UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNDER ARMOUR, INC.,
Petitioner,

v.

ATHALONZ, LLC,
Patent Owner.

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

PATENT OWNER'S MOTION TO EXCLUDE

TABLE OF CONTENTS

I. Patent Owner Timely Objected To The Exhibits It Seeks To Exclude.....1

II. The Board Should Exclude the Objected-To Exhibits 2

A. The Board Should Exclude EX 1024 Because It Is Irrelevant.....2

B. The Board Should Exclude Exhibit 1026 Both Because Petitioner Has Failed to Establish Its Authenticity and Because It Is In Fact Not Authentic.....3

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 1024 and 1026.

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

On April 16, 2025, Patent Owner timely served objections to Exhibits 1024 and 1026 (Paper 17), which Patent Owner first filed in conjunction with the filing of its Reply (Paper 15) on April 9, 2025. Patent Owner objected to Exhibit 1024 on the ground that it is "it is not relevant to any issue in the present proceeding and/or unduly prejudicial," citing FRE 401-403. Paper 17, 3. Patent owner also objected to Exhibit 1024 on hearsay grounds, to the extent Petitioner relied on it for the truth of the matter asserted, under FRE 801-803. *Id.*

With respect to Exhibit 1026, Patent Owner also objected on both relevance and hearsay grounds, citing FRE 401-403 and FRE 801-803. *Id.*, 4. Patent Owner further objected to Exhibit 1026 "as lacking foundation and lacking authentication under FRE 602 and FRE 901-903." *Id.* Patent Owner had previously preserved objections to the document that Petitioner subsequently filed as EX1026 that was introduced during the March 18, 2025 deposition of its expert Timothy Markison. EX1023, 213:19-214:7.

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 EX 1024 Because It Is Irrelevant

Exhibit 1024 is an apparent copy of U.S. Pat. No. 11,206,878 ("the '878 patent"), which is titled "Body Impact Protection System" and lists Timothy W. Markison as an inventor. Petitioner cites Exhibit 1024 only once, in a footnote, as purported support for its claim construction position under which the claimed "first material" and "second material" can be the same. Paper 15, 2 n.4.

The '878 patent has no relevance to the parties' claim construction dispute. While, to be sure, it shares a common inventor with the challenged patent, the '878 patent is not related to the patent at issue in this proceeding and is directed to a wholly different technology relating to body impact protection systems. The patent also has a priority date five years later than the relevant date of the patent at issue in this proceeding. Further, contrary to Petitioner's assertion that the Exhibit 1024 is an "***Athalonz***/Markison patent," Paper 15, 2 (emphasis added), the '878 patent is not assigned to Athalonz. The content of the '878 patent has no bearing whatsoever on how a POSITA would understand the claim terms in dispute. Accordingly, Exhibit 1024 should be excluded under FRE 401-403.

B. The Board Should Exclude Exhibit 1026 Both Because Petitioner Has Failed to Establish Its Authenticity and Because It Is In Fact Not Authentic

"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). This evidence typically comes in the form of the "testimony of a witness with knowledge," but the FRE provide for other authentication methods—none of which apply to Exhibit 1026. Fed. R. Evid. 901(b)(1)-(10).

Here, Petitioner never even says what Exhibit 1026 is, much less provides the required evidence of its authenticity. In the table of exhibits provided in its Reply, Petitioner merely refers to Exhibit 1026 as "Markison Ex. 10 - UA000000077 (redacted)"—no further explanatory information is provided. The body of Petitioner's reply brief is no better. Petitioner cites the exhibit once, in the midst of string cite intended to support Petitioner's claim that Patent Owner's infringement contentions support Petitioner's claim construction position—***but never once says what Exhibit 1026 actually is***. Paper 15, 3-4. For his part, Petitioner's expert Mr. Delgatty never cites Exhibit 1026, much less explains what it is. And when the document was introduced during Mr. Markison's deposition, Petitioner's counsel stated that "I don't think you've ever seen it before," and Mr. Markison's subsequent testimony showed that he in fact had no familiarity with the document. EX1023,

213:22-217:18. The context of Petitioner's use of the exhibit in its Reply and during the Markison deposition suggests that it is an Under Armour blueprint for a shoe that was produced and used in the parallel district court litigation, but the document is tellingly missing any Bates number from the district court litigation (even though a Bates number appears in the exhibit list title).

In short, there is no witness testimony of any kind authenticating the exhibit, nor is there any other corroborating evidence or indicator of authenticity that could be sufficient under FRE 901—and the missing Bates number is an affirmative indication of inauthenticity. Further, Exhibit 1026 plainly does not meet any of the criteria for self-authentication enumerated in FRE 902. Accordingly, Exhibit 1026 should be excluded because Petitioner has failed to provide any basis for deeming it authentic under FRE 901. *See Shimano Inc. v. Globeride, Inc.,* IPR2015-00273, 2016 WL 4395373 (P.T.A.B. June 16, 2016) (excluding "articles apparently downloaded from the internet" because proponent of the evidence "provided no evidence to establish that any of [the exhibits] were authentic"); *Standard Innovation Corp. v. Lelo*, IPR2014-00148, 2015 WL 1906730, at *6 (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).

Further, and even more significantly, Exhibit 1026 should be excluded because it is in fact ***not an authentic copy of the document produced as UA000000077*** in the parallel litigation. As noted above, Petitioner's exhibit list indicates the document is "redacted" (Paper 15 at vi), but Petitioner notably never says what has been redacted. Further, its decision to redact in white rather than black (such that the locations of the redactions are not visible) creates a misleading impression as to the scope of the redactions. While the Protective Order in the parallel litigation limits what Patent Owner's counsel can disclose about the contents of the unredacted document, the redacted material includes at least the following: (1) the Bates number assigned to the document; (2) the "CONFIDENTIAL" legend that appears on the document; and most importantly (3) significant, material technical details about the shoe at issue, including the identity of the specific shoe to which the blueprint relates, shoe dimensions and other images, and other critical information that may contradict the position Petitioner cited the document to support (*i.e.*, that Patent Owner's infringement contentions purportedly accuse a shoe that has identical materials in the forefoot and heel).

Petitioner thus has not only failed to satisfy the threshold requirements for establishing authenticity, it has attempted to pass off a document as authentic when

it in fact has been materially altered. Exhibit 1026 should be excluded for this independent reason.

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:

Frank C. Cimino (Reg. No. 39,945)
FCCimino@Venable.com
VENABLE LLP
600 Massachusetts Ave., NW
Washington, DC 20001
T 202-344-4569 / F 202-344-8300

Megan S. Woodworth (Reg. No. 53,655)
MSWoodworth@Venable.com
VENABLE LLP
600 Massachusetts Ave., NW
Washington, DC 20001
T 202-344-4507 / F 202-344-8300

Justin J. Oliver (Reg. No. 44,986)
JJOliver@Venable.com
VENABLE LLP
600 Massachusetts Ave., NW
Washington, DC 20001
T 202-721-5423 / F 202-344-8300

Robert E. Bugg (Reg. No. 65,949)
REBugg@Venable.com
VENABLE LLP
151 West 42nd Street 49th Floor
New York, NY 10036
T 212-370-6241 / F 212-307-5598

/Connor Houghton/
Connor Houghton