

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNDER ARMOUR, INC.
Petitioner

v.

ATHALONZ, LLC
Patent Owner

Case No. IPR2024-00639
Patent No. 11,375,768

SUPPLEMENTAL DECLARATION OF GRANT DELGATTY

I. ENGAGEMENT AND COMPENSATION

1. My name is Grant Delgatty. I have been retained by Under Armour, Inc. for the purpose of providing a supplemental declaration with respect to the unpatentability of U.S. Patent No. 11,375,768 (“’768 Patent”).

2. In addition to the materials identified in my declaration dated March 4, 2024, I reviewed:

Exhibit No.	Description
IPR2024-00636 EX2008	Markison ‘786 Declaration
IPR2024-00637 EX2008	Markison ‘291 Declaration
IPR2024-00638 EX2008	Markison ‘760 Declaration
IPR2024-00639 EX2008	Markison ‘768 Declaration
IPR2024-00640 EX2009	Markison ‘456 Declaration
EX1023	Markison Deposition Transcript
EX1032	Cross Section Definition
EX1033	Perspective Definition
EX1034	Langer Statistics

EX2015	Height Definition
N/A	The Institution Decisions for IPR2024-00636-640

II. “CONVENTIONAL” SHOES

3. Mr. Markison suggests that I based my opinion regarding the design traits of “conventional” shoes merely on the outward appearance of shoes I included pictures of in my initial declaration. EX2008, ¶¶150-151. That is incorrect. Rather, I am aware of “conventional” shoe design traits (including having a heel platform that is substantially uniform in height around its perimeter and a sole that is thicker at a position proximal to the front edge of the heel platform than at the toe portion) based on my extensive experience and over 25 years in the industry. I simply included images of some shoes that I described as having these traits in my initial declaration. EX1002, ¶¶61-69.

4. While I do not believe any additional evidence is needed, further evidence is provided below showing that the shoes I designed for Vans that were sold in the United States between 2002 and 2005 have a heel platform that is substantially uniform in height around its perimeter and a sole that is thicker at a position proximal to the front edge of the heel platform than at the toe portion, at least based on Patent Owner’s apparent interpretation of these limitations.







5. A substantially uniform height heel platform is also shown in the images of the Nike 1977 Boston running shoe and the Nike 1971 Cortez included in my initial declaration. A POSITA would know that both the outsole and the midsole of these shoes are shown in the images, which depict a heel platform that is

substantially uniform in height around its perimeter, given that a conventional insole is flat, and a sole that is thicker at a position proximal to the front edge of the heel platform than at the toe portion.

6. Further evidence of the Nike Cortez's heel design is provided below, which further demonstrates that it has a heel platform that is substantially uniform in height around its perimeter and a sole that is thicker at a position proximal to the front edge of the heel platform than at the toe portion.





7. U.S. Design Patent No. D275146 includes images of the sole of the Nike Air Force One shoe. Further evidence is provided below showing that Nike's Air Force One has a heel platform that is substantially uniform in height around its perimeter and a sole that is thicker at a position proximal to the front edge of the heel platform than at the toe portion.





8. Further evidence is provided below showing that the 1970 FootJoy Style 51409 has a heel platform that is substantially uniform in height around its perimeter and a sole that is thicker at a position proximal to the front edge of the heel platform than at the toe portion.



9. The images in U.S. Design Patent No. D310294 are described as a “golf shoe bottom,” which a POSITA would understand includes both the midsole and the outsole of the shoe. The images show a heel platform that is substantially uniform

in height around its perimeter, given that a conventional insole is flat, and a sole that is thicker at a position proximal to the front edge of the heel platform than at the toe portion

10. Images of the Athalonz EnVe shoe that I understand Mr. Markison has stated includes a consistent height heel platform throughout are below:





III. OPINIONS ON UNPATENTABILITY

A. Ground 1: Claims 1-5, 8 are Obvious Based on Umezawa

11. Mr. Markison suggests that Umezawa fails to disclose a forefoot platform having a gradient compression factor or a greater level of compression proximal to the inner edge than the outer edge. EX2008, ¶¶180-198. I disagree.

12. In annotated Figure 2 prepared by Mr. Markison (EX2008, p. 82), the bones of the big toe and small toe fall partially, or predominantly, on low elastic part 20 at each of the cross sections shown in Figures 3-5.

