know that's an area you kind of talked about sort of indirectly being interested in, but you haven't really mentioned much specifics around products or timing. So it sounds kind of interesting to me. So I was just wondering if you could provide any more detail around that, maybe the kind of market opportunity and so forth.

Joe Kiani

Sure. Thank you. Yeah, I think as I've mentioned before, one of the reasons we acquired Sound United was for their audio engineers as we were planning to get into the hearing aid market for low to moderate hearing loss. So with the help of that team, the help of the neuro team in Australia and our own engineering team here in Irvine, we are developing what I hope will be a revolutionary hearing aid. And we call that H1 for now, that might stick as the final name. But I think H1 should be available for sale this year.

Mike Matson

Okay. And do you have any feel for the TAM or pricing or anything like that at this point?

Joe Kiani

Yeah. My understanding, the TAM is $35 billion roughly. And our pricing is probably going to be around $1,500 in that area. That's what we're planning. Now, we -- to sell that over the counter, which now we can with the new regulatory guidelines that have been changed, we still have to get FDA clearance. So we're going to have to submit the H1 for FDA approval for sale in the US but many countries will be able to sell it under our CE Mark.

Mike Matson

Okay. Got it. And then just on the -- all the contract wins are obviously positive. Just wondering, to what degree has kind of the uncertainty around your primary competitor, Medtronic, separation and now kind of retention of their monitoring business? Is that -- do you think that contributed to customer willingness to kind of switch to Masimo or…

Joe Kiani

I don't think so. I think what really changed our market share of gains was COVID. I think when pulse oximetry and its accuracy really meant a lot, people started thinking, well why am I not using Masimo? And on top of that we created the Radius PPG, which is a tetherless wearable monitor that change things. We created the COVID system for patients at home remotely monitoring them at the hospital.

All of that just made us really the company to go to for pulse oximetry. I think that's one of the reason. If you look at 2019 we were doing about $170 million in TI through incrementals and now we're doing about $400

million. So, yes, we don't think it had anything to do with the spinoff or not. We really think it's -- just finally make people think why are we resisting it.

As you know already no other pulse oximetry has been shown to have a positive clinical outcome despite the fact that they became ubiquitous before we even entered the market. But ever since Masimo SET pulse has been introduced because it works accurately during motion at low perfusion because it works on dark as well as light-pigmented patients during other challenges the studies have been incredible with blindness in the neonatal ICU has dropped detection of CCHD is not possible with newborns. And people on opioids are not dying from overdose on the general floors after their surgeries.

So -- and all of that by the way comes with reduced costs. We calculate that on average a 250-bed hospital can save about $4 million to $5 million a year by switching to Masimo. That really makes our pulse oximetry sensor prices irrelevant because we could charge 5x more and we'd still be showing cost savings to the hospital.

So the competitive advantage we have is really big. And I think customers during COVID finally decided to take advantage of this.

Mike Matson

Okay. Great. Thanks. Bye.

Joe Kiani

Sorry for the long answer but I just want you to understand this isn't just two companies competing with similar technologies. There's a huge difference. And that's why we're winning continuously and it has become even bigger in the past few years.

Operator

Our next question comes from the line of Jason Bednar with Piper Sandler. Please go ahead.

Jason Bednar

Thanks. Good afternoon. Thanks for taking the questions. Joe, Micah I wanted to start with that driver number. Definitely lighter than our model. I think they're probably lighter than where most estimates were sitting here. I think the lowest absolute figure you've had since the first quarter of 2018. I guess we can look at these two ways. You put up good results in spite of those driver sales being lower. You're tapping into that large installed base really driving better utilization. So maybe the driver figure means less today than what it has historically. But I guess the alternative here is that drivers have fallen for four consecutive quarters. And I guess I'm just having a hard time reconciling this against like that record contract that we continue to hear about.

So I guess the question here is whether investors need to be concerned with the driver decel? And then what's the outlook for this line as we look ahead? Drivers grow in 2024 does this need to decline further? Any help there would be great.

Micah Young

Yes. Thanks, Jason. Yes I am less concerned about the driver numbers. We think this is more short-term in nature. The focus for us is -- and what we really focus on internally is that the incremental new business and contract wins. And that's what's giving us the confidence with our outlook. We are coming off of transition from years where there's a lot of monitoring those put by the bedside. And we think that the replacement cycles of existing equipment have slowed temporarily.

