

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNDER ARMOUR, INC.,
Petitioner,

v.

ATHALONZ, LLC,
Patent Owner.

Case IPR2024-00638
Patent No. 11,064,760

PATENT OWNER'S SUR-REPLY

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PATENT OWNER'S EXHIBIT LIST

Exhibit	Description
2001	Docket Control Order (Dkt. 35) in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2002	United States District Court Judicial Case Profiles, as of December 2023
2003	Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2004	Exhibit A ('760 Patent Invalidity Chart Based on Kim) to Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2005	Exhibit B ('760 Patent Invalidity Chart Based on Rubin) to Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2006	Exhibit C ('760 Patent Invalidity Chart Based on Dufour) to Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2007	Exhibit R ('760 Patent Obviousness Chart) to Under Armour's Invalidity Contentions in <i>Athalonz LLC v. Under Armour, Inc.</i> , No. 2:23-cv-00193-JRG (E.D. Tex.)
2008	Declaration of Mr. Timothy Markison in Support of Patent Owner's Response Regarding U.S. Patent No. 11,064,760
2009	CV of Mr. Timothy Markison
2010	Transcript of the 12/19/24 Deposition of Mr. Grant Delgatty in IPR2024-00636, IPR2024-00637, IPR2024-00638, IPR2024-00639, and IPR2024-00640

Exhibit	Description
2011	Excerpts from Holt, Serway & Faughin, Physics (1st ed. 2002)
2012	Presentation Titled “Athletic Positioning Shoe: Presentation to Under Armour, August 22, 2013”
2013	Article Titled “Athalonz Golf Shoes: The Golf Shoe for Distance?” downloaded from https://thelefttrough.com/athalonz-golf-shoes-review/ on December 30, 2024
2014	Claim Charts for U.S. Patent No. 10,674,786; 11,013,291; and 11,064,760 for Athalonz Products
2015	RESERVED
2016	RESERVED
2017	RESERVED
2018	RESERVED
2019	RESERVED
2020	RESERVED
2021	Declaration of Stephen P. Bosco
2022	Transcript of the 5/13/25 Deposition of Mr. Grant Delgatty in IPR2024-00636, IPR2024-00637, IPR2024-00638, IPR2024-00639, and IPR2024-00640

I. INTRODUCTION

Petitioner's Reply is riddled with misquotes, misrepresentations, and conclusory arguments that fail to meet its burden of proving unpatentability. Petitioner relies on new evidence and arguments to try and fill gaps in the Petition, but none of its hindsight-biased assertions or cherry-picked descriptions of the prior art are sufficient.

First, Petitioner argues the Board should discredit Patent Owner's expert. That Petitioner opens with personal attacks on Mr. Markison—rather than disputing the merits of his opinions—says it all. Mr. Markison is undisputedly a qualified expert (and a duty-bound patent attorney), and he provided detailed, helpful opinions for the Board's determination. It is Petitioner's expert that parrots conclusory assertions from the Petition and Reply and fails to consider the proper construction of the claims and evidence supporting their patentability. Mr. Markison's affiliation with Athalonz and the patented technology does not make his opinions unreliable, particularly under the circumstances of this case.

Next, Petitioner ignores Patent Owner's construction of "athletic positioning" and instead advances a reading of the claims that simply requires the heel be higher than the toe. This overbroad construction is inconsistent with every figure in the patent, the claims, and with the Board's institution decision that agreed the heel must be higher than the outer toe, which must in turn be higher than the inner toe.

On the merits, each of Petitioner’s arguments fail because they rely on cherry-picked figures and ignore consistent disclosures in the prior art. Patent Owner’s reading of the patents is illogical as it would allow the exact same shoe to meet the claims when worn on flat ground, and suddenly no longer meet the claims when worn on an upslope.

Finally, Petitioner fails to rebut any of Patent Owner’s evidence showing secondary considerations of nonobviousness. Petitioner does not dispute the nexus between this evidence and the claims, argues waived and meritless objections to Patent Owner’s evidence of industry praise, and attempts to sidestep its copying of Athalonz’s patents and products—all while failing to provide any evidence supporting its positions.

Because Petitioner cannot meet its burden of proving obviousness, the Board should confirm the patentability of the challenged claims.

II. PETITIONER’S ATTACKS ON MR. MARKISON ARE UNFOUNDED

Rather than addressing the merits, Petitioner’s Reply opens with unsupported, ad hominem attacks on Patent Owner’s expert, claiming that Mr. Markison’s opinions should be afforded “little, if any, weight” due to his alleged bias and position at Athalonz. Petitioner’s attacks are unfounded, but highlight Petitioner’s goal to have the Board ignore Mr. Markison’s opinions—which logically and properly interpret the art in view of the law and point out the issues with Petitioner’s

hindsight-driven arguments—rather than consider them on the merits. The Board should weigh the expert testimony in this case as it would any other. *See* CTPG, 35 (citing *Yorkey v. Diab*, 601 F.3d 1279, 1284 (Fed. Cir. 2010) (“The Board has broad discretion to assign weight to be accorded expert testimony.”)).

Importantly, Petitioner has not challenged Mr. Markison’s expert qualifications. Mr. Markison has 13 years of experience designing, developing, and manufacturing athletic shoes, EX2008 ¶44, far exceeding Petitioner’s proposed level of skill in the art, *id.* ¶40. Mr. Markison is also a named inventor on the challenged patents and their prosecuting attorney, as well as the CEO of Athalonz, but this strengthens his qualifications, rather than diminishing them. He invented and wrote these patents and has been working directly on making products embodying the patents since the formation of Athalonz, providing him unique and powerful insight into the prior art, the scope of the claims, and the knowledge of a POSITA that will assist the Board. EX2008 ¶¶17-29.

Mr. Markison’s opinions are based on extensive facts and data and are the product of reliable principles and methods. *See* CTPG, 35. He spent 300-500 hours drafting his declarations across the five IPRs. EX1023, 25:13-26:17. Petitioner asserts Mr. Markison has a financial interest in the proceeding, but that interest is far-removed—it would require IPR and district court victories, success on appeal, collection of a verdict, and then Athalonz deciding to pay out shareholders before he

ever receives a dime.¹ Moreover, Petitioner’s claims of bias ignore Mr. Markison’s testimony under oath explaining how he is duty-bound as a patent attorney to be ethical and truthful, and stating that he is rendering an objective opinion from the viewpoint of a POSITA. EX2008 ¶¶2, 30; EX1023, 230:3-231:9.