13. Mr. Markison's annotated Figure 3 (EX2008, ¶186) is incorrect as the big toe would actually fall squarely upon low elastic part 20, as shown in superimposed annotated images from the POR below:

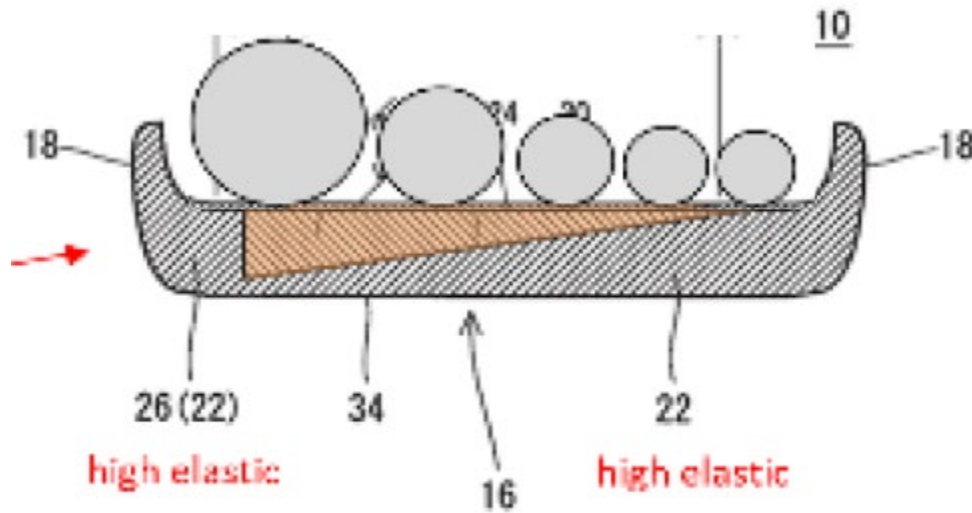


Fig. 3

14. These teachings suggest to a POSITA that Mr. Markison’s conclusion is incorrect. Furthermore, Umezawa expressly describes that Umezawa’s sole compresses more on the inside than the outside when the shoe is worn, and that the wearer’s foot inclines upward from the inside to the outside of the shoe based on this variance, further confirming the placement of the wearer’s foot on low elastic part 20. EX1005, ¶¶38, 43, claim 1.

15. A POSITA would understand that 3mm is “near” or “proximal to” the area of the shoe where the edge of the foot sits when compared to the overall width of the shoe W being 100 mm, as described in Par. 78 and shown in Figure 4.

B. Ground 2: Claims 1-5, 8 are Obvious Based on Umezawa in View of Gallas

16. Gallas teaches that the “rear portion 110” of sole 106 has “an elevation,” (EX1020, ¶¶21, 28, 30) which a POSITA would understand means a

singular elevation throughout, and Gallas provides examples for the elevation of the rear portion 110. Gallas also teaches that the rear portion “may” taper (EX1020, ¶21) which a POSITA would understand teaches that the heel platform may not taper, but rather is flat from front to back.

17. A POSITA would understand that the heel platform in Gallas Figures 2-3 and 5 disclose a heel platform having a first height that is “substantially uniform” around its perimeter since the heel platform has only a small degree of height change from the front to the back of the heel. A POSITA would also understand Gallas’ teaching that the “angle of the shoe slant[s] down from the back to the front” refers to the height change between the heel and the toe section, not that the heel platform itself must be slanted.

C. Ground 3: Claims 1-5, 8 are Obvious Based on Norton

18. A POSITA would understand that Norton teaches that the heel portion of the shoe may be different than the forefoot. EX1007, 5:63-67.

19. Norton also suggests that the sole element is typically used as part of a sole ensemble, including an outsole, midsole and insole. EX1007, 5:56-60.

20. A POSITA would understand that the sole element of Norton wherein the heel portion is made of the same material as the forefoot but lacks the compression gradient would meet the Board’s proposal suggesting that the first and second materials be “different in some manner.” Paper 8, 13.

21. Giese, incorporated by reference, explains what a typical midsole and outsole (“shoe bottom”) would look like, consisting “primarily of flat surfaces on both their top and bottom” and more recently including a “slight arch” on the top surface for contouring to the arch in the user’s foot. EX1010, 1:10-27. Giese also discloses multiple embodiments depicting a heel platform that is flat from front to back, and with less curvature and change in height from inside to outside than the accused products.

22. Considering the teachings of both Norton and Giese, a POSITA would envision implementing Norton’s sole element in a shoe with a conventionally uniform heel design, like that disclosed in Giese.

23. I understand that Athalonz argues that Norton “teaches away” from a combination with Giese. I do not agree that Norton in any way “teaches away” from using a conventional heel design, rather it generally suggests adding a particular “sole element” into “sports shoes.” EX1007, Abstract; 3:1-4 (“sole unit for shoes, in particular for sports shoes”); 4:19-21 (“adapted to different sports”). To a POSITA, one would envision using Norton’s sole element with various sports shoes, including those having conventional design traits. The only negative comment that Norton provides about Giese’s shoe design is its reliance on “two different materials of different densities” to achieve the desired density variation, nothing relating to its heel design. EX1007, 2:54-67.

