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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

Parsons Xtreme Golf, LLC,  
Plaintiff,

vs.

Taylor Made Golf Company, Inc.,  
Defendant.

No.

**APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION**

**REDACTED PUBLIC VERSION**

**MEMORANDUM OF POINTS AND AUTHORITIES**

Founded in 2014, Parsons Xtreme Golf (“PXG”) has quickly emerged as a leading innovator in the golf club industry by developing several high-performance golf clubs, notably, the 0311 irons launched in 2015. Those ground-breaking innovations have yielded over 100 patents, including the two asserted here—U.S. Patent Nos. 8,961,336 (“the ’336 patent”) and 9,346,203 (“the ’203 patent”). The ’336 patent covers a novel golf

1 club head having an interior cavity filled with an elastic polymer material and having first  
2 and second weights. The '203 patent covers methods for making those clubs.

3 Unfortunately, PXG's success and its patented technology are being copied by an  
4 established golf club manufacturer, Taylor Made Golf Company, Inc. ("TaylorMade").  
5 Around August 22, 2017, TaylorMade announced the launch of a new line of golf clubs  
6 called the P790 irons. The P790 irons have the patented features of an interior cavity filled  
7 with an elastic polymer material and with weighting below the horizontal midplane of the  
8 club head, among others. TaylorMade has been promoting fitting events throughout the  
9 United States, including Arizona, and intends to distribute the P790 irons in retail stores  
10 on Friday, September 15. To address infringement, PXG offers the opinions of Mr. John  
11 Thomas Stites ("Mr. Stites"), the former Director of Research and Product Development  
12 for the golf division at Nike.

13 TaylorMade's infringement is irreparably harming PXG and the need for immediate  
14 injunctive relief is critical. TaylorMade's conduct is causing PXG to suffer irreparable  
15 harm in three distinct ways: (1) loss of sales and market share due to a spoiled market that  
16 TaylorMade is creating; (2) lost business opportunities to fully benefit from PXG's  
17 investment in the patented technology; and (3) loss of exclusivity and damage to PXG's  
18 reputation as an innovator. Money damages will not fully compensate PXG for these  
19 collective harms being caused by TaylorMade. And the need for timely injunctive relief is  
20 immediate because TaylorMade intends to distribute its P790 irons to the public on Friday,  
21 September 15. To address irreparable harm, PXG offers the opinions of Andrew Carter  
22 ("Mr. Carter"). His opinions are supported by discussions and declarations from PXG  
23 personnel: Bob Parsons ("Mr. Parsons"), Steven Gabbay ("Gabbay"), Pete Lehr ("Lehr"),  
24 Michael Nicolette ("Nicolette"), and Brad Schweigert ("Schweigert").

25 The balance of harms favors an injunction. Absent an injunction PXG will continue  
26 to experience the irreparable harms mentioned above—harms which money cannot fully  
27 remedy. PXG is still a young company in an early growth phase and the only iron PXG  
28 sells is the 0311 iron series. By comparison, the P790 iron is one of many irons offered by

TaylorMade, including for example, M1, M2, P730, P750, P770, M CGB, and Psi irons. And, even if enjoined, TaylorMade could still sell its other irons, so the “hardship” then would be TaylorMade’s inability to infringe the ’336 and ’203 patents. Lastly, the public interest favors the enforcement of PXG’s patent rights against infringers like TaylorMade, thereby allowing PXG to protect the fruits of its labor—its patents and 0311 irons.

Absent immediate assistance from this Court, TaylorMade will continue inappropriately competing head-to-head with PXG by infringing its patents and causing irreparable harm. Accordingly, under 35 U.S.C. § 283, this Court should issue a temporary restraining order and preliminary injunction to enjoin TaylorMade from infringing the ’336 and ’203 patents until this Court concludes a trial on the merits and post-trial briefing.

## **I. STATEMENT OF FACTS**

### **A. PXG Quickly Emerges as an Industry Leader and Revolutionizes Golf Club Design By Creating the 0311 Irons**

PXG was founded by local entrepreneur and innovator Mr. Parsons in September 2014.<sup>1</sup> At that time, as an avid golfer and student of golf club equipment, Mr. Parsons was frustrated by the lack of innovation with golf club iron technology then-available on the market.<sup>2</sup> Rather than continue using inferior golf clubs sold in the market, Mr. Parsons decided to become the catalyst for innovation and founded PXG.