Petitioner’s argument essentially states that any employee-expert should be discredited, but that is directly contrary to law. *Sw. Constr. Corp. v. West*, 82 F.3d 435 (Fed. Cir. 1996) (“[T]hat an expert witness was an employee of a party does not disqualify his testimony, but would merely be a factor to be taken into consideration...” (citation omitted)). While the Board is free to consider his employment status in weighing his testimony, it should not prejudge its determination by handicapping Mr. Markison’s opinions at the outset. *Iriusrisk, Inc. v. Threatmodeler Software Inc.*, IPR2023-00821, 2024 WL 4795022, at *16 n.9 (P.T.A.B. Nov. 14, 2024) (“[W]e assess the credibility of both parties’ experts based on the plausibility of and support for their testimony, and weigh such testimony accordingly”) (citation omitted)); *Draftkings Inc. v. Ag 18, LLC*, IPR2022-01448,

¹ In contrast, Petitioner’s expert is being paid \$400/hour to parrot invalidity theories from the Petition, and has spent significantly less time than Mr. Markison working on these proceedings. EX2010, 15:17-17:12; EX2022, 8:3-13.

2024 WL 1080011, at *46 (P.T.A.B. Mar. 12, 2024) (refusing to disregard expert and instead “evaluat[ing] each of his assertions on their own”).

The Board should also consider the purpose of AIA proceedings in promoting fairness and efficiency and allowing “each party to determine the preferred manner of putting forward its case.” CTPG, 2. Athalonz is a two-person operating company that has yet to turn a profit, trying to compete in the marketplace against multi-billion-dollar juggernauts like Petitioner based on the protections afforded by its patents. *See* EX1031 ¶¶1-44; EX1023, 18:5-16. Athalonz does not have the resources to pay an “independent” expert tens or hundreds of thousands of dollars, simply to defend the patents it already spent years of time and effort obtaining from the PTO. It would be fundamentally unfair to small patent owners to discredit Mr. Markison’s testimony just because Athalonz cannot afford a hired gun.

Finally, given Petitioner’s direct attacks on his credibility and the importance of his testimony, Patent Owner believes it would be helpful to the Board to hear Mr. Markison’s testimony live and have its own opportunity to ask questions. *See* CTPG, 85. While Patent Owner understands that live expert testimony is uncommon, this case is different and exactly the type of case where it is appropriate—Petitioner has lodged a direct attack on Mr. Markison’s credibility as a witness, rather than simply disputing the merits of his expert opinions.

III. PETITIONER’S NEW ARGUMENTS REGARDING “CONVENTIONAL” SHOES ARE IMPROPER AND IRRELEVANT

Recognizing deficiencies in the Petition, Petitioner relies on improper new reply evidence from Mr. Delgatty to try and fill gaps regarding “conventional” shoes. Specifically, Mr. Delgatty cut apart and photographed seven pairs of shoes to support his conclusory opinion that it was “conventional” to have heel platforms with a uniform height from inner to outer edge and from front to rear. EX1022 ¶¶3-9. These photographs and opinions are procedurally improper—Mr. Delgatty failed to include any such cutaways in his original declaration and admitted that without them, it was impossible to know what features these allegedly “conventional” shoes had. EX2010, 32:10-22, 35:7-36:8, 38:19-39:2 (agreeing you cannot tell what the interior dimensions of the shoe are based on exterior photographs); EX2022, 11:6-13:1 (agreeing he created new cutouts because of issues with original declarations). Moreover, Mr. Delgatty included at least three physical new shoes that he did not even photograph the *exterior* of before. *Compare* EX1022 ¶¶5, 6, 9, with EX1002 ¶¶47-52. Mr. Delgatty’s photographs are also deficient on the merits, as Petitioner 1) fails to prove any of the shoes are prior art; 2) does not assert any of these shoes

as prior art in the Petition; and 3) includes no measurements or annotations that actually show that the cutaways have the dimensions Petitioner claims they do.²

Regardless, the dispute over “conventional” features is irrelevant to this proceeding. Petitioner must prove that the prior art it actually asserts—here, Kim, Dufour, and Rubin—renders the claims obvious. Petitioner’s reliance on extrinsic evidence about Athalonz’s own products changes nothing—none of that has anything to do with whether Petitioner’s prior art meets the claim limitations. The fact that some conventional golf shoes have a “flat” heel from inner to outer edge does not change the disclosures in any of Petitioner’s prior art.

IV. PETITIONER CANNOT SHOW UNPATENTABILITY UNDER THE CORRECT CONSTRUCTION OF “ATHLETIC POSITIONING”

Petitioner’s only answer to Patent Owner’s construction of “athletic positioning” is to ask the Board not to address it at all. But Patent Owner put forth extensive evidence in the Response for why its construction is correct, POR, 26-30, and Petitioner has no response on the merits. Indeed, its expert—despite recognizing that “athletic positioning” had to limit the claims somehow—acknowledged he put

² This is in striking contrast to Patent Owner’s district court infringement contentions, which contain detailed measurements and analysis to show how Under Armour and Athalonz’s shoes fall within the scope of the claims. *See* EX1025; EX1036.

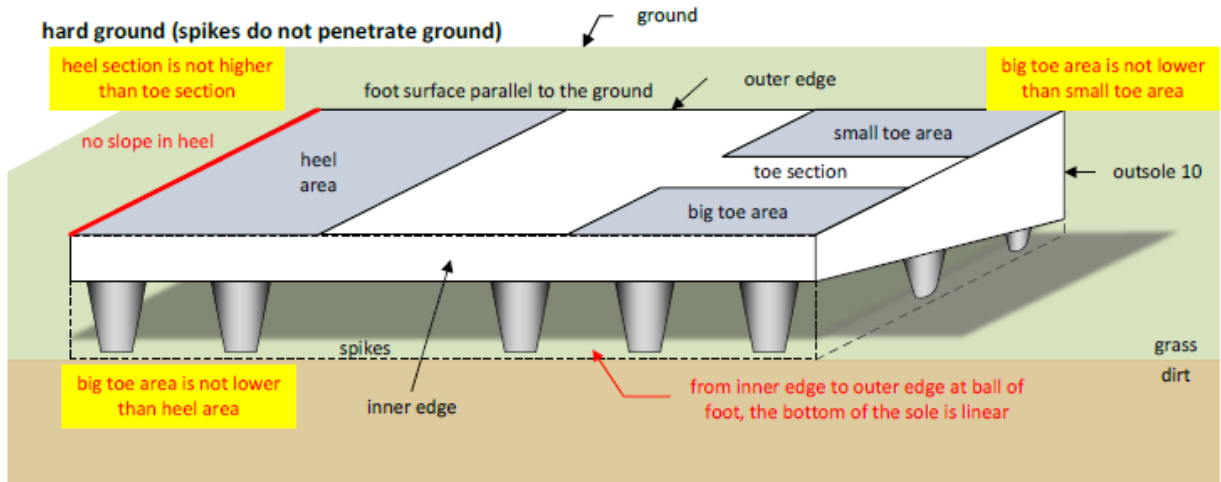
forth no evidence as to how that limitation was met. EX2010, 53:1-54:7. Under the correct construction, “athletic positioning” requires a heel section higher than the toe section and the outside edge of the toe section higher than the inside edge of the toe section.