24. Athalonz cannot show that Norton teaches away from incorporating a uniform heel or a forefoot platform with an outer edge that is thicker near the heel than the toe simply because it is improving the art in other ways. This feature is also not inconsistent with Norton's teaching that the sole element (typically a midsole in a sole ensemble) has a consistent thickness, as the other sole elements, e.g. the outsole, can have varying thicknesses, and it is the overall combination of these thicknesses which would dictate the entire sole ensemble's thickness at any point.

25. A POSITA would also understand that Norton taught advantages of including a compression gradient in the forefoot, regardless of material(s), and Talarico '911 discloses a dual-material forefoot having that beneficial design. Norton describes use of "a single material being supplies as a preform" instead of "us[ing] two different materials with different densities to create the density variation over the sole element" as just "one embodiment" of its invention. EX1007, 3:9-15. My understanding of reference to this feature as "one embodiment" means that it is not limiting on the disclosure, and that even stating a preference for a "one material" design does not amount to teaching away. Thus, a POSITA would know to incorporate a dual-material forefoot like that in Talarico '911 having a compression gradient, as described in Claim 5.

D. Ground 4: Claims 1-5, 8 are Obvious Based on Won in View of Norton

26. Mr. Markison's suggestion that the "surface" described in Won has "negligible thickness" (EX2008, ¶250) is unsupported. Nowhere in Won does it suggest that. Rather, Won teaches that the dual-compression forefoot platform can include a longitudinal axis dividing the two elastic materials in either the sole or the midsole. EX1005, 3:14-15.

27. A POSITA would understand that the midsole embodiment would have different compression materials be included in between the insole and the outsole, thus providing for the compression differential and tilting of the shoes and bending inward of the player's legs described in the spec and claims.

28. Regardless of whether Won's entire sole, the midsole or the outsole have the differing materials, Won also teaches that the inside portion of the forefoot region would compress when worn by a golfer.

29. When Won states that the spikes on the inside part of the shoe are "pressed down," a POSITA would understand that to mean the spikes are pressed into the compressible sole material, whereas the spikes on the outside part of the forefoot "remain in the same position." EX1005, 4:46-58.

30. Compression of the inside portion of the forefoot is the entire purpose and goal of this embodiment in Won. Won explains that, in use, the sole "tilt(s) ...

toward the insides of the shoes” which “facilitates bending inward the player's legs to attain stability at address and swing” as described in claim 1.

31. Won also teaches that the purposes of the shoe include improved weight distribution, stability, and balance (EX1005 1:5-8, 2:36-41, 2:60-63, claim 1) which would only be achieved by the forefoot platform, and not just its surface, having the compressive differential.

32. Won teaches that the sole of the shoe is tilted inward toward the “softer and more elastic material” on the inside of the forefoot which a POSITA would understand is caused by the softer material compressing more than the harder material on the outside of the forefoot.

33. All of these teachings contradict Mr. Markison’s conclusion that the surface has “negligible thickness.”

34. Mr. Markison also admits that his understanding of Won makes no sense, (EX2008, ¶¶140-145) as spikes placed on a softer surface would not be pressed further into the ground when compared to spikes placed on a harder surface when the shoes are worn.

35. Mr. Markison suggests that the combined teachings of Won and Norton would not result in a forefoot platform constructed of a second material different from the first material in the heel. EX2008, ¶¶249-259. I disagree.

36. As I previously explained, Won's multi-material sole or midsole could easily be replaced with a single material sole element disclosed in Norton, and a POSITA would know that only the forefoot portion of the sole or midsole could be altered or replaced.

37. Both Norton and Won teach that the material in the heel portions of the shoes may be different than the forefoot. EX1002, Fig. 5, 6:28-36, 4:46-58; EX1007, 5:63-67. In Won Fig. 5, the heel is depicted as having the same hard surface as the outside portion of the forefoot.

38. It would have been obvious to a POSITA to replace the forefoot platform of Won, or some element thereof (including either the outsole or midsole), with the varying compression sole element of Norton. Indeed, this is precisely the type of combination that Norton suggests. E.g., EX1007 Abstract (describing a "sole element for shoes, in particular sports shoes"); 5:56-67 (describing the embodiments of the invention as a "sole element" that is typically "part of a sole ensemble;" it may be a midsole and may or may not be over the entire longitudinal direction of the sole). In this combination, a POSITA would recognize that the heel would include the "hard surfaced elastic material" of Won, and the forefoot would include the varied compression sole element of Norton made of EVA or PU. EX1007, 6:56-60.