Contemporaneously, Mr. Parsons hired two former golf club designers from PING, Nicolette and Schweigert.<sup>3</sup> Together, their collective objective was to design and build a game-changing iron that outperformed any iron on the market. That iron needed to look like a blade, be more forgiving than a cavity-back iron, produce a longer, straighter, and higher ball trajectory, and provide the golfer with better feel. But unlike many mass-produced club competitors, this design team had an unlimited budget and no timeline. PXG’s goal was and is still to make and sell high performance clubs at whatever cost.

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<sup>1</sup> Declaration of Bob Parsons (“Parsons Decl.”) at ¶¶ 1-7.

<sup>2</sup> Parsons Decl. at ¶ 8.

<sup>3</sup> Parsons Decl. at ¶ 9.

PXG's unorthodox approach to research and development resulted in a "eureka moment" in golf-iron design for the design team: a hollow-bodied design filled with an elastic polymer, and perimeter weighting.<sup>4</sup> That combination of elements allowed PXG to create an ultra-thin club face with an expanded sweet spot that would be impervious to deformation, despite the relative thickness of the club face. No other golf club in the industry had anything like what PXG invented.

PXG named its breakthrough design the 0311 irons,<sup>5</sup> and launched them in Spring 2015.<sup>6</sup> At approximately \$350 per iron and \$5,800 for a set of 14 clubs, inclusive of club fitting, the PXG clubs (and irons) were approximately twice the cost of a conventional club set. Despite their expensive price tag, as compared to other then-available irons, the 0311 irons were well-accepted by consumers and praised by golfers in the professional and non-professional market segments. As PXG's advertisement warns, "our clubs are amazing but expensive."

Once in the market, PXG learned that customers want and are willing to pay more money for features that provide them a competitive advantage and make a golf shot feel better.<sup>7</sup> PXG experienced the same or similar reaction amongst PGA Tour players, who have been known to covet the better control, distance, feel, and competitive advantage that the 0311 irons provide. Numerous Tour players now play PXG's irons, including Billy Horschel, Zach Johnson, and Charles Howell III.

#### **B. TaylorMade Develops the P790 Irons After PXG's 0311 Irons**

About the same time PXG launched the 0311 irons, TaylorMade purportedly began efforts to create a new iron which would eventually become the P790.<sup>8</sup> That two-year development effort apparently yielded the P790 irons. The P790 irons have a body with a

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<sup>4</sup> Parsons Decl. at ¶ 10.

<sup>5</sup> The 0311 iron is named after a military term for the MOS 0311 Riflemen. *See* <https://www.pxg.com/en-us/about/club-numbering>.

<sup>6</sup> Parsons Decl. at ¶ 11.

<sup>7</sup> Parsons Decl. at ¶¶ 12-13.

<sup>8</sup> Declaration of Lindsay Leavitt ("Leavitt Decl.") at Exhibit A.

1 hollow interior cavity filled with “SpeedFoam”, purportedly a polyurethane material, and  
 2 an ultra-thin face.<sup>9</sup> The P790 irons also have an exterior weight port, through which the  
 3 polyurethane material is injected into the interior cavity, and a screw weight—a first  
 4 weight.<sup>10</sup> The interior cavity also has an interior tungsten weight (*i.e.*, a second weight)  
 5 residing in an interior weight port on the inside back portion of the club head below the  
 6 horizontal midplane.<sup>11</sup> TaylorMade considers these combination of features in the P790  
 7 irons as “The Holy Grail.”<sup>12</sup> Yet, those features are claimed by the ’336 and ’203 patents.

