## ARGUMENT

The standard for granting a motion for reconsideration is strict, but reconsideration may be granted where there is "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Roman v. Leibert*, No. 16-cv-1988 (JCH), 2017 WL 4286302, at *1 (D. Conn. Sept. 27, 2017) (citing cases); *Evergreen Nat. Indem. Co. v. Capstone Bldg. Corp.*, No. 07-cv-1189 (JCH), 2008 WL 2645685, at *1 (D. Conn. July 2, 2008) (same). Indeed, "a district court has considerable discretion to decide whether reconsideration is necessary to prevent manifest injustice." *Disability Rights New Jersey, Inc. v. Velez*, No. 05-4723 (AET), 2010 WL 5055820, at *2 (D. N.J. Dec. 2, 2010).

Here, Woodway blocked Plaintiff from advancing obviousness theories based on the Schmidt reference, arguing that Plaintiffs' disclosure of Dr. Giachetti's expert opinion referencing the Schmidt combinations was late, and that Woodway would be prejudiced by it, even though Woodway deposed Dr. Giachetti on those opinions (including Schmidt) during expert discovery, and Dr. Blair submitted an expert report that rebutted the Schmidt combinations.[5] (*See* Dkt. No. 91, at 4.)

Now, in light of the latitude Woodway sought in serving an admittedly late expert report relating to the Air Runner – which has required Dr. Giachetti to travel to Wisconsin on Friday, May 11, 2018 to analyze the Air Runner Dr. Blair inspected, necessitated preparing and serving a new rebuttal expert report from Dr. Giachetti, and may require additional depositions of the liability experts – reconsideration is appropriate to prevent manifest injustice to Plaintiffs.

[5] Woodway marked that rebuttal report as a trial exhibit: Defendant's Trial Exhibit No. 266. *See, e.g.*, DTX 266, at 90-112.

**A. Reconsideration is Appropriate Because Woodway Was Permitted to Supplement Two Expert Reports, Which Should Change the Prior Analysis to Avoid Manifest Injustice.**

Fact discovery closed December 31, 2016. (Dkt. No. 51.) The Scheduling Order required the parties to serve expert disclosures on March 2, 2017. (Id.) Plaintiffs served the Opening Report of Dr. Giachetti, which includes analysis relating to the Schmidt reference, on March 2, 2017. (*See* Dkt. No. 91-3, at 1 (cover page of Opening Report).) Woodway deposed Dr. Giachetti on April 11, 2017.

On May 1, 2017, Woodway filed its Motion to Strike, arguing that Dr. Giachetti's March 2, 2017 opinions regarding Schmidt were untimely. (Dkt. No. 91.) In that Motion to Strike, Woodway claimed that the Schmidt disclosure was untimely because Plaintiffs did not supplement their Invalidity Contentions within the fact discovery period, i.e. December 31, 2016, to include Schmidt. (Dkt. No. 91, at 4.)

Plaintiffs opposed the Motion to Strike, arguing that the Opening Report was timely filed based on the Scheduling Order and the timing of Dr. Giachetti's analysis. (Dkt. No. 99, at 4.) In fact, Woodway did not even articulate any prejudice it claimed to have suffered until it filed its Reply Brief, and even there Woodway acknowledged (1) that Plaintiffs timely served the Opening Giachetti Report; (2) that it was aware of the Schmidt reference prior to the Opening Giachetti Report; and (3) that Dr. Blair had adequate time to review and respond to the Opening Giachetti Report. (Dkt. No. 113, at 1-4.) In short, Woodway did not argue that it was robbed of a reasonable time to prepare for either Dr. Giachetti's opinions or the substance of the Schmidt reference. To the contrary, Woodway was aware of those opinions before it was required to serve a rebuttal expert report and before it deposed Dr. Giachetti. (Dkt. No. 99, at 4.)

Last September, the Court denied Woodway's Motion to Strike as procedurally improper,

but the Court adopted the substance of Woodway's arguments and declined to consider a portion of Dr. Giachetti's invalidity opinions at summary judgment that relate to Schmidt. (Dkt. No. 144 at 24-29, citing Dkt. No. 91 at 4.) Assessing the *Outley* factors,[7] the Court noted that although the importance of the testimony favors Plaintiffs, "it appears there has been prejudice to Woodway" by having to meet Dr. Giachetti's analysis that includes Schmidt. (Dkt. No. 144 at 27-28.) As to the fourth *Outley* factor, the Court noted that a continuance was not available as, "[a]lthough this case has not been set for trial, discovery has closed and dispositive motions have been filed," so reopening discovery would unjustly postpone resolution. *Id.* at 28.

On March 16, 2018, Woodway filed a Motion to Supplement the expert reports of Dr. Blair (liability expert) and Mr. Green (damages) ("Motion to Supplement"). (Dkt. Nos. 184, 184-1.) When Woodway filed its Motion to Supplement, trial was scheduled for May 2018.

In its Motion to Supplement, Woodway sought leave to expand its expert analyses to address the Air Runner, which Woodway inspected at a trade show in early 2017 and disassembled in September 2017. (Dkt. No. 184-1, 4-5.) In a footnote, Woodway suggested that it made Plaintiffs aware in December 2017 that it believed the Air Runner infringed the '580 patent (Dkt. No. 184-1, at 8, fn. 8) but Woodway never sought leave to amend its expert reports at any point prior to March 16, 2018.

Plaintiffs made all those points in their Opposition, citing the *Outley* factors, and largely mirroring the arguments Woodway advanced in the Motion to Strike.[8] (Dkt. No. 205.) Specifically, Plaintiffs complained that Woodway never produced any of the underlying information relating to the Air Runner in discovery, that Woodway was aware of the Air Runner

[7] (1) The party's explanation for its failure to comply with the discovery order; (2) the importance of the testimony of the witness to be excluded; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance. *Outley*, 837 F.2d at 590 (2d Cir. 1988).
[8] *Outley v. City of New York*, 837 F.2d 587, 590 (2d Cir. 1988).

in early 2017, and that the disclosure is untimely in view of the delay between September 2017 and March 2018. (Dkt. No. 205, at 2-5, 10-11.) Even though Woodway offered to make Dr. Blair available for deposition, since the trial was fast approaching, there would be no meaningful opportunity to depose Dr. Blair in the midst of pre-trial deliverables and preparation, which unfairly prejudiced Plaintiffs. (Dkt. No. 205, at 9.)

In its Reply, Woodway minimized the prejudice to Plaintiffs, arguing that the supplemental report from Dr. Blair is critical. (Dkt. No. 225, at 4.) After the postponement of trial, the Court exercised its discretion, granted Woodway's Motion to Supplement, and allowed Woodway to serve the expert reports. (Apr. 30, 2018 Hrg. Tr. at 406:18-24.)

With the shift in the trial date, the parties have worked out a schedule for Dr. Giachetti to inspect the Air Runner later this week and to serve a rebuttal report on Monday, May 15, 2018. That is the same level of opportunity afforded Woodway after it received Dr. Giachetti's Opening Report on March 2nd, served its rebuttal report on March 30, 2017, and deposed Dr. Giachetti on April 11, 2017.

In short, given the recent events, and Woodway's change in position late in the case, Plaintiffs respectfully submit that reconsideration is appropriate to prevent manifest injustice. The same *Outley* factors apply to all parties, and Woodway should not be permitted (on the one hand) to argue it was prejudiced based on a two month delay – when Woodway had the time to do a rebuttal report and an expert deposition – and (on the other hand) to argue Plaintiffs are not prejudiced based on a six month delay – when Plaintiffs are now in a position of arranging for their expert to travel to Wisconsin to inspect the Air Runner and then generate a rebuttal report the following Monday. Plaintiffs respectfully suggest that allowing Woodway to supplement

with two additional expert reports while prohibiting Plaintiffs from offering Schmidt as part of the invalidity analysis would result in manifest injustice.

**B. Woodway Will Not be Unduly Prejudiced by the Limited Reconsideration Sought, Which Will Allow Consideration on the Merits of the Validity of the '580 patent.**

The discrete testimony Plaintiffs seek to present is critical to Plaintiffs' invalidity arguments. Courts favor decisions on the merits, and the Supreme Court has made clear that there "is a public interest favoring the judicial testing of patent validity." *U.S. v. Glaxo Group Ltd.*, 410 U.S. 52, 69 (1973). The importance of this information is juxtaposed against the limited impact reconsideration may on the case.

First, allowing Plaintiffs to offer Dr. Giachetti's expert testimony on Schmidt will not expand the scope of trial: Plaintiffs already are challenging the validity of the remaining claims Woodway asserts from the '580 patent. Invalidity will be a key focus of the upcoming summary judgment filings and trial, and the limited Schmidt combinations presented will not affect the duration of the trial.

Nor will Woodway be unduly burdened by additional expert discovery or trial preparation. Woodway already took Dr. Giachetti's deposition over the course of nine hours on his Opening Report, so it has the information it needs. Woodway also made Dr. Blair's rebuttal validity position on Schmidt clear (*see* Defendant's Trial Exhibit 266, at 90-112), so an argument that Woodway will be burdened by reconsideration should not be credited. Where, as here, Woodway was aware of the information at issue and the underlying theories, there is no unfair prejudice to Woodway. *See e.g., Eli Lilly and Co. v. Teva Pharmaceuticals USA, Inc.*, 619 F.3d 1329, 1345 (Fed. Cir. 2010) (no abuse of discretion in allowing an accused infringer to raise a written description argument though not included in final invalidity contentions because opposing party on sufficient notice due to testimony at trial); *Hitkansut LLC v. United States,*

127 Fed. Cl. 101, 109 (Ct. Fed. Cl. 2016) (no prejudice where additional prior art disclosed two weeks before expert disclosure and where responding party had an expert with adequate time to consider and respond during expert discovery); *Inventio AG v. ThyssenKrupp Elevator Corp.*, No. 08-08874-RGA, 2014 WL 468897, at *4-5 (D. Del. Feb. 3, 2014) (though disclosure of entirely new theory of infringement based on doctrine of equivalents, no prejudice because no new products accused and no additional evidence required to oppose theory).

Finally, Woodway has also recently supplemented its expert opinion relating to the Gen III TrueForm Runner, reviving the method claim (claim 25) it had dismissed from the '580 patent. Dr. Blair's infringement analysis of the Gen III in the context of claim 25 brings the question of the validity of that method claim back to the forefront, and Plaintiffs should be permitted to offer invalidity positions that include Schmidt. *See Glaxo Group*, 410 U.S. at 69 ("[T]here is a public interest favoring the judicial testing of patent validity" because "when a patent is invalid, the public parts with the monopoly grant for no return, the public has been imposed upon and the patent clause subverted," so "[i]t is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly.").

Ultimately, this comes down to an exercise of Court discretion. The Court allowed Woodway to supplement its expert reports, which grants Woodway significant latitude in presenting its case, even though there was a delay before Woodway supplemented with the information. Plaintiffs request only the same: an exercise of discretion allowing them latitude to present the full scope of Dr. Giachetti's opinions offered in his reports, which include the Schmidt reference.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court Plaintiffs' Motion for Reconsideration.

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Dated: May 7, 2018

**CERTIFICATION OF SERVICE**

I hereby certify that on May 7, 2018, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

*/s/ Christine K. Bush*

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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|---|---|
| CHAPCO, INC. AND SAMSARA FITNESS, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>WOODWAY USA, INC.,<br><br>Defendant. | Civil Action No. 3-15-CV-1665(JCH)<br><br>May 29, 2018 |

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION**

Plaintiffs' request for partial reconsideration came on the heels of Woodway's request to supplement two expert reports right before trial.[1] After Woodway was permitted those supplements, over Plaintiffs' objection, Plaintiffs sought the opportunity to offer the full scope of the invalidity theories disclosed in Plaintiffs' timely-served expert report.

In response, Woodway now argues that reconsideration would reopen an aspect of summary judgment. Not so. Woodway also uses its Opposition to argue that it should be permitted to pursue theories of indirect infringement against Chapco. But allowing Woodway that additional relief now would invite yet another round of expert reports because unlike the issue with the Schmidt reference, Woodway never identified the basis for its indirect infringement claim. Finally, Woodway argues that it would be unfairly prejudiced by reconsideration, but all parties have the same amount of time to adjust to the changed landscape of this case before the October trial.

[1] Counting days since the entry of the Order, as Woodway does, is not meaningful for the analysis. *See* Dkt. No. 250 at 1 and n. 2. Woodway's eve of trial request to supplement its expert reports concerning so-called non-infringing alternatives – admittedly belated – was the inflection point giving rise to the request for reconsideration.

**A. Reconsideration Does Not Reopen Other Aspects of the Order**[2]

Plaintiffs request that the Court reconsider, in part, the prior Order and allow Plaintiffs to offer invalidity theories that include the Schmidt reference. Woodway's argument that reconsideration would reopen their challenge that Dr. Giachetti "failed to provide opinions regarding Schmidt on a claim-element by claim-element basis"[3] blurs the issues. First, the Court already addressed Woodway's challenges to Dr. Giachetti's opinion. *See* Dkt. No. 144 at 29-30 (finding other challenge to Dr. Giachetti's obviousness opinions "unpersuasive").[4] Second, if the Court grants Plaintiffs' request for reconsideration, the parties' dueling Motions in Limine relating to expert opinions ensures that Woodway will be in the same position as Plaintiffs with respect to expert challenges, i.e. raising challenges at the time of trial as to the substance of the expert opinion offered. That parity does not constitute a reopening of additional issues.

Then Woodway goes a step further, using its Opposition to suggest it should be permitted to assert theories of indirect infringement against Chapco. Dkt. No. 250 at 8 ("the exclusion of Schmidt appeared to motivate the Court's exclusion of Woodway's indirect infringement allegations against Chapco on summary judgment."). That comparison is inapt. Plaintiffs were granted summary judgment on Woodway's counterclaims alleging indirect infringement because Woodway never identified the basis for any indirect infringement theory-- not in its infringement contentions, interrogatory responses, expert reports, or otherwise. *See* Dkt. No. 144 at 9-10. If the Court grants reconsideration and allows Plaintiffs to pursue the invalidity theories including Schmidt in light of the latitude Woodway sought in serving its late expert reports on non-infringing alternatives, this should not open the door for further late disclosures from Woodway.

---

2 Plaintiffs use the same terms as defined in their Motion. Dkt. Nos. 248-249.

3 Dkt. No. 250 at 1-2.

4 Woodway argues that *Outley* was not the appropriate standard for reviewing its Motion to Strike, ignoring that this is the standard the Court applied. *Compare* Dkt. No. 250 at 10 *with* Dkt. No. 144 at 23-29 (analyzing the timing of the disclosure of invalidity theories including Schmidt under *Outley*).

**B. Reconsideration Would Not Unfairly Prejudice Woodway**

Woodway argues that any further deposition of Dr. Giachetti would "allow him to backfill the deficiencies in his report." Dkt. No. 250 at 5. That pre-supposes deficiencies and ignores that Woodway already deposed Dr. Giachetti on his Opening Report, including Dr. Giachetti's opinions concerning Schmidt. Woodway does not need to depose Dr. Giachetti again if reconsideration is granted, and there is no prejudice to Woodway from such a hypothetical event.

Undeterred by the actual record, Woodway argues that Dr. Blair "may have been able to prepare a more thorough analysis" had Plaintiffs earlier disclosed theories regarding Schmidt. *Id.* at 6. But Dr. Blair did address Schmidt in his Rebuttal Report, and he testified as follows:

> Q: Did you have adequate time to consider Schmidt?
>
> A: **I had adequate time to consider Schmidt in reference to what Giachetti wrote**. You know, if there were some other invalidity contentions or something that I wasn't aware of, obviously I didn't have a chance to respond to those.

Dkt. No. 250 Ex. E at 197:5-11 (emphasis added).

Woodway's other claims of unfair prejudice are similarly unavailing. For example, Plaintiffs' request for reconsideration is not a "continued violation" of the Scheduling Order in an effort to pursue new theories of invalidity. *See* Dkt. No. 250 at 2. Rather, the request seeks reconsideration of the Order that precluded invalidity theories incorporating Schmidt.

Finally, Woodway's suggestion that it "streamline[d] this case" in reliance on the Court's ruling regarding Schmidt strains credulity. Dkt. No. 250 at 4. Woodway elected to pursue only those claims of the '580 patent the Court already found Samsara infringed. The logical takeway from the tone and substance of Woodway's argument is that those four claims are vulnerable to an invalidity challenge based on Schmidt, but that supports allowing the jury to review the merits of a full invalidity challenge. *See U.S. v. Glaxo Group Ltd.*, 410 U.S. 52, 69 (1973).

For all these reasons, and as set forth in their Motion, Plaintiffs respectfully request the Court grant their Motion for Reconsideration.

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Dated: May 29, 2018

**CERTIFICATION OF SERVICE**

I hereby certify that on May 29, 2018, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

*/s/ Rebecca F. Briggs*

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| CHAPCO, INC. AND SAMSARA FITNESS, LLC,<br>Plaintiffs,<br>v.<br>WOODWAY USA, INC.,<br>Defendant. | Civil Action No. 3-15-CV-1665(JCH)<br><br>June 8, 2018 |

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT AND INVALIDITY ON CLAIM 25 OF U.S. PATENT NO. 9,039,580**

Pursuant to Fed. R. Civ. P. 56, Plaintiffs move for summary judgment of non-infringement of claim 25 of United States Patent No. 9,039,580 (the "'580 Patent"). Plaintiffs also move for summary judgment of invalidity on claim 25 of the '580 Patent.

In support of this Motion, Plaintiffs rely on the supporting Memorandum of Law, Plaintiffs' Local Rule 56(a)1 Statement, and supporting Exhibits.

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**CERTIFICATION OF SERVICE**

I hereby certify that on June 8, 2018, a copy of the foregoing Plaintiffs' Motion for Summary Judgment was filed through the ECF system on all counsel of record.

*/s/ Christine K. Bush*
Christine K. Bush

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

| | |
|---|---|
| CHAPCO, INC. AND SAMSARA FITNESS, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>WOODWAY USA, INC.,<br><br>Defendant. | Civil Action No. 3-15-CV-1665(JCH)<br><br>June 8, 2018 |

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT AND INVALIDITY ON CLAIM 25 OF U.S. PATENT NO. 9,039,580**

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## OVERVIEW AND SUMMARY OF RELIEF REQUESTED

Woodway USA, Inc. ("Woodway") alleges that the TrueForm Runner Generation III ("Gen III") infringes claim 25 of United States Patent No. 9,039,580 (the "'580 Patent"). Of the claims Woodway has asserted against Chapco Inc. ("Chapco") and Samsara Fitness, LLC ("Samsara"), claim 25 is the only method claim. Chapco and Samsara are entitled to summary judgment on claim 25 for at least two reasons.

First, Chapco and Samsara are entitled to summary judgment of non-infringement because neither performs all steps of claim 25, which is required for direct infringement of a method claim, the only theory of liability pled. Even assuming the Court permits Woodway to advance a theory of joint infringement – not pled in the Counterclaims or explained by Woodway's liability expert – Plaintiffs still are entitled to summary judgment because Woodway cannot meet the requirements of the Federal Circuit test. That should end the analysis.

Plaintiffs also are entitled to summary judgment of invalidity. Claim 25 is a broad claim, and the breadth of the claim makes it vulnerable to invalidity challenges. Although the Court did not reach the invalidity argument specific to claim 25 in the last round of summary judgment briefing, Plaintiffs contend that the Court should do so now, and enter summary judgment in their favor on that claim.

## ARGUMENT

### A. Local Rule 56(a)(1) Statement.

Pursuant to Local Rule 56(a)1, Plaintiffs file herewith the Local Rule 56(a)1 Statement of Undisputed Material Facts in support of Plaintiffs' Motion for Summary Judgment.

### B. Legal Standard for Summary Judgment Motions.

Summary judgment is appropriate when "there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Facts are only genuinely disputed when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material under Rule 56 if it "might affect the outcome of the suit under the governing law." *Id.* The party with the burden of proof must come forth with admissible evidence that creates a genuine dispute of material fact for a jury. *See id.* A party moving for summary judgment meets its burden by pointing out to the district court "that there is an absence of evidence to support the nonmoving party's case." *Exigent Tech., Inc. v. Atrana Solutions, Inc.*, 442 F.3d 1301, 1308 (Fed. Cir. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "Summary judgment is appropriate in a patent case, as in other cases[.]" *Nike Inc. v. Wolverine World Wide, Inc.*, 43 F.3d 644, 646 (Fed. Cir. 1994) (citations omitted).

**C. The Former Allegations Regarding Claim 25.**

The '580 Patent includes four independent claims, one of which is claim 25. UF ¶ 1.[1] On July 18, 2016, Woodway served Supplemental Preliminary Infringement Contentions. UF ¶ 2. In Appendix B to the Supplemental Preliminary Infringement Contentions, Woodway claimed that the Original and Redesigned TrueForm Runner treadmills both infringe claim 25. *Id.*

On July 25, 2016, Woodway served an Answer and Counterclaims (Dkt. No. 54). There, Woodway claims that Chapco "has manufactured and continues to manufacture" the alleged infringing products. (Dkt. No. 54, at p. 7, ¶ 2.) Woodway alleges that Samsara "has sold, offered for sale, and used and continues to sell, offer for sale, and use the" alleged infringing products. (Dkt. No. 54, at p. 7, ¶ 3.)

On April 13, 2017, Woodway filed Supplemental Counterclaims. (Dkt. No. 85.) There,

[1] References to paragraphs in Plaintiffs Local Rule 56(a)1 Statement of Undisputed Materials Facts are abbreviated as "UF" herein.

Woodway alleges that "Chapco and Samsara made, sold, offered for sale, and/or used and are continuing to make, sell, offer for sale and/or use" manual treadmills that allegedly infringe claims 1, 4-6, 10-14, 18-20 and 25 of the '580 Patent. (Dkt. No. 85, at pp. 4-5, ¶ 23.)

Plaintiffs timely moved for summary judgment of non-infringement. In its Opposition to Plaintiffs' Motion for Summary Judgment, Woodway argued that "there is sufficient evidence to create a genuine dispute of material fact whether **Brian Weinstein** is the alter ego of Chapco, such that his actions in directing the companies' infringing acts can be fairly imputed to both Plaintiffs." (Dkt. No. 105, at 17) (filed under seal) (emphasis added).

In the Ruling on the parties' motions for summary judgment, the Court noted that "Woodway argues that both Chapco and Samsara are the alter-ego of Brian Weinstein." (Dkt. No. 144, at 10.) The Court concluded that "there is a genuine issue of fact as to whether Chapco and Samsara are both alter-egos of Weinstein." (*Id.* at 12.) Mr. Weinstein is not, and has never been, a party to this litigation.

**D. The Current Allegation Regarding Gen III.**

On April 11, 2018, Dr. Blair inspected the Gen III. UF ¶ 3. Woodway then served a second supplemental expert report relating to the Gen III (the "Supplemental Blair Report"). UF ¶ 3. In that Supplemental Report, Dr. Blair opines the Gen III infringes only claim 25 of the '580 Patent. UF ¶ 4. Claim 25 recites:

> A method, comprising:
>
> **[Element a] providing** a manually powered treadmill, the manually powered treadmill having a frame with a front end and rear end;
>
> **[Element b] providing** a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile;
> **[Element c] disposing** a running belt on the plurality of bearings of the

> first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails;
>
> **[Element d] permitting** movement of the running belt in a first direction; and
>
> **[Element e] substantially** preventing movement of the running belt in a second direction opposite the first direction.

UF ¶ 5 ('580 Patent, claim 25, emphasis and element annotations added).

On May 7, 2018, Plaintiffs' expert, Dr. Robert Giachetti, issued a report rebutting Woodway's allegations that the Gen III infringes claim 25 of the '580 Patent. UF ¶ 6.

**E. Chapco and Samsara Are Entitled to Summary Judgment of Non-Infringement.**

"[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States...infringes the patent." 35 U.S.C. § 271(a); *Lexmark Int'l, Inc. v. Impression Prods.*, Inc., 816 F.3d 721, 726 (Fed. Cir. 2016). Allegations of direct patent infringement require a two-step analysis. *See Grober v. Mako Prods., Inc.*, 686 F.3d 1335, 1344 (Fed. Cir. 2012). In the first step, the Court construes the asserted claim terms. *See id.* The second step compares the claim limitations to the accused device. *Planet Bingo, LLC v. GameTech Int'l, Inc.*, 472 F.3d 1338, 1343 (Fed. Cir. 2006). The patent holder bears the burden of proving infringement by a preponderance of the evidence. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1758 (2014); *Cephalon, Inc. v. Watson Pharms., Inc.*, 707 F.3d 1330, 1340 (Fed. Cir. 2013).

Infringement of a method claim requires that a single party perform every step of the claimed method. *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1378 (Fed. Cir. 2007). This is the "single entity rule" or "single actor rule."

Although the single entity rule requires that a single infringer perform every step of the claimed method, it does not require the infringer to do so personally. *Id.* at 1379-81. Instead, steps performed by one party may be attributed to another in certain circumstances. *Id.*

In *BMC*, the Federal Circuit held that attribution was appropriate when the infringer directed or controlled another party's performance. *Id.* In *Muniauction*, the Court limited that direction or control to "situations where the law would traditionally hold the accused direct infringer vicariously liable for the acts committed by another party." *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1330 (Fed. Cir. 2008).

In *Akamai V*, the Federal Circuit affirmed the *BMC* "single-actor rule," writing that, "[d]irect infringement under § 271(a) occurs where all steps of a claimed method are performed by or attributable to a single entity." *See Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) ("Akamai V") (citing *BMC*, 498 F.3d at 1379-81). The Court next observed that, "[w]here more than one actor is involved in practicing the steps, a court must determine whether the acts of one are attributable to the other such that a single entity is responsible for the infringement." *Id.* The Court then held that an entity will be held "responsible for others' performance of method steps [under § 271(a)] in two sets of circumstances: (1) where that entity directs or controls others' performance, and (2) where the actors form a joint enterprise." *Id.* at 1022.

For the first part of that test (control), the Court concluded that liability under § 271(a) could be found when an alleged infringer "acts through an agent (applying traditional agency principles) or contracts with another to perform one or more steps of a claimed method." *Id.* at 1023 (citing *BMC*, 498 F.3d at 1380-81). Alternatively, "liability under § 271(a) can also be found when an alleged infringer conditions participation in an activity or receipt of a benefit

upon performance of a step or steps of a patented method" and "establishes the manner or timing of that performance." *Id.* at 1023 (citing *Metro-Goldwyn–Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)).

For the joint enterprise route to liability, the Federal Circuit provided a four-element test:

1. an agreement, express or implied, among the members of the group [i.e., the defendant and the third party];
2. a common purpose to be carried out by the group;
3. a community of pecuniary interest in that purpose, among the members; and
4. an equal right to voice in the direction of the enterprise, which gives an equal right of control.

*Id.* at 1023 (citing Restatement (Second) of Torts § 491 cmt. c (Am. Law Inst. 1965)). Federal Circuit case law emphasizes "that the context of the claims and conduct in a particular case will inform whether attribution is proper under [Akamai's] two-prong test." *Travel Sentry, Inc. v. Tropp*, 877 F.3d 1370, 1380 (Fed. Cir. 2017).

In short, to prevail on its claim of direct infringement of a method claim,[2] Woodway must show either that a single actor (Chapco or Samsara) practices every step of the claimed method, or attribution. *See Akamai*, 797 F.3d at 1022; *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1317 (Fed. Cir. 2009); *Aristocrat Tech. Australia Pty Ltd. v. International Game Technology*, 709 F.3d 1348, 1353 (Fed. Cir. 2013) ("direct infringement requires a single party to perform every step of a claimed method"). Plaintiffs are entitled to summary judgment of non-infringement by demonstrating "an absence of evidence to support [Woodway's] case." *Exigent*, 442 F.3d at 1308.

[2] Woodway did not articulate a basis for indirect infringement claims in its infringement contentions or expert report, so Woodway's claims for indirect infringement were dismissed. (Dkt. No. 144 at 9-10.)

**1. No single actor: Woodway Fails to Prove that Chapco Performs all Steps of the Method Claim.**

Based on Dr. Blair's April 2018 inspection, Woodway, through Dr. Blair, asserts that Gen III literally infringes claim 25 of the '580 Patent.[3] UF ¶ 7. But the Supplemental Blair Report does not differentiate between Plaintiffs, nor does Dr. Blair identify which of Chapco or Samsara allegedly performs each step. UF ¶ 8. Neither Chapco nor Samsara performs each step of the claimed method, so there is no liability under the single entity rule.

**a. Chapco Does Not Perform at Least Element [a] Because Chapco Does not Meet the Step of "Providing a Manually Powered Treadmill . . ."**

Element [a] of claim 25 requires that the accused infringer perform the step of "providing a manually powered treadmill." UF ¶ 5. Defying common drafting practices, this claim requires "providing a manually powered treadmill" as a separate limitation. The Federal Circuit has construed "providing" to mean "furnishing, supplying, making available or preparing." *Meyer Intellectual Props. Ltd. v. Bodum, Inc.*, 690 F.3d 1354, 1370 (Fed. Cir. 2012) . Accordingly, to meet this limitation, Chapco must provide, i.e. furnish, supply, make available or prepare, a "manually powered treadmill."

During discovery, Plaintiffs produced the "Samsara Timed Build," which reflects the status of the subassembly (which Woodway identifies as the "bearing rail") when Chapco delivers it to Samsara's facility at Inspiration Lane. UF ¶ 10. As is apparent from the first image of the timed built, the subassembly lacks a running belt and/or bearings:

[3] Woodway no longer asserts claim 25 against the two earlier versions of the TrueForm Runner. Dkt. No. 244.

Start at 7:15
Inner rails aluminum tubes sub assy
7:25 rail done



Woodway has no evidence that Chapco furnishes or supplies the running belt for Gen III or the components for the running belt. Chapco does not. UF ¶ 11. Nor does Chapco assemble the running belt. UF ¶ 12.

Without a running belt, there is no manually powered treadmill, which is the first limitation of claim 25. Accordingly, because Chapco does not "provid[e] a manually powered treadmill," Chapco does not perform all steps of claim 25, so it is not liable for infringement of claim 25 of the '580 Patent.

**b. Element [b] – Chapco Also Does not "Provid[e] a First Bearing Rail . . . Comprising a Plurality of Bearings . . ."**

Chapco also does not furnish, supply, make available or prepare the bearings on the part that Woodway identifies as the bearing rail. UF ¶ 13. Instead, the "Timed Build" document reflects that the subassembly, which Dr. Blair identifies as the bearing rail, arrives at Samsara without a plurality of bearings. UF ¶ 14. Thus, even under Dr. Blair's analysis, Chapco does not provide "a first bearing rail ... comprising a plurality of bearings." Because it does not perform at least one step of a method claim, Chapco is not liable for infringement of claim 25 of the '580 Patent.

**c. Elements [d] and [e] – Chapco Also Does not "Substantially Prevent[] Movement of the Running Belt in a First Direction" or Permit[] Movement of the Running Belt in a First Direction."**

Dr. Blair combines his analysis of elements [d] and [e], contending that the safety device "coupled" to the shaft is structured "to substantially prevent movement of the running belt [9] in a first direction and permit movement of the running belt [9] in a second direction that is opposite the first direction." UF ¶ 15. Claim 25 does not reference a safety device. But even crediting Dr. Blair's analysis that installation of a safety device meets the limitation of "permitting movement of the running belt," Chapco does not install (or couple) a safety device, and it has no role in the running belt. UF ¶ 16. Because it does not perform at least one step of a method claim, Chapco is not liable for infringement of claim 25 of the '580 Patent.

**2. No Single Actor: Woodway Fails to Prove that Either Chapco or Samsara Performs Element [c] of the Method Claim.**

Element [c] recites "disposing a running belt **on** the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running

surface corresponding to the curved top profile of the first and second bearing rails."[4] Dr. Blair opines that Gen III meets the limitation because, according to Dr. Blair, "[t]he assembly . . . includes providing a running belt and locating it **above** the bearing rails[.]" UF ¶ 18 (emphasis added). Dr. Blair's opinion equates "disposing on" with an "assembly" that includes "providing a running belt," and "locating [the belt] **above** (not on) the bearing rails."

As set forth above, Chapco does not "locate" a running belt on Gen III. UF ¶ 19. Instead, when Chapco delivers the subassembly to Samsara's facility at Inspiration Lane, it has no running belt and no bearings. UF ¶¶ 10, 11, 14. Chapco has no role in assembling the running belt or placing it on the treadmill, so Chapco does not perform this step of claim 25.

Woodway does not prove that Samsara meets the limitation either. Specifically, the claim limitation recites that the belt is disposed "on" the plurality of bearings. Ignoring that claim language, Dr. Blair opines that locating the belt "above" the rails meets the limitation. Dr. Blair does not explain his basis for substituting "on" with "above," nor does he cite any evidence in support of the substitution.

The intrinsic evidence reflects that the distinction between "on" and "above" is meaningful. Claim 1 recites a running belt "supported by" a first and second bearing rail. UF ¶ 5. Because of the inclusion of the word "support," even though the running belt of the accused Redesigned TrueForm is not directly "on," i.e. touching, the plurality of bearings but, instead, supported by the bearings with an endless belt in between the belt and bearings, Dr. Blair opined that the Redesigned TrueForm infringed claim 1. According to Dr. Blair:

> The plain and ordinary meaning of "support" does not require that components must be directly or physically connected or touching. "Support" may be provided directly, may be provided indirectly via an intermediary component or series of components, may bear some of the

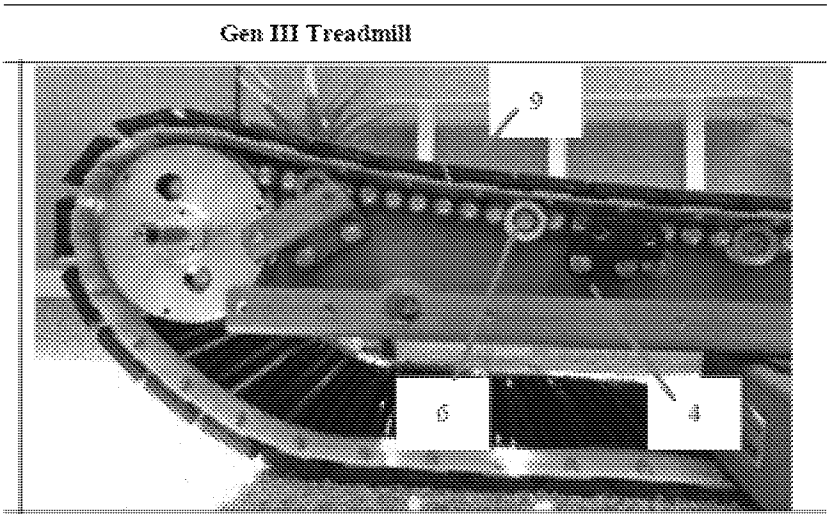
[4] The Court determined that no further construction was needed for "running belt." Dkt. No. 76, at 29.

> weight of another component or a series of components, and/or may bear all of the weight of another component or series of components.

UF ¶ 20.

"It is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude.'" *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (quoting *Innova/Pure Water Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). Claim 25 does not include the term "supported by;" it recites "disposing on." The plain and ordinary meaning of "disposing" a running belt "on" is locating the belt on the bearings so that they touch without intermediary components. To hold otherwise would be to equate "supported by" with "disposing on," which is not permitted under tenets of claim construction where courts "presume that the use … of different terms in the claims connotes different meanings." *CAE Screenplates, Inc. v. Heinrich Fiedler GmbH & Co. KG*, 224 F.3d 1308, 1317 (Fed. Cir. 2000). Crediting Dr. Blair's definition of "support" for the purposes of this motion, "disposing on" cannot mean indirect support, or the patentee would have used "supported by."

Here, the Gen III treadmill running belt is not directly on the plurality of bearings: it does not directly touch them but instead it is separated by the endless belt, as illustrated by the images included in Exhibit A to the Supplemental Blair Report:




UF ¶ 21. As a result, Samsara does not dispose a running belt on the plurality of bearings, so it does not perform at least one step of claim 25, and it does not infringe that claim.

**3. No Joint Infringement: Woodway Cannot Show Joint Infringement in Light of its Arguments Earlier in the Case and the Undisputed Facts.**

If Woodway attempts to argue joint infringement to backstop its case, that, too, should be rejected. A plaintiff proceeding on a joint infringement theory must show that the "acts of one party are attributable to the other such that a single entity is responsible for the infringement." *Lyda v. CBS Corp.*, 838 F.3d 1331, 1338 (Fed. Cir. 2016). That showing can be made by two possible routes: either (1) the alleged infringer directs or controls others performance of the necessary steps, or (2) the alleged infringer is engaged in a "joint enterprise" with others to perform the steps. *Id.* at 1339. An alleged infringer may direct or control the behavior of third parties through an agency relationship or through "contracts with another to perform" steps of the claimed method. *Akamai V*, 797 F.3d at 1023.

Under either the agency or joint enterprise theories of infringement, Woodway would have to show that Chapco exercises a degree of control over Samsara, the other entity allegedly involved in the infringement: for an agency theory, the authority of a principal, or for a joint

enterprise, an equal voice in the direction of the enterprise. *See Akamai V*, 797 F.3d at 1023. But here, there are no allegations anywhere that Chapco exercised control over Samsara or that Chapco had "an equal voice" in the direction of Samsara. In fact, Woodway successfully argued otherwise in the context of the earlier briefing on summary judgment. Accordingly, and as set forth more fully below, Woodway cannot show that either Chapco or Samsara is liable for direct infringement on either joint infringement theory.

**a. Woodway Waived the Direction or Control Argument.**

An alleged infringer may direct or control the behavior of third parties through a traditional agency relationship or through "contracts with another to perform" steps of the claimed method. *Akamai V*, 797 F.3d at 1023. Based on the allegations in its Supplemental Counterclaim and the positions it advocated in the earlier round of summary judgment, Woodway cannot advance the direction or control argument to save its infringement claim.

Here, Woodway never alleged in its Supplemental Counterclaim or anywhere in its Infringement Contentions or expert reports that Chapco exercises control over Samsara, or vice versa. To the contrary, Woodway successfully asserted that Brian Weinstein, not a party to this case, controls both. (*See, e.g.*, Dkt. No. 102, at pp. 17-18) (Woodway arguing that Mr. Weinstein is the alter ego of Chapco because of Mr. Weinstein's alleged "domination" and that Samsara has little business discretion outside the will of its managing member, Mr. Weinstein). Woodway's selection of Mr. Weinstein for that "control" role precludes Woodway from now claiming that one of the corporate entities controls the other.[5]

The absence of any reference to a theory of joint infringement in the Supplemental Blair Report is particularly telling. There, Dr. Blair repeatedly emphasizes that the assembly of a

[5] Plaintiffs are separate corporate entities and each denies that the other controls it. For the purposes of this argument, however, Woodway has conceded the point based on the arguments it made earlier.

treadmill is enough – under his analysis – to meet the limitations of this method claim. UF ¶ 17. No mention of direction or control.

The fact that Chapco supplies the subassembly to Samsara has no bearing on whether Chapco, in fact, exercised control over Samsara's use of that part of a treadmill. Woodway has never alleged that Chapco instructed Samsara on how to use the treadmill parts or that Chapco (not a member of Samsara)[6] has an equal voice in Samsara's use of the treadmill parts.

Woodway also closed off the second possible avenue for relief when it did not allege a principal-agent relationship between the corporate entities. In fact, not only did Woodway fail to allege agency, but it argues that "Brian Weinstein controls both Chapco and Samsara," which is not an agency relationship between the corporate entities. (Dkt. No. 102, at p. 16.) That position cannot be squared with an agency theory involving just the corporate entities.

**b. Woodway Never Pled or Proved a Joint Enterprise.**

To pursue a joint enterprise theory, the patent holder must allege facts sufficient to substantiate four elements: "(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 491 cmt. c (AM. LAW. INST. 1979)).

Nothing in Woodway's Supplemental Counterclaims or its Infringement Contentions alleges infringement under the joint enterprise theory. Woodway has never claimed in any of those documents that Chapco had an "agreement" with any group; that there was a common purpose to be carried out by the "group;" that there was a common pecuniary purpose among the members of the group; and/or that Chapco had an "equal" right to a voice in the direction of the

[6] UF ¶ 22.

enterprise/Samsara. Having failed to identify this theory of liability, Woodway is precluded from offering it now.

**F. Plaintiffs Are Entitled to Summary Judgment of Invalidity.**

The purpose of summary judgment is to "narrow the issues for trial[.]" *Graves v. Chubb & Son, Inc.*, No. 3:12–CV–568 (JCH), 2014 WL 1289464, at *9 n.3 (D. Conn. Mar. 31, 2014) (citations omitted). Not only is a determination that claim 25 is invalid appropriate as a matter of law, but a ruling on this issue would limit the jury trial because there would be no need for the jury to determine liability or damages on Gen III.[7]

Although the parties had an earlier round of briefing on summary judgment, because of the claims Woodway was asserting at the time, the Court did not reach all of the invalidity references specific to claim 25. Since that briefing and hearing last year, the landscape of this case has changed. Now, Woodway asserts only claim 25 solely with respect to the Gen III, and Woodway has altered the basis for its infringement allegation of that method claim. Even if Woodway argues that the Court already fully considered invalidity arguments relating to claim 25 as asserted against the Gen III, which it has not, that does not bar consideration now because the Court has discretion to revise any ruling before entry of judgment. *Rezzonico v. H&R Block, Inc.*, 182 F.3d 144, 148149 (2d Cir. 1999) (quoting Fed. R. Civ. P. 54(b)).

**G. Claim 25 of the '580 Patent Is Invalid as Obvious Under 35 U.S.C. § 103.**

A patent is obvious "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter

[7] This is not to say there would be no mention of Gen III. Evidence regarding Gen III is relevant to Woodway's allegations of willful infringement as well as to establish an end point for damages arising from infringement by the earlier versions of the TrueForm Runner, should the jury not find claims 1, 6, 19, and 20 invalid.

pertains." 35 U.S.C. § 103(a); *DSS Tech. Mgmt., Inc. v. Apple Inc.*, 885 F.3d 1367, 1375 (Fed. Cir. 2018); *InTouch Techs., Inc. v. VGO Commc'ns, Inc.*, 751 F.3d 1327, 1347 (Fed. Cir. 2014). Although the ultimate determination of obviousness under Section 103 is a question of law, it is based on several underlying factual findings, including: (1) the scope and content of the prior art; (2) the scope of the claimed invention; (3) the level of ordinary skill in the pertinent art; (4) the differences between the claimed invention and the prior art; (5) the existence of a reason to combine the prior art references; and (6) evidence of secondary considerations such as commercial success, long-felt need, and copying by others. *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966); *In re Kubin*, 561 F.3d 1351, 1355 (Fed. Cir. 2009). A court must consider all these factors prior to deciding the obviousness issue. *In re Cyclobenzaprine Hydrochloride Extended–Release Capsule Patent Litig.*, 676 F.3d 1063, 1076-77 (Fed. Cir. 2012). "[A] district court can properly grant, as a matter of law, a motion for summary judgment on patent invalidity when the factual inquiries into obviousness present no genuine issue of material facts." *Ryko Mfg. Co. v. Nu–Star, Inc.*, 950 F.2d 714, 716 (Fed. Cir. 1991).

Since *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007), district courts conducting an obviousness inquiry are to "take a more 'expansive and flexible approach' in determining whether a patented invention was obvious at the time it as made." *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1238 (Fed. Cir. 2010) (quoting *KSR*, 550 U.S. at 415). The Supreme Court has emphasized the role of the court's "common sense" in determining obviousness as "[r]igid preventative rules that deny factfinders recourse to common sense . . . are neither necessary under our case law nor consistent with it." *KSR*, 550 U.S. at 421. Accordingly, the scope of prior art is construed broadly and is not limited to prior art designed to solve the same problem as the claimed invention. *KSR*, 550 U.S. at 420; *Wyers*, 616 F.3d at 1238.

Common sense is typically invoked to provide a known motivation to combine. *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1361 (Fed. Cir. 2016). In *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, a pre-*KSR* case, the Federal Circuit held a patent obvious where "all claim limitations [were] found in a number of prior art references," 464 F.3d 1356, 1360 (Fed. Cir. 2007), and a person of ordinary skill in the art would have combined the references to achieve a "cheaper, faster, and more convenient" process. *Id.* at 1371 (quoting *Sandt Tech., Ltd. v. Resco Metal & Plastics Corp.*, 264 F.3d 1344, 1355 (Fed. Cir. 2001)). The Court stated that "an implicit motivation to combine exists not only when a suggestion may be gleaned from the prior art as a whole, but when the 'improvement' is technology-independent and the combination of references results in a product or process that is more desirable." *DyStar*, 464 F.3d at 1368.

In certain patent cases, expert testimony is not necessary where "the technology will be easily understandable without the need for expert explanatory testimony." *Perfect Web Techs. Inc. v. InfoUSA Inc.*, 587 F.3d 1324, 1329 (Fed. Cir. 2009) (listing cases) (addressing patent claim methods of managing bulk e-mail distribution).

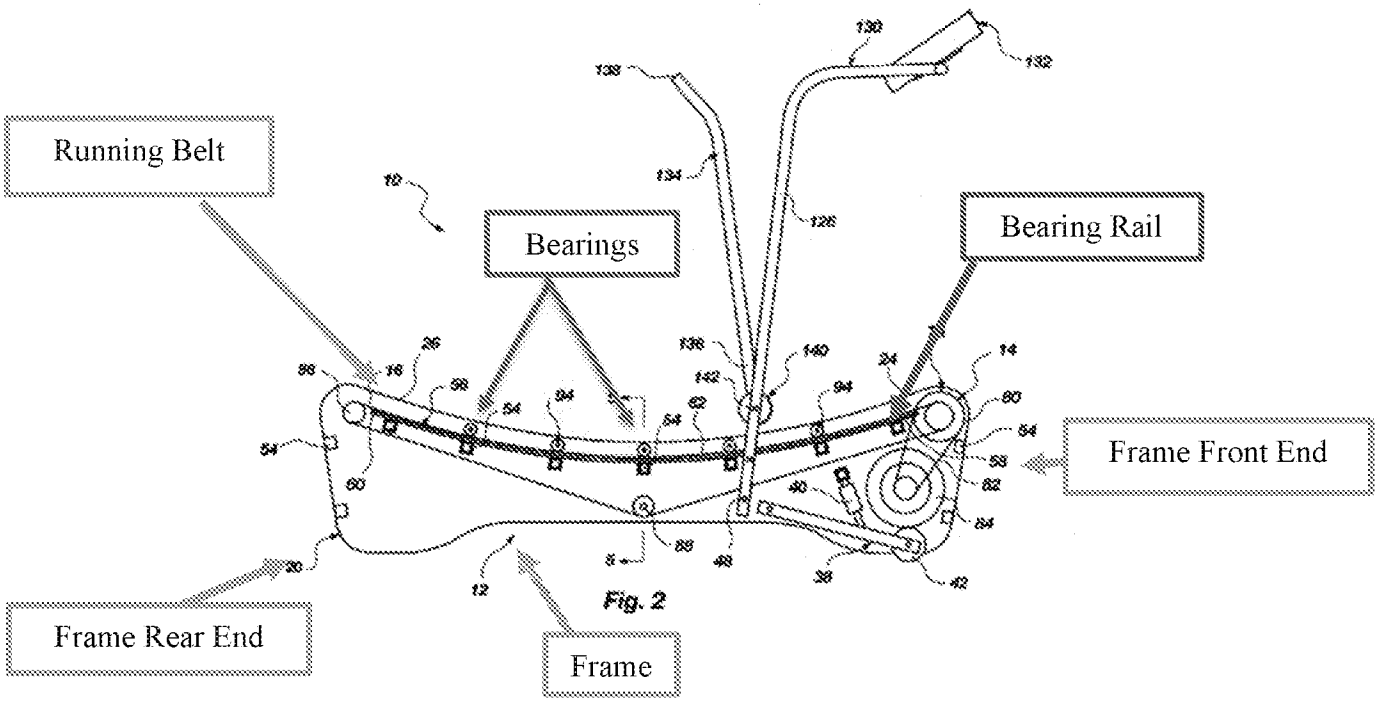
**1. The Scope and Content of the Prior Art.**

Woodway acknowledges that the basic concept of a manually powered, i.e. non-motorized, treadmill having a curved running surface was publicly available before Woodway's alleged conception of the invention claimed in the '580 Patent. UF ¶ 23.

Additionally, relevant pre-2009 standards define a treadmill as "training equipment with a unidirectional moving surface on which a walking or running activity can take place where the feet are free to leave the moving surface." UF ¶ 24 (emphasis added). The use of a device (like a ratchet and pawl) to ensure unidirectional movement of the belt was well-known before the priority date of the '580 Patent, consistent with the existing industry standards. UF ¶ 25.

**a. United States Patent No. 5,709,632 ("Socwell").**

On January 20, 1998, the U.S. Patent and Trademark Office ("PTO") issued U.S. Patent No. 5,709,632 to Socwell, entitled "Curved Deck Treadmill." UF ¶ 26. According to the Brief Summary of the Invention, the object of Socwell was to provide (i) a curved deck treadmill "which substantially prevents the user from falling off the back end of the treadmill;" (ii) a curved deck treadmill which is capable of providing meaningful walking, jogging, or running control in relation to the physiology of the user; and (iii) a curved deck treadmill which provides a continuous, smooth exercising motion. UF ¶ 27. Socwell includes Figure 2, below:




As is reflected in Figure 2 and described in the specification, Socwell includes: (1) a frame (part 12) with a front end and a rear end (parts 20, 22); (2) a first bearing rail and a second bearing rail (part 94) that comprise a plurality of bearings (part 98, Fig. 5); (3) the bearing rails extend longitudinally on the frame and define a curved top profile; and (4) a running belt (16) on the plurality of bearings of the bearing rails such that the running belt follows a top curved

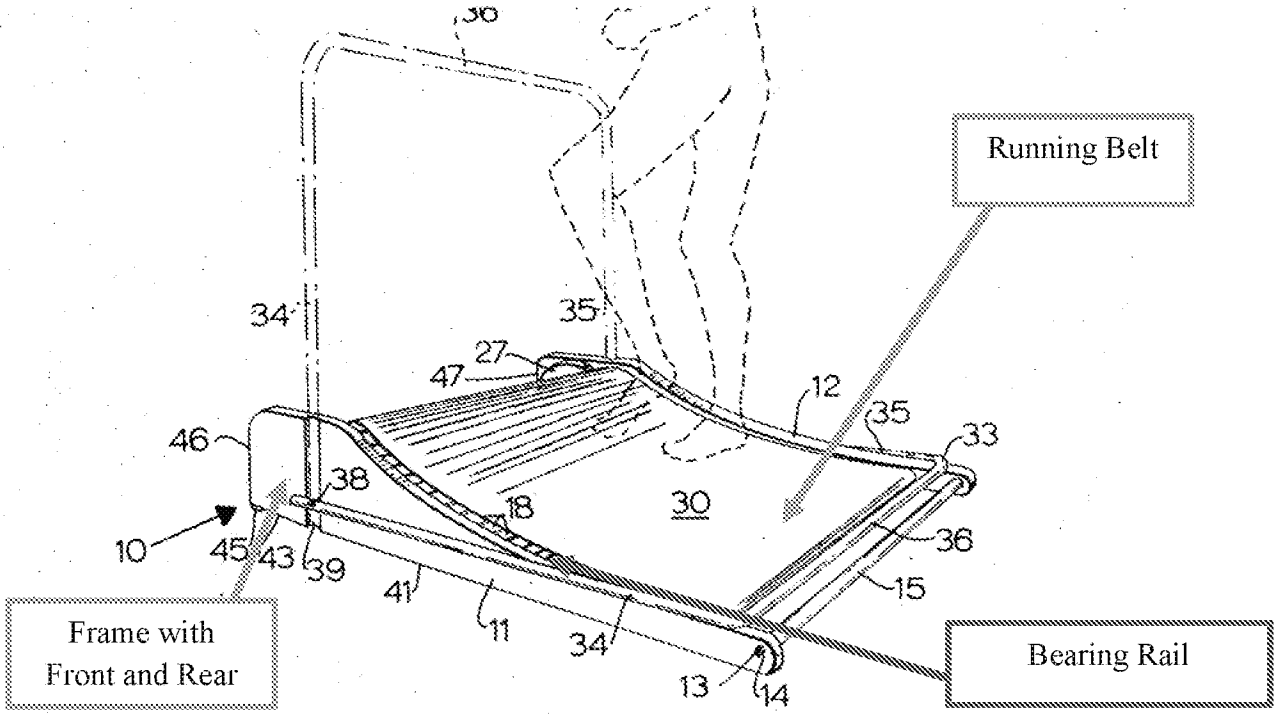
running surface corresponding to the curved top profile of the first and second bearing rails. An alternative embodiment of Socwell is not motorized. UF ¶ 28.

