

24-1285

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UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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APPLE INC.,

*Appellant,*

v.

INTERNATIONAL TRADE COMMISSION,

*Appellee,*

AND

MASIMO CORPORATION, CERCACOR LABORATORIES, INC.,

*Intervenors.*

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Appeal from the United States International Trade Commission in  
Investigation No. 337-TA-1276

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**SUPPLEMENTAL BRIEF OF APPELLLEE  
INTERNATIONAL TRADE COMMISSION**

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**Dated:** December 9, 2025

Appellee International Trade Commission (“Commission”) respectfully submits this supplemental brief in response to the Court’s December 1, 2025 Order requesting briefing on whether “the Commission’s institution of a combined modification and enforcement proceeding concerning the Apple Redesign 2 Watch affects this court’s review of the Limited Exclusion Order currently on appeal.” *See* ECF No. 102, at 2 (Dec. 1, 2025). As explained below, the Commission’s institution of the proceeding for a newly redesigned product has no effect on this Court’s review of the Limited Exclusion Order (“LEO”)—it neither strips this Court of jurisdiction nor renders the appeal non-justiciable.

### **BACKGROUND**

The Commission instituted the original investigation based on a complaint filed by intervenors Masimo Corporation (“Masimo”) and Cercacor Laboratories, Inc. (together, “Intervenors”), alleging a violation of 19 U.S.C. § 1337 (“section 337”), by Apple Inc. (“Apple”), based on, *inter alia*, Apple’s importation of certain Apple watches that infringe U.S. Patent Nos. 10,912,502 and 10,945,648 (together, “Asserted Patents”). 86 Fed. Reg. 46,275, 46,276 (Aug. 18, 2021). The Commission concluded that Apple violated section 337 as to certain claims of those patents and certain then-existing Apple Watch models (collectively referred to as the “Original Apple Watch”). 88 Fed. Reg. 75,032, 75,033 (Nov. 1, 2023). To remedy that violation, the Commission issued a LEO and a cease and desist

order (together, “remedial orders”) under 19 U.S.C. §§ 1337(d) and (f), respectively, which became effective on October 26, 2024.<sup>1</sup> *Id.* Thereafter, Apple filed this appeal, challenging the Commission’s final determination. ECF No. 1, at 1 (Dec. 26, 2023).

In response to the Commission’s remedial orders, Apple developed a redesign of its Apple Watch (the “Apple Redesign 2 Watch”), which moved the final calculation of a user’s blood oxygen saturation from the Apple Watch to a paired Apple iPhone but has the same processors and hardware as the Original Apple Watch.<sup>2</sup> ITC Addendum, Exhibit 2, at 12-14; ITC Addendum, Exhibit 4, at 14. Apple alleged that this “two-device” version no longer satisfied the claim’s recitation of “a user-worn device.” *E.g.*, ITC Addendum, Exhibit 5, at 5. In January 2025, Apple requested that Customs and Border Protection (“CBP”) issue a Part 177 ruling<sup>3</sup> regarding whether Apple Redesign 2 Watch infringes the claims

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<sup>1</sup> The LEO is directed to “wearable electronic devices with light-based pulse oximetry functionality” that infringe certain claims, and it excludes the Original Apple Watch from the United States.

<sup>2</sup> Apple created a first redesigned Apple Watch that disabled the infringing blood-oxygen monitoring from the original Apple Watch, but it is not at issue here. *See* ITC-Addendum, Exhibit 1, at 12-16. CBP found that that redesign did not infringe the claims in the LEO. *See* ITC Addendum, Exhibit 1, at 30.

<sup>3</sup> A Part 177 ruling is an administrative ruling under 19 C.F.R. Part 177 made by CBP, who enforces the Commission’s exclusion orders. The ruling adjudicates, after an *inter partes* proceeding, whether an article should be excluded

in the LEO. *See* ITC Addendum, Exhibit 2, at 12-13. CBP found that the combination of the Apple Redesign 2 Watch and iPhone directly infringes and therefore should be excluded by the LEO. *See* ITC Addendum, Exhibit 2, at 61. Indirect infringement was not presented to CBP. *See* ITC Addendum, Exhibit 3, at 21. At Apple's request, CBP later issued an Internal Advice Ruling<sup>4</sup> that ultimately allowed the importation of the Apple Redesign 2 Watch, reasoning that the Apple Redesign 2 Watch alone did not directly infringe.<sup>5</sup> *See* ITC Addendum, Exhibit 3, at 18.

Upon learning of the Apple Redesign 2 Watch's entry into the United States, Masimo petitioned the Commission to clarify or modify the remedial orders with a finding that the Apple Redesign 2 Watch infringes claims in the LEO and should be excluded by CBP. *E.g.*, ITC Addendum, Exhibit 4, at 1-3, 13-16. As a result,

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by an existing LEO issued by the Commission. Parties often use these procedures for redesigned articles that they assert no longer infringe. *E.g.*, *Certain Composite Aerogel Insulation Materials & Methods for Mfg. the Same*, Inv. No. 337-TA-1003, Comm'n Op., 2018 WL 8648369, at \*40 (Feb. 22, 2018).

<sup>4</sup> This Internal Advice Ruling was an *ex parte* ruling by CBP regarding the Apple Redesign 2 Watches that were detained at the border (as opposed to being adjudicated prior to importation).

<sup>5</sup> Masimo subsequently filed a lawsuit challenging this Internal Advice Ruling. *See Masimo Corp. v. CBP et al.*, Case No.: 1:25-cv-2749 (D.D.C.). That litigation is stayed pending the resolution of the Commission's ongoing Ancillary Proceeding. Minute Order (Nov. 18, 2025). The district court urged Masimo to seek relief at the Commission which it has now done. *See* ITC Addendum, Exhibit 7, at 129-32.

the Commission instituted a modification proceeding pursuant to 19 U.S.C. § 1337(k). 90 Fed. Reg. 51,791, 51,792 (Nov. 18, 2025). Masimo’s request also alleged a violation of the LEO, so the Commission additionally instituted an enforcement proceeding pursuant to 19 U.S.C. § 1337(b). *Id.* The Commission consolidated these proceedings into a single ancillary proceeding (“Ancillary Proceeding”), *id.*, which has a target date for completion of May 18, 2026.

### **RESPONSE TO BRIEFING REQUEST**

The Commission’s institution of the Ancillary Proceeding does not affect this Court’s review of the LEO on appeal. *See* ECF No. 102, at 2. Before this Court, Apple exercised its right to appeal the Commission’s final determination under 28 U.S.C. § 1295(a)(6) (granting exclusive jurisdiction over “final determinations”) and 19 U.S.C. § 1337(c) (allowing appeals of “final determinations”). ECF No. 1, at 1; *see Realtek Semiconductor Corp. v. Int’l Trade Comm’n*, 140 F.4th 1375, 1378-79 (Fed. Cir. 2025). The Commission is aware of no statutory provision or precedent providing that the Commission’s institution of an ancillary proceeding would strip this Court of jurisdiction.<sup>6</sup> Additionally, the

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<sup>6</sup> We note that, in opposing Masimo’s request for a modification proceeding, Apple asserted that this Court maintains exclusive jurisdiction during appeal. ITC Addendum, Exhibit 5, at 9-11. Apple cannot argue now that the Court has lost jurisdiction.

mere fact that the Commission instituted the Ancillary Proceeding did not rescind or otherwise affect the scope of the LEO, and accordingly, Apple remains an aggrieved party. Moreover, Apple has not abandoned or otherwise consented to not importing the Original Apple Watch found to infringe in the underlying investigation. Accordingly, Apple's appeal is not moot.

The LEO remains in effect during the pendency of the appeal, and the Commission retains authority to enforce it during the appeal. 19 U.S.C. §§ 1337(b), (k). For example, in *Cisco Systems, Inc. v. International Trade Commission*, No. 17-2289, Order at 3 (Fed. Cir. Sept. 22, 2017) (ECF No. 57), the Court expressly permitted the Commission to initiate and complete an enforcement proceeding during the pendency of an appeal and did so without relinquishing jurisdiction of the appeal. And in *In re Koki Holdings America, Ltd.*, 830 Fed. App'x 320, 321-22 (Fed. Cir. 2020), during the pendency of the merits appeal<sup>7</sup> from the issuance of remedial orders, the Court denied a party's writ of mandamus alleging that the Commission exceeded its authority in instituting an ancillary proceeding. Thus, like in *Cisco*, the Court permitted an ancillary proceeding

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<sup>7</sup> *In re Koki* was decided on November 25, 2020, during the pendency of the appeal from the underlying investigation at issue in *Koki, Kyocera Senco Industrial Tools Inc. v. International Trade Commission*, 22 F.4th 1369 (Fed. Cir. 2022) (appealing Inv. No. 337-TA-1082).

concurrent with an appeal without relinquishing jurisdiction of the appeal. This Court has also recognized that, when a patentee believes that “prior [CBP] opinions of noninfringement in this case demonstrate that [CBP] cannot adequately enforce” the subject exclusion order, the patentee may go to the Commission for “more guidance as to the scope of the order,” which is precisely what Massimo did here. *Fuji Photo Film v. Int’l Trade Comm’n*, 386 F.3d 1095, 1107 (Fed. Cir. 2004).<sup>8</sup>

The Commission’s authority to enforce its remedial orders through ancillary proceedings does not interfere with the Court’s review here because the Ancillary Proceeding is narrowly tailored to address issues specific to infringement by the Apple Redesign 2 Watch, which were not at issue in the Commission’s adjudication of the Original Apple Watch (and therefore are not at issue in the pending appeal). *See* 90 Fed. Reg. at 51,792 (identifying the issue as “whether the Apple Redesign 2 Watch should be excluded under the current terms of the LEO”); ITC Addendum, Exhibit 6, at 4-5 (Order Instituting a Combined Modification and Enforcement Proceeding (Nov. 14, 2025)) (allowing Apple to present only those defenses that relate to the Apple Redesign 2 Watch infringement issue, and stating

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<sup>8</sup> By issuing further guidance, “Customs will therefore have new guidance as to the scope of the” order, “which will assist it in restricting the entry of infringing” products. *Fuji*, 386 F.3d at 1107.

that “[p]rinciples of claim preclusion and issue preclusion, and other doctrines that prevent litigation or relitigation ... will apply”).<sup>9</sup> For example, Apple argued to the Commission that the “two-device” version no longer satisfies the claim’s recitation of “a user-worn device.” ITC Addendum, Exhibit 5, at 9-11. Apple also acknowledged, however, that this claim term was not presented to the Court on appeal. ITC Addendum, Exhibit 5, at 9-11. Moreover, the Ancillary Proceeding involves indirect infringement, whereas the present appeal involves only direct infringement. *E.g.*, ITC Addendum, Exhibit 6, at 4. Accordingly, the specific issues in the Ancillary Proceeding are not at issue before the Court.<sup>10</sup>

Accordingly, the Commission’s institution of the Ancillary Proceeding has no effect on this Court’s review of the LEO. That said, the Commission’s Ancillary Proceeding will, of course, be bound by the Court’s findings in the present appeal.

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<sup>9</sup> By way of example, the Commission provided that the domestic industry requirement “is not subject to relitigation.” ITC Addendum, Exhibit 6, at 4-5.

<sup>10</sup> The Ancillary Proceeding, when ultimately decided, will give rise to its own independently-appealable Commission final determination regarding the Apple Redesign 2 Watch. *See Allied Corp. v. U.S. Int’l Trade Comm’n*, 850 F.2d 1573, 1580 (Fed. Cir. 1988) (concluding that the Court has jurisdiction over modification proceedings); *see also generally VastFame Camera, Ltd. v. Int’l Trade Comm’n*, 386 F.3d 1108, 1111 (Fed. Cir. 2004) (exercising jurisdiction over an appeal from an enforcement proceeding).

Respectfully submitted,

/s/ Ronald A. Traud

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Date: December 9, 2025

**CERTIFICATE OF SERVICE**

I, Ronald A. Traud, hereby certify on this 9th day of December 2025 that I filed the attached **SUPPLEMENTAL BRIEF OF APPELLLEE INTERNATIONAL TRADE COMMISSION**, to be served on counsel of record via the Court's CM/ECF system.

*/s/ Ronald A. Traud*

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE, AND TYPE STYLE REQUIREMENTS**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that the attached supplemental brief complies with the type-volume limitation and typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and (a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Office 365 ProPlus, in Times New Roman 14-point font. This brief contains a total of 1,691 words based on the word-count function of the word-processing system. I further certify that the brief complies with the Court's December 1, 2025 order (ECF No. 102) requiring briefs to be limited to ten (10) pages.

/s/ Ronald A. Traud

Ronald A. Traud

Date: December 9, 2025

# ITC Addendum

# Exhibit 1

HQ H335304

January 12, 2024

**OT:RR:BSTC:EOE H335304 WMW / ACC**

**CATEGORY:** 19 U.S.C. § 1337; Unfair Competition

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VIA EMAIL: [MARK.SELWYN@WILMERHALE.COM](mailto:MARK.SELWYN@WILMERHALE.COM)

**RE:** Ruling Request; U.S. International Trade Commission; Limited Exclusion Order; Investigation No. 337-TA-1276; Certain Light-Based Physiological Measurement Devices and Components Thereof

Dear Mr. Selwyn:

Pursuant to 19 C.F.R. Part 177, the Exclusion Order Enforcement Branch, Regulations and Rulings, U.S. Customs and Border Protection (“CBP”) issues this ruling letter holding that Apple Inc.’s (“Apple”) redesigned versions of the Apple Watch models 8, 9, Ultra, and Ultra 2, (“Redesigned Watches” or “articles at issue”) are not subject to the limited exclusion order (“LEO”) that the U.S. International Trade Commission (“ITC” or “Commission”) issued as a result of Investigation No. 337-TA-1276 (“the ‘1276 investigation”) under Section 337 of the Tariff of 1930, as amended, 19 U.S.C. § 1337.

We further note that determinations of the Commission resulting from the underlying investigation or a related proceeding under 19 C.F.R. Part 210 are binding authority on CBP and, in the case of conflict, will by operation of law modify or revoke any contrary CBP ruling or decision pertaining to section 337 exclusion orders.

This ruling letter is the result of a request for an administrative ruling under 19 C.F.R. Part 177, which was conducted on an *inter partes* basis. The proceeding involved the two parties with a direct and demonstrable interest in the question presented by the ruling request: (1) your client, Apple, the ruling requester and respondent in the 1276 investigation; and (2) Masimo

Corporation and Cercacor Laboratories, Inc. (“Masimo”), the patent owner and complainant in the 1276 investigation. See, e.g., 19 C.F.R. § 177.1(c).

The parties were asked to clearly identify confidential information, including information subject to the administrative protective order in the underlying investigation, with [[red brackets]] in their submissions. See 19 C.F.R. §§ 177.2, 177.8. If there is additional information in this ruling letter not currently bracketed in red [[ ]] that either party believes constitutes confidential information, and should be redacted from the published ruling, the parties are asked to contact the EOE Branch within ten (10) working days of the date of this ruling letter. See, e.g., 19 C.F.R. § 177.8(a)(3).

Please note that disclosure of information related to administrative rulings under 19 C.F.R. Part 177 is governed by, for example, 6 C.F.R. Part 5, 31 C.F.R. Part 1, 19 C.F.R. Part 103, and 19 C.F.R. § 177.8(a)(3). See, e.g., 19 C.F.R. § 177.10(a). In addition, CBP is guided by the laws relating to confidentiality and disclosure, such as the Freedom of Information Act (“FOIA”), as amended (5 U.S.C. § 552), the Trade Secrets Act (18 U.S.C. § 1905), and the Privacy Act of 1974, as amended (5 U.S.C. § 552a). A request for confidential treatment of information submitted in connection with a ruling requested under 19 C.F.R. Part 177 faces a strong presumption in favor of disclosure. See, e.g., 19 C.F.R. § 177.8(a)(3). The person seeking this treatment must overcome that presumption with a request that is appropriately tailored and supported by evidence establishing that: the information in question is customarily kept private or closely-held and either that the government provided an express or implied assurance of confidentiality when the information was shared with the government or there were no express or implied indications at the time the information was submitted that the government would publicly disclose the information. See Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) (concluding that “[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of exemption 4.”); see also U.S. Department of Justice, Office of Information Policy (OIP): Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA (updated 10/7/2019); and OIP Guidance: Exemption 4 after the Supreme Court’s Ruling in Food Marketing Institute v. Argus Leader Media (updated 10/4/2019).