We believe that it will kind of trough -- our expectation is the trough in Q1 and then it starts to improve back up to more normalized levels as we exit this year. So we think it's going to start heading the right direction based on our internal estimates and that's less of a concern for us.

Our concern is really getting after new business converting customers to Masimo technologies and placing the equipment in there and return for those recurring sensor revenues that's going to continue to help us grow in the outlook that we've provided for this year.

Jason Bednar

I guess Micah what's the disconnect between record contracting, which – and new customers, which theoretically they need drivers to consume the sensors? Why isn't that translating into a better driver number and we're seeing this driver number decel?

Joe Kiani

Let me maybe take this. So 20 years ago, every driver was a new driver for us and it was growing our sensor business. Today, given that we have a significant market share the new – every new driver is not a new driver that you see. It's replacing an existing Masimo socket. So that's why that is not as important.

Now the second part of your question is what's the disconnect? Well it doesn't take as many drivers for us to secure these big TIs, $400 million worth of them because it's basically we put the number of sockets that they need that have to be replaced to get that sensor contract. So that's why this is not a one-for-one to see a doubling of our contract wins with a doubling of our driver volumes.

Jason Bednar

Okay. Okay. I'll probably follow up a little bit on some of this. But just maybe here I do want to ask one more maybe tough one here so maybe I'll apologize upfront. But there's definitely a lot of interest here on this topic just with the latest developments with the Board.

Joe from your public commentary still sounds like there's maybe some difficulties in the Board room to put that maybe gently. The announced departure here recently of a Board member, you didn't fill any of those vacated committee positions with Board members that were elected during last year's shareholder vote cycle. Maybe help us through what the latest discussions have been regarding the business strategy with your Board

discussions have been regarding the business strategy with your Board members that were elected last year whether there's been any progress made on finding common ground between your position and where currently stands? And then if you'll comment I think a lot of investors would be interested to hear your thoughts with respect to the kind of the upcoming shareholder vote that we're all looking ahead to this summer.

Joe Kiani

Well first of all, I won't lie, it's been a rough start with the new Board members. But we're managing. Things are getting better. We're getting along better. We're finding more common ground. And yes, we're sorry to see Adam Mikkelson leave but Adam had served exceptionally well. But he had a lot of personal things he had to attend to including twins that were just recently born. We wish him well. He's going to miss all the fun here. But we intend to replace Adam, but we're going to find hopefully someone that is well suited for that position.

And the new Board members from the ones that the shareholders voted in the activists, which are Quentin and Michelle, who do sit on our committees, audit, comp, governance; but also the new Board members Bob Chapek and Rolf Classon, they sit on many committees now.

So look, before the election, we had Board members that have been here for five to maybe 15 years that was me I guess 35 years. But now I think we only have one Board member left that has a tenure of more than one year. So the rest of them have been here now for just from a few weeks to a few months.

Jason Bednar

Okay. Thank you.

Operator

Our next question comes from the line of Jayson Bedford from Raymond James. Please go ahead.

Unidentified Analyst

I am sorry. This is Eric on for Jason today. Just a couple of clarifying questions. When you're thinking about the wearables and hearables and STORK, I'm just trying to figure out is STORK going to be reported under the healthcare revenue segment and wearables will be non-healthcare? And I guess where does W1 fit in that?

Joe Kiani

Well, I'm glad you asked that because I want to make sure you understand our definitions on how we segment. First of all yes, there's a healthcare segment and a consumer segment. So something like Stork with prescription is certainly going to be under healthcare. But it doesn't mean that it's not considered a wearable. So our wearable definition is all of our sensors that attach to the body and do not have a cable connection to it for continuous monitoring. It started off with Radius-7 and then Radius PPG, Radius VSM, W1, Radius T. So those are definition of the wearables. And Stork by the way is a wearable.

As far as other products that will enter the wearable category, it will be hopefully Freedom and the Freedom band. And then there's a whole host of wearables we're working on for other measurement modalities. And on the hearables, it's the headphones both in ear and outer ear. And it will include not just our regular hearables that we have today but the hearing aid as well.

Unidentified Analyst

And sorry just to make sure I understand. Anything that's wearables that's healthcare revenue and then the hearables is in the non-healthcare revenue? Just want to know just for -- looking at the growth?