8 On August 22, 2017, TaylorMade announced its intention to begin offering for sale  
 9 and selling the P790 irons.<sup>13</sup> For example, TaylorMade has offered to sell the P790 irons  
 10 in retail stores such as the PGA Super Store.<sup>14</sup> TaylorMade has also promoted on its  
 11 website that consumers may “pre-order” the P790 irons with an “expected in stock date” of  
 12 September 15.<sup>15</sup> Further, TaylorMade recently offered the P790 irons at a “fitting event”  
 13 on September 9, at Talking Stick Resort and Casino in Scottsdale, Arizona, where  
 14 customers were allowed to select and be fitted for the P790 irons with delivery on or after  
 15 September 15.<sup>16</sup> Absent an injunction these activities will continue.

## 16 **II. PRELIMINARILY ENJOINING TAYLORMADE IS APPROPRIATE**

### 17 **A. The TRO and Preliminary Injunction Standards in Patent Cases**

18 The Patent Act empowers this Court with broad discretion to enjoin TaylorMade.  
 19 *See* 35 U.S.C. § 283. PXG is entitled to an injunction because it establishes below (1) a  
 20 likelihood of success on the merits that TaylorMade’s P790 irons infringe the ’336 and

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22 <sup>9</sup> Leavitt Decl. at Exhibits A-B, E-G; *see also* video posted at  
<http://taylormadegolf.com/p790-irons-p-series.html>

23 <sup>10</sup> Leavitt Decl. at Exhibits A-B, E-G.

24 <sup>11</sup> Leavitt Decl. at Exhibits A-B, E-G.

25 <sup>12</sup> Leavitt Decl. at Exhibit B.

26 <sup>13</sup> Leavitt Decl. at Exhibits A.

27 <sup>14</sup> *See, e.g.*, <http://www.pgatoursuperstore.com/taylormade-p790.jsp>

28 <sup>15</sup> *See, e.g.*, <http://taylormadegolf.com/P790-Irons/DW-WZ711.html?icid=hp-p790-pre-order>

<sup>16</sup> *See, e.g.*, <http://taylormadegolf.com/p790-fitting-events.html>

'203 patents, (2) that PXG will continue to suffer irreparable harm in the absence of preliminary relief, (3) the equitable balance strongly favors PXG over TaylorMade, and (4) the public's interest in entering an injunction and enforcing PXG's patent rights. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008)). The four-factor test applies to disputes arising under the Patent Act. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006).

This Circuit employs a sliding scale analysis, where "serious questions going to the merits" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Drake Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1078 (9th Cir. 2013). "The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction." *Lockheed Missile & Space Co., Inc v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995).

## **B. PXG Is Highly Likely to Prevail on Infringement**

### **1. The Evidence Establishes that the '336 and '203 Patents Are Valid and Infringed by TaylorMade**

To establish a likelihood of success on the merits PXG need only demonstrate a "reasonable probability" of prevailing on its claim for patent infringement. *See H.H. Robertson Co. v. United Steel Deck*, 820 F.2d 384, 390 (Fed. Cir. 1987). To prevail on infringement, PXG must show (1) ownership of the '336 and '203 patents<sup>17</sup>, and (2) that TaylorMade infringes those patents. *See* 35 U.S.C. § 271. Here, PXG will likely prevail, because it proves below by a reasonable probability that TaylorMade's unauthorized acts of offering for sale, selling, making, using, and importing the P790 irons infringes at least claim 16 of the '336 patent and at least claim 15 of the '203 patent.

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<sup>17</sup> Assignment records located at the PTO reel/frame 034345/0569 and 034999/0468 demonstrate that PXG owns the '336 and '203 patents. *See* Leavitt Decl. at Exhibits J-K.



**a. The '336 and '206 Patents Are Valid**

Under 35 U.S.C. § 282, the '336 and '203 patents are “presumed valid . . . at every stage of the litigation.” *Canon Computer Sys., Inc v. Nu-Kote Int’l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 1998). Only if “a party opposing a request for a preliminary injunction raises a ‘substantial question’ concerning the validity of the patent,” must a party seeking injunctive relief establish that the invalidity defense lacks merit.” *New England Braiding Co., Inc. v. A.W. Chesterton Co.*, 970 F.2d 878, 883 (Fed. Cir. 1992). Thus, if an infringer like TaylorMade, is unable to “identify any persuasive evidence of invalidity, the very existence of the patent satisfies the patentee’s burden on the validity issue.” *Canon Computer Sys.*, 134 F.3d at 1088. Even a cursory review of the prior art references identified on the face of the '336 and '203 patents reveals that the PTO considered hundreds of prior art references, further bolstering the validity presumption. Beyond the presumption, patent validity is further demonstrated by other factors, for example, PXG’s substantial 0311 iron sales and TaylorMade’s copying.