## **I. BACKGROUND**

### **A. ITC Investigation No. 337-TA-1276**

#### **1. Procedural History at the ITC**

The Commission instituted Investigation No. 337-TA-1276 on August 21, 2021, based on a complaint filed by Masimo Corporation of Irvine, California and Cercacor Laboratories, Inc. of Irvine, California. Certain Light-Based Physiological Measurement Devices and Components Thereof, Inv. No. 337-TA-1276, EDIS Doc. ID 808521, Public Commission Opinion (Nov. 14, 2023) (“Comm’n Op.”) at 2 (citing 86 Fed. Reg. 46275-76 (Aug. 18, 2021)). The complaint, as supplemented, alleged a violation of section 337 by reason of infringement of certain claims of

that Apple has provided Masimo with the source code needed to evaluate the proposed redesign and that it is available for inspection when requested. Frazier email to EOE Branch, dated November 11, 2023. Additionally, Apple stated that the request for a demonstration could be obliged, though it did not comment on whether a physical sample would be provided. Id.

On November 3, 2023, the EOE Branch had an initial conference call with Apple and Masimo, on which both parties agreed to conduct this proceeding on an *inter partes* basis as administered by the EOE Branch. During this initial call, the EOE Branch and the parties discussed scheduling for the *inter partes* ruling and requested that the parties submit a joint proposed schedule on November 7, 2023 and if the parties were unable to agree on such a schedule to submit a proposed schedule that same day. EOE Branch email to parties, dated November 3, 2023. On November 7, 2023, both parties submitted their respective proposed procedural schedules. Selwyn email to EOE Branch, dated November 7, 2023 and Swaroop email to EOE Branch dated November 7, 2023. On November 10, 2023, the EOE Branch sent out the procedural schedule and set the target date for the EOE Branch to issue the ruling on January 5, 2024. EOE Branch email to Parties, dated November 10, 2023.

On November 20, 2023, in accordance with the procedural schedule established by the EOE Branch, Masimo stated that it had not yet received all of the information needed in order to properly draft a response to the ruling request submitted by Apple, specifically that it had not had the opportunity to receive evidence, including samples, of the proposed redesign being applied to the series 9 and Ultra 2 model of smartwatches, as well as the opportunity to depose Apple personnel. Swaroop email to EOE Branch, dated November 20, 2023. On November 20, 2023, the EOE Branch proposed a conference call on November 21, 2023 to discuss the issues raised by this communication. EOE Branch email to Parties, dated November 20, 2023. During the call, Apple declined to provide a sample to Masimo, though stated that samples would be available for inspection. After the conference call on November 21, 2023, the EOE Branch sent out a revised procedural schedule and set the target date for the EOE Branch to issue the ruling on January 12, 2024. EOE Branch email to Parties, dated November 21, 2023.

On December 6, 2023, Masimo provided its response to the Ruling Request, which included attachments 1-50 (collectively, “Masimo Response”). On December 13, 2023, Apple provided its reply to the Masimo Response, which included Attachments F through I (collectively, “Apple Reply”). On December 20, 2023, Masimo provided its sur-reply (“Masimo Sur-Reply”) to the Apple Reply. On December 28, 2023, the EOE Branch conducted an oral discussion with the parties, with each party providing a presentation (“Apple Oral Discussion Presentation” and “Masimo Oral Discussion Presentation accordingly). Lastly, on January 5, 2024, the parties submitted post oral discussion submissions (“Apple Post Oral Discussion Submission” and “Masimo Post Oral Discussion Submission” accordingly).

## **2. The Articles at Issue**

The articles at issue in the Ruling Request consist of certain smartwatches accused at the underlying ITC proceeding and unaccused smartwatches that were developed and sold after the implementation of the Investigation at the ITC. Specifically, the products for which Apple requested a ruling are:

- (a) Apple Watch Series 6-9; and
- (b) Apple Watch Ultra and Ultra 2

Ruling Request at 9. Of the articles at issue, the Apple Watch Series 6-8 were accused and found to infringe during the underlying investigation. Id. The Apple Watch Series 9, Ultra and Ultra 2 were not accused but became available in the United States after the filing of Masimo's complaint at the Commission. Id.

The articles at issue in the ruling request, as referenced above, are depicted below:



Apple Watch Series 8

Apple Watch Series 6

Apple Watch Series 7



Apple Watch Series 9

Apple Watch Ultra

Apple Watch Ultra 2

**a. Apple Watch Series 6 and 7**

As noted above, during the underlying investigation, The ITC found that the Apple Watch Series 6 and 7 were found to infringe that claims at issue in the '502 patent and '648 patent. See FID at 49, 52 and 55. In its Ruling Request, Apple argues that its proposed redesign of the Apple Watch Series 6 and 7 place it outside the category of products subject to the 1276 LEO. See Ruling Request at 1.

**b. Apple Watch Series 8, 9, Ultra and Ultra 2**

At the time of filing of the complaint at the ITC, Apple Watch Series 8,9, Ultra and Ultra 2 did not exist, but were released after the evidentiary hearing. See Ruling Request at 9. The Commission included the Apple Watch Series 8 in its determination of the accused products in its opinion. See Comm'n Op. at 13-14. In its Ruling Request, Apple argues that its proposed redesign of the Apple Watch Series 8,9, Ultra and Ultra 2 place it outside the category of products subject to the 1276 LEO. See Ruling Request at 1.

**c. Redesign Under Consideration**

The redesign at issue in this ruling request comprises of two steps. The first step is implemented on the articles at issue, in that every Apple Smart Watch with pulse oximetry capability destined to be sold in the United States and Puerto Rico is [[

]] See Ruling Request at 11. See Also Ruling Request, Attachment C at 8. The second step involves modifying the [[ ]] the iPhone for use with the articles at issue to block pulse oximetry functionality during the pairing process. Id. Despite the changes above, the Redesigned Watches have the same pulse oximetry hardware as the legacy products found to infringe. See Masimo Sur-Reply at 7.

The Redesigned Watches “must be paired to an iPhone before becoming operable.” Attachment F to Apple Reply (“Crowell Decl.”) at ¶15; see also Apple Post-Oral Discussion Submission at 9. Prior to pairing with an iPhone, the Redesigned Watches “cannot perform the Blood Oxygen feature or [] any feature.” Apple Post-Oral Discussion Submission at 9 (citing Cromwell Decl. at ¶15).

### 1. Apple’s Pairing of Redesigned Watches

The Redesigned Watches have been designed by Apple to “only pair with iPhone XS or newer models” and “pair only with an iPhone running the ‘.0’ version or higher of the latest operating system [(i.e., currently iOS 17).]” Cromwell Decl. at ¶¶16-18; see also Apple Post-Oral Discussion Submission at 9-10; see also Cromwell Decl., Ex. 6.

After the Redesigned Watches are activated via pairing with an iPhone of a compatible model and operating system version, the Redesigned Watches will [[ ]] Apple Post-Oral Discussion Submission at 10. Specifically, the Redesigned Watches [[

]] See Amended Attachment C to Ruling Request (“Thomas Decl.”) at ¶34; see also Apple Post Oral Discussion Submission at 10. [[

]] Thomas Decl. at ¶¶34-35; see also Apple Post Oral Discussion Submission at 10. According to Apple, [[

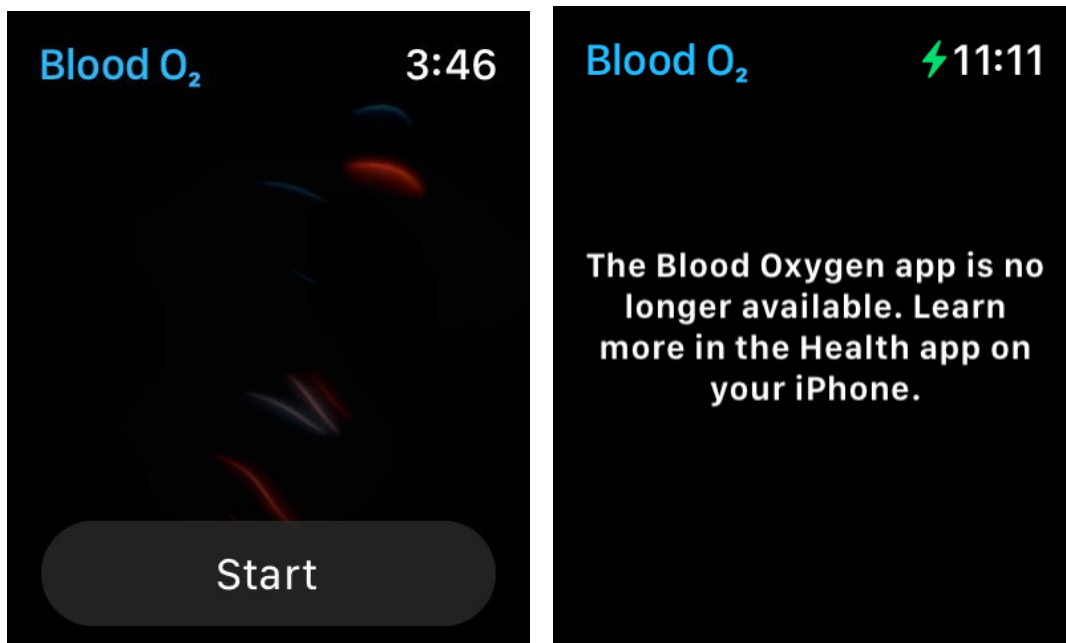
]] indicating that the Blood Oxygen feature is removed.” Thomas Decl. at ¶¶34-35. see also Apple Post Oral Discussion Submission at 10. After the [[

]] each time the user attempts to access the blood oxygen feature using a Redesigned Watch or an iPhone actively paired with a Redesigned Watch. Thomas Decl. at ¶35; see also Apple Reply at 5; see also Apple Post Oral Discussion Submission at 10. For example, [[

]] See Apple Post-Oral Discussion Submission at 11. The [[ ]] on the Redesigned Watch prevents a user from using the “[b]lood [o]xygen feature ... to take a measurement or to enable background blood measurements.” Thomas Decl. at ¶¶91-92; see also Apple Post Oral Discussion Submission at 11. When “the [[ ]]

indicate[s] that the [b]lood [o]xygen feature is removed, the [r]edesigned [Apple] [w]atch will (i) prevent the Watch from engaging in any pulse oximetry functionality or measurement, (ii) prevent the user from enabling any pulse oximetry functionality or measurement, including Blood Oxygen feature measurements or background measurements, and (iii) display a screen indicating that the Blood Oxygen feature is unavailable[.]” Thomas Decl. at ¶35, ¶41; see also Apple Post Oral Discussion Submission at 10; see also Masimo Post Oral Discussion Submission at 15.

For example, when a user attempts to open the Blood Oxygen Application on a Redesigned Watch using the pairing method discussed above, the Redesigned Watch will no longer initiate a blood oxygen measurement and the user will see a user interface explaining that “[t]he Blood Oxygen app is not available. Learn more in the Health app on your iPhone” as shown in the images below:



Ruling Request at 12; see also Thomas Decl., Ex. 1 at 11, 22.

Additionally, Apple has “indicated in all marketing and educational materials for the [Redesigned Watches] that the Blood Oxygen feature would no longer be available in the United States and Puerto Rico.” Ruling Request at 13. Specifically, Apple has “remov[ed] references to the Blood Oxygen feature from marketing materials, including webpages, and by adding notations to educational materials indicating that the Blood Oxygen feature is no longer available for Redesigned Watch Products with part numbers ending in LW/A sold in the United States and Puerto Rico. Ruling Request at 13.

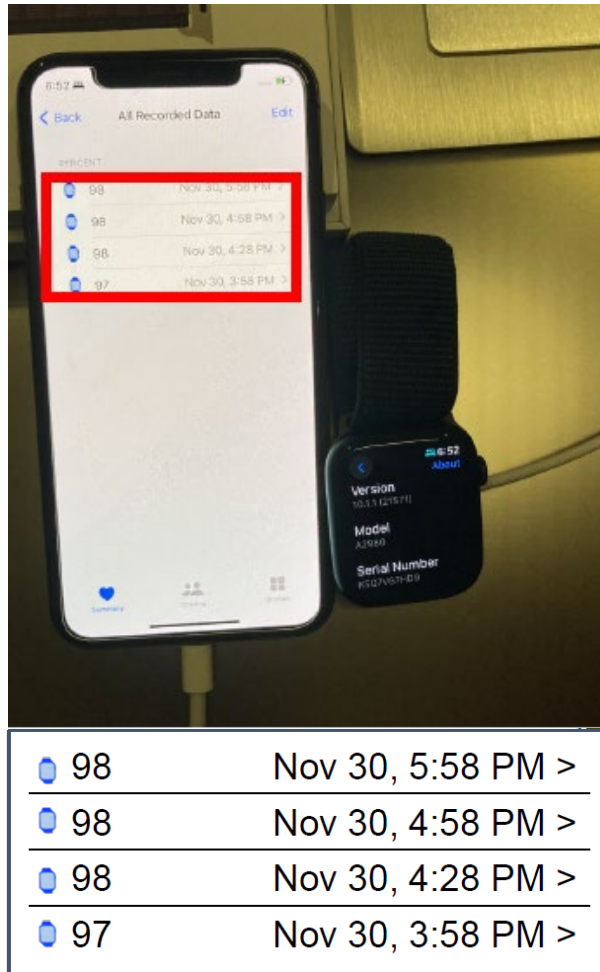
## 2. Masimo’s Pairing of Redesigned Watch

Masimo notes that “Apple’s [[ ]] from its “proper pairing” did not cause the

[[

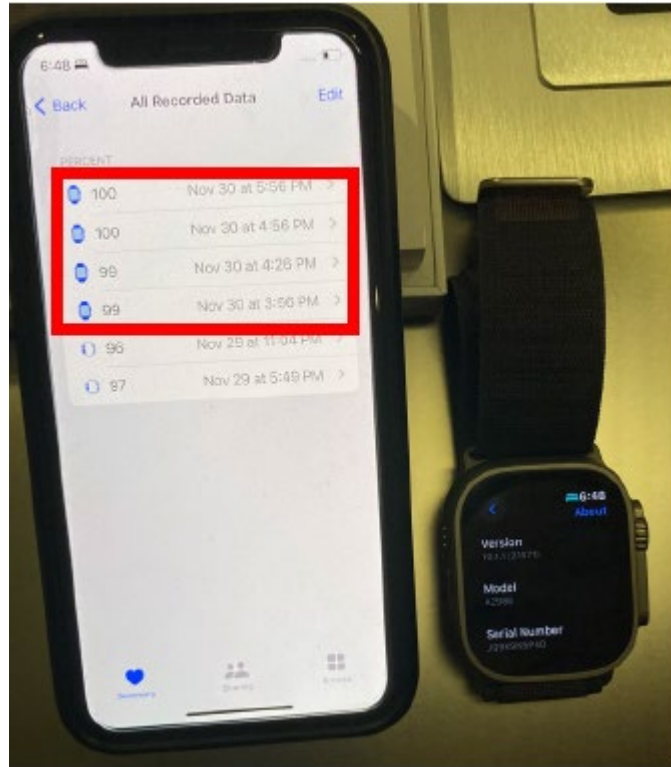
]] because Masimo accessed the blood oxygen feature on the very same LW/A Watches after Apple had already paired them using the pairing methods discussed below. Masimo Post-Oral Discussion Submission at 15. To test the Redesigned Watches, Masimo paired the Redesigned Watches to iPhones using two different methods. Both methods involve pairing the Redesigned Watches with a “jailbroken” iPhone. See Masimo Sur-Reply at 10. “Jailbreaking” refers to a modification of a device that “permits the circumvention of computer programs on mobile phones to enable interoperability of non-vendor-approved software applications[.]” Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260, 65263 (Oct. 26, 2012) (codified at 37 C.F.R. § 201.40); see also Masimo Sur-Reply at 9.

For the first method, Masimo used an iPhone X (*i.e.*, an outdated iPhone) running iOS 15 (*i.e.*, an outdated version of the iOS operating system) and installed the Legizmo Lighthouse application onto the phone. Madisetti Decl. at ¶¶ 67-92; see also Masimo Slides at 24; see also Apple Post Oral Discussion Submission at 8-9 (“Apple blocks the current generation of Apple Watch models (Series 9 and Ultra 2) from pairing with iPhone X or older models” and “to ensure security, current versions of Apple Watches, including the Series 9 and Ultra 2, are configured by Apple to pair only with the most recent iOS release [*i.e.*, iOS 17.0 or later].”) (citing Crowell Decl. at ¶¶15-19). Legizmo Lighthouse is a publicly available “third-party application that cannot be installed on an iPhone unless ... the iPhone is ‘jailbroken.’” Apple Reply at 9; see also Crowell Decl. at ¶¶21-24, 30-32. The Legizmo Lighthouse application allows users “to pair an outdated iPhone and/or iOS to a ‘normally’ incompatible Apple Watch.” Apple Reply at 11; see also Masimo Sur-Reply at 8. When employing this third-party application, Masimo was able to pair the modified iPhone with the redesigned LW/A Series 9 Apple Watch. Masimo Response at 7, 11; Madisetti Decl. at ¶75. After pairing, “the Health application and the Watch application on the iPhone identified the availability of the Blood Oxygen feature” and “Masimo [was able to use] the [redesigned] LW/A Series 9 to measure blood oxygen.” Masimo Response at 7; see also Madisetti Decl. at ¶¶ 80-81, 84-90. As shown below, with the modifications noted above, the redesigned Apple “watch sen[t] the blood oxygen results to the paired iPhone where they were displayed in the Health application”:



Masimo Response at 7; see also Madisetti Decl. at ¶¶90; see also Masimo Slides at 26.