Joe Kiani

No, the hearing aid will be considered healthcare but it will be part of the hearables. Just like Radius PPG is the healthcare product but it's part of the wearables.

Unidentified Analyst

Okay. And just one other follow-up. I'm specifically looking at stork and W1. I know earlier last year you talked about -- obviously there was a little bit more delay in getting the FDA approval than we had all hoped for but you had mentioned an expectation of about a 1% revenue contribution in 2023. Is that -- I assume that didn't hit that number but is that a number for 2024 to look towards?

Joe Kiani

Well, I don't know what all of our wearables did but I think Stork did about $2 million of revenue last year. And while it is great that by the year-end we got FDA clearance for Rx that wasn't long enough to really take advantage of it last year. But also we still don't have FDA clearance for OTC and until we get that it will impact our STORK business, because we can't alert parents to alarms for SpO2 and pulse rate without a prescription. So once we get the OTC clearance then we'll be able to alert parents even without a prescription for SpO2 and pulse rate dangers. Right now we can only alert them on temperature dangers and for those who've gotten the prescription for Stork, they can get alerted for SpO2 pulse rate as well.

Unidentified Analyst

Okay. Thanks a lot.

Joe Kiani

Thank you. I think we have time for one more question.

Operator

Okay. And our last question comes from the line of Vik Chopra from Wells Fargo. Please go ahead.

Dino Weinstock

Hi. This is Dino Weinstock on for Vik Chopra. So you recently received a 510(k) approval for an over-the-counter version of MightySat, the fingertip pulse oximeter. Could you talk about how your launch plans for MightySat might address the market opportunity?

Joe Kiani

Yes. Thanks for asking it. We just got that clearance in Q1 that's why it wasn't part of my statements for last year. But yes, we're really excited about that, because right now people can't differentiate between a fingertip pulse oximeter that they can rely on and ones that they can't. So were competing with $20 products at a $200 price tag. So, a lot of people think, well, why should I buy the $200 product? And now that we have FDA clearance as a medical product, for MightySat OTC, we have plans to hopefully make it available across all the major pharmacies. And obviously, online, you can buy it right now online. But the real I think push will be in the pharmacies. So I know at one point, when we were expecting to FDA clearance sooner than we got it, there was a major pharmacy system that wanted to provide it. And so we're just picking up that conversation again. And hopefully in 2024, we will successfully deploy MightySat to all the major pharmacies.

Unidentified Analyst

Thank you. That's helpful. And then on the status of the Apple litigation is there any update you could provide?

Joe Kiani

Well, we were happy that we got our injunction as a patent owner and a company that makes products that are competing in that space. That's ultimately what we wanted. We hope in the future to broaden our injunction hopefully, beyond just SpO2 as well as beyond the US and hopefully get our damages for the infringement. So those cases are pending and we hope to have a trade secret case and patent case in California this year. The court in California, just ruled that they're still pausing our patent cases in California because Apple is doing a hail Mary with a federal court to try to have them hear over here what they lost.

Assuming they lose that, which we think they will hopefully, we'll have the patent and the trade secret case together here in California before the year-end. And in Delaware, we are making great progress. It's gone a lot faster than we expected. We do have a new federal judge. Magistrate, has become the judge in that case. She has a very busy schedule. So while we thought for sure we're going to be in trial in Delaware in 2024, we're not certain of that at this point. We might but we might not. It might push to 2025.

Unidentified Analyst

Thank you.

Joe Kiani

Thank you so much everyone for your time. We appreciate it. We feel like we're back. We're looking forward to reporting to you our Q1 results soon. And hopefully, it's going to be a great year. Thank you so much.

Operator

This concludes today's conference call. You may now disconnect.