Dr. Blair acknowledged at deposition that Socwell "disclose[s] a running belt that follows the top curved running surface." UF ¶ 29. The only element of claim 25 that Dr. Blair opined was not disclosed in Socwell was a device permitting the running belt to move in only one rotational direction. UF ¶ 30.

Yet, Socwell expressly warns that "if the rollers … are so easily moveable, the user may potentially lose his equilibrium or balance and fall from the exercise treadmill resulting in possible injuries." UF ¶ 31. To address that unwanted movement, Socwell discloses the need for a method to prevent a user "from falling off the back of the treadmill." UF ¶ 32. Socwell teaches calibration of the rollers in relation to the belt to enable the user to safely walk, jog or run. UF ¶ 33.

**b. United States Patent No. 3,642,279 ("Cutter").**

On February 15, 1972, the PTO issued U.S. Patent No. 3,642,279 to Cutter, entitled "Treadmill Jogger." UF ¶ 34. Dr. Blair does not dispute that the treadmill in Cutter is manually powered and has a frame with a front and a rear end. UF ¶ 35. Cutter includes Figure 1, below:




Dr. Blair acknowledges that "Cutter discloses a treadmill (10) with a running belt (30) that has a curved surface proximate the front of the treadmill . . ." UF ¶ 36. Cutter discloses bearing rail structures with a plurality of "rollers (18) extend[ing] between the left side member (11) and the right side member (12)." UF ¶ 37. Dr. Blair attempted to distinguish the rollers of Cutter from the claimed bearings on the grounds that they are not "attached to the rail or connected to the rail" – i.e. rotatably coupled,[8] but claim 25 does not include that limitation. *See Artmatic USA Cosmetics v. Maybelline Co.*, No. 94-cv-1799, 1995 WL 151762, at *5 (E.D.N.Y. Mar. 30, 1995) (finding dispute not "genuine" to preclude summary judgment where plaintiff's expert opinion as contrary to a reasonable interpretation of the claim).

As is shown above and below, the first and second bearing rail structures with a plurality of bearings (or rollers) extend longitudinally on the frame and define a curved top profile. The

[8] UF ¶ 38.

running belt follows a top curved running surface corresponding to the curved top profile of the bearing rails, on either side of the apparatus. UF ¶ 39.

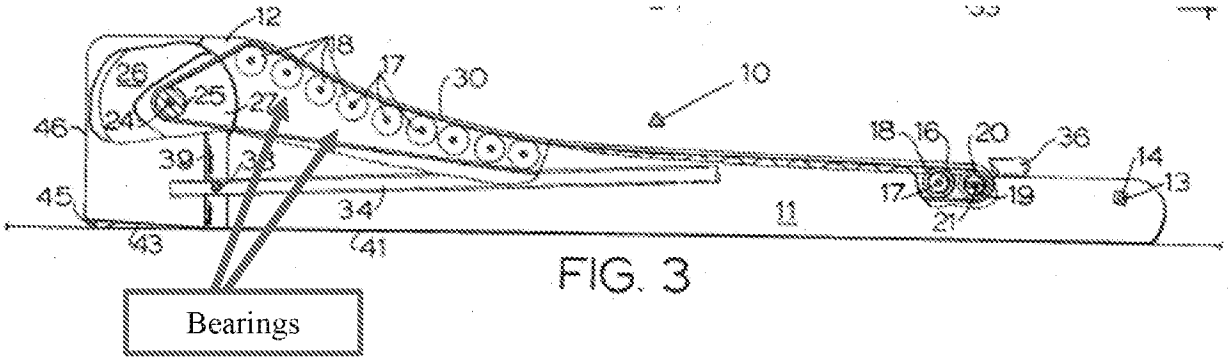



FIG. 3

Dr. Blair acknowledged that "Cutter does appear to recognize the need for a safety in a treadmill." UF ¶ 40. In fact, Cutter makes clear that existing exercisers are known to have a problem with "how to restrain the user from walking off or running off or falling off the end of the machine and possibly injuring himself." *Id.*

**c. United States Patent No. 3,637,206 ("Chickering").**

In 1972, U.S. Patent No. 3,637, 206 issued to Chickering for "Endless Belt Exerciser With Accelerating and Decelerating Tread Surfaces." UF ¶ 41. In Figure 1, Chickering discloses a manually powered treadmill with a curved running surface:

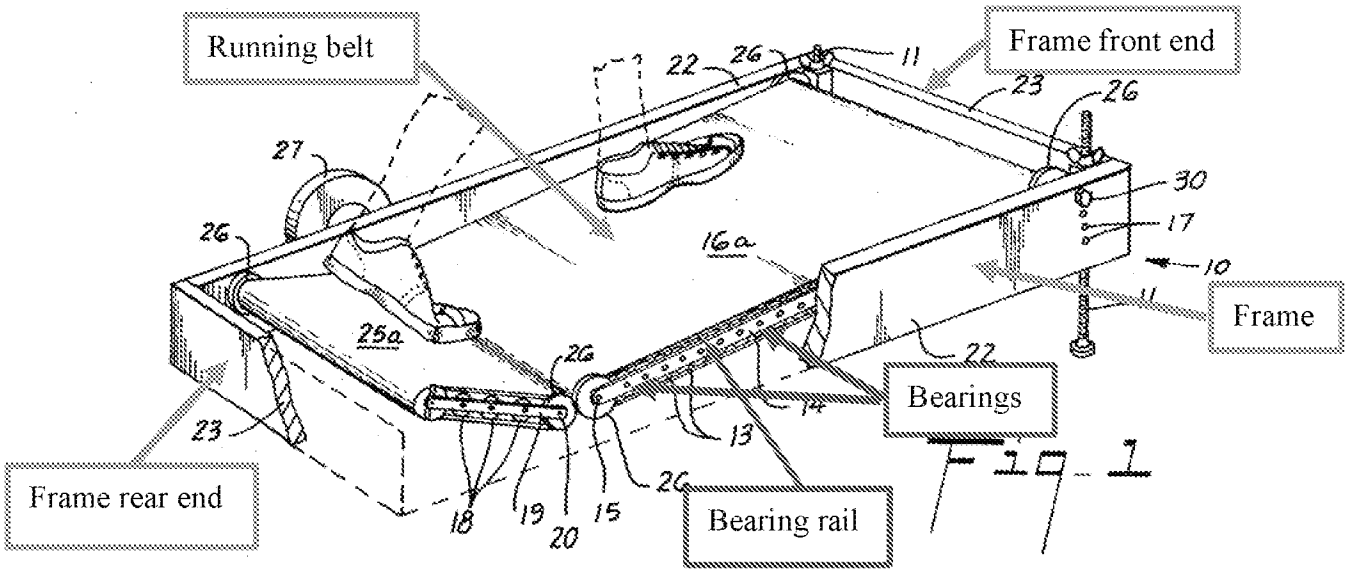



Fig. 1

As is reflected in Figures 1 and 3 and described in the specification, Chickering includes a frame (part 10) with a front end and a rear end. UF ¶ 42. Chickering includes a first bearing rail and a second bearing rail (part 14) that comprise a plurality of bearings (parts 13, 18) and the bearing rails extend longitudinally on the frame. UF ¶ 43. The Chickering bearing rails define a curved top profile, as evidenced below:

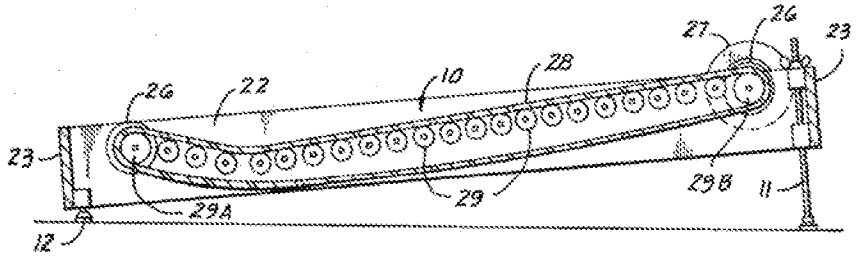


Fig. 3

Chickering also includes a running belt (28) on the plurality of bearings (13, 18) of the bearing rails such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails. UF ¶ 44.

In his Rebuttal Report, Dr. Blair acknowledged that Chickering:

> discloses a treadmill having a base where a single endless belt forms both an accelerating and a decelerating area. Rollers are provided in the base such that 'when the endless belt 28 is placed over the rollers, it follows their contour and provides a forward accelerating area and a rear decelerating area.

UF ¶ 45.

Dr. Blair also acknowledged that Chickering discloses the need for a safety device on a treadmill as follows:

> This invention relates to a new type of treadmill exercising device, and more particularly to an exercising device on which the user can simulate the acts of walking, jogging and running **without relying on handles, belts or other external supports for maintaining his balance**.

UF ¶ 46 (emphasis added). Chickering teaches that a person exercising on a treadmill "is likely to lose his balance because the frictionless surface offers no resistance to the movement of his feet, and he is therefore unable to obtain the leverage necessary for proper balance." UF ¶ 47.

**d. United States Patent No. 6,053,848 ("Eschenbach").**

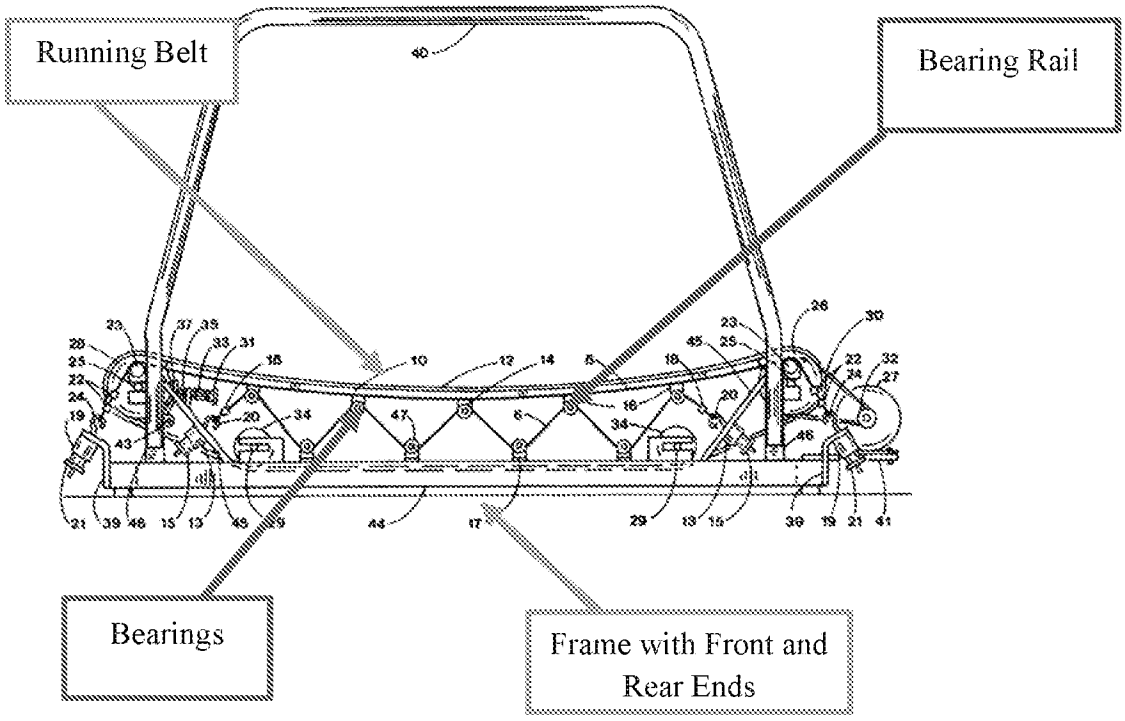
On April 25, 2000, the PTO issued U.S. Patent No. 6,053,848 to Eschenbach, entitled "Treadmill Deck Suspension." UF ¶ 48. In the Background of the Invention, Eschenbach explains that "[a] treadmill is an exercise device which permits walking or running by moving a continuous belt along the length of a chassis. The belt slides over a supporting deck with speed controlled by … load resistance, as in the case of a manual treadmill." UF ¶ 49.

Eschenbach cites the Socwell patent, explaining that Socwell "shows a curved deck having the center of curvature above the deck wherein the deck is rigidly supported with stationary cross members." UF ¶ 50. It then claims that the present (Eschenbach) invention is directed to:

> an exercise **treadmill** including a **frame**, first and second **roller assemblies rotatably mounted on the frame**, and an **endless belt trained about the first and second roller assemblies**. The exercise treadmill also includes a deck disposed between the frame and an upper run of the belt. The deck is semi-rigid, able to conform to a predetermined **curve...**

UF ¶ 51 (emphasis added.) Eschenbach teaches a non-motorized embodiment of a curved treadmill that can be self-powered. UF ¶ 52.

It has a frame with a front end and a rear end, bearing rails, and a running belt, as reflected in Figure 1, below:




At deposition, Dr. Blair conceded that Eschenbach teaches a curved surface. UF ¶ 53. Eschenbach also discloses first and second bearing rails (the "flexible linking" (part 8) with a plurality of bearings (described as idlers – part 34)). UF ¶ 54. The bearing rails (8) define a top curved profile and extend longitudinally. The running belt follows the top curved running surface corresponding to the curved top profile of the bearing rails.

In rebuttal, Dr. Blair argued that Eschenbach does not teach a running belt supported by the bearings because there is an intervening deck. UF ¶ 55. But claim 25 does not include a "support" limitation. If the Court credits Woodway's analysis in the Supplemental Blair Report, claim 25 requires only that the running belt is located "**above** the bearing rails." Though Plaintiffs disagree with that analysis, accepting Dr. Blair's analysis of claim 25, the running belt disclosed in Eschenbach is "on [*i.e.* above] the plurality of bearings of the first bearing rail and the second bearing rail."

**e. United States Patent No. 5,411,455 ("Haber").**

In 1995, U.S. Patent No. 5,411,455 issued to Haber for "User Propelled Treadmill." UF ¶ 56. In Figure 2, Haber shows a manually powered treadmill with a running belt (part 4) disposed about front and rear drums (parts 19 and 20). Haber includes a one-way clutch (part 22) of "conventional design" joined to the front drum. UF ¶ 57.

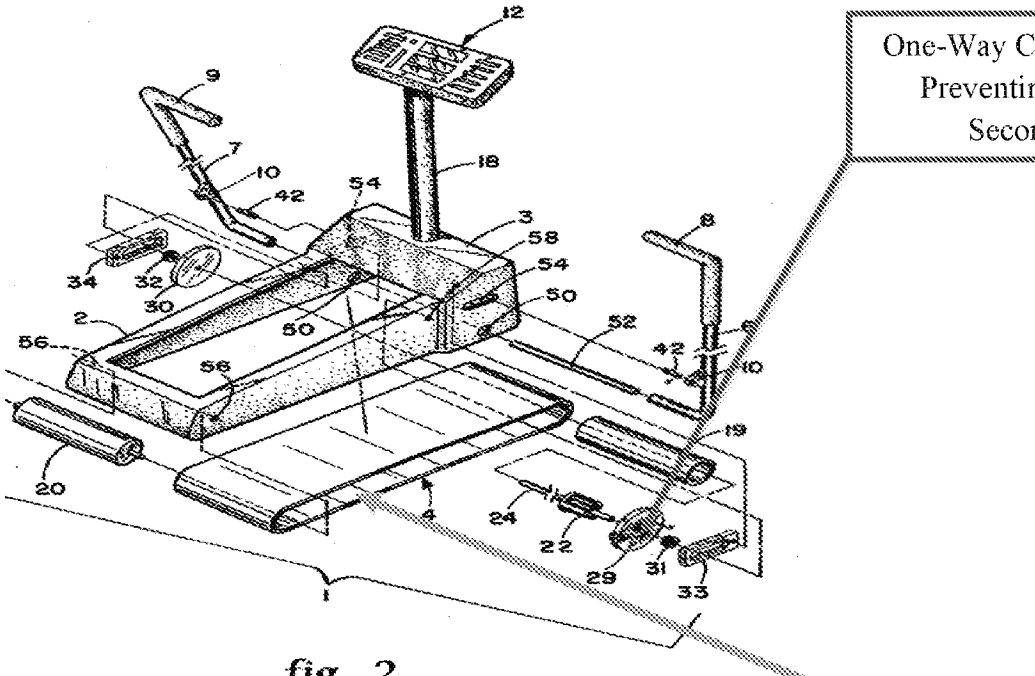



*fig. 2*

The one-way clutch substantially prevents movement of the belt in a second direction, as it forces the front drum and the tread of the running belt to rotate in the same direction as the one-way clutch. UF ¶ 58. At deposition, Dr. Blair acknowledged that the one-way clutch disclosed in Haber would affect the running belt. UF ¶ 59. In short, the one-way clutch of Haber will substantially prevent movement of the running belt of a manual treadmill in a second direction opposite the first.

**f. United States Patent No. 5,538,489 ("Magid").**

In 1996, the PTO issued U.S. Patent No. 5,538,489 to Magid, entitled "Walker Apparatus With Left And Right Foot Belts." UF ¶ 60. Magid teaches a non-motorized treadmill comprised of a continuous belt disposed around a front and rear shaft. UF ¶ 61. Magid discloses a support frame. UF ¶ 62. Magid includes Figure 8, below, which shows the rollers/bearings, and a first and second rail (24) that extend longitudinally on the frame. UF ¶ 63. Dr. Blair agrees that part 24 is a rail. UF ¶ 64. The running belts are on the plurality of bearings of the bearing rails such that the running belt follows the top profile of the first and second bearing rails.

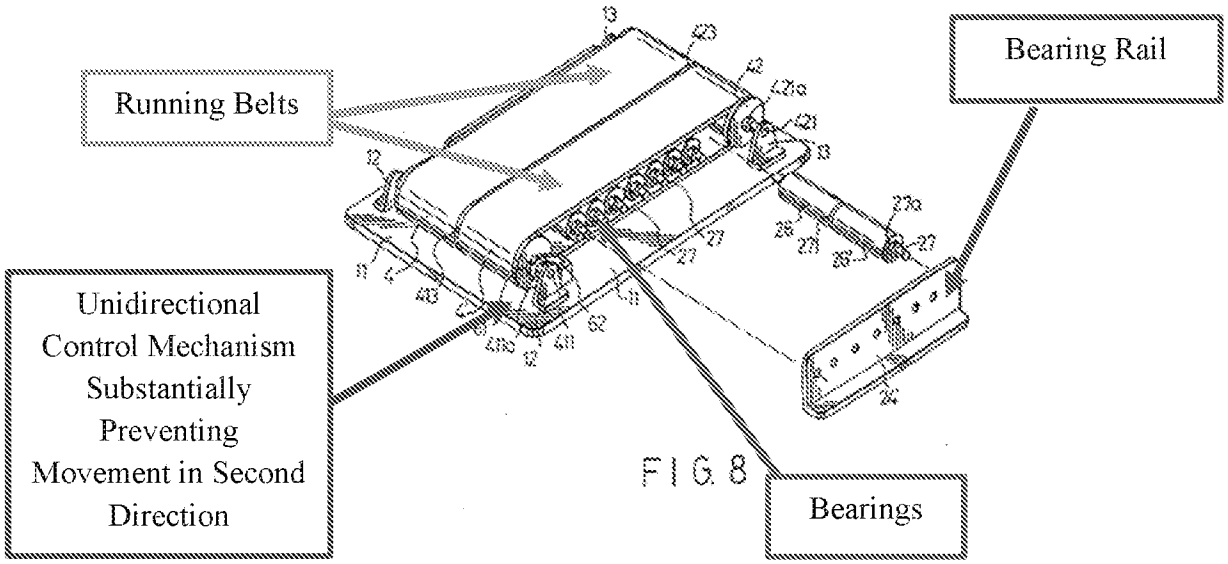



FIG. 8

In his rebuttal report, Dr. Blair takes an overly restrictive approach to the disclosed bearing rail, contending that the disclosure in Magid is a "roller," but that is not relevant to the analysis of claim 25. UF ¶ 65. Dr. Blair acknowledges that Magid discloses a "unidirectional control" mechanism designed to "permit only unidirectional movement of the left and right foot belts." UF ¶ 66. This mechanism "includes a pair of ratchet gears (61) attached to outer ends of the front rollers (41) . . . thereby preventing bidirectional movement of the foot belts." UF ¶ 67. Magid's ratchet and pawl "unidirectional control mechanism" restricts the treadmill belts to movement in a single direction of travel. UF ¶ 68.

**2. The Differences between Claim 25 and the Prior Art: Woodway Claims the Inventive Concept is a Device to Ensure Unidirectional Movement of the Belt.**

When asked to identify the patented invention, Douglas Bayerlein, a named inventor, identified a timing belt used to synchronize shafts, a one-way safety bearing, and a size variation between front and rear pulleys. UF ¶ 69. Claim 25 does not include limitations drawn to a timing belt or pulleys. Instead, claim 25 recites a method "to substantially prevent movement of the running belt in a first direction and permit movement of the running belt in a second direction that is opposite the first direction."

As taught in the specification of the '580 Patent, the running belt is generally responsive to the weight of the user mounting, dismounting and running on the treadmill. UF ¶ 70. If a user were to mount a treadmill by placing her weight bearing foot at a location near the back, the running belt might move in the opposite direction and cause the user to lose her footing. UF ¶ 71. Dr. Blair acknowledged that when a user steps on the rear of a treadmill without a unidirectional safety device, the user's weight may cause the belt to move in the unintended direction which would be immediately obvious to the user. UF ¶ 72.

The specification of the '580 Patent identifies a number of pre-existing devices available to prevent unwanted rotation of a running belt. UF ¶ 73. Beyond numerous types of one-way bearing assemblies, "[o]ther safety devices" included "cam locking systems," taper locks," and "band brake system with a lever." *Id.* Additionally, the Occupational Health and Safety Administration identifies standard mechanical power transmission elements, all of which function to prevent unwanted rotation (including prag clutches, ratchets and pawls), and all of which are interchangeable as a design choice. UF ¶ 74.

During prosecution of the application for the '169 Patent, which is the parent of the '580 Patent, the Examiner rejected pending claims under 35 U.S.C. § 103(a) as obvious over Pasqualin in view of Cutter and further in view of Magid. UF ¶¶ 75, 76. In the Office Action, the Examiner wrote that "Magid teaches a human-powered treadmill comprising a one-way bearing assembly [] mounted to the front shaft (by way of the belt) to provide unidirectional movement of the belt." UF ¶ 77. The Examiner went on:

> It would have been obvious to one of ordinary skill in the art before the effective filing date of the claimed invention to modify Pasqualin/Cuttter's treadmill with Magid's unidirectional bearing assembly **in order to prevent the user from accidentally propelling the belt in the wrong direction**.

UF ¶ 78 (emphasis added.) Woodway did not challenge that it would have been obvious to one of ordinary skill in the art that there was a need to prevent the user from accidentally propelling the belt in the wrong direction. Instead, Woodway overcame that objection by advancing a declaration from another named inventor, Nicholas Oblamski, and arguing that the one-way bearing assembly on a rear shaft was distinguishable from, and preferable to, the front shaft location disclosed in Magid. UF ¶ 79. Claim 25 does not specify a safety device or its location; it claims only a method that "substantially" prevents movement of the running belt in a second direction opposite the first direction. UF ¶ 5.

**a. Element [a] a manually powered treadmill with a frame with a front and rear end.**

As set forth *supra*, all six prior art references (Socwell, Cutter, Chickering, Eschenbach Haber, and Magid) disclose a manually powered treadmill with a frame with a front and rear end. Although the non-motorized version was, at times, an alternative embodiment, it nevertheless is taught in each prior art reference identified.

**b. Element [b] a first bearing rail and a second bearing rail, comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile.**

As set forth *supra*, all six prior art references (Socwell, Cutter, Chickering, Eschenbach Haber, and Magid) disclose a first bearing rail and a second bearing rail, comprising a plurality of bearings and extending longitudinally on the frame. Socwell, Cutter, Chickering and Eschenbach all teach that the bearing rails define a curved top profile.

**c. Element [c] disposing a running belt on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails.**

As set forth *supra*, all six prior art references (Socwell, Cutter, Chickering, Eschenbach Haber, and Magid) disclose a running belt. Crediting Woodway's construction of "disposing on," all six prior art references also teach disposing a running belt on the plurality of bearings of the bearing rails. Socwell, Cutter, Chickering and Eschenbach all teach that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails.

**d. Element [d] permitting movement of the running belt in a first direction.**

As set forth *supra*, all six prior art references (Socwell, Cutter, Chickering, Eschenbach Haber, and Magid) disclose a running belt that moves in a first direction, which is consistent with

treadmills generally.

**e. Element [e] substantially preventing movement of the running belt in a second direction opposite the first direction.**

As set forth *supra*, industry standards effective prior to the priority date require that treadmills be unidirectional. Socwell, Cutter, Chickering, Haber and Magid disclose the need for a safety device on a treadmill. OSHA identifies a number of available mechanical devices to ensure unidirectional movement of a belt. Haber and Magid each disclose specific devices to ensure unidirectional movement of a treadmill belt.

**3. Person Having Ordinary Skill in the Art.**

Although there exists a dispute concerning the level of ordinary skill in the art,[9] for the purposes of this Motion, Plaintiffs apply Dr. Blair's definition of a POSITA, i.e. a "person with a bachelor degree in mechanical engineering or at least two years of experience in the treadmill industry, including experience and knowledge of the design, construction, testing, and operation of the manual treadmill." *Id.*

**4. Motivation to Combine References.**

"The ultimate judgment of obviousness is a legal determination" such that expert testimony concerning motivation to combine may be unnecessary and, even if present, will not necessarily create a genuine issue of material fact. *KSR Int'l*, 550 U.S. at 427; *Wyers*, 616 F.3d at 1239-40. In appropriate cases, like this one, "the legal determination of obviousness may include recourse to logic, judgment, and common sense in lieu of expert testimony." *Wyers*, 616 F.3d at 1239-40 (citing *Perfect Web Techs. Inc.*, 587 F.3d at 1330; *Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*, 555 F.3d 984, 993 (Fed. Cir. 2009); *Sundance, Inc. v. DeMonte Fabricating, Ltd.*, 550 F.3d 1356, 1366-67 (Fed. Cir. 2008)). Indeed, "the ultimate

[9] *See* Dkt. No. 144 at 37-38.

inference as to the existence of a motivation to combine references may boil down to a question of 'common sense,' appropriate for resolution on summary judgment or JMOL." *Id.* at 1240 (citing *Perfect Web Techs.*, 587 F.3d at 1330).

To support a finding of invalidity, there must have existed a reason to combine the prior art references in a manner as to reach the patented design at the time of invention. *Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568, 1573 (Fed. Cir. 1996). This "reason to combine" can be shown by identifying some teaching, suggestion, or motivation in the prior art to combine or modify the art in the manner identified in the patent claims. *KSR*, 550 U.S. at 418-19; *Pro-Mold & Tool Co.*, 75 F.3d at 1573 (Fed. Cir. 1996) (reason or suggestion to combine can be found explicitly or implicitly: in prior art references themselves; knowledge of those of ordinary skill in the art; or from the nature of the problem to be solved leading inventors to look at references relating to possible solutions) (citations omitted).

A prior art reference may be used to invalidate a patent as part of an obviousness combination if (1) it is from the "same field of endeavor" as the patent-in-suit, or (2) "if the reference is not within the field of the inventor's endeavor, ... the reference ... is reasonably pertinent to the particular problem with which the inventor is involved." *Unwired Planet, LLC v. Google Inc.*, 841 F.3d 995, 1000 (Fed. Cir. 2016) (citing *In re Clay*, 966 F.2d 656, 658-59 (Fed. Cir. 1992)). "The field of endeavor of a patent is not limited to the specific point of novelty, the narrowest possible conception of the field, or the particular focus within a given field." *Id.* at 1001. Further, guidance by the Supreme Court in *KSR* directs a court to "construe the scope of analogous art broadly, stating that 'familiar items may have obvious uses beyond their primary purposes, and a person of ordinary skill often will be able to fit the teachings of multiple patents together like pieces of a puzzle.'" *Wyers*, 616 F.3d at 1238 (quoting *KSR*, 550 U.S. at 402).

Here, all of the cited prior art references expressly disclose a manually powered treadmill, are from the same field of endeavor and reasonably pertinent to the particular problem involved, and thus are analogous art.

At the time of the invention, industry standard dictated that treadmills be unidirectional. UF ¶ 24. As detailed *supra*, the use of standard mechanical devices to ensure unidirectional movement of belts, and the need for safety devices relative to treadmills, was well known. And, as made clear in the overview of prior art, safety concerns were a known problem, including the known possibility of injury from unexpected reversal of the running belt, which would propel the user off the treadmill.

Eric Weber, who has a bachelor's degree in marketing, is responsible for Woodway's sales. According to Mr. Weber, a critical feature of any treadmill is ensuring the safety of the treadmill user. (Weber Disclosure, Exhibit 24, ¶ 25.) Mr. Weber agrees that user safety is mandated by industry standards, including those promulgated by the International Organization for Standardization (as cited by Dr. Giachetti), and that user safety should be "the utmost concern" when introducing any new consumer product to market. (Exh. 24, ¶ 25.)

Dr. Blair acknowledged that when a user steps on the rear of a treadmill with a curved running surface without a unidirectional safety device, the user's weight may cause the belt to move in the unintended direction, which would be immediately obvious to the user. UF ¶ 72. That is consistent with Mr. Weber's conclusion that a user could be startled, feel a loss of control, or fall if the user stepped on the back of a treadmill without the unidirectional device. (Exh. 24, ¶ 26.) Dr. Blair also testified that a treadmill without the device to ensure unidirectional movement of the belt would be less safe – increasing the risk of liability – and that all curved manual treadmills should have safety devices. UF ¶ 80. Mr. Weber concluded

that without such a device, the treadmill would be extremely dangerous, commercially unviable, and uninsurable. (Weber Disclosure, ¶¶ 27-28.) Neither suggested that falling and stumbling safety concerns post-date issuance of the patent.

A POSITA would be familiar with the industry standard requiring unidirectional movement of the belt. Experience and common sense dictates that the POSITA would be motivated to combine the identified prior art references to address the known and obvious liability and safety issue of a treadmill belt moving backwards in the manner identified in claim 25.

The prior art references disclose the known safety issues (stumbling, falling) relating to manual treadmills and identify mechanism to address those issues and ensure user safety. Socwell and Haber are analogous art that would be logical to combine, particularly as Socwell teaches the need for a safety device to prevent users from falling off the back. UF ¶ 32. Socwell expressly warns that "if the rollers … are so easily moveable, the user may potentially lose his equilibrium or balance and fall from the exercise treadmill resulting in possible injuries." UF ¶ 31. To address that unwanted movement, Socwell discloses the need for a method to prevent a user "from falling off the back of the treadmill." UF ¶ 32. Socwell teaches calibration of the rollers in relation to the belt to enable the user to safely walk, jog or run. UF ¶ 33. Combining Socwell with Haber would join the common power transmission element for use with a manual treadmill taught by Haber to the roller of the curved, non-motorized treadmill of Socwell and address the known safety concerns.

The combination of Socwell and Magid is similar. Socwell and Magid are analogous art that also would be logical to combine. The combination of the curved, non-motorized treadmill of Socwell with the unidirectional control mechanism of Magid is particularly apt where, as

discussed above, Socwell teaches the need for a safety device to prevent users from falling off, and the Magid device would prevent that by controlling the movement of the belt. UF ¶ 32, 68. Combining Socwell with Magid would join the common power transmission element for use with a manual treadmill taught by Magid to the curved, non-motorized treadmill of Socwell and address the known safety concerns and the industry requirement that the treadmill belt is unidirectional.

Magid and Cutter are analogous art that would be logical to combine, particularly as Cutter recognizes the need for safety, including how to restrain the user from falling off the end of the treadmill, which the Magid safety device would address that known issue. UF ¶¶ 40, 68. Combining Cutter with Magid would join the common power transmission element taught by Magid to the curved, non-motorized treadmill of Cutter and address the known safety concerns and the industry requirement that the treadmill belt is unidirectional.

Magid and Chickering are analogous art that would be logical to combine, particularly as Chickering discloses the need for a safety device. UF ¶¶ 46, 68. Combining Chickering with Magid would join the common power transmission element taught by Magid to the curved, non-motorized treadmill of Chickering and address the known safety concerns and the industry requirement that the treadmill belt is unidirectional.

Magid and Eschenbach also are analogous art from the same time period that would be logical to combine. Combining Eschenbach with Magid would join the common power transmission element taught by Magid to the curved, non-motorized treadmill of Eschenbach and address the known safety concerns and the industry requirement that the treadmill belt is unidirectional.

In sum, all limitations of claim 25 are found in a number of prior art references. A person

of ordinary skill in the art would have combined the references to ensure unidirectional movement of the belt and achieve a safer curved non-motorized treadmill consistent with existing industry standards and – according to Woodway – basic insurance and consumer requirements.

**5. Lack of Indicia of Non-Obviousness.**

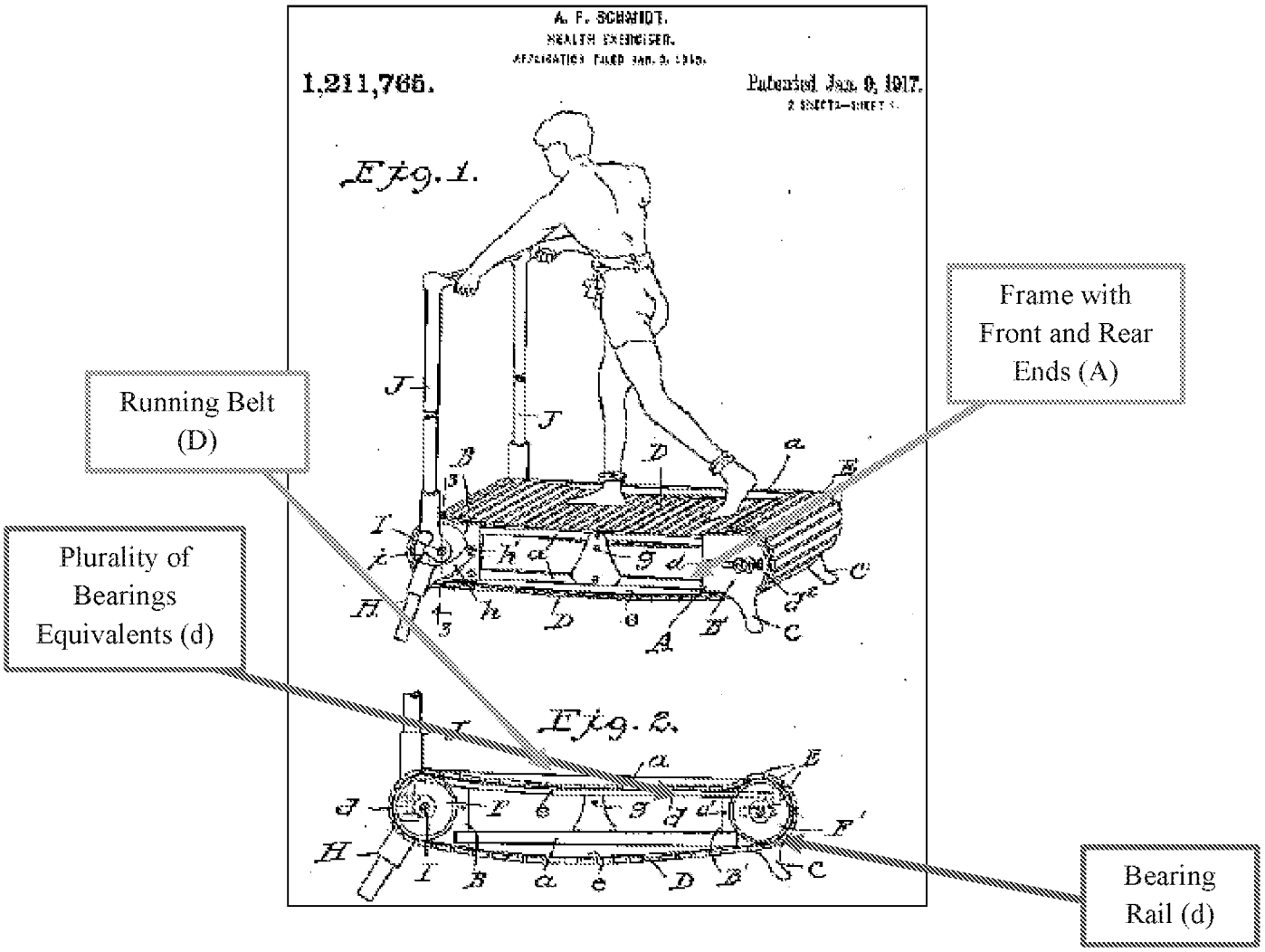
Plaintiffs served an interrogatory requesting that Woodway "state whether [it] contend[s] there is any objective indicia or evidence of non-obviousness" and, if so, to detail such evidence. UF ¶ 81. Woodway declined to answer, objecting that the interrogatory was "premature . . . in that it purports to seek the early disclosure of expert opinions." UF ¶ 82. Woodway, through Dr. Blair, did not identify any such evidence in its report responding to Plaintiffs' invalidity analysis. UF ¶ 83. Instead, Woodway advanced Mr. Weber, but Mr. Weber's disclosure is conclusory and not specific to claim 25.

Though the existence of secondary considerations – *i.e.* commercial success, long-felt but unmet need, and failure of others – can be considered within an invalidity analysis, Woodway has not identified any evidence of secondary considerations specific to claim 25. *KSR*, 550 U.S. at 406, 415, 425 (citation omitted) (noting party "has shown no secondary factors to dislodge the determination" that a patent claim is obvious).

## H. Schmidt Renders Obvious Claim 25 of the '580 Patent Under 35 U.S.C. § 103, Alone or in Combination with Magid.[10]

In 1917, the PTO granted U.S. Patent No. 1,211,765 to Schmidt for a self-powered "Health Exerciser" treadmill. UF ¶ 84. Schmidt includes Figure 1, below:

[10] Plaintiffs include this section separately because the pending Motion for Reconsideration remains pending.




As is reflected in Figure 1, Schmidt includes a frame (part A) with a front end and a rear end. Dr. Blair acknowledged that Schmidt discloses a curved running belt surface. UF ¶ 85.

Schmidt also discloses curved rails (part d) that provide a similar friction and wear reduction function as the bearing claimed in the '580 Patent, reducing friction with the running belt. UF ¶ 86. The friction reducing rails disclosed in Schmidt are consistent with Dr. Blair's use of "bearing" as a friction reducing device, and the Examiner also argued that Schmidt discloses the bearing rail prior to Woodway's amendment to add additional limitations.[11] UF ¶

[11] Indeed, Woodway's expert's sole argument that Schmidt does not disclose a bearing rail is that a POSITA would not recognize the element d of Schmidt to be the equivalent of a bearing. UF ¶ 87 (Blair rebuttal ¶349). This is

89. The bearing rails (d) extend longitudinally and define a curved profile that the running belt follows. UF ¶ 90. The running surface allows a user to exercise and "exert a push at the end of a step without rendering him liable to slip off the rear end of the apparatus." UF ¶ 91.

In his Rebuttal Report, Dr. Blair acknowledged that Schmidt discloses the need for a safety device on a curved treadmill as follows:

> When the flexible tread is laid over the frame, it will engage with rolls F F', but will sag at the after part of the apparatus just forwardly of rolls F. This construction is preferable for the reason that, when the operator is exercising on the device, **he cannot slip off the back of the apparatus**.

UF ¶ 92. Dr. Blair acknowledged that this disclosure was "focused on keeping a user on the treadmill during usage of the treadmill." UF ¶ 93.

Schmidt explicitly teaches an option for a stationary roller/shaft. UF ¶ 94. Dr. Giachetti opined that a POSITA would understand that the roller could be made moveable or stationary by deploying common power transmission elements to the shaft, like the ratchet and pawl taught in Magid, which would enforce the single direction of the shaft rotation. UF ¶ 95. Enforcing that single direction of the roller would prevent the belt from moving in the opposite direction.

In short, experience and common sense dictates that a POSITA would be motivated to reference the industry standard requiring unidirectional movement of the belt and combine Schmidt and Magid to address the known and obvious liability and safety issue. Schmidt and Magid are analogous art that would be logical to combine, particularly as Schmidt teaches the need for a safety device to prevent users from falling off the back, and it also teaches that the roller can be made stationary. UF ¶¶ 68, 94. Combining Schmidt with Magid would join the

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belied by the the prosecution history of the applicable application and Woodway's response to the Examiner and thus does not constitute a genuine dispute of material fact.

common power transmission element taught by Magid to the curved, non-motorized treadmill of Schmidt and address the known safety concerns.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant this Motion and find that (i) Plaintiffs do not infringe claim 25 and/or (ii) claim 25 is invalid as obvious.

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Dated: June 8, 2018

**CERTIFICATION OF SERVICE**

I hereby certify that on June 8, 2018, a copy of the foregoing Plaintiffs' Motion for Summary Judgment was filed through the ECF sysetem and also served by electronic mail to all counsel of record.

/s/ Christine K. Bush
Christine K. Bush

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

| | |
|---|---|
| CHAPCO, INC. AND SAMSARA FITNESS, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>WOODWAY USA, INC.,<br><br>Defendant. | Civil Action No. 3-15-CV-1665(JCH)<br><br>June 8, 2018 |

**PLAINTIFFS' LOCAL RULE 56(a)1 STATEMENT OF UNDISPUTED MATERIAL FACTS**

In compliance with Local Civil Rule 56(a)1, and in support of their concurrently-filed Motion for Summary Judgment, Plaintiffs hereby set forth a concise statement of each material fact to which Plaintiffs contend there is no genuine issue to be tried.

1. U.S. Patent No. 9,039,580 (the "'580 Patent") has four independent claims: claims 1, 11, 19, and 25. (A true copy of the '580 Patent is attached hereto as Exhibit 1.)

2. Woodway served Supplemental Preliminary Infringement Contentions claiming that the Original and Redesigned TrueForm Runner treadmills infringe claim 25. Exhibit 2 (excerpted portion of Woodway USA, Inc.'s Supplemental Preliminary Infringement Contentions) at Appendix B, pp. 48-56.

3. On April 11, 2018, Dr. Blair inspected Gen III and issued a second supplemental expert report on April 13, 2018.[1] Exhibit 3 (Second Supplemental Expert Report of Kim B. Blair, Ph.D., "Supplemental Blair Report").

4. In the Supplemental Blair Report, Dr. Blair opines that Gen III infringes claim 25 of the '580 Patent. Ex. 3.

5. Claim 25 of the '580 Patent recites:

> A method, comprising:
>
> [element a] providing a manually powered treadmill, the manually powered treadmill having a frame with a front end and rear end;
>
> [element b] providing a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile;
>
> [element c] disposing a running belt on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails;
>
> [element d] permitting movement of the running belt in a first direction; and

[1] Plaintiffs use the same defined terms as in the concurrently-filed Memorandum in Support of Summary Judgment.

> [element e] substantially preventing movement of the running belt in a second direction opposite the first direction.

Ex. 1 (element annotations added).

6. On May 7, 2018, Plaintiffs' expert, Dr. Robert Giachetti, issued a rebuttal report to the Supplemental Blair Report. Exhibit 4 ("Giachetti Rebuttal Rep.").

7. Woodway, through Dr. Blair, asserts that "the assembly of the Gen III literally infringes claim 25 of the '580 Patent." Ex. 3 at ¶ 18.

8. The Supplemental Blair Report does not differentiate between Plaintiffs nor does Dr. Blair identify any entity or which of the Plaintiffs allegedly performs each step of the method claim. Ex. 3 at ¶ 18 and Ex. A.

9. Woodway no longer asserts claim 25 against the two earlier versions of the TrueForm Runner. Dkt. No. 244.

10. Plaintiffs produced a document titled "Samsara Timed Build," which reflects the status of the subassembly when Chapco delivers it to Samsara's facility. Exhibit 5 (SAM0006695); Exhibit 6, Declaration of Brian Weinstein ("Weinstein Decl."), at ¶10.

11. Chapco does not furnish or supply the running belt for Gen III or the components for the running belt. Ex. 6, Weinstein Decl., at ¶¶ 8, 10-11.

12. Chapco does not assemble the running belt. Ex. 4 at ¶ 26; Ex. 6 at ¶¶ 10-11.

13. Chapco does not furnish, supply, make available or prepare the bearings on the part that Woodway identifies as the bearing rail. Ex. 4 at ¶ 41; Ex. 6 at ¶ 14.

14. Samsara's "Timed Build" document reflects that the sub-assembly, which Dr. Blair identifies as the bearing rail, arrives at Samsara without a plurality of bearings. Ex. 5; Ex. 6 at ¶¶ 14-15.

15. Dr. Blair combines his analysis of the limitations of claim 25 that include

"permitting movement . . ." and "substantially preventing . . .," by contending that the safety device "coupled" to the shaft is structured "to substantially prevent movement of the running belt [9] in a first direction and permit movement of the running belt [9] in a second direction that is opposite the first direction." Ex. 3 at Ex. A, pp. 10-12.

16. Chapco does not install, or couple, the safety device. Ex. 4 at ¶ 62; Ex. 6 at ¶ 18.

17. Throughout the Supplemental Blair Report, Dr. Blair contends that "assembly" of a treadmill meets the limitations of claim 25 of the '580 Patent. Ex. 3 at ¶¶ 16, 18, Ex. A.

18. Dr. Blair opines that Gen III meets the limitation of claim 25 of the '580 Patent of "disposing a running belt on . . ." because "[t]he assembly . . . includes providing a running belt and locating it above the bearing rails[.]" Ex. 3 at Ex. A, pp. 6-7.

19. Chapco does not "locate" a running belt on Gen III. Ex. 5; Ex. 6 at ¶ 11.

20. Dr. Blair opined in his first expert report regarding infringement that:

> The plain and ordinary meaning of "support" does not require that components must be directly or physically connected or touching. "Support" may be provided directly, may be provided indirectly via an intermediary component or series of components, may bear some of the weight of another component or a series of components, and/or may bear all of the weight of another component or series of components.

Exhibit 7 (excerpted portion of the initial Expert Report of Kim B. Blair, Ph.D), at Ex. F, pp. 8-9.

21. The endless belt of the Gen III treadmill is between the running belt and the plurality of bearings. Ex. 3 at Ex. A, p. 9; Ex. 4 at ¶¶ 53-54.

22. Chapco is not a member of Samsara. Ex. 6 at ¶ 3.

23. Woodway acknowledges that "the basic idea" of a non-motorized treadmill having a "convex running surface has been around for awhile" before Woodway's alleged conception of the invention claimed in the '580 Patent. Exhibit 8 (excerpted portion of the prosecution history of the '169 Patent, ¶¶ 5-7 of the Decl. of Nicholas Oblamski at WW000755);

Exhibit 9 (excerpted portions of the deposition of Mr. Oblamski) at 161:21-162:10; Exhibit 10 (excerpted portions of the deposition of Douglas Bayerlein at 97:25-98:19).

24. Prior to the claimed invention, the International Standards Organization in 2005 defined a treadmill as "training equipment with a unidirectional moving surface on which a walking or running activity can take place, where the feet are free to leave the moving surface." Exhibit 11 (ISO 20957-6:2005/ EN 957-6:2001) at § 3.1.

25. Before the priority date of the '580 Patent, industry standards disclosed the need for a device to ensure unidirectional movement of the belt. Ex. 11 at § 3.1; Exhibit 12 (Opening Expert Report of Dr. Robert Giachetti, the "Giachetti Inval. Report") at ¶¶ 36, 129-130.

26. On January 20, 1998, the U.S. Patent and Trademark Office ("PTO") issued U.S. Patent No. 5,709,632 to Socwell, entitled "Curved Deck Treadmill." Exhibit 13 (Socwell).

27. The Brief Summary of the Invention in Socwell describes the invention: (i) a curved deck treadmill which substantially prevents the user from falling off the back; (ii) a curved deck treadmill which is capable of providing meaningful walking, jogging, or running control in relation to the physiology of the user; (iii) a curved deck treadmill which provides a continuous, smooth exercising motion. Ex. 13 at Col. 3, ln.24-Col. 4, ln.17.

28. An alternative embodiment of Socwell is not motorized. Ex. 13 at Col. 11, ll. 25-27 ("[i]n an alternative embodiment… the present invention may be implemented without a driving means . . .").

29. Dr. Blair testified that Socwell "disclose[s] a running belt that follows the top curved running surface." Exhibit 14 (portions of the deposition of Dr. Blair) at 186:13-16.

30. The only element of claim 25 that Dr. Blair opined was not disclosed in Socwell was a device permitting the running belt of Socwell to move in only one rotational direction.

Exhibit 15 (Rebuttal Expert Report of Kim B. Blair, Ph. D.) at ¶¶ 39-43, 79.

31. Socwell expressly warns that "if the rollers ... are so easily moveable, the user may potentially lose his equilibrium or balance and fall from the exercise treadmill resulting in possible injuries." Ex. 13 at Col. 1, ll. 23-32.

32. Socwell discloses the need for a device to prevent a user "from falling off the back of the treadmill." Exhibit 16 (Plaintiffs' Preliminary Invalidity Contentions excerpted) at Ex. E, p. 4 (citing Socwell, Col. 11, ll. 25-34; Col. 12, ln. 67-Col. 13, ln. 4).

33. Socwell teaches calibration of the rollers in relation to the belt to enable the user to safely walk, jog or run. Ex. 13 at Col. 11, ll. 28-34.

34. On February 15, 1972, the PTO issued U.S. Patent No. 3,642,279 to Cutter, entitled "Treadmill Jogger." Exhibit 17 (Cutter).

35. Dr. Blair does not dispute that the treadmill in Cutter is manually powered and has a frame with a front and a rear end. Ex. 15 at § VI.D; Ex. 16 at Ex. H, claim 1.

36. Dr. Blair acknowledges that "Cutter discloses a treadmill (10) with a running belt (30) that has a curved surface proximate the front of the treadmill . . ." Ex. 15 at ¶ 199.

37. Cutter discloses bearing rail structures with "rollers (18) extend[ing] between the left side member (11) and the right side member (12)." Ex. 15 at ¶ 210.

38. Dr. Blair attempted to distinguish the rollers of Cutter from the claimed bearings, arguing that they are not "attached to the rail or connected to the rail." Ex. 14 at 194:22-195:16.

39. The running belt Cutter discloses follows a top curved running surface corresponding to the curved top profile of the bearing rail structures, on either side of the device. Ex. 12 at ¶¶ 53, 121, Fig. 8; Ex. 16 at Ex. H, claim 25; Ex. 17 at Fig. 2.

40. Dr. Blair acknowledged that "Cutter does appear to recognize the need for a

safety in a treadmill" including "that a 'principal problem has been that of how to restrain the user from walking off or running off or falling off the end of the machine and possibly injuring himself[.]'" Ex. 15 at ¶ 200.

41. In 1972, U.S. Patent No. 3,637, 206 issued to Chickering for "Endless Belt Exerciser With Accelerating and Decelerating Tread Surfaces." Exhibit 18 (Chickering).

42. Chickering includes a frame (10) with front and rear ends. Ex. 18 at Col. 1, ll. 65-68.

43. Chickering includes a first bearing rail and a second bearing rail (part 14) that comprise a plurality of bearings (parts 13, 18) and the bearing rails extend longitudinally on the frame. Ex. 18 at Col. 2, ll. 2-6; 13-15.