Petitioner’s arguments throughout the Petition and Reply assume that the ’760 patent requires only that the big toe area be lower than the heel section, and not that both the big toe be lower than the outer toe and that both toes be lower than the heel. However, this interpretation broadens the claims beyond any disclosure or figures in the patent. The Institution Decision already recognized that the ’760 patent “is directed to a pair of shoes that positions a big toe lower than an outer toe, *both of which* are lower than the heel.” Paper 8, 4 (emphasis added). The Board should adopt Patent Owner’s construction.

V. GROUND 1

A. Kim Does Not Disclose a Toe Area Lower Than the Heel Area.

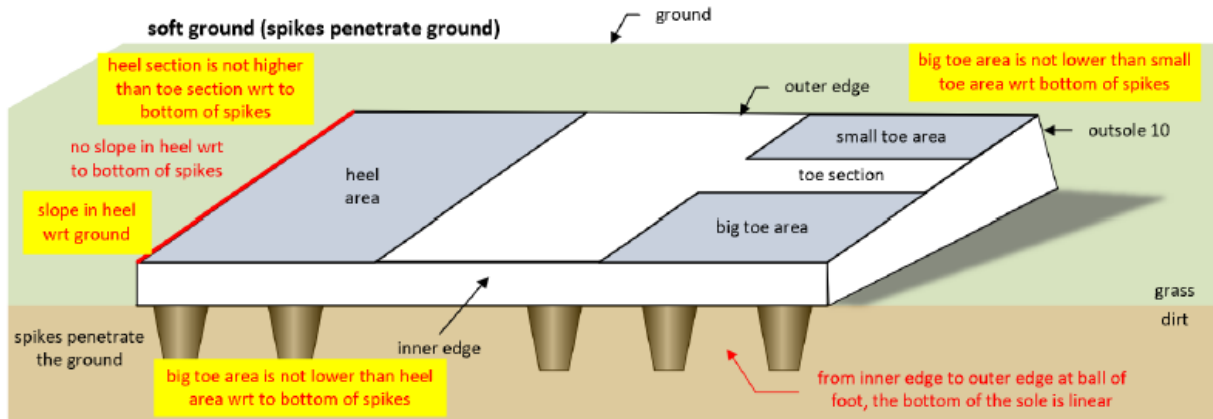
Petitioner’s argument that Kim discloses a big toe area lower than the heel relies on a single perspective figure and ignores the rest of Kim’s consistent disclosure that the foot platform remains parallel to the ground. Kim repeatedly and consistently explains that the entire upper surface of the outsole is parallel to the ground. POR 31-33; EX2008 ¶¶178-186. Reading Kim’s entire disclosure, Mr. Markison created the diagram below illustrating Kim’s primary embodiment:



EX2008 ¶180.

Petitioner ignores all of Kim’s disclosures other than the one figure it likes—none of the portions of Kim discussing the foot surface being parallel to the ground are cited in the Petition or Reply because Petitioner has no answer to them. Instead, Petitioner asserts essentially that if a prior art patent shows one figure that looks like the claims, that is enough for invalidity. But it is black-letter law that the figures cannot be used “to change the patent, and make it embrace a different invention from that described in the specification.” *Hailes v. Albany Stove Co.*, 123 U.S. 582, 587 (1887).

Finally, Patent Owner also explained at length why on soft ground, Kim still fails to disclose the claims because the heel section remains at the same position as the toe section at both the inner and outer edge of the shoe, and because the heel area no longer has “substantially no slope.” POR, 35-36.



EX2008 ¶187. Petitioner’s only response is to point to Kim’s “what if” embodiment, which is addressed below.

B. Kim Does Not Disclose the Claimed “Athletic Positioning.”

Even if the Board relies exclusively on Figure 2 to find that Kim discloses a heel section higher than a toe section, Kim still fails to disclose the claimed “athletic positioning.” As shown in the figures above and in the Response, Kim does not—on either soft or hard ground—disclose a heel section higher than the outer toe section, which in turn is higher than the big toe section. POR, 38-40. Petitioner does not separately address this argument in Reply.

C. Kim’s What-If Embodiment Fails to Meet the Claims.

Petitioner’s arguments regarding the what-if embodiments fare no better. Petitioner’s primary theory relies on a single line in the last paragraph of Kim stating that “the inclined plane *may* be formed only at the front portion of the outsole.” EX1005 ¶[0046] (emphasis added). Petitioner selectively removed the rest of the sentence, which reads: “For example, the inclined plane may be formed only at the

front portion of the outsole, or only at parts of the front and/or *rear portions of the outsole.*” *Id.* (emphasis added). Petitioner claims this half-sentence somehow cancels out not only the rest of the sentence, but also Kim’s entire disclosure that consistently describes a shoe where the entire upper surface of the sole is parallel on hard ground and tilted on soft ground. POR, 12-15 (collecting evidence). That is, Kim’s preferred embodiment—the one pictured in Figures 1-5 and Mr. Markison’s diagram—does *not* have an inclined plane only at the front portion of the outsole, and instead has the inclined plane throughout the shoe from front to back.

If Kim were modified to remove the incline plane disclosed in every figure to add a flat heel without spikes, Patent Owner explained in detail why this “what-if embodiment” would still not meet the claims. POR, 36-38. Petitioner falsely claims that Mr. Markison “admitted that the conventional heel disclosed in Kim has this design.” Reply, 9. Mr. Markison made no such admission. EX1023, 99:1-17 (explaining that hypothetically, “*if* they put a conventional heel like they have on a dress shoe” on Kim, it would be flat from inner to outer edge).