**b. TaylorMade Infringes the '336 and '203 Patents**

To determine a likelihood of infringement, this Court must (1) first determine, as a matter of law, the correct meaning and scope of the asserted claims, and then (2) compare the properly construed claims to the accused products or process. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970-71 (Fed. Cir. 1995). Because a patent is infringed if any single claim is infringed, *see TIP Sys., LLC v. Phillips & Brooks/Gladwin, Inc.*, 529 F.3d 1364, 1379 (Fed. Cir. 2008) (“Under the ‘all elements’ rule, to find infringement, the accused device must contain ‘each limitation of the claim, either literally or by an equivalent.’”), PXG does not need to show that TaylorMade infringes every claim of the '336 and '203 patents. Rather, for purpose of this motion and to avoid any unnecessary burden on this Court, PXG analyzes only two representative claims: claim 16 of the '336 and claim 15 of the '203 patent. Applying the *Markman* analysis here, the evidence demonstrates by a reasonable probability that TaylorMade’s P790 irons and the process used to make them meets each of the construed elements of those representative claims.

# 1                    1.        Construing the Claims of the '336 and '203 Patents

2            Claim construction begins with the claim itself. *Phillips v. AWH Corp.*, 415 F.3d  
 3 1303, 1312 (Fed. Cir. 2005) (en banc). The Court must first ascertain the plain and  
 4 ordinary meaning of the claim term. *Id.* The plain and ordinary meaning of a claim term  
 5 is the meaning that the term would have meant to a person of ordinary skill in the art at the  
 6 time of the invention. *Id.* “Importantly, the person of skill in the art is deemed to read the  
 7 claim term not only in the context of the particular claim in which the disputed term  
 8 appears, but in the context of the entire patent, including the specification.” *Id.*

9            Here, PXG has provided the Court with the evidence necessary to construe the  
 10 representative claims from the perspective of a person having ordinary skill in the art.  
 11 That evidence can be found within the Declaration of Mr. Stites (“Stites Declaration”), an  
 12 expert in golf club design who is familiar with the perspective of a person of ordinary skill  
 13 in the art. Mr. Stites provides a claim chart,<sup>18</sup> detailing how a person of ordinary skill in  
 14 the art would have interpreted several of the asserted claim terms. Following the *Phillips*  
 15 framework, that understanding is based upon the claim terms’ plain and ordinary meaning,  
 16 the claims themselves, the specification, and the prosecution history, as follows:

- 17            • *Top portion* means the entire portion of the club head extending away from  
 18 the ground from a plane that (a) is parallel to the ground plane of the club  
 19 head and (b) extends through the middle of the club head.
- 20            • *Sole portion* means the entire portion of the club head extending toward the  
 21 ground from a plane that (a) is parallel to the ground plane of the club head  
 22 and (b) extends through the middle of the club head.
- 23            • *Toe portion* means the entire portion of the club head extending away from  
 24 the hosel from a plane that (a) is perpendicular to the ground plane and the  
 25 front surface of the strike face of the club head and (b) extends through the  
 26 middle of the club head.
- 27            • *Set of weight portions* means one or more weight portions.
- 28            • *Top-to-toe transition region between the top portion and the toe portion*  
 means the region shared by the top portion and toe portion.
- *Sole-to-toe transition region between the sole portion and the toe portion*  
 means the region shared by the sole portion and toe portion.

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<sup>18</sup> See Stites Declaration at Exhibit 8.



- *Elastic polymer material* means a polymer-like material with elastic properties, which may absorb shock, isolate vibrations, and/or dampen sound.

Based on the evidence provided by PXG (including the patents and file history), this Court may properly construe the scope of the asserted claims.

