UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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UNDER ARMOUR, INC.
Petitioner

v.

ATHALONZ, LLC
Patent Owner

_____

Case No. IPR2024-00636
Patent No. 10,674,786

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PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE

EXHIBIT LIST

Exhibit No.	Description
1001	U.S. Patent No 10,674,786 ("the '786 patent")
1002	Declaration of Grant Delgatty
1003	Curriculum Vitae of Grant Delgatty
1004	Prosecution History Excerpts of U.S. Patent Application No. 13/355,801
1005	U.S. Patent Publication No. 2004/0040181 ("Kim")
1006	U.S. Patent No. 4,754,561 ("Dufour")
1007	U.S. Patent No. 3,789,523 ("Rubin")
1008	RESERVED
1009	Excerpts from Athalonz's Infringement Contentions, served in *Athalonz, LLC v. Under Armour*., Case No. 2:23-cv-00193 (E.D. Tex.).
1010	RESERVED
1011	RESERVED
1012	RESERVED
1013	1977 Nike Boston Running Shoe

1014	FootJoy 51409
1015	FootJoy 1970 Product Catalog
1016	U.S. Patent No. D275146
1017	U.S. Patent No. D310294
1018	1971 Nike Cortez
1019	RESERVED
1020	RESERVED
1021	CAD Image of Heel Platform of Curry 4 FloTro
1022	Supplemental Declaration of Grant Delgatty
1023	Transcript from the March 18, 2025, Deposition of Timothy Markison in IPR2024-00636, IPR2024-00637, IPR2024-00638, IPR2024-00639, and IPR2024-00640
1024	RESERVED
1025	Athalonz's Second Supplemental Infringement Contentions, served in *Athalonz, LLC v. Under Armour*, Case No. 2:23-cv-00193 (E.D. Tex.)
1026	RESERVED
1027	"Athalonz Golf Shoes," produced in *Athalonz, LLC v. Under Armour*, Case No. 2:23-cv-00193 (E.D. Tex.) at ATHALONZ0007372

1028	"From the ground up," 2019 Sports Illustrated, M. Purkey, https://www.si.com/golf/gear/feature-2019-11-21-from-the-ground-up
1029	Transcript of Athalonz YouTube Channel Video Titled "Athalonz Technology Explained," downloaded from https://www.youtube.com/watch?v=FNLc3D-5SZg
1030	Athalonz Blog Titled "Athalonz Shoes – Leveraging the Laws of Physics," downloaded from https://www.athalonz.com/blogs/news/athalonz-shoes-leveraging-the-laws-of-physics-1?srsltid=AfmBOor1UcXLaaaGPUOPk35_JqoKeSAHebj9yRAB%E2%80%A6
1031	Plaintiff Athalonz, LLC's First Amended Complaint, served in *Athalonz, LLC v. Under Armour*, Case No. 2:23-cv-00193 (E.D. Tex.)
1032	Britannica Dictionary, "cross section"
1033	Britannica Dictionary, "perspective"
1034	Compilation of Bernard Langer PGA Tour Statistics
1035	RESERVED
1036	Claim Charts for U.S. Patent No. 10,674,786; 11,013,291; and 11,064,760 for Athalonz Products, served in *Athalonz, LLC v. Under Armour*, Case No. 2:23-cv-00193 (E.D. Tex.)
1037	Declaration of Eric T. Harmon In Support Of Motion for *Pro Hac Vice* Admission

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I. INTRODUCTION

Petitioner Under Armour Inc. ("Petitioner") hereby opposes Patent Owner's Motion to Exclude (Paper 29) ("Motion"). Each of the Exhibits 1032, 1033 and 1034 is admissible under the Federal Rules of Evidence. Patent Owner bears the burden of proving that the material sought to be excluded is inadmissible. *See* 37 C.F.R. §§ 42.20(c), 42.62(a) (2023). "The Board in *Inter Partes* review proceedings acts as both the gatekeeper of evidence and as the weigher of evidence. Similar to a district court in a bench trial, the Board, sitting as a non-jury tribunal with administrative expertise, is well positioned to determine and assign appropriate weight to evidence presented, including giving it no weight." *Casper Sleep Inc. v. Werner Media Partners LLC d/b/a Nature's Sleep, LLC*, IPR2024-00474, Paper 60, 80-81 (P.T.A.B. April 24, 2025), citing *Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1941). "Where, as here, the decision is by an administrative agency, rather than a jury, there is a diminished concern that [ ] exhibits [will] be prejudicial." *Eli Lilly and Co., v. Teva Pharms. Int'l GMBH*, IPR2018- 01710, Paper 69, 161 (P.T.A.B. Mar. 31, 2020) (citing *Corning Inc. v. DSM IP Assets B.V.*, IPR2013-00053, Paper 66, 19 (P.T.A.B. May 1, 2014)).

