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

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

EXHIBIT LIST

Exhibit No.	Description
1001	U.S. Patent No 11,375,768 ("the '768 patent")
1002	Declaration of Grant Delgatty
1003	Curriculum Vitae of Grant Delgatty
1004	RESERVED
1005	U.S. Patent No. 6,158,151 ("Won")
1006	U.S. Patent Publication No. 2007/0107258 ("Umezawa")
1007	U.S. Patent No. 7,464,428 ("Norton")
1008	U.S. Patent No. 4,642,911 ("Talarico '911")
1009	U.S. Patent No. 4,615,126 ("Mathews")
1010	U.S. Patent No. 5,025,573 ("Giese")
1011	Prosecution History Excerpts of U.S. Patent Application No. 16/555,171
1012	Excerpts from Athalonz's Infringement Contentions, served in *Athalonz, LLC v. Under Armour*, Case No. 2:23-cv-00193 (E.D. Tex.).
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	Merriam-Webster's Collegiate Dictionary Definition of "Gradient"
1020	RESERVED
1021	CAD Image of Heel Platform of UA HOVR Drive
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	U.S. Patent No. 11,206,878
1025	Athalonz's Second Supplemental Infringement Contentions, served in *Athalonz, LLC v. Under Armour*, Case No. 2:23-cv-00193 (E.D. Tex.)
1026	Markison Ex. 10 - UA000000077 (redacted)
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	RESERVED
1032	RESERVED
1033	RESERVED
1034	RESERVED
1035	Markison Ex. 3 - US2847769
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 32) ("Motion"). Exhibits 1024 and 1026 are both 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. Exhibit 1024 is Admissible

Exhibit 1024 is another patent sharing the same inventor and prosecuting attorney as the challenged patents. The only challenge Patent Owner raises to exhibit 1024 is relevance. "[E]vidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Merck Sharp & Dohme Corp. v. Pfizer Corp.*, IPR2017-02131, Paper 59, 79 (P.T.A.B. Mar. 13, 2019) (citing Fed. R. Evid. § 401). Exhibit 1024 easily meets this "low threshold for relevancy." *Id.*, citing *OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1407 (Fed. Cir. 1997).

In pressing for a particular claim construction on "first material" and "second material," Patent Owner argues that it is "common patent-law convention" for inventors and/or patent attorneys to use the terms "first" and "second" to describe things that "are in some way different." POPR, 20; *see also* POR, 16 ("the terms 'first' and 'second' are ***conventionally used*** in patent claims to distinguish between different elements.") (emphasis added). That Mr. Markison, the named inventor and prosecuting attorney of the challenged patents, has another patent on which he is also the named inventor and the prosecuting attorney that directly contradicts this supposed "common convention" is relevant.

Where, as here, an exhibit is challenged based on relevancy grounds, Board panels consistently hold that the argument goes to weight—not admissibility—since "the Board, rather than a lay jury, is the fact finder." *Echelon Fitness Multimedia, LLC v. Peloton Interactive, Inc.*, IPR2020-01541, Paper 56, 86 (P.T.A.B. March 2, 2022); (citing *Machinex Indus., Inc. v. JJG IP Holdings, LLC*, IPR2020-00899, Paper 45, 103–04 (P.T.A.B. Oct. 4, 2021); *see also Intri-Plex Techs., Inc. v. Saint-Gobain Performance Plastics Rencol Ltd.*, IPR2014-00309, Paper 83, 17 (P.T.A.B. Mar. 23, 2015) (denying exclusion under FRE 403, noting there is "little danger of unfair prejudice" or confusion when the Board is the fact-finder); *Pelican Biothermal, LLC v. VA-Q-TEC AG*, PGR2021-00085, Paper 35, 30–31 (P.T.A.B. June 16, 2023) ("the Board, sitting as a non-jury tribunal with administrative expertise, is well-positioned to determine and assign appropriate weight to evidence presented," such that the Board can simply assign little or no weight to evidence, "[r]ather than excluding" it) (citing *Corning Inc. v. DSM IP Assets B.V.*, IPR2013-00053, Paper 66, 19 (P.T.A.B. May 1, 2014)) ("public policy" and pragmatic reasons guide the Board to the "better course" admitting instead of excluding such evidence).