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EXHIBIT 5

Motion	Opening	Opposition	Reply
Masimo's Motion For Stay Pending *Inter Partes* Review	-1378 D.I. 445	-1378 D.I. 449	-1378 D.I. 459
Apple's Motion To Exclude Daniel McGavock's Lost Profits And Reasonable Royalty Opinions	-1377 D.I. 451 -1378 D.I. 479	-1377 D.I. 517 -1378 D.I. 540	-1377 D.I. 558 -1378 D.I. 579
Apple's Omnibus Brief In Support Of Its Motions For Summary Judgment And Motion To Exclude Dr. Steven Schwartz's Opinion	-1377 D.I. 472 -1378 D.I. 496	-1377 D.I. 521 -1378 D.I. 550	-1377 D.I. 564 -1378 D.I. 586
Masimo's Motion For Summary Judgment That U.S. Patent No. 11,474,483 Is Invalid For Obviousness Under 35 U.S.C. § 103 (Motion Rank No. 1)	-1378 D.I. 483	-1378 D.I. 541	-1378 D.I. 580
Masimo's Motion For Summary Judgment That It Does Not Infringe The Apple Design Patents (Motion Rank No. 2)	-1377 D.I. 457	-1377 D.I. 523	-1377 D.I. 550
Masimo's Motion For Summary Judgment That Certain Apple Design Patents Are Invalid For Indefiniteness Under 35 U.S.C. § 112 (Motion Rank No. 3)	-1377 D.I. 471	-1377 D.I. 527	-1377 D.I. 553
Masimo's Motion For Summary Judgment That U.S. Patent No. 11,106,352 Is Invalid For Claiming Unpatentable Subject Matter Under 35 U.S.C. § 101 (Motion Rank No. 4)	-1378 D.I. 505	-1378 D.I. 555	-1378 D.I. 576
Masimo's *Daubert* Motion To Exclude Certain Testimony Of Apple's Experts	-1377 D.I. 476 -1378 D.I. 497	-1377 D.I. 537 -1378 D.I. 561	-1377 D.I. 548 -1378 D.I. 571
Masimo's request to modify the Protective Order	-1377 D.I. 572 -1378 D.I. 595	Due on 3/11	n/a
Masimo's Motion For A Bench Trial On Apple's Patent Infringement Claims	-1377 D.I. 576 -1378 D.I. 599	*Not yet filed*	*Not yet filed*

EXHIBIT 6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

- - -

THE HONORABLE JAMES V. SELNA, JUDGE PRESIDING

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MASIMO CORPORATION, et al.,    )CERTIFIED TRANSCRIPT
                  Plaintiffs, )
   vs.                        )
                              ) SACV-20-00048-JVS
APPLE, INC.,                  )
                  Defendant.  )
-----------------------------)
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

Santa Ana, California

February 26, 2024

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1 SANTA ANA, CALIFORNIA; MONDAY, FEBRUARY 26, 2024; 1:44 P.M.

01:44 2 THE CLERK: Calling Item No. 7, SACV-20-00048-JVS,

01:44 3 Masimo Corporation, et al. versus Apple, Inc.

01:45 4 If you could please state your appearances for the

01:45 5 record, counsel.

01:45 6 MR. CLAASSEN: Good afternoon, Your Honor. Brian

01:45 7 Claassen on behalf of Masimo.

01:45 8 THE COURT: Good afternoon.

01:45 9 MR. CLAASSEN: Here with me is my partner, Steve

01:45 10 Jensen.

01:45 11 THE COURT: Good afternoon.

01:45 12 MR. MUELLER: Good afternoon, Your Honor. Joe

01:45 13 Mueller on behalf of Apple. With me are my partner, Tom

01:45 14 Sprankling; our co-counsel, Ken Parker, from Haynes and

01:45 15 Boone; and Tucker Terhufen from Apple.

01:45 16 THE COURT: Good afternoon all.

01:45 17 Who's going to argue this? Mr. Claassen.

01:45 18 MR. CLAASSEN: Good afternoon, Your Honor.

01:45 19 I'd like to walk the Court through a few things

01:45 20 that we'd like to talk about on the tentative, and I'll go

01:45 21 into --

01:45 22 THE COURT: Assume I stick with the tentative. Is

01:46 23 60 days going to be that big a deal?