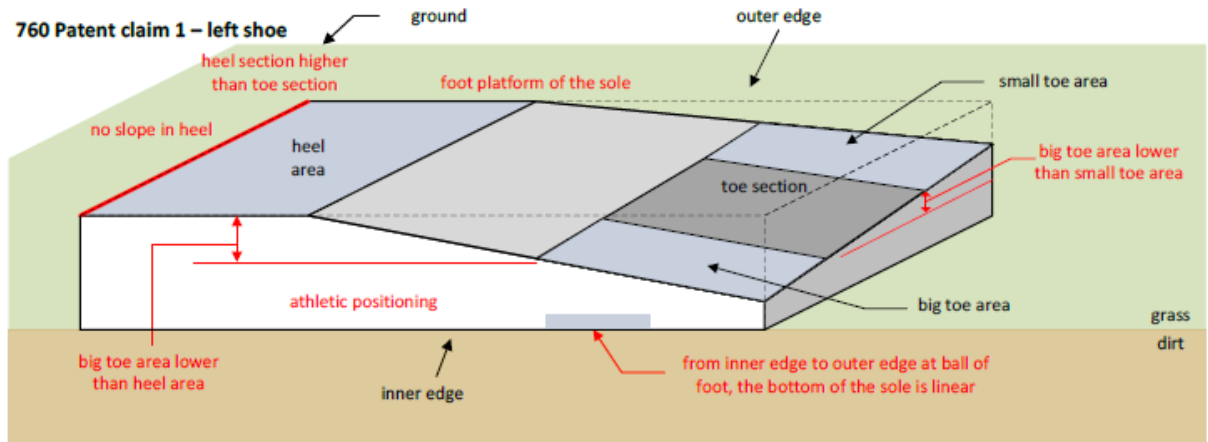
Petitioner newly argues that Kim’s sole must be a material that would allow the toe section to flex while the heel remains flat on the ground. This ignores Kim’s disclosure that its spikes are “integrally formed with the outsole,” EX1005 ¶[0030]; if the outsole were flexible, the spikes would be too, meaning that they would flex under the weight of the athlete, which is implausible. Regardless, this argument was

nowhere in the Petition, requires modification of Kim to remove the spikes and change its material, and represents a new ground of unpatentability that should not be considered.

D. Petitioner’s New Arguments Regarding Heel and Toe Position Measurements are Illogical.

Petitioner argues for a new construction in Reply, claiming both that the spikes should be excluded, and that the “heel and toe positions should be measured relative to one another when the shoe is being used as intended, *i.e.* when golfing on soft ground.” Reply, 12. This construction is procedurally improper, as it was nowhere in the Petition. Moreover, it is illogical and inconsistent with the patent.

Primarily, Petitioner’s construction is illogical as it requires shoes being used only on soft ground and manipulated to certain angles that are nowhere in the claims. Claim 1 requires a pair of shoes, each having a foot platform that provides an athletic positioning with a heel area with substantially no slope, the heel area higher than the outer toe area, and the outer toe area higher than the big toe area. Mr. Markison created the following annotated diagram of the claims:



EX2008 ¶72. As the claim makes clear, the *pair of shoes* is what must position the wearer’s foot, not a use case where shoes are pushed into the ground at particular angles. These are not method claims covering shoes used to achieve a certain position—the shoe needs to meet the claim on its own.³ Taking Petitioner’s argument to its logical extreme, *any* shoe would meet the claims if a hole was dug in the ground and the shoe was placed in the hole at the right angle—that simply cannot be. Indeed, Mr. Delgatty admitted that his view was these patents only apply to shoes on a flat, soft surface that sink into the ground; he was unable to answer whether the same shoe worn on a different surface like an upslope would fall within the scope of the claims. EX2022, 43:12-44:3.

³ This makes sense, as the claims are not limited to golf shoes and are intended to be used in “any type of shoe (e.g., a dress shoe, a casual shoe, a sport specific shoe, a training shoe, and/or a combination thereof).” EX1001, 10:46-53.

Petitioner's other arguments change nothing. While Petitioner argues that the cleats are separate components from the sole, claim 6 makes clear that the foot platform can include a specific bottom such as cleats. And the patent claims an "athletic positioning apparatus" with a particular foot positioning. EX1001, Title. The purpose of the invention is to put an athlete into a better athletic position with a shoe that independently manipulates foot position to create the slopes and angles in the claims. EX2008 ¶¶58-59.

Petitioner's assertion that the cleats should be ignored when determining whether a given shoe falls within the scope of the claims is illogical, ignores the plain meaning of the claim language, casts aside basic principles of physics, and would produce absurd results that read out every embodiment in the patent. *See Kaufman v. Microsoft Corp.*, 34 F.4th 1360, 1372 (Fed. Cir. 2022) ("A claim construction that excludes a preferred embodiment is rarely, if ever correct[.]"). For example, Petitioner's new argument that "whether or not a shoe has cleats, an athlete's foot will be positioned the same with respect to the surface of the ground when in use" is clearly wrong. Reply, 14. Indeed, Petitioner's main prior art references—Kim and Rubin—teach exactly the opposite: both references use longer cleats on the inner edge of the shoe so that the athlete's foot sinks into the soft ground when in use and do not sink into the hard ground when in use. These shoes—and any shoe with cleats—provide meaningful "traction" only when the cleats at least

partially penetrate the ground. The cleats impact the position of the wearer's foot with respect to the ground any time the cleats have not fully penetrated the ground such that the bottom surface of the midsole is flush with the ground.⁴

Further, as Mr. Markison explained, removing the cleats from Kim and Rubin would result in shoes that both do not work in practice, and lack the claimed slopes regardless. EX2008 ¶¶195-200, 271-277. The Institution Decision's finding that Kim depicts the claimed slope when a golfer is attempting a swing did not consider the need to measure foot positioning with reference to the shoe and not the ground.

Petitioner's citation to extrinsic evidence, such as the Athalonz marketing document (Reply, 15) supports Patent Owner's point. That image shows that the Athalonz shoes that practice the claims themselves put the athlete in an athletic position on all surfaces, contrary to the conditional positioning in Kim and Rubin that requires ignoring the cleats that actually engage the ground.

⁴ The amount the cleats sink into the ground depends on many factors, including the penetration resistance of the ground, the amount and position of the weight force applied to the shoe, and the quantity, shape, length, and contact area of the cleats. *See* EX2008 ¶¶47-55, 110-121. Mr. Delgatty did not consider these factors. EX2022, 35:17-38:9.