44. Chickering also includes a running belt (28) on the plurality of bearings (13, 18) of the bearing rails such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails. Ex. 18 at Fig. 3; Col. 3, ll. 6-9.

45. Dr. Blair acknowledged that Chickering:

> discloses a treadmill having a base (10) where a single endless belt (28) forms both an accelerating and a decelerating area. Rollers (29) are provided in the base (10) such that "when the endless belt 28 is placed over the rollers, it follows their contour and provides a forward accelerating area and a rear decelerating area."

Ex. 15 at ¶ 417 (citing Chickering, col. 3, ll. 6-9.)

46. Dr. Blair acknowledged that Chickering recognizes the need for a safety device on a treadmill as follows:

> This invention relates to a new type of treadmill exercising device, and more particularly to an exercising device on which the user can simulate the acts of walking, jogging and running without relying on handles, belts or other external supports for maintaining his balance.

Ex. 15 at ¶ 420 (citing Chickering, col. 1, ll. 3-7).

47. Chickering teaches that a person using a treadmill "is likely to lose his balance

because the frictionless surface offers no resistance to the movement of his feet, and he is therefore unable to obtain the leverage necessary for proper balance." Ex. 18 at Col. 1, ll. 31-33.

48. On April 25, 2000, the PTO issued U.S. Patent No. 6,053,848 to Eschenbach, entitled "Treadmill Deck Suspension." Exhibit 19 (Eschenbach).

49. In the Background of the Invention, Eschenbach explains that

> [a] treadmill is an exercise device which permits walking or running by moving a continuous belt along the length of a chassis. The belt slides over a supporting deck with speed controlled by motor with appropriate controls or load resistance, as in the case of a manual treadmill.

Ex. 19 at Col. 1, ll. 16-20.

50. Eschenbach cites the Socwell patent, explaining that Socwell "shows a curved deck having the center of curvature above the deck wherein the deck is rigidly supported with stationary cross members." Ex. 19 at Col. 2, ll. 2-5.

51. Eschenbach claims that its invention is directed to:

> an exercise treadmill including a frame, first and second roller assemblies rotatably mounted on the frame, and an endless belt trained about the first and second roller assemblies. The exercise treadmill also includes a deck disposed between the frame and an upper run of the belt. The deck is semi-rigid, able to conform to a predetermined curve…

Ex. 19 at Col. 2, ll. 17-23.

52. Eschenbach teaches a non-motorized embodiment of a curved treadmill that can be self-powered. Ex. 19 at Col. 2, ll. 56-60.

53. Dr. Blair testified that Eschenbach teaches a curved surface. Ex. 14 at 196:21-23.

54. Eschenbach discloses first and second bearing rails (or the "flexible linking" (part 8) with a plurality of bearings (described as idlers – part 34)). Ex. 12 at ¶ 128 (citing Eschenbach (Ex. 19) Col. 2, ll. 26-38, 48-55).

55. Dr. Blair argued that Eschenbach does not teach a running belt supported by the bearings because there is an intervening deck. Ex. 15 at ¶¶ 308, 330.

56. In 1995, U.S. Patent No. 5,411,455 issued to Haber for "User Propelled Treadmill." Exhibit 20 (Haber).

57. Haber includes a one-way clutch (part 22) of "conventional design" joined to the front drum. Ex. 20 at Col. 3, ll. 21-22.

58. The one-way clutch disclosed in Haber forces the front drum and the tread of the running belt to rotate in the same direction as the one-way clutch and thus substantially prevents movement of the belt in a second direction. Ex. 16 at Ex. F, claim 25 (citing Haber Col. 1, l. 59-Col. 2, l. 3; Col. 3, ll. 20-25).

59. Dr. Blair testified that the one-way clutch disclosed in Haber would affect the running belt. Ex. 14 at 184:16-185:23.

60. In 1996, the PTO issued U.S. Patent No. 5,538,489 to Magid, entitled "Walker Apparatus With Left And Right Foot Belts." Exhibit 21 (Magid).

61. Magid teaches a non-motorized treadmill comprised of a continuous belt disposed around a front and rear shaft. Ex. 16 at Ex. G (citing Magid Fig. 8).

62. Magid discloses a support frame. Ex. 12 at ¶ 65.

63. Magid includes a Figure 8 which shows the rollers/bearings, and a first and second rail (24) that extend longitudinally on the frame. Ex. 12 at ¶ 65; Ex. 16 at Ex. H.

64. Dr. Blair agrees that part 24 disclosed in Magid is a rail. Ex. 14 at 193:11-19.

65. Dr. Blair contended in his rebuttal report that the disclosure in Magid is a "roller." Ex. 15 at ¶ 154. Dr. Blair contends the "roller" system in Magid is the same as that disclosed in Cutter and Chickering. Ex. 15 at ¶¶ 210, 430.

66. Dr. Blair acknowledges that Magid discloses a "unidirectional control" mechanism designed to "permit only unidirectional movement of the left and right foot belts." Ex. 15 at ¶ 143 (quoting Magid (Ex. 21) at Col. 4, ll. 46-48).

67. The unidirectional control mechanism of Magid "includes a pair of ratchet gears (61) attached to outer ends of the front rollers (41) . . . thereby preventing bidirectional movement of the foot belts." Ex. 15 at ¶ 143 (quoting Magid (Ex. 21) at Col. 4, ll. 59-60).

68. Magid's ratchet and pawl "unidirectional control mechanism" restricts the treadmill belts to movement in a single direction of travel. Ex. 12 at p. 32, Fig. 13.

69. When asked to identify the invention claimed, Douglas Bayerlein, a named inventor, identified a timing belt used to synchronize shafts, a one-way safety bearing, and a size variation between front and rear pulleys. Ex. 10 at 99:22-101:11.

70. The running belt is generally responsive to the weight of the user mounting, dismounting and running on the treadmill. Ex. 1 at Col. 26, ll. 62-64.

71. The '580 Patent specification states that if a user were to mount the treadmill by placing her weight bearing foot at a location near the back, the running belt might move in the opposite direction and cause the user to lose their footing. Ex. 1 at Col. 27, ll. 1-3.

72. Dr. Blair testified that when a user steps on the rear of a treadmill with a curved running surface without a unidirectional safety device, the user's weight may cause the belt to move in the unintended direction which would be immediately obvious to the user. Ex. 14 at 191:18-192:14.

73. The specification of the '580 Patent identifies other pre-existing devices to prevent unwanted rotation of the running belt including the one-way bearing assembly, "cam locking systems," taper locks," and "band brake system with a lever." Ex. 1 at Col. 27, ll. 7-9,

Col. 29, ll. 23-28.

74. The Occupational Health and Safety Administration identifies standard mechanical power transmission elements including sprag clutches, ratchets and pawls. Ex. 12 at ¶¶ 34-35.

75. U.S. Patent No. 8,986,169 is the parent of the '580 Patent. Ex. 1.

76. During prosecution of the application for the '169 Patent, the Patent Examiner rejected pending claims under 35 U.S.C. § 103(a) as obvious over Pasqualin (2006/0287165) in view of Cutter and further in view of Magid. Ex. 8 (October 17, 2014, Final Rejection at WW000582, WW0000775-776).

77. The Examiner wrote that "Magid teaches a human-powered treadmill comprising a one-way bearing assembly [] mounted to the front shaft (by way of the belt) to provide unidirectional movement of the belt." Ex. 8 (WW000776).

78. The Examiner wrote:

> It would have been obvious to one of ordinary skill in the art before the effective filing date of the claimed invention to modify Pasqualin/Cuttter's treadmill with Magid's unidirectional bearing assembly in order to prevent the user from accidentally propelling the belt in the wrong direction.

Ex. 8 (WW000776-777).

79. Woodway overcame the rejection by arguing that a one-way bearing assembly located on the rear shaft was distinguishable from, and preferable to, the front shaft location disclosed in Magid. Ex. 8 (WW000757-759, Oblamski Decl. ¶¶ 16-17; 27-32).

80. Dr. Blair testified that a treadmill without the safety device to ensure unidirectional movement of the belt would be less safe – increasing the risk of liability – and all curved manual treadmills should have safety devices because otherwise, a user could be hurt. Ex. 14 at 92:8-13, 98:4-11.

81. Plaintiffs served an interrogatory requesting that Woodway "state whether [it] contend[s] there is any objective indicia or evidence of non-obviousness" and, if so, to detail such evidence. Exhibit 22 (Woodway's Response to First Set of Interrogatories, Interrogatory No. 5).

82. Woodway objected that the interrogatory was "premature . . . in that it purports to seek the early disclosure of expert opinions." Ex. 22 (Response No. 5).

83. Dr. Blair did not identify any objective indicia or evidence of non-obviousness in his report responding to Plaintiffs' invalidity analysis. Ex. 15.

84. In 1917, the PTO granted U.S. Patent No. 1,211,765 to Schmidt for a self-powered "Health Exerciser" Treadmill. Exhibit 23 (Schmidt).

85. Dr. Blair acknowledged that Schmidt discloses a curved running belt surface. Ex. 15 at ¶ 342.

86. Component (d) disclosed in Schmidt provides a similar friction and wear reduction function as the bearing claimed in the '580 Patent, reducing friction with the running belt. Ex. 12 at ¶ 119 (citing the '580 Patent at Col. 13, ll. 1-12).

87. Dr. Blair's sole argument that Schmidt does not disclose a bearing rail is that a POSITA would not recognize the element d of Schmidt to be the equivalent of a bearing. Ex. 15 at ¶ 349.

88. Dr. Blair defined bearings as a mechanical device allowing rotational motion between two objects and reducing friction in that motion. Ex. 14 at 148:7-11; 179:12-20.

89. During prosecution of the '169 Patent, the Examiner found Schmidt disclosed the bearing rail as identified in then-numbered claims 16 and 17. Ex. 8 (WW000713).

90. Parts (d) disclosed in Schmidt extend longitudinally and define a curved profile

that the running belt follows. Ex. 12 at ¶ 49.

91. The running surface disclosed in Schmidt allows a user to exercise and "exert a push at the end of a step without rendering him liable to slip off the rear end of the apparatus." Ex. 23, p. 2, Col. 2, ll. 108-112.

92. In his Rebuttal Report, Dr. Blair acknowledged that Schmidt discloses the need for a safety device on a treadmill as follows:

> When the flexible tread is laid over the frame, it will engage with rolls F F', but will sag at the after part of the apparatus just forwardly of rolls F. This construction is preferable for the reason that, when the operator is exercising on the device, he cannot slip off the back of the apparatus.

Ex. 15 at ¶ 343 (citing Schmidt (Ex. 23), Col. 4, ll. 96-102).

93. Dr. Blair acknowledged that the disclosure in Schmidt was, like Cutter, "focused on keeping a user on the treadmill during usage of the treadmill." Ex. 15 at ¶ 343.

94. Schmidt teaches an option for a stationary roller. Ex. 23 at p. 1, Col. 2, ll. 69-75; p. 2, Col. 2, ll. 79-84; Ex. 12 at ¶ 50.

95. Dr. Giachetti opined that a POSITA would understand that the roller could be made moveable or stationary by deploying common power transmission elements to the shaft, like the ratchet and pawl taught in Magid, which would enforce the single direction of the shaft rotation. Ex. 12 at ¶ 134; Ex. 23 at p. 1, Col. 2, ll. 69-75.

96. On March 30, 2017, Woodway served the Disclosure of Eric A. Weber. Exhibit 24 (Disclosure of Eric A. Weber Pursuant to Fed. R. Civ. P. 26(a)(2)(C)).

CHAPCO, INC. and SAMSARA FITNESS, LLC

By Their Attorneys,

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Dated: June 8, 2018

**CERTIFICATION OF SERVICE**

I hereby certify that on June 8, 2018, a copy of the foregoing Plaintiffs' Rule 56(a)(1) Statement in Support of Motion for Summary Judgment was filed through the ECF system to all counsel of record.

/s/ *Christine K. Bush*
Christine K. Bush

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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|---|---|
| CHAPCO, INC. AND SAMSARA FITNESS, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>WOODWAY USA, INC.,<br><br>Defendant. | Civil Action No. 3-15-CV-1665(JCH)<br><br>June 29, 2018 |

**PLAINTIFFS' OPPOSITION TO WOODWAY USA, INC.'S MOTION FOR SUMMARY JUDGMENT OF INFRINGEMENT ON CLAIM 25 OF U.S. PATENT NO. 9,039,580**

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## INTRODUCTION

The Court should deny Woodway USA, Inc.'s ("Woodway") Motion for Summary Judgment of infringement of claim 25 of U.S. Patent No. 9,039,580 (the "'580 patent"). Infringement of a method claim occurs only when an actor performs each step of the method. Woodway's Motion does not identify the "actor" that it claims performs the steps of claim 25. In fact, nowhere in the Motion does Woodway even identify the entity against which it seeks summary judgment.

Instead of performing a method claim analysis and identifying the steps and the actor, Woodway suggests that the Court should focus on the sheer existence of the Gen III treadmill and perform an apparatus claim analysis. That is wrong. Black letter law makes clear that the existence or sale of an apparatus alone does not infringe a method claim.

Woodway also revisits a regular theme and attempts to paint Plaintiffs in a poor light by arguing that Plaintiffs are improperly seeking a belated claim construction and/or changing positions. Woodway also claims that Plaintiffs waived certain non-infringement positions in the context of the earlier motions for summary judgment. None of that is accurate.

Woodway served Supplemental Preliminary Infringement Contentions and an Opening Expert Report from Dr. Kim Blair. Each – as shown in the excerpted chart below – uses similar language relating to claim 25. That changed on April 13, 2018. Years into this litigation, Woodway served the Second Supplemental Report of Kim Blair. There, Woodway advances a new theory of infringement for claim 25 that equates, for the first time, "assembly" with the limitations of the claim, and implicitly seeks a claim construction for "disposing on" at odds with the position it advanced for "supported" in the earlier motion for summary judgment:

| Claim 25 | Woodway's **2016** Supplemental Preliminary Infringement Contentions | **March 2, 2017** Opening Expert Report of Kim Blair, Ph.D. | **April 13, 2018** Supplemental Expert Report of Kim B. Blair, Ph.D.[1] |
|---|---|---|---|
| A method, comprising: | | | "[P]roviding a manually powered treadmill" is the assembly of the Gen III treadmill.<br><br>The Gen III is a "manually powered treadmill".<br><br>None of the Chapco design documentation identifies any motor, which was confirmed during the April 11, 2018 inspection and disassembly. Hence, the treadmill is manually powered.<br><br>*Excerpted from SAM0014290.* |
| Providing a manually powered treadmill | A "manually powered treadmill" is literally each of the Original and Redesigned Infringing Products.<br><br>The TrueForm™ Runner Low Rider Product is pictured. As described in the product specification, the "TrueForm … relies 100% on human power." (Product Specification, p. 2.) Each of the Infringing Products are "nonmotorized, powered by you." (*Id.* at p. 1.) | A "manually powered treadmill" is literally each of the Original and Redesigned TrueForm Runner Treadmills.<br><br>As described in the product literature attached as Exhibit G and as Chapco and Samsara have admitted, the Original and Redesigned TrueForm Runner Treadmills are human powered and nonmotorized. | |
| the manually powered treadmill having a frame with a front end and rear end; | A "frame having a front end and a rear end" is literally provided in each of the Original and Redesigned Infringing Products.<br><br>As shown, the frame [1, which designates the entire frame assembly not a single piece of | A "frame having a front end and a rear end" is literally provided in each of the Original and Redesigned TrueForm Runner Treadmills;Chapco and Samsara agree. As shown, the frame [1], which designates the entire frame assembly not a single piece of | A "frame having a front end and a rear end" is literally provided in the Gen III treadmill.<br>As shown, a frame [1] has a front end [2] and a rear end [3].<br><br>*Engineering drawing excerpted from SAM0014284.* |

[1] The highlights reflect changes between Dr. Blair's 2017 Opening Report and the 2018 Supplemental Report.

| | | | |
|---|---|---|---|
| | metal] has a front end [2] and a rear end [3]. | metal, has a front end [2] and a rear end [3].<br>*** | |
| providing a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile; | A "first bearing rail" having "a plurality of bearings" and a "second bearing rail" having a "plurality of bearings" where "the first and second bearing rails define a curved top profile" and "extend[] longitudinally on the frame" is literally provided in each of the Original and Redesigned Infringing Products.<br><br>As shown, a first bearing rail is attached longitudinally to one side of the frame [1] (i.e., the left side), while a second bearing rail is attached longitudinally to the other side of the frame [1] (i.e., the right side. As also shown, the top edge of the first bearing rail to which the plurality of bearings [6] are mounted and the top edge of the second bearing rail to which the plurality of bearings [7] are mounted to | A "first bearing rail" having "a plurality of bearings" and a "second bearing rail" having a "plurality of bearings" where "the first and second bearing rails define a curved top profile" and "extend[] longitudinally on the frame" is literally provided in each of the Original and Redesigned TrueForm Runner Treadmills.<br><br>As shown, a first bearing rail is attached longitudinally to one side of the frame [1] (i.e., the left side), while a second bearing rail is attached longitudinally to the other side of the frame [1] (i.e., the right side. As also shown, the top edge of the first bearing rail to which the plurality of bearings [6] are mounted and the top edge of the second bearing rail to which the plurality of bearings [7] are mounted | The assembly of the Gen III treadmill, which includes providing two bearing rails, meets this limitation.<br><br>"[P]roviding a "first bearing rail" having "a plurality of bearings" and a "second bearing rail" having a "plurality of bearings" where "the first and second bearing rails define a curved top profile" and "extend[] longitudinally on the frame" is literally provided in the assembly of the Gen III treadmill.<br><br>As shown, a first bearing rail [4] extends longitudinally on one side of the frame [1] (i.e., the left side), while a second bearing rail [5] extends longitudinally on the other side of the frame [1] (i.e., the right side). The first bearing rail [4] includes a plurality of bearings [6]. The second bearing rail [5] includes a plurality of bearings [7]. The first and second bearing rails [4] and [5] define a curved top profile [8].<br><br>*Top engineering drawing excerpted from SAM0014260. Bottom engineering drawing excerpted from SAM0014261.* |

| | | | |
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| | define a top curved profile [14]. | define a curved top profile [14]. | |
| disposing a running belt on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails; | A "running belt" that is disposed "on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails" is literally present in each of the Infringing Products.<br><br>As shown, a running belt [8] follows a curved running surface [9]. The running belt [8] is disposed on the first bearing rail and the second bearing rail. Because the curved top profile [14] is proximate the curved running surface [9], the curved running surface [9] corresponds to the curved top profile [14]. | A "running belt" that is disposed "on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails" is literally present in each of the Original and Redesigned TrueForm Runner Treadmills.<br><br>As shown, a running belt [8] follows a curved running surface [9]. The running belt [8] is disposed on the first bearing rail and the second bearing rail. Because the curved top profile [14] is proximate the curved running surface [9], the curved running surface [9] corresponds to the curved top profile [14]. | The assembly of the Gen III treadmill, which includes providing a running belt and locating it above the bearing rails, meets this limitation.<br><br>A "running belt" that is disposed "on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails" is literally present in the Gen III treadmill.<br><br>As shown, a running belt [9] follows a curved running surface [10]. The running belt [9] is disposed on the pluralities of bearings [6] and [7] of first bearing rail [4] and the second bearing rail [5], respectively. Because the curved top profile [8] is proximate the curved running surface [10], the curved running surface [10] corresponds to the curved top profile [8].<br><br>*Top two engineering drawings excerpted from SAM0014284. Bottom engineering drawing excerpted from SAM0014261.* |
| permitting movement of the running belt in a first direction; and | The "running belt" being only permitted to move in one direction and "substantially prevent[ed]" from moving "in a second | The "running belt" being only permitted to move in one direction and "substantially prevent[ed]" from moving "in a second | The assembly of the Gen III treadmill, which includes the coupling of a safety device, meets this limitation.<br><br>The "running belt" being permitted to move in a first direction and |

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| substantially preventing movement of the running belt in a second direction opposite the first direction. | direction opposite the first direction" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown in the Original Design, the safety device [10] is coupled to the rear shaft [5]. As shown in the Redesign, the safety device [10] is coupled to the front shaft [4].<br><br>As also shown, the safety device [10] of the Original Design is a Koyo brand with a model number of RCB-121616 while the safety device [10] of the Redesign is a Koyo brand with a model number of RCB-162117. Each of these model numbers corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction."<br>***[2] | direction opposite the first direction" is literally present in each of the Original and Redesigned TrueForm Runner Treadmills.<br><br>As shown in the Original Design, the safety device [10] is coupled to the rear shaft [5]; Chapco and Samsara agree. As shown in the Redesign, the safety device [10] is coupled to the front shaft [4]; Chapco and Samsara agree.<br><br>As also shown, the safety device [10] of the Original Design is a Koyo brand with a model number of RCB-121616 while the safety device [10] of the Redesign is a Koyo brand with a model number of RCB-162117. Each of these model numbers corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction."<br>*** | "substantially prevent[ed]" from moving "in a second direction opposite the first direction" is literally present in the Gen III treadmill.<br><br>As shown, a safety device [11] is coupled to a shaft [12].<br><br>As also shown, the safety device [11] has a model number of RCB-162117, which corresponds with a Koyo brand. This model number corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction." (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-4 (2014), http://www.jtektna.com/assets/ce/Documents/(B2018E-1)%20Needle%20Roller%20Bearing%20Catalog.pdf). |

[2] Sections relating to the Original Design of the TrueForm Runner and website links removed from this chart.

| | | | |
|---|---|---|---|
| | In regard to the Redesign, because the safety device [10] is coupled to the front shaft [4] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is structured to substantially prevent rotation of the front shaft [4] in a first rotational direction while permitting rotation of the front shaft [4] in a second rotational direction opposite the first rotational direction.<br><br>Because the running belt [8] is disposed about the front shaft [4], rotational movement of the running belt [8] is affected/constrained by movement of the front shaft [4]. Thus, the safety device [10] is structured to substantially prevent movement of the running belt [8] in a first direction and permit movement of the running belt [8] in a second direction that is opposite the first direction. | In regard to the Redesign, because the safety device [10] is coupled to the front shaft [4] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is structured to substantially prevent rotation of the front shaft [4] in a first rotational direction while permitting rotation of the front shaft [4] in a second rotational direction opposite the first rotational direction.<br><br>Because the running belt [8] is disposed about the front shaft [4], rotational movement of the running belt [8] is affected/constrained by movement of the front shaft [4]. Thus, the safety device [10] is structured to substantially prevent movement of the running belt [8] in a first direction and permit movement of the running belt [8] in a second direction that is opposite the first direction. | Because the safety device [11] is coupled to the shaft [12] and because the safety device [11] "allows free overrun," (*id.*), in one rotational direction, the safety device [11] is structured to substantially prevent rotation of the shaft [12] in a first rotational direction while permitting rotation of the shaft [12] in a second rotational direction opposite the first rotational direction.<br><br>Because the running belt [9] is disposed about the shaft [12], rotational movement of the running belt [9] is affected/constrained by movement of the shaft [12]. Thus, the safety device [11] is structured to substantially prevent movement of the running belt [9] in a first direction and permit movement of the running belt [9] in a second direction that is opposite the first direction.<br><br>*Engineering drawing excerpted from SAM0014264.* |

Put simply, Woodway bears the burden of proof on infringement, and Woodway materially changed its position a few months ago. Woodway never advanced its wholesale "assembly" argument before April 2018. Before April 2018, Woodway never argued that "disposing a running belt on the plurality of bearings" means "providing a running belt and **locating it above** the bearing rails." Until Woodway unveiled those new theories, Plaintiffs could not have addressed or rebutted them, in Non-Infringement Contentions, an expert report, at summary judgment, or otherwise.

Yet Woodway's Motion recognizes none of that. Instead, Woodway suggests that Plaintiffs failed to have certain claims construed; "waived" current non-infringement positions; and "admitted" other aspects of Woodway's analysis. That ignores the sea change to Woodway's infringement theory and turns the burden of proof on its head.

Woodway cannot claim that changes from Gen II to Gen III drove its altered infringement theory. In fact, Woodway's Local Rule 56(a)1 Statement downplays the differences between the Gen III and the earlier versions of the TrueForm Runner, characterizing the differences as limited to a rear axle assembly and wheels. Dkt. No. 257 at 1, ¶¶ 1, 2. Woodway's technical expert wrote that the Gen III and earlier versions are "in large part identical." Crediting that, Woodway had no basis to change its infringement analysis on claim 25 in the April 2018 Supplemental Blair Report.

But it made those changes. Even assuming the Court considers the new theories in light of Woodway's animated arguments that all infringement and invalidity theories must have been included in contentions served during fact discovery – which these unquestionably are not – Woodway still has not proved that it is entitled to summary judgment on claim 25. Woodway's

failure to meet the basic burden of identifying the party against whom it seeks judgment, and its failure to prove that any actor performs the steps of the method claim, are fatal to its Motion.

## PROCEDURAL BACKGROUND AND FACTS

### A. Woodway's 2016 and 2017 Infringement Theories.

On July 18, 2016, Woodway served Supplemental Preliminary Infringement Contentions directed to the Original and Redesigned TrueForm Treadmills (the "Supplemental Infringement Contentions"). AMF ¶ 2.[3] Woodway's Supplemental Infringement Contentions do not include the word "assembly" or allege that "assembly" of treadmills infringes claim 25. AMF ¶ 5. Woodway's Supplemental Infringement Contentions do not identify which entity allegedly performed the steps in claim 25. AMF ¶ 6. Woodway's Supplemental Infringement Contentions do not include any analysis of joint infringement, joint enterprise liability or control. AMF ¶ 7.

On March 2, 2017, Woodway's technical expert, Dr. Kim Blair, issued an Opening Report directed to infringement (the "Blair Opening Report"). AMF ¶ 11. Dr. Blair did not contend that any entity performed the steps of claim 25. AMF ¶ 12. Dr. Blair's infringement analysis as to claim 25 in the Blair Opening Report does not address the "assembly." AMF ¶ 13. His Opening Report does not include a substantive analysis of method, performance, or step. AMF ¶¶ 14-15. The Blair Opening Report does not include any analysis of joint infringement, joint enterprise liability or control. AMF ¶ 16. At deposition, Dr. Blair testified to his understanding of the relationship between the Plaintiffs, never referencing joint enterprise or control. AMF ¶ 17. Dr. Blair did not know which of Chapco, Inc. ("Chapco") or Samsara Fitness, LLC ("Samsara") makes the accused treadmills, he admitted that Chapco does not make the entire product, and he confirmed that he was not engaged to opine on the issue of which Plaintiff manufactures the accused products. AMF ¶¶ 19-21. In his March 30, 2017 Rebuttal

[3] Plaintiffs' Local Rule 56(a)2(ii) Additional Material Facts are referenced herein as "AMF at ¶ ___."

Report, Plaintiffs' expert, Dr. Robert Giachetti, "reserve[d] the right to amend or supplement this report should additional material facts or new opinions emerge during future discovery or in testimony." AMF ¶ 23.

**B. Woodway's Motion for Summary Judgment**

On May 1, 2017, Woodway moved for summary judgment of infringement on independent claims 1 and 19 and dependent claims 6 and 20 of the '580 patent (the "2017 Motion for Summary Judgment"). Dkt. No. 97 at 20. Those claims include the limitation of a running belt "supported by" a bearing rail. Dkt. No. 97 at 22, 27.

In its 2017 Motion for Summary Judgment, Woodway argued that the "plain and ordinary meaning of 'support' does not require that components must be directly or physically connected or touching." *See* Dkt. No. 97 at 23, 27. Working off that position, Woodway argued that the accused TrueForm Runners had a "running belt supported by the first bearing rail and the second bearing rail and disposed about the front shaft and the rear shaft..." *Id.* at 22-23 (emphasis added). According to Woodway, because "'support' may be provided directly, may be provided indirectly via an intermediary component or series of components, and/or may bear all of the weight of another component," the running belt is supported by the plurality of bearings in the then-accused device. *Id.; see also id.* at 27 (same).

Plaintiffs opposed Woodway's position, arguing that "support" required element-to-element contact and could not include indirect connection. Dkt. No. 101, at 35 (Plaintiffs' Response to Statement No. 54) and 40 (Plaintiffs' Response to Statement No. 63). Plaintiffs also disputed Woodway's claim that Plaintiffs and their technical expert challenged only the bearing rail and frame limitations in the context of non-infringement. Dkt. No. 101, at 11 (Plaintiffs' Response to Statement No. 23).

Over Plaintiffs' Objection, the Court granted Woodway's Motion for Summary Judgment of infringement of claims 1, 6, 19, and 20 of the '580 patent. Dkt. No. 144. The Court's Order does not reference claim 25 or make a determination as to that claim. *See generally id.*

### C. Woodway's Pretrial Dismissal of Claim 25 as Against the Original and Redesigned TrueForm Runner.

On March 9, 2018, Woodway represented that it planned to dismiss its claims of infringement of claim 25 of the '580 patent against the Redesigned TrueForm Runner. AMF ¶ 24. On March 16, 2018, Woodway confirmed dismissal with prejudice of claim 25 as to the Original and Redesigned TrueForm Runner. Dkt. No. 183 at 5-6; Dkt. No. 244 at 2.

### D. The Supplemental Blair Report and Gen III

On April 13, 2018, Woodway served the Second Supplemental Expert Report of Dr. Blair (the "Supplemental Blair Report"). AMF ¶ 25; Dkt. No. 236. In the Supplemental Blair Report, Dr. Blair opines that "Gen III is in large part identical to the 'Redesigned TrueForm Runner Treadmill'" evaluated earlier. AMF ¶ 26.

Despite that characterization, the Supplemental Blair Report includes an infringement analysis predicated on an argument that "assembly" of the Gen III infringes each limitation of claim 25 of the '580 patent. AMF ¶¶ 27, 39-40. That "assembly" argument was not included in the Blair Opening Report. AMF ¶ 13.

The Supplemental Blair Report also includes an infringement analysis predicated on an argument that the limitation of "**disposing a running belt on** the plurality of bearings of the first bearing rail and the second bearing rail" is met by "[t]he assembly of the Gen III treadmill, which includes **providing a running belt and locating it above the bearing rails.**" AMF ¶ 27 (emphasis added). That argument about "locating" a running belt "above" the bearing rails was not included in the Blair Opening Report. AMF ¶ 28.

The Supplemental Blair Report does not identify who performs the steps of claim 25.

AMF ¶ 29. Dr. Blair offers no opinion that any actor performs all steps of claim 25. AMF ¶ 30. The Supplemental Blair Report does not include any analysis of joint infringement, joint enterprise liability or control. AMF ¶ 31. Woodway served no supplemental infringement contentions specifically addressing joint infringement, joint enterprise liability or control. AMF ¶¶ 3, 5, 32.

### E. Dr. Giachetti's Rebuttal Report

On May 7, 2018 Plaintiffs timely served a report from Dr. Giachetti rebutting the Supplemental Blair Report ("Giachetti Supplemental Rebuttal Report"). AMF ¶ 33. Dr. Giachetti noted that the Court did not construe the terms "providing," or "disposing on," so he applied the plain and ordinary meaning of those terms as understood by a person having ordinary skill in the art. AMF ¶ 34.

Dr. Giachetti expressly stated that Dr. Blair failed to identify the execution of steps and failed to identify which of Chapco or Samsara allegedly performs the steps. AMF ¶ 35. Dr. Giachetti opined that Chapco does not perform all steps of the method and, further, that Samsara does not perform all steps of the method. AMF ¶ 36.

## ARGUMENT

### A. Local Rule 56(a)2 Statement.

Pursuant to Local Rule 56(a)2, Plaintiffs file herewith the Local Rule 56(a)2 Statement of Facts in Opposition to Summary Judgment. This includes an "Additional Material Facts" section pursuant to Local Rule 56(a)2(ii) setting forth additional facts not previously set forth in responding to Woodway's Local Rule 56(a)1 Statement that establish genuine issues of material fact precluding summary judgment in Woodway's favor.

### B. Applying the Summary Judgment Standard, Woodway is not Entitled to the Relief it Seeks.

Summary judgment may not be granted unless the moving party "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). Thus, to establish entitlement to summary judgment, the moving party must establish both the absence of a dispute of material fact and each element required by law to support of the relief requested. *See, e.g., id.; Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 246 (2d Cir. 2004) (even when unopposed, court must review the motion to determine whether moving party established "that the undisputed facts entitle him to 'a judgment as a matter of law.'") (citations omitted). This requires a finding that the legal theory underpinning the request is sound. *See id.* The moving party bears the burden of proof. *See Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010) (citation omitted). In determining whether that burden has been met, courts must view all facts in the light most favorable to the nonmoving party. *Id.* ("required to resolve all ambiguities and credit all factual inferences that could be drawn in favor of the party against whom summary judgment is sought.") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Woodway's request for summary judgment should be denied because Woodway fails to address, let alone establish, essential elements for the relief it seeks. Indeed, Woodway demands "summary judgment of infringement of claim 25" while "leaving which entity is responsible" for trial. Dkt. No. 258 at 30. On this basis alone, there is no sound legal theory to support Woodway's request for summary judgment, and its Motion must be denied.

### C. Woodway Has Not Identified Essential Elements to Establish Liability for Method Claim Infringement.

Claim 25 is a method claim; thus, the "patented invention" is the series of process steps disclosed in the claim – not a product or apparatus. *See, e.g., Cardiac Pacemakers, Inc. v. St.*

*Jude Medical, Inc.*, 576 F.3d 1348, 1362-1363 (Fed. Cir. 2009) ("We have noted 'the distinction between a claim to a product, device, or apparatus, all of which are tangible items, and a claim to a process, which consists of a series of acts or steps.'") (listing cases). Federal Circuit "precedents draw a clear distinction between method and apparatus claims for purposes of infringement liability." *Id.* at 1363 (citing *Joy Tech. Inc. v. Flakt, Inc.*, 6 F.3d 770, 773-75 (Fed. Cir. 1993) (stating that method claims are infringed only by practicing the steps of the method); *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005) ("[A] patent for a method or process is not infringed unless all steps or stages of the claimed process are utilized."). Thus, "the patented invention at issue when a method patent is implicated consists of a 'series of acts or steps.'" *Id.* (quoting *In re Kollar*, 286 F.3d 1326, 1332 (Fed. Cir. 2002)) (noting there are steps to method claims, "but the steps are not the physical components used in performance of the method.")

As to method claims, the Federal Circuit has explained: "The law is unequivocal that the sale of equipment to perform a process is not a sale of the process within the meaning of 271(a)." *Joy Tech. Inc.*, 6 F.3d at 773; *see also Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1317 (Fed. Cir. 2009). Accordingly, as a matter of law, a method claim can only be infringed by performance, or use, of that method. *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 850 (Fed. Cir. 2010) (direct infringement of a method claim "only occurs when someone performs the claimed method"); *accord Meyer Intellectual Props. Ltd. v. Bodum, Inc.*, 690 F.3d 1354, 1366 (Fed. Cir. 2012); *Joy Techs., Inc.*, 6 F.3d at 773-74 ("a method or process claim is directly infringed only when the process is performed"). Even Woodway's technical expert recognizes that "each step of that patent claim must be performed." AMF ¶ 37.[4]

Accordingly, to establish infringement of claim 25, Woodway must prove that a single

[4] Dr. Blair then embeds a fundamental error by opining as to the product ("for the Gen III to infringe claim 25") rather than the entity that performed each step of claim 25.

actor performs every step of the claimed method. *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1378 (Fed. Cir. 2007); *Aristocrat Tech. Australia Pty Ltd. v. International Game Technology*, 709 F.3d 1348, 1353 (Fed. Cir. 2013) ("direct infringement requires a single party to perform every step of a claimed method"). Without that showing, Woodway cannot obtain summary judgment for infringement of the method claim. *See i4i Ltd. P'ship*, 598 F.3d at 850; *Meyer Intellectual Props. Ltd.*, 690 F.3d at 1366; *Joy Techs., Inc.*, 6 F.3d at 773-74; *Verco Decking Inc. v. Consolidated Systems Inc.*, No. 11-cv-02516, 2015 WL 11117077, at *4 (D. Az. July 21, 2015) ("To obtain summary judgment for a method claim, Verco must show that there are no genuine issues of material fact that [defendant] has performed 'all of the steps or stages of the process' outlined in" the claim.) (citation omitted).

**1. Woodway Concedes that It Is Not Moving for Summary Judgment Against Either Chapco or Samsara, and It Fails to Identify an Actor That Performed the Steps.**

By statute, "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent." 35 U.S.C. § 271(a) (emphasis added). Section 271 applies to method and apparatus claims, but "method claims are directed toward novel processes and describe a step-by-step method for accomplishing the transformation of an article." Dkt. No. 258 at 5 fn. 5. Woodway concedes, as it must, that to establish liability on a method claim, each step must be performed by or attributed to a single entity. Dkt. No. 258 at 13.

Yet, Woodway does not identify which entity performs any or all of the claimed steps. Instead, Woodway inexplicably advances a Motion for Summary Judgment that does not seek a determination as to whether Chapco or Samsara is responsible for the alleged infringement. Dkt. No. 258 at 29. It claims that it seeks, instead, "a finding that the assembly of the Gen III

infringes claim 25." *Id.*

That entire approach is wrong as a matter of law. Method claim infringement requires the identification of the steps and which entity performs each step. *See, e.g., BMC Res., Inc.*, 498 F.3d at 1378; *Aristocrat Tech. Australia Pty Ltd.*, 709 F.3d at 1353. Without establishing the entity against whom it seeks judgment, there is no procedural or statutory mechanism to afford relief to Woodway.

None of the cases Woodway cites hold otherwise. Most stand for the unremarkable proposition that courts grant summary judgment of infringement where there are no legitimate factual disputes. *See* Dkt. No. 258 at 14 (citing, e.g., *General Mills, Inc. v. Hunt-Wesson, Inc.*, 103 F.3d 978, 983 (Fed. Cir. 1997) (granting defendant's motion for summary judgment after concluding that popcorn is not a food item that meets the color and crispness limitations of the claims); *Mikkelson Graphic Eng'g, Inc. v. Zund Am., Inc.*, 541 F. App'x 964, 971 (Fed. Cir. 2013) (affirming grant of summary judgment of direct infringement where district court found that defendant's software systems met the limitations of apparatus claims); *Innovention Toys, LLC v. MGA Enter., Inc.*, 637 F.3d 1314, 1317, 1319 (Fed. Cir. 2011) (affirming grant of summary judgment of direct infringement where district court found that defendant's game met the limitations of apparatus claims); *Lexion Med., LLC v. Northgate Tech., Inc.*, 618 F.Supp.2d 896 (N.D. Ill. 2009) (post-trial and post-appeal summary judgment determination where district court awarded summary judgment against named defendant); *Philips Elec. North America Corp. v. Contec Corp.*, 411 F.Supp.2d 470 (D. Del. 2006) (method of programming involving remote control units for controlling appliances, and finding liability for indirect infringement)). None

grants summary judgment where the patentee failed to establish an actor liable for direct infringement.

Woodway cites no caselaw that would permit the Court to embark on an advisory opinion pursuant to which it would determine a hypothetical, e.g., assuming "someone" performs each step of a method claim, evidenced solely by the existence of an assembled product, then "someone" is liable for infringement. *See Matthews Intern. Corp. v. Biosafe Eng.*, LLC, 695 F.3d 1322, 1328 (Fed. Cir. 2012) (Court may not adjudicate a dispute of a hypothetical or abstract character and cannot issue an opinion advising what the law would be on a hypothetical state of facts); *Jang v. Boston Scientific Corp.*, 532 F.3d 1330, 1335 (Fed. Cir. 2008) (the Supreme Court has explicitly held that Article III does not permit the courts to resolve issues when it is not clear that the resolution of the question will resolve a concrete controversy between interested parties). Even if Woodway's newest infringement analysis were timely and correct (which is disputed), there is no procedural mechanism to enter an Order granting the relief Woodway seeks because Woodway identifies no entity to be adjudged liable for infringement of claim 25.

**2. Woodway Never Pled Divided Infringement or Included Any Analysis of Divided Infringement in its Infringement Contentions or Expert Reports.**

Having failed to identify a single actor that performs the steps of claim 25, Woodway claims in a half-page argument that the jury should determine the issue of divided infringement. Dkt. No. 258 at 29 (citing *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022-23 (Fed. Cir. 2015) ("*Akamai V*")). That argument comes far too late, and Woodway cites no evidence anywhere in its Local Rule 56(a)1 Statement relating to divided infringement.

**i. Woodway Never Pled Divided Infringement or Referenced that Theory in Contentions or Expert Reports.**

In *Akamai V*, the Federal Circuit reaffirmed the "single actor rule" for direct infringement of a method claim under 35 U.S.C. 271(a) and observed that "[w]here more than one actor is involved in practicing the steps, a court must determine whether the acts of one are attributable to the other such that a single entity is responsible for the infringement." *Akamai V*, 797 F.3d at 1022. The Court then held that an entity will be held "responsible for others' performance of method steps [under § 271(a)] in two sets of circumstances: (1) where that entity directs or controls others' performance, and (2) where the actors form a joint enterprise." *Id.* Regardless of the theory, divided infringement requires specific showings to establish direction and control or joint enterprise. *Id.*

Woodway touts the fact that filed Counterclaims on July 15, 2016 and Supplemental Counterclaims on April 13, 2017. Dkt. No. 258 at 5-6 and n. 7. Nowhere in either document is there any reference to divided infringement, joint enterprise, or allegations of control or direction of performance. Dkt. Nos. 54, 85.

During fact discovery, Woodway served Preliminary and Supplemental Infringement Contentions. Dkt. No. 258 at 6. Those Infringement Contentions are entirely silent on joint infringement and/or joint enterprise liability and include no discussions concerning control or direction of performance. AMF ¶ 7, 8, 32.

December 30, 2016 marked the close of fact discovery, but Woodway never pled or advanced theories of joint infringement or joint enterprise liability, and it never argued direction or control in its Infringement Contentions[5] prior to that point. As the Court reasoned in the context of Woodway's Motion to Strike, "the court's Scheduling Order clearly required the use

[5] Woodway served only the Preliminary Infringement Contentions and Supplemental Infringement Contentions, neither of which addresses joint infringement, joint enterprise liability or direction/control. AMF ¶ 7, 8, 32.

of infringement and invalidity contentions, [] and the attempt to use new theories, absent a request to amend, violates the court's Order." Dkt. No. 144 at 25.

Woodway never sought leave to amend its Counterclaims and Contentions to advance new liability theories on a version of the product its expert characterizes as "in large part identical" to the earlier versions. Instead, Woodway includes a cursory, undeveloped argument for the first time, at the very back of its Motion for Summary Judgment,[6] previewing a plan to present a divided infringement theory to the jury. Mere months from trial, well after the close of all fact and expert deadlines, and based on the hardline Woodway has successfully taken with respect to contentions,[7] that should not be allowed. Fed. R.Civ.P. 37(c)(1)(C) and (b)(2)(A)(ii).

**ii. Woodway's Technical Expert Did Not Consider Divided Infringement or Offer an Opinion on Liability on that Theory.**

On March 2, 2017, Woodway's technical expert, Dr. Kim Blair, issued the Blair Opening Report directed to infringement. Dr. Blair did not opine that any entity performed the steps of claim 25. AMF ¶ 12. The Blair Opening Report does not include an "assembly" analysis as to claim 25. AMF ¶ 13. The Blair Opening Report does not substantively reference method, performance, or step. AMF ¶ 14-15. The Blair Opening Report does not include any analysis of joint infringement, joint enterprise liability or direction/control. AMF ¶ 16. At deposition, Dr. Blair testified to his understanding of the relationship between the Plaintiffs, never referencing joint enterprise or control. AMF ¶¶ 17-18. Dr. Blair did not know which of Chapco or Samsara makes the accused treadmills, he admitted that Chapco does not make the entire product, and he confirmed that he was not engaged to opine on the issue of which Plaintiff manufactures the accused products. AMF ¶¶ 19-21.

Dr. Blair's Supplemental Expert Report fares no better. In the Supplemental Blair

[6] Dkt. No. 258

[7] E.g. Woodway asserted that parties cannot serially make changes to their positions "when it suits their needs." Dkt. No. 113, at 4.

Report, Dr. Blair opines that "Gen III is in large part identical to the 'Redesigned TrueForm Runner Treadmill" evaluated earlier. AMF ¶ 26. The Supplemental Blair Report does not identify who performs the steps of claim 25. AMF ¶ 29. Dr. Blair offers no opinion that any actor performs all steps of claim 25. AMF ¶ 30. The Supplemental Blair Report does not include any analysis of joint infringement, joint enterprise liability or control. AMF ¶ 31.

In short, Woodway has never claimed that Plaintiffs are liable under a divided infringement theory – not in its Infringement Contentions, Dr. Blair's Opening Report, or Dr. Blair's April 2018 Supplemental Report. AMF ¶¶ 7-8, 16, 31. The Scheduling Order has long since barred Woodway's newly-claimed theory, and Woodway should be prevented from advancing it now, or to the jury. *See* Dkt. No. 144 at 24.

**iii. Woodway Did Not Make the Showing Required for Divided Infringement and Should Be Estopped from Making the Divided Infringement Argument.**

For whatever reason, Woodway elected to serve a Motion for Summary Judgment that exposes Woodway's lack of infringement evidence and asks that the jury make the liability assessment. Dkt. No. 258 at 30. Even if the Court permits Woodway to advance its belated theory of divided infringement – which the Court should not – Woodway still is not entitled to summary judgment. In its Motion, Woodway recognizes that to prove that an entity "directs or controls" another, a party must show that the entity "'(1) conditions participation in an activity or receipt of a benefit' upon others' performance of one or more steps of a patented method, and (2) 'establishes the manner or timing of that performance.'" Dkt. No. 258 at 13 (quoting *Eli Lilly and Co. v. Teva Parenteral Meds., Inc.*, 845 F.3d 1357, 1365 (Fed. Cir. 2017)). To prove the "joint enterprise" basis for divided infringement, a party must show four elements: (i) agreement among the group members; (ii) a common purpose to be carried out; (iii) community of pecuniary interest; and (iv) equal right to voice in the direction of the enterprise. *Akamai V* at

1023 (citing Restatement (Second) of Torts § 491 cmt. c (Am. Law Inst. 1965)).

Woodway does not identify which test it proposes to use, i.e. joint enterprise or direction/control. Woodway did not substantively address any of the factors to support either prong for divided infringement. Instead, Woodway identified the elements and segued to a representation that "there is ample evidence to be presented at trial that Chapco controls Samsara's actions" or that the corporate entities are "involved in a joint enterprise." Dkt. No. 258 at 29. But Woodway, which bears the burden, never identifies any of that so-called "ample evidence" for the alternative theories in its Local Rule 56(a)1 Statement or anywhere else. That failure, among others, supports the relief sought in Plaintiffs' Motion for Summary Judgment. *See CILP Assocs., L.P. v. Pricewaterhouse Coopers LLP*, 735 F.3d 114, 123 (2d Cir. 2013) ("the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment."); *Wrobel v. County of Erie*, 692 F.3d 22, 30 (2d Cir. 2012) ("[t]o survive a [summary judgment] motion ..., [a nonmovant] need[s] to create more than a 'metaphysical' possibility that his allegations were correct; he need[s] to 'come forward with specific facts showing that there is a genuine issue for trial.").

Moreover, Woodway's new "control" argument is inconsistent with the position it successfully advanced in the context of the apparatus claims, i.e. that Chapco and Samsara are alter-egos of Brian Weinstein. Dkt. No. 105 at 16-19. Propelling that argument forward, Woodway represented that "due to Brian Weinstein's directions, [] the independence of these two companies does not exist." *Id.* at 19. Crediting Woodway, the Court ruled that "there is a genuine issue of fact as to whether Chapco and Samsara are both alter-egos of Weinstein." Dkt. No. 144 at 12.

That triggers the doctrine of judicial estoppel, which "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the

exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 743, 121 S.Ct. 1808 (2001). It prevents a party from switching to an inconsistent theory to gain a litigation advantage. *Id.* at 749; *Young v. U.S. Dept. of Justice*, 882 F.2d 633, 639 (2d Cir.1989). To apply, the doctrine requires a two part showing: (1) the party to be estopped must have "argued an inconsistent position in a prior proceeding;" and (2) the prior inconsistent position must have been adopted by the court in some manner." *Bates v. Long Island R. Co.*, 997 F.2d 1028, 1033 (2d Cir.1993). A "prior proceeding" could be an earlier matter in the same proceeding. *Republic of Ecuador v. Chevron Corp*, 638 F.3d 384, 395- 96 (2d Cir. 2011). "Adoption" can include adjudication by the court or reliance by another party, the court, or both. *Id.* at 395.

Having successfully argued last year that a non-party controls both Chapco and Samsara, and having never pled any theory of divided infringement, Woodway should not be permitted to switch positions and argue now that Chapco controls Samsara or has entered into a joint enterprise in which it has an "equal voice." The Court should not sanction Woodway's change to this new position and should estop Woodway from arguing divided infringement.

### D. Woodway's Arguments that the Prior Summary Judgment Proceedings Limit Plaintiffs' Non-Infringement Defenses Should Be Rejected.

Woodway peppers the Motion for Summary Judgment with arguments suggesting "waiver" and "admissions." *See, e.g.* Dkt. No. 258 at 16-17, 21. First, Woodway claims that because the Court denied Plaintiffs' Motion for Summary Judgment of Non-Infringement relating to the prior versions of the TrueForm Runner, Plaintiffs are constrained from arguing non-infringement of claim 25 with respect to Gen III. *See* Dkt. No. 258 at 7-8. But the cited portion of the Summary Judgment Order makes clear that the Court considered substantive infringement issues relating to the four claims Woodway advanced (1, 6, 19, 20), not the others. *See* Dkt. No. 144 at 14 and fn. 4 (recognizing that Plaintiffs raised a non-infringement position relevant to claim 11, but concluding that "[w]hether or not this is true is not relevant to resolution

of Woodway's MFSJ, as Woodway did not move for summary judgment as to claim 11."). Woodway's citation to the transcript of the Summary Judgment proceeding[8] omits the first part of the Court's hypothetical ("Would you then concede that the accused products infringe the claims the way Woodway asserts?), which makes clear that the discussion related to Plaintiffs' objection to the four claims in Woodway's Motion for Summary Judgment. (Transcript of Summary Judgment Hearing, 17:13-18.) The Court's Summary Judgment Order includes no substantive analysis of claim 25.

Woodway's claims of "admissions" are also unsupported. *See, e.g.*, Dkt. No. 258 at 2, 15, 28. Perhaps most egregious is Woodway's argument that "Plaintiffs have already admitted that the Gen II treadmill infringes the asserted claims (which include claim 25) if the "frame and bearing limitations are met." Dkt. No. 258 at 15. That is simply false. The Local Rule 56(a)1 Statement Woodway filed with the 2017 Motion for Summary Judgment does not even reference claim 25, so that cannot be the source of the "admissions." *See* Dkt. No. 96 at 2, ¶ 8. Neither Chapco nor Samsara made any "admissions" in the context of the 2017 Motion for Summary Judgment that limit their defenses to claim 25 here, and neither admitted that a product meets the limitations of a method claim's steps. *Cf.* Dkt. No. 258 at 15.

Again, Woodway cannot even identify the entity it claims is liable for infringement of claim 25. Since that is the case, Woodway's argument that Chapco and/or Samsara waived non-infringement defenses to claim 25 is not plausible and should be rejected.

[8] Dkt. No. 258 at 8.

Nor is the Court's Summary Judgment Order on apparatus claims dispositive of the method claim analysis. Woodway repeatedly suggests that the Court's earlier determination that Samsara is liable for infringement based on its sales of treadmills allows a short circuit around the method claim analysis. Dkt. No. 258 at 15. Not so. *See, e.g., Cardiac Pacemakers,* 576 F.3d at 1362-1363 ("distinction between a claim to a product, device, or apparatus, all of which are tangible items, and a claim to a process, which consists of a series of acts or steps.'"). Federal Circuit "precedents draw a clear distinction between method and apparatus claims for purposes of infringement liability." *Id.* at 1363. The Federal Circuit has explained that the sale of equipment to perform a process is not a sale of the process within the meaning of 271(a)." *Joy Technologies Inc.*, 6 F.3d at 773. Since the Summary Judgment Order relates to Samsara's sale of accused products, that Order is not dispositive of this analysis, which relates to the performance of certain steps.