01:46 24 MR. CLAASSEN: No, Your Honor, provided that --

01:46 25 THE COURT: If they came down tomorrow and

01:46 1 decided, it would set the clock, and we're off and running.
01:46 2 MR. CLAASSEN: One important update, Your Honor.
01:46 3 The mandates have issued on two of the three patents.
01:46 4 THE COURT: Okay, but --
01:46 5 MR. CLAASSEN: So that is a little bit of an
01:46 6 update. The 60 days isn't problematic for us, so long as
01:46 7 the stay were to be lifted at the end of that 60 days and we
01:46 8 don't have to go through another round of motion practice.
01:46 9 THE COURT: Well, that's what I contemplate in
01:46 10 suggesting you can apply to the Court with ten days' notice.
01:46 11 MR. CLAASSEN: That's what we would prefer, Your
01:46 12 Honor. We'd also like to propose a schedule at that time,
01:46 13 if that's amenable to the Court.
01:46 14 THE COURT: That seems appropriate. Well, I'm
01:46 15 just not going to let this languish in terms of how the
01:46 16 Federal Circuit manages its docket.
01:46 17 MR. CLAASSEN: Understood, Your Honor. So we'd
01:46 18 propose that we move forward pursuant to the Court's order
01:46 19 and propose a schedule. If the Federal Circuit for some
01:46 20 reason has not ruled within 60 days, as noted in your order,
01:47 21 we'd come back to the Court at the time.
01:47 22 THE COURT: Well, I'm accelerating that now,
01:47 23 having you meet and confer and put together a schedule, or
01:47 24 at least express your views on what the schedule ought to
01:47 25 be, so when the time comes, we'll promptly enter a

01:47 1 scheduling order.
01:47 2 MR. CLAASSEN: Yes, we'd do it now, Your Honor.
01:47 3 Yes, we would agree with that.
01:47 4 THE COURT: Okay.
01:47 5 MR. CLAASSEN: Anything further that you'd like me
01:47 6 to go through on earlier --
01:47 7 THE COURT: Well, yes. I mean, the big issue for
01:47 8 me in terms of timing is we're scheduled to commence trial
01:47 9 again on the trade secret -- mostly trade secret, the first
01:47 10 part, in October. Can we put these two together?
01:47 11 MR. CLAASSEN: Yes, Your Honor. Masimo believes
01:47 12 that's entirely appropriate, and we believe that there's
01:47 13 sufficient time remaining between now and October to
01:47 14 complete the necessary discovery in order to present the
01:47 15 patents at the same trial.
01:48 16 THE COURT: Okay. Thank you.
01:48 17 Mr. Mueller.
01:48 18 MR. MUELLER: May I just have one moment, Your
01:48 19 Honor?
01:48 20 THE COURT: Sure.
01:48 21 (Counsel conferring)
01:48 22 MR. CLAASSEN: Your Honor, there is one small
01:48 23 typographical error in the order that you might want to
01:48 24 correct.
01:48 25 THE COURT: Sure.

01:48 1 MR. CLAASSEN: The patent number on the first page
01:48 2 for the '554 Patent, it's currently listed as 10,558,554,
01:48 3 but the actual number is 10,588,554.
01:48 4 THE COURT: Okay. Thank you.
01:48 5 Mr. Mueller.
01:48 6 MR. MUELLER: Sure. May I proceed?
01:48 7 THE COURT: Please.
01:48 8 MR. MUELLER: Your Honor, if I understand, the
01:48 9 procedural proposal would be that if there has not been a
01:48 10 decision on the petition for rehearing or there's been a
01:49 11 denial that the stay would be lifted in 60 days, and that
01:49 12 Your Honor would prefer that the parties meet and confer
01:49 13 before then on an appropriate schedule to enter if the stay
01:49 14 were lifted at that time. If I have that right, we have no
01:49 15 objection to that.
01:49 16 THE COURT: I think you have that right. If they
01:49 17 don't act, we'll have a prompt scheduling conference, and
01:49 18 we'll discuss either the agreed or differences in your
01:49 19 proposed schedule, and we go forward. If they act sooner,
01:49 20 I'll accelerate, and we'll hold -- as soon as the mandate
01:49 21 comes down on the last patent, I would set a scheduling
01:49 22 conference.
01:49 23 MR. MUELLER: Understood. So we have no objection
01:49 24 to any of that, Your Honor.
01:49 25 I would like to address the trial in October if I