For the second method, Masimo used an iPhone X (*i.e.*, an outdated iPhone) running iOS 16 (*i.e.*, an outdated version of the iOS operating system) installed with the same third-party Legizmo Lighthouse application discussed above. Madisetti Decl. at ¶¶ 67-92; see also Masimo Slides at 24. Additionally, Masimo found five files on the iPhone that use the term   and Masimo modified the files to change all instances of  . Masimo Response at 7; see also Madisetti Decl. at ¶ 72; see also Apple Post Oral Discussion Submission at 12. Masimo was able to pair the modified iPhone with a redesigned LW/A Ultra 2 Apple watch. See Masimo Response at 7; see also Masimo Slides at 28. After pairing, Masimo was able to measure blood oxygen with the Redesigned Watch and the results of the blood oxygen measurements were sent to and displayed on the iPhone as shown in the images below:



100	Nov 30, 5:56 PM >
100	Nov 30, 4:56 PM >
99	Nov 30, 4:26 PM >
99	Nov 30, 3:56 PM >

Masimo Response at 7; see also Madisetti Decl. at ¶¶75-92; see also Masimo Slides at 28.

Apple notes that Masimo was only able to access the blood oxygen measurements using the method above in its view “by reconfiguring the Redesigned Watch Products—using hacked, jailbroken, out-of-date iPhones containing out-of-date iOS and third-party security ‘exploits’ to corrupt the pairing process”. Apple Post Oral Discussion Submission at 2. Masimo does not dispute that it was only able to access the blood oxygen measurements through the steps and modifications described above. According to Apple, Masimo’s pairing of the Redesigned Watches “corrupt[ed]” the pairing process because it “materially change[s] the configuration of the Redesigned Watch Products, [[

Oral Discussion Submission at 3.

]] Apple Post

However, Masimo, like Nazomi, argues that jailbreaking the phones and installation of the Legizmo software is not a modification that precludes a finding of infringement. We conclude on the record before us that, like the Federal Circuit in Nazomi, jailbreaking and installation of this software “clearly constitutes a ‘modification’ of the accused products.” Id. at 1345. Additionally, in Typhoon Touch Technologies, Inc. v. Dell, Inc., 659 F.3d 1376 (Fed Cir. 2011), Typhoon made the same argument as Nazomi, namely that the accused devices infringed if they had “the capability of being configured or programmed to perform the stated function,” even though the accused devices were not structured to perform that stated function as sold. Id. at 1380. The Federal Circuit disagreed, finding that an accused device must be presently structured to store at least one data collection application. Id. at 1381. Here, as in Nazomi and Typhoon, the products designed and manufactured by Apple cannot infringe without modification—the modification of jailbreaking the iPhones that is needed for pairing with the Redesigned Watches for their operation and the installation of the software. On this basis, we conclude that Redesigned Watches do not infringe. See Telemac, 247 F.3d at 1326, 1330 (finding accused product non-infringing where the functionality present in the source code was blocked and therefore, without modification, the function could not be performed.).

## V. HOLDING

We find that Apple has met its burden to establish that the articles at issue do not infringe any of the asserted patent claims mentioned above. Accordingly, we find that the articles at issue are not subject to the LEO issued as a result of Inv. No. 337-TA-1276.

The decision is limited to the specific facts set forth herein. If articles differ in any material way from the articles at issue described above, or if future importations vary from the facts stipulated to herein, this decision shall not be binding on CBP as provided for in 19 C.F.R. §§ 177.2(b)(1), (2), (4), and 177.9(b)(1) and (2).

Sincerely,

Dax Terrill  
Chief, Exclusion Order Enforcement Branch

CC: Ms. Sheila N. Swaroop  
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# Exhibit 2



**U.S. Department of Homeland Security**  
Washington, DC 20229  
U.S. Customs and Border Protection

HQ H338254

January 7, 2025

**OT:RR:BSTC:EOE H338254 ACC / WMW**

**CATEGORY:** 19 U.S.C. § 1337; Unfair Competition

Mark D. Selwyn  
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Palo Alto, California 94306

VIA EMAIL: [mark.selwyn@wilmerhale.com](mailto:mark.selwyn@wilmerhale.com)

**RE:** Ruling Request; U.S. International Trade Commission; Limited Exclusion Order; Investigation No. 337-TA-1276; Certain Light-Based Physiological Measurement Devices and Components Thereof

Dear Mr. Selwyn:

Pursuant to 19 C.F.R. Part 177, the Exclusion Order Enforcement Branch, Regulations and Rulings, U.S. Customs and Border Protection (“CBP”) issues this ruling letter, based on a request from Apple Inc. (“Apple”) submitted on March 26, 2024 (“Ruling Request”), holding that the articles at issue, related to certain redesigned versions of the Apple Watch, as described below, are subject to the limited exclusion order (“LEO”) that the U.S. International Trade Commission (“ITC” or “Commission”) issued as a result of Investigation No. 337-TA-1276 (“the 1276 investigation”) under Section 337 of the Tariff of 1930, as amended, 19 U.S.C. § 1337.

We further note that determinations of the Commission resulting from the underlying investigation or a related proceeding under 19 C.F.R. Part 210 are binding authority on CBP and, in the case of conflict, will by operation of law modify or revoke any contrary CBP ruling or decision pertaining to Section 337 exclusion orders.

This ruling letter is the result of a request for an administrative ruling under 19 C.F.R. Part 177 that was conducted on an *inter partes* basis. The proceeding involved the two parties with a direct and demonstrable interest in the question presented by the Ruling Request: (1) your client, Apple, the ruling requester and respondent in the 1276 investigation; and (2) Masimo Corporation

and Cercacor Laboratories, Inc. (“Masimo”), the patent owner and complainant in the 1276 investigation. See, e.g., 19 C.F.R. § 177.1(c).

The parties were asked to identify in their submissions confidential information, including information subject to the administrative protective order in the underlying investigation, with **[[red brackets]]**. See 19 C.F.R. §§ 177.2, 177.8. Consistent with the above, the parties are directed to identify information in this ruling that should be bracketed in red **[[ ]]** because it constitutes confidential information, as defined below, such that it should be redacted from the public version of this ruling that will be published in accordance with 19 C.F.R. § 177.10. The parties are to contact the EOE Branch within ten (10) business days of the date of this ruling letter to identify such information with brackets. See, e.g., 19 C.F.R. § 177.8(a)(3).

Please note that disclosure of information related to administrative rulings under 19 C.F.R. Part 177 is governed by, for example, 6 C.F.R. Part 5, 31 C.F.R. Part 1, 19 C.F.R. Part 103, and 19 C.F.R. § 177.8(a)(3). See, e.g., 19 C.F.R. § 177.10(a). In addition, CBP is guided by the laws relating to confidentiality and disclosure, such as the Freedom of Information Act (“FOIA”), as amended (5 U.S.C. § 552), the Trade Secrets Act (18 U.S.C. § 1905), and the Privacy Act of 1974, as amended (5 U.S.C. § 552a). A request for confidential treatment of information submitted in connection with a ruling requested under 19 C.F.R. Part 177 faces a strong presumption in favor of disclosure. See, e.g., 19 C.F.R. § 177.8(a)(3). The person seeking this treatment must overcome that presumption with a request that is appropriately tailored and supported by evidence establishing that: the information in question is customarily kept private or closely-held and either that the government provided an express or implied assurance of confidentiality when the information was shared with the government or there were no express or implied indications at the time the information was submitted that the government would publicly disclose the information. See Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) (concluding that “[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of exemption 4.”); see also U.S. Department of Justice, Office of Information Policy (OIP): Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA (updated 10/7/2019); see also OIP Guidance: Exemption 4 after the Supreme Court’s Ruling in Food Marketing Institute v. Argus Leader Media (updated 10/4/2019).

## **I. BACKGROUND**

### **A. ITC Investigation No. 337-TA-1276**

#### **1. Procedural History At The ITC**

The Commission instituted Investigation No. 337-TA-1276 on August 21, 2021, based on a complaint filed by Masimo Corporation of Irvine, California and Cercacor Laboratories, Inc. of Irvine, California. Certain Light-Based Physiological Measurement Devices and Components Thereof, Inv. No. 337-TA-1276, EDIS Doc. ID 808521, Public Commission Opinion (Nov. 14, 2023) (“Comm’n Op.”) at 2 (citing 86 Fed. Reg. 46275-76 (Aug. 18, 2021)). The complaint, as supplemented, alleged a violation of section 337 by reason of infringement of certain claims of

both parties submitted an update regarding the difficulty agreeing to an NDA and their respective proposed procedural schedules. Apple Email to EOE Branch (dated April 9, 2024); see also Masimo Email to EOE Branch (dated April 10, 2024). The EOE Branch established and distributed the procedural schedule for this *inter partes* proceeding. EOE Branch Email to Parties (dated April 10, 2024).

On May 3, 2024, Masimo requested a conference call regarding access to the source code of the Redesign 2 Watch. Masimo Email to Parties (dated May 3, 2024). On May 6, 2024, the EOE Branch held a conference call with Apple and Masimo regarding the dispute over source code for the Redesign 2 Watch and requested that the parties provide a submission detailing the respective positions on source code. EOE Branch Email to Parties (dated May 6, 2024). On May 7, 2024, both parties submitted their positions on the source code necessary to determine whether the Redesign 2 Watch infringes the relevant patents. Apple Email to EOE Branch (dated May 7, 2024); see also Masimo Email to EOE Branch (dated May 7, 2024). On May 8, 2024, EOE Branch requested that Apple provide the source code to Masimo and extended the dates on the procedural schedule. EOE Branch Email to Parties (dated May 8, 2024).

On June 7, 2024, Masimo provided its response to the Ruling Request, which included attachments 1-20 (collectively, “Masimo Response”). On June 14, 2024, Apple provided its reply to Masimo’s response, which included Attachments I through J (collectively, “Apple Reply”). On June 21, 2024, Masimo provided its sur-reply (“Masimo Sur-Reply”) to the Apple Reply. On June 28, 2024, the EOE Branch conducted an oral discussion with the parties, with each party providing a presentation (“Apple Oral Discussion Presentation” and “Masimo Oral Discussion Presentation” respectively). Lastly, on July 5, 2024, the parties submitted post oral discussion submissions (“Apple Post Oral Discussion Submission” and “Masimo Post Oral Discussion Submission” respectively).

### **3. The Articles at Issue**

The articles at issue in the Ruling Request consist of certain Apple Watches, and iPhones that are paired to those Apple Watches, with embodiments or modifications that, as detailed below, were not developed at the time of the investigation at the Commission and therefore were not accused of infringement during that investigation. Apple refers to the Apple Watches at issue in this administrative ruling as the “Redesign 2 Watch” and the iPhone at issue in this administrative ruling as the “Redesigned iPhone.” Additionally, the models for which Apple has requested a ruling are (1) the Apple Watch Series 8 and 9 and (2) the Apple Watch Ultra and Ultra 2. See Ruling Request at 9. Regarding its product models, the legacy Apple Watch Series 6, 7, and 8 were accused and found to infringe during the underlying investigation. Id. The Apple Watch Series 9, and the Ultra and Ultra 2, were not accused as they were introduced in the United States after Masimo filed its complaint at the Commission. Id.

The models at issue in the Ruling Request, as referenced above, are depicted below:



Apple Watch Series 8



Apple Watch Series 9



Apple Watch Ultra



Apple Watch Ultra 2

**a. Apple Watch Series 8, 9, Ultra, and Ultra 2**

At the time of filing of the complaint at the Commission, the Apple Watch Series 8, 9, Ultra, and Ultra 2 did not exist and were released only after the evidentiary hearing in the underlying investigation. See CBP HQ Ruling H334304 at 9. The Commission included the Apple Watch Series 8 in its determination regarding the accused products. See Comm’n Op. at 13-14. In its Ruling Request, and as described in more detail below, Apple argues that its redesign for the

Apple Watch Series 8, 9, Ultra, and Ultra 2 removes these articles from the scope of the 1276 LEO. See Ruling Request at 18.

**b. Redesign Under Consideration**

The Redesign 2 Watch at issue in this Ruling Request comprises of three primary aspects. The first aspect is implemented on the articles at issue, in that every Apple Watch with pulse oximetry capability destined to be sold in the United States and Puerto Rico is hardcoded with a part number ending in LW/A. See Ruling Request at 19. The second aspect involves [[

]]. Id. The third aspect involves adding source code to the Redesigned iPhone for blood oxygen processing and results notification. Id. at 20. This source code change to the Redesigned iPhone moves processors for the final calculation of blood oxygen saturation from the Redesign 2 Watch to the Redesigned iPhone. See Masimo Response at 2. As such, in Apple’s view, [[

]] record binary photoplethysmography (‘PPG’) signals and “send[] them to [the] iPhone for blood oxygen processing.” Ruling Request at 1-2, 18 (emphasis added); see also Masimo Response at 8.

As Masimo explained with respect the redesigned functionality, “the LW/A 2 Watch<sup>[1]</sup> emits red and infrared light, detects light with four photodetectors, [[

]] Masimo Post-Oral Discussion Submission at 10. Masimo provides the following chart explaining how the pulse oximetry functionality and processing is divided between the Redesign 2 Watch and the Redesigned iPhone:

[[

]]

---

<sup>1</sup> The parties in this *inter partes* proceeding at times refer to the Redesign 2 Watch as the LW/A 2 Watch.

Masimo Oral Discussion Slides at 21.

In Apple’s redesign, the PPG measurements for both wavelengths (*i.e.*, PPG for red light and PPG for infrared light) are done on the LW/A 2 Watch. Attachment 1 to Masimo Response (“Madisetti Declaration”) at ¶¶ 50-52; see also Masimo Post Oral Discussion Submission at 11; see also Apple Reply at 22 [[

]] Id.; see also Masimo Post Oral Discussion Submission at 11; see also Apple Reply at 3 (“[Complainant] acknowledges that the relevant functionality has been relocated to the Redesigned iPhone [and] processors of the LW/A 2 Watch are configured to output PPG signals with information that can be used, and is used, by the iPhone to compute the user’s oxygen saturation measurement.”).

Significantly, in this *inter partes* proceeding, as noted below, the EOE Branch finds that there is no dispute among the parties (1) as to operation of the articles at issue; (2) that, in the articles at issue, [[

]]; (3) that Apple admits it has “moved” or “relocated” certain processors for the final calculation of blood oxygen saturation from the Redesign 2 Watch to the Redesigned iPhone; and (4) that, other than their location, [[

]].

- “Complainants do not dispute the operation of the Redesign 2 Watch or Redesigned iPhone. Indeed, Complainants’ Response does not contest any factual statements set forth in Apple’s Request. In particular, no dispute remains regarding (1) the operation of the Redesign 2 Watch or Redesigned iPhone; (2) the functionality or operating location of any source code; (3) the user interfaces presented on the Redesign 2 Watch and Redesigned iPhone; or (4) the ‘fixed and final’ nature of Apple’s redesign.”

Apple Reply at 3.

- “Apple did not dispute any of Masimo’s evidence or explanation of the operation of Apple’s attempted work-around. Reply at 3-4. That included that the [[ **]] as the adjudicated infringing Apple Watches**, and that [[ **]].** Response at 8, 12.”

Masimo Sur-Reply at 3 (emphasis added)

- “Complainants concede that the Redesign 2 Watch no longer calculates a user’s blood oxygen saturation, and that all functionality for doing so has been moved to the Redesigned iPhone.”