### E. Woodway's Arguments that Plaintiffs Are Advancing New Claim Constructions or Belated Non-Infringement Positions Are Wrong.

In its Motion, Woodway argues that claim 25 has been part of this case since the beginning, and it provides the dates on which it served various infringement contentions and expert reports directed to infringement. Dkt. No. 258 at 5-6. Missing from that section – and the brief as a whole – is a discussion about how Woodway changed its infringement claims using the Supplemental Blair Report, as evidenced in the highlighted chart, *supra.*

Instead, Woodway repeatedly attacks Plaintiffs, charging that Plaintiffs are seeking new claim constructions and/or failed to challenge Woodway's infringement allegations contained in the contentions.[9] That again ignores the key issue: Woodway bears the burden of proof. Plaintiffs' Non-Infringement Contentions and Dr. Giachetti's Rebuttal Reports on Non-

[9] Woodway also makes much of the fact that Dr. Giachetti conveyed that he disagrees with determinations as to the frame and bearing rail limitations (Dkt. No. 258 at 19-20); that disagreement does not form the basis of Plaintiffs' Opposition here.

Infringement respond to arguments Woodway makes, but need go no further. It is not Plaintiffs' burden, for example, to explain to Woodway – a patentee with sophisticated counsel – that a method claim requires proof of an actor performing each step. Plaintiffs included the divided infringement affirmative defense in their Answer to the Supplemental Counterclaims (Dkt. No. 87 at 10) and then responded to Woodway's Supplemental Infringement Contentions for claim 25 as Woodway framed them.

Not until April of this year did Woodway revamp its position and serve a report from Dr. Blair that *sua sponte* inserts a theory of "assembly" and includes embedded constructions of claim terms (e.g. disposing on) that Woodway had never raised in the past. There was no way for Plaintiffs to anticipate that – Woodway does not even argue that they should have. Instead, Woodway ignores entirely the fact that any "changes" in Plaintiffs' positions result from the substance of Woodway's Supplemental Blair Report.

Plaintiffs are not seeking new claim constructions.[10] Quite the contrary. Throughout his Supplemental Report, Dr. Blair equates the steps of "providing," "disposing," "permitting," and "substantially preventing" with "assembly." Dr. Blair cites nothing from the intrinsic or extrinsic record that support his substitution of "assembly" for those commonly understood terms. Woodway never sought to have any of those terms construed as part of the *Markman* process. Dkt No. 76. Nevertheless, Dr. Blair's opinion is based on a belated proposed construction without any explanation of why any of those terms should be understood to have anything other than plain and ordinary meaning. Woodway does not even try to defend Dr. Blair, instead arguing – consistent with Plaintiffs – that "providing" is entitled to its plain and

[10] The cases Woodway cites are inapposite. See Dkt. No. 253 at 24 (citing *Central Admixture Pharma. Servs., Inc. v. Advanced Cardiac Solutions, P.C.*, 482 F.3d 1347, 1356 (Fed. Cir. 2007) (involving a party who argued on appeal that district court erred in failing to construe a term that the party never requested to be construed).

ordinary meaning.[11] Dkt. No. 258 at 18. As is clear from the Giachetti Supplemental Rebuttal Report, Plaintiffs and Dr. Giachetti apply the plain and ordinary meaning for those terms, consistent with Federal Circuit precedent. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc).

In short, if the Court reaches the claim 25 infringement analysis, either in the context of this Motion or Plaintiffs' Motion for Summary Judgment, Woodway's challenges to Dr. Giachetti's Rebuttal Report should be rejected. The Court permitted Plaintiffs to serve a rebuttal report following Dr. Blair's Supplemental Report, and Plaintiffs timely did so. The Giachetti Rebuttal Report addresses the embedded constructions Dr. Blair advanced, identifies Dr. Blair's methodological failings, and offers an opinion of non-infringement, the substance and timing of which is entirely proper.

### F. Woodway Failed to Adduce Evidence of Infringement.

Woodway acknowledges that method claim infringement requires a comparison of claim terms to the "process applying the terms as construed." *Lego System A/S v. Rubicon C'mm'c'ns, LLC*, No. 15-cv-000832, 2017 WL 4280866, at *2 (D. Conn. Sept. 27, 2017); *see also, e.g., Cardiac Pacemakers, Inc.*, 576 F.3d at 1362-1363. For all of the reasons set forth in Plaintiffs' Motion for Summary Judgment (Dkt. Nos. 252, 253), Chapco and Samsara both are entitled to summary judgment of non-infringement of claim 25.[12]

[11] Although there are limited exceptions to the general rule of plain and ordinary meaning, i.e. "(1) when a patentee sets out a definition and acts as his own lexicographer, or (2) when the patentee disavows the full scope of the claim term either in the specification or during prosecution," *Thorner v. Sony Computer Ent. America, L.L.C.*, 669 F.3d 1362, 1365 (Fed. Cir. 2012), Woodway and Dr. Blair do not claim that either exception forms the basis for the constructions Dr. Blair advances.

[12] Plaintiffs incorporate by reference Plaintiffs' Motion for Summary Judgment, including the arguments explaining why Woodway has failed to adduce competent evidence that Chapco perform numerous steps, including the "disposing on" step.

For the purposes of this Opposition, Plaintiffs focus on the "disposing on" step of claim 25, to highlight Woodway's failure of proof. *See* Dkt. No. 258 at 24-26. First, Woodway argues that "[t]he assembly of the Gen III satisfies this limitation," again without explaining the basis for its substitution of "assembly" for "disposing." Dkt. No. 258 at 23.

Then Woodway argues that Plaintiffs conceded this limitation with respect to Gen II. Dkt. No. 258 at 24. The "evidence" Woodway cites for the proposition does not support that broad statement, and it is inaccurate for at least two reasons, one involving the Supplemental Blair Report, and the other involving the 2017 Motion for Summary Judgment.

The Supplemental Blair Report changed Woodway's position concerning "disposing on." For the first time, Woodway argued in the context of the Supplemental Blair Report that "disposing on" means "providing a running belt and locating it above" the bearing rails. Nowhere in its Infringement Contentions did Woodway ever include that "locating above" analysis. Having only been presented with that argument in April 2018, Plaintiffs could not have waived a defense responding to Infringement Contentions that did not include it. *Cf.* Dkt. No. 258 at 24.

Nor did Plaintiffs waive any defenses to this limitation in the context of the earlier summary judgment. As noted *supra*, all of the apparatus claims Woodway presented in the 2017 Motion for Summary Judgment included "a running belt supported by" the claimed bearing rails. Woodway successfully argued that because "'support' may be provided directly, may be provided indirectly via an intermediary component or series of components, and/or may bear all of the weight of another component," the running belt was "supported by" the plurality of bearings in the then-accused device. Dkt. No. 97 at 23. Crediting Woodway's position, the Court granted summary judgment to Woodway, even though the Original and Redesigned TrueForm Runner include an intervening component, the endless belt, between the running belt

and bearings on the structure the Court identified as the bearing rails. Dkt. No. 144.

Woodway's new position interprets "disposing **on**" to mean "locating **above,**" impliedly requiring that the term be construed the same as "supported by," i.e. to include indirect contact. That contravenes basic patent principles that the use of different terms in claims denotes different meanings. *E.g., CAE Screenplates, Inc. v. Heinrich Fiedler GmbH & Co. KG,* 224 F.3d 1308, 1317 (Fed. Cir. 2000). In short, Woodway's new theory is at odds with established precedent.

Then Woodway argues that the plain and ordinary meaning of "disposing on" is placing or attaching. Dkt. No. 258 at 25. Tellingly, Dr. Blair included no such analysis or discussion in the Supplemental Blair Report, leaving Woodway solely with lawyer argument for this proposition. Even if credited, Woodway does not assert or prove that the treads of the treadmill are "attached to" and physically touch the bearings; the images Plaintiffs and Woodway included in these pending motions show that it is not the case. E.g. Dkt. No. 258 at 23 (top image).

At a certain point, Woodway has to live with the drafting conventions of its patent. The claims of the '580 patent include various terms claiming different modes of connectivity, some of which the Court construed (e.g. coupled) and some of which the Court did not, e.g. "attached" (claims 1, 11, 19), "mounted" (claim 19), "operatively coupled" (claim 19). Having successfully argued that "coupled" means the "joining of two members directly or indirectly," and that "supported by" may be provided directly or indirectly via an intermediary component or series of components, Woodway should not be permitted to argue that "disposing on" also includes indirect contact because that would collapse any differences between different claim terms.

The case law Woodway cites supports Plaintiffs' plain and ordinary meaning of "disposing on." Dkt. No. 258 at 25-26. In *Regents of Univ. of Cal. v. Micro Therapeutics, Inc.*, the court construed "disposing" to require placement of an object "in a particular location or position." No. C 03-05669, 2007 WL 2580594, at *5 (N.D. Cal. Aug. 17, 2007) (emphasis added). In *Kwench Sys. Int'l LLC v. Uponor Wirsbo Co.*, the court went further, specifying that "disposing . . . upon a structure" means "attaching to the structure." No. 1:07-CV-221-JM, 2008 WL 7084432, at *1 (D.N.H. Sept. 16, 2008). Woodway's choice of caselaw, paired with its past arguments all support Plaintiffs' position that "dispos[ed] on" requires locating the belt directly on the bearings, without an intervening component. To hold otherwise would render "supported by" synonymous with "disposing on" in contravention of case law and Woodway's earlier position. Because Woodway provides no evidence that the running belt attaches to or physically contacts the bearings, neither Chapco nor Samsara perform the "disposing on" step of claim 25.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Woodway's Motion for Summary Judgment.

CHAPCO, INC. and SAMSARA FITNESS, LLC
By Their Attorneys,

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Dated: June 29, 2018

**CERTIFICATION OF SERVICE**

I hereby certify that on June 29, 2018, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

*/s/ Christine K. Bush*

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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|---|---|
| CHAPCO, INC. AND SAMSARA FITNESS, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>WOODWAY USA, INC.,<br><br>Defendant. | Civil Action No. 3-15-CV-1665(JCH)<br><br>June 29, 2018 |

**PLAINTIFFS' LOCAL RULE 56(a)2 STATEMENT OF FACTS IN OPPOSITION TO SUMMARY JUDGMENT**

Pursuant to Local Rule 56(a)2, Plaintiffs Chapco, Inc. and Samsara Fitness, LLC respond to Defendant, Woodway USA, Inc.'s ("Woodway") Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment of Infringement of U.S. Patent No. 9,039,580 (the "'580 patent").

**STATEMENTS AND RESPONSES**

**STATEMENT NO. 1:** The only changes made between the Gen II TrueForm Runner treadmill and the Gen III relate to the wheels' location when the treadmill is in use, and the rear shaft assembly and its attachment to the frame. (Ex. A, Pretrial Hearing Tr., April 10, 2018, at 4:23-5:3, 7:10-17; Dkt. No. 211 at 25-26.)

**PLAINTIFFS' RESPONSE NO. 1:** **Admitted** that the Gen III has wheels in contact with a ground surface when the treadmill is in an operating position and lacks a claimed rear shaft assembly.[1]

**STATEMENT NO. 2**: Claim 25 of the '580 patent does not require the elements of "wheels" or a "rear shaft." (Ex. B, '580 patent, at 36:1-18.)

**PLAINTIFFS' RESPONSE NO. 2:** **Admitted**.

**STATEMENT NO. 3:** Claim 25 of the '580 patent was asserted in Woodway's original counterclaims and included in Woodway's Supplemental Infringement Contentions against the Gen II TrueForm Runner treadmill. (Dkt. No. 54 at ¶ 22; Ex. C, Woodway's Supplemental Infringement Contentions, at Appendix B, 48-56.)

**PLAINTIFFS' RESPONSE NO. 3:** **Admitted**.

**STATEMENT NO. 4:** Plaintiffs addressed claim 25 of the '580 patent in their Supplemental Non-Infringement Contentions. (Ex. D, Plaintiffs' Supplemental Non-Infringement Contentions,

[1] As the final page of this document, Plaintiffs provide a list of exhibits cited by Woodway in its Local Rule 56(a)1 Statement of Undisputed Material Facts and by Plaintiffs in this Local Rule 56(a)2 Statement of Facts in Opposition.

at Exhibit B, 49-57.)

**PLAINTIFFS' RESPONSE NO. 4:** **Admitted** that Plaintiffs' Supplemental Non-Infringement contentions addressed Woodway's Supplemental Infringement Contentions regarding claim 25 of the '580 patent. (Ex. D, Plaintiffs' Supplemental Non-Infringement Contentions, at Ex. B, 49-57.) **Denied** that Plaintiffs waived any non-infringement positions, particularly regarding Dr. Blair's April 13, 2018 Second Supplemental Expert Report (the "Supplemental Blair Report"), which contains new infringement positions. Supplemental Blair Report (attached hereto as Exhibit AA)[2]; *see also* Dr. Giachetti's Mar. 30, 2017 Non-Infringement Report[3] (Ex. E to Woodway's Local Rule 56(a)1 Statement) at 19 (reserving right to address new opinions.)

**STATEMENT NO. 5:** Plaintiffs conceded that, with respect to claim 25 of the '580 patent, in their Supplemental Non-Infringement Contentions that the only claim limitations missing were the "bearing rail" and "running belt" limitations. (Ex. D, Plaintiffs' Supplemental Non-Infringement Contentions, at Exhibit B, 49-57.)

**PLAINTIFFS' RESPONSE NO. 5:** **Denied**. (May 7, 2018 Giachetti Supplemental Rebuttal Expert Report ("Giachetti Supp. Rebuttal Report"), attached as Exhibit BB). Further stating, Woodway's Supplemental Infringement Contentions regarding claim 25 failed to address performance of the steps as is required to prove infringement of a method claim. (Ex. C, Woodway's Supplemental Infringement Contention); *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1378 (Fed. Cir. 2007).

**STATEMENT NO. 6:** In his March 30, 2017 report, regarding claim 25 of the ''580 patent, Dr. Giachetti stated the following:

**"The accused products do not have a bearing rail. The**

[2] For ease of the reference, any exhibits that Plaintiffs rely on in addition to those cited by Woodway are attached hereto and use a double-letter naming convention to differentiate Plaintiffs' submission from Woodway's.
[3] "Giachetti Rebuttal Report."

> **element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame."**

Dr. Giachetti did not offer any other opinions regarding any purported missing claim limitations in the Gen II TrueForm Runner Treadmill with respect to claim 25. (Ex. E, March 30, 2017 Giachetti Report, at 18.)

**PLAINTIFFS' RESPONSE NO. 6:** **Denied, in part.** Admitted that the quoted language appears in the March 30, 2017 Non-Infringement Rebuttal Report of Dr. Giachetti (the "Giachetti Rebuttal Report"), regarding claim 25 of the '580 patent. The second sentence is denied for the same reasons delineated in Response Nos. 4-5 *supra*.

**STATEMENT NO. 7:** Dr. Giachetti confirmed in deposition that the entirety of his opinions regarding non-infringement were included in his March 30, 2017 report. (Ex. F, Giachetti Tr., at 170:12-173:19.)

**PLAINTIFFS' RESPONSE NO. 7:** **Denied** that the material establishes the absence or presence of a genuine dispute of material fact. Fed. R. Civ. P. 56(c). The cited testimony pre-dates the Supplemental Blair Report (Ex. AA), and the Court allowed Plaintiffs to serve the Giachetti Supp. Rebuttal Report in response to the Supplemental Blair Report. (Exhibit CC, Pretrial Hearing Tr., Apr. 30, 2018, at 406:18-21). Dr. Giachetti also expressly reserved the right to supplement the Giachetti Rebuttal Report. (Ex. E, Giachetti Rebuttal Report, at 19).

**STATEMENT NO. 8:** The Gen II TrueForm Runner treadmill infringes claim 25 of the '580 patent if found to have a "frame" and "bearing rails." (Ex. G, Summary Judgment Hearing Tr., September 17, 2017, at 14:24-15:12, 17:8-25; Dkt. No. 144 at 15.)

**PLAINTIFFS' RESPONSE NO. 8:** **Denied.** The statement mischaracterizes the record, since Woodway did not move for summary judgment regarding claim 25 of the '580 patent. (Ex. G at 14:24-15:12; Dkt. No. 97 at 20-28.) Woodway dismissed claim 25 with prejudice with respect to

the Gen II TrueForm Runner treadmill. (Dkt. No. 244.)

**STATEMENT NO. 9:** Chapco's internal engineering documents do not reflect any changes, other than the wheels' location when the treadmill is in use, and the rear shaft assembly and its attachment to the frame, between the Gen II and Gen III TrueForm Runner Treadmill. (*See, e.g.*, Ex. H, Gen III Cad Drawings, at SAM0014284.)

**PLAINTIFFS' RESPONSE NO. 9:** **Admitted** that the attached CAD drawings reflect the position of the wheels and lack of a rear shaft assembly, as claimed. (Ex. A,, Apr. 10, 2018 Hrg. Tr., at 7:10-17; Dkt. No. 211 at 25-26). Denied that the material establishes the absence or presence of a genuine dispute of material fact. Fed. R. Civ. P. 56(c). Further denied because Woodway did not define "Chapco" in its Local Rule 56(a)1 Statement. (Dkt. No. 257.)

**STATEMENT NO. 10:** Dr. Giachetti's May 7, 2018 report references the same timed build for the Gen III as he did in his March 30, 2017 report regarding the Gen I and Gen II TrueForm Runner treadmills. (*Compare* "Timed Build," Dkt. No. 90-11 at 1, *with* May 7, 2018 Giachetti Report, at ¶ 42 and 10, Figure 1.)

**PLAINTIFFS' RESPONSE NO. 10:** **Denied.** Woodway does not identify any portion of the March 30, 2017 Giachetti Rebuttal Report that references a timed build. Local Rule 56(a)3.

**STATEMENT NO. 11:** The expert report of Woodway's technical expert, Kim Blair, sets forth a claim-by-claim analysis comparing the assembly of the Gen III to each element of claim 25. (Blair Suppl. Rpt., Dkt. No. 236 at Exhibit A, 1-12.)

**PLAINTIFFS' RESPONSE NO. 11:** **Denied** that Dr. Blair's analysis is "claim-by-claim" or that he addresses performance of any step as required. (Ex. AA, Supplemental Blair Report); *BMC Res., Inc.*, 498 F.3d at 1378.

**STATEMENT NO. 12:** Plaintiffs never sought or offered a construction of the terms

"providing" or "disposing on" during claim construction. (*See* Dkt. No. 68 at 2.)

**PLAINTIFFS' RESPONSE NO. 12:** **Admitted.** Woodway never contended that "assembly" met the limitations of "providing" or "disposing on" meant "providing a running belt and locating it above the bearing rails" or proposed a construction of "disposing on" until the Supplemental Blair Report. (Ex. AA, Supplemental Blair Report).

**STATEMENT NO. 13:** Claim 25 of the '580 patent requires, among other things, "providing a manually powered treadmill, the manually powered treadmill having a frame with a front end and a rear end." (*E.g.*, Ex. B, '580 patent, at 36:1-4.)

**PLAINTIFFS' RESPONSE NO. 13:** **Admitted**.

**STATEMENT NO. 14:** "Providing a manually powered treadmill" is achieved by assembling the Gen III TrueForm Runner treadmill. (Blair Suppl. Rpt., Dkt. No. 236 at Exhibit A, 1.)

**PLAINTIFFS' RESPONSE NO. 14:** **Denied**. (Ex. BB, Giachetti Supp. Rebuttal Report at ¶¶ 19-24, 38).

**STATEMENT NO. 15:** The Gen III TrueForm Runner is a manually powered treadmill. (Blair Suppl. Rpt., Dkt. No. 236 at Exhibit A, 1; Dkt. No. 27 at ¶ 2; Dkt. No. 101 at 25.)

**PLAINTIFFS' RESPONSE NO. 15:** **Admitted.**

**STATEMENT NO. 16:** Plaintiffs admitted that the limitation described in Paragraph 13 above is satisfied regarding the Gen II TrueForm Runner treadmill. (Ex. D, Plaintiffs' Supplemental Non- Infringement Contentions, at Exhibit B, 49.)

**PLAINTIFFS' RESPONSE NO. 16:** **Denied.** The material cited does not establish the absence or presence of a genuine dispute of material fact. Fed. R. Civ. P. 56(c). (*See also* Ex. D, Supplemental Non-Infringement Contentions, at Ex. B, 49-50 (denying structure meeting limitation of bearing rail); Ex. E, Giachetti Rebuttal Report, at 10-14 (the accused products do

not meet the frame and bearing rail limitations)).

**STATEMENT NO. 17:** The Gen III TrueForm Runner treadmill has a frame with a front end and a rear end. (Blair Suppl. Rpt., Dkt. No. 236 at Exhibit A, 2-3.)

**PLAINTIFFS' RESPONSE NO. 17:** **Admitted** that the Court determined the structure identified meets the limitation of a frame with a front end and a rear end. (Dkt. No. 144.) **Denied** that Plaintiffs admit that the identified structure meets the frame limitation of the claims. (Ex. BB, Giachetti Supp. Rebuttal Report, at ¶¶ 31-34).

**STATEMENT NO. 18:** Plaintiffs admitted that the Gen II TrueForm Runner treadmill includes a frame having a front end and a rear end. (Ex. D, Plaintiffs' Supplemental Non-Infringement Contentions, at Exhibit B, 50.)

**PLAINTIFFS' RESPONSE NO. 18:** **Denied**, *see* Responses to Statement Nos. 16-17.

**STATEMENT NO. 19:** Claim 25 of the '580 patent requires, among other things, "providing a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile." (Ex. B, '580 patent, at 36:5-9.)

**PLAINTIFFS' RESPONSE NO. 19:** **Admitted**.

**STATEMENT NO. 20:** Chapco employees place two bearing rails on the Gen III during assembly. (TrueForm Runner "Timed Build", Dkt. No. 90-11 at 1; Dkt. No. 144 at 7-8.)

**PLAINTIFFS' RESPONSE NO. 20:** **Denied**. The cited document is entitled "Samsara Timed Build." (Dkt. No. 90-11; Dkt. No. 254-5). Chapco delivers a subassembly of the Gen III to Samsara's facility that includes two rails without bearings. (Dkt. No. 254-5; Dkt. No. 254-6, Weinstein Decl. at ¶¶ 9-16).

**STATEMENT NO. 21:** The assembly of the Gen III TrueForm Runner treadmill includes

providing two bearing rails to the assembly. (Blair Suppl. Rpt., Dkt. No. 236 at Exhibit A, 4-6.)

**PLAINTIFFS' RESPONSE NO. 21:** **Denied.** (Ex. BB, Giachetti Supp. Rebuttal Report at ¶¶ 37-43).

**STATEMENT NO. 22:** The Gen III TrueForm Runner has a first bearing rail which extends longitudinally on one side of the frame and a second bearing rail which extends longitudinally on the other side of the frame. Both bearing rails include a plurality of bearings and define a curved top profile. (Blair Suppl. Rpt., Dkt. No. 236 at Exhibit A, 4-6.)

**PLAINTIFFS' RESPONSE NO. 22:** **Denied**. (*See* Ex. D, Plaintiffs' Supplemental Non-Infringement Contentions, at Ex. B, 49-50; Ex. E, Giachetti Rebuttal Report, at 10-14; Ex. BB, Giachetti Supp. Rebuttal Report, at ¶¶ 38-39).

**STATEMENT NO. 23:** Claim 25 of the '580 patent requires, among other things, "disposing a running belt on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails." (Ex. B, '580 patent, at 36:10-14.)

**PLAINTIFFS' RESPONSE NO. 23:** **Admitted**.

**STATEMENT NO. 24:** Chapco employees place a running belt on top of the bearings of the bearing rails in assembling the Gen III. (TrueForm Runner "Timed Build", Dkt. No. 90-11 at 6; Dkt. No. 144 at 7-8.)

**PLAINTIFFS' RESPONSE NO. 24:** **Denied**. Chapco has never made or assembled a Gen III treadmill and has no role in assembling the running belt or placing it on the treadmill. (Dkt. No. 254-6, Weinstein Decl. at ¶¶ 9-14). Neither Plaintiff places a running belt "on top of" the bearings. (Ex. BB, Giachetti Supp. Rebuttal Report, at ¶¶ 44-59).

**STATEMENT NO. 25:** The assembly of the Gen III TrueForm Runner treadmill includes

disposing a running belt on the bearing rails. (Blair Suppl. Rpt., Dkt. No. 236 at Exhibit A, 6-9.)

**PLAINTIFFS' RESPONSE NO. 25:** **Denied.** (Ex. BB, Giachetti Supp. Rebuttal Report, at ¶¶ 44-59).

**STATEMENT NO. 26:** The running belt of the Gen III TrueForm Runner treadmill follows a top curved running surface which corresponds to the curved top profile of the bearing rails. (Blair Suppl. Rpt., Dkt. No. 236 at Exhibit A, 6-9.)

**PLAINTIFFS' RESPONSE NO. 26:** **Denied.** (Ex. BB, Giachetti Supp. Rebuttal Report, at ¶¶ 38-39, 44-59).

**STATEMENT NO. 27:** Claim 25 of the '580 patent requires, among other things, "permitting movement of the running belt in a first direction and substantially preventing movement of the running belt in a second direction opposite the first direction." (Ex. B, '580 patent, at 36:15-18.)

**PLAINTIFFS' RESPONSE NO. 27:** **Admitted**, but the quotation omits a semi-colon.

**STATEMENT NO. 28:** Plaintiffs admitted that the limitation described above in Paragraph 27 is satisfied regarding the Gen II TrueForm Runner treadmill. (Ex. D, Plaintiffs' Supplemental Non- Infringement Contentions, at Exhibit B, 53.)

**PLAINTIFFS' RESPONSE NO. 28:** **Denied.** Woodway's Supplemental Infringement Contentions regarding claim 25 failed to address performance of the method claim steps. *BMC Res., Inc.*, 498 F.3d at 1378; *see also* (Ex. C, Woodways' Supplemental Infringement Contentions; Ex. BB, Giachetti Supp. Rebuttal Report, at ¶¶ 60-65).

**STATEMENT NO. 29:** The safety device that is installed during the assembly of the Gen III TrueForm Runner permits the running belt to move in a first direction and substantially prevents the running belt form moving in a second direction opposite the first direction. (Blair Suppl. Rpt., Dkt. No. 236 at Exhibit A, 10-12.)

**PLAINTIFFS' RESPONSE NO. 29:** **Denied.** (Ex. BB, Giachetti Supp. Rebuttal Report, at ¶¶ 61-62).

**STATEMENT NO. 30:** Dr. Giachetti's May 7, 2018 report does not reference the wheels' location when the treadmill is in use or the rear shaft assembly and its attachment to the frame. (May 7, 2018 Giachetti Report, at ¶¶ 19-65.)

**PLAINTIFFS' RESPONSE NO. 30:** **Denied, in part.** The material cited does not establish the absence or presence of a genuine dispute of material fact. Fed. R. Civ. P. 56(c). Admitted that Dr. Giachetti's May 7, 2018 report does not reference the location of the wheels of Gen III when it is in an operating position, but denied that the report does not reference the rear shaft assembly. (Ex. BB, Giachetti Supp. Rebuttal Report, at ¶¶ 58, 61).

## PLAINTIFFS' LOCAL RULE 56(a)2 STATEMENT OF ADDITIONAL MATERIAL FACTS

Plaintiffs submit the Local Rule 56(a)2(ii) Statement of Additional Material Facts.

1. On April 18, 2016, Woodway served Preliminary Infringement Contentions. (Exhibit FF, excerpts of Woodway's "Preliminary Infringement Contentions").

2. On July 18, 2016, Woodway served Supplemental Preliminary Infringement Contentions (the "Supplemental Infringement Contentions"). (Ex. C to Woodway's Local Rule 56(a)1 Statement ("Woodway 56(a)1")).[4]

3. Woodway's Preliminary Infringement Contentions do not allege that "assembly" infringes claim 25 of U.S. Patent No. 9,039,580 ("the '580 patent"). (Ex. FF, Preliminary Infringement Contentions, at App'x B, *e.g.*, 8, 15, 26).

[4] To reduce the volume, Plaintiffs cite to Woodway's exhibits rather than filing duplicates.

4. Woodway's Preliminary Infringement Contentions do not identify any entity that allegedly performed the steps in claim 25. (*See generally* Ex. FF, Preliminary Infringement Contentions).

5. Woodway's Supplemental Infringement Contentions do not allege that "assembly" of treadmills infringes claim 25. (Ex. C to Woodway 56(a)1, Supplemental Infringement Contentions at, *e.g.*, 7, 14, 20 (App'x. B p. 2, 9, 15)).

6. Woodway's Supplemental Infringement Contentions do not identify any entity that allegedly performed the steps in claim 25. (Ex. C to Woodway 56(a)1, Supplemental Infringement Contentions).

7. Woodway's Preliminary Infringement Contentions do not include any analysis of joint infringement, joint enterprise liability or control. (*See generally* Ex. FF, Preliminary Infringement Contentions).

8. Woodway's Supplemental Infringement Contentions do not include any analysis of joint infringement, joint enterprise liability or control. (Ex. C to Woodway 56(a)1, Supplemental Infringement Contentions).

9. Woodway's Preliminary Infringement Contentions do not address "locating" a running belt or a running belt "above" the bearing rails. (Ex. FF, Preliminary Infringement Contentions, at App'x B p. 49).

10. Woodway's Supplemental Preliminary Infringement Contentions do not include analysis that "disposing on" means "locating" a running belt "above" the bearing rails. (Ex. C to Woodway 56(a)1, Supplemental Infringement Contentions, at App'x B p. 51).

11. On March 2, 2017, Woodway's technical expert, Dr. Kim Blair, issued an Opening Report directed to infringement. (Exhibit DD, excerpts of the "Blair Opening Report").

12. The March 2, 2017 Blair Opening Report does not identify any entity that allegedly performed the steps of claim 25 of the '580 patent. (Ex. DD, Blair Opening Report).

13. In the infringement chart for the '580 patent attached to the Blair Opening Report, Dr. Blair's infringement analysis as to claim 25 only mentions "assembly" in the context of the "frame assembly" and the "bearing assembly." (Ex. DD, Blair Opening Report, at Ex. F pp. 49, 54).

14. The Blair Opening Report does not mention "method" except when quoting the patents. (Ex. DD, Blair Opening Report, at ¶¶ 28-29, 33).

15. The Blair Opening Report does not reference performance of any steps of claim 25 by any entity. (Ex. DD, Blair Opening Report, at ¶ 3).

16. The Blair Opening Report does not identify or address analyze joint infringement, joint enterprise liability or control. (Ex. DD, Blair Opening Report).

17. Dr. Blair testified concerning his knowledge of the relationship between Chapco, Inc. ("Chapco") and Samsara Fitness, LLC ("Samsara"). (Exhibit EE, Transcript of Deposition of Kim Blair ("Blair Tr.") at 60:22-61:15).

18. Dr. Blair did not reference joint infringement, joint enterprise or control. (Ex. EE, Blair Tr. at 61:3-15.)

19. Dr. Blair did not know which of Chapco or Samsara makes the accused treadmills. (Ex. EE, Blair Tr. at 61:16-64:21).

20. Dr. Blair admitted that Chapco does not make the entire treadmill. (Ex. EE, Blair Tr. at 63:3-6).

21. Dr. Blair was not engaged to opine on the issue of which Plaintiff manufactures the accused products. (Ex. EE, Blair Tr. at 64:18-21).

22. On March 30, 2017, Plaintiffs' expert issued a rebuttal report responding to the Blair Opening Report. (Ex. E to Woodway 56(a)1, Giachetti Rebuttal Report).

23. In the Giachetti Rebuttal Report, Plaintiffs' expert "reserve[d] the right to amend or supplement this report should additional material facts or new opinions emerge during future discovery or in testimony." (Ex. E, Giachetti Rebuttal Report, at p. 19).

24. On March 9, 2018, Woodway represented that it planned to limit the asserted claims against the Redesigned TrueForm Runner to 1, 6, 19, and 20 of the '580 patent. (Exhibit GG, Mar. 9, 2018 correspondence, at 1).

25. On April 13, 2018, Woodway served the Second Supplemental Expert Report of Dr. Blair. (Ex. AA, Supplemental Blair Report).

26. In the Supplemental Blair Report, Dr. Blair opines that "Gen III is in large part identical to the 'Redesigned TrueForm Runner Treadmill.'" (Ex. AA, Supplemental Blair Report, at ¶ 8.)

27. In the Supplemental Blair Report, Dr. Blair contends that the limitation of "disposing a running belt on the plurality of bearings of the first bearing rail and the second bearing rail" is met by "[t]he assembly of the Gen III treadmill, which includes providing a running belt and locating it above the bearing rails." (Ex. AA, Supplemental Blair Report, at Ex. A p. 6).

28. In the Opening Blair Report, Dr. Blair did not opine as to "locating" a running belt or a running belt "above" the bearing rails. (Ex. DD, Blair Opening Report, at Ex. F p. 52).

29. The Supplemental Blair Report does not identify who performs the steps of claim 25. (*See generally* Ex. AA, Supplemental Blair Report).

30. Dr. Blair offers no opinion that any actor performs all steps of claim 25. (*See generally* Ex. AA, Supplemental Blair Report; Ex. DD, Opening Blair Report).

31. The Supplemental Blair Report does not identify or analyze joint infringement, joint enterprise liability or control. (*See generally* Ex. AA, Supplemental Blair Report).

32. Woodway's Preliminary and Supplemental Infringement Contentions do not assert or analyze joint infringement, joint enterprise liability or control. (Ex. C to Woodway 56(a)1, Supplemental Infringement Contentions; Ex. FF, Preliminary Infringement Contentions).

33. On May 7, 2018 Plaintiffs served a report from Dr. Giachetti rebutting the Supplemental Blair Report. (Ex. BB, Giachetti Supp. Rebuttal Report)

34. Dr. Giachetti noted that the Court did not construe the terms "providing," or "disposing on," so he applied the plain and ordinary meaning of those terms as understood by a person having ordinary skill in the art. (Ex. BB, Giachetti Supp. Rebuttal Report, ¶¶ 20, 36, 47-48.)

35. In his Supplemental Rebuttal Report, Dr. Giachetti opined that Dr. Blair failed to identify the execution of steps and failed to identify which of Chapco or Samsara allegedly performs the steps. (Ex. BB, Giachetti Supp. Rebuttal Report, ¶¶ 23, 24, 40.)

36. In his Supplemental Rebuttal Report, Dr. Giachetti opined that Chapco does not perform all steps of the method and, further that Samsara does not perform all steps of the method. (Ex. BB, Giachetti Supp. Rebuttal Report, ¶¶ 29, 30, 41, 43, 49, 59, 62, 65.)

37. In the Supplemental Blair Report, Dr. Blair states that "each step of that patent claim must be performed." (Ex. AA, Supplemental Blair Report, ¶ 11.)

38. In the Supplemental Blair Report, Dr. Blair states that "'[P]roviding a manually powered treadmill' is the assembly of the Gen III treadmill." (Ex. AA, Supplemental Blair

Report, at Ex. A t, p. 1).

39. In the Supplemental Blair Report, Dr. Blair opined that "assembly of the Gen III treadmill" meets the limitations beginning "providing a manually powered treadmill" and "providing a first bearing rail and a second bearing rail…" (Ex. AA, Supplemental Blair Report, at Ex. A, pp. 1, 4).

40. In the Supplemental Blair Report, Dr. Blair opined that "assembly of the Gen III treadmill" meets the limitations beginning "permitting movement" and "substantially preventing . . ." (Ex. AA, Supplemental Blair Report, at Ex. A, p. 10).

41. Claim 1 of the '580 patent includes the following language: "a running belt supported by the first bearing rail and the second bearing rail and disposed about the front shaft and the rear shaft, wherein the running belt follows a curved running surface." (Ex. B, '580 patent, Col. 32, lns. 48-67).

42. The endless belt of the Gen III is located between the running belt and the plurality of bearings. (Ex. AA, Supplemental Blair Report at Ex. A, p. 9; Ex. BB Giachetti Supp. Rebuttal Report at ¶¶ 53-54).

## LIST OF EXHIBITS

**Exhibits Attached to Woodway USA Inc.'s Local Rule 56(a)1 Statement (Dkt. No. 257)**

- Exhibit A – Pretrial Hearing Transcript, April 10, 2018, excerpted (Dkt. No. 257-1)
- Exhibit B – U.S. Patent No. 9,039,580 (the "'580 patent") (Dkt. No. 257-2)
- Exhibit C – Woodway's Supplemental Infringement Contentions, excerpted (Dkt. No. 257-3)
- Exhibit D – Plaintiffs' Supplemental Non-Infringement Contentions, excerpted (Dkt. No. 257-4)
- Exhibit E – Non-Infringement Rebuttal Report of Dr. Giachetti, March 30, 2017 (the "Giachetti Rebuttal Report"), excerpted (Dkt. No. 257-5)
- Exhibit F – Transcript of Deposition of Dr. Giachetti ("Giachetti Tr."), excerpted (Dkt. No. 257-6)
- Exhibit G – Summary Judgment Hearing Transcript, Sept. 17, 2017, excerpted (Dkt. No. 257-7)
- Ex. H – CAD drawings (Dkt. No. 257-8)

**Exhibits Attached to Plaintiffs' Local Rule 56(a)2 Statement**

- Exhibit AA – Second Supplemental Expert Report of Dr. Blair, April 13, 2018 (the "Supplemental Blair Report")
- Exhibit BB – Supplemental Rebuttal Expert Report of Dr. Giachetti, May 7, 2018 (the "Giachetti Supp. Rebuttal Report")
- Exhibit CC – Pretrial Hearing Transcript, April 30, 2018, excerpted
- Exhibit DD – Expert Report of Dr. Blair, March 2, 2017 (the "Blair Opening Report"), excerpted
- Exhibit EE – Excerpts of Transcript of Deposition of Dr. Blair ("Blair Tr.")
- Exhibit FF – Woodway's Preliminary Infringement Contentions, excerpted
- Exhibit GG – March 9, 2018 Letter

CHAPCO, INC. and SAMSARA FITNESS, LLC

By Their Attorneys,

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DATED: June 29, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was filed through the ECF system on the 29th day of June, 2018, and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ *Christine K. Bush*

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

| | |
|---|---|
| CHAPCO, INC. AND SAMSARA FITNESS, LLC,<br>Plaintiffs,<br>v.<br>WOODWAY USA, INC.,<br>Defendant. | Civil Action No. 3-15-CV-1665(JCH)<br>**September 14, 2018** |

**CHAPCO, INC. AND SAMSARA FITNESS LLC's**
**NOTICE PURSUANT TO 35 U.S.C. §282**

Pursuant to 35 U.S.C. § 282, Plaintiffs Chapco, Inc. and Samsara Fitness, LLC ("Plaintiffs") hereby provide notice that Plaintiffs may rely on one or more of the following patents (including filing histories thereof), publications, and/or other information to show that one or more of the asserted claims of U.S. Patent No. 9,039,580 (the "'580 Patent") is invalid and/or to show the state of the art.

Plaintiffs also affirmatively state that they have already provided notice to Defendant Woodway USA, Inc. of the identity of certain patents and publications within the scope of Section 282 through pleadings, written discovery and contentions, expert reports (and exhibits thereto), depositions, and other documents in this action. To the extent not set forth below, Plaintiffs hereby incorporate by reference all pleadings, written discovery and invalidity contentions, expert reports (and exhibits thereto), depositions, and any other documents served in the above-captioned case that have already provided written notice. To the extent not set forth below, Plaintiffs also hereby incorporate by reference each patent and publication listed on the face of the '580 Patent and/or identified in the prosecution history.

The identification of a particular patent or publication does not mean that Plaintiffs necessarily will introduce or rely on that patent or publication at trial, and is not an admission or representation that reliance upon such patent or publication is necessary to establish any of Plaintiffs' defenses.

Plaintiffs reserve the right to amend or supplement this Notice as circumstances may require.

**Patents and Patent Applications**

| No. | Country | Patent / Publication No. | Date Issued/Published | Patentee |
|---|---|---|---|---|
| 1. | United States | 411,986 | 10-1-1889 | Frazeur *et al.* |
| 2. | United States | 641,424 | 1-16-1900 | Ziebell *et al.* |
| 3. | United States | 759,296 | 5-10-1904 | Moriarty *et al.* |
| 4. | United States | 1,211,765 | 1-9-1917 | Schmidt *et al.* |
| 5. | United States | 3,637,206 | 1-25-1972 | Chickering *et al.* |
| 6. | United States | 3,642,279 | 2-15-1972 | Cutter *et al.* |
| 7. | United States | 4,334,676 | 6-15-1982 | Schonenberger *et al.* |
| 8. | United States | 4,389,047 | 1-21-1983 | Hall *et al.* |
| 9. | United States | 5,411,455 | 5-2-1995 | Haber *et al.* |
| 10. | United States | 5,538,489 | 7-23-1996 | Magid *et al.* |
| 11. | United States | 5,669,856 | 9-23-1997 | Liu *et al.* |
| 12. | United States | 5,709,632 | 1-20-1998 | Socwell *et al.* |
| 13. | United States | 6,042,514 | 3-28-2000 | Abelbeck *et al.* |
| 14. | United States | 6,053,848 | 4-25-2000 | Eschenbach *et al.* |
| 15. | United States | 2006/0287165 | 12-21-2006 | Pasqualin *et al.* |

**Publications & Other Prior Art**

| No. | Title | Date |
|---|---|---|
| 1. | International Standards Organization 20957-6:2005/European Standards Technical Committee 957-6:2001. | 2005 |
| 2. | Occupational Safety and Health Administration (OSHA) Code 1926.307 | 2004 |
| 3. | Occupational Safety and Health Administration (OSHA) Code 1926.219 | -- |
| 4. | "Power Transmission Handbook" 2009, Fourth Edition 2nd Printing, by Power Transmission Distributors Association | 2009 |
| 5. | ASTM International: F2276-05 | 2005 |
| 6. | ASTM International: F2115-05 | 2005 |

THE PLAINTIFFS,
CHAPCO, INC. and SAMSARA FITNESS, LLC

By Their Attorneys,

/s/ *Christine K. Bush*

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**CERTIFICATION OF SERVICE**

I hereby certify that on September 14, 2018, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system:

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| CHAPCO, INC. and SAMSARA FITNESS, LLC | : | CIVIL ACTION NO. 3:15-cv-01665 (JCH) |
| Plaintiffs, | : | |
| v. | : | |
| WOODWAY USA, Inc. | : | |
| Defendant. | : | MAY 27, 2016 |

**PLAINTIFFS' PRELIMINARY NON-INFRINGEMENT CONTENTIONS**

Pursuant to the Court's Scheduling Order, Plaintiffs Chapco, Inc. ("Chapco") and Samsara Fitness, LLC ("Samsara") (collectively, "Plaintiffs") make the following Initial Non-Infringement Contentions in response to the Initial Infringement Contentions served by Defendant Woodway USA, Inc. ("Woodway") regarding U.S. Patent No. 8,590,169 (Exhibit A) and U.S. Patent No. 9,039,580 (Exhibit B). Plaintiffs' Initial Non-Infringement Contentions are responsive to Woodway's Initial Infringement Contentions and, as such, only address the claims and accused products identified in those Initial Infringement Contentions. As is made clear in these Non-Infringement Contentions, Chapco does not manufacture, and Samsara does not sell or offer for sale, the product in the exact configuration as depicted in certain of Woodway's Initial Infringement Contentions.

These Initial Non-Infringement Contentions are based on the information presently known to Plaintiffs. Plaintiffs' investigation is ongoing and the Court has not yet ruled on any construction of the asserted claims. Plaintiffs reserve the right to alter their non-infringement positions in light of further discovery, claim construction positions, court rulings, and expert opinion.

CHAPCO, INC. and SAMSARA FITNESS, LLC
By Their Attorneys,

/s/ Christine K. Bush

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Dated: May 27, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of May, 2016, the within *Plaintiffs' Preliminary Non-Infringement Contentions* was served electronically to:

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Bridgeport, CT 06604

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Foley & Lardner, LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202

/s/ Christine K. Bush

# EXHIBIT B

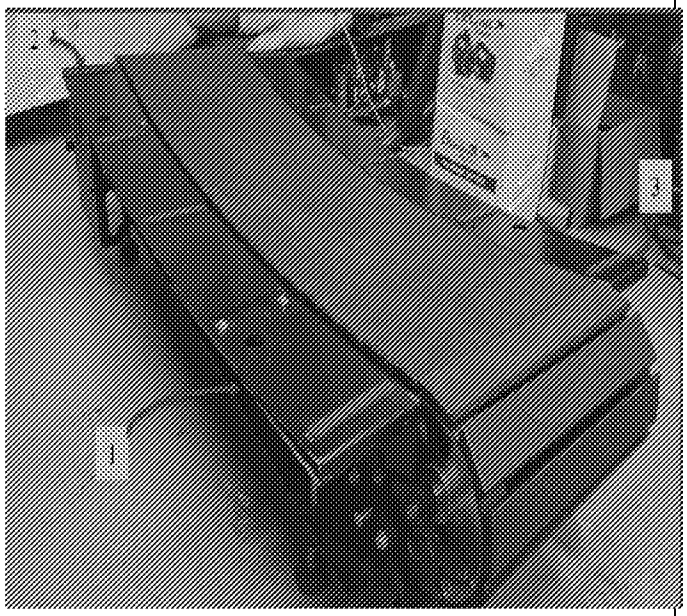
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**EXHIBIT B- Claim Chart for U. Patent No. 9,039,580**

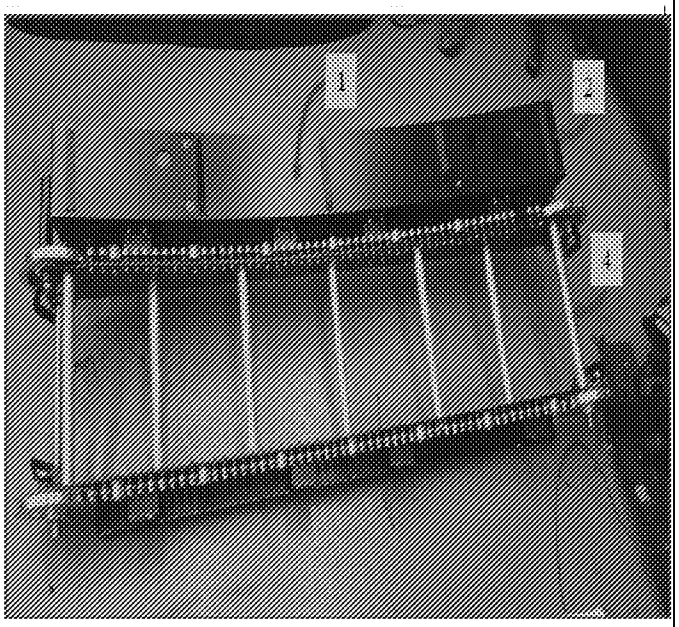
| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 1. A manually powered treadmill comprising: | A "manually powered treadmill" is literally each of the Infringing Products.<br><br>The TrueForm™ Runner Low Rider Product is pictured. As described in the product specification where the picture was taken from, the "TrueForm … relies 100% on human power." (Product Specification, p. 2.) Each of the Infringing Products are "non-motorized, powered by you." (Id. at p. 1.) |  | This is a preamble, not entitled to any weight.<br><br>Plaintiffs admit that the image depicted is one of the products Woodway accuses of infringement (the "Accused Products"). Plaintiffs also admit that the Accused Products are human powered and non-motorized. |

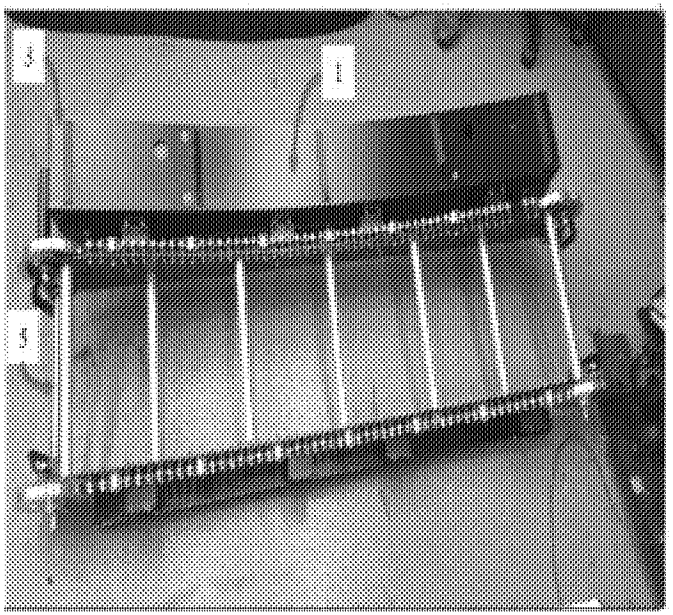
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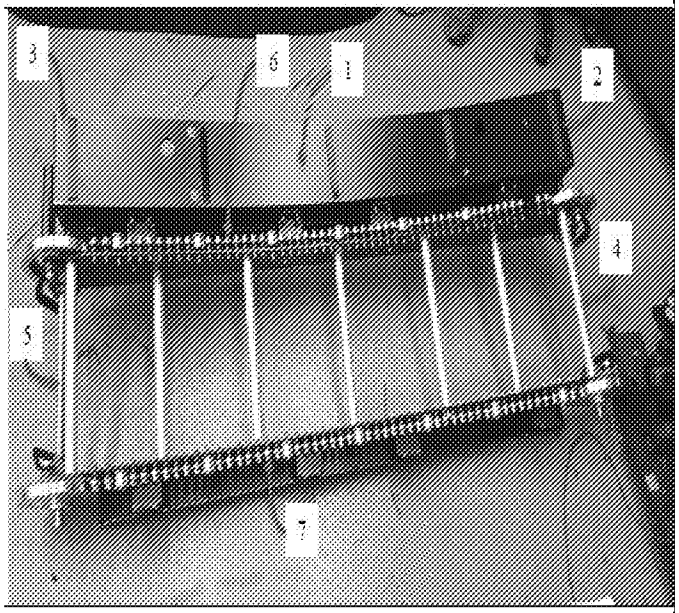
Page 1321 of 2517

| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a frame having a front end and a rear end positioned opposite the front end; | A "frame having a front end and a rear end positioned opposite the front end" is literally present in each of the Infringing Products.<br><br>As shown, the frame [1] has a front end [2] and a rear end [3], where the front end [2] is positioned opposite the rear end [3]. |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The Accused Products do not have "a" frame as that term is used in the patent. The Accused Products include two frames, one of which Woodway depicts in this image as part [1]. |

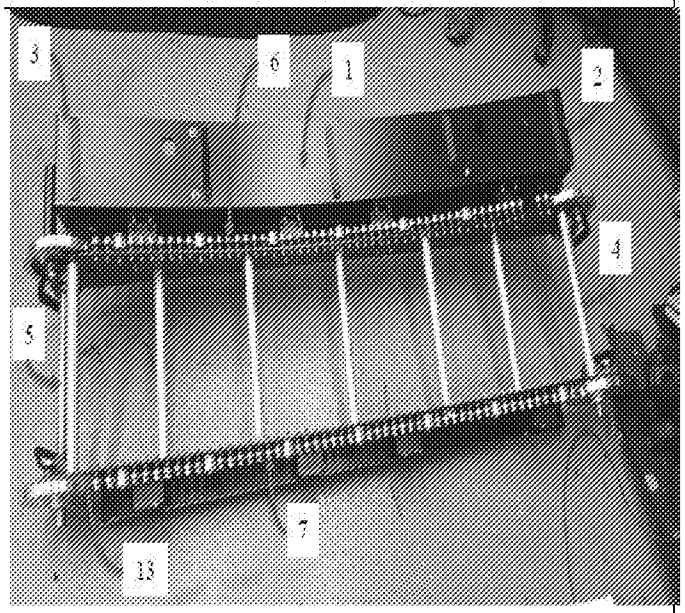
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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a front shaft rotatably coupled to the frame at the front end; | A "front shaft rotatably coupled to the frame at the front end" is literally present in each of the Infringing Products.<br><br>As shown, a front shaft [4] is rotatably coupled to the frame [1] at the front end [2]. |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The Accused Products include two frames. Woodway depicts in this image part [1], the outer frame. The front shaft, which Woodway identifies as part [4] is not rotatably coupled to that outer frame [1], it is rotatably coupled to the inner frame. |

| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a rear shaft rotatably coupled to the frame at the rear end; | A "rear shaft rotatably coupled to the frame at the rear end" is literally present in each of the Infringing Products.<br><br>As shown, a rear shaft [5] is rotatably coupled to the frame [1] at the rear end [3]. |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The Accused Products include two frames, one of which Woodway depicts in this image as part [1]. The rear shaft, which Woodway identifies as part [5] is not rotatably coupled to that outer frame [1], it is rotably coupled to the inner frame. |