"Moreover, in *Inter Partes* review proceedings, 'there is a strong public policy for making all information filed in an administrative proceeding available to the public." *Casper Sleep*, IPR2024-00474, Paper 60, 80-81 (citing *Liberty Mut. Ins.*

Co. v. Progressive Cas. Ins. Co., CBM2012-00010, Paper 59, 40 (P.T.A.B. Feb. 24, 2014). "Rather than excluding evidence that is allegedly hearsay, confusing, misleading, untimely, and/or irrelevant, [the Board] will simply not rely on it or give it little or no probative weight, as appropriate, in [its] analysis. *Id*. In an *Inter Partes* review, the Board "typically regard[s] it as the better course to have a complete record of the evidence to facilitate public access, as well as appellate review." *Sony Computer Entm't Am. LLC v. Game Controller Tech. LLC*, IPR2013-00634, Paper 32, 31 (P.T.A.B. Apr. 14, 2015); *see also Gnosis S.p.A. v. S. Alabama Med. Sci. Found*., IPR2013-00118, Paper 64, 43 (P.T.A.B. June 20, 2014) (citing *Donnelly*, 123 F.2d at 224 ("If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided.")).

Based on Patent Owner's failure to demonstrate that the challenged exhibits are inadmissible, the Board's ability to assign the proper weight to the exhibits, and the preference for a complete record, Petitioner respectfully submits that Patent Owner's Motion should be denied in its entirety.

II. ARGUMENT

A. Exhibits 1032 and 1033 are Admissible

Exhibits 1032 and 1033—dictionary definitions from Britannica's online dictionary relied on by Petitioner's expert—are admissible. Authentication requires the production of evidence "sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Showing that an exhibit is authentic "is a low bar, simply requiring a rational basis for Petitioner's claim." *Paragon 28, Inc. v. Wright Medical Technology, Inc.*, IPR2019-00894, Paper 41, 9 (P.T.A.B. September 23, 2020) (citing *Caterpillar Inc. v. Wirtgen Am., Inc.*, IPR2018-01091, Paper 49, 72 (P.T.A.B. Nov. 27, 2019). "The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" can authenticate an item of evidence. Fed. R. Evid. 901(b)(4); s*ee also* Fed. R. Evid. 901 Advisory Committee's Notes, ("Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety.").

Here, Exhibits 1032 and 1033 indicate that they are definitions obtained from the Britannica online dictionary located at https://www.britannica.com/dictionary, along with the date and time they were created. The source is clearly indicated, the exhibits are publicly available, and Patent Owner does not suggest nor provide any evidence that the documents are anything other than what Petitioner suggests that

they are. Based on their appearance, substance and characteristics, these exhibits are admissible under Fed. R. Evid. 901(a) and FRE 901(b)(4). *See, e.g. Trend Micro Inc. v. Cupp Computing AS,* IPR2019-00767, Paper 32, 11 (P.T.A.B. Aug. 25, 2020) (indicia of publication from recognized sources is sufficient "proof of their authenticity"); *Luxshare Precision Indus. Co., v. Bing Xu Precision Co.,* IPR2017-01657, Paper 47, 52 (P.T.A.B. Jan. 10, 2019) ("We find the indicia on the webpages and the fact that they are not offered to prove the existence of a fact on a particular date is sufficient to rely on these web pages as authenticated."); *Hulu, LLC, v. Sound View Innovations, Inc.,* IPR2018-01039, Paper 29, 17–18 (P.T.A.B. Dec. 20, 2019) ("[T]he indicia on the face of a reference, such as printed dates and stamps, are considered as part of the totality of the evidence."); *Continental Automotive Systems, Inc., v. Intellectual Ventures II LLC*, IPR2021-00406, Paper 41, 43-44 (P.T.A.B. Dec. 4, 2023) (authentication of exhibit based on appearance and characteristics "consistent with a drug label"); *Advanced Micro Devices, Inc. v. Aquila Innovations, Inc*., IPR2019-01526, Paper 37, 100 (P.T.A.B. March 10, 2021) (authenticating exhibit based on indication of origin and having the "appearance and distinctive characteristics" of a white paper.); *Paragon 28*, IPR2019-00894, Paper 41, 10 (finding that an exhibit is authentic based on its "look and overall presentation" and Patent Owner's failure to identify any evidence that might suggest the exhibit is "anything other than [what] it appears to be.").