Finally, Petitioner's argument that Patent Owner's position is inconsistent with its infringement contentions is irrelevant and wrong. For one, to the extent they are relevant, the contentions are extrinsic evidence that should be afforded little weight. *Ocado Grp. PLC v. AutoStore Tech. AS*, PGR2021-00038, 2021 WL 3412974, at *13 (P.T.A.B. Aug. 4, 2021). Regardless, Petitioner's allegations are wrong on the merits; the location where heights were measured has nothing to do with the relative foot position, and Petitioner never inspected or otherwise looked at the cutaways in the infringement contentions during discovery, so has no basis to say how they were measured.

VI. GROUND 2

A. Petitioner's New Arguments Regarding Figures 11 and 12 Fail.

There is no dispute that Figures 11 and 12 of Dufour represent the same embodiment, EX2010, 102:8-103:3, 105:17-19, and that this is a different embodiment than Figures 8-10, EX1006, 3:12-29. Those differences are clear in the figures. The Figures 8-10 embodiment, represented by Figure 9 below, has a consistent slope from inner to outer edge throughout the shoe. In contrast, the Figures 11-12 embodiment, represented by Figure 12 below, has a consistent height at the outer length of the shoe (65), a flat plantar section (61) at the same height as the outer edge, and a downward slope only in the angled platform section (63):

FIG. 12

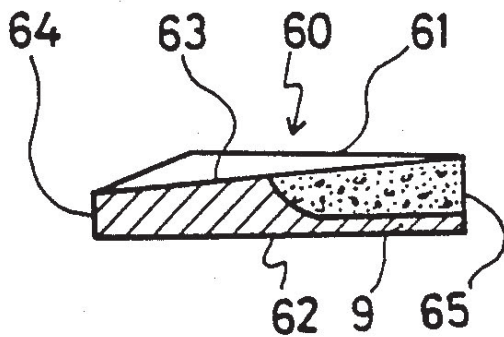
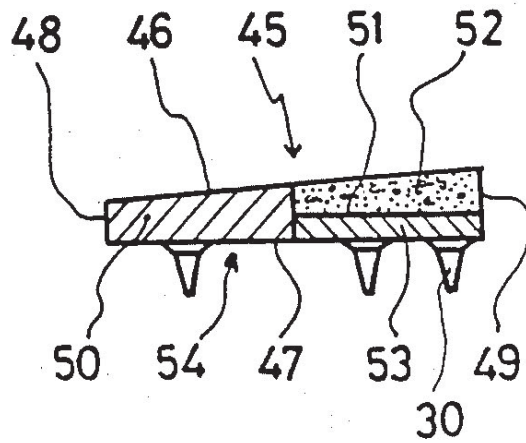


FIG. 9



POR, 44-49; EX2008 ¶¶215-220.

Even Petitioner's expert previously correctly interpreted Figure 12 as showing the heel at the same height as the outer edge of the shoe throughout all of his declarations:

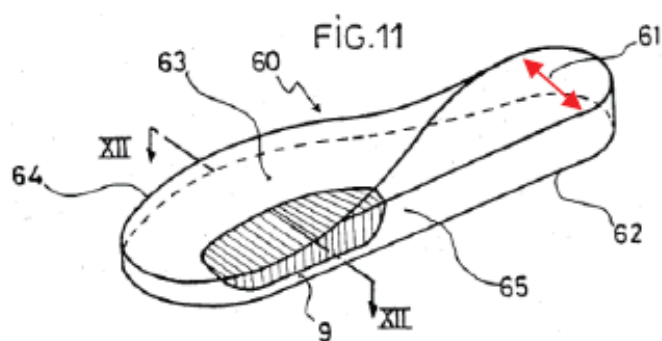
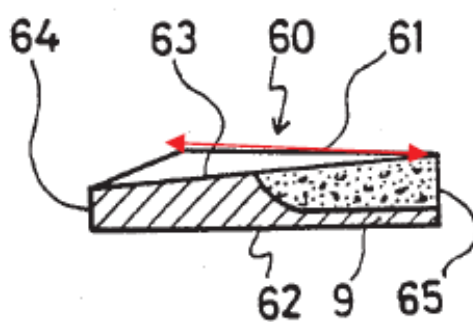
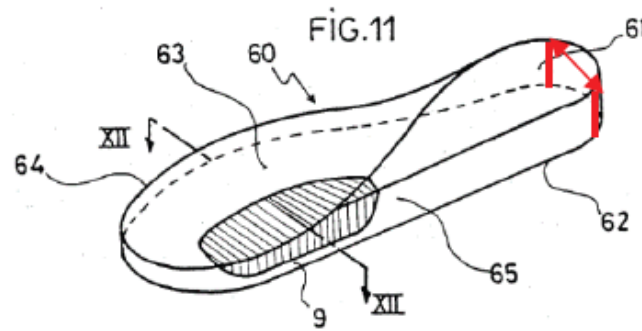


FIG. 12

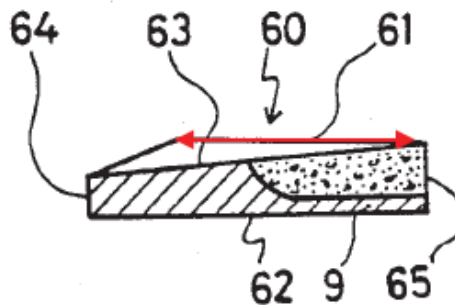


EX1002, 61.