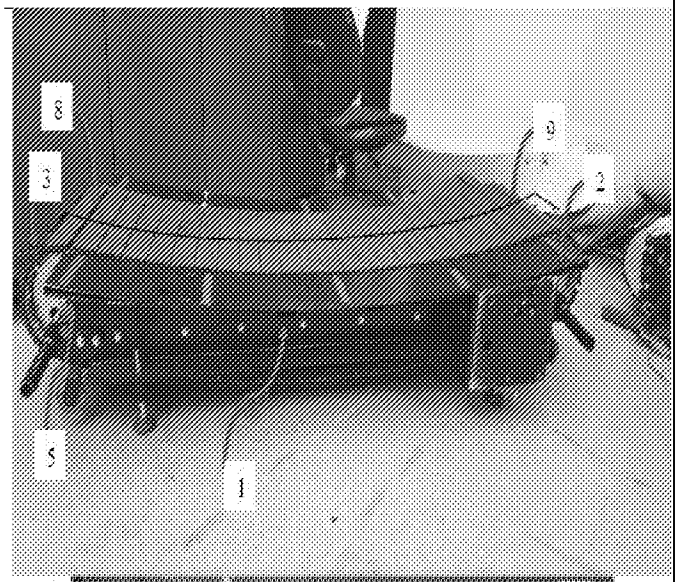
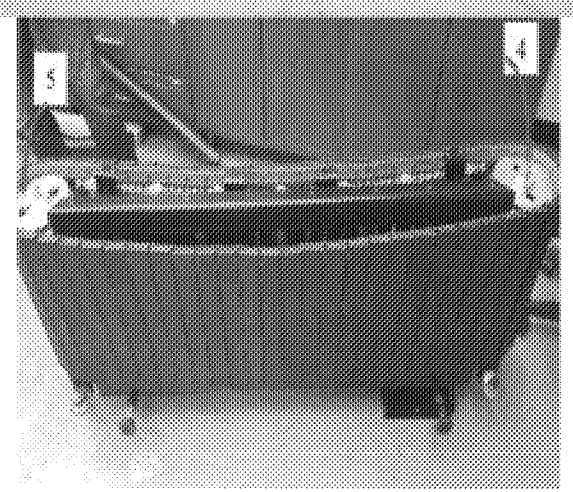
| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame; | A "first bearing rail having a plurality of bearings" and "attached to a left side of the frame" are literally present in each of the Infringing Products.<br><br>As shown, a first bearing rail [6] is attached to one side of the frame [1] (i.e., the left side), while a second bearing rail [7] is attached to the other side of the frame [1] (i.e., the right side). |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually rotatably coupled to the inner frame, not a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed in the '580 patent indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. Accordingly, the first bearing rail is not "attached" to a left side of the frame. |

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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame; | A "second bearing rail having a plurality of bearings" and "attached to a right side of the frame" are literally present in each of the Infringing Products.<br><br>As shown, the first bearing rail [6] is attached to one side of the frame [1] (i.e., the left side), while the second bearing rail [7] is attached to the other side of the frame [1] (i.e., the right side). |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually rotatably coupled to the inner frame, not a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed in the '580 patent indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. Accordingly, the second bearing rail is not "attached" to a right side of the frame. |

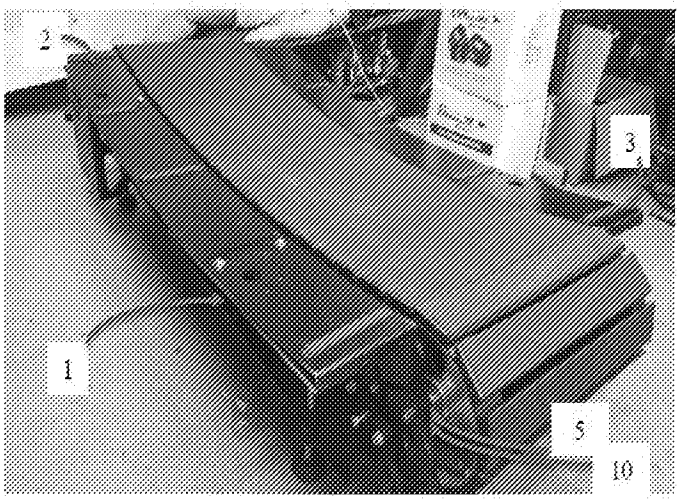


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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a running belt supported by the first bearing rail and the second bearing rail and disposed about the front shaft and the rear shaft,<br><br>wherein the running belt follows a curved running surface; and | A "running belt" supported by the "first bearing rail" and the "second bearing rail" and following a "curved running surface" is literally present in each of the Infringing Products.<br><br>As shown, a running belt [8] follows a curved running surface [9]. The running belt [8] is supported by the first bearing rail [6] and the second bearing rail [7] as well as disposed about the front shaft [4] and the rear shaft [5]. |  <br>  | For the reasons set forth above with respect to the bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. The Accused Products do not include a running belt supported by first and second bearing rails.<br><br>Additionally, the "running belt" identified as part [8] in this image does not appear to correspond to the "running belt" (part 16) taught in the '580 patent. *See* Col. 14, ln. 1- Col. 15, ln. 28. Nor is the "running belt" shown supported by the shaft assemblies as Woodway construed the shaft assemblies. *See also*, Woodway infringement analysis of dependent claim 14 of the '169 patent. |

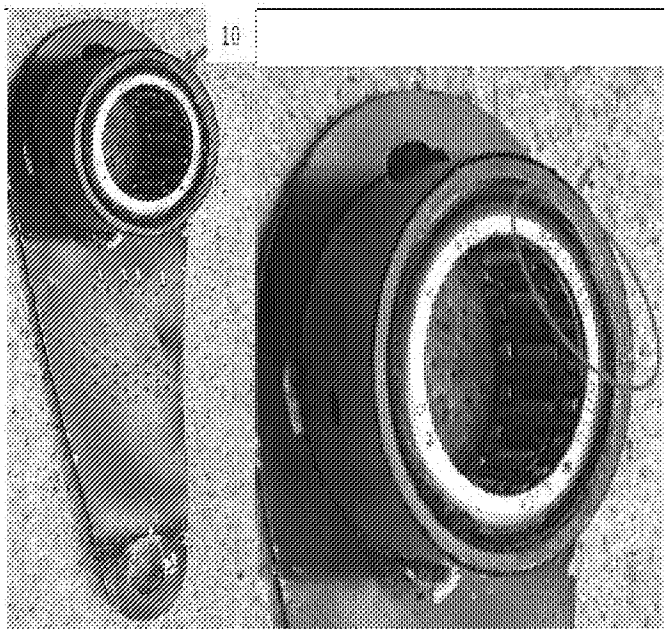


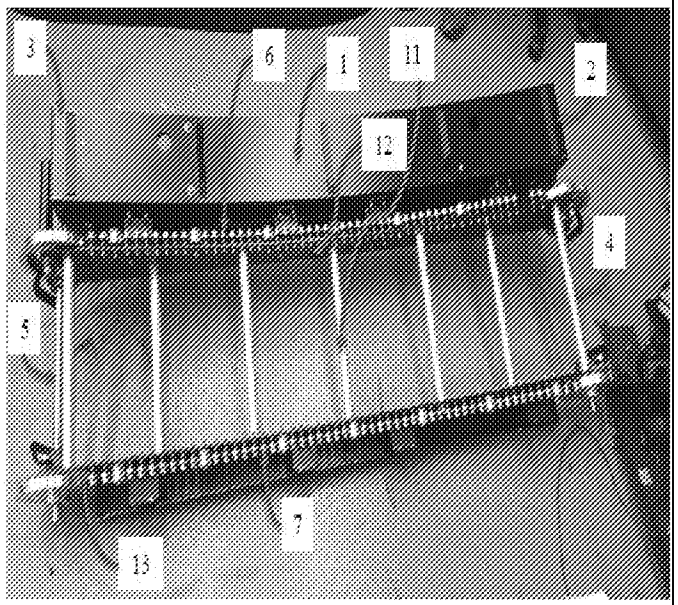
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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a safety device coupled to at least one of the front shaft and the rear shaft,<br><br>wherein the safety device is structured to substantially prevent rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction. | A "safety device coupled to at least one of the front shaft and the rear shaft" is literally present in each of the Infringing Products.<br><br>"At least one of the front shaft and the rear shaft" can mean that the "safety device" is coupled to the "front shaft" alone; the "safety device" is coupled to the "rear shaft" alone; or, the "safety device" is coupled to each of the "front shaft" and the "rear shaft." As shown, the safety device [10] is coupled to the rear shaft [5].<br><br>As also shown, the safety device [10] is a Koyo brand with a model number of RCB-121616. This model number corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction." |  | Plaintiffs admit that the Accused Products include a safety device but deny that the safety device is coupled to at least one of the front shaft and the rear shaft in that Woodway's infringement analysis *supra* concerning the front and rear shafts is incorrect.<br><br>Additionally the images included in these Infringement Contentions does not reflect the safety device on products Plaintiffs currently manufacture, sell or offer for sale. Contrary to the statements in the Infringement Contentions, the safety device [10] is not coupled to the rear shaft [5]. |



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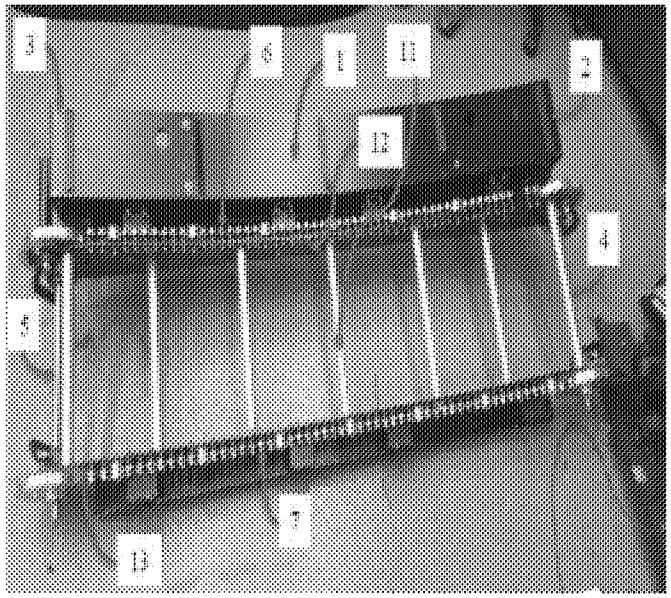
| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| | (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-3 (2014), http://www.jtekt-na.com/assets/ce/Documents/(B2018E-1)%20Needle%20Roller%20Bearing% 20Catalog.pdf).<br><br>Because the safety device [10] is coupled to the rear shaft [5] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is "structured to substantially prevent rotation of … the rear shaft in a first rotational direction while permitting rotation of the … rear shaft in a second rotational direction opposite the first rotational direction." |  | |

| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 2. The manually powered treadmill of claim 1, wherein the frame includes at least one cross-member, a left side member, and a right side member; and<br><br>wherein the at least one cross-member extends between the left side member and the right side member. | The "frame" having "at least one cross-member, a left side member, and a right side member" where the "at least one cross-member extends between the left side member and the right side member" is literally present in each of the Infringing Products.<br><br>As shown, the frame [1] includes a cross-member [11], a left side member [12], and a right side member [13], where the cross-member [11] extends between the left side member [12] and the right side member [13]. |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 1.<br><br>Additionally, the cross-member Woodway identifies as part [11] would, according to Woodway, extend between those elements which Woodway mischaracterized as bearing rails in connection with claim 1. Part [11] extends between the sides (the left side member and the right side member) of the inner frame, not the outer frame Woodway identifies as part [1]. Notably, there is no reference to "bearing rails" in this dependent claim 2; the arrow to part [6] points to bearings individually mounted to the frame. |

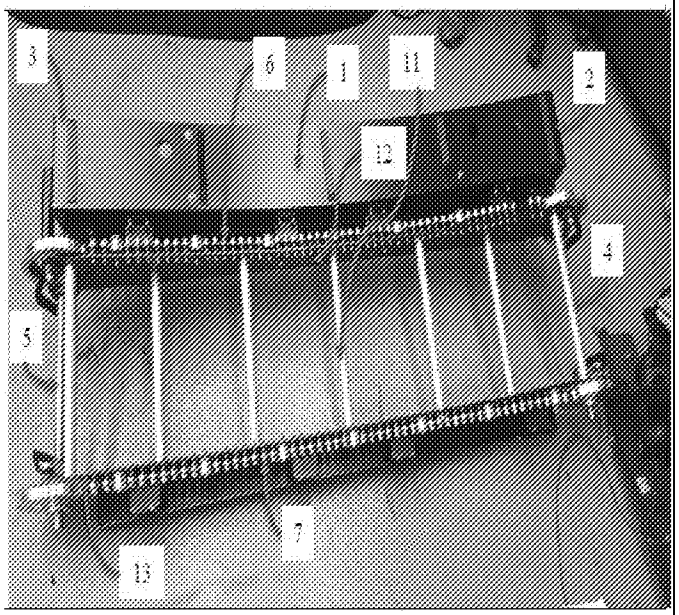


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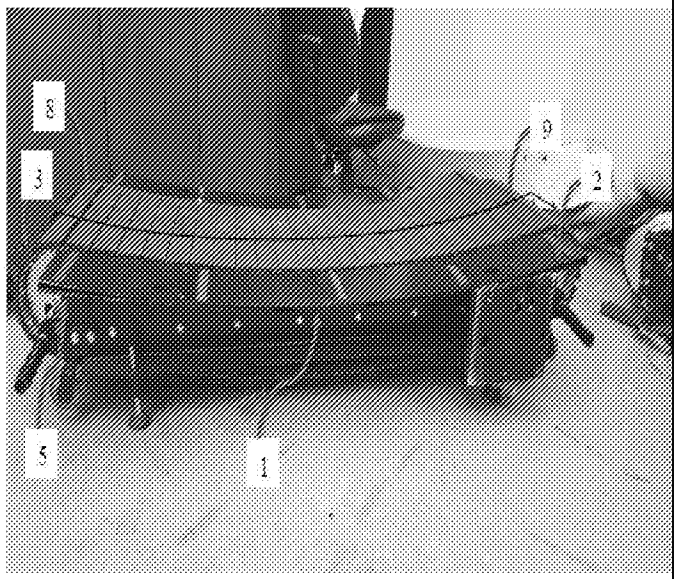
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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 3. The manually powered treadmill of claim 2,<br><br>wherein each one of the first and second bearing rails are coupled to at least one of the at least one cross-member. | Each "of the first and second bearing rails" coupled to the "at least one cross-member" is literally present in each of the Infringing Products.<br><br>As shown, the first bearing rail [6] is coupled to one side of the frame [1] (i.e., the left side member [12]), while the second bearing rail [7] is coupled to another side of the frame [1] (i.e., the ride side member [13]). Further, the cross-member [11] is coupled to each of the left side member [12] and the right side member [13].<br><br>Each one of the first and second bearing rails [6], [7] are coupled to the at least one cross-member [11] via the left and right side members [12] and [13], respectively. |  | This dependent claim is not infringed for at least the reasons set forth with respect to claims 1 and 2.<br><br>Additionally, the Accused Products do not include bearing rails as the patent uses that term. The cross-member Woodway identifies as part [11] extends between the sides [12, 13] (the left side member and the right side member) of the inner frame, not the outer frame Woodway identified earlier as part [1]. |

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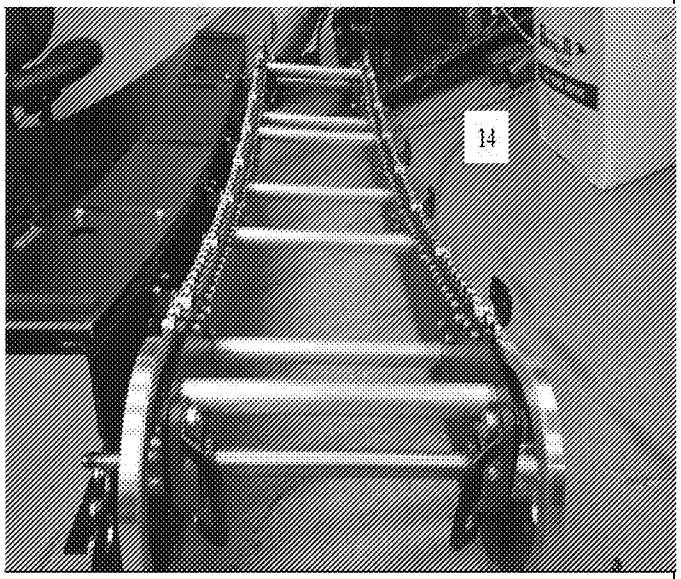
| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 4. The manually powered treadmill of claim 1,<br><br>wherein each one of the first and second bearing rails are attached longitudinally to the frame between the front shaft and the rear shaft. | "Each one of the first and second bearing rails" being "attached longitudinally to the frame between the front shaft and rear shaft" is literally present in each of the Infringing Products.<br><br>As shown, the bearing rails [6], [7] are longitudinally attached to the frame [1] between the front shaft [4] and the rear shaft [5]. |  | This dependent claim is not infringed for at least the reasons set forth with respect to claims 1 and 3.<br><br>Additionally, the Accused Products do not include bearing rails as the patent uses that term, and the image provided does not reflect first and second bearing rails attached longitudinally to the frame [1]. |

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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 5. The manually powered treadmill of claim 1,<br><br>wherein each one of the first bearing rail and the second bearing rail define in part a top profile corresponding to the curved running surface. | "Each one of the first bearing rail and the second bearing rail" that "define in part a top profile corresponding to the curved running surface" is literally present in each of the Infringing Products.<br><br>The first bearing rail [6] and the second bearing rail [7] define a curved top profile [14]. The curved top profile [14] is proximate the curved running surface [9] and each of the bearing rails [6] and [7] at least, in part, support the running belt [8]. Therefore, the top profile [14] corresponds to the curved running surface [9]. |  | This dependent claim is not infringed for at least the reasons set forth with respect to claims 1 and 3.<br><br>Additionally, the Accused Products do not include bearing rails as the patent uses that term, and the image provided does not reflect bearing rails (there are no parts [6] or [7] in the image). The first bearing rail and the second bearing rail do not define in part a top profile corresponding to the curved running surface. The image that includes part [14] shows the bearings on top of the frame, not bearing rails. |

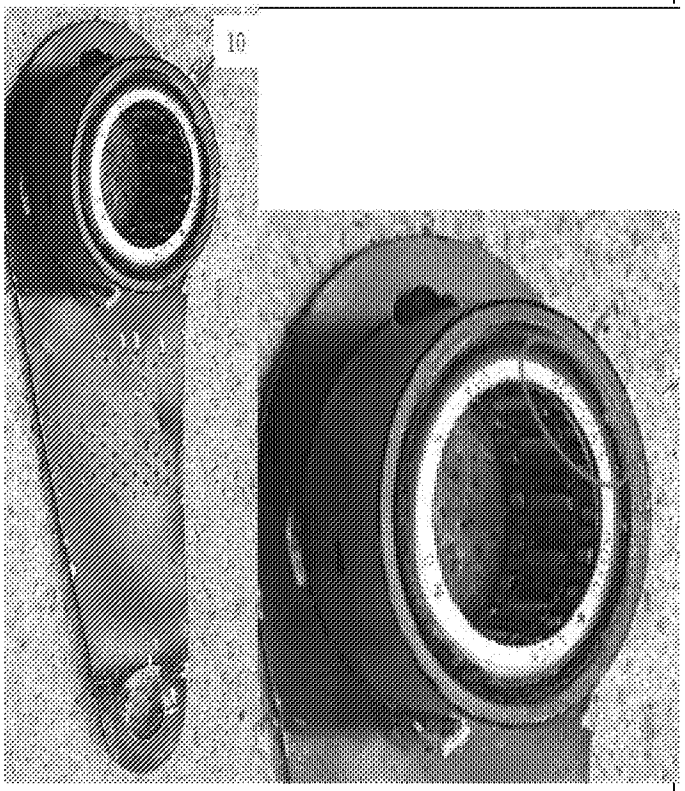


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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
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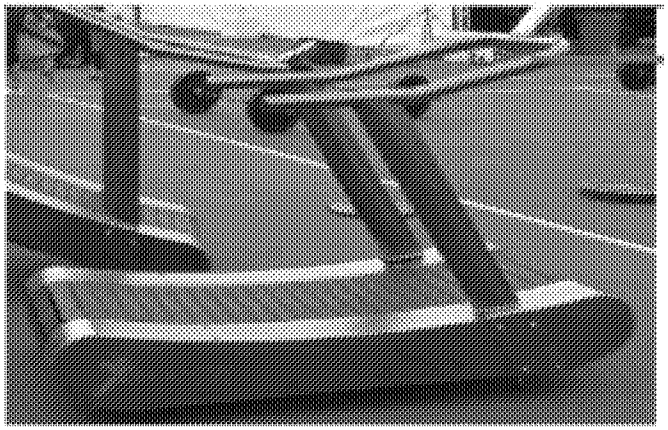
LIFECORE Ex. 1002

| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 6. The manually powered treadmill of claim 1,<br><br>wherein the safety device includes a one-way bearing. | The "safety device" includes "a one-way bearing" is literally present in each of the Infringing Products.<br><br>As shown, the safety device [10] is a Koyo brand with a model number of RCB-121616. This model number corresponds with a "regular clutch and ***bearing*** assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction" (emphasis added). (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-3 (2014), http://www.jtekt-na.com/assets/ce/Documents/<br><br>(B2018E-1)%20Needle%20Roller%20Bearing% 20Catalog.pdf). |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 1.<br><br>Plaintiffs admit that the Accused Products include a safety device with a one-way bearing. |



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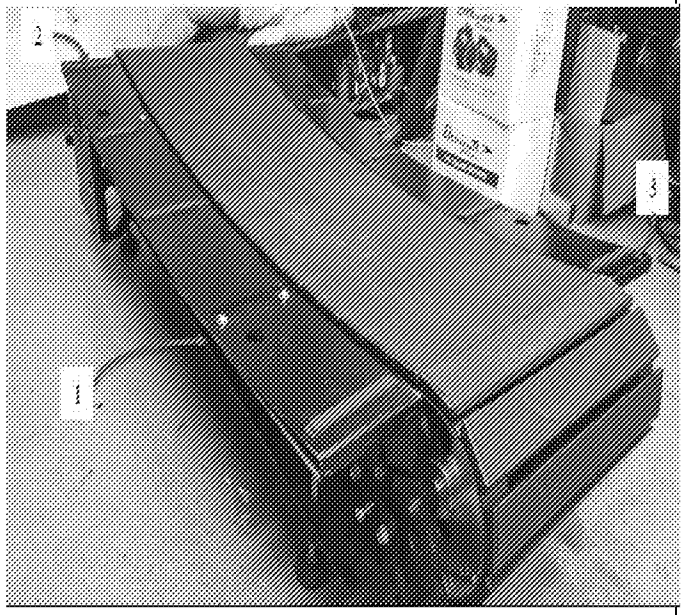
| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 10. The manually powered treadmill of claim 1,<br><br>further comprising a handrail attached to the frame and structured to provide a support structure for the user of the manually powered treadmill. | A "handrail attached to the frame" which is "structured to provide a support structure for the user of the manually powered treadmill" is literally present in each of the Infringing Products.<br><br>As shown, the manually powered treadmill includes a handrail [15] that is structured to provide a support structure to a user of the manually powered treadmill. |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 1.<br><br>Plaintiffs admit that the Accused Products include a handrail attached to the outer frame. |

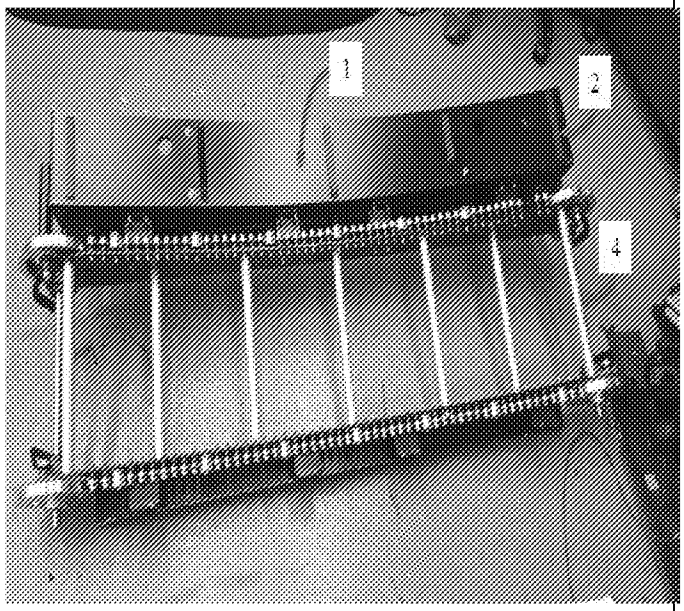
LIFECORE Ex. 1002

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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 11. A manually powered treadmill, comprising: | A "manually powered treadmill" is literally each of the Infringing Products.<br><br>The TrueForm™ Runner Low Rider Product is pictured. As described in the product specification where the picture was taken from, the "TrueForm … relies 100% on human power." (TrueForm™ Runner Product Specification, p. 2.) Each of the Infringing Products are "non-motorized, powered by you." (*Id.* at p. 1.) |  | This is a preamble, not entitled to any weight.<br><br>Plaintiffs admit that the image depicted is one of the products Woodway accuses of infringement (the "Accused Products"). Plaintiffs also admit that the Accused Products are human powered and non-motorized |

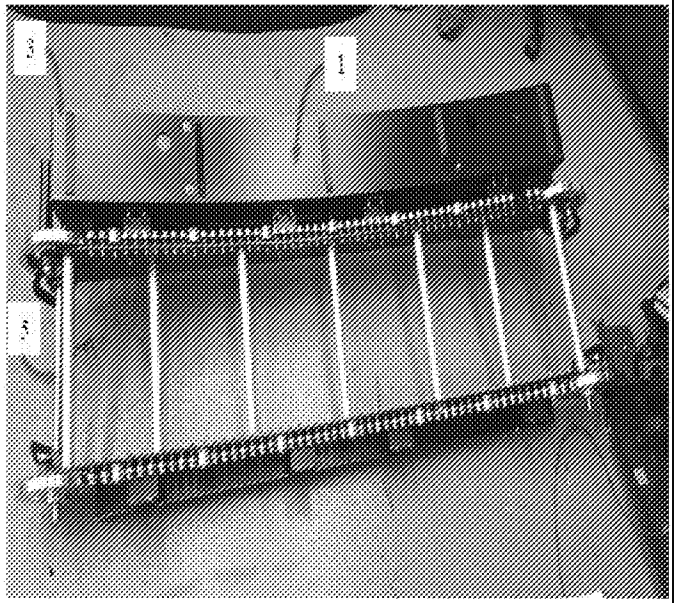
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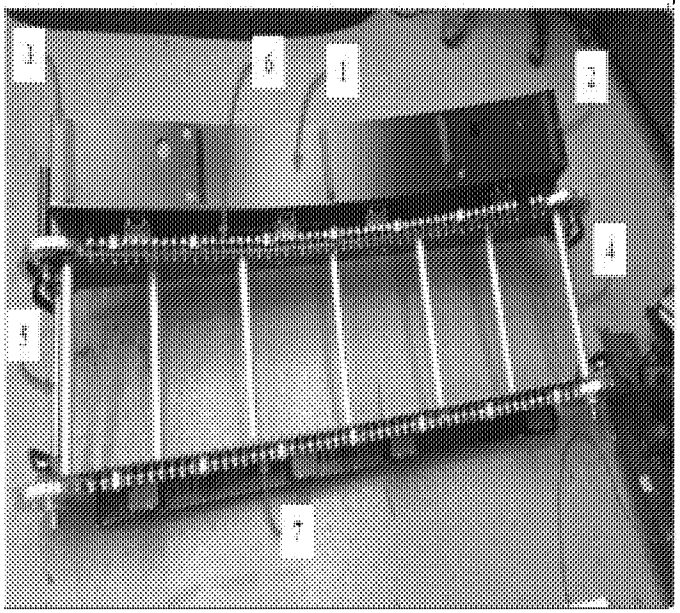
| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a frame having a front end and a rear end positioned opposite the front end; | A "frame having a front end and a rear end positioned opposite the front end" is literally present in each of the Infringing Products.<br><br>As shown, the frame [1] has a front end [2] and a rear end [3], where the front end [2] is positioned opposite the rear end. |  | Plaintiffs admit that the Accused Products include a frame having a front end and a rear end positioned opposite the front end. |

| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a front shaft attached to the frame adjacent the front end; | A "front shaft attached to the frame adjacent the front end" is literally present in each of the Infringing Products.<br><br>As shown, a front shaft [4] is attached to the frame [1] at the front end [2]. |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The front shaft, which Woodway identifies as part [4] is not attached to the outer frame [1]; it is rotatably coupled to the inner frame. *See* claim 1. |



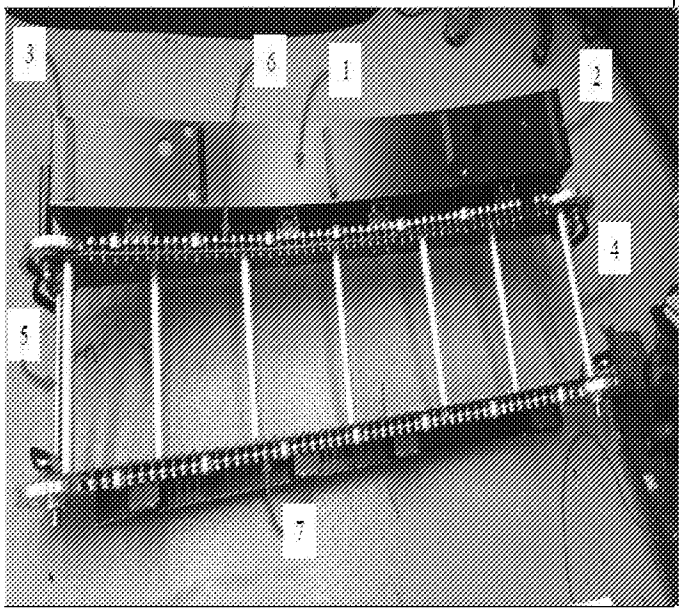
LIFECORE Ex. 1002

| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a rear shaft attached to the frame adjacent the rear end; | A "rear shaft attached to the frame adjacent the rear end" is literally present in each of the Infringing Products.<br><br>As shown, a rear shaft [5] is attached to the frame [1] adjacent the rear end [3]. |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The rear shaft, which Woodway identifies as part [5] is not attached to the outer frame [1]; it is rotatably coupled to the inner frame. *See* claim 1. |

| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame; | A "first bearing rail having a plurality of bearings" and "attached to a left side of the frame" is literally present in each of the Infringing Products.<br><br>As shown, a first bearing rail [6] is attached to one side of the frame [1] (i.e., the left side), while a second bearing rail [7] is attached to the other side of the frame [1] (i.e., the right side). |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. |

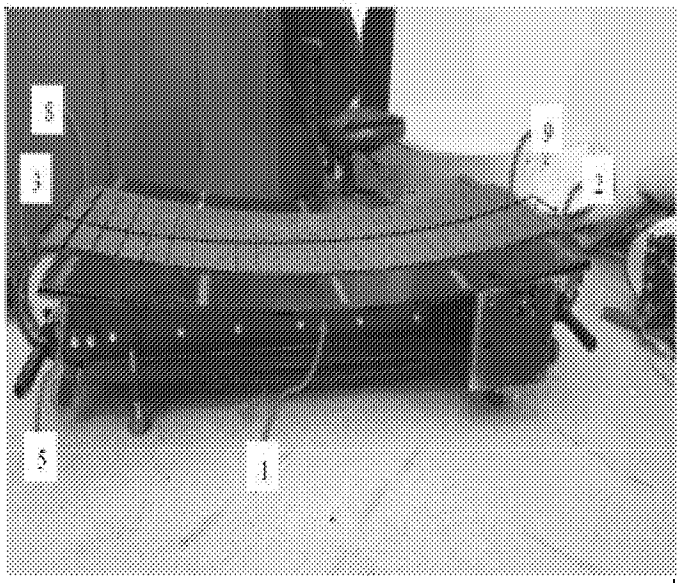


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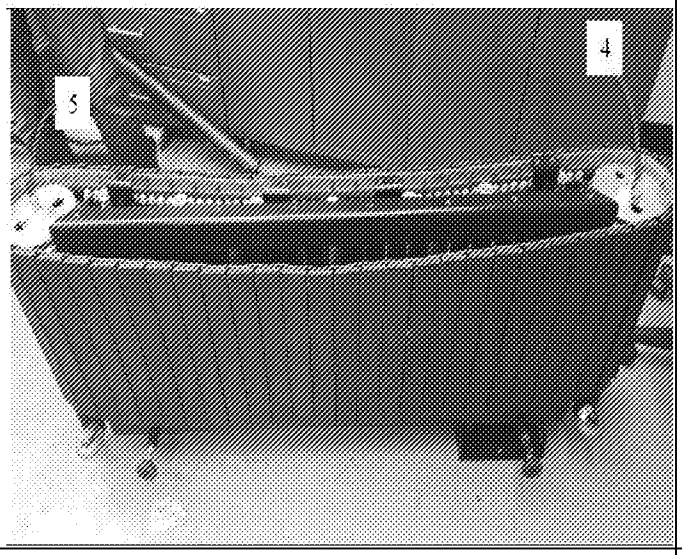
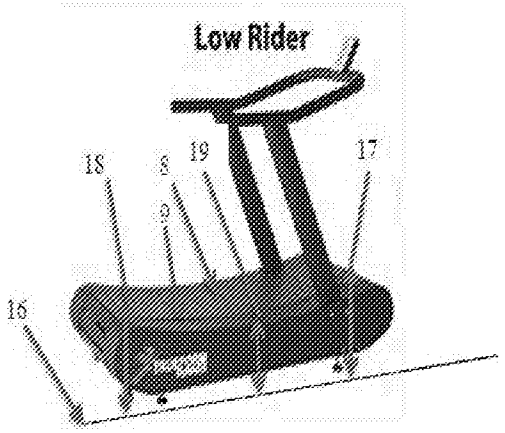
| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame; | A "second bearing rail having a plurality of bearings" and "attached to a right side of the frame" is literally present in each of the Infringing Products.<br><br>As shown, the first bearing rail [6] is attached to one side of the frame [1] (i.e., the left side), while the second bearing rail [7] is attached to the other side of the frame [1] (i.e., the right side). |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. |



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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a running belt at least partially disposed about the front shaft and the rear shaft and at least partially supported by the first bearing rail and the second bearing rail, | A "running belt" that is "at least partially disposed about the front shaft and the rear shaft and at least partially supported by the first bearing and the second bearing rail" is literally present in each of the Infringing Products.<br><br>As shown, a running belt [8] is supported by the first bearing rail [6] and the second bearing rail [7] and disposed about the front shaft [4] and the rear shaft |  | For the reasons set forth above with respect to the front shaft, rear shaft and bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. The Accused Products do not include a running belt at least partially supported by bearing rails.<br><br>Additionally, the "running belt" identified as part [8] in this image does not appear to correspond to the "running belt" (part 16) taught in the '580 patent. *See* Col. 14, ln. 1- Col. 15, ln. 28. Nor is the "running belt" shown supported by the shaft assemblies as claimed. *See also*, Woodway infringement analysis of dependent claim 14 of the '169 patent. |

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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| | |   | |
| wherein the running belt includes a front belt portion proximate the front end,<br><br>a rear belt portion proximate the rear end, and<br><br>a central belt portion intermediate the front and rear belt | The "running belt" having "front belt portion," a "rear belt portion," and "a central belt portion" that is "positioned vertically closer to a ground surface … than the front and rear belt portions such that the running belt follows a curved running surface" is literally present in each of the Infringing Products.<br><br>As shown, the running belt [8] includes a front belt portion [17] proximate the front end, a rear belt |   | For the reasons set forth above with respect to the front shaft, rear shaft and bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. |



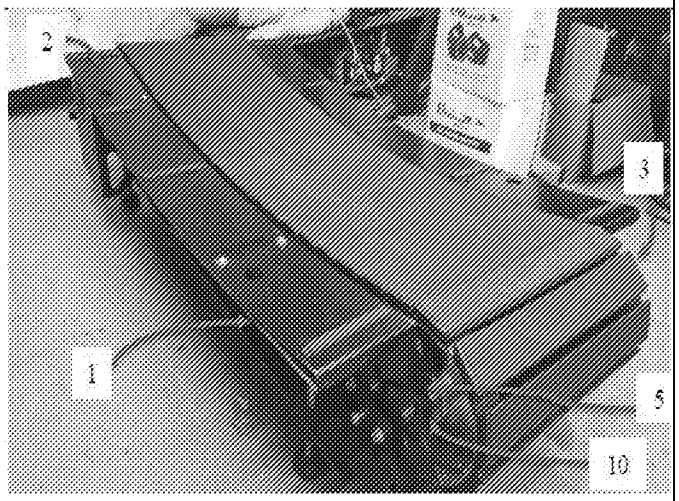
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| Claims of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| wherein the central belt portion is positioned vertically closer to a ground surface supporting the frame than the front and rear belt portions such that the running belt follows a curved running surface; | portion [18] proximate the rear end, and a central belt portion [19] intermediate the front belt portion [17] and the rear belt portion [18].<br><br>As also shown, a horizontal plane line [16] has been inserted on the picture of the Low Rider Infringing Product. While the horizontal plane line [16] is shown as angled, this is due to the orientation of the Infringing Product. In this regard, the horizontal plane line [16] represents a ground surface that supports the treadmill.<br><br>Relative the horizontal plane line [16], the central portion [19] is vertically lower (i.e., closer to the horizontal plane line [16]) than each of the front belt portion [17] and the rear belt portion [18]. Due to the front belt portion [17] and rear belt portion [18] being vertically higher than the central belt portion [19], a curved running surface [9] is formed. | | |

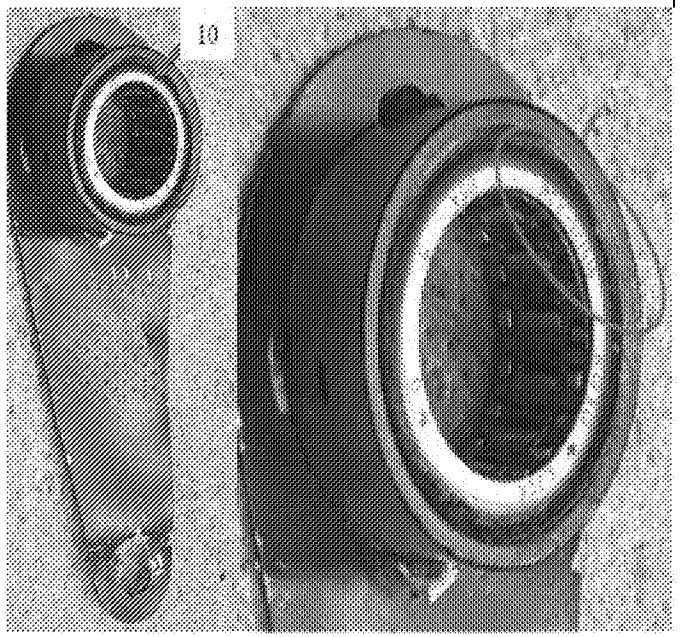


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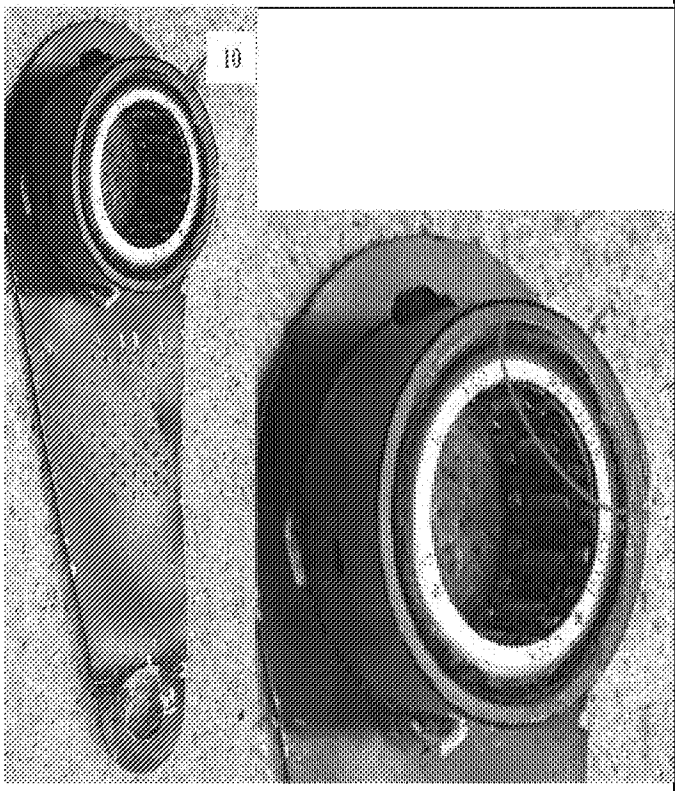
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| and a safety device for substantially preventing rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction. | A "safety device for substantially preventing rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of at least one of the front shaft and the rear shaft in a second rotational direction" is literally present in each of the Infringing Products.<br><br>As shown, the safety device [10] is coupled to the rear shaft [5].<br><br>As also shown, the safety device [10] is a Koyo brand with a model number of RCB-121616. This model number corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction." (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-3 (2014), |  | Plaintiffs admit that the Accused Products include a safety device but deny it is coupled to the rear shaft, as Woodway asserts. |

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| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
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| | http://www.jtekt-na.com/assets/ce/Documents/ (B2018E-1)%20Needle%20Roller%20Bearing%20Catalog.pdf).<br><br>Because the safety device [10] is coupled to the rear shaft [5] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] "substantially prevent[s] rotation of … the rear shaft in a first rotational direction while permitting rotation of … the rear shaft in a second rotational direction opposite the first rotational direction." |  | |

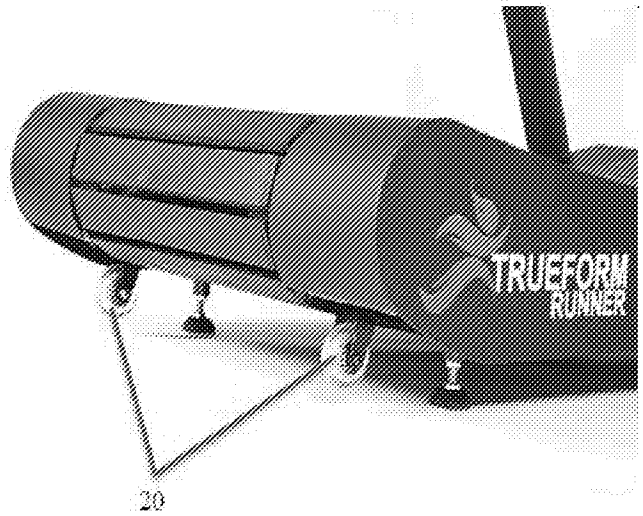


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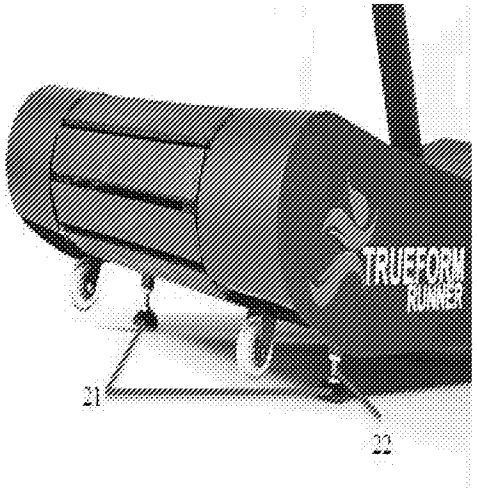
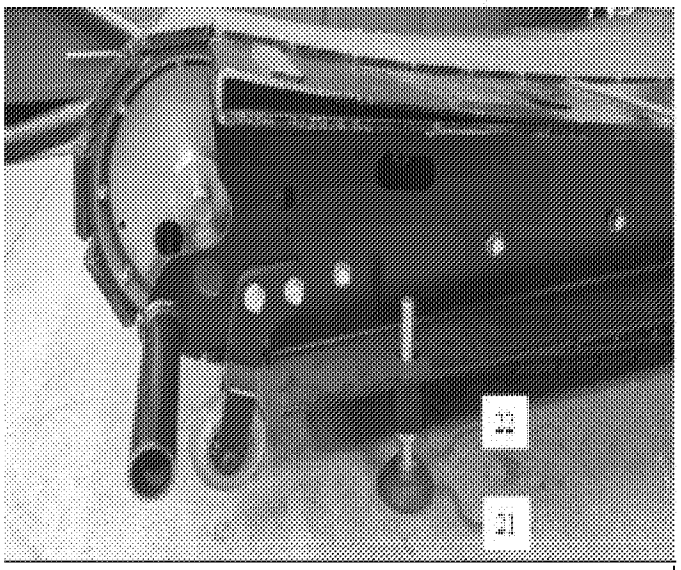
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 12. The manually powered treadmill of claim 11,<br><br>wherein the safety device includes a one-way bearing. | The "safety device" including "a one-way bearing" is literally present in each of the Infringing Products.<br><br>As shown, the safety device [10] is a Koyo brand with a model number of RCB-121616. This model number corresponds with a "regular clutch and ***bearing*** assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction" (emphasis added). (*See* Koyo Needle Roller Bearings Product Catalog at p. B-3-3). |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 11.<br><br>Plaintiffs admit that the Accused Products include a safety device with a one-way bearing. |



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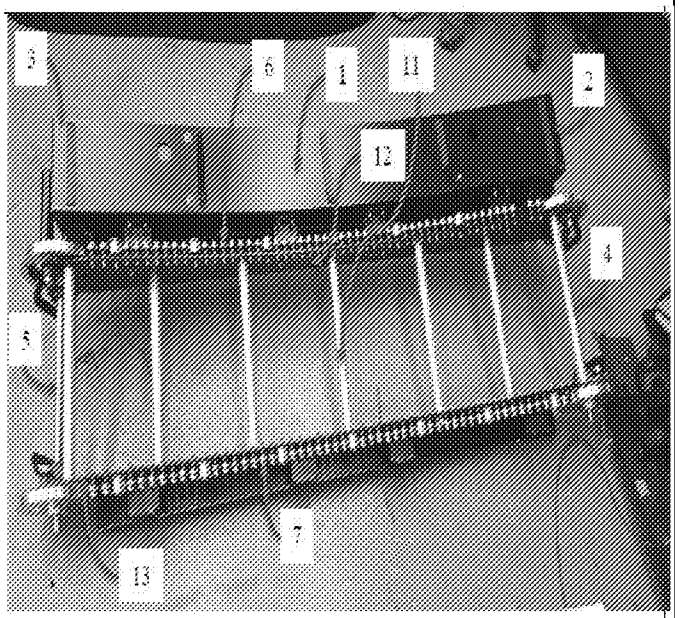
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 13. The manually powered treadmill of claim 11,<br><br>further comprising a pair of wheels mounted to the frame,<br><br>wherein the pair of wheels are mounted so that the pair of wheels are not in contact with the ground surface when the manually powered treadmill is in an operating position. | A "pair of wheels mounted to the frame" that "are not in contact with the ground surface when the manually powered treadmill is in an operating position" is literally present in each of the Infringing Products.<br><br>As shown, a pair of wheels [20] are not in contact with a ground surface when the Infringing Product is in an operating position whereby a user may walk or run on the Infringing Product (i.e., the operating position). |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 11.<br><br>Plaintiffs admit that the Accused Products include a pair of wheels mounted so the wheels are not in contacts with the ground surface when the treadmill is operating. |

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| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 14. The manually powered treadmill of claim 11,<br><br>further comprising support feet coupled to the frame,<br><br>wherein the support feet are vertically adjustable to adjust an incline of the manually powered treadmill relative to the ground surface. | "Support feet coupled to the frame" that are "vertically adjustable relative to the ground surface" are literally present in each of the Infringing Products.<br><br>As shown, support feet [21] are coupled to the frame [1] using a threaded rod [22]. The threaded nature of the rod [22] allows the rod [22] to be rotatably movable towards the frame [1] and away from the frame [1] to allow the incline of the treadmill to be adjusted relative to a ground surface. |  <br>  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 11.<br><br>Plaintiffs admit that the Accused Products include support feet coupled to the frame. |



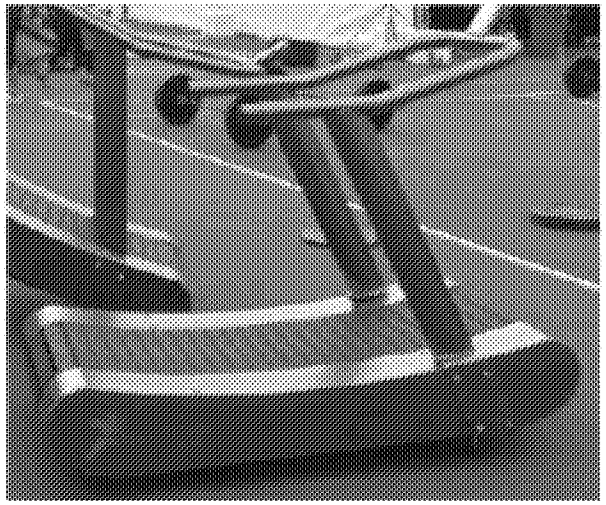
LIFECORE Ex. 1002

| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 18. The manually powered treadmill of claim 11,<br><br>wherein each of the first and second bearing rails are attached longitudinally to the frame between the front shaft and the rear shaft. | "Each one of the first and second bearing rails" being "attached longitudinally to the frame between the front shaft and rear shaft" is literally present in each of the Infringing Products.<br><br>As shown, the first bearing rail [6] and the second bearing rail [7] are longitudinally attached to the frame [1] between the front shaft [4] and the rear shaft [5]. |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 11.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. |

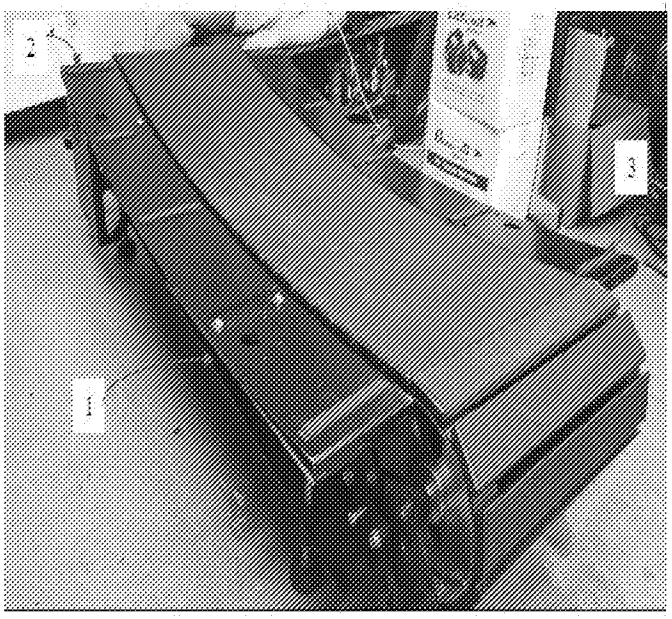


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| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 19. A manually powered treadmill, comprising: | A "manually powered treadmill" is literally each of the Infringing Products.<br><br>The TrueForm™ Runner Low Rider Product is pictured. As described in the product specification where the picture was taken from, the "TrueForm … relies 100% on human power." (Product Specification, p. 2.) Each of the Infringing Products are "non-motorized, powered by you." (*Id.* at p. 1.) |  | This is a preamble, not entitled to any weight.<br><br>Plaintiffs admit that the image depicted is one of the products Woodway accuses of infringement (the "Accused Products"). Plaintiffs also admit that the Accused Products are human powered and non-motorized |