Exhibits 1032 and 1033 are also not hearsay. Facing a similar objection, one Board panel denied a motion to exclude a dictionary definition as hearsay, explaining "*Phillips* makes clear that when used in an appropriate manner, dictionaries … 'are often useful to assist in understanding the commonly understood meaning of words and have been used both by our court and the Supreme Court in claim interpretation,' and 'judges are free to consult dictionaries and technical treatises.'" *Satco Products, Inc. v. The Regents of the University of California,* IPR2021-00662, Paper 57, 59 (P.T.A.B. Nov. 04, 2022) (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1322 (Fed. Cir. 2005) (en banc)).

In fact, the PTAB often relies on similar online definitions of terms without any concerns regarding authenticity or hearsay. *See, e.g., Amazon.com, Inc. v. Swarm Tech. LLC*, IPR2022-00633, Paper 36, 15 (P.T.A.B. Aug. 28, 2023) (citing dictionary.com definition); *LinkedIn Corp. v. eBuddy Techs. B.V.*, IPR2022-00165, Paper 40, 12 (P.T.A.B. June 30, 2023) (citing dictionary.com definition); *Packers Plus Energy Servs. Inc. v. Baker Hughes Oilfield Ops., Inc.*, IPR2016-01099, Paper 30, 14 (P.T.A.B. Dec. 12, 2019) (citing merriamwebster.com definition); *Vivint, Inc. v. SB IP Holdings LLC*, IPR2022-01365, Paper 8, 13 (P.T.A.B. Apr. 26, 2023) (citing ahdictionary.com definition). In this case, Patent Owner's own inventor/expert, Mr. Markison, agreed that the definition for cross-section included in Exhibit 1032 is accurate. EX1023, 115:7-116:15 ("Q. Do you see No. 1, it defines

cross-section as: A view or drawing that shows what the inside of something looks like after a cut has been made across it. Do you see that? A. Yes. Q. Do you agree with that definition? … A. Yeah, that's basically the same definition I gave.").

Finally, Exhibits 1032 and 1033 are directly relied on by Petitioner's Expert, Mr. Delgatty. See EX1022, ¶11. Federal Rule of Evidence 703 allows for admission of facts or data underlying an expert's opinion even if they would otherwise be inadmissible, and these exhibits should be admitted here so that the Board can fully consider Mr. Delgatty's opinion. Experts in Mr. Delgatty's field would reasonably rely on online dictionary definitions like those included in Exhibits 1032 and 1033 in forming opinions on the subject about which he testified, and "[t]he Board has repeatedly applied Rule 703 to deny motions to exclude materials underlying expert opinions, reasoning that the benefit to the Board of assessing the underlying support for the expert testimony outweighs any prejudicial effect." *Surgalign Spine Technologies, Inc. f/k/a RTI Surgical, Inc. v. LifeNet Health*, IPR2019-00571, Paper 75, 7-9 (P.T.A.B. August 4, 2020) (citing *Argentum Pharms. LLC v. Research Corp. Techs*., *Inc*., IPR2016-00204, Paper 85, 48 (P.T.A.B. Mar. 22, 2017) ("[T]he probative value of reviewing the documents substantially assisted our evaluation of Patent Owner's contentions regarding skepticism."); *LG Chem, Ltd. v. Celgard, LLC*, IPR2014-00692, Paper 76, 44–45 (P.T.A.B. Oct. 5, 2015) ("[W]e find that these exhibits have substantial probative value in helping us to evaluate Dr. White's