Apple Reply at 1-2

- “Apple relocated the processing for blood oxygen saturation measurements to the Redesigned iPhone.”  
Apple Reply at 16
- “Apple has [ ] needed to allegedly ‘measure,’ ‘determine,’ ‘calculate,’ or ‘output’ a user’s blood oxygen saturation on the Redesign 2 Watch and moved these functions to the Redesigned iPhone.”  
Apple Post-Oral Discussion Submission at 1
- “[T]he processors that perform [pulse oximetry] functionality are now in the [ ] iPhone.”  
Masimo Response at 5 (quoting the Ruling Request at 31)

## II. ISSUE

Whether Apple has carried its burden, as detailed below, to show that the articles at issue do not infringe the relevant claims of the asserted patents and are not subject to the Commission’s limited exclusion order. Specifically, the issues to address are whether Apple has established that: (1) the Apple Watch, as redesigned, is not a “covered article” as defined by the limited exclusion order and for purposes of the 1276 investigation; (2) the Apple Watch, as redesigned, when considered alone, does not infringe claim 22 of the ’502 patent; (3) the Apple Watch and iPhone, as redesigned, when considered in combination, do not infringe claim 22 of the ’502 patent or claims 12, 24, or 30 of the ’648 patent; and (4) the Apple Watch and iPhone, as redesigned, when considered in combination, do not infringe claim 22 of the ’502 patent or claims 12, 24, or 30 of the ’648 patent under the doctrine of equivalents as applied by CBP. Apple’s arguments that the articles at issue are not infringing or fall outside the scope of the limited exclusion order are addressed below.

## III. LEGAL FRAMEWORK

### A. Section 337 Exclusion Order Administration

The Commission shall investigate any alleged violation of section 337 to determine, with respect to each investigation conducted by it under this section, whether there is a violation of this section. See 19 U.S.C. § 1337(b)(1) and (c). If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States unless the Commission finds based on consideration of the public interest that such articles should not be excluded from entry. See 19 U.S.C. § 1337(d)(1).

When the Commission determines that there is a violation of section 337, it generally issues one of two types of exclusion orders: (1) a limited exclusion order or (2) a general exclusion order. See Fuji Photo Film Co., Ltd. v. ITC, 474 F.3d 1281, 1286 (Fed. Cir. 2007). Both types of orders direct CBP to bar infringing products from entering the country. See Yingbin-Nature (Guangdong) Wood Indus. Co. v. ITC, 535 F.3d 1322, 1330 (Fed. Cir. 2008). “A limited exclusion order is ‘limited’ in that it only applies to the specific parties before the Commission in the investigation. In contrast, a general exclusion order bars the importation of infringing products by everyone,

regardless of whether they were respondents in the Commission's investigation.” *Id.* A general exclusion order is appropriate only if two exceptional circumstances apply. See Kyocera Wireless Corp. v. ITC, 545 F.3d 1340, 1356 (Fed. Cir. 2008). A general exclusion order may only be issued if (1) “necessary to prevent circumvention of a limited exclusion order,” or (2) “there is a pattern of violation of this section and it is difficult to identify the source of infringing products.” 19 U.S.C. § 1337(d)(2); see Kyocera, 545 F.3d at 1356 (“If a complainant wishes to obtain an exclusion order operative against articles of non-respondents, it must seek a GEO [general exclusion order] by satisfying the heightened burdens of §§ 1337(d)(2)(A) and (B).”).

In addition to the action taken above, the Commission may issue an order under 19 U.S.C. § 1337(i) directing CBP to seize and forfeit articles attempting entry in violation of an exclusion order if their owner, importer, or consignee previously had articles denied entry on the basis of that exclusion order and received notice that seizure and forfeiture would result from any future attempt to enter articles subject to the same. An exclusion order under § 1337(d)—either limited or general—and a seizure and forfeiture order under § 1337(i) apply at the border only and are operative against articles presented for customs examination or articles conditionally released from customs custody but still subject to a timely demand for redelivery. See 19 U.S.C. §§ 1337(d)(1) (“The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.”); *id.* at (i)(3) (“Upon the attempted entry of **articles** subject to an order issued under this subsection, the Secretary of the Treasury shall immediately notify all ports of entry of the attempted importation and shall identify the persons notified under paragraph (1)(C).”) (emphasis added).

Significantly, unlike district court injunctions, the Commission can issue a general exclusion order that broadly prohibits entry of articles that violate section 337 of the Tariff Act of 1930 without regard to whether the persons importing such articles were parties to, or were related to parties to, the investigation that led to issuance of the general exclusion order. See Vastfame Camera, Ltd. v. ITC, 386 F.3d 1108, 1114 (Fed. Cir. 2004). The Commission also has recognized that even limited exclusion orders have broader applicability beyond just the parties found to infringe during an investigation. See Certain GPS Devices and Products Containing Same, Inv. No. 337-TA-602, Comm’n Op. at 17, n.6, Doc ID 317981 (Jan. 2009) (“We do not view the Court’s opinion in Kyocera as affecting the issuance of LEOs [limited exclusion orders] that exclude infringing products made by respondents found to be violating Section 337, but imported by another entity. The exclusionary language in this regard that is traditionally included in LEOs is consistent with 19 U.S.C. § 1337(a)(1)(B)-(D) and 19 U.S.C. § 1337(d)(1).”).

Moreover, “[t]he Commission has consistently issued exclusion orders *coextensive with the violation* of section 337 found to exist.” See Certain Erasable Programmable Read Only Memories, Inv. No. 337-TA-276, Enforcement Proceeding, Comm’n Op. at 11, Doc ID 43536 (Aug. 1991) (emphasis added). “[W]hile individual models may be evaluated to determine importation and [violation], the Commission’s jurisdiction extends to all models of [violative] products that are imported at the time of the Commission’s determination and to all such products that will be imported during the life of the remedial orders.” See Certain Optical Disk Controller Chips and Chipsets, Inv. No. 337-TA-506, Comm’n Op. at 56-57, USITC Pub. 3935, Doc ID 287263 (July 2007).

Lastly, despite the well-established principle that “the burden of proving infringement generally rests upon the patentee [or plaintiff],” Medtronic, Inc. v. Mirowski Family Ventures, LLC, 571 U.S. 191 (2014), the Commission has held that Medtronic is not controlling precedent and does not overturn its longstanding practice of placing the burden of proof on the party who, in light of the issued exclusion order, is seeking to have an article entered for consumption. See Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof, Inv. No. 337-TA-879, Advisory Opinion at 6-11. In particular, the Commission has noted that the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) “has upheld a Commission remedy which effectively shifted the burden of proof on infringement issues to require a company seeking to import goods to prove that its product does *not* infringe, despite the fact that, in general, the burden of proof is on the patentee to prove, by a preponderance of the evidence, that a given article *does* infringe[.]” Certain Integrated Circuit Telecommunication Chips, Inv. No. 337-TA-337, Comm’n Op. at 21, n.14, USITC Pub. 2670, Doc ID 217024 (Aug. 1993) (emphasis in original) (citing Sealed Air Corp. v. ITC, 645 F.2d 976, 988-89 (C.C.P.A. 1981)).

This approach is supported by Federal Circuit precedent. See Hyundai Elecs. Indus. Co. v. ITC, 899 F.2d 1204, 1210 (Fed. Cir. 1990) (“Indeed, we have recognized, and Hyundai does not dispute, that in an appropriate case the Commission can impose a general exclusion order that binds parties and non-parties alike and *effectively shifts to would-be importers of potentially infringing articles, as a condition of entry, the burden of establishing noninfringement*. The rationale underlying the issuance of general exclusion orders—placing the risk of unfairness associated with a prophylactic order upon potential importers rather than American manufacturers that, vis-a-vis at least some foreign manufacturers and importers, have demonstrated their entitlement to protection from unfair trade practices—applies here [in regard to a limited exclusion order] with increased force.”) (emphasis added) (internal citation omitted).

## B. Patent Infringement

Determining patent infringement requires two steps. Advanced Steel Recovery, LLC v. X-Body Equip., Inc., 808 F.3d 1313, 1316 (2015). The first is to construe the limitations of the asserted claims and the second is to compare the properly construed claims to the accused product. Id. To establish literal infringement, every limitation recited in a claim must be found in the accused product whereas, under the doctrine of equivalents, infringement occurs when there is equivalence between the elements of the accused product and the claimed elements of the patented invention. Microsoft Corp. v. GeoTag, Inc., 817 F.3d 1305, 1313 (Fed. Cir. 2016). One way to establish equivalence is by showing, on an element-by-element basis, that the accused product performs substantially the same function in substantially the same way with substantially the same result as each claim limitation of the patented invention, which is often referred to as the function-way-result test. See Intendis GmbH v. Glenmark Pharms., Inc., 822 F.3d 1355, 1361 (Fed. Cir. 2016).

As for the first step above, “claim construction is a matter of law.” SIMO Holdings, Inc. v. H.K. uCloudlink Network Tech., Ltd., 983 F.3d 1367, 1374 (Fed. Cir. 2021). Moreover, the ultimate construction of a claim limitation is a legal conclusion, as are interpretations of the patent’s intrinsic evidence (the patent claims, specifications, and prosecution history).

the EOE Branch finds that Apple, the party with the burden under the standard established in CBP HQ Ruling H284032, has failed to present a *prima facie* case that the doctrine of equivalents does not apply to the articles at issue.

## V. HOLDING

We find that Apple has not met its burden to establish that the articles at issue do not infringe the relevant claims of the asserted patents. Accordingly, we find that the articles at issue are subject to the limited exclusion order issued as a result of Inv. No. 337-TA-1276. However, nothing in this ruling modifies, revokes, or otherwise changes the admissibility determination in *Apple I*. As such, Apple may continue to enter the articles at issue, including its redesigned Apple Watch that was adjudicated in the previous *inter partes* proceeding. See CBP HQ Ruling H335304 (dated January 12, 2024).

The decision is limited to the specific facts set forth herein. If articles differ in any material way from the articles at issue described above, or if future importations vary from the facts stipulated to herein, this decision shall not be binding on CBP as provided for in 19 C.F.R. §§ 177.2(b)(1), (2), (4), and 177.9(b)(1) and (2).

Sincerely,

Dax Terrill  
Chief, Exclusion Order Enforcement Branch

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# Exhibit 3

90 K Street NE – 10<sup>th</sup> Floor  
Washington, DC 20229-1177



**U.S. Customs and  
Border Protection**

HQ H351038

August 1, 2025

**OT:RR:BSTC:EOE** H351038

**CATEGORY:** 19 U.S.C. § 1337; Unfair Competition

Center Director  
Electronics Center of Excellence and Expertise  
U.S. Customs and Border Protection  
301 E. Ocean Blvd., Suite 900  
Long Beach, California 90802

Attn: John Gerber, Supervisory Import Specialist

VIA EMAIL: john.p.gerber@cbp.dhs.gov

**RE:** Internal Advice Request; U.S. International Trade Commission; Limited Exclusion Order; Investigation No. 337-TA-1276; Certain Light-Based Physiological Measurement Devices and Components Thereof

Dear Center Director:

Pursuant to 19 C.F.R. § 177.11, the Exclusion Order Enforcement (“EOE”) Branch, Regulations and Rulings, U.S. Customs and Border Protection (“CBP”) issues this internal advice ruling based on your request (dated July 8, 2025) regarding the entry for consumption of five (5) Apple Watches that Apple Inc. (“Apple”) imported at the Port of Chicago under Entry Number SCS-20982810 and related to AWB 014-23379381-YYZ00011437 (H). The Apple Watches, as described in more detail below, have been detained based on the limited exclusion order that the U.S. International Trade Commission (“ITC” or “Commission”) issued resulting from ITC Investigation No. 337-TA-1276 (“the 1276 investigation” or “underlying investigation”) under section 337 of the Tariff of 1930, as amended, 19 U.S.C. § 1337 (“Section 337”). See CBP Detention Notice (dated July 07, 2025) for Detention No. 1751555713390. The Apple Watches were presented for examination on July 2, 2025. See Email to the EOE Branch from the Port of Chicago (dated July 9, 2025); see also 19 U.S.C. § 1499(c)(5), as implemented by 19 C.F.R. § 151.16(b) (“For purposes of this section, merchandise will be considered to be presented for CBP examination when it is in a condition to be viewed and examined by a CBP officer.”); see also Blink Design, Inc. v. United States, 986 F. Supp. 2d 1348, 38 C.I.T. 746, 749-754 (Ct. Int’l Trade, 2014) (“In light of this regulation, Defendant contends that Customs considers merchandise ‘presented for examination’ when ‘it is in a condition to be examined by a Customs official.’ ... When Customs requests that merchandise be delivered to a container examination station (‘CES’)

for inspection, as occurred in the present action, Defendant specifies that ‘Customs routinely considers the date on which merchandise is presented for examination as being the date that the last requested container is delivered to the CES, its contents have been unloaded by the private contractor, and Customs has received the pertinent documents that it needs to perform the examination. ... ***By treating the date when (1) the last requested container arrives at a CES and is unloaded and (2) Customs has the relevant explanatory documents, as the date on which merchandise is presented for examination, Customs ensures that the actual merchandise and relevant accompanying information are before its officials so that an examination may proceed.***’) (emphasis added).

Specifically, you have requested the EOE Branch’s admissibility determination regarding the proper administration of the limited exclusion order and, in particular, the applicability of an administrative ruling the EOE Branch issued on January 7, 2025, resulting from an *inter partes* proceeding under 19 C.F.R. § 177, to the importation of these Apple Watches. See CBP HQ Ruling H338254 (dated January 7, 2025) (“*Apple II Ruling*”). Familiarity with the EOE Branch’s administrative rulings related to the 1276 investigation is presumed and recited below are those facts necessary to address the issues presented by this entry for consumption.

The EOE Branch further notes that determinations of the Commission resulting from the underlying investigation or a related proceeding under 19 C.F.R. Part 210 are binding authority on CBP and, in the case of conflict, will by operation of law modify or revoke any contrary CBP ruling or decision pertaining to Section 337 exclusion orders. A “related proceeding” is defined as, *inter alia*, “proceedings to ***enforce, modify, or revoke*** a remedial or consent order, or ***advisory opinion proceedings.***” 19 C.F.R. § 210.3 (emphasis added). A determination from these proceedings represents binding authority, as noted above, and Commission action that directs CBP accordingly. Moreover, the Commission may “investigate any alleged violation of this section on complaint under oath ***or upon its initiative.***” 19 U.S.C. § 1337(b) (emphasis added); see also Certain Road Construction Machines and Components Thereof Notice of Commission Determination To Institute a Modification Proceeding; Request for Written Submissions, 85 Fed. Reg. 3944, 3945 (Jan. 23, 2020) (“[T]he Commission has determined that institution of a modification proceeding is also warranted based on the Commission’s authority, *sua sponte*, to institute a modification proceeding. Commission Rule 210.76(a)(1), 19 CFR 210.76(a)(1) (‘The Commission may also in its own initiative consider such action’ to modify its remedial orders.)”).

Lastly, before publication of this internal advice ruling pursuant to 19 U.S.C. § 1625, as implemented by 19 C.F.R. § 177.10, Apple is to be given an opportunity to identify any confidential information, including any information subject to the administrative protective order from the underlying investigation. See 19 C.F.R. §§ 177.2, 177.8. Consistent with the above, Apple is directed upon receiving this internal advice ruling to identify any confidential information with [red brackets] that indicate such information should be redacted from the public version of the ruling that will be published in accordance with 19 C.F.R. § 177.10. Apple is to contact the EOE Branch within ten (10) business days of the date of this internal advice ruling to identify such information with the brackets noted above. See, e.g., 19 C.F.R. § 177.8(a)(3).

To confirm, disclosure and redaction of information related to administrative rulings under 19 C.F.R. Part 177 is governed by, for example, 6 C.F.R. Part 5, 31 C.F.R. Part 1, 19 C.F.R. Part

103, and 19 C.F.R. § 177.8(a)(3). See, e.g., 19 C.F.R. § 177.10(a). In addition, CBP is guided by the laws relating to confidentiality and disclosure, such as the Freedom of Information Act (“FOIA”), as amended (5 U.S.C. § 552), the Trade Secrets Act (18 U.S.C. § 1905), and the Privacy Act of 1974, as amended (5 U.S.C. § 552a). A request for confidential treatment of information submitted in connection with a ruling requested under 19 C.F.R. Part 177 faces a strong presumption in favor of disclosure. See, e.g., 19 C.F.R. § 177.8(a)(3). The person seeking this treatment must overcome that presumption with a request that is appropriately tailored and supported by evidence establishing that: the information in question is customarily kept private or closely-held and either that the government provided an express or implied assurance of confidentiality when the information was shared with the government or there were no express or implied indications at the time the information was submitted that the government would publicly disclose the information. See Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) (concluding that “[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of exemption 4.”); see also U.S. Department of Justice, Office of Information Policy (OIP): Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA (updated 10/7/2019); see also OIP Guidance: Exemption 4 after the Supreme Court’s Ruling in Food Marketing Institute v. Argus Leader Media (updated 10/4/2019).

