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 MOTION TO EXCLUDE

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Pursuant to 37 C.F.R. §§ 42.62 and 42.64(c) and the Federal Rules of Evidence ("FRE"), Patent Owner hereby moves to exclude Petitioner's Exhibits 1032, 1033, and 1034.

I. Patent Owner Timely Objected To The Exhibits It Seeks To Exclude

On April 16, 2025, Patent Owner timely served objections to Exhibits 1032-1034 (Paper 16), which Patent Owner first filed in conjunction with the filing of its Reply (Paper 15) on April 9, 2025. Patent Owner objected to Exhibit 1032 on a variety of bases, including that it is "lacking foundation and lacking authentication under FRE 602 and FRE 901-903." Paper 16, 5. By way of example, Patent Owner pointed out that "Petitioner fails to offer sufficient evidence that Exhibit 1032 was publicly accessible in its presented form as of the alleged publication date" and that "Petitioner also fails to offer evidence that the exhibit is what Petitioner claims it to be." *Id.* Patent Owner also objected to Exhibit 1032 on hearsay grounds, stating that "Patent Owner objects to this exhibit as containing hearsay to the extent that Petitioner attempts to rely on it to prove the truth of any matter described therein under FRE 801-803." *Id.* Patent Owner's objections to Exhibit 1033 were substantially identical. *Id.*, 6.

With respect to Exhibit 1034, Patent Owner likewise objected to the exhibit as "lacking foundation and lacking authentication under FRE 602 and FRE 901-903." *Id.* Patent Owner pointed out that "Petitioner fail[ed] to offer evidence that the

exhibit is what Petitioner claims it to be." *Id.* Patent Owner also objected "to this exhibit as containing hearsay to the extent that Petitioner attempts to rely on it to prove the truth of any matter described therein under FRE 801-803." *Id.*

Petitioner did not file any supplemental information or otherwise respond to any of Patent Owner's objections.

II. The Board Should Exclude the Objected-To Exhibits

A. The Board Should Exclude Exhibits 1032 and 1033 Because Patent Owner Has Not Established That They Are What They Purport To Be And They Contain Inadmissible Hearsay

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a).

Here, Patent Owner's Reply and its expert Mr. Delgatty's Reply Declaration cite Exhibits 1032 and 1033 as purported dictionary definitions of the terms "cross section" and "perspective," respectively. Paper 15, vi, 6-7; EX1022 ¶11. But the exhibits themselves are nothing more than website printouts that are not authenticated by witness testimony of any kind[1] and lack key indicia of authenticity

[1] Mr. Delgatty's mere citation to the exhibits has no bearing on their authenticity. He provides no analysis of them and instead simply assumes they are authentic dictionary definitions without explaining the basis for his belief. EX1022 ¶11. For

such as publication and bibliographic information. Accordingly, the Board should exclude them because Petitioner "provided no evidence to establish that any of [the exhibits] were authentic." *Shimano Inc. v. Globeride, Inc.,* IPR2015-00273, Paper 40 at 27 (P.T.A.B. June 16, 2016); *Standard Innovation Corp. v. Lelo*, IPR2014-00148, Paper 41 at 10-13 (P.T.A.B. Apr. 23, 2015) (excluding screenshot and printouts on authenticity grounds because "Petitioner has not provided testimony of any witness with personal knowledge of the information on the website(s) or the associated printouts at issue" and rejecting argument that company and device information appearing on documents provided sufficient authentication).

The Board should also exclude Exhibits 1032 and 1033 on hearsay grounds. Petitioner offers them for the truth of the matter asserted—*i.e.*, that the definitions appearing within them are in fact the true definitions of the terms at issue—yet no hearsay exemption or exception applies. The closest hearsay exception, FRE 801(18)'s exception for "Statements in Learned Treatises, Periodicals, or Pamphlets," does not apply at least because no expert has established the source of the definitions in Exhibits 1032 and 33 as a "reliable authority," and in any event,

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instance, Mr. Delgatty does not testify that he personally searched for the definitions or chose the dictionaries or websites from which they were obtained.

the exception prohibits receiving the hearsay statement as an exhibit. Fed. R. Evid. 801(18). Accordingly, the exhibits should also be excluded under FRE 802.

B. The Board Should Exclude Exhibit 1034 Because Petitioner Has Failed to Establish That It Includes Authentic PGA Data And It Is Inadmissible Hearsay

The evidentiary defects with Exhibit 1034 are even more significant than those with Exhibits 1032 and 1033. Petitioner cites Exhibit 1034 as a purported "compil[ation]" of "the PGA tour's official stats" in an attempt to rebut Patent Owner's secondary considerations evidence. Paper 15, 31; *see also* EX1022 ¶53 (citing Exhibit 1034 without saying what it is). But Exhibit 1034 is nothing more than a table of data with no specific sourcing information, no information about who prepared it (presumably Petitioner's counsel), and no official labels, seals, or other indicia of authenticity. Further, there is no witness testimony in the record describing the contents of Exhibit 1034 or explaining how it was prepared. Mr. Delgatty cites Exhibit 1034 but says nothing about what it is and simply assumes its contents to be accurate and authentic. EX1022 ¶53 ("I ***understand*** that Mr. Langer's performance got worse, not better, after switching to Athalonz's products (see EX1034)…" (emphasis added)). Petitioner does not even include a link to the alleged "PGA tour

official stats" that are purportedly the ultimate source for the data presented in the table.[2]

In short, Petitioner has provided no evidentiary foundation at all that would permit the Board to conclude that the figures presented in Exhibit 1034 are in fact "PGA tour official stats" as Petitioner asserts. Instead, Exhibit 1034 is effectively nothing more than attorney argument in exhibit form. The Board should exclude it. *Accord Billerud Aktiebolag (PUBL) v. Westrock MWV, LLC*, IPR2023-01206, Paper 60 (P.T.A.B. March 12, 2025) (excluding exhibits containing data analysis prepared by European patent attorney despite testimonial evidence explaining how it was prepared).

Exhibit 1034 should also be excluded because the statements within it are inadmissible hearsay. The data and statements in Exhibit 1034 are offered for the truth of the matter asserted—*i.e.*, that they truly and accurately reflect Bernard Langer's actual PGA tour statistics—but no hearsay exception or exemption is applicable. Accordingly, Exhibit 1034 should also be excluded under FRE 802.

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[2] Because Patent Owner timely objected to this evidence and Petitioner failed to provide any supplemental evidence, it should not be permitted to attempt to cure the defects in Exhibit 1034 in its opposition to this motion.

Dated: May 28, 2025

Respectfully submitted,

/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 28, 2025 a copy of the foregoing document was served by email upon the following:

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