February 23, 2023

Lisa R. Barton
Secretary to the Commission
United States International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: The Alliance for U.S. Startups and Inventors for Jobs Response to the Commission's Request for Submissions in the Public Interest in the Matter of Certain Light-Based Physiological Measurement Devices and Components Thereof, Inv. No. 337-TA-1276

This comment is submitted by the Alliance for U.S. Startups and Inventors for Jobs ("USIJ") in response to the Commission's "Request for Submissions on the Public Interest," dated January 25, 2023 ("Request") in connection with the subject investigation. USIJ is not a party to this investigation nor does it have a relationship with any party.

USIJ is a coalition of over 20 startups, entrepreneurs, inventors and investors; all of whom depend on stable and reliable patent protection as an essential foundation for making long term investments of capital and time commitments to high-risk businesses developing new technologies.

USIJ Supports Masimo's Request for an Exclusion Order. The consequences of this investigation and the relief provided will extend far beyond the boundaries of the investigation itself. Masimo provides an exemplary model for inventors and entrepreneurs across the nation, and more generally, for this nation's commitment to innovation. Pulse oximeter devices based on the technology that Masimo pioneered are today a ubiquitous fixture in hospitals, clinics and

wherever the need to monitor blood oxygen levels presents itself. The Masimo patents at issue here are among many that have protected the company from the theft of its technology for nearly two decades as it continued to invest in improving its products and technology. USIJ submits that it is very much in the public interest to see Masimo's patents enforced to the full extent of the law, not just for Masimo's sake, but for the thousands of entrepreneurs and investors who are watching to see whether a dominant company like Apple will be allowed to willfully infringe the patents of a disruptive startup. If other entrepreneurs and investors see a company, such as Masimo, win a patent case on the merits and then be turned away without a remedy, it will have a devastating effect on their willingness to rely on U.S. patents as the basis for building their own companies.

Penalizing Apple's Infringement Is in the Public Interest. Apple has long considered its own corporate interests to be paramount to those of other companies, irrespective of whatever legal rights others might have. The corporate culture at Apple has at times encouraged the notion that IP theft and piracy are simply another form of innovation.[1] Remarkably, a former Apple executive, Boris Teksler, in a statement to *The Economist*, pointed out that it is more "efficient" to infringe other people's technology than to pay for it. He acknowledged candidly that, in Apple's view, a cash rich company like Apple actually had a "fiduciary duty" to infringe the rights of others.[2]

Apple's disdain for the property rights of smaller companies manifests in a number of ways. Following enactment of the America Invents Act and the creation of Inter Partes Review ("IPR")

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1 https://qz.com/1719898/steve-jobs-speech-that-made-silicon-valley-obsessed-with-pirates

2 https://www.economist.com/business/2019/12/14/the-trouble-with-patent-troll-hunting

procedures in 2011, Apple and a few other dominant technology companies began to use IPR procedures to harass small companies that asked them to take licenses or brought infringement cases against them. One of the more pernicious practices of this group has been the filing of multiple IPR petitions against the same patent claim based on the same prior art, even though Congress fully intended that IPRs would not be used to harass small companies in that fashion. In 2018, USIJ did a study of this practice and discovered that Apple was the leading abuser, filing multiple petitions against the same patent more than 60% of the time. *See*, https://www.usij.org/research/2018/serial-attacks.

Apple also pursues another common tactic, as seen in this case, which is to invite a disruptive startup to meet under the guise of exploring a business deal, only to use the opportunity to learn in depth about a new technology and either hire away key employees or simply copy the technology. That predatory scenario surfaces frequently, Masimo being only the most recent example to come to the fore. An article entitled "Weaponizing IPRs" tells the story of Valencell, whose biosensor device Apple simply added to its own smartphones despite Valencell's patents, after which Apple was relentless in its efforts to beat the company into the ground using threats of destruction along with multiple IPRs challenging patents not even alleged to be infringed.[3]

And of course, this Commission is fully aware of Apple's predatory behavior as documented in the trial record in *Certain Wearable Electronic Devices with ECG Functionality and Components Thereof*, ITC Investigation No. 337-TA-1266 brought by AliveCor, another medical device

[3] Steven C. Carlson, "Weaponizing IPRs," published in Landslide® magazine, Volume 12, Number 1, a publication of the ABA Section of Intellectual Property Law (ABA-IPL), ©2019 by the American Bar Association.

company whose technology was simply copied by Apple after pretending to be interested in a financial arrangement. These examples are but the tip of an iceberg in that many technologies that Apple infringes end up in litigation or pre-litigation settlements that give the inventor value amounting to pennies on the dollar, stories that are largely obscured from public view by nondisclosure agreements that form a significant part of every such settlement.

USIJ respectfully submits that orders discouraging this type of anti-competitive behavior by Apple, and other dominant companies, are very much in the public interest.

Orders that Help Restore Competition in the Digital Technology Industry Are in the Public Interest. One of the factors the Commission has included in its inquiry about the public interest in an Exclusion Order is the impact of such a ruling on competition. We call to the attention of the Commission the report of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law released in 2021 entitled "Investigation of competition in digital markets" ("House Report"). The Report is primarily concerned with the impact that the so-called "platform companies" – *i.e.*, Google, Facebook, Amazon and Apple – are having on competition in the digital technologies. One of the key findings in the report is:

> "Apple's dominance in this market, where it controls the iOS mobile operating system that runs on Apple mobile devices, has enabled it to control all software distribution to iOS devices. As a result, Apple exerts monopoly power in the mobile app store market, controlling access to more than 100 million iPhones and iPads in the U.S. … In the absence of competition, Apple's monopoly power over software distribution to iOS devices has resulted in harms to competitors and competition, reducing quality and innovation among app developers, and increasing prices and reducing choices for consumers." House Report at pp. 16 – 17.

Another important finding of the House Judiciary Committee's investigation, and one highly relevant here, shows a significant decline in the number of startups and entrepreneurs willing to start companies to compete with these large incumbents:

> "In recent decades, however, there has been a sharp decline in new business formation as well as early-stage startup funding. The number of new technology firms in the digital economy has declined, while the entrepreneurship rate—the share of startups and young firms in the industry as a whole—has also fallen significantly in this market. Unsurprisingly, there has also been a sharp reduction in early-stage funding for technology startups." House Report at p.46.

This conclusion confirms those in a number of other studies, including one released in 2021 by Professor Mark F. Shultz at the University of Akron showing the shift in venture capital spending away from critical technologies, such as semiconductors, that are dependent upon patents and toward lower risk investments, such as new marketing and financing techniques, consumer products, hospitality, etc.[4]

Conclusion. It is critically important that those responsible for real innovation in this country believe that their high-risk expenditures of time and money to develop new technologies will be rewarded if and when they succeed, and that large, incumbent competitors cannot simply use their established infrastructure and distribution channels to usurp the benefits that belong to the entrepreneur/inventors and their investors. That is the primary point of this submission and one we hope to to see implemented by the entry of an Exclusion Order.

Respectfully submitted,

/s/

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[4] https://www.usij.org/research/2020/8/3/usij-releases-report-on-the-importance-of-an-effective-and-reliable-patent-system-to-critical-technologies