## **I. BACKGROUND**

### **A. The Limited Exclusion Order and Asserted Patents From ITC Investigation No. 337-TA-1276**

The limited exclusion order from the 1276 investigation prohibits the unlicensed entry for consumption of light-based physiological devices and components thereof that infringe one or more of claims 22 and 28 of U.S. Patent No. 10,912,502 (“the ’502 patent”) and claims 12, 24 and 30 of U.S. Patent Nos. 10,945,648 (“the ’648 patent”). See Certain Light-Based Physiological Measurement Devices and Components Thereof, Inv. No. 337-TA-1276, EDIS Doc. ID 2011470, Limited Exclusion Order (Oct. 26, 2023) at 2, ¶ 1. The Commission described the asserted patents as covering “non-invasive physiological sensors for measuring blood constituents or analytes using multi-stream spectroscopy.” *Apple II* Ruling at 3. The “sensors use an emitter that [] uses optical radiation at different wavelengths to measure blood analytes like glucose, hemoglobin, or oxygen saturation.” *Id.* “The sensors are connected to handheld or portable monitoring devices that can be attached to a patient’s body.” *Id.*

### **B. Inter Partes Proceedings Under 19 C.F.R. Part 177 Related To The Limited Exclusion Order From ITC Investigation No. 337-TA-1276**

#### **1. Apple’s First Ruling Request (“Apple I”)**

On October 27, 2023, Apple requested an administrative ruling under 19 C.F.R. Part 177 that its redesigned Apple Watches were not subject to the limited exclusion order from the 1276 investigation because they did not infringe any claims of the ’502 and ’648 patents. See CBP HQ

Ruling H335304 (dated January 12, 2024) at 8. In its ruling request, Apple stated that as redesigned the Apple Watches in question were no longer reasonably capable of satisfying the claim limitations at issue in the limited exclusion order. *Id.* at 1. Specifically, Apple’s argument was based on the pairing process between the redesigned Apple Watch and an unmodified iPhone such that the pulse oximetry functionality was disabled. *Id.* at 11. Nonetheless, Masimo argued that an ability existed that allowed the redesigned Apple Watch to practice the claim limitations at issue. *Id.* at 13. Specifically, Masimo attempted to show that the infringing pulse oximetry functionality from the legacy devices at issue in the underlying investigation, while disabled, could nonetheless be enabled “after (1) jailbreaking the iPhones used for pairing with the Redesigned Watches that is needed to activate the Watches and put them into operation; and (2) installing third-party software[.]” *Id.* at 29. Relying on the relevant caselaw, the EOE Branch concluded that “the products designed and manufactured by Apple cannot infringe without modification—the modification of jailbreaking the iPhones that is needed for pairing with the Redesigned Watches for their operation and the installation of the software.” *Id.* at 28. Accordingly, the EOE Branch concluded that the redesigned Apple Watches in *Apple I* did not infringe the ’502 and ’648 patents and were not subject to the limited exclusion order.

## 2. Apple’s Second Ruling Request (“*Apple II*”)

On March 26, 2024, Apple submitted another request an administrative ruling pursuant to 19 C.F.R. Part 177. This time, Apple’s request concerned its “Redesign 2 Watch” that “include[d] the same processors and hardware” at issue in the *Apple I* but with the processing responsible for the final calculation of a user’s blood oxygen saturation moved from the Apple Watch to the iPhone. *Apple II* Ruling at 9. Apple referred to the Apple Watches at issue in this second administrative ruling request as the “Redesign 2 Watch” and the iPhone at issue as the “Redesigned iPhone.” *Id.*

As Masimo explained with respect the redesigned functionality, “the LW/A 2 Watch<sup>1</sup> emits red and infrared light, detects light with four photodetectors, processes the detected light signals to separate them into red and infrared PPGs, and further processes those two PPGs before sending them to the iPhone.” *Apple II*, Masimo Post-Oral Discussion Submission at 10. Masimo provides the following chart explaining how the pulse oximetry functionality and processing is divided between the Redesign 2 Watch and the Redesigned iPhone:

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<sup>1</sup> The parties in this *inter partes* proceeding at times referred to the Redesign 2 Watch as the LW/A 2 Watch.

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*Apple II*, Masimo Oral Discussion Slides at 21.

In Apple’s redesign, the PPG measurements for both wavelengths (*i.e.*, PPG for red light and PPG for infrared light) are done on the LW/A 2 Watch. *Apple II*, Attachment 1 to Masimo Response (“Madisetti Declaration”) at ¶¶ 50-52; see also *Apple II*, Masimo Post Oral Discussion Submission at 11; see also Apple Reply at 22 (“The individual red and infrared PPG signals [are] recorded by the Redesign 2 Watch[.]”). Using those PPGs, the Redesigned iPhone computes the ratio of ratios and the user’s oxygen saturation value. *Id.*; see also *Apple II*, Masimo Post Oral Discussion Submission at 11; see also *Apple II*, Apple Reply at 3 (“[Complainant] acknowledges that the relevant functionality has been relocated to the Redesigned iPhone [and] processors of the LW/A 2 Watch are configured to output PPG signals with information that can be used, and is used, by the iPhone to compute the user’s oxygen saturation measurement.”).

### **C. Apple Watches Imported Under Entry Number SCS-20982810**

The entry documents Apple submitted in connection with this importation confirm that the shipment contains five Apple Watches and no other products. See CBP Form 7501 for Entry Number SCS-20982810. The model numbers for the imported Apple Watches from this shipment, as identified in the commercial invoice, are depicted below. Moreover, Apple has confirmed that, for this specific shipment, the imported Apple Watches implement the functionality from the *Apple II* Ruling. See Apple Certification (executed on April 16, 2025) (providing that Apple will enter for consumption one shipment containing five Apple Watches that “implement the redesign that was at issue in CBP HQ Ruling H338254 (dated January 7, 2025) (the ‘Redesign 2 Watches’).”).

is imported unassembled in three basic pieces that “snap together for ease of assembly by the ultimate consumer,” is properly classified under heading 8509 “at [the level of] GRI 1 and GRI 2(a) (because the Wet Jet is imported unassembled)”. Indeed, the Explanatory Notes themselves state that “[n]o account is to be taken...of the complexity of the assembly method.” See Explanatory Note 2(a)(VII).

Pomeroy Collection, Ltd. v. United States, 559 F. Supp. 2d 1374, 1386, FN 13 (Ct. Int’l Trade 2008) (emphasis in original). Accordingly, since unassembled products are considered assembled for entry purposes, the determination here is that the R-Series products were *properly excluded from entry when the “ink container” and “adapter” were contained in the same shipment.*

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Therefore, based on the entire analysis above, the entered “ink container” and “adapter” articles that were *contained in the same shipment fall within the scope of the [exclusion order].*

Id. at 23-25 (emphasis added in last two paragraphs). Accordingly, CBP has upheld the exclusion from entry of articles, even those characterized as “separate products,” in cases where they are imported in the same shipment and where, having been considered in combination, they directly infringe the relevant patents because the articles at issue satisfy all of the limitations in a claim from the asserted patents in the exclusion order. Significantly, given that a Customs ruling (including a Protest Decision) represents the official position of the agency under 19 C.F.R. § 177.9(a) with respect to the particular transaction or issue described therein, it is binding on all CBP officials and must be applied until modified or revoked. See CBP HQ Ruling H339732 (dated June 11, 2024) at 20; see also Int’l Custom Prods. v. United States, 748 F.3d 1182, 1185-86, 1187 (“Section 1625(c) requires Customs to undergo notice and comment procedures before it may issue ‘a proposed *interpretive ruling or decision* which would — (1) *modify . . . or revoke* a prior interpretive ruling or decision which has been in effect for at least 60 days.” (emphasis in original) . . . “Once Customs issued the Ruling Letter, [plaintiff] *and other importers* were entitled ‘to expect certainty’ that Customs ‘w[ould] not unilaterally change’ [its position] ‘without providing proper notice and an opportunity for comment.’” (emphasis added) (internal citations omitted)). As such, the enforcement position regarding articles entered “in the same shipment” applies with equal force with respect to the importation at issue in this internal advice ruling.

For the reasons above, the entry of the redesigned Apple Watches, by themselves and without the redesigned iPhones at issue in the *Apple II* Ruling, cannot satisfy all of the claim limitations in the asserted patents and, therefore, cannot be excluded from entry under a theory of direct infringement. Moreover, the EOE Branch specifically found that, the redesign Apple Watch, when considered alone, such as the importation at issue here, was “not a basis to refuse the article’s entry pursuant to the” limited exclusion order from the 1276 investigation. Accordingly, as noted above, the Apple Watches at the Port of Chicago under Detention No. 1751555713390 are to be released.

### C. CBP Exclusion Order Administration And Application Of Indirect Patent Infringement

As recognized in the *Apple II*, the Commission’s long-established practice “does not limit [an exclusion order] to covered products that were actually adjudicated to infringe [during the underlying investigation].” *Apple II* Ruling at 20 (quoting Certain Movable Barrier Operator Systems and Components Thereof, Inv. No. 337-TA-1118, EDIS Doc. ID 839790, Remand Commission Opinion at 48 (Public) (December 20, 2024). “Consistent with [that] long-standing practice, the scope of [exclusion orders] includes all [ ] infringing [devices subject to the scope of the investigation], *whether they have been adjudicated in the investigation or were later introduced.*” Certain Road Construction Machines and Components Thereof, Inv. No. 337-TA-1088 (Modification), Commission Opinion, Doc. ID 719534 (Sept. 14, 2020) at 12-13 (emphasis added). “This coverage is to ensure that the exclusion order affords the complainant ‘complete relief’ and cannot be ‘easily circumvented.’” Certain Movable Barrier Operator Systems and Components Thereof, Inv. No. 337-TA-1118, EDIS Doc. ID 839790, Remand Commission Opinion at 48 (Public) (December 20, 2024) (citing Certain Graphics Systems, Components Thereof, and Consumer Products Containing Same, Inv. No. 337-TA-1044, Comm’n Op. at 66 (Sept. 18, 2018); *see also* Certain Human Milk Oligosaccharides and Methods of Producing Same, Comm’n Op. at 19-20, 2020 WL 3073788 at \*11 (June 20, 2020) (redesigned products may still fall within the scope of the remedial orders even if they were not adjudicated for infringement in the original investigation), *aff’d*, Jennewein Biotechnologie GmbH v. Int’l Trade Comm’n, 2021 WL 4250784 (Fed. Cir. Sept. 17, 2021) (unpublished)).

In applying the Commission’s precedent concerning its remedial orders under Section 337, the EOE Branch has recognized that “an infringement analysis is required and remains the test to determine admissibility under Section 337 absent specific direction from the Commission, such as in an exclusion order with express indication in any Commission Opinion from the underlying investigation.” CBP HQ Ruling H325119 (dated November 30, 2023) at 20. As the EOE Branch further explained:

The scope of the exclusion order, however, is best understood to encompass articles “covered by” the relevant patent claims, the infringement of which formed the basis of the violation of Section 337 in the underlying investigation and resulted in the issuance of the exclusion order. As [the Commission] has repeatedly confirmed: “The Commission’s long-standing practice is to direct its remedial orders to all products ***covered by the patent claims*** as to which a violation has been found, rather than limiting its orders only to those specific models selected for the infringement analysis[.] [W]hile individual models may be evaluated to determine importation and infringement, the Commission’s jurisdiction extends to all models of ***infringing products*** that are imported at the time of the Commission’s determination ***and to all such products that will be imported during the life of the remedial orders.***” Certain Road Construction Machines and Components Thereof, Inv. No. 337-TA-1088 (Modification), Commission Opinion, Doc. ID 719534 (Sept. 14, 2020) at 13 (emphasis added) (quoting Optical Disk Controller Chips and Chipsets and Products Containing Same, including DVD Players and PC Optical

Storage Devices, Inv. No. 337-TA-506, Comm'n Op. at 56-57 (Sept. 28, 2005) (that quoted Certain Hardware Logic Emulation Systems & Components Thereof, Inv. No. 337-TA-383, Comm'n Op., 1998 WL 307240, \*9 (Mar. 31, 1998))).

CBP HQ Ruling H325119 at 20-21.

As indicated above, “both Commission and EOE Branch precedent makes clear that the traditional test for patent infringement remains the touchstone for CBP when administering a Section 337 exclusion order.” *Apple II* Ruling at 30. “Accordingly, the test that the EOE Branch must apply requires an analysis whether an unadjudicated article that falls within the scope of the underlying investigation *infringes any claims from the patents at issue based on the traditional two-step approach noted above.*” *Id.* (emphasis added). However, this “traditional two-step approach” only concerns *direct* patent infringement when determining whether all the limitations in the asserted patents are satisfied by the article at issue, such that it would be subject to an exclusion order.

Consequently, the question remains whether the terms “covered by” the patent claims or “that infringe” the patent claims, as used in the Commission’s remedial orders – including the limited exclusion order from the 1276 investigation – require CBP to apply indirect infringement when enforcing exclusion orders. For the reasons below, the EOE Branch concludes that it does not and, as such, declines to apply this an approach with respect to active inducement infringement under 35 U.S.C. § 271(b).<sup>3</sup>

The Federal Circuit has upheld the Commission’s statutory authority to issue exclusion orders under Section 337 for violations based on a theory of indirect infringement. See *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338 (Fed. Cir. 2015); see also *Comcast Corp. v. Int’l Trade Comm’n*, 951 F.3d 1301 (Fed. Cir. 2020). To confirm, nothing in this internal advice ruling applies to such exclusion orders where the Commission finds a violation of Section 337 based on indirect infringement and directs CBP to refuse entry to the legacy products found to infringe. Conversely, nothing in the Federal Circuit cases cited above indicates that CBP must extend exclusion orders that are based only on violations under direct infringement theories and, in such cases, apply indirect infringement where the Commission has not, in the first instance, made such a finding.

It is notable in this regard that, as an agency practice, CBP has never applied a theory of indirect infringement to find that an article is subject to a Section 337 exclusion order and, on these grounds, must be denied entry. A reason for this is likely that parties appearing before the EOE

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<sup>3</sup> Notwithstanding this position regarding active inducement infringement under 35 U.S.C. § 271(b), the EOE Branch acknowledges that contributory infringement under 35 U.S.C. § 271(c) may present a different question. For example, the Commission frequently includes “components thereof” in the operative paragraph of its exclusion orders and this inclusion may align with the “*component*” reference in 35 U.S.C. § 271(c). In fact, the same Protest Decision referred to above notes that, “on September 11, 2008, the ITC modified [the seizure and forfeiture order in question] to delete the phrase ‘component parts thereof’” and that this carried significance because, in deleting that phrase, the ITC confirmed “[t]he general exclusion order [as originally issued did] not in fact cover components of ink cartridges.” CBP HQ Protest Decision H025822 at 23. In other words, the Commission’s statements in that investigation suggest that, when it intends for CBP to apply 35 U.S.C. § 271(c) and refuse entry to “components thereof” that infringe, it includes this phrase in its remedial orders.

Branch in *inter partes* proceedings under 19 C.F.R. Part 177 rarely present theories of indirect infringement. In fact, Masimo did not present a theory of indirect infringement in *Apple II*. This is telling, not only in demonstrating the reluctance of a party to raise theories of indirect infringement before the EOE Branch but, more significantly, as Masimo did not raise such an argument, it has waived its ability to do so before CBP in connection with this limited exclusion order. Of course, this would not preclude Masimo from presenting such an argument in a related proceeding at the Commission.

Additionally, it is far from clear that the Commission has directed, or would even want, CBP to refuse entry to imported articles based on a theory of indirect infringement when the Commission has not, in the first instance, found such infringement during an underlying investigation. The EOE Branch is not aware of any Section 337 precedent that instructs CBP to take such action and, as already noted above, the precedent that is available focuses on CBP enforcing exclusion orders against new or modified products by applying theories of direct infringement. This seems even more appropriate when considering that, for indirect infringement through active inducement, not only must a party have known of the patent and that the induced acts constitute patent infringement, but that the infringer also possess a specific intent to encourage another's infringement. See *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831, 851 (Fed. Cir. 2010), *aff'd*, 564 U.S. 91 (2011). The EOE Branch concludes that such determinations are better suited for related proceedings at the Commission rather than the border enforcement operations at CBP. As such, the EOE Branch finds that infringement questions such as these should return to the Commission in the first instance for a related proceeding because the Commission is the ultimate arbiter of its remedial orders and is the agency that issues final determinations that are subject to direct appeal at the Federal Circuit by any person adversely affected by such a final determination. See 19 U.S.C. § 1337(c).