B. Exhibit 1026 is Admissible

Exhibit 1026 is a redacted version of an Under Armour business document showing the materials and construction of the UA Charged Curry shoe produced to Patent Owner in the parallel litigation as UA000000077. Exhibit 1026 should not

be excluded based on Patent Owner's challenge to its authenticity. 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."). Separately, Under FRE 902(7), an inscription, signs, tag, or label affixed in the course of business to indicate origin, ownership, or control can establish an item's authenticity.

Here, Petitioner's Reply explains that Exhibit 1026 is the redacted version of UA000000077 produced in the underlying litigation, and Patent Owner's counsel, who is in possession of the unredacted version of UA000000077, does not provide any evidence that the document is anything other than what Petitioner suggests that

it is.[1] Furthermore, Exhibit 1026 includes Under Armour's logo, copyright symbol and date of creation affixed in the course of business, has the general appearance of being a design schematic of a shoe, and was introduced and discussed during the deposition of Patent Owner's expert, Mr. Markison, as described in Petitioner's Reply. POR, 3-4, citing EX1023, 215:6-217:12. UA000000077 is also cited by name in Patent Owner's infringement contentions (EX1025) sixty-three times below images of Under Armour's Charged Curry shoes having the identical design as that depicted in Exhibit 1026, including the same identifiable midsole and outsole design and ornamentation, the same identifiable single-material sole construction, and the same identifiable tread pattern and ornamentation on the bottom of the shoe. Compare EX1026 with EX1025 at 14, 29, 37, 44, 119, 137, 165, 181, 228, 236.

Based on its appearance, substance and characteristics, taken together with all the circumstances, Exhibit 1026 is admissible under FRE 901(a), FRE 901(b)(4) and FRE 902(7). *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) based on a "header indicating the society's name and the annual meeting number" on the document); *Advanced Micro Devices, Inc. v. Aquila*

[1] Patent Owner's suggestion that the redactions removed information that "may contradict" Petitioner's position (Motion, 5) is unsupported. Patent Owner's counsel has the unredacted version and offers no evidence that the unredacted document shows anything different regarding the materials used in the sole of the shoe—the only reason Petitioner cites to Exhibit 1026.

Innovations, Inc., IPR2019-01526, Paper 37, 100 (P.T.A.B. March 10, 2021) (authenticating exhibit based on reference to "Microsoft Corporation" and a copyright date "indicating origin and ownership" as well as having the "appearance and distinctive characteristics" of a white paper.)*; Paragon 28, Inc. v. Wright Medical Technology, Inc*., IPR2019-00894, Paper 41, 10 (P.T.A.B. September 23, 2020) (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."); *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"); *Biomarin Pharm. Inc. v. Genzyme Therapeutic Prods. Ltd*., IPR2013-00537, Paper 79, 24 (P.T.A.B. Feb. 23, 2015) (authenticating exhibit under 902(7) based on trade inscription); *Microsoft Corporation v. Saint Regis Mohawk Tribe et al*, IPR2018-01604, Paper 76, 12 (P.T.A.B. April 30, 2020)

(authenticating exhibit under 902(7) based on trade inscription and copyright symbol).[2]

DATED: June 4, 2025

Respectfully submitted,

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[2] Patent Owner's reliance on *Shimano* and *Standard Innovation* (Motion, 4) is inapposite and both decisions are easily distinguishable. In *Shimano*, "no evidence" of authenticity was provided or included in the exhibit, and in *Standard Innovation*, printouts from the Wayback Machine were excluded because they lacked the supporting evidence required by the Federal Circuit for that specific type of exhibit. *See U.S. v. Bansal*, 663 F.3d 634, 667-68 (Fed. Cir. 2011). The exhibits in both cases also lacked the authenticating appearance, substance, characteristics and surrounding circumstances of Exhibit 1026 that support its admissibility.

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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