39. A POSITA would know how to incorporate the variably-compressible insole, midsole or outsole disclosed in Norton with the sole or midsole taught in

Won, and expect success in doing so, based on the teachings of those references and the knowledge of a POSITA. Indeed, many shoe designs used a harder material in the heel platform than the forefoot. The design of athletic shoe soles is highly predictable and typically includes three common components: an outsole, a midsole and an insole. Combining different designs of any one of these components (including changes in size, shape or material), with the other components, and ensuring that all of the components of the sole work well together, is commonplace during the shoe design process. A POSITA is easily capable of making any necessary modifications to the shoe or any of its individual sole components to implement this Ground.

40. Alternatively, A POSITA would recognize that the entire midsole or sole of Won could be replaced with the sole element of Norton. In this combination wherein the heel portion of the sole element is made of the same material as the forefoot but lacks the compression gradient, it would meet the Board's proposal suggesting that the first and second materials be "different in some manner." Paper 8, 13.

E. Ground 5: Claims 1-5, 8 are Obvious Based on Won in View of Talarico '911

41. Talarico '911 discloses different heel and forefoot materials, as the heel and part of the forefoot are the same material, and the forefoot includes a

combination with second, denser material. EX1008, Figs. 9, 11, 13, 15; 11:64-68; 12:41-47; 11:42-55; 12:41-47.

42. Mr. Markison suggests that the combined teachings of Won and Talarico '911 would not result in a forefoot platform constructed of a second material different from the first material in the heel. EX2008, ¶¶ 269-270. I disagree.

43. A POSITA would understand that only the forefoot portion of the sole or midsole of Won could be altered or replaced with dual-material sole element disclosed in Talarico '911.

44. Talarico '911 expressly teaches that the inventive features may be incorporated into "the midsole, outersole, or innersole construction of the footwear" (EX1008, 1:14-16), and both Won and Talarico '911 teach that the heel portions of the shoes may be different than the forefoot. EX1005, Fig. 5, 6:28-36, 4:46-58; EX1008, Figs 8-15; 11:42-55; 11:64-68; 15:15-22. 20:1-13.

45. It would have been obvious to a POSITA to replace the forefoot platform of Won, or some portion thereof, including either the outsole or the midsole, with the midsole or outersole having variable compression taught in Talarico '911. In this combination, a POSITA would recognize that the heel would include the "hard surfaced elastic material" of Won, and the forefoot would include the sole element of Talarico '911 made of differing compression EVA. EX1008, 12:1-9.

46. Alternatively, A POSITA would recognize that the entire midsole of Won could be replaced with Talarico '911's midsole made of differing compression EVA in the forefoot, and a single material in heel.

47. A POSITA would know how to incorporate the variably-compressible insole, midsole or outsole disclosed in Talarico '911 with the sole or midsole taught in Won, and expect success in doing so, based on the teachings of those references and the knowledge of a POSITA. The design of athletic shoe soles is highly predictable and typically includes three common components: an outsole, a midsole and an insole. Combining different designs of any one of these components (including changes in size, shape or material), with the other components, and ensuring that all of the components of the sole work well together, is commonplace during the shoe design process. A POSITA is easily capable of making any necessary modifications to the shoe or any of its individual sole components to implement this Ground.

IV. SECONDARY CONSIDERATIONS

48. I have considered the alleged secondary considerations of nonobviousness raised by Mr. Markison. They do not alter my opinion regarding the invalidity of the challenged claims.

49. Athalonz fails to show a persistent need recognized by a POSITA, why the cited prior art in the grounds above did not meet such a need, nor evidence of how the alleged invention met that need.

50. There are also no products in the industry that I am aware of, including Athalonz's own products, that practice the claims of the '456 patent.

51. Athalonz provided no evidence supporting its allegation that Under Armour copied its products or patents, nor provided any technical analysis of Under Armour's products.

V. CONCLUSION

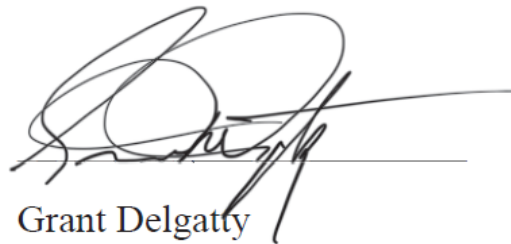
52. For the reasons set forth above, it is my opinion that claims 1-5 and 8 of the '768 patent are rendered obvious by the prior art.

53. In signing this declaration, I understand that the declaration will be filed as evidence in a contested case before the Patent Trial and Appeal Board of the United States Patent and Trademark Office. I acknowledge that I may be subject to cross-examination in this case.

I declare that all statements made herein of my knowledge are true, that all statements made on information and belief are believed to be true, and that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

DATED: April 9, 2025

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Grant Delgatty', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Grant Delgatty