Accordingly, for the reasons above, CBP will not apply indirect infringement under a theory of active inducement when administering an exclusion order under Section 337 *except* when the Commission finds a violation of Section 337 based on indirect infringement during an underlying investigation or when CBP is instructed to do so by the Commission, either as a general instruction that would have the effect of modifying or revoking this ruling by operation of law, see 19 C.F.R. § 177.12(d) (“The publication and issuance requirements set forth in paragraphs (b) and (c) of this section are inapplicable in circumstances in which ***a Customs position is modified, revoked or otherwise materially affected by operation of law or by publication pursuant to other legal authority or by other appropriate action taken by Customs in furtherance of an order, instruction or other policy decision of another governmental agency*** or entity pursuant to statutory or delegated authority.”) (emphasis added), or with an instruction on an exclusion order-by-exclusion order basis.

## V. HOLDING

For the reasons above, the redesigned Apple Watches at the Port of Chicago under Detention No. 1751555713390 are to be released.

The EOE Branch reiterates that determinations of the Commission resulting from the underlying investigation or a related proceeding under 19 C.F.R. Part 210 are binding authority on

CBP and, in the case of conflict, will by operation of law modify or revoke any contrary CBP ruling or decision pertaining to Section 337 exclusion orders. Moreover, the Commission may modify or revoke this position, as noted above, or provide investigation-specific directions when issuing exclusion orders in the future and directing CBP accordingly.

Please send this internal advice ruling to Apple and confirm its transmission once that is complete. As noted above, Apple is directed upon receiving this internal advice ruling to identify any confidential information with [[red brackets]] that indicate such information should be redacted from the public version of the ruling that will be published in accordance with 19 C.F.R. § 177.10. Apple is to contact the EOE Branch within ten (10) business days of the date of this internal advice ruling to identify such information with the brackets noted above.

Sincerely,

Dax Terrill  
Chief, Exclusion Order Enforcement Branch

# Exhibit 4

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.**

**In the Matter of**

**CERTAIN LIGHT-BASED  
PHYSIOLOGICAL MEASUREMENT  
DEVICES AND COMPONENTS THEREOF**

**Investigation No. 337-TA-1276  
(Modification)**

**COMPLAINANT MASIMO'S REQUEST FOR CLARIFICATION, OR IN THE  
ALTERNATIVE, PETITION FOR MODIFICATION AND REQUEST FOR  
EXPEDITED TREATMENT**

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3	June 24, 2024 Presentation to CBP
4	Apple Press Release, <i>An Update on Blood Oxygen for Apple Watch in the U.S.</i> (Aug. 14, 2025)
5	<i>Masimo Corp. v. CBP et al.</i> , Case No.: 1:25-cv-2749 (D.D.C.), Sept. 2, 2025 Hrg. Tr.
6	<i>Certain Light-Based Physiological Measurement Devices &amp; Components Thereof</i> , Ruling Request, Inv. No. 337-TA-1276, HQ H338254 (Mar. 26, 2024)
7	<i>Certain Light-Based Physiological Measurement Devices &amp; Components Thereof</i> , Ruling Request Attachment G (Thomas Decl.), Inv. No. 337-TA-1276, HQ H338254 (Mar. 26, 2024)
8	<i>Certain Light-Based Physiological Measurement Devices &amp; Components Thereof</i> , Ruling Request Attachment H (Sarrafzadeh Decl.), Inv. No. 337-TA-1276, HQ H338254 (Mar. 26, 2024)
9	Oxford English Dictionary, 2d ed. 1989
10	Merriam-Webster Online Dictionary
11	<i>Certain Light-Based Physiological Measurement Devices &amp; Components Thereof</i> , Masimo Response to Ruling Request Attachment 1 (Madisetti Decl.), Inv. No. 337-TA-1276, HQ H338254 (June 7, 2024)
12	Apple iPhone User Guide: Intro to Health Data on iPhone
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14	How to use the Blood Oxygen app on Apple Watch - Apple Support
15	Masimo Response to Apple's Second Request for Administrative Ruling
16	Apple Watch User Guide: Set Up Your Apple Watch

## I. INTRODUCTION

Pursuant to 19 C.F.R. § 210.76, Complainant Masimo Corp. petitions the Commission for clarification of the remedial orders issued in this investigation.<sup>1</sup> The orders bar Respondent Apple Inc. from, *inter alia*, importing light-based physiological measurement devices and components thereof that infringe one or more of claims 22 and 28 of ‘502 Patent and claims 12, 24, and 30 of the ‘648 Patent—including certain Apple Watches adjudicated in the underlying investigation. The day after the Commission entered the orders, Apple approached Customs with a proposed redesign that allegedly disabled blood-oxygen monitoring functionality in the Apple Watches.<sup>2</sup> Following an *inter partes* proceeding, and over Masimo’s opposition, Customs found this redesign sufficient to avoid infringement and cleared the watches for importation in January 2024.

Two months later, Apple asked Customs to evaluate a different redesign. This time, rather than disabling the infringing functionality, Apple distributed it between an Apple Watch and Apple iPhone.<sup>3</sup> The redesign included the same hardware and software found to infringe and continued to record photoplethysmography signals from detectors housed in the watch. The only difference was that the watch transmitted those signals to an iPhone for a final calculation of blood oxygen saturation. Following an *inter partes* proceeding with full participation by Masimo, Customs ruled in January 2025 that the redesigned watch would, if imported into the United States, violate the LEO. Although Customs found that the redesigned watch, by itself, would not infringe Masimo’s

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<sup>1</sup> Masimo understands that the Commission views petitions for modification as an appropriate procedural mechanism to clarify the scope of a remedial order. *See Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Products Containing the Same and Components Thereof*, Inv. No. 337-TA-921, Comm’n Mod. Op. (Aug. 29, 2016). That is the relief Masimo seeks here: clarification of the LEO and CDO.

<sup>2</sup> Apple has never explained why it did not ask the Commission to assess this redesign given Apple clearly had it in hand prior to completion of the investigation.

<sup>3</sup> The watches at issue in the underlying investigation also paired with an iPhone to perform the infringing blood-oxygen monitoring functionality.

patents, it held that the redesigned watch paired with an iPhone would be an infringing wearable subject to the order. Customs' January 2025 ruling explicitly rejected Apple's redesign and allowed only the continued importation of "disabled" watches cleared in January 2024.

Seven months later, Apple suddenly and unexpectedly announced it was able to provide blood-oxygen monitoring on its redesigned watches based on a "a recent U.S. Customs ruling." Unaware of this ruling—or any proceeding that might have led to it—Masimo inquired with Customs and ultimately found out that the agency had issued an *ex parte* ruling on August 1, 2025, that inexplicably reversed its previous ruling and allowed Apple to import the same watches that Customs previously had held would violate the limited exclusion order. This about-face created significant confusion and harm. Notably, before Masimo could object to the ruling, Apple pushed out a software update immediately enabling the "disabled" watches it imported under the January 2024 ruling.<sup>4</sup> It is also questionable that Customs had authority to retroactively clear watches that were imported subject to the Commission's remedial orders based on Apple's representation that the watches would be disabled. In any event, there is no administrative record detailing the reasons why CBP reversed its January 2025 ruling. And the August 2025 ruling violated Masimo's right to notice for modification or revocation pursuant to 19 C.F.R. § 177.12(c)(2).

To stem the harm and return to the status quo, Masimo filed a complaint against Customs in the United States District Court for the District of Columbia and sought a temporary restraining order and preliminary injunction against implementation of its *ex parte* order. The Commission intervened and made clear that, through its authority to modify remedial orders, it could quickly clarify the scope of the limited exclusion order and cease and desist order. Masimo now asks the

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<sup>4</sup> Customs has since made clear that it did not authorize Apple to release this software update.

Commission to exercise that authority, resolve the chaos resulting from Customs' inconsistent rulings, and clarify that the orders covers the redesigned Apple Watches.

Masimo's requested relief is straightforward. It is undisputed that the redesigned watch-plus-phone combination includes the functionality found to infringe; that the redesigned watch and phone are designed to pair together to effectuate this functionality; and that Apple instructs its users to do exactly that. The only issues—whether the watch-plus-phone combination is a covered article and whether Apple importing and enabling the redesigned watch is within the scope of the remedial orders—can be resolved based on undisputed facts and well-settled Federal Circuit and Commission precedent.<sup>5</sup> Masimo respectfully asks the Commission to address these issues and clarify that Apple's importation of the redesigned watch is within the scope of the Commission's remedial orders.

## **II. BACKGROUND**

### **A. Underlying Investigation**

The Commission instituted the underlying investigation on August 18, 2021, based on a complaint filed on behalf of Masimo Corporation and Cercacor Laboratories, Inc. EDIS No. 749538 (“Notice of Institution”) at 2-3. The complaint, as amended, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain light-based physiological measurement devices and components thereof by reason of infringement of certain claims of U.S. Patent No. 10,912,501 (the “‘501 Patent”); U.S. Patent No.

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<sup>5</sup> Masimo also asks the Commission to address whether the redesigned watch alone continues to infringe claim 22 of the ‘502 Patent, which turns on a matter of claim construction that CBP declined to address as discussed in Section IV.C *infra*. The Commission need not reach this issue if it determines that the Redesign 2 Watch is subject to the remedial orders because it infringes when paired with an iPhone as discussed in Section IV.B *infra*.

indicated that they would “take this [matter] up,” and while the Commission “had thought about self-instituting,” it concluded that “it would be better for [Masimo] to file something so that [Masimo] can frame modification in the manner that they want.” *Id.* at 129. The District Court suggested that Masimo file such a petition with the Commission “by Monday [September 8]” and that “they be given expedited advances” in the proceeding. *Id.* at 129, 131-32. The Commission acknowledged the District Court’s statement. *Id.* at 130 (“That message is loud and clear, and understood.”). The Court withheld ruling on Masimo’s motion for a TRO and a PI pending jurisdictional discovery, which would occur in parallel with any ITC proceeding. *Id.* at 129, 131-32. The Court ordered that the parties provide a status update by September 12, 2025. *Id.* at 133.

### **III. LEGAL STANDARD**

“Whenever any person believes that changed conditions of fact or law, or the public interest, require that an exclusion order, cease and desist order, consent order, or seizure and forfeiture order be modified or rescinded, in whole or in part, such person may file a petition, pursuant to section 337(k)(1) of the Tariff Act of 1930, requesting that the Commission make a determination that the conditions which led to the issuance of an exclusion order, cease and desist order, consent order, or seizure and forfeiture order no longer exist.” 19 C.F.R. § 210.76(a)(1).

### **IV. ARGUMENT**

#### **A. Clarification or Modification Is Appropriate**

The Commission has found changed conditions sufficient to trigger clarification or modification when a respondent subject to remedial orders alters its importation practices in an effort to circumvent the orders. *Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Products Containing the Same and Components Thereof*, Inv. No. 337-TA-921, Comm’n Mod. Op. 589261 at 7 (Aug. 29, 2016) (“There is no dispute that Garmin’s current practice of importing standalone transducers to be kitted post-importation is new and that prior to

issuance of the LEO it imported only the following: (1) fully kitted devices, or (2) transducers intended for independent sale.”). Apple has done exactly that by moving part of the infringing functionality from the Apple Watch to an iPhone paired with the watch, and declaring unilaterally that it can avoid the remedial orders on this basis.

The products at issue in the underlying investigation included certain models of the Apple Watch, including the Apple Watch Series 6, the Apple Watch Series 7, and certain prototype Apple Watch products with project names N197, N198, and N199 (collectively, the “Accused Products”). EDIS No. 808521 (“Comm’n Op.”) at 13-14. The Commission’s infringement determination was based on the Accused Products including the capability to meet every requirement in claim 22 of the ’502 Patent, and claims 12, 24, and 30 of the ’648 Patent. *Id.*; Final ID at 40-55. Relevant here, the Accused Products were found to include one or more processors configured to calculate an oxygen saturation measurement of the user.” *Id.* at 39, 42, 47, 52.

Apple’s redesign simply “relocated” processing of the oxygen saturation measurements to an iPhone paired with the Redesign 2 Watch. Ex. 6 (Apple March 26, 2024 Section 177 Ruling Request) at 6, 18-25, 29-37. It is undisputed that the Redesign 2 Watch still meets every other limitation in claims 22 and 28 of the ’502 Patent,<sup>8</sup> and claims 12, 24, and 30 of the ’648 patent. *Id.* It retains the same processors and other hardware as the Accused Products, and it continues to initiate the process to measure blood oxygen by recording photoplethysmography (“PPG”) signals from detectors housed in the watch, and then transmits those signals to an iPhone for further processing and the final calculation of blood oxygen saturation. *Id.* at 1-2, 18 (“

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<sup>8</sup> To focus the issues, Masimo is not seeking clarification with respect to claim 28 of the ’502 Patent at this time.

[REDACTED]”); *see also id.* at 21, 24; Ex. 7 (Thomas Decl.) ¶ 57; Ex. 8 (Sarrafszadeh Decl.) ¶¶ 36, 41, 50-53.

Indeed, Customs agreed these facts are undisputed in its January 7, 2025 Ruling, “there is no dispute among the parties (1) as to operation of the articles at issue; [REDACTED]

[REDACTED] (3) that Apple admits it has ‘moved’ or ‘relocated’ certain processors for the final calculation of blood oxygen saturation from the Redesign 2 Watch to the Redesigned iPhone; and (4) that, other than their location, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 1 at 13.

Apple’s current practice, therefore, is premised on importing the Redesign 2 Watch, which is then paired with an iPhone to complete functionality found to infringe, and pushing software updates to enable the infringing functionality in watches in the United States. Apple did not put this purported redesign at issue in the underlying investigation and thus the Commission did not have occasion to address the questions raised in this petition: whether Apple’s importation of the Redesign 2 Watch is within the scope of the limited exclusion order; and whether Apple software updates that will enable the infringing functionality in imported watches paired with an iPhone are within the scope of the cease and desist order. Both questions can be answered in the affirmative based on undisputed facts<sup>9</sup> contained in the record of the underlying investigation, the proceedings

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<sup>9</sup> Because Masimo is seeking clarification about the scope of the remedial orders based on undisputed facts, the Commission should exercise its authority to grant this petition without referring the matter to an Administrative Law Judge for further proceedings. 19 C.F.R.

before Customs, and public statements by Apple concerning the Apple Watch. The Commission should grant this petition and clarify that its remedial orders cover the Redesign 2 Watch and any redesign that distributes the infringing functionality between the watch and an iPhone with which it is paired.<sup>10</sup>

**B. The Commission Should Clarify that the Redesign 2 Watch is Within the Scope of the Remedial Orders Because It Infringes When Paired With an iPhone**

**1. The Redesigned Watch Paired with an iPhone are “Wearable Devices” and “A User-Worn Device”**

The Commission’s remedial orders cover “Light-based physiological measurement devices and components thereof” that infringe one or more of claims 22 and 28 of ‘502 Patent and claims 12, 24, and 30 of the ‘648 Patent. EDIS No. 807002, Limited Exclusion Order for Apple, Inc., ¶ 1 (Oct. 26, 2023) (“LEO”); *see also* EDIS No. 807049, Cease and Desist Order for Apple, Inc., ¶ 1 (Oct. 27, 2023) (“CDO”) at 1. The LEO defines the “covered articles” as “wearable electronic devices with light-based pulse oximetry functionality and components thereof.” LEO ¶ 2. It is undisputed that the watches at issue in the underlying investigation are “wearable electronic devices with light-based pulse oximetry functionality” and a “user-worn device” as recited in claims 22 and 28 of ‘502 Patent and claims 12, 24, and 30 of the ‘648 Patent. The question in this proceeding is whether a combination of the Redesign 2 Watch and a paired iPhone meets those definitions. It does based on undisputed evidence and principles of claim construction as detailed below.

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§ 210.76(b); *Marine Sonar*, Comm’n Mod. Op., EDIS No. 589261 at 8 (“Navico’s request simply clarifies the LEO as originally issued and does not change the scope of the order).

<sup>10</sup> To be clear, Masimo is not asking the Commission to find that the iPhone itself is subject to the remedial orders. The relief Masimo seeks—*i.e.*, clarification that the Redesign 2 Watch and watches enabled with the same functionality via software update are within the scope of the orders—will give the orders full effect.

Commission precedent makes clear that the scope of an investigation—and therefore the scope of any remedial order—is based on a plain language description of the accused products. *See Certain Graphics Systems, Components Thereof, and Digital Televisions Containing the Same*, Inv. No. 337-TA-1318, Comm’n Op. at 55, n. 42 (Feb. 23, 2024); *see also Certain Lithium Ion Batteries, Battery Cells, Battery Modules, Battery Packs, Components Thereof, And Processes Therefor*, Inv. No. 337-TA-1159, Comm’n Op. at 80-81 (Mar. 4, 2021) (“The notice will define the scope of the investigation in such plain language as to make explicit what accused products or category of accused products ... will be the subject of the investigation” and “any relief must be limited to the plain English statement.”) (internal citation omitted). The Oxford English Dictionary defines “wearable” as “capable of being worn” and “fit or suitable to be worn.” Ex. 9 (20 Oxford English Dictionary, 2d ed. 1989) at 49. Merriam-Webster offers a nearly identical definition. *See* Ex. 10 (Merriam-Webster Online Dictionary) (“wearable: capable of being worn: suitable to be worn”). For purposes of the LEO, therefore, an electronic device is “wearable” if, under the narrowest definition, it is suitable for being worn and, under the broadest definition, it is merely capable of being worn. This is the conclusion Customs reached in its January 7, 2025 Ruling following an *inter partes* proceedings. Ex. 1 at 25-26.