01:49 1 could.
01:49 2 THE COURT: Sure.
01:49 3 MR. MUELLER: Your Honor, we feel that that trial
01:49 4 should go forward on the date scheduled. We're not trying
01:49 5 to delay this at all. In fact, we very much want this trial
01:49 6 to occur as soon as possible. That case, as you well know,
01:49 7 has not only been ready for trial, but it's been tried. We
01:50 8 had proposed dates for the retrial during meet and confer
01:50 9 discussions as early as last year, 2023, and also early this
01:50 10 year, 2024.
01:50 11 THE COURT: But the date that you proposed to me
01:50 12 jointly, I believe, contemplated that the ITC litigation
01:50 13 would be wrapped up, and there would be some possibility or
01:50 14 opportunity for a global settlement. Otherwise, I wouldn't
01:50 15 have put it out that far.
01:50 16 MR. MUELLER: Well, Your Honor, I'm just speaking
01:50 17 for Apple. We would have been happy to have it earlier or
01:50 18 happy where it is now, but we are not trying to delay that
01:50 19 trial a day.
01:50 20 THE COURT: Okay.
01:50 21 MR. MUELLER: Now, we want that trial to go
01:50 22 forward as scheduled, and there's a couple reasons for that,
01:50 23 Your Honor. One of the most important reasons is the facts
01:50 24 that underlie that case are now nearly a decade old, and
01:50 25 some of the critical facts are quite aged. Some of the

01:50 1 witnesses in terms of availability may change.
01:50 2 THE COURT: They're quite aged, too.
01:50 3 MR. MUELLER: We all have. Your Honor, you know,
01:50 4 just to give you one example, Steve Hotelling, who Your
01:50 5 Honor may recall, has retired. Now, we're hoping to bring
01:51 6 him to trial to testify. But as time goes along, it's going
01:51 7 to be more and more difficult to arrange witness
01:51 8 availability.
01:51 9 THE COURT: Understood.
01:51 10 MR. MUELLER: And for the trade secret claims in
01:51 11 particular, that percipient witness testimony is obviously
01:51 12 critical. So just in terms of the timing of the evidence
01:51 13 itself, we think there's a premium on trying that case as
01:51 14 soon as we can feasibly do so, and we think the October 31
01:51 15 date -- we don't want that to move.
01:51 16 The second thing I'd say, Your Honor, is that
01:51 17 these new -- the patent claims, which would come out of the
01:51 18 Federal Circuit and for which we will discuss the schedule
01:51 19 with the plaintiff do involve, as Your Honor noted in the
01:51 20 tentative, different technology. The trade secret trial was
01:51 21 alone a very complicated trial as Your Honor well recalls.
01:51 22 We had, of course, the big board with all the different
01:51 23 issues on it.
01:51 24 THE COURT: Right.
01:51 25 MR. MUELLER: It was a lot for the jurors to

01:51 1 digest and to comprehend. We have a lot of concern about
01:52 2 adding a whole new issue set on top of those issues. To
01:52 3 boot, if the trial on the patent issues were going to occur
01:52 4 this fall, between now and then, we have to do all the fact
01:52 5 discovery, all the expert discovery, Markman proceedings,
01:52 6 summary judgment. It's a lot.
01:52 7 We're prepared to do that on a brisk schedule,
01:52 8 Your Honor. To be very, very clear, we're not trying to
01:52 9 delay it. We're prepared to move quickly on the patent
01:52 10 issues. But we would respectfully submit to Your Honor --
01:52 11 and we can more formally submit this after we've met and
01:52 12 conferred with the plaintiff on the schedule -- that the
01:52 13 most appropriate course, both in terms of ensuring the trade
01:52 14 secret claims are brought to a prompt resolution and also
01:52 15 ensuring that the trial on those issues is not confused by
01:52 16 injecting a whole new set of technologically distinct
01:52 17 issues -- our suggestion right now, Your Honor, would be to
01:52 18 keep that first trial where it is on the schedule as it is
01:52 19 in terms of issue set. It's been fully tried, and we can
01:52 20 try it again on the date scheduled.
01:52 21 In parallel, we will work with the plaintiff to
01:53 22 set a brisk schedule on fact discovery, expert discovery,
01:53 23 Markman proceedings, summary judgment, and pretrial motion
01:53 24 practice on the patent issues. But at this point, Your
01:53 25 Honor, we respectfully request from Your Honor a second