## **2. The Properly Construed Claims Applied to TaylorMade's P790 Irons Reveal Direct Infringement**

Next, after construing the claims, this Court must apply the claims to the P790 irons and the process used to make those irons. *Markman*, 52 F.3d at 970-971. To aid the Court in analyzing representative claims, PXG has provided the Court with Mr. Stites' claim comparison charts,<sup>19</sup> which establish on an element-by-element basis that TaylorMade infringes those claims. As such, PXG has demonstrated by a reasonable probability a strong likelihood of success on the merits of infringement.

### **C. TaylorMade Is Causing PXG To Suffer Irreparable Harm**

"As its name implies, the irreparable harm inquiry seeks to measure harms that no damages payment, however great, could address." *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). "The simple fact that one could, if pressed, compute a money damages award does not always preclude a finding of irreparable harm." *Id.* Examples of irreparable harm caused by infringement include: price erosion, damage to ongoing customer relationships, loss of customer goodwill (*e.g.*, when an effort is later made to restore the original price), and loss of business opportunities for a company in a growth mode. *Id.* In addition, PXG must show that a "causal nexus relates the alleged harm to the alleged infringement." *Apple, Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1374 (Fed. Cir. 2012). Such evidence must show that TaylorMade's infringement causes the harm. *Apple, Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 639 (Fed. Cir. 2015).

Here, TaylorMade's conduct is causing PXG to suffer irreparable harm in at least three distinct ways: (1) loss of sales and market share due to a spoiled market; (2) lost business opportunities to fully benefit from PXG's investment in the patented technology;

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<sup>19</sup> See Stites Declaration at Exhibits 10, 11.

1 and (3) loss of exclusivity and damage to reputation as an innovator. And money damages  
2 will not fully compensate PXG for these collective harms caused by TaylorMade.

3 **1. TaylorMade is Creating a Spoiled Market, Causing PXG to**  
4 **Suffer Lost Sales and Market Share**

5 To begin, PXG will suffer loss of sales and market share because TaylorMade is  
6 spoiling the market.<sup>20</sup> According to PXG's damages expert, Mr. Carter, PXG has been  
7 widely credited with expanding the luxury golf market which created a "change in the  
8 entire landscape" of the golf equipment industry, commonly referred to as "The PXG  
9 Effect". PXG's creation of the 0311 iron that delivered superior performance enabled  
10 PXG to attract the same avid golfers targeted by traditional golf equipment companies like  
11 TaylorMade.<sup>21</sup> And PXG was able to price its clubs as a luxury golf product. Absent the  
12 P790 iron, PXG has been able to enjoy monopoly pricing due to increasing demand for the  
13 0311 iron and PXG's growing brand reputation. Even though PXG's clubs cost more to  
14 make than conventional clubs, PXG's averaged price point per 0311 iron at \$325 is two to  
15 three times higher than the average price point for conventional irons at \$125-\$150. That  
16 sustainable pricing has enabled competitors to increase their price ceiling up to \$150-\$175.  
17 For example, Callaway and Titleist have introduced premium concept irons at \$250/iron.  
18 Prior to PXG and its 0311 iron, these prices would have been highly unusual.

19 Despite the overall decline in the golf market, the change in consumer spending  
20 habits was caused by PXG's ability to attract avid golfers away from mainstream club  
21 manufacturers at a significantly higher price and earn measurable market share—all in just  
22 two years.<sup>22</sup> By comparison, since PXG's entrance into the market, other competitors have  
23 experienced a declining market such as TaylorMade, Titleist, and PING.

24 Although golfers generally consider a variety of factors when making a purchasing  
25 decision, technology-driven performance (*e.g.*, distance, forgiveness, and "sweet spot") are

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26 <sup>20</sup> Declaration of Andrew W. Carter ("Carter Declaration") at ¶¶ 60-84.

27 <sup>21</sup> Carter Declaration at ¶ 62-64 & Figure 6.

28 <sup>22</sup> Carter Declaration at ¶ 65 & Figure 7.

paramount.<sup>23</sup> Such technology provides a competitive advantage and will dominate sales and capture market share. The sale of PXG's 0311 iron evinces the impact of having patented technology. And that patented technology has enabled PXG to gain a presence with Tour professionals, such as Zach Johnson, Billy Horschel, and Lydia Ko.<sup>24</sup>

PXG's rapid expansion into the premium iron market can be attributed to the superior performance by the 0311 irons—and the technology behind that performance is protected by its patents.<sup>25</sup> The key differentiator to PXG's technology is the patented construction of injecting a material called thermoplastic elastomer material (TPE) into the interior cavity of the body, which not only supports the ultra-thin club face, but also takes mass out of the face and redistributes it elsewhere, improving the moment of inertia (MOI) and center of gravity (CG), while also improving sound and feel.