The Redesign 2 Watch and a paired iPhone are “wearable devices” that fall within the scope of the LEO. There is no dispute that the Redesign 2 Watch is “suitable for being worn” and “capable of being worn.” Ex. 6 at 2-3, 25. The Apple iPhone also meets this definition, as it is designed to be worn for various health-related purposes. Ex. 11 (Madisetti Decl.) ¶ 111. For example, Apple literature explains that “as you walk with iPhone in your pocket or *wear it near your waist*,” the iPhone calculates and records mobility metrics. Ex. 12 (iPhone User Guide: Intro to Health Data on iPhone) at 2 (emphasis added). Apple also designs the iPhone for users to wear in an armband, for example, while walking or running. Ex. 11 (Madisetti Decl.) ¶ 111. When

# Exhibit 5

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.**

**In the Matter of  
CERTAIN LIGHT-BASED PHYSIOLOGICAL  
MEASUREMENT DEVICES AND  
COMPONENTS THEREOF**

Inv. No. 337-TA-1276

**RESPONDENT APPLE INC.'S RESPONSE TO MASIMO'S REQUEST FOR  
CLARIFICATION, OR IN THE ALTERNATIVE, PETITION FOR MODIFICATION  
AND REQUEST FOR EXPEDITED TREATMENT**

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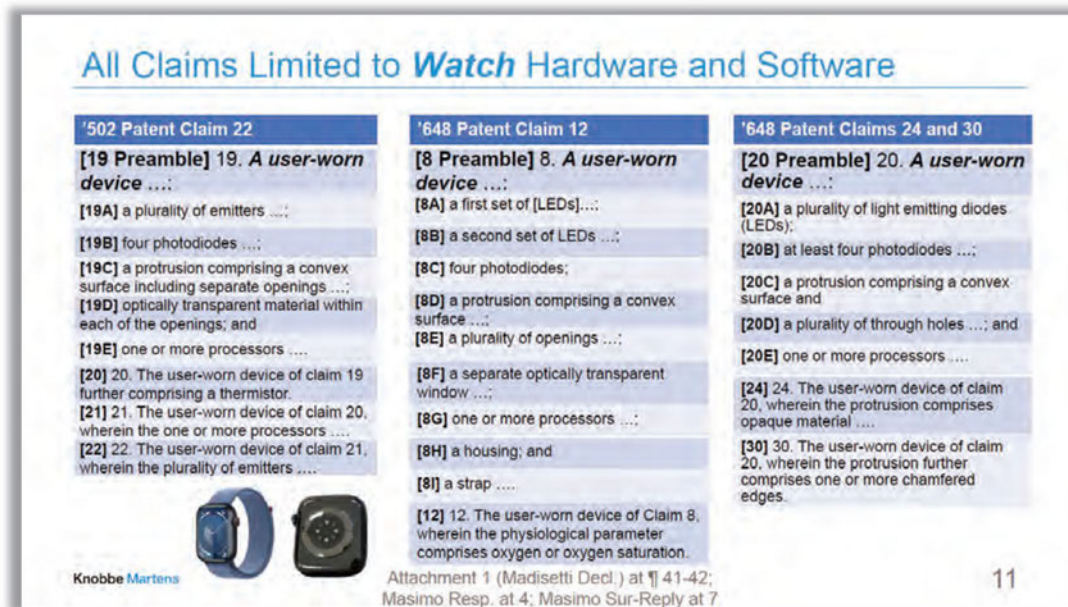
Commission. Although those theories fail on the merits, the Commission should not consider them at all because it lacks jurisdiction to do so, both because the arguments implicate issues already on appeal to the Federal Circuit, and because nothing in Section 337 authorizes the Commission to expand its remedial orders through a modification proceeding.

**A. Masimo’s Redesign 2 Watch In Combination With The iPhone Theory Would Fail On The Merits**

Masimo argues in support of its request to expand the remedial orders that the Redesign 2 Watch in combination with the iPhone is “a user-worn device” that falls within the scope of the LEO. But this theory fails on the merits. The relevant preambles—which the Commission has confirmed and Masimo does not currently dispute *are limiting*—require “a user-worn device configured to non-invasively measure the oxygen saturation of a user” where “*the* user-worn device” further comprises the additional listed limitations, including one or more processors that determine blood oxygen saturation. *See, e.g.*, ’648 patent, cls. 8, 12. This preamble language, when considered in the context of the full claims, requires that all claim limitations, including the calculating and measuring of blood oxygen, *must occur within a single device*. The Redesign 2 Watch is a separate device from an iPhone—and when a Watch is with an iPhone the two devices are still separate devices—and they are not a singular device as unambiguously required by the limiting preambles.

Notably, the preambles are *not* directed to systems, even though the patentee could have drafted them as such. The patentee demonstrated that it knew how to claim multi-device systems, but it declined to do so in the ’502 and ’648 patents. For instance, U.S. Patent No. 9,277,880, an earlier patent in the same family, covers “a signal processing system . . . the *system* comprising a noninvasive clip-type optical sensor . . . a monitor . . . and a cable connected to the monitor.” The patentee’s awareness of other possible claim formulations demonstrates the patentee intentionally

slide, which emphasizes that “All Claims [Are] Limited to *Watch* Hardware and Software” because each preamble recites “*A user-worn device*” (Masimo’s emphasis):



Masimo expressly represented that the claimed functionality must be performed on Watch without regard to any processing that may occur on the iPhone, explaining “[t]he system is not relevant here. The claims relate to the watch itself, relate to the watch hardware and software.” Ex. 2 [Dec. 28, 2023 Oral Discussion Tr.] at 119:15–120:1.

For all these reasons, the adjudicated patents demonstrate the claimed “a user-worn device” must be limited to a single device. There is no merit to Masimo’s argument that the Redesign 2 Watch in combination with the iPhone practices the adjudicated patents.

**B. The Commission Lacks Jurisdiction To “Modify” The Remedial Orders In The Manner Masimo Requests**

**1. The Federal Circuit Presently Has Jurisdiction Over Issues Implicated In This Proceeding**

The Commission cannot rule on Masimo’s request for modification because it implicates issues presently under the Federal Circuit’s jurisdiction. *Gilda Indus. v. United States*, 511 F.3d

1348, 1350 (Fed. Cir. 2008) (“Ordinarily, the act of filing a notice of appeal confers jurisdiction on an appellate court and divests the trial court of jurisdiction over matters related to the appeal.” (citing *Griggs v. Provident*, 459 U.S. 59 (1982))). Specifically, the appeal from the underlying investigation directly implicates the meaning of the term “user worn device,” the meaning of which is relevant to at least two issues pending on appeal: (1) whether Masimo’s alleged domestic industry devices satisfied the “user worn device” limitation; and (2) whether the Lumidigm prior art reference—RX-0411 [U.S. Patent No. 7,620,212] (“Lumidigm”)—taught the “user-worn device” limitation and renders the relevant asserted claims invalid. See Appellant’s Brief, *Apple v. ITC*, No. 24-1285 at 33-34, 36-37 (Fed. Cir. Apr. 28, 2024); Brief of Appellee International Trade Commission, *Apple v. ITC*, No. 24-1285 at 10-11 (Fed. Cir. Jun. 28, 2024) (“ITC’s Federal Circuit Brief”) (“The Commission’s non-obviousness conclusion is supported on two independent grounds relevant to all claims subject to appeal: (1) Apple failed to show that the prior art teaches or suggests the “*user-worn device*” configured to measure “oxygen saturation” limitations”); *id.* at 20-21 (arguing that domestic industry devices were user-worn).

Notably, Masimo’s petition now equates “user-worn” with “wearable,” a new term that does not appear in any claims nor even in the shared specification of the ’502 and ’648 patents.<sup>3</sup> Pet. at 16-17. Masimo construes the term “wearable”—even though “wearable” devices are not what is claimed—using dictionary definitions to mean “suitable for being worn” or “merely capable of being worn.” Masimo then urges the Commission to find under that construction that

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<sup>3</sup> The word “wearable” only appears in the titles of certain prior art references cited on the face of the patents.

the iPhone is “user-worn” even though it cannot be “worn” without modification. Pet. at 16-17.<sup>4</sup> Masimo’s interpretation renders the “user-worn” limitation meaningless, as anything could be hypothetically modified to allow it to be attached to a person.

Neither Masimo nor the Commission identified that construction to the Federal Circuit for purposes of evaluating the domestic industry or invalidity issues on appeal. Moreover, Masimo’s theory that the iPhone is “user-worn,” despite being strapless, is inconsistent with the manner in which the Commission itself argued to the Federal Circuit that Masimo’s domestic industry devices allegedly met the “user-worn” limitation. See ITC’s Federal Circuit Brief at 20-21 (arguing Masimo’s devices were “user-worn” because they had a “mechanism for attaching a strap” and also “had [a strap] at one point in time”); Brief of Intervenors Masimo and Cercacor, *Apple v. ITC*, No. 24-1285 at 35 (Fed. Cir. June 28, 2024) (similar).

Although the Commission has previously held that it retains the ability to enforce its remedial orders while its final determination is on appeal, see *Certain Marine Sonar Imaging Devices*, USITC Inv. No. 337-TA-921, Comm’n Op. (Aug. 29, 2016), the present case is

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<sup>4</sup> Masimo’s new claim revision and construction are improper for a host of reasons. For one, it is erroneous to rewrite the claim language by substituting “wearable” for “user-worn.” The Federal Circuit has rejected attempts to re-draft claim language in such a manner. See *In re Shafovaloff*, 2025 WL 1779173, at \*2 (Fed. Cir. June 27, 2025) (“‘It is not our function to rewrite claims ...’ and construing ‘bent’ as ‘bendable’ would rewrite the claim language to include what is foreclosed by the plain meaning” (citation omitted)). Additionally, Masimo’s revision would materially broaden the “user-worn device” claims into claims drawn to mere capability—even though claims 22 and 28 of the ’502 patent and claims 22 and 28 of the ’648 patent do not use the word “capable of” (or *wearable*) and instead use the term “**configured to**.” E.g., ’502 patent, cl. 19 (“A user-worn device configured to”); ’648 patent, claim 8 (same); *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 672 F.3d 1335, 1349 (Fed. Cir. 2012) (explaining that claims drawn to “capable of” are “broader” than “configured to”/“designed to”). Masimo’s claim construction approach is also erroneous because it relies on extrinsic, dictionary definitions (Petition at 17) instead of the intrinsic record. See *Intel Corp. v. VIA Techs., Inc.*, 319 F.3d 1357, 1367 (Fed. Cir. 2003) (use of extrinsic evidence improper when intrinsic evidence unambiguous); see also *Phillips v. AWH Corp.*, 415 F.3d 1303, 1321-22 (Fed. Cir. 2005) (en banc) (holding that claim construction does not start with the dictionary definitions of a word).

distinguishable. In *Marine Sonar*, the Commission expressly acknowledged that the modification proceeding would not “affect the Commission’s findings concerning indirect infringement, which are at issue in Navico’s appeal.” *Id.* at 6. By contrast, the Commission’s applied scope of “user-worn device” is directly at issue in these proceedings in the two ways outlined above. Although styled as a request for “modification” or “clarification,” Masimo’s request asks the ITC to adopt a significantly broader scope of “user-worn device,” arguing that it should cover not only a single wristwatch, but also a pair of two devices, including a mobile phone that is not even user-worn. *See Pet.* at 16 (“The question in this proceeding is whether a combination of the Redesign 2 Watch and a paired iPhone meets [the user-worn device limitation].”). Adopting that sweeping new claim scope would go far beyond what is permissible during an appeal—i.e., “preserving the status quo or otherwise supervising compliance.” *See Washington Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 985 F. Supp. 2d 23, 30 (D.D.C. 2013). Masimo’s petition asks the Commission to fundamentally change the meaning of a disputed claim term (an issue which the Federal Circuit reviews *de novo*) and apply it to a new product at a time when the parties have already briefed and argued the issues under the original claim scope the Commission applied in the underlying Investigation. Granting Masimo’s petition would therefore improperly impinge upon the Federal Circuit’s jurisdiction. *Newton v. Consol. Gas Co. of New York*, 258 U.S. 165, 177 (1922) (during pendency of appeal, trial court “may not finally adjudicate substantial rights directly involved in the appeal”). The proper course of action is for the Commission to defer ruling on Masimo’s petition until after the Federal Circuit has issued its opinion and resulting mandate.<sup>5</sup>

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<sup>5</sup> Delaying resolution of Masimo’s petition would also conserve Commission resources in the event that the Federal Circuit overturns any portion of the Commission’s Final Determination.

# Exhibit 6

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

**In the Matter of**

**CERTAIN LIGHT-BASED  
PHYSIOLOGICAL MEASUREMENT  
DEVICES AND COMPONENTS  
THEREOF**

**Investigation No. 337-TA-1276  
(Modification/Enforcement)**

**ORDER INSTITUTING A COMBINED MODIFICATION AND ENFORCEMENT  
PROCEEDING**

On August 18, 2021, the Commission instituted the underlying investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, based on a complaint filed on behalf of Masimo Corporation (“Masimo”) and Cercacor Laboratories, Inc., both of Irvine, California. 86 FR 46275 (Aug. 18, 2021). The complaint, as amended, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain light-based physiological measurement devices and components thereof by reason of infringement of certain claims of U.S. Patent No. 10,912,501 (“the ’501 patent”); U.S. Patent No. 10,912,502 (“the ’502 patent”); U.S. Patent No. 10,945,648 (“the ’648 patent”); U.S. Patent No. 10,687,745 (“the ’745 patent”); and U.S. Patent No. 7,761,127 (“the ’127 patent”). *Id.* The amended complaint further alleged that an industry in the United States exists and/or is in the process of being established as required by section 337. *Id.* The notice of investigation named Apple Inc. of Cupertino, California (“Apple”) as the sole respondent. *Id.* at 46276. The Office of Unfair Import Investigations did not participate in this investigation. *Id.*

Before the presiding administrative law judge (“ALJ”) issued the final initial determination (“Final ID”), Complainants withdrew from the investigation certain asserted patent claims. *See* Order No. 25 (Mar. 23, 2022), *unreviewed* by Comm’n Notice (Apr. 12, 2022); Order No. 33 (May 20, 2022), *unreviewed* by Comm’n Notice (June 10, 2022). At the time of the Final ID, only claim 12 of the ’501 patent, claims 22 and 28 of the ’502 patent, claims 12, 24, and 30 of the ’648 patent, claims 9, 18, and 27 of the ’745 patent, and claim 9 of the ’127 patent remained in the investigation. Claim 18 of the ’745 patent remained at issue for purposes of the domestic industry only.

On January 10, 2023, the ALJ issued the Final ID, which found that Apple violated section 337 as to claims 24 and 30 of the ’648 patent, but not as to claim 12 of the ’501 patent, claims 22 and 28 of the ’502 patent, claim 12 of the ’648 patent, claims 9 and 27 of the ’745 patent, and claim 9 of the ’127 patent. *See* Final ID at 335–36.

On May 15, 2023, the Commission determined to review the Final ID in part. *See* 88 FR 32243, 32243–46 (May 19, 2023). The Commission requested briefing on certain issues under review and on remedy, the public interest, and bonding. *See id.*

On October 26, 2023, the Commission issued its final determination in this investigation, finding Apple in violation of section 337 as to claims 22 and 28 of the '502 patent and claims 12, 24, and 30 of the '648 patent. 88 FR 75032, 75032–33 (Nov. 1, 2023). The Commission issued: (1) a limited exclusion order (“LEO”) prohibiting the importation of light-based physiological measurement devices and components thereof that infringe one or more of claims 22 and 28 of the '502 patent and claims 12, 24, and 30 of the '648 patent; and (2) a cease and desist order (“CDO”) directed to Apple. *Id.* The Commission determined that the public interest factors did not preclude issuance of the limited exclusion order or the cease and desist order. *Id.* The Commission further determined that no bond was to be required during the period of Presidential review. *See id.*; 19 U.S.C. § 1337(j)(3).