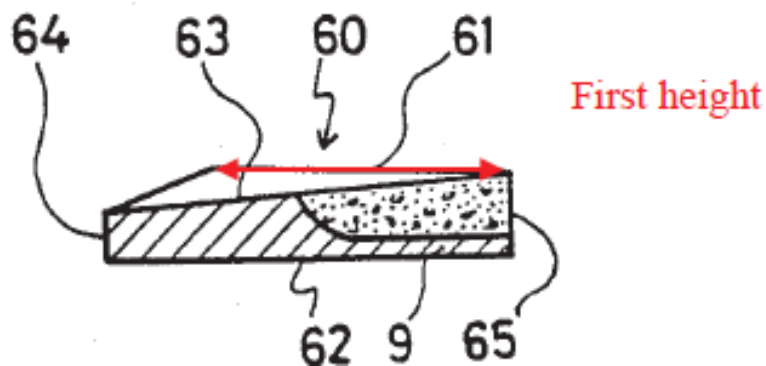


Uniform height

FIG. 12

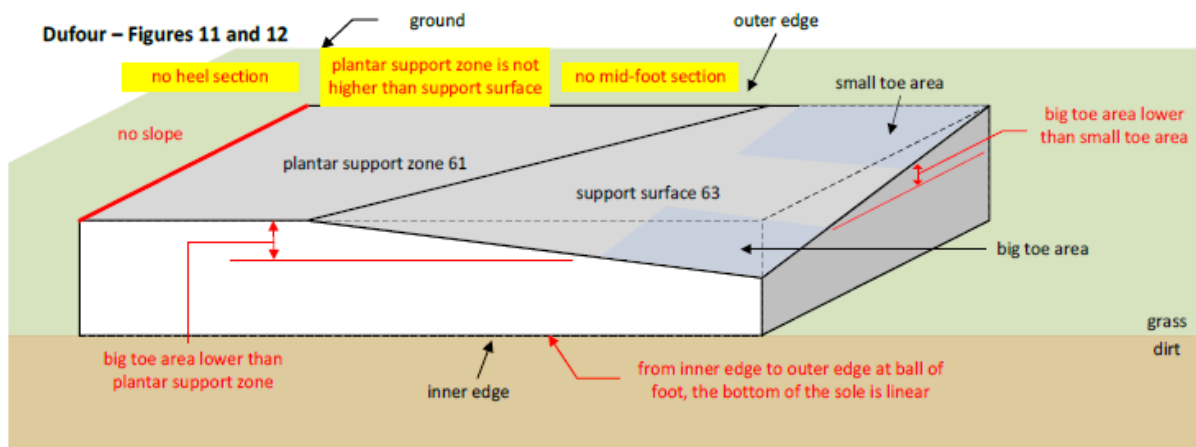


IPR2024-00636, EX1002, 50.



IPR2024-00637, EX1002, 54; *see* EX2010, 105:17-22. Now, in an attempt to cure the obvious flaws in Petitioner's theory, Mr. Delgatty has contradicted his previous opinions in a new reply declaration to claim that Figure 12 actually has errors, and

Figure 11 must be correct. EX1022 ¶¶29-31. The Board should discredit this inconsistent testimony. Mr. Markison’s explanation of Figures 11 and 12—which is consistent and supported by detailed analysis of the specification, and summarized in the block diagram below (EX2008 ¶218)—is far more credible than Mr. Delgatty’s shifting-sands approach. *See id.* ¶¶215-220.

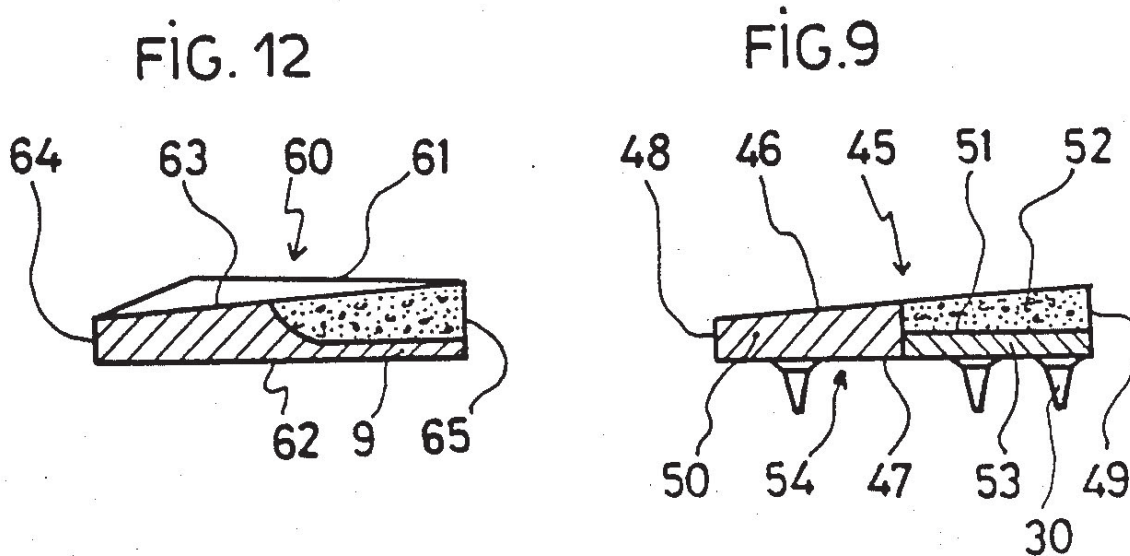


Petitioner’s argument that “Mr. Markison admitted that the height of the toe section (line C) is smaller than the thickness of the heel section at line A” or that he “admits that the embodiment shown in Figure 11 has all the claimed relative positions of the toes and heel” (Reply, 16-17) mischaracterizes his testimony. Mr. Markison made clear that only “in a vacuum, Figure 11, without context of what the patent is teaching” shows line C smaller than line A, “but that’s not what Figure 12 shows.” EX1023, 117:3-119:11. And he made clear his opinion that based on Dufour’s disclosure, the Figure 11/12 embodiment has the heel at the same height as the outer toe. EX2008 ¶¶129-137, 215-220. Petitioner provides no meaningful

response to any of the contradictions in Dufour explained by Mr. Markison; it relies solely on cherry-picking its preferred way of viewing one figure over another. This is insufficient to meet its burden.

B. Figures 1 and 9 Also Fail to Meet the Claims.

Petitioner's arguments about Figures 1 and 9 and the meaning of "cross-section" also fail. Figure 9 is clearly different from Figure 12—there is a reason Figure 9 does not show the consistent heel height from inner to outer edge:



Petitioner's new reliance on Figure 1—which was nowhere in the Petition—fails to change anything. Petitioner misleadingly quotes Dufour's disclosure that "plantar support zone 61 at the level of the heel remains substantially parallel to the walking surface." EX1006, 5:7-14. While accurate, this disclosure expressly applies to *Figures 11 and 12*, which as shown above does have a flat heel section, and does not apply to the separate embodiment of Figures 1-10. And Petitioner's citation to

Mr. Markison’s deposition tellingly leaves out his explanation that Figure 1 is inaccurate and inconsistent with the embodiments disclosed in the rest of Dufour. EX1023, 109:13-114:12.

Finally, Petitioner concedes it has no evidence to support combining the disclosures of Dufour’s Figures 8-10 and Figures 11-12 embodiments by failing to respond to that part of the Response. *See* POR, 48-49; EX2008 ¶¶221-234.