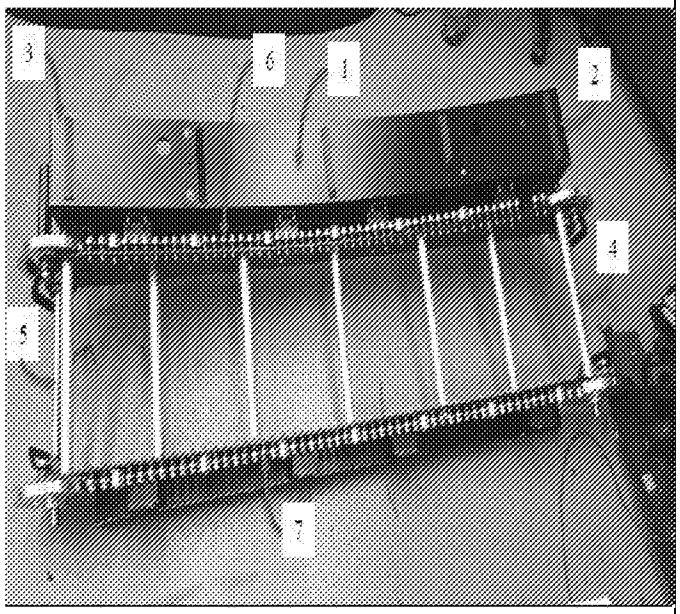
LIFECORE Ex. 1002

| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a frame having a front end and a rear end; | A "frame having a front end and a rear end" is literally present in each of the Infringing Products.<br><br>As shown, the frame [1] has a front end [2] and a rear end [3]. |  | Plaintiffs admit that the Accused Products include a frame having a front end and a rear end. |



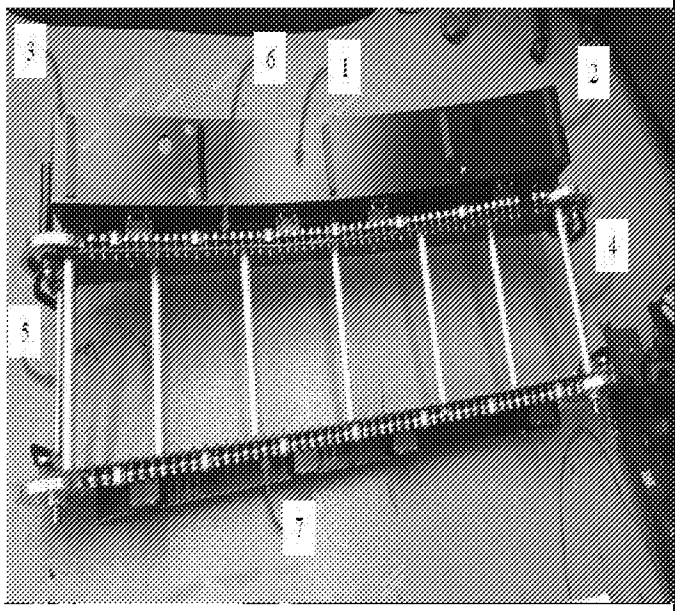
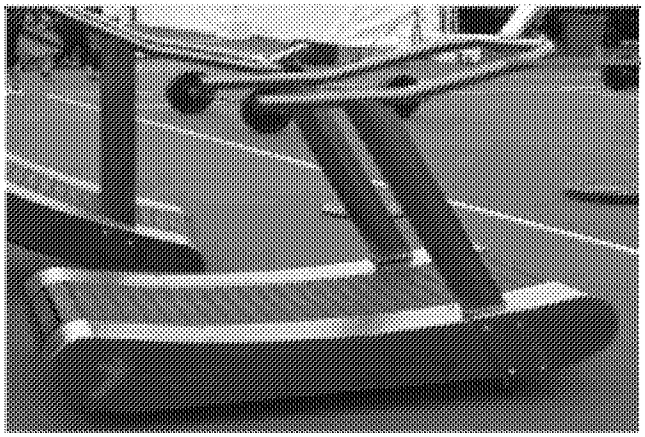
LIFECORE Ex. 1002

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| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame; | A "first bearing rail having a plurality of bearings" and "attached to a left side of the frame" is literally present in each of the Infringing Products.<br><br>As shown, a first bearing rail [6] is attached to one side of the frame [1] (i.e., the left side), while a second bearing rail [7] is attached to the other side of the frame [1] (i.e., the right side). |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. |

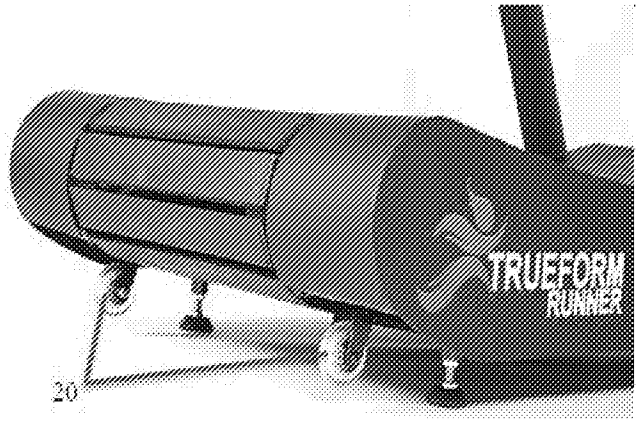
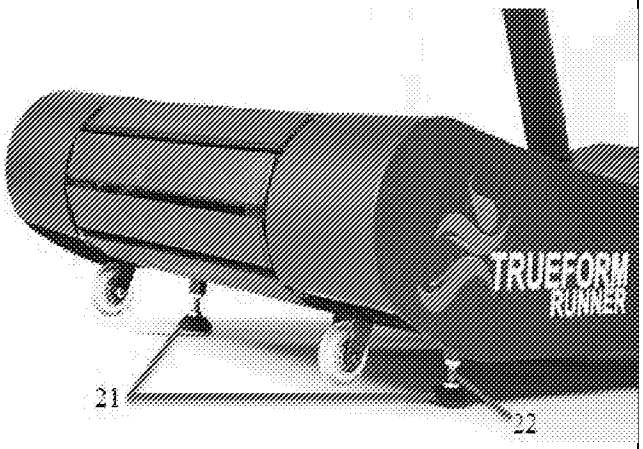
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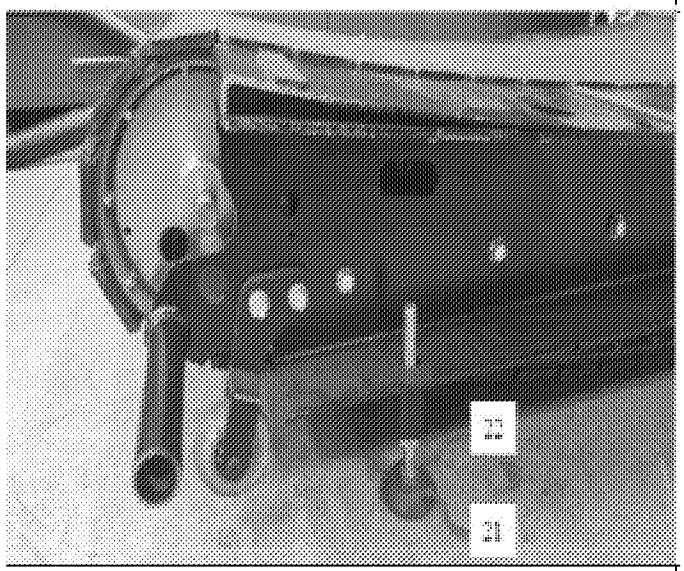
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame; | A "second bearing rail having a plurality of bearings" and "attached to a right side of the frame" is literally present in each of the Infringing Products.<br><br>As shown, the first bearing rail [6] is attached to one side of the frame [1] (i.e., the left side), while the second bearing rail [7] is attached to the other side of the frame [1] (i.e., the right side). |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. |
| a handrail attached to the frame and structured to provide a support structure for a user of the manually powered treadmill; | A "handrail attached to the frame" and "structured to provide a support structure for a user of the manually powered treadmill" is literally present in each of the Infringing Products.<br><br>As shown, the manually powered treadmill includes a handrail [15] structured to provide a support structure for a user. |  | Plaintiffs admit that the Accused Products include a handrail attached to the outer frame. |



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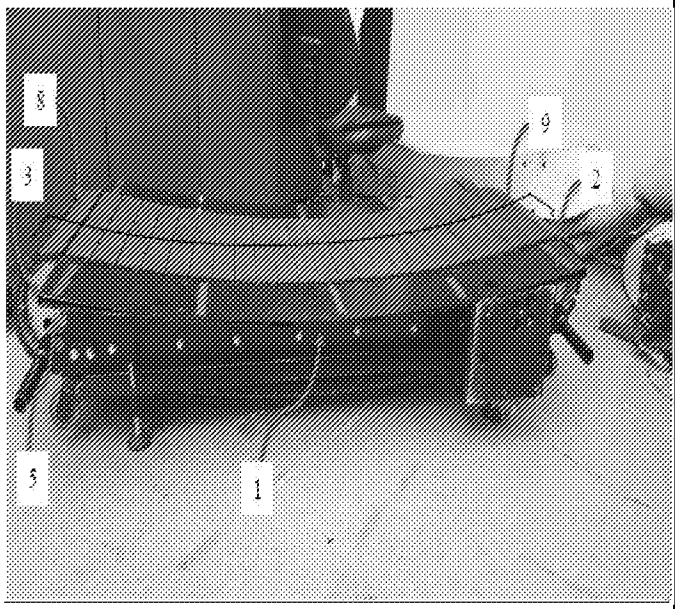
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a pair of wheels mounted to the frame,<br><br>wherein the pair of wheels are mounted so that the pair of wheels are not in contact with a ground surface when the manually powered treadmill is in an operating position; | A "pair of wheels mounted to the frame" that "are not in contact with the ground surface when the manually powered treadmill is in an operating position" is literally present in each of the Infringing Products.<br><br>As shown, a pair of wheels [20] are not in contact with a ground surface when the Infringing Product is in an operating position whereby a user may walk or run on the Infringing Product (i.e., the operating position). |  | Plaintiffs admit that the Accused Products include a pair of wheels mounted to the frame so that the wheels are not in contact with a ground surface when the treadmill is in an operating position. |
| at least two support feet coupled to the frame,<br><br>wherein the support feet are vertically adjustable to adjust an incline of the manually powered treadmill relative to the ground surface; | "Support feet coupled to the frame" that are "vertically adjustable relative to the ground surface" are literally present in each of the Infringing Products.<br><br>As shown, support feet [21] are coupled<br><br>to the frame [1] using a threaded rod [22]. The threaded nature of the rod [22] allows the rod [22] to be rotatably movable towards the frame [1] and away from the frame [1] to |  | Plaintiffs admit that the Accused Products include at least two support feet coupled to the frame wherein the support feet are vertically adjustable. |

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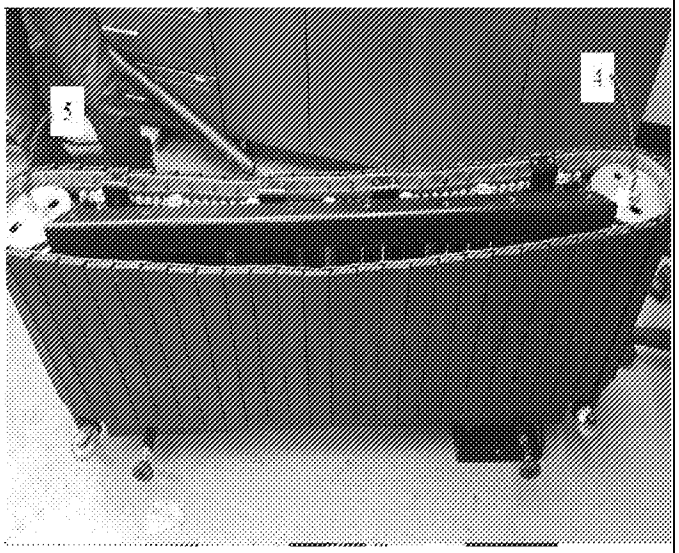
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| | allow the incline of the treadmill to be adjusted relative to a ground surface. |  | |

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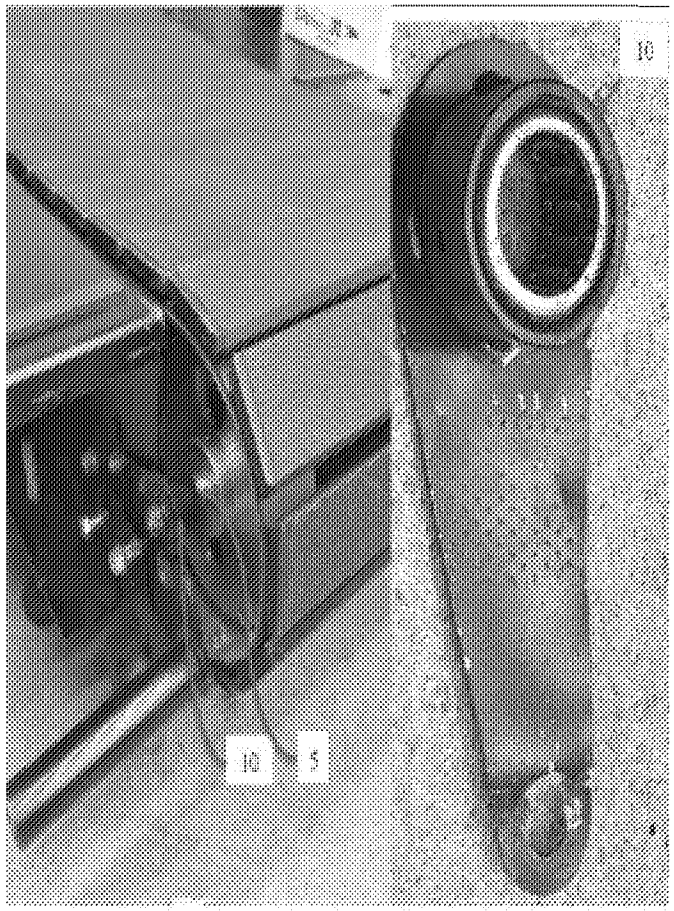
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| a running belt supported by the first and second bearing rails,<br><br>wherein the running belt follows a curved running surface; | A "running belt" supported by the "first bearing rail" and the "second bearing rail" and following a "curved running surface" is literally present in each of the Infringing Products.<br><br>As shown, a running belt [8] follows a curved running surface [9]. As also shown, the running belt [8] is supported by the first bearing rail [6] and the second bearing rail [7]. |  | For the reasons set forth above with respect to the bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. The Accused Products do not include a running belt supported by first and second bearing rails.<br><br>Additionally, the "running belt" identified as part [8] in this image does not appear to correspond to the "running belt" (part 16) taught in the '580 patent. *See* Col. 14, ln. 1- Col. 15, ln. 28. |

LIFECORE Ex. 1002

| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| | |  | |
| and a safety device coupled to the frame and operatively coupled to the running belt,<br><br>wherein the safety device is structured to substantially prevent movement of the running belt in a first direction and permit movement | A "safety device" that is "operatively coupled to the running belt" to "substantially prevent movement of the running belt in a first direction and permit movement" in a "second direction" is literally in each of the Infringing Products.<br><br>As shown, the safety device [10] is coupled to the rear shaft [5]. |  | Plaintiffs deny that the structure shown is present literally in the Accused Products: the safety device is not coupled to the rear shaft. |

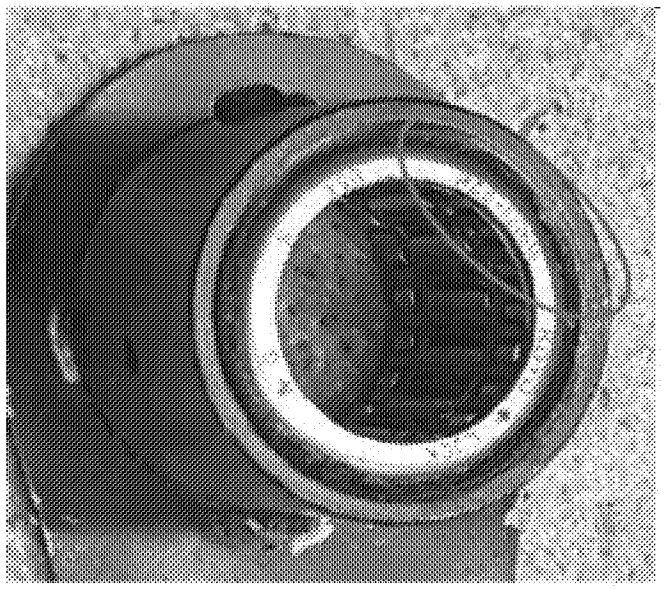


LIFECORE Ex. 1002

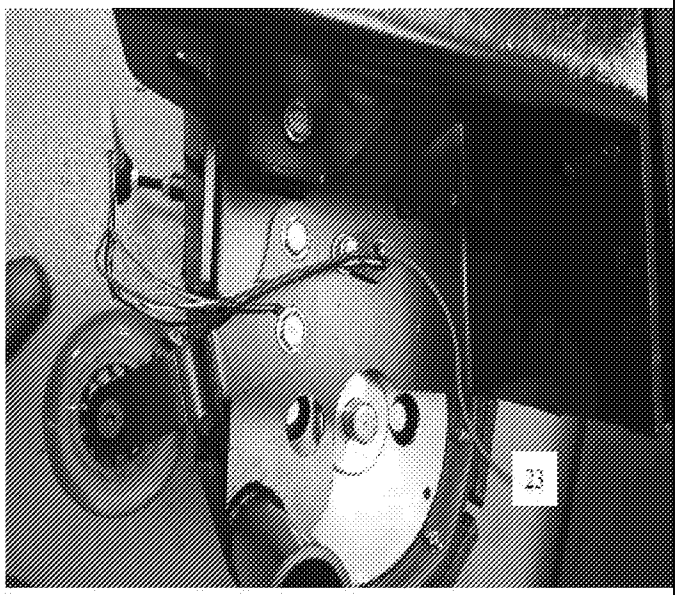
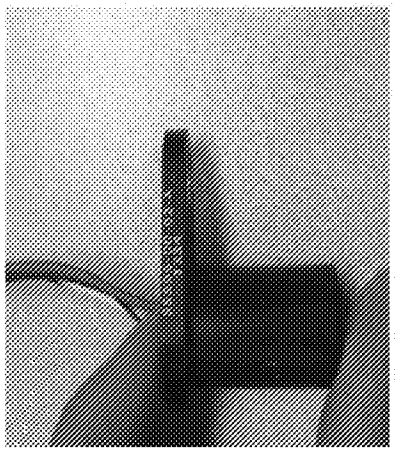
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| of the running belt in a second direction opposite the first direction. | As also shown, the safety device [10] is a Koyo brand with a model number of RCB-121616. This model number corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction." (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-3 (2014), http://www.jtekt-na.com/assets/ce/ Documents/ (B2018E-1)%20Needle% 20Roller%20Bearing% 20Catalog.pdf).<br><br>Because the safety device [10] is coupled to the rear shaft [5] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is structured to substantially prevent rotation of the rear shaft [5] in a first rotational direction while permitting rotation of the rear shaft [5] in a second |  | |



LIFECORE Ex. 1002

| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| | rotational direction opposite the first rotational direction. Because the running belt [8] is disposed about the rear shaft [5], rotational movement of the running belt [8] is affected/constrained by the movement of the rear shaft [5]. Thus, the safety device [10] is structured to substantially prevent movement of the running belt [8] in a first direction and permit movement of the running belt [8] in a second direction that is opposite the first direction. |  | |

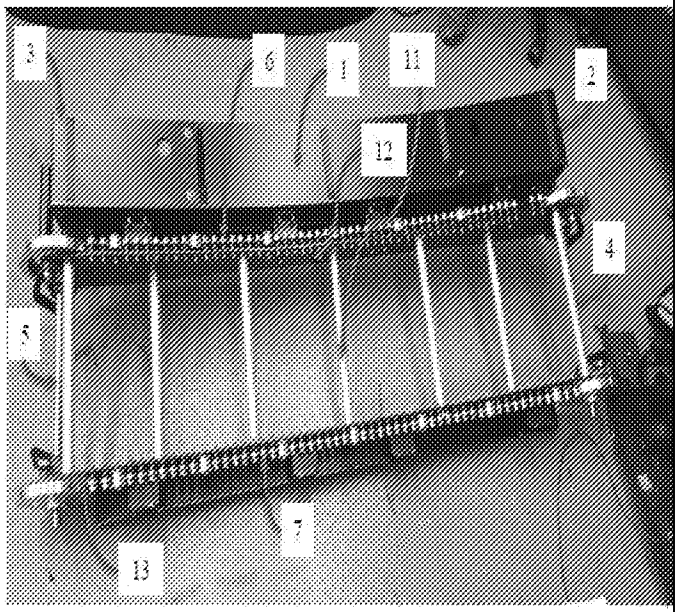
Page 1361 of 2517

| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 20. The manually powered treadmill of claim 19,<br><br>further comprising a sensor configured to acquire data indicative of a speed of the running belt. | A "sensor configured to acquire data indicative of a speed of the running belt" is literally present in each of the Infringing Products.<br><br>As shown, the manually powered treadmill includes a sensor [23] that is configured to acquire data indicative of the speed of the running belt.<br><br>As shown in the bottom picture, Model Number 55505-00-02-A is a Hall Effect Sensor provided by Littelfuse, Inc. According to the corresponding datasheet, the 55505-00-02-A, a Hall Effect Sensor is "primarily for … speed sensing." (*See* Littelfuse, Inc., *55505 Hall Effect Flange Mount Geartooth Speed Sensor* at p. 1 (October 16, 2015), http://www.littelfuse.com/~/media/electronics/datasheets/hall_effect_sensors/littelfuse_hall_effect_sensors_55505_datasheet.pdf.pdf). |  <br>  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 19.<br><br>Plaintiffs admit that the Accused Products include a sensor configured to acquire data indicative of a speed of the running belt. |



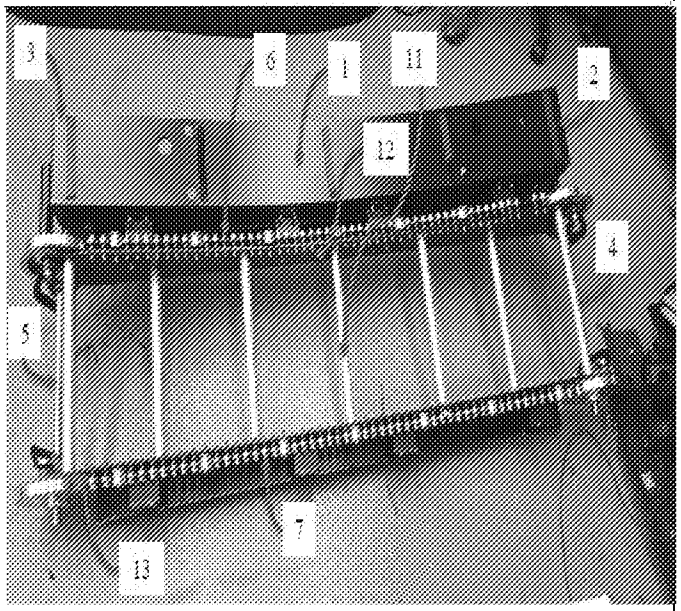
LIFECORE Ex. 1002

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| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 21. The manually powered treadmill of claim 19,<br><br>wherein the frame includes at least one cross-member, a left side member, and a right side member; and<br><br>wherein the at least one cross-member extends between the left side member and the right side member. | The "frame" having "at least one cross-member, a left side member, and a right side member" where the "at least one cross-member extends between the left side member and the right side member" is literally present in each of the Infringing Products.<br><br>As shown, the frame [1] includes a cross-member [11], a left side member [12], and a right side member [13], where the cross-member [11] extends between the left side member [12] and the right side member [13]. |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 19.<br><br>Additionally, the cross-member Woodway identifies as part [11] extends between the sides [12, 13] (the left side member and the right side member) of the inner frame, not the outer frame Woodway identified earlier as part [1]. |

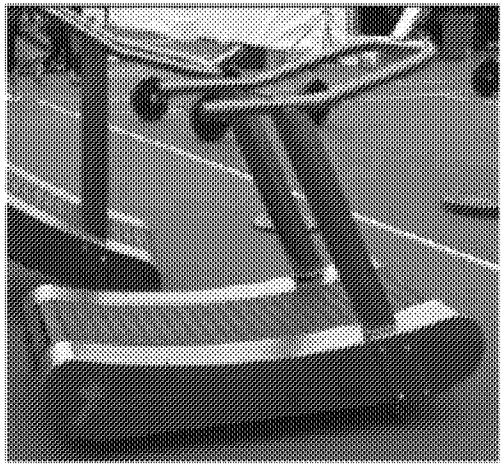
LIFECORE Ex. 1002

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| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 22. The manually powered treadmill of claim 21,<br><br>wherein each one of the first and second bearing rails are coupled to at least one of the at least one cross-member. | Each "of the first and second bearing rails" coupled to the "at least one cross-member" is literally present in each of the Infringing Products.<br><br>As shown, the first bearing rail [6] is coupled to one side of the frame [1] (i.e., the left side member [12]), while a second bearing rail [7] is coupled to another side of the frame [1] (i.e., the ride side member [13]). Further, the cross-member [11] is coupled to each of the left side member [12] and the right side member [13].<br><br>Therefore, each one of the first and second bearing rails [6], [7] are coupled to the at least one cross-member [11] via the left and right side members [12] and [13], respectively. |  | This dependent claim is not infringed for at least the reasons set forth with respect to claims 19 and 21.<br><br>Additionally, the cross-member Woodway identifies as part [11] extends between the sides [12, 13] (the left side member and the right side member) of the inner frame, not bearing rails. The Accused Products do not include structures to meet the bearing rail limitation and do not include first and second bearing rails coupled to at least one of the at least one cross-member. |

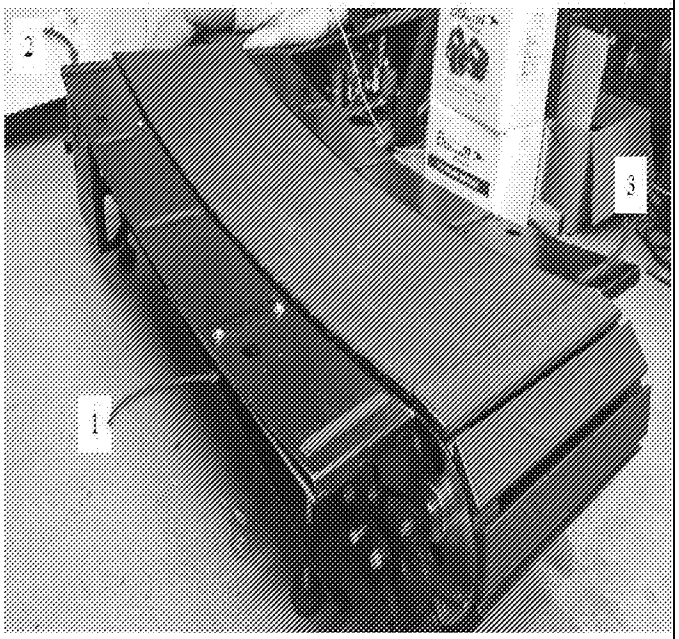
LIFECORE Ex. 1002

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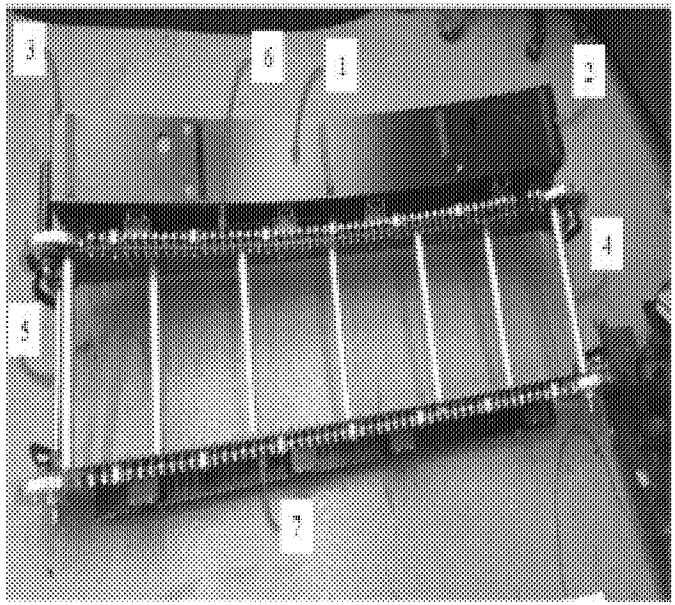
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| 25. A method, comprising: | | | This is a preamble, not entitled to any weight. |
| providing a manually powered treadmill, | A "manually powered treadmill" is literally each of the Infringing Products.<br><br>The TrueForm™ Runner Low Rider Product is pictured. As described in the product specification where the picture was taken from, the "TrueForm … relies 100% on human power." (Product Specification, p. 2.) Each of the Infringing Products are "non-motorized, powered by you." (*Id.* at p. 1.) |  | Plaintiffs admit that the image depicted is one of the products Woodway accuses of infringement (the "Accused Products"). Plaintiffs also admit that the Accused Products are human powered and non-motorized |

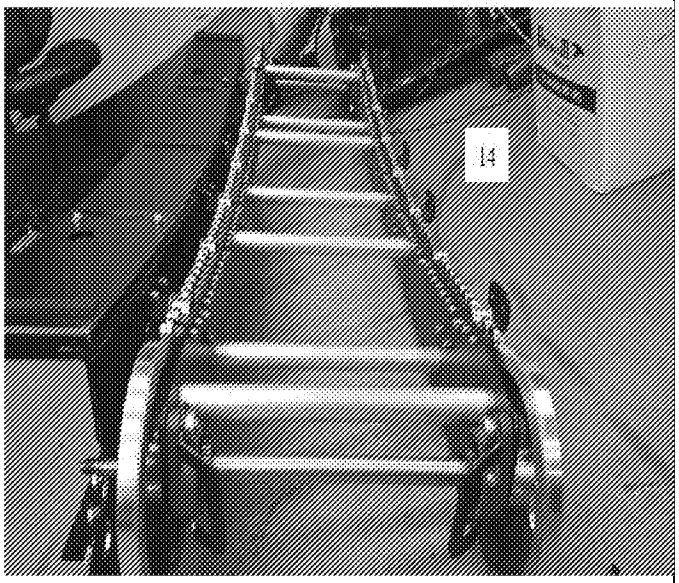
LIFECORE Ex. 1002

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| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| the manually powered treadmill having a frame with a front end and rear end; | A "frame having a front end and a rear end" is literally provided in each of the Infringing Products.<br>As shown, the frame [1] has a front end [2] and a rear end [3]. |  | Plaintiffs admit that the Accused Products include a frame having a front end and a rear end. |

LIFECORE Ex. 1002

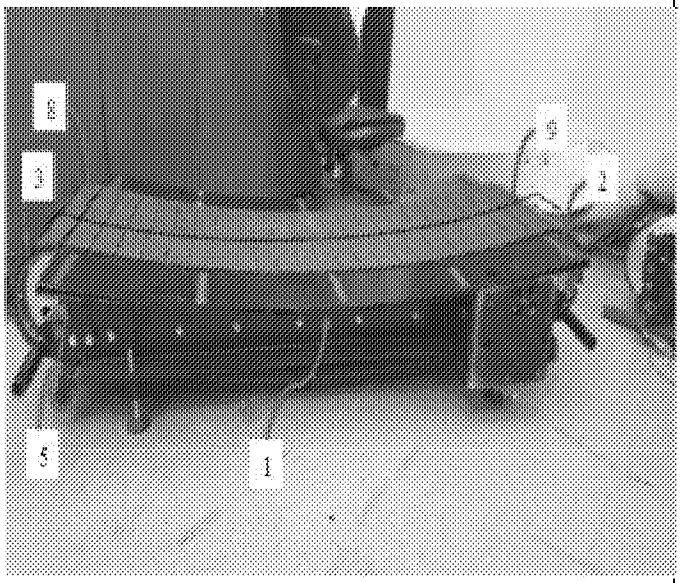
| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| providing a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame,<br><br>wherein the first and second bearing rails define a curved top profile; | A "first bearing rail" having "a plurality of bearings" and a "second bearing rail" having a "plurality of bearings" where "the first and second bearing rails define a curved top profile" and "extend[] longitudinally on the frame" is literally provided in each of the Infringing Products.<br><br>As shown, a first bearing rail [6] is attached longitudinally to one side of the frame [1] (i.e., the left side), while a second bearing rail [7] is attached longitudinally to the other side of the frame [1] (i.e., the right side). As also shown, the first bearing rail [6] and the second bearing rail [7] define a curved top profile [14]. |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The Accused Products do not provide bearing rails as the patent uses that term, and the image provided does not reflect first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame [1], nor do the first and second bearing rails define a curved top profile. |

| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| | |  | |



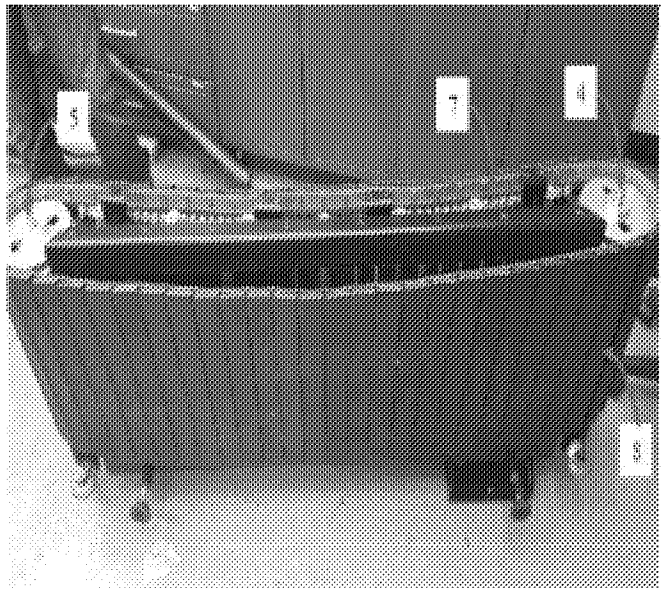
LIFECORE Ex. 1002

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| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| disposing a running belt on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails; | A "running belt" that is disposed "on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails" is literally present in each of the Infringing Products.<br><br>As shown, a running belt [8] follows a curved running surface [9]. The running belt [8] is disposed on the first bearing rail [6] and the second bearing rail [7]. Because the curved top profile [14] is proximate the curved running surface [9], the curved running surface [9] corresponds to the curved top profile [14]. |  | For the reasons set forth above with respect to the bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. The Accused Products do not include a running belt supported by bearing rails.<br><br>Additionally, the "running belt" identified as part [8] in this image does not appear correspond to the "running belt" (part 16) taught in the '580 patent. *See* Col. 14, ln. 1- Col. 15, ln. 28. |

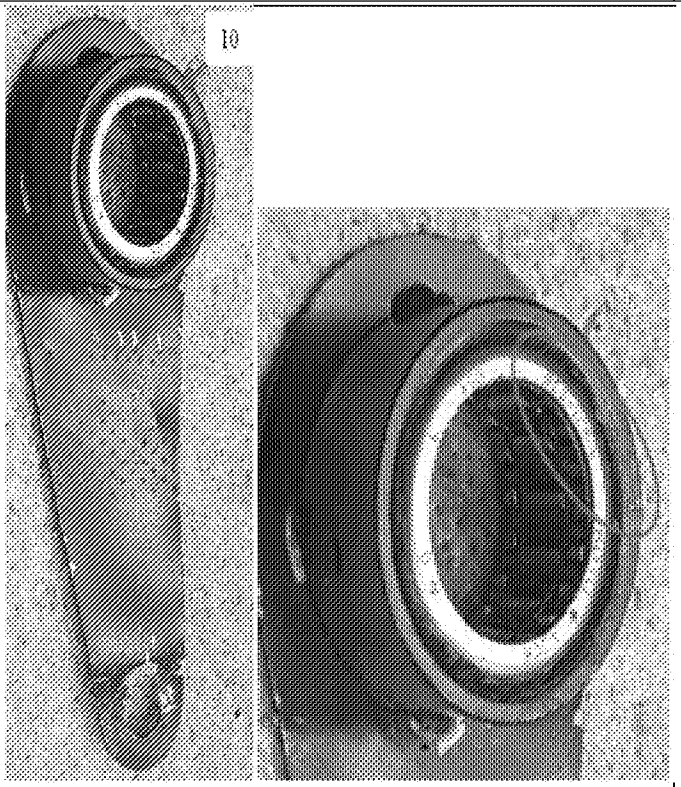
LIFECORE Ex. 1002

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| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| | |  | |
| permitting movement of the running belt in a first direction; and<br><br>substantially preventing movement of the running belt in a second direction opposite the first direction. | The "running belt" being only permitted to move in one direction and "substantially prevent[ed]" from moving "in a second direction opposite the first direction" is literally present in each of the Infringing Products.<br><br>As shown, the safety device [10] is coupled to the rear shaft [5]. |  | Plaintiffs admit that the Accused Products include a safety device but deny that the safety device is coupled to the rear shaft, as Woodway claims. |



LIFECORE Ex. 1002

| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| | As also shown, the safety device [10] is a Koyo brand with a model number of RCB-121616. This model number corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction." (See JTEKT Corp., Koyo Needle Roller Bearings at p. B-3-3 (2014), http://www.jtekt-na.com/assets/ce/ Documents/ (B2018E-1)%20Needle%20Roller%20Bearing%20Catalog.pdf).<br><br>Because the safety device [10] is coupled to the rear shaft [5] and because the safety device [10] "allows free overrun," (id.), in one rotational direction, the safety device [10] is structured to substantially prevent |  | |



LIFECORE Ex. 1002

| Claim of the 9,039,580 Patent | Woodway's Infringement Contentions | Image Woodway included | Non-Infringement Position |
|---|---|---|---|
| | rotation of the rear shaft [5] in a first rotational direction while permitting rotation of the rear shaft [5] in a second rotational direction opposite the first rotational direction. Because the running belt [8] is disposed about the rear shaft [5], rotational movement of the running belt [8] is affected/constrained by movement of the rear shaft [5]. Thus, the safety device [10] is structured to substantially prevent movement of the running belt [8] in a first direction and permit movement of the running belt [8] in a second direction that is opposite the first direction. | | |

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| CHAPCO, INC. and SAMSARA FITNESS, LLC | : | CIVIL ACTION NO. 3:15-cv-01665 (JCH) |
| Plaintiffs, | : | |
| v. | : | |
| WOODWAY USA, Inc. | : | |
| Defendant. | : | AUGUST 8, 2016 |

**PLAINTIFFS' SUPPLEMENTAL NON-INFRINGEMENT CONTENTIONS**

Pursuant to the Court's Order (Dkt. No. 51), Plaintiffs Chapco, Inc. ("Chapco") and Samsara Fitness, LLC ("Samsara") (collectively, "Plaintiffs") make the following Supplemental Non-Infringement Contentions in response to the July 18, 2016 Supplemental Infringement Contentions served by Defendant Woodway USA, Inc. ("Woodway") regarding U.S. Patent No. 8,590,169 (Exhibit A), U.S. Patent No. 9,039,580 (Exhibit B), U.S. Design Patent No. 736,866 (Exhibit C) and U.S. Design Patent No. D753,776 (Exhibit D). Plaintiffs' Supplemental Non-Infringement Contentions are responsive to Woodway's Supplemental Infringement Contentions and, as such, only address the claims and accused products identified in those Initial Infringement Contentions. As is made clear in these Non-Infringement Contentions, Plaintiffs deny infringement.

These Supplemental Non-Infringement Contentions are based upon the information presently known to Plaintiffs. Plaintiffs' investigation is ongoing and the Court has not yet ruled on any construction of the asserted claims. Plaintiffs reserve the right to alter their non-infringement positions in light of further discovery, claim construction positions, court rulings, and expert opinion.

CHAPCO, INC. and SAMSARA FITNESS, LLC
By Their Attorneys,

/s/ Christine K. Bush

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Dated: August 8, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8th day of August, 2016, the within *Plaintiffs' Supplemental Non-Infringement Contentions* was served electronically to:

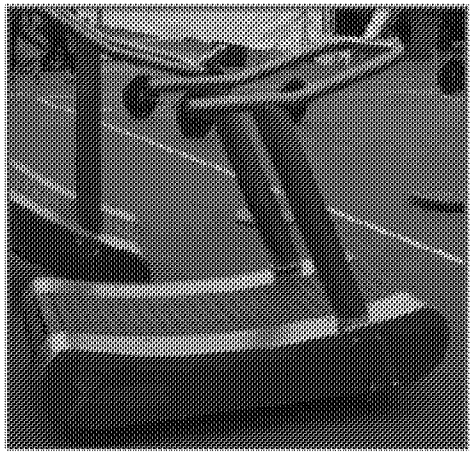
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/s/ Christine K. Bush

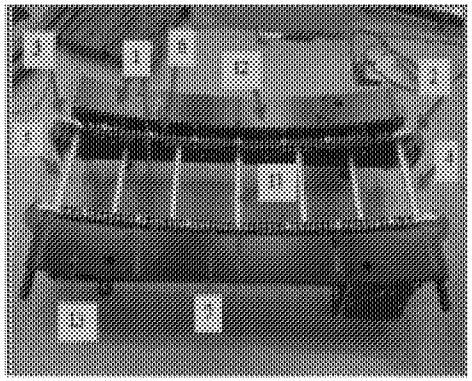
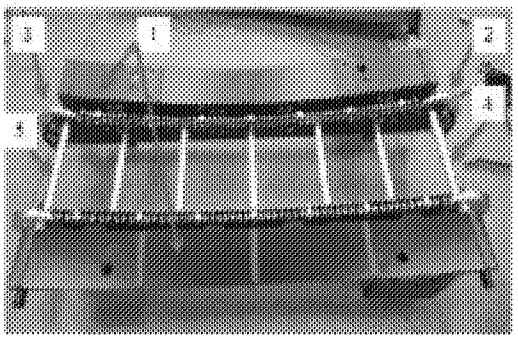
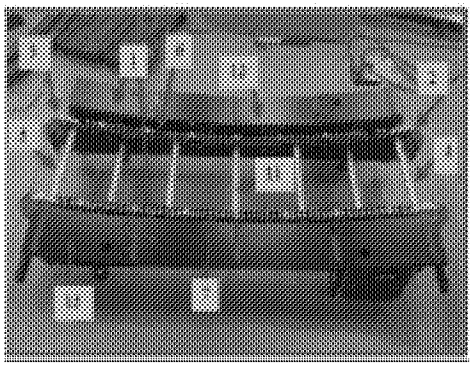
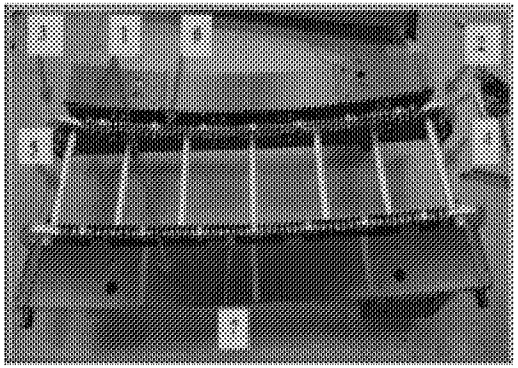
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## EXHIBIT B - Claim Chart for U. Patent No. 9,039,580

| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
|---|---|---|---|---|
| **1**. A manually powered treadmill comprising: | **1.** A "manually powered treadmill" is literally each of the Original and Redesigned Infringing Products.<br><br>The TrueForm™ Runner Low Rider Infringing Product is pictured. As described in the product specification, the "TrueForm … relies 100% on human power." (Product Specification, p. 2.) Each of the Infringing Products is "non-motorized, powered by you." (*Id.* at p. 1.) |  |  | This is a preamble, not entitled to any weight.<br><br>Plaintiffs admit that the image depicted is one of the products Woodway accuses of infringement (the "Accused Products"). Plaintiffs also admit that the Accused Products are human powered and non-motorized. |

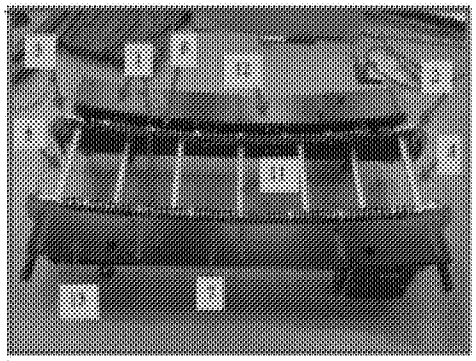
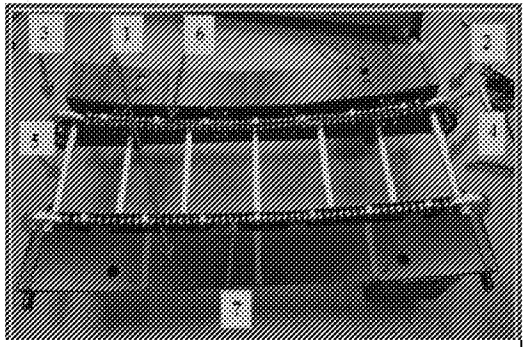
LIFECORE Ex. 1002

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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
|---|---|---|---|---|
| a frame having a front end and a rear end positioned opposite the front end; | A "frame having a front end and a rear end positioned opposite the front end" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, the frame [1, which designates the entire frame assembly not a single piece of metal] has a front end [2] and a rear end [3], where the front end [2] is positioned opposite the rear end [3]. |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The Accused Products do not have "a" frame as that term is used in the patent. The Accused Products do not include a "frame assembly" but instead include two frames, one of which Woodway depicts in these images as part [1]. |
| a front shaft rotatably coupled to the frame at the front end; | A "front shaft rotatably coupled to the frame at the front end" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a front shaft [4] is rotatably coupled to the frame [1] at the front end [2]. In this regard, "the term 'coupled' means the joining of two members directly or indirectly to one another. … Such joining may be achieved |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The front shaft, which Woodway identifies as part [4] is not rotatably coupled to the outer frame [1] Woodway identifies, it is rotatably coupled to the inner frame. Additionally, the limitation is "rotatably coupled," not simply "coupled" and Woodway fails to explain how the front shaft could be "rotatably coupled" indirectly. |

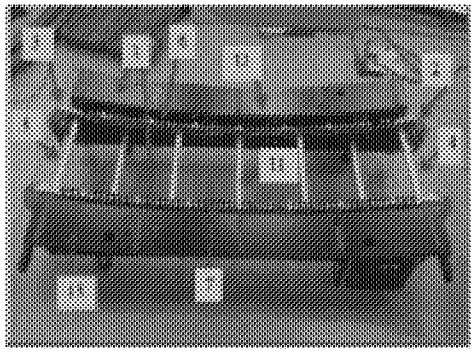
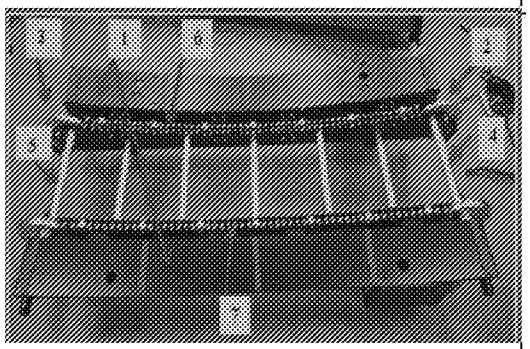
LIFECORE Ex. 1002

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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
|---|---|---|---|---|
| | with the two members or the two members and any additional intermediate members." *See* the '580 patent at col. 32, ll. 10-14.<br><br>Thus, coupling of the front shaft [4] to the frame [1] may be directly or indirectly, such as through an intermediary member (e.g., via bearing rail [6] or [7]). | | | |
| a rear shaft rotatably coupled to the frame at the rear end; | A "rear shaft rotatably coupled to the frame at the rear end" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a rear shaft [5] is rotatably coupled to the frame [1] at the rear end [3]. In this regard, "the term 'coupled' means the joining of two members directly or indirectly to one another. … Such joining may be achieved with the two members or the two members and any additional intermediate members." *See* the '580 |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The rear shaft, which Woodway identifies as part [5] is not rotatably coupled to the outer frame [1] Woodway identifies, it is rotatably coupled to the inner frame. Additionally, the limitation is "rotatably coupled," not simply "coupled" and Woodway fails to explain how the front shaft could be "rotatably coupled" indirectly. |

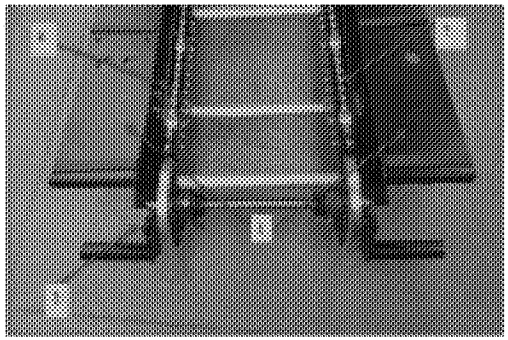
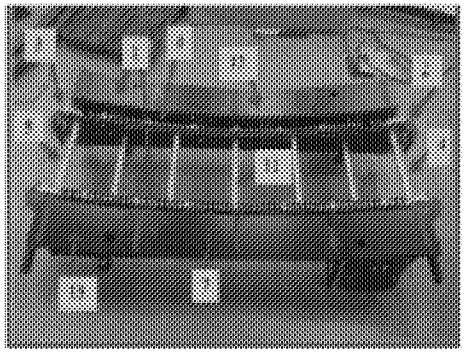
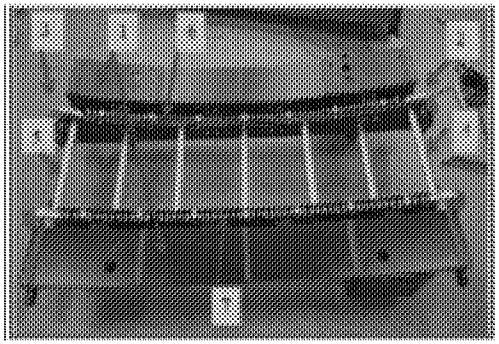


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | patent at col. 32, ll. 10-14. Thus, coupling of the rear shaft [5] to the frame [1] may be directly or indirectly, such as through an intermediary member (e.g., via bearing rail [6] or 7]). | | | |
| a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame; | A "first bearing rail having a plurality of bearings" and "attached to a left side of the frame" are literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a plurality of bearings [6] are supported by a bearing rail and the bearing rail is attached to the left side of the frame [1]. |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually rotatably coupled to the inner frame, not a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed in the '580 patent indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. Accordingly, a first bearing rail is not "attached" to a left side of the frame.<br><br>Additionally, Woodway does not identify, by number, where the bearing rail is on the image – it identifies solely the bearings [6] and the frame [1]. |

