

1 UNITED STATES PATENT AND TRADEMARK OFFICE

2

3 BEFORE THE PATENT TRIAL AND APPEAL BOARD

4

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Under Armour, Inc.,

6

Petitioner

7

v.

8

Adidas AG,

9

Patent Owner

10

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Case No. IPR2015-00698

12

Patent No. 8,092,345

13

14

- - -

15

16 DEPOSITION OF WILLIAM R. MICHALSON, Ph.D.

17

FEBRUARY 5, 2016

9:45 A.M.

18

19

KILPATRICK TOWNSEND & STOCKTON LLP

20

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SUZANNE BEASLEY, RPR

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CCR-B-1184

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<p>1 INDEX TO EXAMINATION</p> <p>2</p> <p>3 Examination Page No.</p> <p>4</p> <p>5 By Mr. Ansley ..... 4</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p>	<p>1 (The signature of the witness to the</p> <p>2 deposition was reserved.)</p> <p>3 WILLIAM R. MICHALSON, Ph.D.,</p> <p>4 having been duly sworn, was examined and testified</p> <p>5 as follows:</p> <p>6 EXAMINATION</p> <p>7 BY MR. ANSLEY:</p> <p>8 Q. Hello again, Dr. Michalson.</p> <p>9 A. Hello.</p>
<p>10 INDEX TO EXHIBITS</p> <p>11</p> <p>12</p> <p>13 Exhibit No. Page No.</p> <p>14</p> <p>15 Exhibit 2002 ..... 4</p> <p>16 Declaration of William R.</p> <p>17 Michalson, Ph.D.</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>10 Q. We just concluded the deposition for IPR</p> <p>11 proceeding that ends in 697. Now we're moving on to</p> <p>12 the IPR proceeding that ends in 698 for U.S. Patent</p> <p>13 No. 8,092,345.</p> <p>14 Again, same rules as last time. You</p> <p>15 understand?</p> <p>16 A. Yes.</p> <p>17 (Exhibit 2002 was marked for</p> <p>18 identification.)</p> <p>19 BY MR. ANSLEY:</p> <p>20 Q. So I've already handed you Exhibit 2002.</p> <p>21 Are you familiar with this document?</p> <p>22 A. Yes.</p> <p>23 Q. Let's turn to page 35. And in Section B</p> <p>24 you provide analysis of secondary considerations; is</p> <p>25 that correct?</p>
Page 3	Page 5
<p>1 APPEARANCES OF COUNSEL:</p> <p>2 On behalf of the Petitioner:</p> <p>3 W. SUTTON ANSLEY, Esq.</p> <p>4 Weil, Gotshal &amp; Manges LLP</p> <p>5 1300 Eye Street, N.W.</p> <p>6 Suite 900</p> <p>7 Washington, D.C. 20005-3314</p> <p>8 (202) 682-7018</p> <p>9 sutton.ansley@weil.com</p> <p>10</p> <p>11 On behalf of the Patent Owner and the Witness:</p> <p>12 JONATHAN D. OLINGER, Esq.</p> <p>13 Kilpatrick Townsend &amp; Stockton LLP</p> <p>14 1100 Peachtree Street, N.E.</p> <p>15 Suite 2800</p> <p>16 Atlanta, Georgia 30309</p> <p>17 (404) 815-6500</p> <p>18 jolinger@kilpatricktownsend.com</p> <p>19</p> <p>20 - - -</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 A. That's correct.</p> <p>2 Q. And let's turn to paragraph 74. And in 74</p> <p>3 you mention the MapMyFitness mobile applications and</p> <p>4 state, "It is my conclusion that the commercial</p> <p>5 success of these mobile applications supports a</p> <p>6 finding that the instituted claims are not obvious."</p> <p>7 Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. And in particular if you go to</p> <p>10 paragraph 75, you state that MapMyFitness is evidence</p> <p>11 of commercial success; is that correct?</p> <p>12 A. I don't see the particular turn of phrase</p> <p>13 you used.</p> <p>14 Q. Sorry. I was just asking you to confirm</p> <p>15 that you lay out your evidence for what -- for your</p> <p>16 opinion that the MapMyFitness mobile applications are</p> <p>17 evidence of commercial success. Is that correct?</p> <p>18 A. On paragraph 75 I elaborate on that</p> <p>19 opinion, yes.</p> <p>20 Q. Okay. And then in paragraph 77 you state</p> <p>21 that -- sorry, I've got the wrong paragraph here.</p> <p>22 Give me one second.</p> <p>23 All right, 76. You state in your opinion,</p> <p>24 the commercial success of the MapMyFitness suite of</p> <p>25 products is plainly demonstrated by the number of</p>