Likewise, TaylorMade considers a key differentiator in its P790 irons over conventional clubs to be the "Speedfoam" (*i.e.*, a polyurethane material), an injectable vibration dampening material within the interior cavity of the body.<sup>26</sup> That material also provides structural support to the P790's thin face upon impact. Another differentiator is the strategically-placed tungsten weight which purportedly provides increased MOI and forgiveness. At present, TaylorMade is the only other competitor who is selling a hollow-body iron claiming to have the same technology as PXG's 0311 irons. Now PXG is in a two-horse race with TaylorMade, where it must compete against its own technology.<sup>27</sup> Industry pundits have already recognized PXG's unfair situation.<sup>28</sup>

But with TaylorMade selling its P790 irons at approximately \$162 per club, compared to PXG's 0311 irons at \$300 to \$350 per club, while touting the same

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<sup>23</sup> Carter Declaration at ¶¶ 66-67.

<sup>24</sup> Carter Declaration at ¶ 68.

<sup>25</sup> Carter Declaration at ¶¶ 67-69.

<sup>26</sup> Carter Declaration at ¶¶ 70-74.

<sup>27</sup> Carter Declaration at ¶ 75.

<sup>28</sup> Leavitt Decl. at Exhibits C-G.

1 technology, a prospective PXG customer would prefer the lower-priced P790.<sup>29</sup> As  
2 explained by Mr. Carter, the perception that the P790 irons feature the same technology  
3 and performance benefits as PXG's 0311 iron, but at a lower price point, will spoil the  
4 niche market PXG created, causing PXG to lose sales and market share.

5 Importantly, given that the patented 0311 irons are early in their product life cycle  
6 and their growth trajectory is unknown, future lost profits are not amenable to  
7 quantification.<sup>30</sup> Since their launch, the average monthly revenue of the 0311 iron has  
8 steadily increased from 2015 to the present. Further complicating quantification, if PXG  
9 loses sales of 0311 irons, it would inevitably have lost customers and sales of ancillary  
10 products across the entire product line. Such ancillary sales include other golf clubs (*e.g.*,  
11 drivers, fairway woods, hybrids, wedges, and putters) and other branded accessories (*e.g.*,  
12 golf bags, apparels, repair tools, ball markers, and gloves). That loss would be significant  
13 as ancillary goods sales accounted for [REDACTED].

14 Lastly, with TaylorMade's P790 irons spoiling the market, given the history of  
15 prevalent patent infringement in the golf industry, other golf club manufacturers will begin  
16 offering comparative irons to the 0311 irons, touting the same technology.<sup>31</sup> Such an  
17 introduction of comparative irons would further reduce PXG's ability to use its patented  
18 technology as a means for differentiating its products from competitive products. But  
19 PXG cannot compete on pricing alone. [REDACTED]

20 [REDACTED]  
21 [REDACTED].<sup>32</sup> Given that math, PXG would be unable to sustain its operations.  
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26 <sup>29</sup> Carter Declaration at ¶¶ 76-77.

27 <sup>30</sup> Carter Declaration at ¶¶ 78-80 & Figures 8-10.

28 <sup>31</sup> Carter Declaration at ¶¶ 81-83.

<sup>32</sup> Carter Declaration at ¶ 84.

## 2. PXG Will Experience Lost Business Opportunities, Rather Than Fully Benefit From Its Investment In the Patented Technology

Next, PXG will experience lost business opportunities instead of fully benefiting from its investment in the patented invention.<sup>33</sup> When Mr. Parsons founded PXG, the primary focus was to design the best golf clubs in the world. The designers were provided an unlimited budget with no time constraints. After six months those designers created the 0311 iron, which the design team believed “were the best clubs on earth.” Thus, entrance into the market with a performance product at a premium price was no accident.