opinion."); *see also Casper Sleep,* IPR2024-00474, Paper 60 at 79-80 ("materials considered by Petitioner's expert witnesses in forming their conclusions and opinions [are] admissible here pursuant to Fed. R. Evid 703. As noted, there is no jury to be potentially prejudiced in this proceeding and we can determine the weight to give any such evidence."); *Protect Animals With Satellites LLC v. OnPoint Systems, LLC*, IPR2021-01483, Paper 69, 69-70 (P.T.A.B. Mar. 02, 2023) (denying motion to exclude exhibits relied on by Expert).

B. Exhibit 1034 is Admissible

Exhibit 1034 is also admissible. Exhibit 1034 indicates that it contains "PGA Tour official stats" between 2017 and 2024. The data included in Exhibit 1034 is publicly available and easily found on the PGA tour website at https://www.pgatour.com/player/01666/bernhard-langer/stats. Exhibit 1034 was created in response to Athalonz' arguments of secondary considerations of non-obviousness related to the alleged improved golfing performance by Mr. Bernhard Langer who switched to Athalonz golf shoes in 2020 after wearing Adidas golf shoes for 40 years. POR, 74-75.

Patent Owner does not suggest nor provide any evidence that the data included in Exhibit 1034 is inaccurate or that the document is anything other than what Petitioner suggests that it is. *See* Patent Owner's Sur-Reply, Paper 23, 26 (relying on the statistics in EX1034 to support Patent Owner's argument that "the fact that a

professional golfer in his mid-60s improved in any statistical category only highlights unexpected results."). Exhibit 1034 has sufficient support to find that it is what Petitioner claims pursuant to Fed. R. Evid. 901(a), and meets the "low bar" for authenticity based on its contents and the surrounding circumstances under FRE 901(b)(4). *See e.g., New World Medical, Inc. v. MicroSurgical Technology, Inc.*, IPR2020-01711, Paper 49, 8-9 (P.T.A.B. Feb. 16, 2022) (authenticating publication under FRE 901(b)(4) after a "rudimentary online search" confirmed its authenticity); *Paragon 28,* IPR2019-00894, Paper 41, 10 (exhibit authenticated based on its "look and overall presentation" and Patent Owner's failure to identify any evidence that might suggest the exhibit is "anything other than [what] it appears to be.").

Exhibit 1034 is also directly relied on by Mr. Delgatty (see EX1022, ¶53) and contains data that an expert would reasonably rely on in evaluating the opinion of Athalonz's expert that Mr. Langer "hit the ball better" when he switched to Athalonz golf shoes. This exhibit should thus be admissible. *See* Fed. R. Ev. 703; *Surgalign Spine Technologies,* IPR2019-00571, Paper 75, 7-9; *Argentum Pharms.,* IPR2016-00204, Paper 85, 48; *LG Chem, Ltd. v. Celgard, LLC*, IPR2014-00692, Paper 76, 44–45; *Casper Sleep,* IPR2024-00474, Paper 60, 79-80; *Protect Animals With Satellites,* IPR2021-01483, Paper 69, 69-70.

Furthermore, "the theory of the hearsay rule … is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare

untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." *In re Epstein*, 32 F.3d 1559, 1565 (Fed. Cir. 1994) (quoting 5 John H. Wigmore, Evidence in Trials at Common Law § 1420, at 250). Here, Patent Owner had the opportunity to cross-examine Mr. Delgatty regarding his statements and understanding of this exhibit, its authenticity, its creation and its contents, but chose not to do so during his deposition.[1]

DATED: June 4, 2025

Respectfully submitted,

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[1] *Billerud Aktiebolag (PUBL) v. Westrock MWV, LLC* cited by Patent Owner (Motion, 5) is easily distinguishable. In *Billerud*, the Board excluded the challenged exhibits because they were improper expert testimony provided by a person who did not meet the definition of a POSITA—an issue not relevant here.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE was served to Patent Owner by causing it to be sent by email to counsel for Patent Owner at the following email addresses:

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