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<p>1 MapMyFitness users and Under Armour's purchase of 2 MapMyFitness. Do you see that? 3 A. I do. 4 Q. So hypothetically would the profitability 5 of MapMyFitness as a company be a relevant factor in 6 your opinion to determining whether its products were 7 commercially successful or not? 8 MR. OLINGER: Objection. Form. 9 Outside the scope. 10 THE WITNESS: Can you state that 11 question again? 12 BY MR. ANSLEY: 13 Q. Sure. So you mention two factors here. 14 In paragraph 76 you state that commercial success is 15 demonstrated, A, by the number of MMF users, and, B, 16 Under Armour's purchase of MapMyFitness. 17 And my question is hypothetically would 18 the profitability of MapMyFitness as a company be a 19 relevant factor in your opinion to determining 20 whether its products were a commercial success? 21 MR. OLINGER: Objection. Form. 22 Outside the scope. 23 THE WITNESS: In paragraph 76 I'm not 24 referring to the profitability of 25 MapMyFitness. I'm referring to the number</p>	<p>1 hypothetically, the profitability of a 2 company may be due to a number of factors. 3 I would have to analyze what that -- I 4 would have to look and see what that 5 profitability was due to. That's not what 6 I'm talking about here in paragraph 76. 7 BY MR. ANSLEY: 8 Q. I understand you're not talking about that 9 here. Well, so you mentioned two things. Again, 10 it's the number of MMF users and Under Armour's 11 purchase of MMF would be the two factors that you 12 considered. 13 Would there be any other factors that you 14 would want information -- I'm sorry. 15 Would there be any other information that 16 you would want to see to assess whether or not the 17 MapMyFitness suite of products are commercially 18 successful? 19 MR. OLINGER: Objection. Form. 20 Outside the scope. 21 THE WITNESS: I wasn't asked to 22 consider any other factors and I didn't 23 consider any other factors. You know, if 24 there were more factors that were brought 25 to my attention or that I obtained, I would</p>
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<p>1 of users they accumulated and the fact that 2 Under Armour purchased the company. 3 BY MR. ANSLEY: 4 Q. I understand that, but I'm asking a 5 hypothetical. Would the profitability of 6 MapMyFitness be a relevant factor in your 7 consideration if you have that information available 8 to you? 9 MR. OLINGER: Objection. Form. 10 Outside the scope. 11 THE WITNESS: Well, hypothetically if 12 I had the information available to me, I 13 would review that information and determine 14 if it appeared as if it made -- if it was 15 also an indicator of commercial success. 16 Without that information I can't really do 17 that analysis. I would have to do that 18 analysis. 19 BY MR. ANSLEY: 20 Q. So without that information, you can't say 21 one way or another whether or not the company's 22 profitability would be a relevant factor? 23 MR. OLINGER: Objection. Form. 24 Outside the scope. 25 THE WITNESS: Again speaking</p>	<p>1 consider them, but I did not do that 2 analysis. 3 BY MR. ANSLEY: 4 Q. Do you consider yourself an expert in 5 evaluating whether a product is a commercial success? 6 MR. OLINGER: Objection. Form. 7 THE WITNESS: I have in the past been 8 asked to provide opinions about technology 9 and likelihood of success of technologies 10 offered by different companies, both, you 11 know, by entrepreneurial groups and also in 12 some of my own endeavors trying to do 13 technical evaluations of companies and my 14 assessment of likelihood of their 15 longevity. So I certainly have some 16 experience in that area. 17 BY MR. ANSLEY: 18 Q. Well, I didn't ask you if you had 19 experience in the area. I asked you if you consider 20 yourself an expert in evaluating whether a product is 21 a commercial success or not. 22 MR. OLINGER: Objection. Form. 23 THE WITNESS: I think that I have 24 enough knowledge about the field to be able 25 to look at some of the typical indicators</p>