01:53 1 trial on those issues.
01:53 2 Again, we're not trying to delay it, but we think
01:53 3 the most feasible way to do it from the Court's perspective,
01:53 4 from the parties' perspective, and from the jury's
01:53 5 perspective, is to finish the part that we had not just
01:53 6 started but we had tried and then to finish the rest.
01:53 7 So what we would say, Your Honor, is we can take
01:53 8 this up further with the plaintiff in the meet and confer
01:53 9 discussions. We're not asking for anything specific right
01:53 10 now. But I did want to provide you with our perspective as
01:53 11 we see it now given what Your Honor had said in the
01:53 12 tentative about not having made up your mind quite yet on
01:53 13 one trial versus two.
01:53 14 THE COURT: Right. But I think we ought to wrap
01:53 15 the whole thing once and for all. Maybe that requires a
01:54 16 slight extension of the October date, but I think one trial
01:54 17 is preferable to two.
01:54 18 MR. MUELLER: I think the problem, Your Honor, is
01:54 19 going to be -- again, we can make this more concrete in our
01:54 20 submissions to Your Honor after we've met and conferred with
01:54 21 the plaintiff. It's going to be very, very difficult to
01:54 22 hold that date in October with everything else that we need
01:54 23 to do.
01:54 24 THE COURT: Yes, but what I'm suggesting is that
01:54 25 that's one option. Another option is to slip the October

01:54 1 date slightly to accommodate whatever discovery is fair and
01:54 2 necessary for the patent part of the case which hasn't been
01:54 3 tried.
01:54 4 MR. MUELLER: Well, Your Honor, again on that, I
01:54 5 think there's two problems. One is it's going to be a
01:54 6 substantial amount that needs to be done. Again, we can
01:54 7 make this more concrete in our submissions to Your Honor.
01:54 8 The second thing, though, is again --
01:54 9 THE COURT: That's why I'm suggesting perhaps a
01:54 10 slight delay in the start of the October trial to address
01:54 11 that issue.
01:54 12 MR. MUELLER: I'm not sure a slight delay would,
01:54 13 but we can take it up in our submissions.
01:54 14 THE COURT: Okay, sure.
01:54 15 MR. MUELLER: Again, Your Honor, with a trade
01:55 16 secret trial, we do have a strong concern that that evidence
01:55 17 is aging by the day in terms of witnesses and documents.
01:55 18 THE COURT: Right.
01:55 19 MR. MUELLER: And we do want that trial with Your
01:55 20 Honor's permission of course to occur as soon as it possibly
01:55 21 can.
01:55 22 THE COURT: Okay. Well, we have much to talk
01:55 23 about down the line it's clear to me.
01:55 24 Anything further, Mr. Claassen?
01:55 25 MR. CLAASSEN: No, Your Honor. Just as a quick

01:55 1 point, in the Delaware case, we prepared for trial on a
01:55 2 similar schedule on 15 patents in about the same period of
01:55 3 time. I think the parties are well capable of preparing
01:55 4 these three patents for trial in roughly the October
01:55 5 timeframe. It may need to slip a little bit but not
01:55 6 significantly, and we're ready for trial as well.
01:55 7 THE COURT: Okay.
01:55 8 Well, anything else for today?
01:55 9 MR. MUELLER: No, Your Honor. Thanks very much.
01:55 10 THE COURT: Okay. Let's just see how things play
01:55 11 out once we are either 60 days out or we have the mandate,
01:55 12 and one way or another, we're going to be getting together
01:56 13 quite shortly to work out scheduling.
01:56 14 MR. MUELLER: Thank you, Your Honor.
01:56 15 THE COURT: Okay. Thank you.
01:56 16 MR. CLAASSEN: Thank you.
02:01 17 (Whereupon, the proceedings were concluded.)
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02:01 1
02:01 2
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02:01 4 **CERTIFICATE**
02:01 5
02:01 6 **I hereby certify that pursuant to Section 753,**
02:01 7 **Title 28, United States Code, the foregoing is a true and**
02:01 8 **correct transcript of the stenographically reported**
02:01 9 **proceedings held in the above-entitled matter and that the**
02:01 10 **transcript page format is in conformance with the**
02:01 11 **regulations of the Judicial Conference of the United States.**
02:01 12
02:01 13 **Date: March 7, 2024**
02:01 14
02:01 15 **/s/ Sharon A. Seffens 3/7/24**
02:01
02:01 16 **SHARON A. SEFFENS, U.S. COURT REPORTER**
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