Despite being a young company in its initial growth phase,

\_\_\_\_\_. According to Mr. Carter, such future lost profits are not quantifiable.

<sup>33</sup> Carter Declaration at ¶¶ 85-86.

<sup>34</sup> Carter Declaration at ¶ 87.

<sup>35</sup> Carter Declaration at ¶¶ 87-89.

1                   **3. PXG Will Suffer Loss of Exclusivity and Damage to Reputation**  
2                   **As an Innovator**

3           Finally, PXG will experience loss of exclusivity and damage to reputation as an  
4 innovator in the golf club industry.<sup>36</sup> Given that PXG has never licensed its patents and  
5 has no intention of licensing any patents to TaylorMade, according to Mr. Carter, the  
6 benefits from market exclusivity are more valuable to PXG in the long-term than a royalty  
7 stream in the short-term. Unlike a royalty stream, exclusivity will provide a competitive  
8 advantage. That competitive advantage is important, as evidenced by PXG's timely  
9 request for injunctive relief, following TaylorMade's announcement around August 22 and  
10 its intended distribution on September 15. In the short-term and prior to trial, PXG would  
11 like to maintain its exclusivity during the upcoming holiday season and PGA Merchandise  
12 Show in January 2018—without TaylorMade's P790 iron available for sale.

13           At present TaylorMade's P790 irons are the only products with similar technical  
14 features as PXG's 0311 irons.<sup>37</sup> But for TaylorMade's infringement, PXG would be  
15 known as the exclusive provider of the patented technology, further enhancing PXG's  
16 reputation as an innovator. Yet, TaylorMade's infringement is damaging that reputation,  
17 which will result in lost opportunities to build goodwill. According to Mr. Carter, money  
18 remedies are insufficient to cure those harms.

19           Since launching the 0311 irons, PXG has forged relationships with golf equipment  
20 retailers and "green grass" distribution channels to build the PXG brand.<sup>38</sup> In addition,  
21 PXG has successfully secured sponsorship opportunities with PGA and LPGA Tour  
22 players. And continuing to actively develop those relationships with Tour players will  
23 only help PXG build its brand. According to Mr. Carter, these relationships enhance  
24 PXG's reputation as the leading provider of golf clubs worthy of use by the best golfers in  
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26           <sup>36</sup> Carter Declaration at ¶¶ 90-91.

27           <sup>37</sup> Carter Declaration at ¶ 92.

28           <sup>38</sup> Carter Declaration at ¶¶ 93-94.



1 the world.<sup>39</sup> And TaylorMade competes with PXG for these partnerships, ones which  
2 provide significant and valuable marketing exposure.

3 But TaylorMade's P790 irons being in the market jeopardizes PXG's opportunities  
4 to pursue these partnerships, despite our players seeking out PXG and exploring  
5 partnership opportunities due to its patented technology and reputation as an innovator.<sup>40</sup>  
6 Such a situation would cause a bidding war, with sponsorship prices rising. According to  
7 Mr. Carter, TaylorMade's infringement will diminish PXG's ability to use innovations  
8 (*i.e.*, the 0311 irons) to distinguish itself from TaylorMade and other competitors. An  
9 injunction would likely enhance PXG's ability to maintain its current relationships with  
10 Tour players and establish new ones. Absent an injunction, such relationships will be  
11 hindered. Were PXG to lose a significant number of sponsorships, those consumers who  
12 would be influenced by or otherwise consider the number of Tour players who play PXG's  
13 clubs might elect to purchase a competitor's clubs. But no monetary remedy is available to  
14 PXG for such lost sponsorship opportunities.

15 Finally, TaylorMade's P790 irons would harm PXG's reputation as an innovator.<sup>41</sup>  
16 The technology that drives the superior performance of the 0311 irons is visible on the  
17 club itself, for example, the weight portions below the horizontal midplane of the club  
18 head. Other technical features are not readily visible, but highly advertised and touted by  
19 PXG, are the thin face and interior cavity filled with an elastic polymer material called  
20 TPE. Yet, with the P790 irons having the same combination of technical features as the  
21 0311 iron, according to Mr. Carter, PXG's ability to use the patented technology to  
22 distinguish its brand from TaylorMade and other potential infringers will be limited. PXG  
23 will be unable to realize the reputational benefits as an innovator. In fact, due to its size  
24 and market share, there is a real risk that TaylorMade will be credited with PXG's  
25 innovation. Put another way, the public would likely believe that whatever innovations

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26 <sup>39</sup> Carter Declaration at ¶¶ 93-94.