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1 of success and determine if that, you know,  
2 at least represents to me something that is  
3 commercially successful.  
4 BY MR. ANSLEY:  
5 Q. So you said you think given enough  
6 knowledge about the field. Is it your testimony then  
7 under oath that you think you're an expert in  
8 evaluating whether a product is a commercial success?  
9 MR. OLINGER: Objection.  
10 THE WITNESS: I stand by what I say  
11 in paragraph 76. I'm offering an opinion  
12 that based on the number of MMF users and  
13 the purchase of MMF, that it appears that  
14 those products were at least successful  
15 enough to get bought up. And presumably  
16 Under Armour would not have purchased MMF  
17 if they didn't think they were going to  
18 make money with that suite of products.  
19 BY MR. ANSLEY:  
20 Q. I want to get to that in a second, that  
21 last thing you said, but so you're not saying one way  
22 or the other whether you're an expert or not in  
23 evaluating the commercial success of products?  
24 MR. OLINGER: Objection. Form.  
25 THE WITNESS: I'm not evaluating the

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1 commercial success in the same sense that  
2 somebody who's in the business of  
3 evaluating the business aspects of  
4 companies would evaluate those companies.  
5 I'm looking at, you know, the number of  
6 users. I'm looking at, you know, the  
7 purchase, the feedback that I've cited in  
8 this report. And in my opinion, those  
9 things are indicators of commercial  
10 success.  
11 BY MR. ANSLEY:  
12 Q. So let's talk about the purchase of  
13 MapMyFitness by Under Armour. In the end of  
14 paragraph 75 you state, "In December 2013  
15 Under Armour acquired MapMyFitness for \$150 million."  
16 Do you see that?  
17 A. Yes.  
18 Q. And so this is one of the bases, one of  
19 the two bases for your opinion that the MapMyFitness  
20 suite of products has been a commercial success?  
21 A. Correct.  
22 Q. Do you know how MapMyFitness, the  
23 valuation for -- strike that.  
24 Do you know how the \$150 million valuation  
25 was calculated?

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1 MR. OLINGER: Objection. Form.  
2 Outside the scope.  
3 THE WITNESS: I don't recall if I've  
4 looked at those details or not.  
5 BY MR. ANSLEY:  
6 Q. So if there's any confidential information  
7 you don't want to disclose, just let me know, but if  
8 you are aware of confidential information I'd ask you  
9 not to disclose that here.  
10 But your testimony is you don't recall  
11 whether you've seen how Under Armour came to the  
12 conclusion that MapMyFitness was worth \$150 million?  
13 You can answer.  
14 MR. OLINGER: I'm trying to hear the  
15 question so I can decide whether or not to  
16 make an objection. I'm not preventing him  
17 answering.  
18 Objection. Form.  
19 THE WITNESS: Can you ask the  
20 question again, please?  
21 BY MR. ANSLEY:  
22 Q. Sure. So you testified that you do not  
23 recall if you looked at the details of how  
24 Under Armour calculated the \$150 million for the  
25 purchase price of MapMyFitness; is that correct?

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1 A. That's correct.  
2 Q. So you don't know here, sitting here,  
3 whether they paid \$149 million for capital  
4 investments, employees, know-how, things like that,  
5 and \$1 million for the product itself, the underlying  
6 technology of the product itself?  
7 MR. OLINGER: Objection. Form.  
8 THE WITNESS: Offhand I don't recall  
9 that breakdown.  
10 BY MR. ANSLEY:  
11 Q. But you don't know one way or the other  
12 how this \$150 million was calculated?  
13 MR. OLINGER: Objection to form.  
14 THE WITNESS: As I said, I don't  
15 recall if I've seen that breakdown or not,  
16 but sitting here today, I don't recall how  
17 that was calculated.  
18 BY MR. ANSLEY:  
19 Q. And you don't cite any evidence in your  
20 declaration about how that evidence was calculated,  
21 do you?  
22 MR. OLINGER: Objection. Form.  
23 THE WITNESS: I don't believe so.  
24 BY MR. ANSLEY:  
25 Q. Do you have any expertise in evaluating