On September 8, 2025, Masimo filed a petition with the Commission, pursuant to Commission Rule 210.76, requesting clarification of, or in the alternative, a modification proceeding to modify, the remedial orders issued against Apple. *See* Complainant Masimo’s Request for Clarification, or in the Alternative, Petition for Modification and Request for Expedited Treatment. Masimo also requested expedited treatment of its petition. *Id.* On September 15, 2025, Apple filed a response to Masimo’s petition, including objecting to the use of a modification proceeding under section 337(k) in this situation. *See* Respondent Apple Inc.’s Response to Masimo’s Request for Clarification, or in the Alternative, Petition for Modification and Request for Expedited Treatment. The Commission shortened the time for Apple to file its response. *See* Letter from Commission Secretary Barton to Counsel for Apple and Masimo, September 9, 2025. On September 22, 2025, Masimo and Apple provided a list of undisputed facts, disputed facts, and claim constructions at issue. Joint Proposed List of Undisputed Facts, Disputed Facts, and Disputed Claim Terms For September 22, 2025 Submission (“Joint Submission”).

The Commission, having reviewed the record in this investigation, including Masimo’s petition, Apple’s response thereto, and their Joint Submission, has determined to institute a combined modification and enforcement proceeding. Section 337(k)(1) provides for modification proceedings when “the conditions which led to such exclusion from entry or order no longer exist.” 19 U.S.C. § 1337(k)(1). Commission Rule 210.76 implements the Commission’s modification proceedings and provides, in pertinent part: “Whenever any person believes that changed conditions of fact or law, or the public interest, require that [a remedial order] be modified or set aside, in whole or in part, such person may request . . . that the Commission make a determination that the conditions which led to the issuance of [the remedial order] no longer exist.” 19 C.F.R. § 210.76(a)(1). Rule 210.76 further states that the request “shall include materials and argument in support thereof.” *Id.* Section 337(b) provides the Commission with the authority to enforce its remedial orders, and Commission Rule 210.75 implements the Commission’s enforcement proceedings. *See VastFame Camera, Ltd. v. Int’l Trade Comm’n*, 386 F.3d 1108, 1115 (Fed. Cir. 2004).

The Commission has determined that Masimo’s petition complies with section 337(b), section 337(k)(1), and Commission Rules 210.75 and 210.76. The Commission finds that the circumstances which lead to the LEO no longer exist and there is a changed condition of fact, inasmuch as Apple has presented a newly redesigned watch, the Apple Redesign 2 Watch, which

was not presented during the investigation below.<sup>1</sup> The Commission further finds that Masimo's modification petition is tantamount to a request for an enforcement of the LEO because it alleges a violation of the LEO. *See* 19 C.F.R. § 210.75(a). Accordingly, the Commission has determined that a combined modification and enforcement proceeding is proper to determine the narrow issue of whether the Apple Redesign 2 Watch should be excluded under the current terms of the LEO. The Commission notes that Masimo has not sought to enforce the CDO or to seek civil penalties. Accordingly, the Commission will not consider whether to issue civil penalties for any violation of the CDO in this proceeding, but may do so, upon request, in a subsequent proceeding.

To further define the issues, the Commission finds, as an initial matter, that the Apple Redesign 2 Watch on its own is a "wearable electronic device" with at least some "light-based pulse oximetry functionality" pursuant to paragraph 2 of the LEO, and as such, it is potentially subject to the terms of the LEO. *See* Joint Submission, ¶ 47; *Certain Light-Based Physiological Measurement Devices & Components Thereof*, Ruling Letter, Inv. No. 337-TA-1276, HQ H338254 at 13 (Jan. 7, 2025). The Commission further finds that Apple manufactured and imported into the United States the Apple Redesign 2 Watch. LEO, paragraph 1; Joint Submission, paragraphs 46, 47. Accordingly, the sole issue to be resolved in this proceeding is whether the Apple Redesign 2 Watch "infringe[s] claims 22 ... of U.S. Patent No. 10,912,502 and claims 12, 24, and 30 of U.S. Patent No. 10,945,648." LEO, paragraph 1. The Commission has held that the term "infringe" as used in the Commission's LEOs is not limited to direct infringement but may also refer to, *inter alia*, induced infringement under 35 U.S.C. § 271(b). *See e.g.*, *Certain Voltage Regulators, Components Thereof and Products Containing Same*, Inv. No. 337-TA-564, Enforcement Comm'n Op., 2010 WL 4780068 at \*4 (Aug. 3, 2010). Finally, the Commission notes that Masimo does not seek a determination of whether the Apple iPhone or the "Apple Redesign 1 Watch," *see* Joint Submission ¶¶ 26-31 (undisputed facts), should be excluded pursuant to the LEO, nor does Masimo seek a determination of whether any article infringes claim 28 of the '502 patent.

Accordingly, upon consideration of the record and the submissions in this matter, the Commission hereby ORDERS that:

1. Pursuant to Commission Rule 210.76(a), 19 C.F.R. § 210.76(a), and section 337(k)(1), Masimo's requested modification proceeding is INSTITUTED.
2. Pursuant to Commission Rule 210.75(a), 19 C.F.R. § 210.75(a), an enforcement proceeding is INSTITUTED and consolidated with the modification proceeding.

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<sup>1</sup> This proceeding includes the Apple Redesign 2 Watch presented to CBP, Joint Submission ¶ 32 (undisputed fact), and Apple Watches subject to a recent over-the-air software update in the United States, *id.* ¶¶ 46-48, 117-118, which collectively are the "Apple Redesign Watch 2." To the extent that there are any differences between the watches presented to CBP and the watches that have been subject to a recent over-the-air update, the ALJ can address those differences in the first instance. Moreover, to the extent that the allegedly infringing functionality requires a software update to an iPhone, it is assumed for this investigation that such an update has been applied. *Id.* ¶¶ 46, 116-117.

3. For purposes of the modification and enforcement proceeding so instituted, the following are named as parties:
  - a. The complainant is Masimo Corporation of Irvine, California.
  - b. The respondent is Apple Inc. of Cupertino, California.
4. The combined modification and enforcement proceeding is hereby certified to the Chief Administrative Law Judge for designation of a presiding Administrative Law Judge (“ALJ”) who will administer the appropriate proceedings and issue a combined recommended determination on modification and enforcement initial determination (“EID”). Regardless of any Commission Rule to the contrary, including Rule 210.51(a), which is waived to expedite this proceeding, the ALJ, within fifteen (15) days of institution, is directed to set the earliest practicable target date for completion of the proceeding, but the target date shall be no later than six (6) months from institution. Pursuant to Commission Rule 210.75(a)(3), such target date is to exceed the date of issuance of the EID by two (2) months.
5. The presiding ALJ has discretion to conduct any proceedings deemed necessary, including issuing a protective order, holding hearings, taking evidence, and ordering discovery consistent with Commission rules to issue the EID.
6. The EID shall rule on the following questions, including the subsidiary claim construction issues presented by Masimo’s petition, Apple’s response thereto, and their Joint Submission:
  - a. Whether Apple directly infringes the claims recited in the LEO, including claim 22 of the ’502 patent, by importing and/or selling the Apple Redesign 2 Watch alone, including under the doctrine of equivalents; and
  - b. Whether Apple induces infringement of the claims recited in the LEO by importing and/or selling the Apple Redesign 2 Watch, including, inter alia, whether there is an underlying act of direct infringement by the Apple Redesign 2 Watch and iPhone once paired in the United States.
7. With respect to point 6a, Masimo shall advise the presiding ALJ as to whether Masimo alleges that the Apple Redesign 2 Watch alone directly infringes claims 12, 24, and 30 of the ’648 patent. If those claims are not alleged, Masimo shall confirm to the presiding ALJ that adjudication of claim 22 of the ’502 patent is sufficient to determine whether the Apple Redesign 2 Watch violates the LEO. The Commission understands that Masimo does not allege claim 28 of the ’502 patent for purposes of direct or indirect infringement against the Redesign 2 Watch, and Masimo shall confirm to the presiding ALJ that claim 28, therefore, does not preclude Apple from importing the Redesign 2 Watch.
8. Principles of claim preclusion and issue preclusion, and other doctrines that prevent litigation or relitigation of matters that were, or should have, been litigated in earlier stages of Commission proceedings will apply in this

investigation. By way of example, Masimo's domestic industry has already been litigated, and is not subject to relitigation in this proceeding. Apple may present defenses that relate to the infringement questions in point 6, including Masimo's allegedly expanded claim constructions, so as to ensure, for example, that validity aligns within infringement. This proceeding does not afford an opportunity to relitigate other defenses that were, or should have been, litigated in the underlying violation investigation. The EID shall rule on such defenses to the extent they are properly raised.

9. The presiding ALJ shall not recommend enforcement measures.
10. Regardless of any Commission Rule to the contrary, including Rules 210.75(a)(3) and 210.76(c), which are waived to expedite this proceeding, petitions for review of the EID may be filed within seven (7) days after service of the EID. Responses to any petitions for review may be filed within five (5) business days after service of the petitions. The Commission finds that good and sufficient reason exists to waive its rules and expedite this proceeding as requested by Masimo, and as recognized by the Honorable Judge Reyes of the U.S. District Court for the District of Columbia during hearings on August 29, 2025 and September 25, 2025, regarding the need for prompt relief in view of concerns that CBP rulings from January 2025 and August 2025 may be in tension. *See* 19 C.F.R. § 201.4(b). For the same reasons, the Commission delegates its authority under Rule 201.4(b) to the ALJ to waive rules pertaining to the timing of party filings and responses in order to expedite proceedings, should the ALJ explain the good and sufficient reason for such waiver.
11. Further, the EID shall become the Commission's final determination on violation thirty (30) days after service of the EID, unless the Commission orders review of the EID or changes the deadline for determining whether to review the EID.
12. The Secretary shall:
  - a. serve a copy of this order upon each party to this proceeding; and
  - b. publish notice of this order in the Federal Register.

By order of the Commission.



Lisa R. Barton  
Secretary to the Commission

Issued: November 14, 2025

# Exhibit 7

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\* \* \* \* \*

MASIMO CORPORATION, ) Civil Action  
Plaintiff, ) No. 25-2749

vs. )

UNITED STATES CUSTOMS AND ) September 2, 2025  
BORDER PROTECTION, et al. ) 12:01 p.m.  
Defendants, ) Washington, D.C.

vs. )

UNITED STATES INTERNATIONAL )  
TRADE COMMISSION, )  
Intervenor Defendant. )

\* \* \* \* \*

**TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE ANA C. REYES  
UNITED STATES DISTRICT COURT JUDGE**

**APPEARANCES:**

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**(Appearances Continued)**

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**ALSO PRESENT:**

**Counsel for Apple:**

Mark Selwyn, Wilmer Hale  
Joe Mueller, Wilmer Hale

**Counsel for U.S. Customs and Border Protection:**

Delbert R. Terrill, III

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Court Reporter: Elizabeth Davila, RPR, FCRR  
Official Court Reporter

Proceedings reported by machine shorthand.  
Transcript produced by computer-aided transcription.

1 potentially.

2 MR. CHERNY: My name is Steve Cherny.

3 THE COURT: Hi.

4 MR. CHERNY: I think all that Mr. Shaffer is  
5 saying is that there may be -- there are additional elements  
6 to indirect infringement. At this point we don't know if  
7 Apple would dispute any of the facts relevant to those --

8 THE COURT: What kind of facts are relevant to  
9 indirect infringement?

10 MR. CHERNY: For example, there is an intent  
11 element with indirect infringement that isn't present with  
12 direct infringement. Now, of course, you already know our  
13 perspective from the January --

14 THE COURT: Okay. All right. I got you.

15 MR. SHAFFER: Very quickly, Your Honor.

16 Obviously, from our perspective, the status quo is  
17 all important. I know Your Honor --

18 THE COURT: I know. But you are not going to get  
19 the status quo from me.

20 MR. SHAFFER: Okay. We understand that. We  
21 regret that, but we understand that. Our concerns are about  
22 timing.

23 THE COURT: That's why I have -- Mr. ITC guy, come  
24 back up please.

25 I read somewhere in the regulations that you-all

1 have to decide whether to take something up before we even  
2 take it up. Are we past that? Can you agree to take this  
3 up if it's presented to you?

4 MR. ROSENZWEIG: Yes. It's my understanding from  
5 the commissioners participating on that that they would take  
6 this up, yes. We actually have invited them to do so.

7 THE COURT: I know.

8 MR. ROSENZWEIG: I will just add, we had thought  
9 about self-instituting, but we think it would be better for  
10 them to file something so they can frame modification in the  
11 manner that they want.

12 THE COURT: Okay. Well, if they file something by  
13 Monday, how long does Apple have to respond?

14 MR. ROSENZWEIG: I don't have my reg book with me.  
15 But they can request expedited responses.

16 THE COURT: Are they -- will they be given  
17 expedited advances?

18 MR. ROSENZWEIG: Excuse me?

19 THE COURT: Let me put it to you this way: I want  
20 this to move very quickly --

21 MR. ROSENZWEIG: Yes.

22 THE COURT: -- because while, right now, I am not  
23 seeing irreparable harm if -- I am not getting rid of this  
24 case, first of all, because, right now, I don't know if I  
25 have jurisdiction or not. Discovery is going to be ongoing

1 on that issue. The faster you-all move, the less you have  
2 to deal with me, which is better for everybody.

3 MR. ROSENZWEIG: That message is loud and clear,  
4 and understood.

5 THE COURT: Good. All right. Okay. Thank you.

6 MR. ROSENZWEIG: Thank you.

7 THE COURT: All right. Here is what I think that  
8 you-all should do. But I don't get paid what private  
9 attorneys get paid, unfortunately, so take this or leave it.

10 I think what we should do is, I think I should sit  
11 on your motion for a week. I think that you-all should take  
12 the ITC up on its offer to institute a clarification -- what  
13 is he going to be moving under, 177.12? What is he going to  
14 be moving under?

15 MR. ROSENZWEIG: Your Honor, at least 337(k),  
16 which would be a modification which subsumes clarification.  
17 If they want --

18 THE COURT: Okay. That's all.

19 I suggest you do a 337(k). I suggest you focus  
20 your efforts on direct infringement because that is going to  
21 go the quickest. Add indirect infringement to cover your  
22 bases. But if you want quick movement, I would ask them to  
23 move quickly on the direct infringement. If you lose there,  
24 then you can move on to indirect infringement.

25 Apple is going to play nice, and they're going to

1 move quickly as well. The ITC is going to get Apple to play  
2 nice and move quickly.

3 Because if everyone is not playing nice and  
4 quickly, what is going to happen is the following: I am  
5 going to come back here, and the government -- and I am  
6 going to hear argument without briefing -- you-all can just  
7 argue to me -- as to whether or not I am entitled to issue  
8 or allow third-party -- discovery outside the administrative  
9 record to determine whether I have jurisdiction.

10 And I am telling Apple -- whose lawyers have been  
11 very attentive and helpful today -- that that includes, and  
12 I would not be hesitant to allow, third-party discovery,  
13 which would be expensive and ugly, potentially. That  
14 discovery will include communications, if any, between  
15 Apple, the administration, the ITC, and the CFB [sic] -- CPF  
16 [sic] regarding whether there was any direct or indirect  
17 *quid pro quo* involved and with respect to CBP extensive  
18 discovery into why CBP took the actions that it took and if,  
19 in fact, it was they just changed their minds or they didn't  
20 think that they were changing their minds, and it was all as  
21 innocent as that. That may well be the case; it sounds like  
22 that is the case.

23 But as I was always told, trust but verify. So I  
24 am going to let you trust but verify.

25 So what we are going to have happen, if everyone

1 is not playing along very nicely and very quickly at the  
2 ITC, is, potentially, very expansive, very expensive, and  
3 very energy-consuming discovery, which is going to happen at  
4 a very, very, very quick rate. That discovery is not just  
5 going to include document discovery, it's going to include  
6 depositions; and with respect to CBP, might also include  
7 interrogatories.

8 So that is the stick. Everyone play nice quickly.

9 Can you guys get whatever you need to get to the  
10 ITC by Monday?

11 MR. SHAFFER: Yes, Your Honor.

12 THE COURT: Okay. If you want to do it earlier,  
13 by all means. They're going to get that to you by Monday.  
14 They are also going to get you a request -- a motion to  
15 expedite -- I suppose, by Monday?

16 MR. SHAFFER: Yes.

17 THE COURT: Will the ITC -- can you agree that  
18 you-all will not be sitting on this but will be moving  
19 quickly? This will be given a priority?

20 MR. ROSENZWEIG: Yes, Your Honor. Yes.

21 THE COURT: Okay. Anything else by anyone?

22 MR. SHAFFER: Not for the plaintiff, Your Honor.

23 MR. EDDON: Nothing, Your Honor.

24 THE COURT: Okay.

25 I should apologize to you. I don't think anyone