27 <sup>40</sup> Carter Declaration at ¶¶ 95-98.

28 <sup>41</sup> Carter Declaration at ¶¶ 99-101.

PXG once touted were not that significant, because if they were significant, innovative, and patent-worthy, then TaylorMade would not be able to use it. Thus, no available monetary remedies will fully compensate PXG for the type of harm to reputation and goodwill caused by TaylorMade.

**D. The Balance of Hardships Between the Parties Heavily Favors PXG**

As between TaylorMade and PXG, the balance of hardships tips in PXG's favor. *Rodeo Collection, Ltd v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987). Although PXG will continue to be irreparably damaged if TaylorMade is not preliminarily enjoined from offering the P790 irons, the only "hardship" TaylorMade faces is its inability to infringe PXG's patents. TaylorMade assumed the risk when it copied PXG's patented technology and began selling the P790 irons. So TaylorMade cannot now complain about the effects of an injunction as a result of its deliberate and wrongful conduct. *A&E Prods. Group, Inc. v. California Supply*, 28 U.S.P.Q.2d 1041, 1048 (C.D. Cal. 1993). Besides, the harm TaylorMade faces is easily calculated, purely monetary, and protectable by a bond. *PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1567 (Fed. Cir. 1996). And TaylorMade may continue to sell other products, including for example, M1, M2, P730, P750, P770, M CGB, and Psi irons.

But the harm to PXG continues to be severe, long-lasting with many incalculable components. *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1383 (Fed. Cir. 2006). And PXG should not have to compete against its own patented technology. *Metalcraft of Mayville, Inc. v. Toro Co.*, 848 F.3d 1358, 1369 (Fed. Cir. 2017). Mr. Carter agrees.<sup>42</sup> Accordingly, on balance, any harm resulting from removal of TaylorMade's P790 irons from the market is far outweighed by PXG's immediate, irreversible harm.

**E. Granting an Injunction Now Furthers the Public's Interest**

Finally, public interest weighs in favor of granting injunctive relief in light of the "strong public policy favoring the enforcement of patent rights." *PPG*, 75 F.3d at 1567.

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<sup>42</sup> Carter Declaration at ¶¶ 102-104 & Figure 11.

More importantly, given PXG's likelihood of success on the merits, the public interest lies in protecting PXG's patents. *A&E Prods.*, 28 U.S.P.Q.2d at 1049. Without the power to enter injunctions for patent infringement, patents would be valueless. *Smith International, Inc. v. Hughes Tools Co.*, 718 F.2d 1577-78 (Fed. Cir. 1983). Thus, granting injunctive relief and enforcing PXG's patent rights to exclude TaylorMade will protect the fruits of PXG's labor—namely, its patents and the 0311 irons. Conversely, there is no countervailing public interest in allowing TaylorMade to continue infringing PXG's patents. To be sure, the public will not suffer the inability to purchase golf clubs, because PXG's 0311 irons and TaylorMade's other irons will remain on the market.

### III. Requested Relief

Having satisfied the Supreme Court's four-part *eBay* test by a reasonable probability, PXG requests that this Court issue a temporary restraining order and preliminary injunction under 28 U.S.C. § 283 to enjoin TaylorMade from the following:

- (1) Making any P790 irons or substantially similar irons that violate the '336 and/or '203 patents;
- (2) Offering to sell, marketing or selling any P790 irons or substantially similar irons that violate the '336 and/or '203 patents;
- (3) Servicing, repairing, and/or exchanging any P790 irons or substantially similar irons that violate the '336 and/or '203 patents; and
- (4) Requiring that TaylorMade remove any P790 irons or substantially similar irons that violates the '336 and/or '203 patents from use by any third-party.

DATED this 12<sup>th</sup> day of September, 2017.

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