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1 whether a product -- sorry.  
2 Do you have any expertise in valuing  
3 companies?  
4 MR. OLINGER: Objection. Form.  
5 THE WITNESS: Companies, no.  
6 BY MR. ANSLEY:  
7 Q. And have you ever evaluated a  
8 company -- I'm assuming then you've never evaluated a  
9 company based on the commercial success of its  
10 products; is that correct?  
11 MR. OLINGER: Objection. Form.  
12 THE WITNESS: I don't think that's  
13 entirely correct, but I want to be careful.  
14 BY MR. ANSLEY:  
15 Q. Well, you said you've never had any  
16 experience evaluating companies, so I mean logically  
17 it must follow that you've never had any experience  
18 valuating companies based on the commercial success  
19 of the products; isn't that right?  
20 MR. OLINGER: Objection. Form.  
21 THE WITNESS: Let me be careful and  
22 clarify what I'm thinking about here. The  
23 phrase "evaluating companies" --  
24 BY MR. ANSLEY:  
25 Q. Valuating.

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1 A. Valuating companies has, you know, the  
2 connotation of determining what the company is worth,  
3 you know, in the market, if you will. I have  
4 certainly evaluated companies based on their products  
5 and success of their products in determining whether  
6 new product offerings stand a chance of surviving in  
7 the marketplace. That piece I have done.  
8 Q. When you say "evaluating," do you mean  
9 assigning a number to that product?  
10 MR. OLINGER: Objection. Vague.  
11 Objection. Form.  
12 BY MR. ANSLEY:  
13 Q. And by number, I mean a dollar amount.  
14 MR. OLINGER: Objection. Form.  
15 THE WITNESS: Most of my experience  
16 in that area has been on the purchase of  
17 technology from a company, so determining  
18 what the dollar value of a product is now,  
19 what its likely trajectory and cost would  
20 be, what its likelihood of success would  
21 be, is something that I've certainly dealt  
22 with. And sometimes that involves seeing  
23 how the company has worked with other  
24 products.  
25

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1 BY MR. ANSLEY:  
2 Q. I'm confused on what you said. You said,  
3 "Most of my experience in that area has been on the  
4 purchase of technology from a company." Do you mean  
5 that you've actually purchased technology from a  
6 company? In what sense do you mean?  
7 A. I've been in --  
8 MR. OLINGER: Objection to form.  
9 THE WITNESS: I've been involved with  
10 startups that may need to acquire  
11 technology and try to get -- to try to hit  
12 certain cross-targets. Sometimes that's  
13 relatively new technology and there may be  
14 multiple competitors in that technology  
15 niche, so I've certainly reviewed competing  
16 technologies, reviewed the companies that  
17 are offering competing technologies, and  
18 tried to provide advice based on those  
19 evaluations that I've made.  
20 BY MR. ANSLEY:  
21 Q. So how many startups have you been  
22 involved with in this role?  
23 MR. OLINGER: Objection. Form.  
24 THE WITNESS: Startups of my own,  
25 two. I have also been contacted two or

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1 three times by others to, you know,  
2 evaluate a technology.  
3 BY MR. ANSLEY:  
4 Q. All right. So you have been involved in  
5 two of your own startups and you've been contacted  
6 two or three times about evaluating technologies; is  
7 that correct?  
8 A. Correct.  
9 Q. Okay. Let's talk about two of those  
10 startups. Did you ever assign a dollar amount to  
11 your company on any of those two startups?  
12 MR. OLINGER: Objection. Form.  
13 Outside the scope.  
14 THE WITNESS: On the first of those  
15 startups, we did develop a business plan.  
16 I participated in the development of that  
17 business plan, and part of that involved  
18 determining what we thought the value of  
19 the company would be at start when we were  
20 trying to pursue venture funding.  
21 BY MR. ANSLEY:  
22 Q. So you say you participated in the  
23 business plan. Did you actually -- did you actually  
24 develop, work on developing what the value of the  
25 company should be?

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