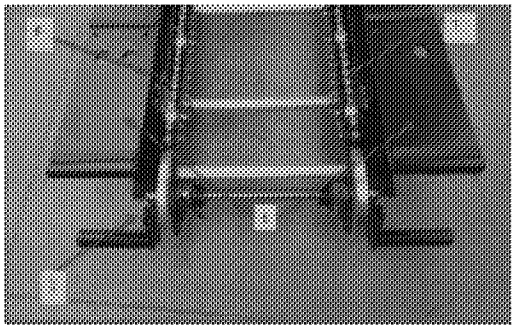


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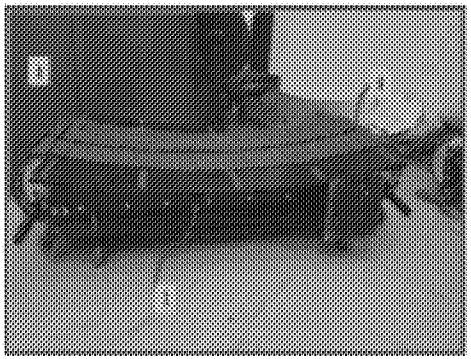
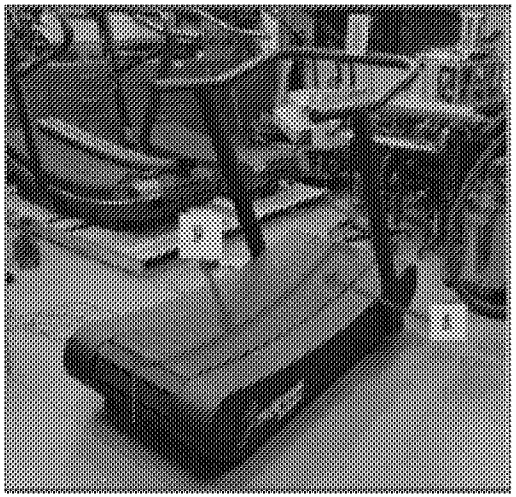
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame; | A "second bearing rail having a plurality of bearings" and "attached to a right side of the frame" are literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a plurality of bearings [7] are supported by a bearing rail and the bearing rail is attached to the right side of the frame [1]. |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually rotatably coupled to the inner frame, not a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed in the '580 patent indicate that the bearing rail is a structure separate from the frame. *See e.g.*, Col. 11, lns. 44-48; dependent claim 2. Accordingly, the second bearing rail is not "attached" to a right side of the frame. |



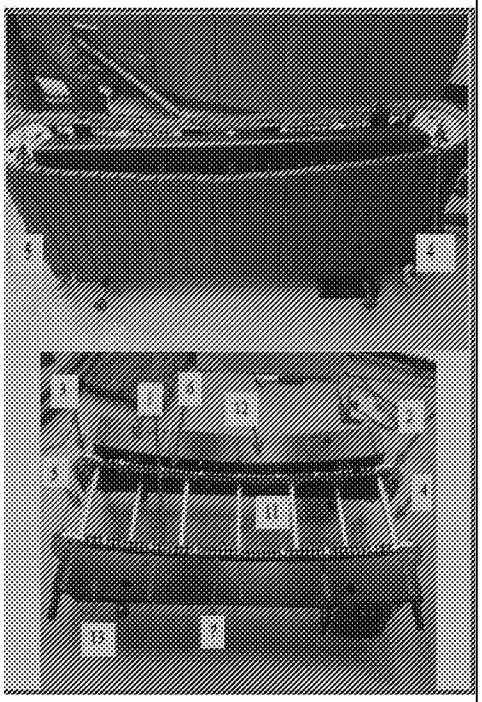
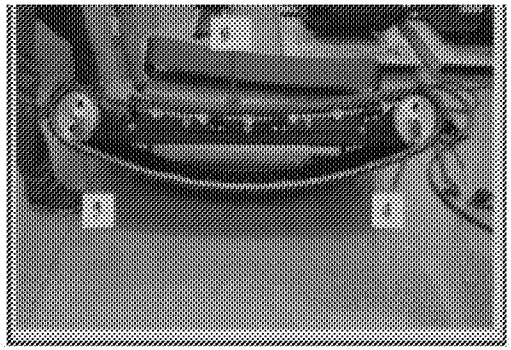
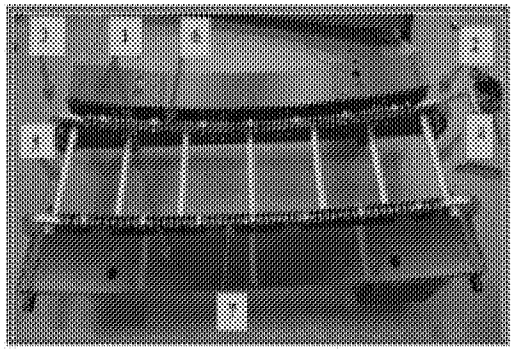
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | | |  | Additionally, Woodway does not identify, by number, where the bearing rail is on the image – it identifies solely the bearings [6] and the frame [1]. |

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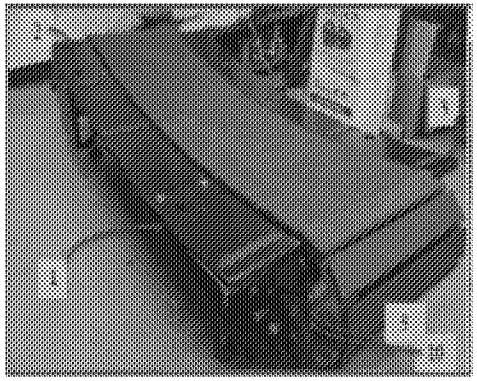
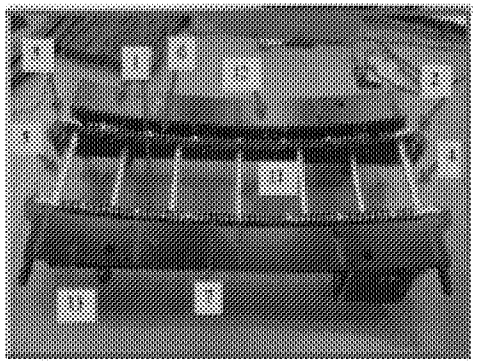
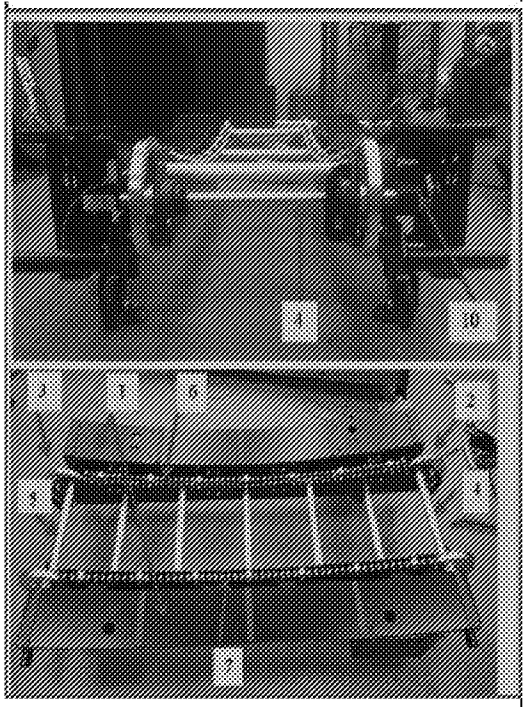
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| a running belt supported by the first bearing rail and the second bearing rail and disposed about the front shaft and the rear shaft,<br><br>wherein the running belt follows a curved running surface; and | A "running belt" supported by the "first bearing rail" and the "second bearing rail" and following a "curved running surface" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a running belt [8] follows a curved running surface [9]. The running belt [8] is supported by the plurality of bearings [6] and [7] which are in turn supported by the first bearing rail and the second bearing rail. The running belt [8] is supported by the first and second bearing rails. The running belt is also disposed about the front shaft [4] and the rear shaft [5]. |  |  | For the reasons set forth above with respect to the bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. The Accused Products do not include a running belt supported by first and second bearing rails or disposed about the shafts as claimed.<br><br>Additionally, the "running belt" identified as part [8] in this image does not appear to correspond to the "running belt" (part 16) taught in the '580 patent. *See* Col. 14, ln. 1- Col. 15, ln. 28. Nor is the "running belt" shown supported by the shaft assemblies as Woodway construed the shaft assemblies. *See also*, Woodway infringement analysis of dependent claim 14 of the '169 patent. |

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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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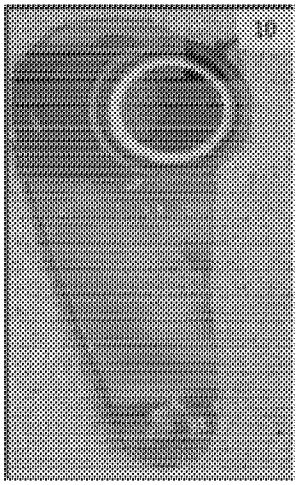
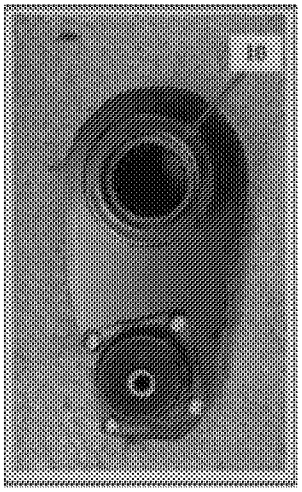


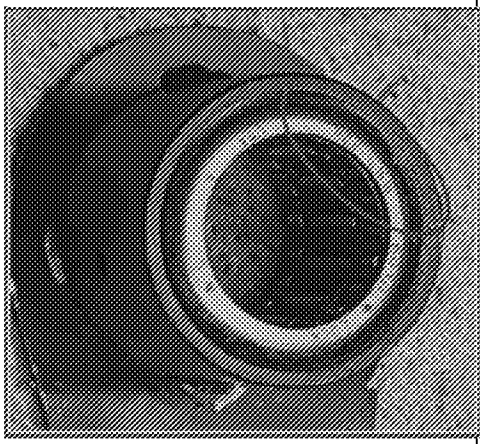
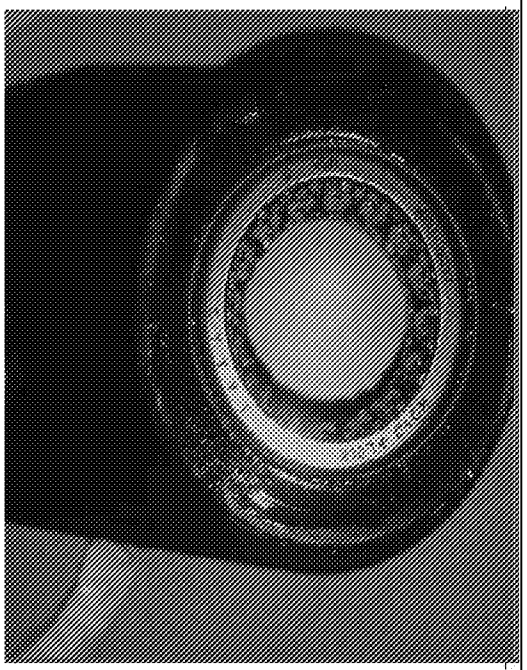
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| a safety device coupled to at least one of the front shaft and the rear shaft,<br><br>wherein the safety device is structured to substantially prevent rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction. | A "safety device coupled to at least one of the front shaft and the rear shaft" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown in the Original Design, the safety device [10] is coupled to the rear shaft [5]. As shown in the Redesign, the safety device [10] is coupled to the front shaft [4].<br><br>As also shown, the safety device [10] of the Original Design is a Koyo brand with a model number of RCB-121616 while the safety device [10] of the Redesign is a Koyo brand with a model number of RCB-162117.<br><br>Each of these model numbers corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows |  <br>  |  | Plaintiffs admit that the Accused Products include a safety device coupled to the rear (Original Design) or the front (Redesign), but since both the "front shaft" and the "rear shaft" are rotatably coupled to the "frame," Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products for the reasons set forth *supra*. |

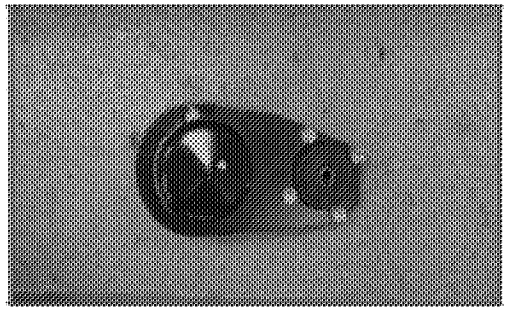
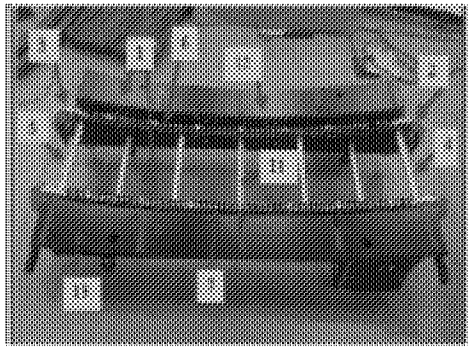
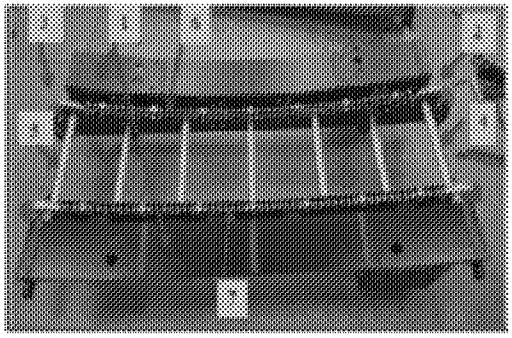


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | free overrun in the opposite direction." (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-3 (2014), http://www.jtektna.com/assets/ce/Documents/(B2018E-1)%20Needle%20Roller%20Bearing%20Catalog.pdf).<br><br>In regard to the Original Design, because the safety device [10] is coupled to the rear shaft [5] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is "structured to substantially prevent rotation of … the rear shaft in a first rotational direction while permitting rotation of the … rear shaft in a second rotational direction opposite the first rotational direction."<br><br>In regard to the Redesign, because the safety device [10] is coupled to the front |  |  | |

| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | shaft [4] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is "structured to substantially prevent rotation of … the front shaft … in a first rotational direction while permitting rotation of … the front shaft … in a second rotational direction opposite the first rotational direction." |  |  | |

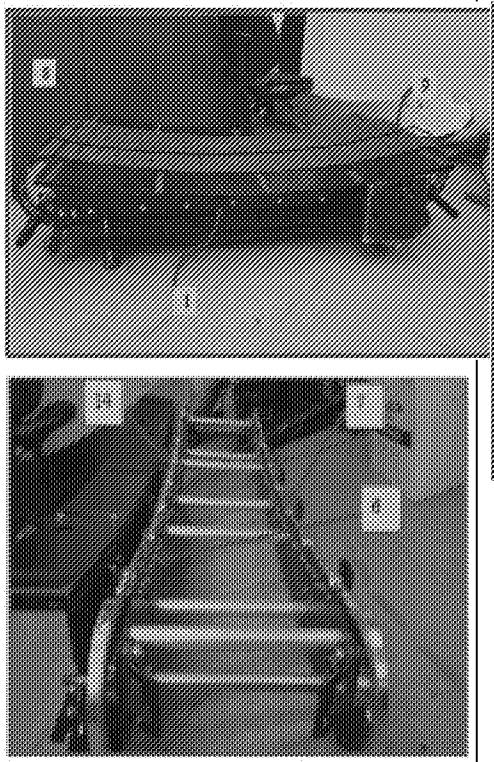
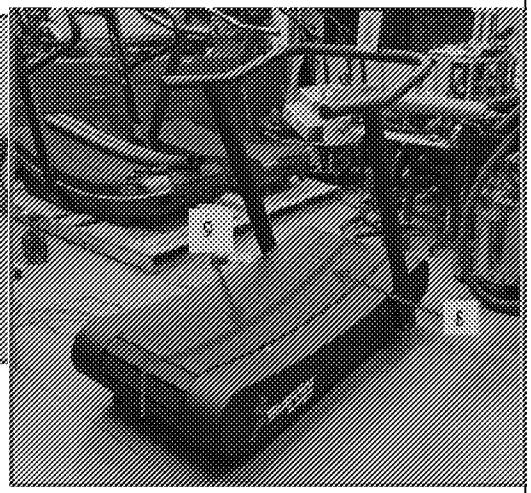
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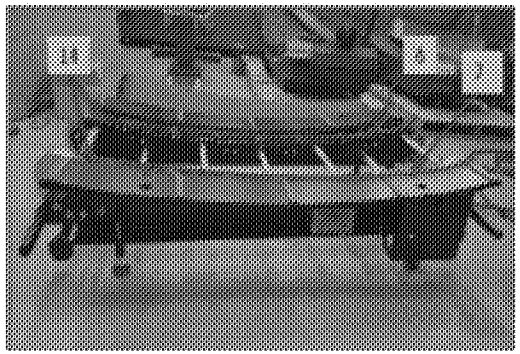
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| **4.**[1] The manually powered treadmill of claim 1,<br><br>wherein each one of the first and second bearing rails are attached longitudinally to the frame between the front shaft and the rear shaft. | "Each one of the first and second bearing rails" being "attached longitudinally to the frame between the front shaft and rear shaft" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, the bearing rails are longitudinally attached to the frame [1] between the front shaft [4] and the rear shaft [5]. |  |  | This dependent claim is not infringed for at least the reasons set forth with respect to claims 1 and 3 (as described in Plaintiffs' Preliminary Non-infringement Contentions), i.e. The cross-member Woodway identifies as part [11] extends between the sides [12, 13] (the left side member and the right side member) of the inner frame, not the outer frame Woodway identified earlier as part [1]..<br><br>Additionally, the Accused Products do not include bearing rails as the patent uses that term, and the image provided does not reflect first and second bearing rails attached longitudinally to the frame [1]. |

[1] Woodway's Supplement Infringement Contentions do not reference Claims 2 or 3 of the '580 patent.



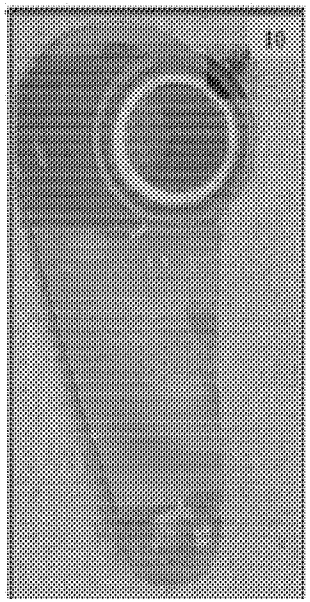
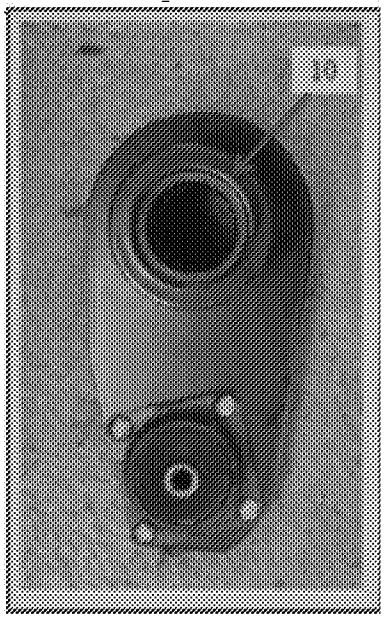
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| **5.** The manually powered treadmill of claim 1,<br><br>wherein each one of the first bearing rail and the second bearing rail define in part a top profile corresponding to the curved running surface. | "Each one of the first bearing rail and the second bearing rail" that "define in part a top profile corresponding to the curved running surface" is literally present in each of the Original and Redesigned Infringing Products.<br><br>The top profile edge of the bearing rails is curved. The plurality of bearings [6] and [7], which in part support the running belt [8], are mounted to the bearing rails to follow this top profile to create the curved running surface. As seen in the photographs, the top surface of the bearing rails corresponds to the curved running surface. |  |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 1.<br><br>Additionally, the Accused Products do not include bearing rails as the patent uses that term, and the image provided does not reflect bearing rails. The first bearing rail and the second bearing rail do not define in part a top profile corresponding to the curved running surface. The image that includes part [14] shows the bearings on top of the frame, not bearing rails. |

| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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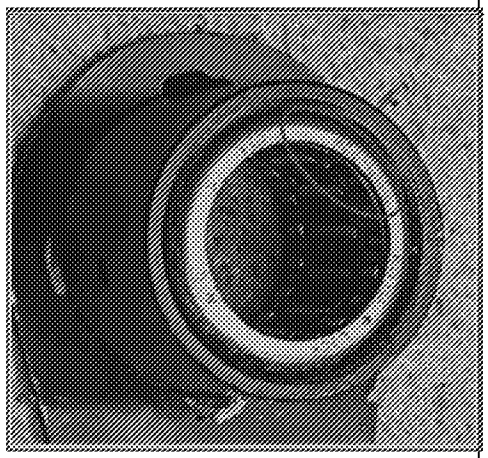
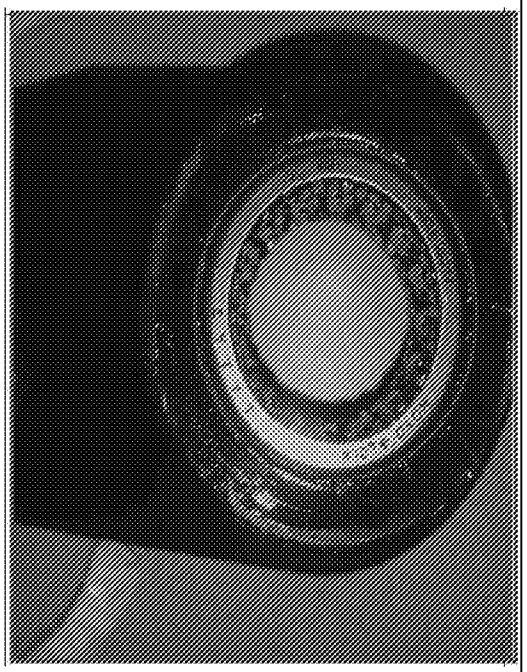


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| **6**. The manually powered treadmill of claim 1,<br><br>wherein the safety device includes a one-way bearing. | The "safety device" includes "a one-way bearing" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, the safety device [10] of the Original Design is a Koyo brand with a model number of RCB-121616 while the safety device of the Redesign is Koyo brand with a model number of RCB-162117. Each model number corresponds with a "regular clutch and ***bearing*** assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction" (emphasis added). (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-3 (2014), http://www.jtektna.com/assets/ce/Documents/(B2018E-1)%20Needle%20Roller%20Bearing% |  |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 1.<br><br>Plaintiffs admit that the Accused Products include a safety device with a one-way bearing. |

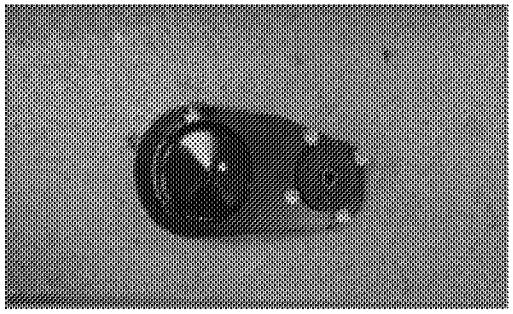
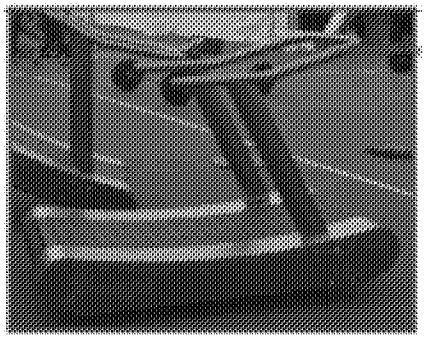
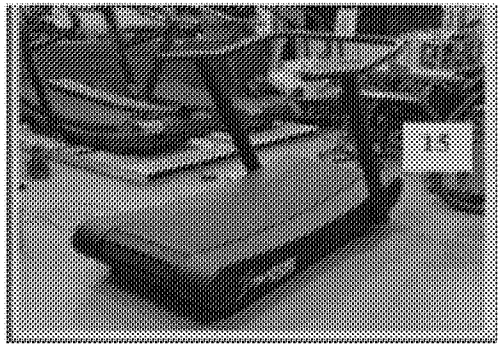


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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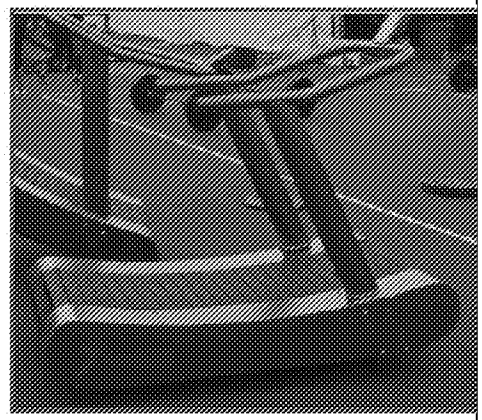


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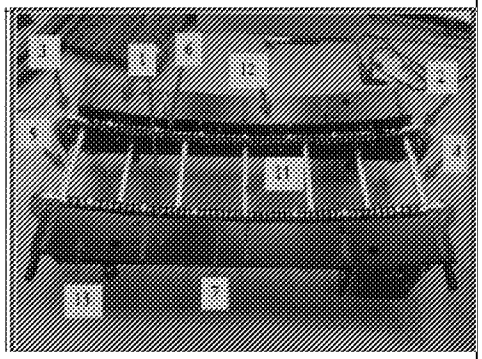
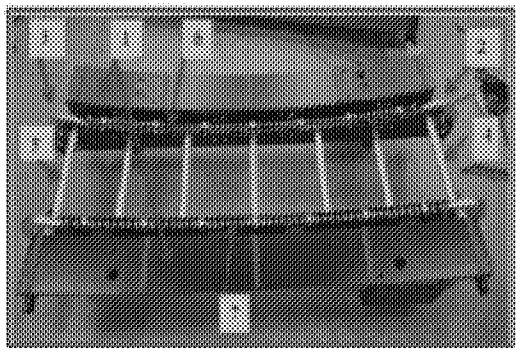
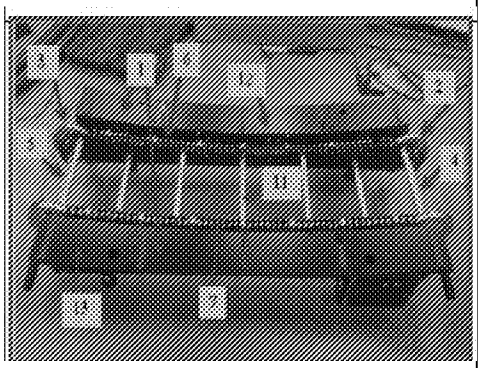
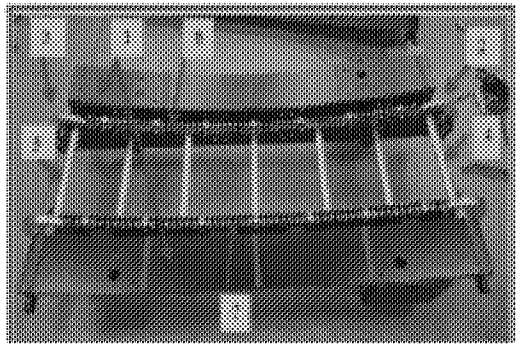
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | | |  | |
| **10.** The manually powered treadmill of claim 1,<br><br>further comprising a handrail attached to the frame and structured to provide a support structure for the user of the manually powered treadmill. | A "handrail attached to the frame" which is "structured to provide a support structure for the user of the manually powered treadmill" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, the manually powered treadmill includes a handrail [15] that is structured to provide a support structure to a user of the manually powered treadmill. |  |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 1.<br><br>Plaintiffs admit that the Accused Products include a handrail structured to provide a support structure for the user of the manually powered treadmill. |



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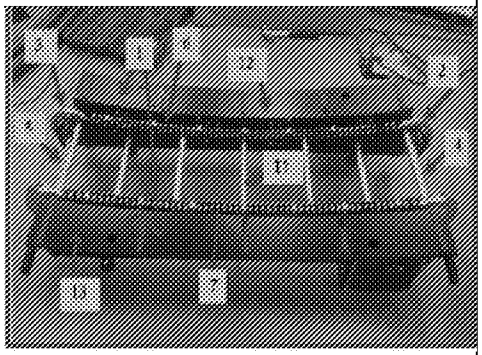
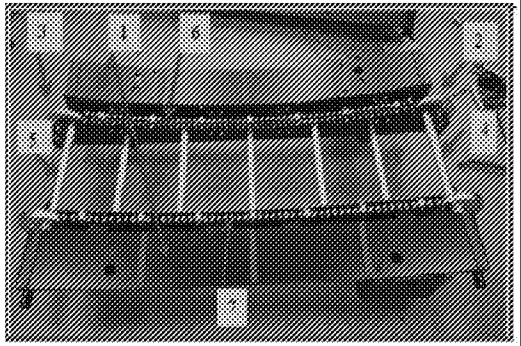
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| **11.** A manually powered treadmill, comprising: | A "manually powered treadmill" is literally each of the Original and Redesigned Infringing Products.<br><br>The TrueForm™ Runner Low Rider Product is pictured. As described in the product specification, the "TrueForm … relies 100% on human power." (TrueForm™ Runner Product Specification, p. 2.) Each of the Infringing Products is "non-motorized, powered by you." (*Id.* at p. 1.) |  |  | This is a preamble, not entitled to any weight.<br><br>Plaintiffs admit that the image depicted is one of the products Woodway accuses of infringement (the "Accused Products"). Plaintiffs also admit that the Accused Products are human powered and non-motorized. |

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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| a frame having a front end and a rear end positioned opposite the front end; | A "frame having a front end and a rear end positioned opposite the front end" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, the frame [1, which designates the entire frame assembly not a single piece of metal] has a front end [2] and a rear end [3], where the front end [2] is positioned opposite the rear end. |  |  | Plaintiffs admit that the Accused Products include a frame having a front end and a rear end positioned opposite the front end. |
| a front shaft attached to the frame adjacent the front end; | A "front shaft attached to the frame adjacent the front end" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a front shaft [4] is attached to the frame [1] at the front end [2]. In this regard, "the term 'coupled' means the joining of two members directly or indirectly to one another. … Such joining may be achieved |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The front shaft, which Woodway identifies as part [4] is not attached to the outer frame [1]; it is rotatably coupled to the inner frame. *See* claim 1.<br><br>Additionally, Woodway provides no support from the specification or from the caselaw for its statement that the term "coupling" is analogous to the term "attached" for the purposes of this infringement analysis. |

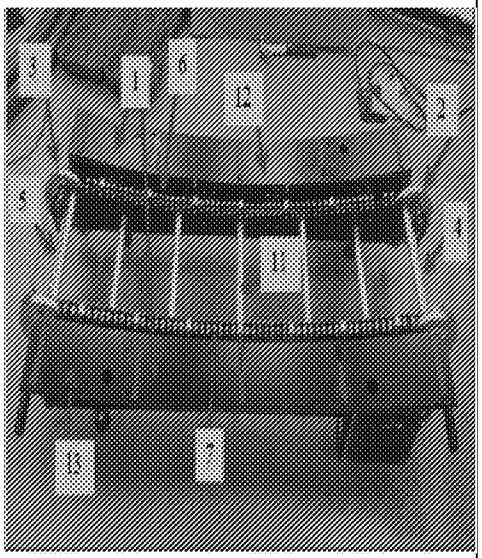
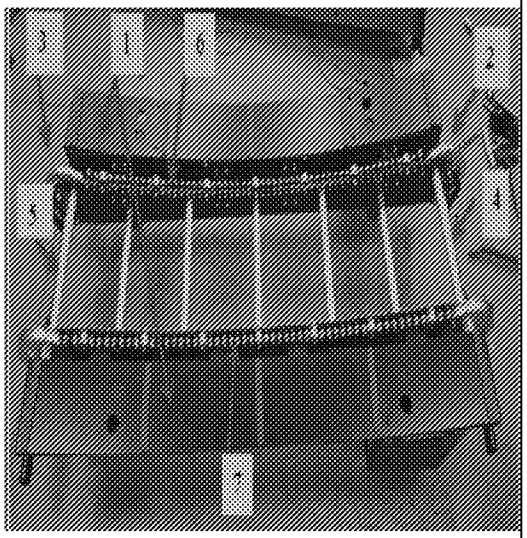
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | with the two members or the two members and any additional intermediate members." *See* the '580 patent at col. 32, ll. 10-14. The term "coupling" is analogous to the term "attached."<br><br>Therefore, attachment of the front shaft [4] to the frame [1] may be directly or indirectly, such as through an intermediary member (e.g., via bearing rail). | | | |
| a rear shaft attached to the frame adjacent the rear end; | A "rear shaft attached to the frame adjacent the rear end" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a rear shaft [5] is attached to the frame [1] adjacent the rear end [3]. In this regard, "the term 'coupled' means the joining of two members directly or indirectly to one another. … Such joining may be achieved with the two members or |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The rear shaft, which Woodway identifies as part [5] is not attached to the outer frame [1]; it is rotatably coupled to the inner frame. *See* claim 1.<br><br>Additionally, Woodway provides no support from the specification or from the caselaw for its statement that "coupling" is analogous to the term "attached" for the purposes of this infringement analysis. |

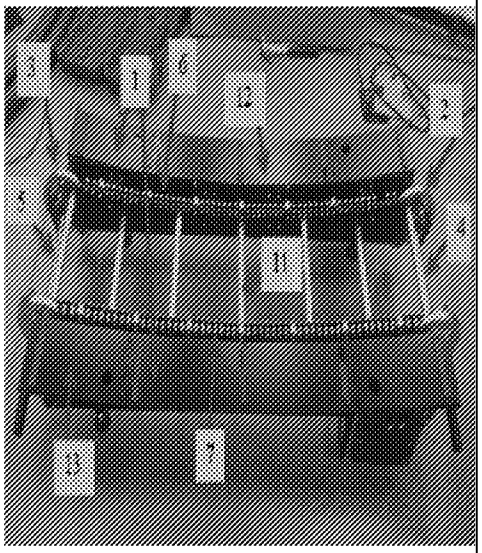
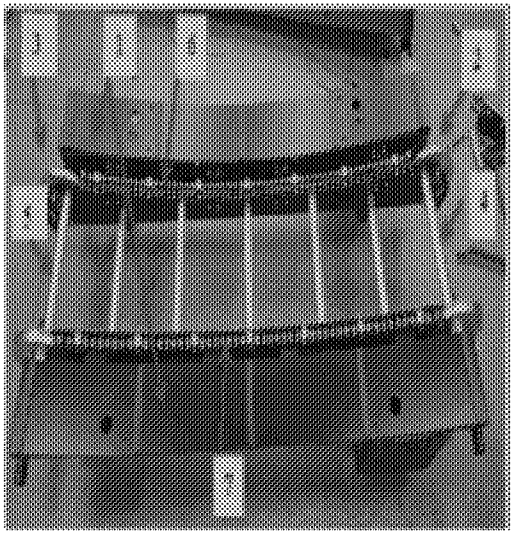


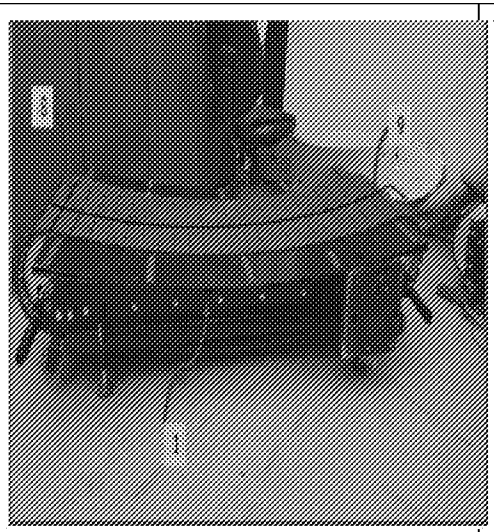
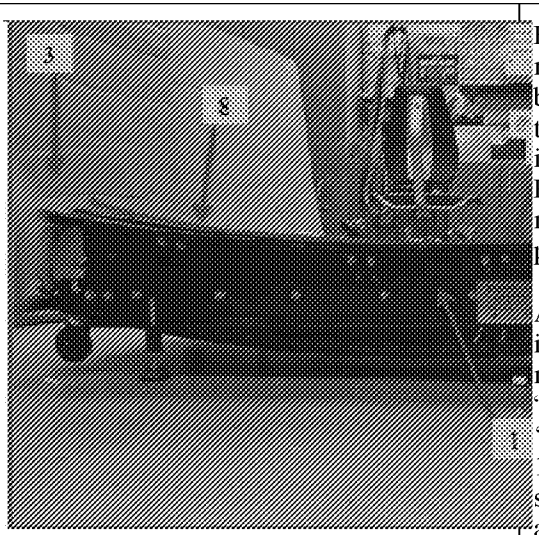
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | the two members and any additional intermediate members." *See* the '580 patent at col. 32, ll. 10-14. The term "coupling" is analogous to the term "attached."<br><br>Therefore, attachment of the front shaft [5] to the frame [1] may be directly or indirectly, such as through an intermediary member (e.g., via bearing rail). | | | |
| a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame; | A "first bearing rail having a plurality of bearings" and "attached to a left side of the frame" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a first bearing rail is attached to one side of the frame [1] (i.e., the left side). A plurality of bearings [6] are provided on the first bearing rail. |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2.<br><br>Notably, Woodway does not identify the bearing rail by part number in these contentions, but it previously identified them as parts [6] and [7] which Woodway now identifies as bearings. |

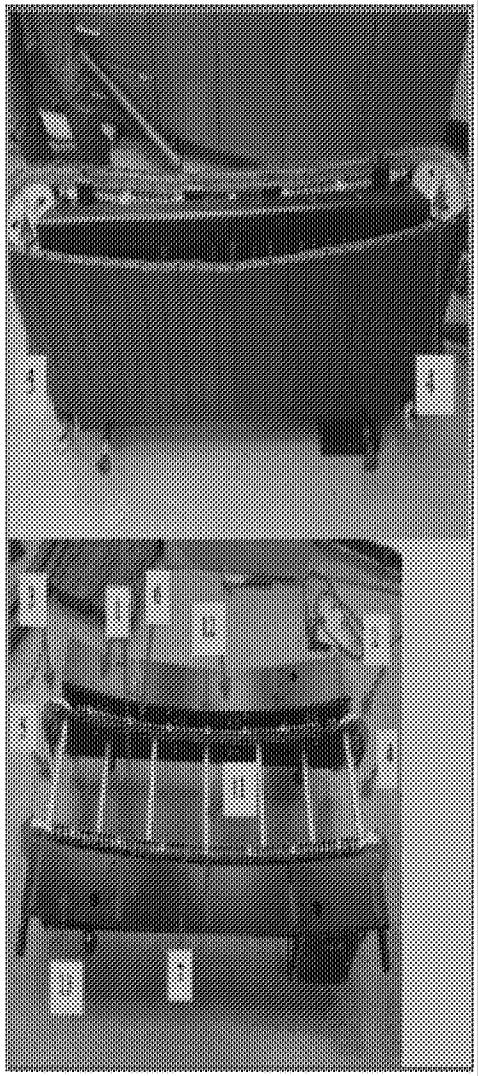
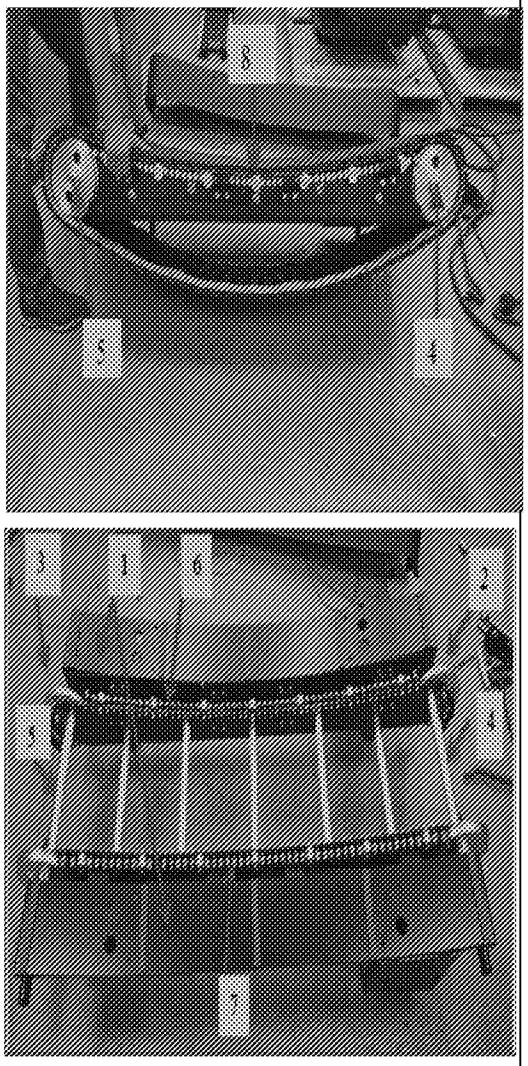


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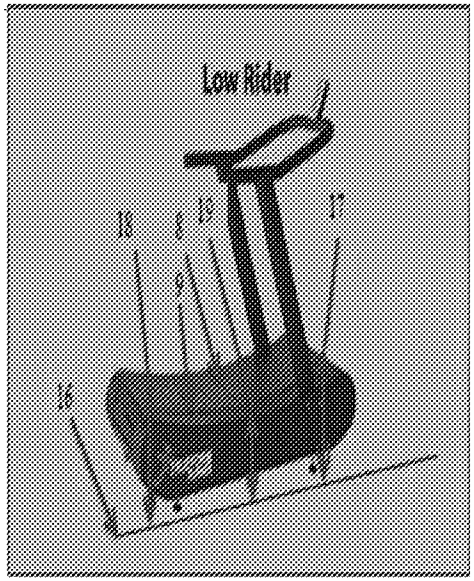
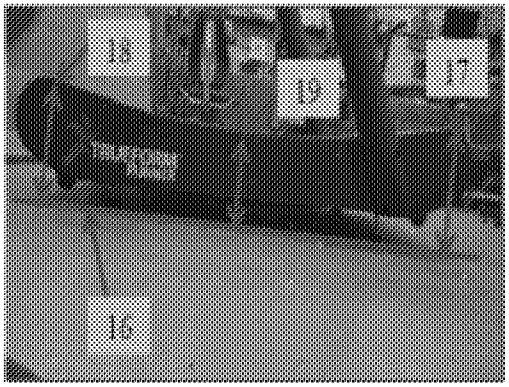
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame; | A "second bearing rail having a plurality of bearings" and "attached to a right side of the frame" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a second bearing rail is attached to the other side of the frame [1] (i.e., the right side). A plurality of bearings [7] are provided on the second bearing rail. |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. See e.g., Col. 11, lns. 44-48; dependent claim 2.<br><br>Notably, and as set forth *supra* Woodway does not identify the bearing rail by part number in these contentions, but it previously identified them as parts [6] and [7] which Woodway now identifies as bearings |

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| a running belt at least partially disposed about the front shaft and the rear shaft and at least partially supported by the first bearing rail and the second bearing rail, | A "running belt" that is "at least partially disposed about the front shaft and the rear shaft and at least partially supported by the first bearing and the second bearing rail" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a running belt [8] is supported by the first bearing rail and the second bearing rail and disposed about the front shaft [4] and the rear shaft [5]. |  |  | For the reasons set forth above with respect to the front shaft, rear shaft and bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. The Accused Products do not include a running belt at least partially supported by bearing rails.<br><br>Additionally, the "running belt" identified as part [8] in this image does not appear to correspond to the "running belt" (part 16) taught in the '580 patent. *See* Col. 14, ln. 1- Col. 15, ln. 28. Nor is the "running belt" shown supported by the shaft assemblies as claimed. *See also*, Woodway infringement analysis of dependent claim 14 of the '169 patent. |

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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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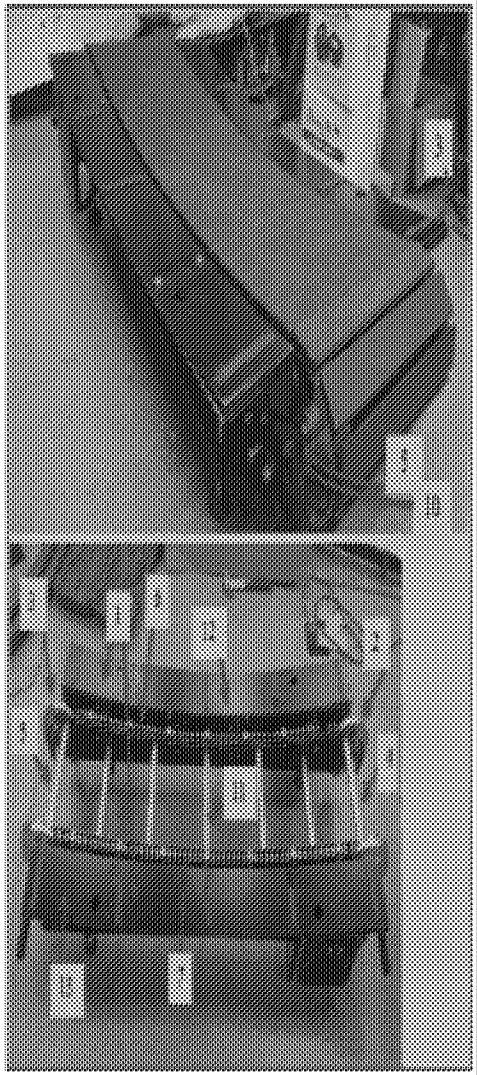
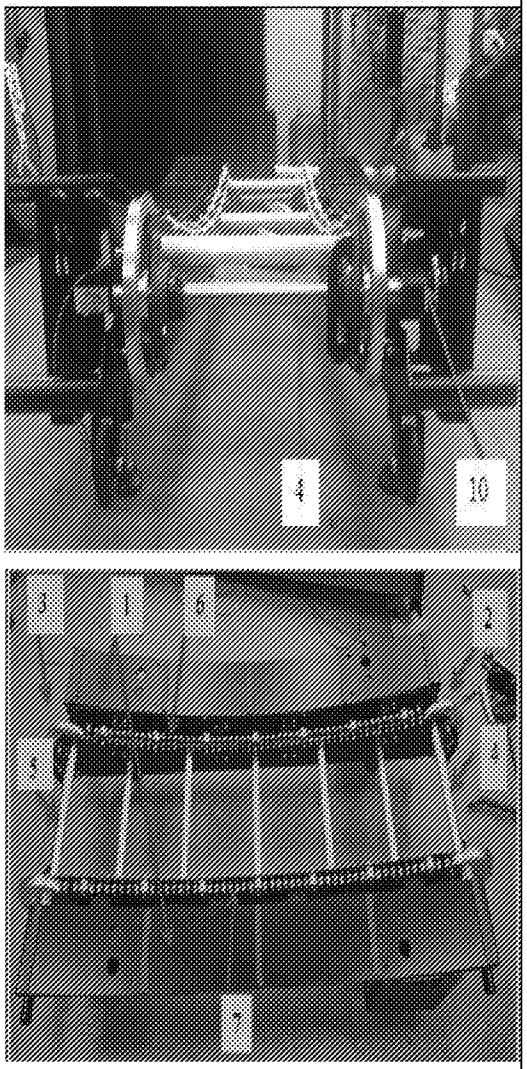
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| wherein the running belt includes a front belt portion proximate the front end,<br><br>a rear belt portion proximate the rear end, and<br><br>a central belt portion intermediate the front and rear belt portions,<br><br>wherein the central belt portion is positioned vertically closer to a ground surface supporting the frame than the front and rear belt portions such that the running belt follows a curved running surface; | The "running belt" having "front belt portion," a "rear belt portion," and "a central belt portion" that is "positioned vertically closer to a ground surface … than the front and rear belt portions such that the running belt follows a curved running surface" is literally present in each of the Original and Redesigned Infringing Products.<br>As shown, the running belt [8] includes a front belt portion [17] proximate the front end, a rear belt portion [18] proximate the rear end, and a central belt portion [19] intermediate the front belt portion [17] and the rear belt portion [18].<br><br>As also shown, a horizontal plane line [16] has been inserted on the picture of each of the Original and Redesigned Infringing Products. While the horizontal plane |  |  <br>  | For the reasons set forth above with respect to the front shaft, rear shaft and bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. |

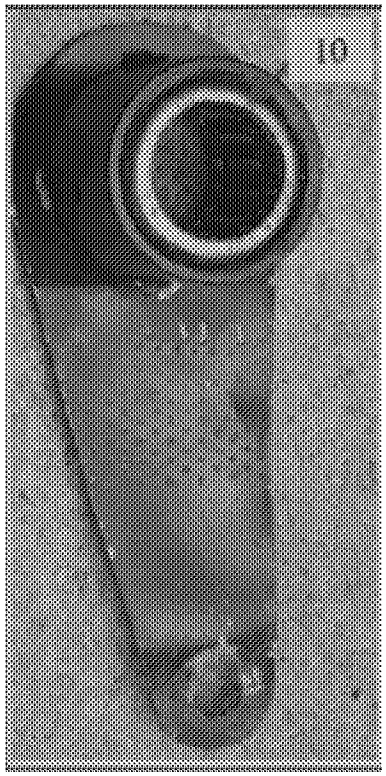


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | line [16] is shown as angled, this is due to the orientation of the Infringing Products. In this regard, the horizontal plane line [16] represents a ground surface that supports the treadmill.<br><br>Relative to the horizontal plane line [16], the central portion [19] is vertically lower (i.e., closer to the horizontal plane line [16]) than each of the front belt portion [17] and the rear belt portion [18].<br>Due to the front belt portion [17] and rear belt portion [18] being vertically higher than the central belt portion [19], a curved running surface [9] is formed. | | | |

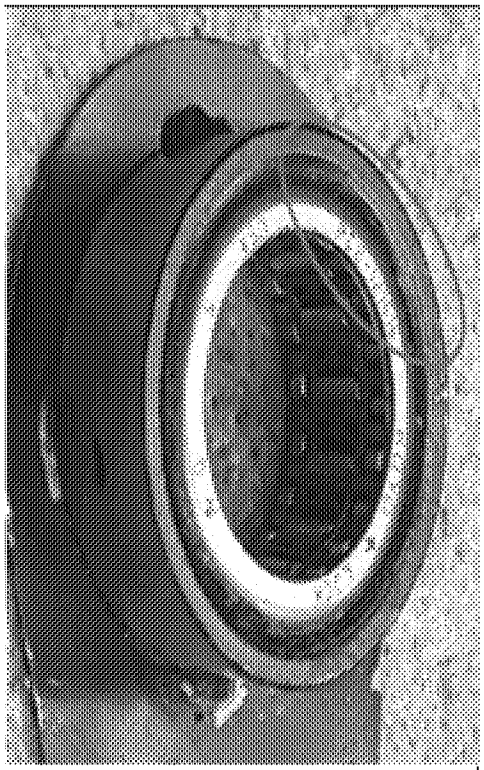
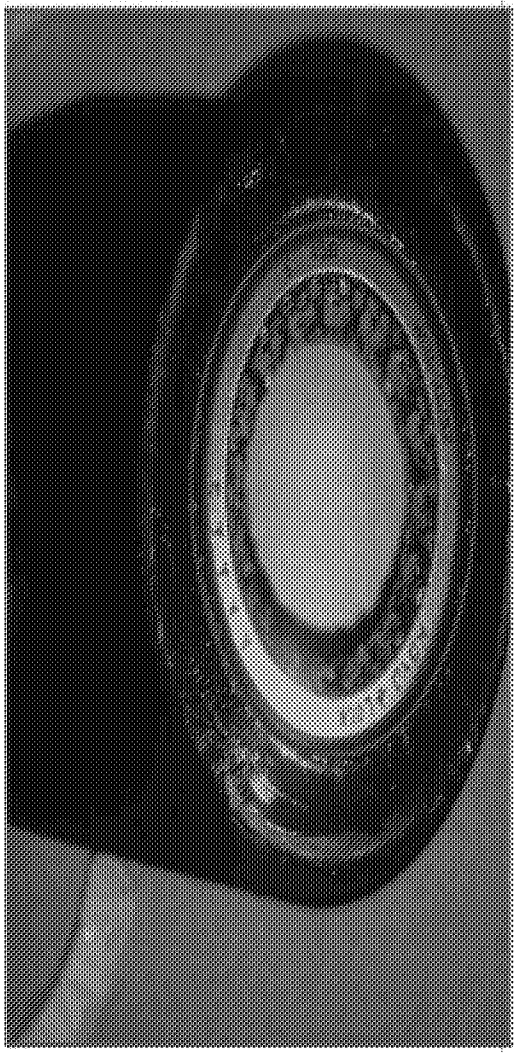
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| and a safety device for substantially preventing rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction. | A "safety device for substantially preventing rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of at least one of the front shaft and the rear shaft in a second rotational direction" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown in the Original Design, the safety device [10] is coupled to the rear shaft [5]. As shown in the Redesign, the safety device [10] is coupled to the front shaft [4].<br><br>As also shown, the safety device [10] of the Original Design is a Koyo brand with a model number of RCB-121616 while the safety device [10] of the Redesign is a Koyo brand with a model number of RCB-162117.<br><br>Each of these model |  |  | Plaintiffs admit that the Accused Products include a safety device coupled to the rear (Original Design) or the front (Redesign), but since both the "front shaft" and the "rear shaft" are rotatably coupled to the "frame" Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products for the reasons set forth *supra*. |