C. Dufour Does Not Disclose “A Pair of Shoes.”

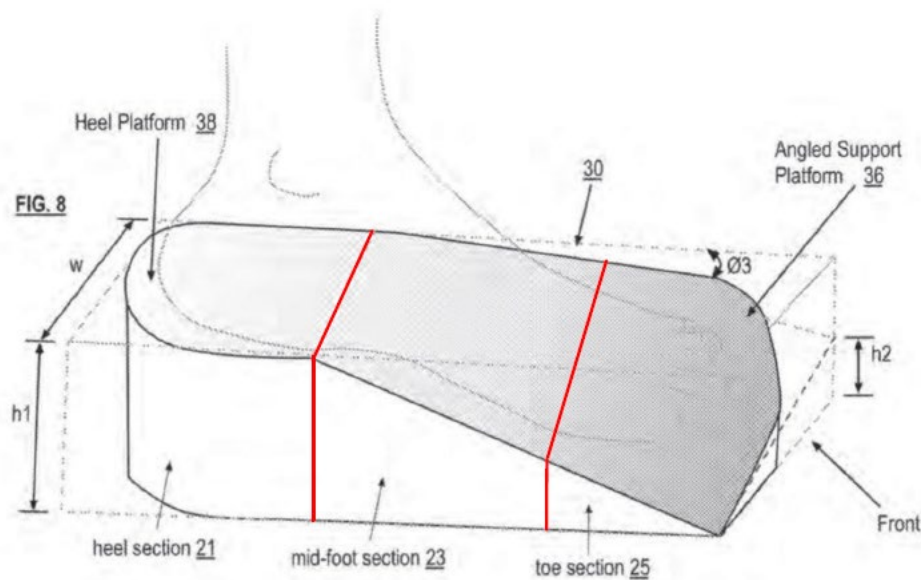
The ’760 patent claims a “pair of shoes” with both a “left foot shoe” and a “right foot shoe,” each having the claimed athletic positioning. The patent makes clear that *both* the left and right shoe have the athletic positioning. *See* EX1001, 9:25-45, 36:1-9, 40:57-62. There is no dispute that Dufour does not teach a pair of shoes each having these characteristics—Dufour’s design is specifically intended only for the *front* foot in a golf stance. POR 45-47; Reply, 19-20. Petitioner makes no attempt in reply to rebut Patent Owner’s evidence that it would not have been obvious to use Dufour’s design in both the left and right shoe.

Instead, Petitioner relies solely on the Board’s institution decision, which noted that the claim would “seem to be satisfied merely by a manufacturer making a left and a right shoe.” Paper 8, 12 n.1. Respectfully, this misreads the claim. A “pair” requires two things used together or regarded as a unit. This cannot be satisfied by simply making a shoe with athletic positioning for one foot and selling

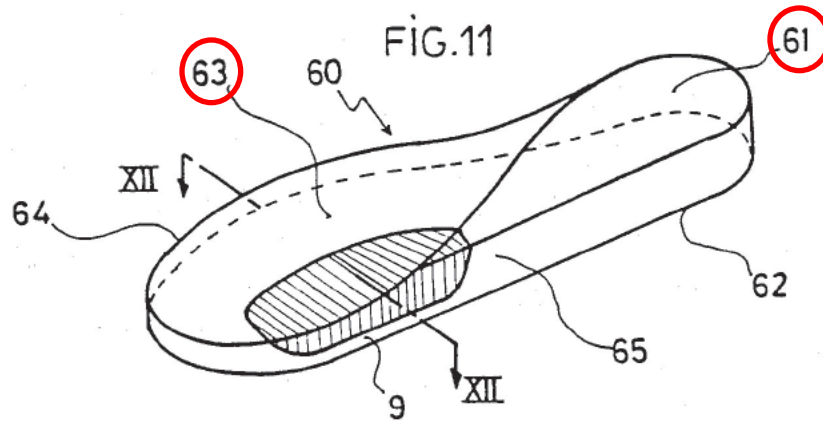
that separately from the other design—such a reading would mean that any company that ever made and sold two different products would satisfy a claim requiring a “pair” of products.

D. Dufour Lacks the Mid-Foot Section in Claims 2 and 7.

Petitioner also fails to show Dufour has a foot platform that provides an athletic positioning through a distinct heel, toe, and mid-foot section with a shape to transition from the heel to toe section. POR, 48-52. The claimed foot platform with three sections is shown below:



POR, 51. Contrary to Petitioner’s argument, a mid-foot section is not a “necessary element of every shoe.” Petitioner does not engage with Dufour’s express disclosure that it has only two sections—the plantar support zone 61 and the support surface 63—rather than separate heel, mid-foot, and toe sections required by the claims. *Id.* ¶¶242-244.



Petitioner also does not dispute that it fails to consistently describe which part of Dufour represents the mid-foot section. EX2008 ¶¶239-241.

VII. GROUND 3

A. Rubin Does Not Disclose a Big Toe Area Lower than a Heel Area.

As with Kim, Petitioner again relies exclusively on guessing about figures in Rubin to dismiss its express disclosures that the foot platform remains parallel to the ground. Specifically, Petitioner's expert looked at pictures in Rubin and claimed that they show a heel higher than the toe, but completely ignored the extensive disclosure in Rubin's specification that the foot of the wearer remains substantially level to the ground. POR, 55-56 (collecting evidence). Petitioner has no answer to this evidence.

Petitioner now claims that Figure 4 shows a big toe area lower than a small toe area. Reply 23. But this ignores all the other requirements of the claims and manufactures a claim that allows the shoe to be manually repositioned by digging holes in the ground to create angles that the shoes themselves do not. These arguments fail for the same reasons discussed above regarding Kim. See POR, 58.

B. Rubin Does Not Disclose the Claimed “Athletic Positioning.”

Even if the Board relies exclusively on Petitioner’s view of the figures and finds Rubin discloses a heel section higher than a toe section generally, Rubin still fails to disclose the claimed “athletic positioning.” As shown in the Response, Rubin does not—on either soft or hard ground—disclose a heel section higher than the outer toe section, which in turn is higher than the big toe section. POR, 64-65. Petitioner does not separately address this argument in Reply.

C. Rubin’s What-If Embodiments Fail to Meet the Claims.

Petitioner also fails to rebut Patent Owner’s arguments regarding the “what-if” embodiments of Rubin with a flat heel without spikes.

Petitioner first repeats its arguments that the heel must be higher than the toe, which are incorrect for the reasons discussed above. Petitioner also argues that the “what if” embodiment on soft ground would cause the big toe area to be lower than the heel and small toe, but Mr. Markison explained why this arrangement still fails to meet the claims because it would cause the shoe to lift off the ground. EX2008 ¶154. Petitioner’s new argument that Rubin discloses meets the claims because its sole can flex also fails. Even if the midsole portion of Rubin flexed as described, that still ignores all the other issues with Rubin, including that its foot platform remains parallel to the ground.

Finally, Petitioner’s arguments rely on a version of Rubin where the cleats are ignored altogether and where the shoe digs into the ground at a particular angle. These claim construction arguments fail for the reasons discussed above regarding Kim.

D. Rubin Does Not Disclose “A Pair of Shoes.”

As explained for Dufour, Rubin’s design for a tilted *rear* golf shoe does not disclose the claimed “pair of shoes” with athletic positioning in both the “left foot shoe” and “right foot shoe.” POR, 66-68. Again, Petitioner does not even argue such a design would be obvious, and relies solely on the Board’s footnote that a “pair” does not require shoes intended to be used together, which is addressed above.

VIII. SECONDARY CONSIDERATIONS WEIGH STRONGLY IN FAVOR OF NONOBVIOUSNESS

Petitioner fails to rebut Patent Owner’s evidence of nonobviousness, which strongly supports the validity of the challenged claims.

Nexus: Patent Owner is entitled to a presumption of nexus because its evidence is “tied to a specific product that embodies the claimed features, and is coextensive with them.” *Volvo Penta of the Ams., LLC v. Brunswick Corp.*, 81 F.4th 1202, 1210 (Fed. Cir. 2023) (cleaned up). Patent Owner showed that Athalonz’s shoes practice and are coextensive with the claimed features (POR, 69-70; EX2008 ¶285; EX2014); Petitioner does not even attempt to rebut this evidence.

Petitioner’s Expert Declaration is Entitled to No Weight: Mr. Delgatty’s

reply declaration parrots arguments in the Reply—almost word-for-word—with no expert analysis. *Compare* Reply 29-32, with EX1022 ¶¶50-54. His testimony is not based on “scientific, technical, or other specialized knowledge” and is not helpful to the Board. *See* CTPG, 34 (citing Fed. R. Evid. 702(a)). Mr. Delgatty also has no proffered expertise or personal knowledge in commercial success, golfer’s performance, or copying to render him an expert in these areas.

Long-Felt Need: Petitioner ignores that none of its prior art was ever used in commercial products and it failed to solve industry needs. EX2010, 123:8-124:6; EX2008 ¶287. The prior art tried to solve problems with athletic stances in golf shoes with different, unsatisfactory solutions that did not work in the market. EX2008 ¶¶286-287. This demonstrates a long-felt need for the patented invention. *See Volvo Penta*, 81 F.4th at 1214-15 (finding long-felt need where prior art attempted unsuccessfully to solve same problem as patent owner’s product).

Industry Praise and Unexpected Results: Petitioner complains about Patent Owner’s evidence that Mitch McDowell and Ryan Steenberg—professional World Long Drivers—praised the invention. Petitioner waived any objections by failing to challenge that evidence when submitted, 37 C.F.R. § 42.64(b)(1), preventing any supplemental evidence. Regardless, these statements are not hearsay because they are “cited only as evidence of industry praise . . . not in whether that praise is true or

accurate.” *Cisco Sys., Inc. v. Centripetal Networks, Inc.*, IPR2018-01436, 2020 WL 402817, at *27 (P.T.A.B. Jan. 23, 2020). Petitioner does not otherwise rebut Mr. Markison’s testimony describing praise from the long-drive industry. EX2008 ¶¶289-293.

Petitioner’s reliance on unauthenticated internet statistics allegedly relating to Bernhard Langer’s performance since switching to Athalonz shoes changes nothing. Mr. Markison explained how Langer switched to Athalonz golf shoes because he felt they improved his ball-striking and how Langer praised the shoes repeatedly, EX2008 ¶294—the fact that a professional golfer in his mid-60s improved in any statistical category only highlights unexpected results.

Finally, the fact that an independent, third-party article praising Athalonz’s products resulted from marketing efforts changes nothing—even the patent owner’s own marketing material can be informative. *See Volvo Penta*, 81 F.4th at 1215.

Copying: Petitioner has no answer to the substance of Patent Owner’s copying allegations. Mr. Markison presented the details of Athalonz’s inventions to Under Armour in 2013, including a 79-slide presentation showing figures directly out of the patents; provided Under Armour with a physical prototype of patent-practicing Athalonz shoes to test; and that after all this Under Armour refused to engage with Athalonz and instead released infringing shoes. EX2008 ¶¶296-303; EX2012; *see also* EX1031¶¶33-44. Petitioner claims there is no technical analysis

of Petitioner’s products showing infringement or similarity to Athalonz’s products, but there is ample such evidence—including Athalonz’s district court complaint, infringement contentions with hundreds of pages of detail, and claim charts regarding practice by the Athalonz shoes—all of which Petitioner itself put in the record. *See* EX1031 ¶¶35-89; EX1025; EX1036.

Petitioner’s only other argument is that Athalonz has not shown direct evidence of copying through Under Armour’s internal documents, but there is no such requirement. *See Medtronic, Inc. v. Teleflex Innovations S.a.r.l.*, 70 F.4th 1331, 1340 (Fed. Cir. 2023). Here, like in *Medtronic*, Under Armour had access to Athalonz’s patents and products and the infringing products are substantially similar to the Athalonz products. Combined with Mr. Markison’s testimony and evidence showing Athalonz’s presentations to Under Armour, this is more than sufficient circumstantial evidence to prove copying. Finally, Patent Owner’s evidence is undisputed—despite Petitioner having every opportunity to provide rebuttal evidence, such as a declaration from its own employees, it failed to do so.

Dated: May 21, 2025

Respectfully submitted,

/Connor Houghton/
Connor Houghton
Counsel for Patent Owner

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Patent Owner's Sur-Reply consists of 5,551 words, excluding the table of contents, certificate of service, this certificate of compliance, or table of exhibits. The Sur-Reply complies with the type-volume limitation of 5,600 words as mandated in 37 C.F.R. § 42.24. In preparing this certificate, counsel has relied on the word count of the word-processing system used to prepare this paper (Microsoft Word).

Dated: May 21, 2025

/Connor Houghton/
Connor Houghton
Counsel for Patent Owner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned certifies that on May 21, 2025
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