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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | numbers corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction." (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-3 (2014), http://www.jtektna.com/assets/ce/Documents/(B2018E-1)%20Needle%20Roller%20Bearing%20Catalog.pdf).<br><br>In regard to the Original Design, because the safety device [10] is coupled to the rear shaft [5] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] "substantially prevent[s] rotation of …the rear shaft in a first rotational direction while permitting rotation of …the rear shaft in a second rotational direction |  |  | |

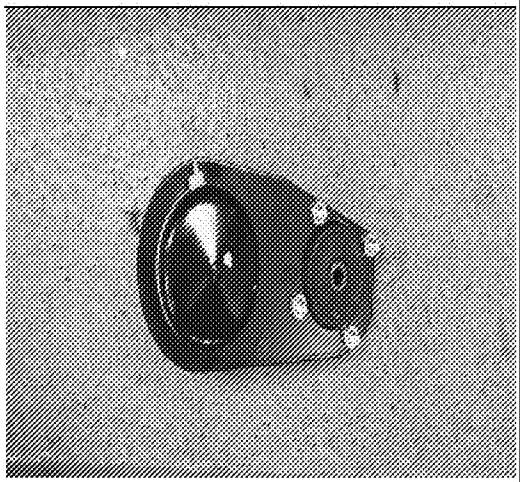


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | opposite the first rotational direction."<br><br>In regard to the Redesign, because the safety device [10] is coupled to the front shaft [4] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] "substantially prevent[s] rotation of … the front shaft in a first rotational direction while permitting rotation of … the front shaft in a second rotational direction opposite the first rotational direction." |  |  | |

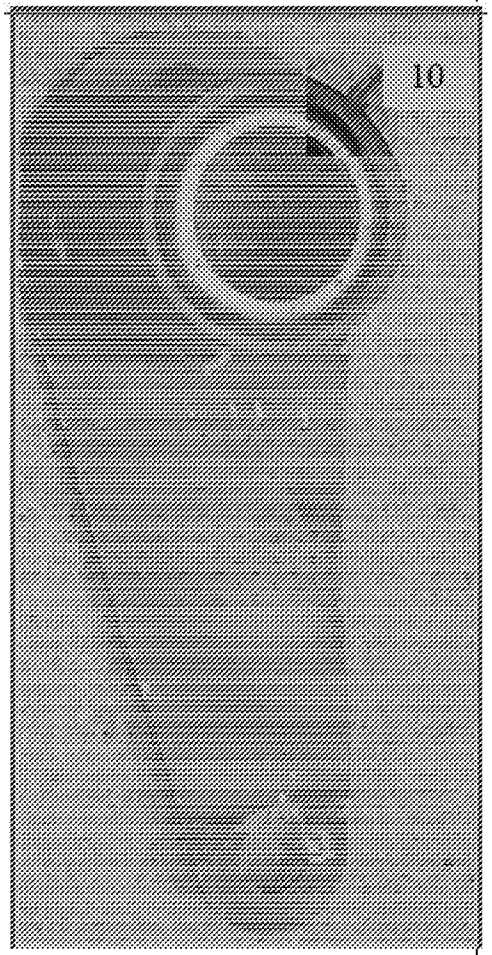
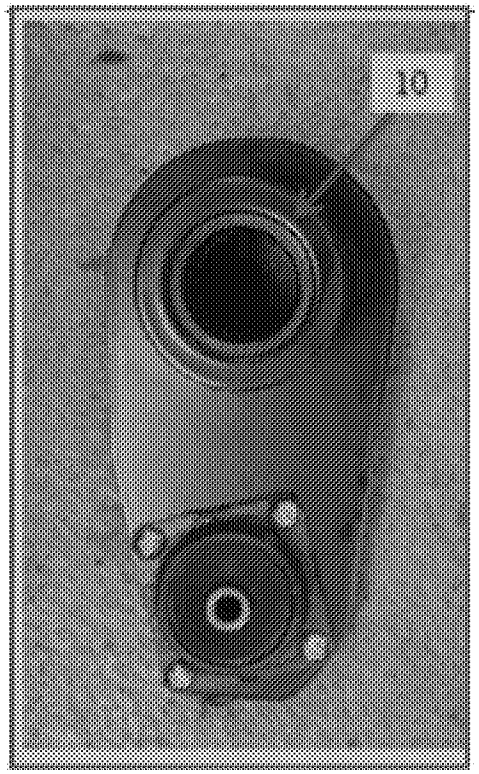


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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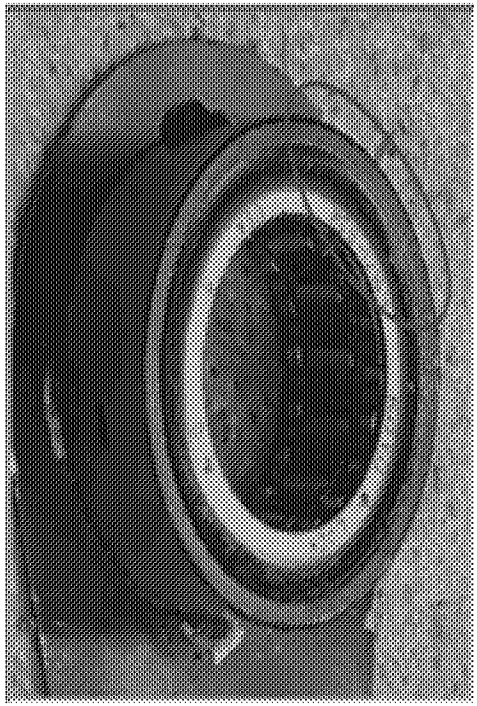
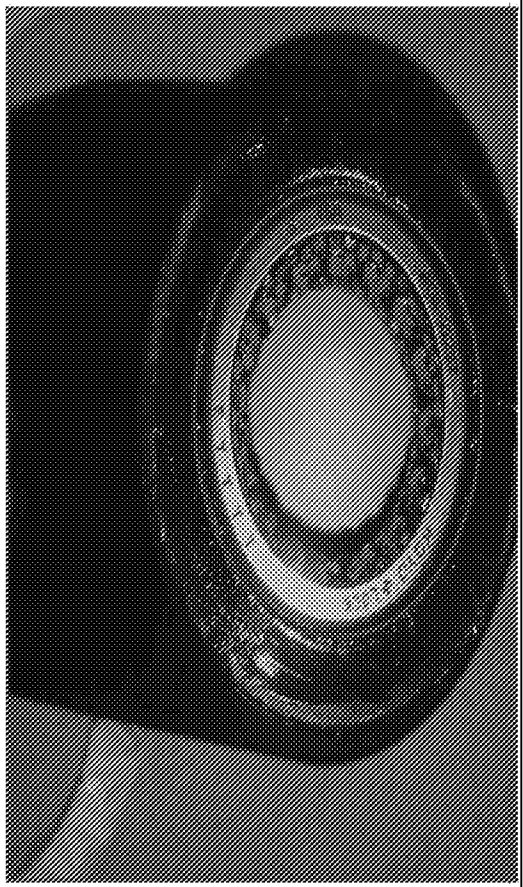


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| **12.** The manually powered treadmill of claim 11,<br><br>wherein the safety device includes a one-way bearing. | The "safety device" including "a one-way bearing" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, the safety device [10] of the Original Design is a Koyo brand with a model number of RCB-121616 while the safety device of the Redesign is Koyo brand with a model number of RCB-162117. Each model number corresponds with a "regular clutch and ***bearing*** assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction" (emphasis added). (*See* Koyo Needle Roller Bearings Product Catalog at p. B-3-3). |  |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 11.<br><br>Plaintiffs admit that the Accused Products include a safety device with a one-way bearing but since both the "front shaft" and the "rear shaft" are rotatably coupled to the "frame" Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products for the reasons set forth *supra*. |

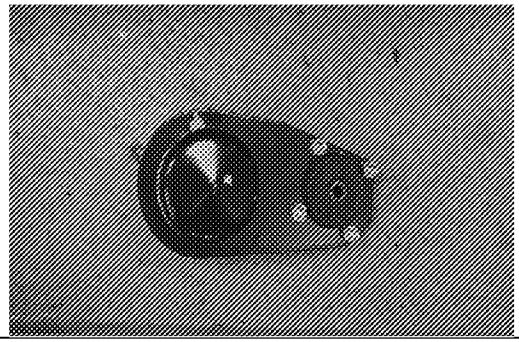
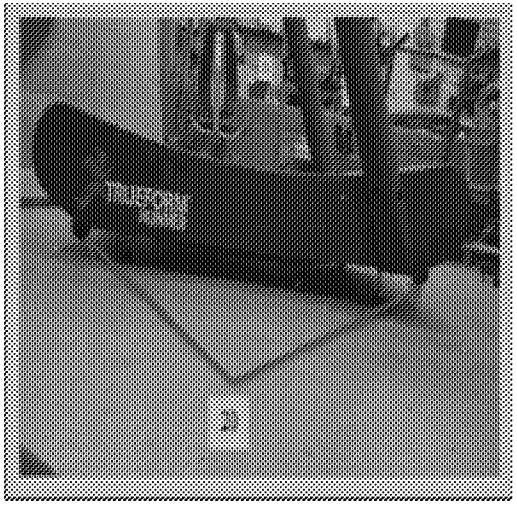


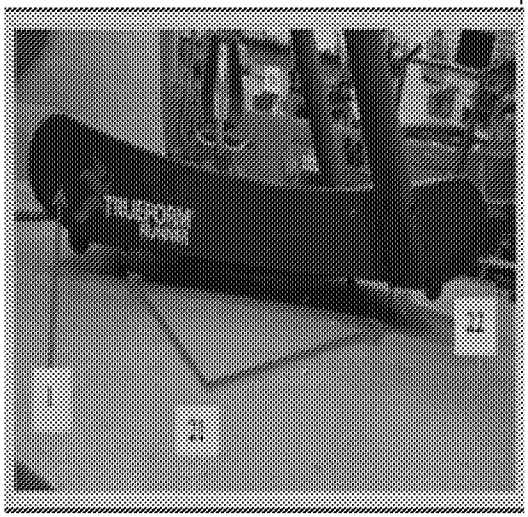
LIFECORE Ex. 1002

| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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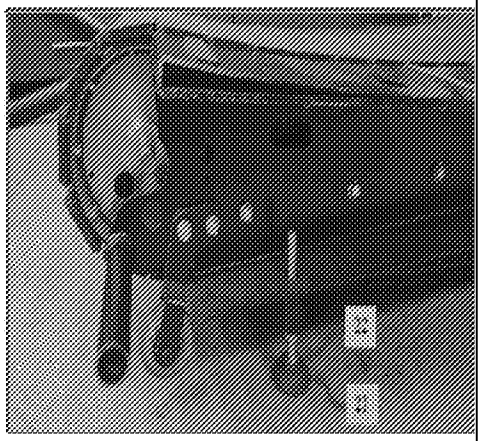
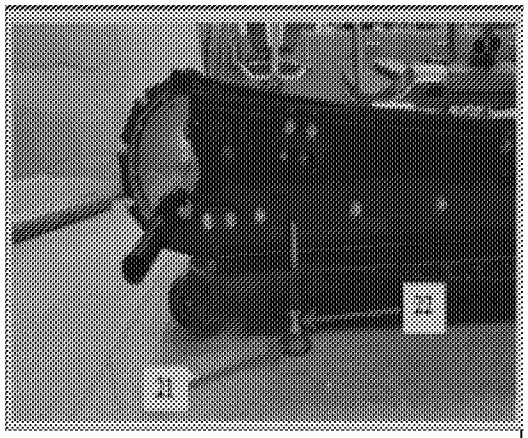
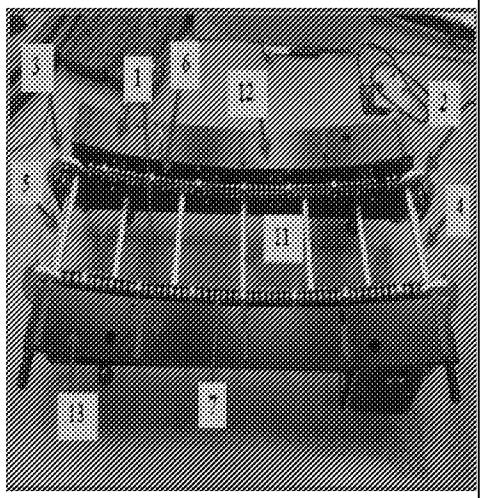
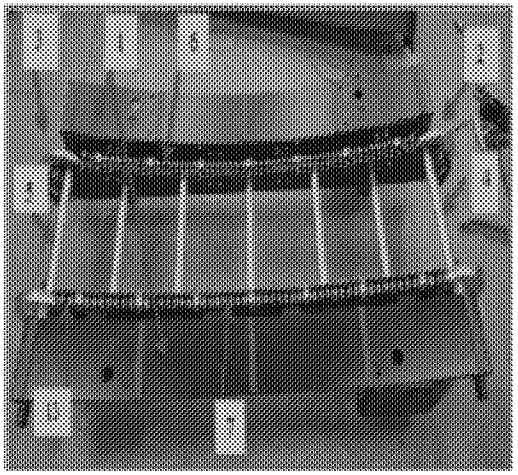


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| **13.** The manually powered treadmill of claim 11,<br><br>Further comprising a pair of wheels mounted to the frame,<br><br>wherein the pair of wheels are mounted so that the pair of wheels are not in contact with the ground surface when the manually powered | A "pair of wheels mounted to the frame" that "are not in contact with the ground surface when the manually powered treadmill is in an operating position" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a pair of wheels [20] are not in contact with a ground surface when each of the Original Design and Redesign is in an operating position whereby a user may walk or run on the Infringing Product (i.e., the operating |  |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 11.<br><br>Plaintiffs admit that the Accused Products include a pair of wheels mounted so the wheels are not in contacts with the ground surface when the treadmill is operating. |

| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| treadmill is in an operating position. | position). | | | |
| **14.** The manually powered treadmill of claim 11,<br><br>Further comprising support feet coupled to the frame,<br><br>wherein the support feet are vertically adjustable to adjust an incline of the manually powered treadmill relative to the ground surface. | "Support feet coupled to the frame" that are "vertically adjustable relative to the ground surface" are literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, support feet [21] are coupled to the frame [1] using a threaded rod [22]. The threaded nature of the rod [22] allows the rod [22] to be rotatably movable towards the frame [1] and away from the frame [1] to adjust the incline of the treadmill to a ground surface. |  |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 11.<br><br>Plaintiffs admit that the Accused Products include support feet. |

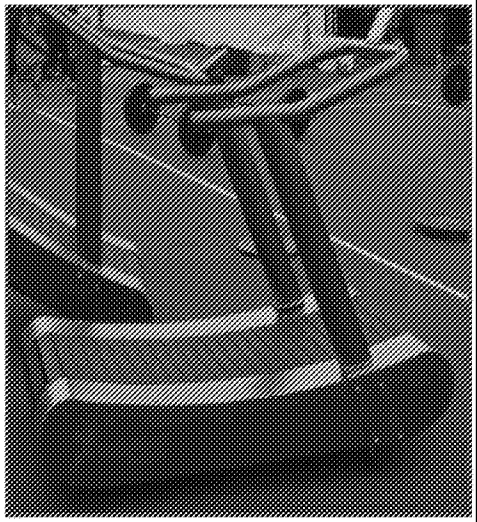
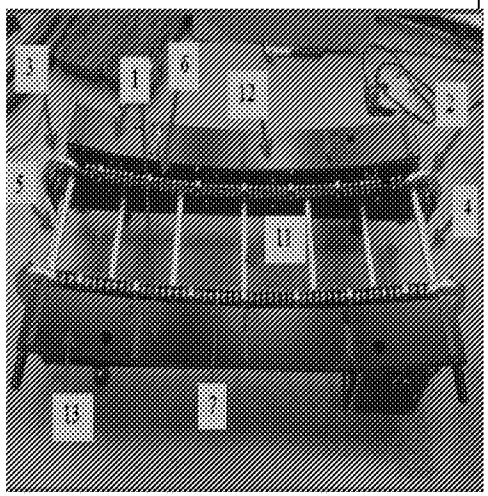
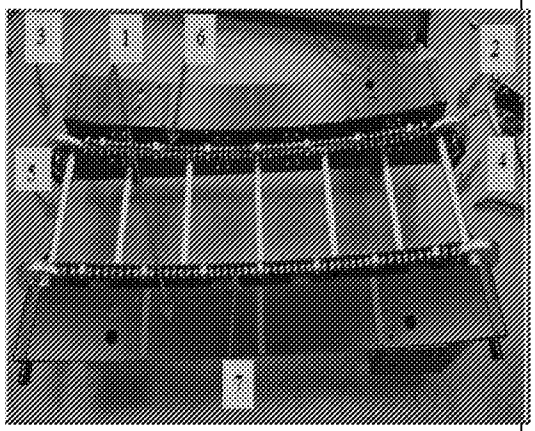
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | |  |  | |
| **18.** The manually powered treadmill of claim 11,<br><br>wherein each of the first and second bearing rails are attached longitudinally to the frame between the front shaft and the rear shaft. | "Each one of the first and second bearing rails" being "attached longitudinally to the frame between the front shaft and rear shaft" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, the first bearing rail and the second bearing rail are longitudinally attached to the frame [1] between the front shaft [4] and the rear shaft [5]. |  |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 11.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. |



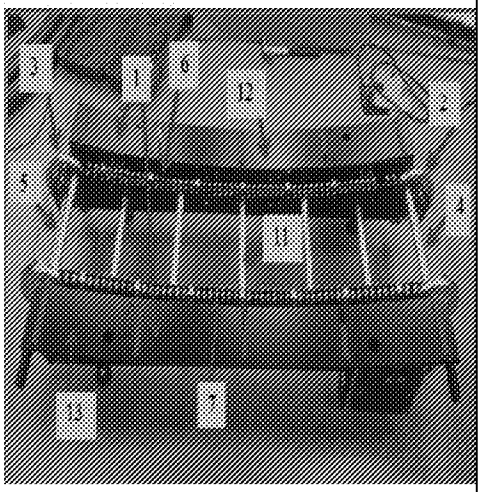
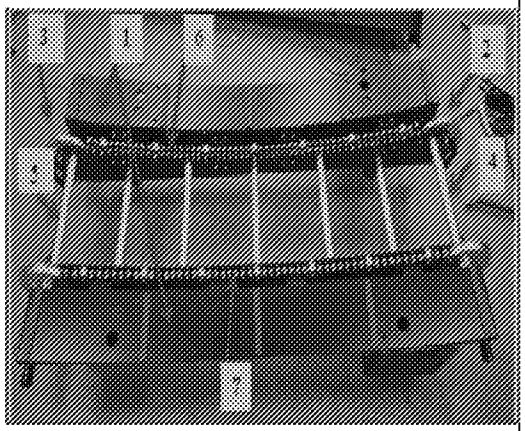
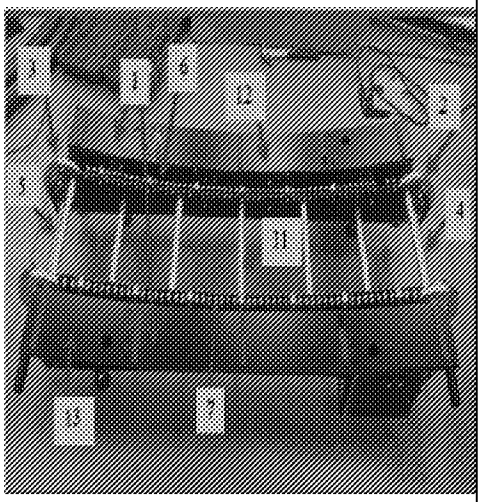
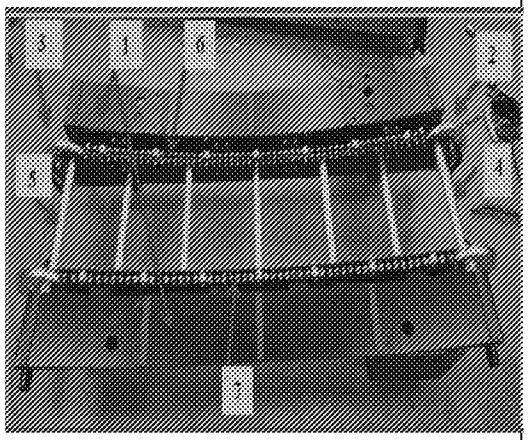
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| **19.** A manually powered treadmill, comprising: | A "manually powered treadmill" is literally each of the Original and Redesigned Infringing Products.<br><br>The TrueForm™ Runner Low Rider Product is pictured. As described in the product specification, the "TrueForm … relies 100% on human power." (Product Specification, p. 2.) Each of the Infringing Products are "non-motorized, powered by you." (*Id.* at p. 1.) |  |  | This is a preamble, not entitled to any weight.<br><br>Plaintiffs admit that the image depicted is one of the products Woodway accuses of infringement (the "Accused Products"). Plaintiffs also admit that the Accused Products are human powered and non-motorized. |
| a frame having a front end and a rear end; | A "frame having a front end and a rear end" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, the frame [1] has a front end [2] and a rear end [3]. |  |  | Plaintiffs admit that the Accused Products include a frame having a front end and a rear end. |

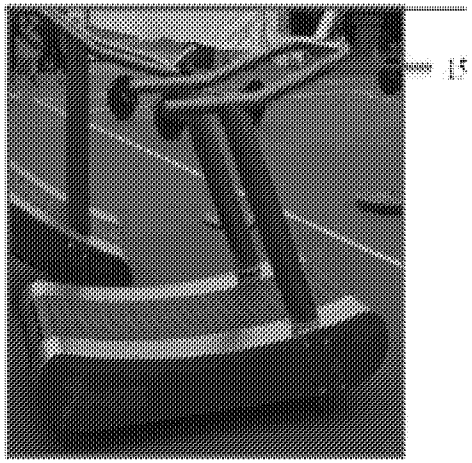
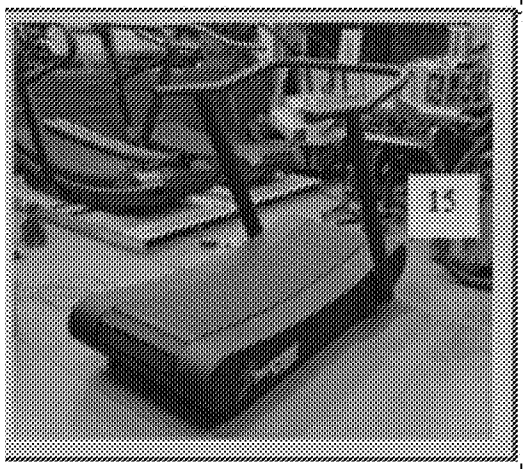
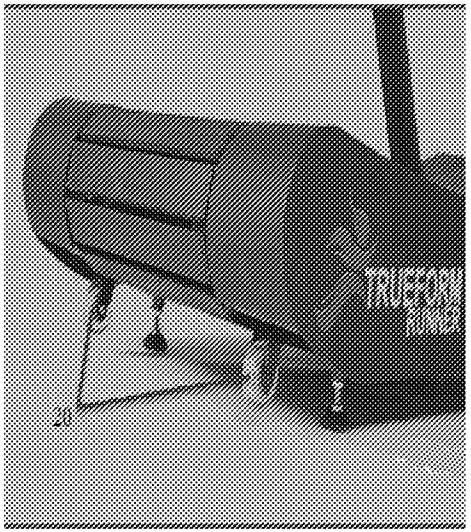


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame; | A "first bearing rail having a plurality of bearings" and "attached to a left side of the frame" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a first bearing rail supporting a plurality of bearings [6] is attached to one side of the frame [1] (i.e., the left side). |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. As set forth *supra,* nor does Woodway's analysis call out the "bearing rail" with a part number so it is identifiable. |
| a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame; | A "second bearing rail having a plurality of bearings" and "attached to a right side of the frame" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a second bearing rail supporting a plurality of bearings [7] is attached to the other side of the frame [1] (i.e., the right side). |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>In the Accused Products, the bearings are individually mounted on the inner frame, not on a "bearing rail" as claimed and described in the '580 patent. The only embodiments disclosed indicate that the bearing rail is a structure separate from the frame. *See e.g.,* Col. 11, lns. 44-48; dependent claim 2. Nor does Woodway's analysis call out the "bearing rail" with a part number so it is identifiable. |



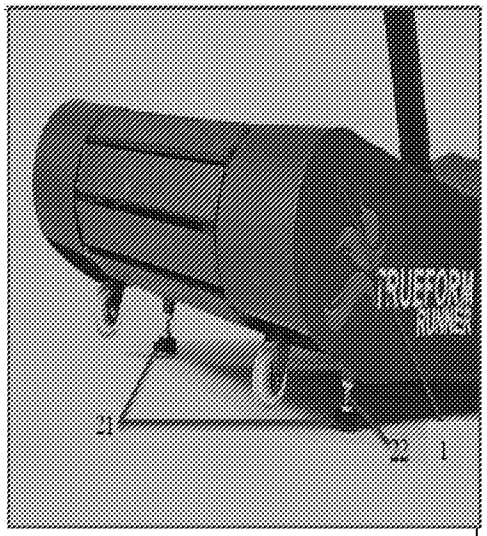
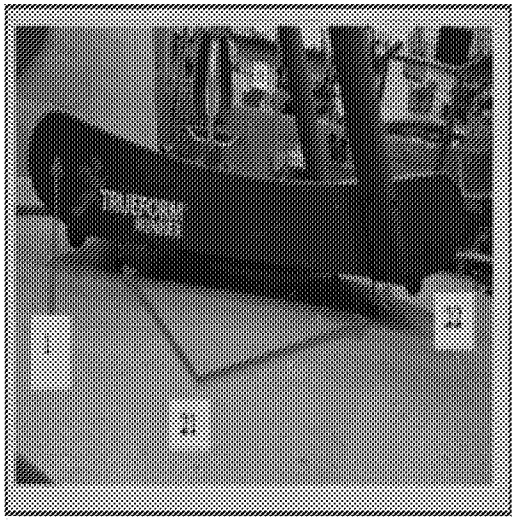
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| a handrail attached to the frame and structured to provide a support structure for a user of the manually powered treadmill; | A "handrail attached to the frame" and "structured to provide a support structure for a user of the manually powered treadmill" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, the manually powered treadmill includes a handrail [15] structured to provide a support structure for a user. |  |  | Plaintiffs admit that the Accused Products include a handrail structured to provide a support structure for a user of the manually powered treadmill. |
| a pair of wheels mounted to the frame,<br><br>wherein the pair of wheels are mounted so that the pair of wheels are not in contact with a ground surface when the manually powered treadmill is in an operating position; | A "pair of wheels mounted to the frame" that "are not in contact with the ground surface when the manually powered treadmill is in an operating position" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a pair of wheels [20] are not in contact with a ground surface when each of the Original and Redesigned Infringing Products is in an operating |  |  | Plaintiffs admit that the Accused Products include a pair of wheels mounted to the frame so that the wheels are not in contact with a ground surface when the treadmill is in an operating position. |

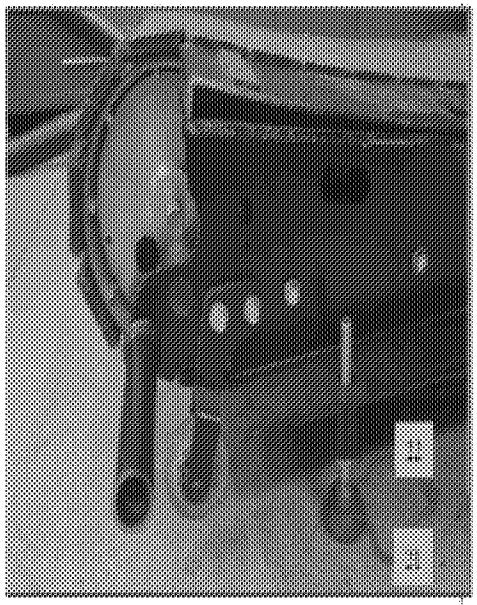
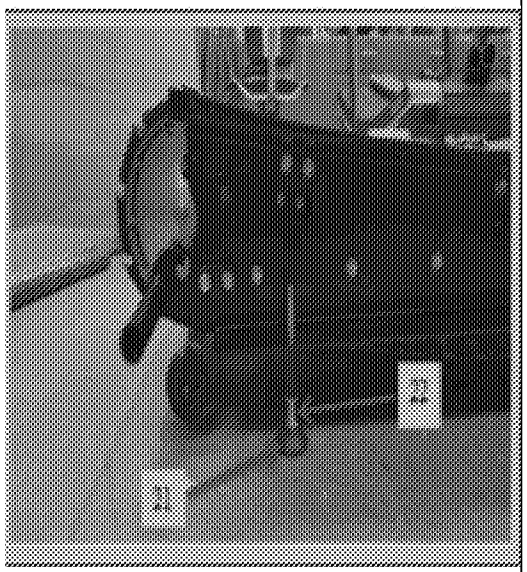


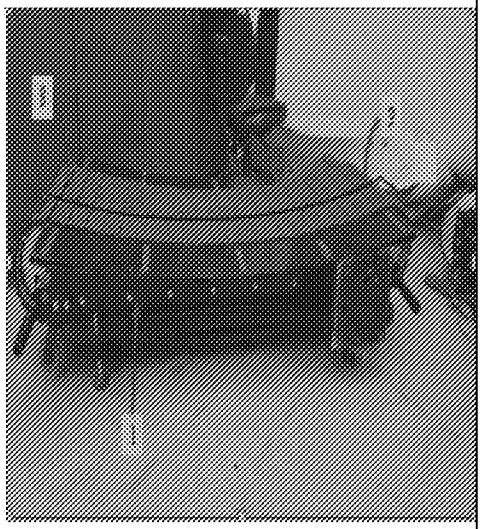
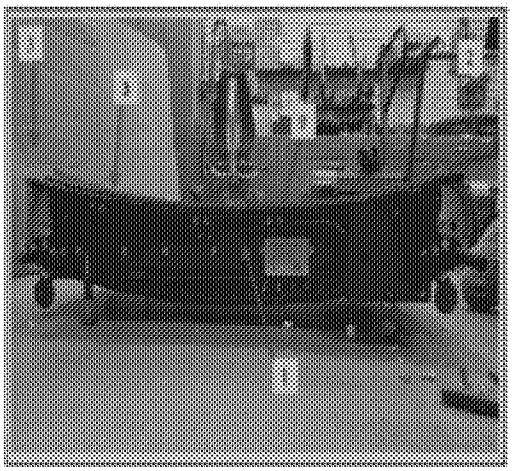
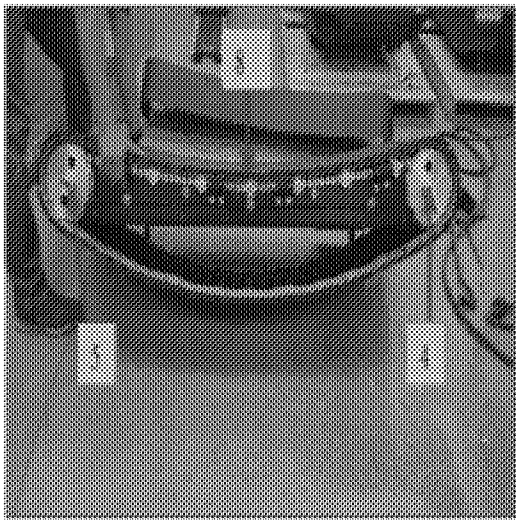
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | position whereby a user may walk or run on the Infringing Products (i.e., the operating position). | | | |
| at least two support feet coupled to the frame,<br><br>wherein the support feet are vertically adjustable to adjust an incline of the manually powered treadmill relative to the ground surface; | "Support feet coupled to the frame" that are "vertically adjustable relative to the ground surface" are literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, support feet [21] are coupled to the frame [1] using a threaded rod [22]. The threaded nature of the rod [22] allows the rod [22] to be rotatably movable towards the frame [1] and away from the frame [1] to adjust the incline of the treadmill relative to a ground surface. |  |  | Plaintiffs admit that the Accused Products include at least two support feet coupled to the frame wherein the support feet are vertically adjustable. |

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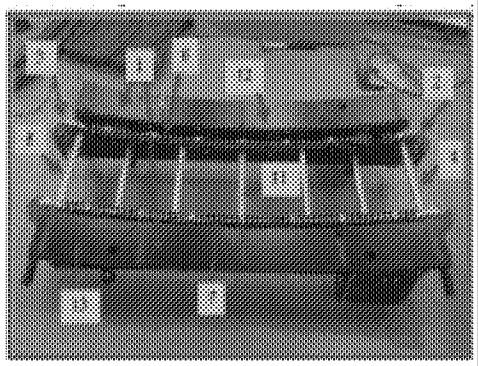
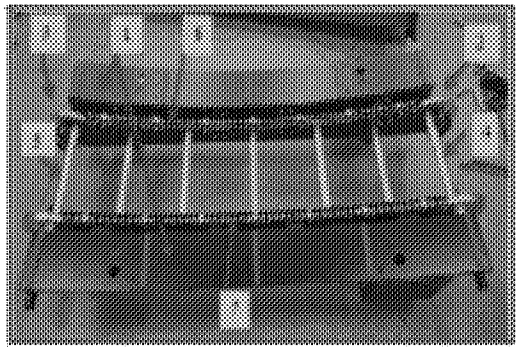
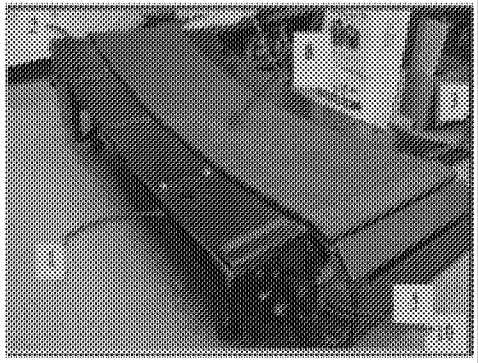
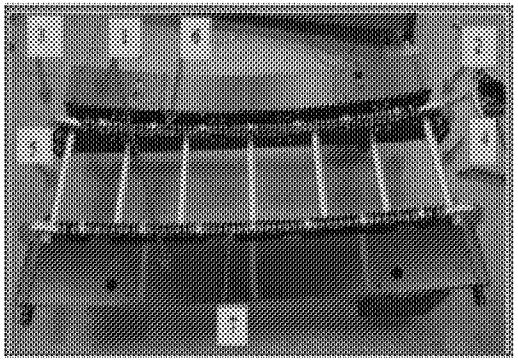
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| a running belt supported by the first and second bearing rails,<br><br>wherein the running belt follows a curved running surface; | A "running belt" supported by the "first bearing rail" and the "second bearing rail" and following a "curved running surface" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, a running belt [8] follows a curved running surface [9]. As also shown, the running belt [8] is supported by the plurality of bearings [6] of the first bearing rail [6] and the plurality of bearing [7] of the second bearing rail. |  <br>  |  <br>  | For the reasons set forth above with respect to the bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. The Accused Products do not include a running belt supported by first and second bearing rails.<br><br>Additionally, the "running belt" identified as part [8] in this image does not appear to correspond to the "running belt" (part 16) taught in the '580 patent. *See* Col. 14, ln. 1- Col. 15, ln. 28. |



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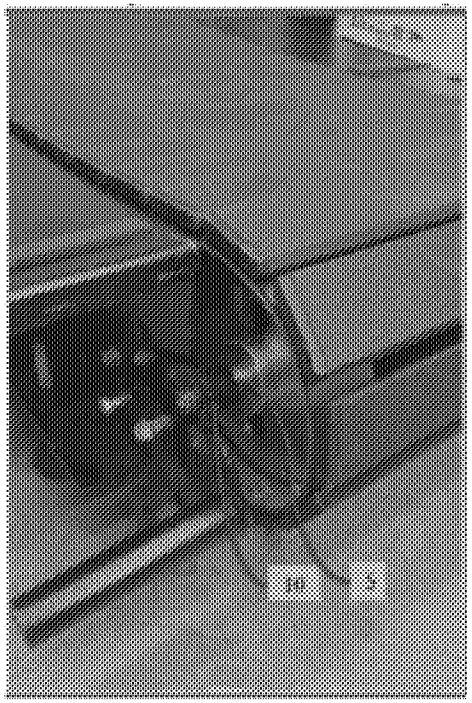
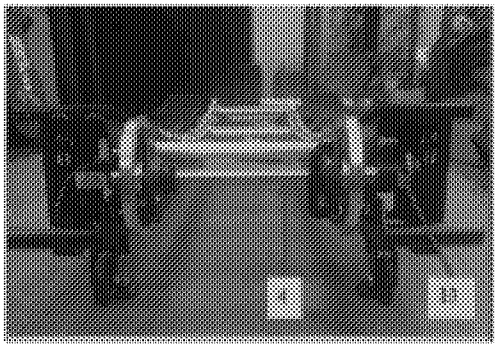
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| and a safety device coupled to the frame and operatively coupled to the running belt,<br><br>wherein the safety device is structured to substantially prevent movement of the running belt in a first direction and permit movement of the running belt in a second | A "safety device" that is "operatively coupled to the running belt" to "substantially prevent movement of the running belt in a first direction and permit movement" in a "second direction" is literally in each of the Original and Redesigned Infringing Products.<br><br>As shown in the Original Design, the safety device [10] is coupled to the rear shaft [5], which is coupled to the frame [1]. As shown in the Redesign, the |  |  | Plaintiffs deny that the structure shown is present literally in the Accused Products: as Woodway acknowledges, the safety device is coupled to shaft, not the frame. |



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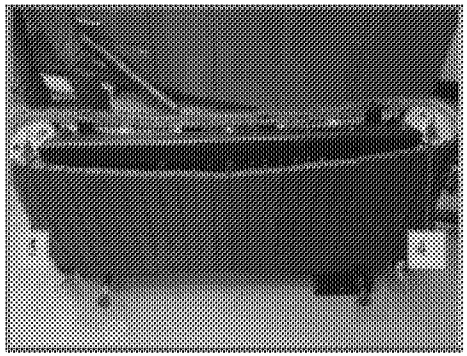
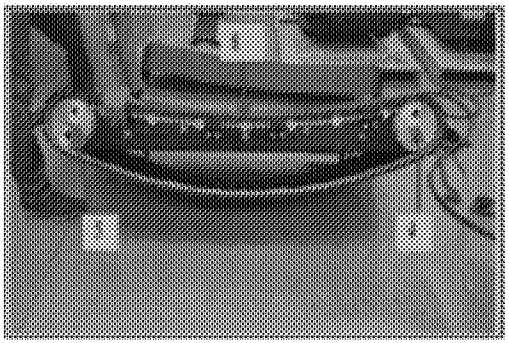
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| direction opposite the first direction. | safety device [10] is coupled to the front shaft [4], which is coupled to the frame [1].<br><br>As also shown, the safety device [10] of the Original Design is a Koyo brand with a model number of RCB-121616 while the safety device [10] of the Redesign is a Koyo brand with a model number of RCB-162117.<br><br>Each of these model numbers corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction." (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-3 (2014), http://www.jtektna.com/assets/ce/Documents/(B2018E-1)%20Needle%20Roller%20Bearing%20Catalog.pdf). |  |  | |

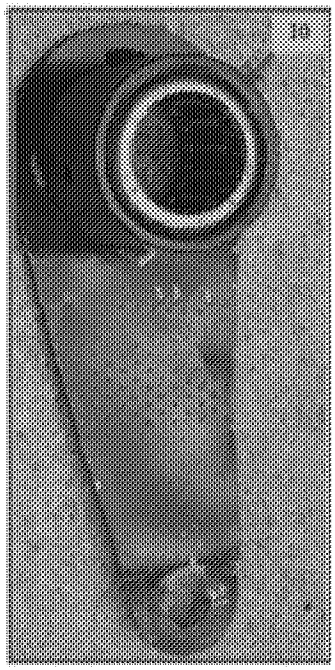
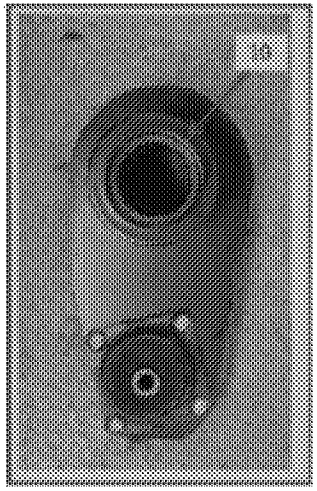


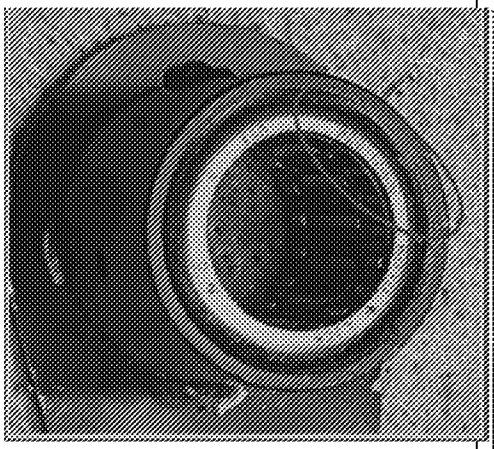
LIFECORE Ex. 1002

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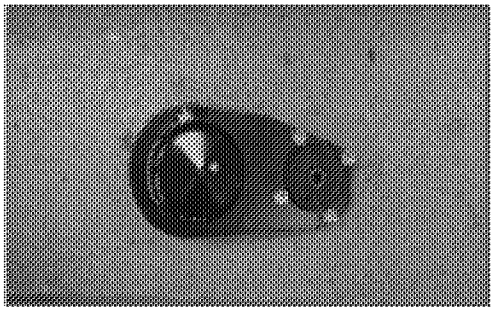
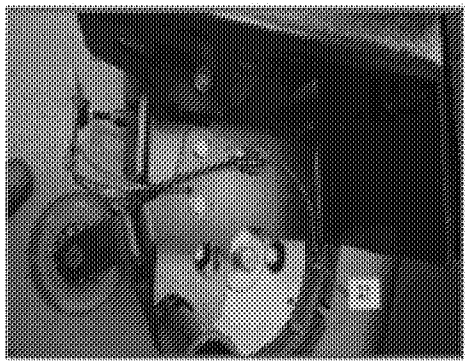
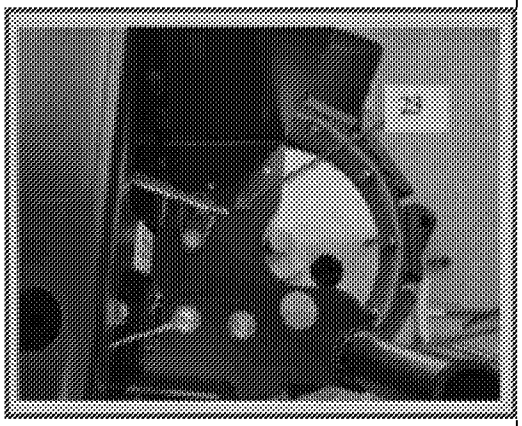
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | In regard to the Original Design, because the safety device [10] is coupled to the rear shaft [5] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is structured to substantially prevent rotation of the rear shaft [5] in a first rotational direction while permitting rotation of the rear shaft [5] in a second rotational direction opposite the first rotational direction. Because the running belt [8] is disposed about the rear shaft [5], rotational movement of the running belt [8] is affected/ constrained by the movement of the rear shaft [5]. Thus, the safety device [10] is structured to substantially prevent movement of the running belt [8] in a first direction and permit movement of the running belt [8] in a second direction that is |  |  | |

LIFECORE Ex. 1002

| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | opposite the first direction.<br><br>In regard to the Redesign, because the safety device [10] is coupled to the front shaft [4] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is structured to substantially prevent rotation of the front shaft [4] in a first rotational direction while permitting rotation of the front shaft [4] in a second rotational direction opposite the first rotational direction. Because the running belt [8] is disposed about the front shaft [4], rotational movement of the running belt [8] is affected/ constrained by the movement of the front shaft [4]. Thus, the safety device [10] is structured to substantially prevent movement of the running belt [8] in a first direction and permit movement of the running belt [8] in a |  |  | |

| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | second direction that is opposite the first direction. |  |  | |

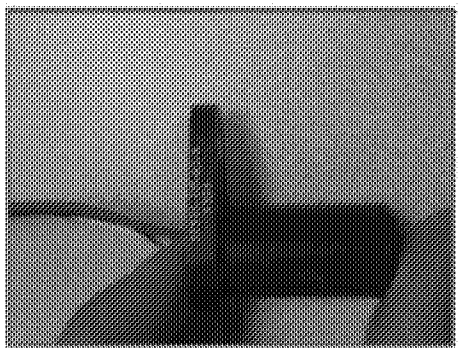
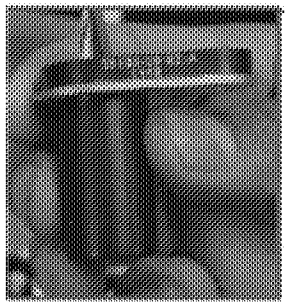
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | | |  | |
| **20.**[2] The manually powered treadmill of claim 19,<br><br>further comprising a sensor configured to acquire data indicative of a speed of the running belt. | A "sensor configured to acquire data indicative of a speed of the running belt" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown, each of the Original and Redesigned Infringing Products includes a sensor [23] that is configured to acquire data indicative of the speed of the running belt.<br><br>As shown in the bottom picture, Model Number 55505-00-02-A is a Hall Effect Sensor provided by |  |  | This dependent claim is not infringed for at least the reasons set forth with respect to claim 19.<br><br>Plaintiffs admit that the Accused Products include a sensor configured to acquire data indicative of a speed of the running belt. |

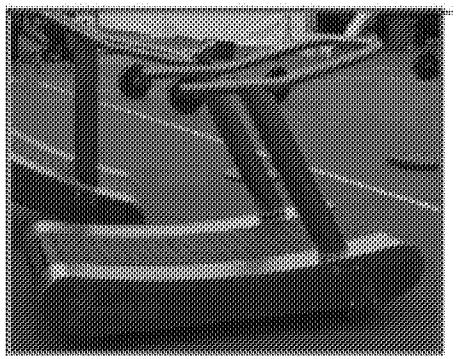
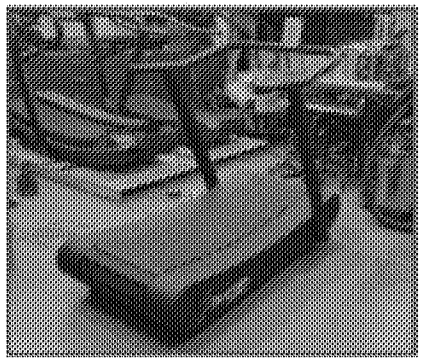
[2] Woodway's Supplement Infringement Contentions do not reference Claims 21 or 22 of the '580 patent.



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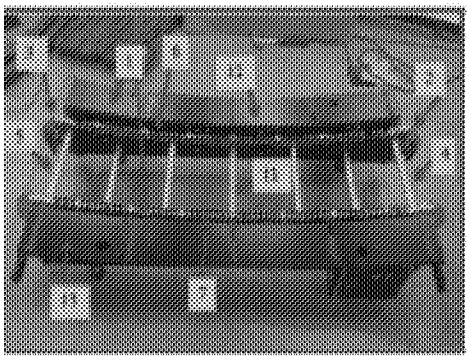
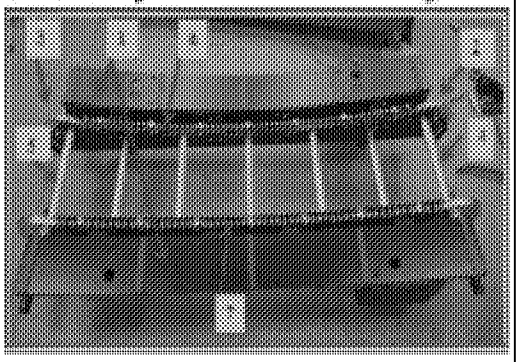
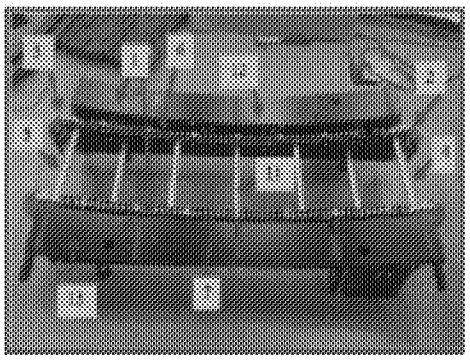
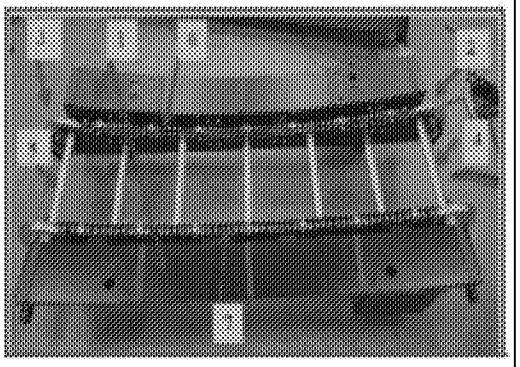
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | Littelfuse, Inc. According to the corresponding datasheet, the 55505-00-02-A, a Hall Effect Sensor is "primarily for … speed sensing." (*See* Littelfuse, Inc., *55505 Hall Effect Flange Mount Geartooth Speed Sensor* at p. 1 (October 16, 2015), http://www.littelfuse.com/~/media/electronics/datasheets/hall_effect_sensors/littelfuse_hall_effect_sensors_55505_datasheet.pdf.pdf) |  |  | |

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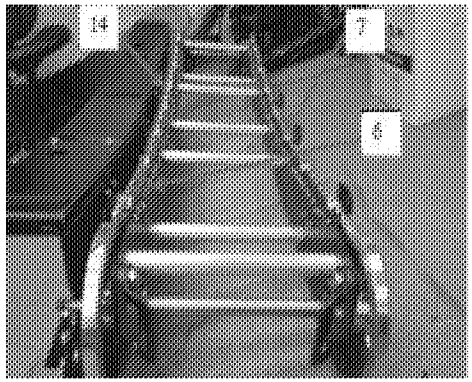
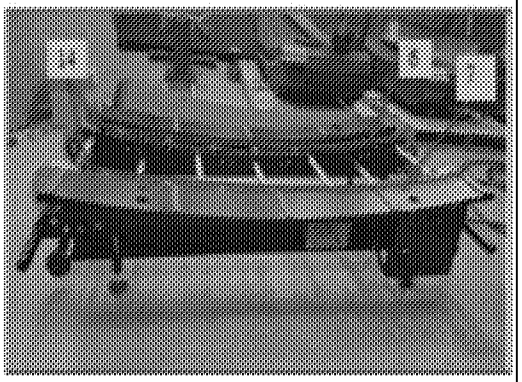
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| 25. A method, comprising: | | | | This is a preamble, not entitled to any weight. |
| providing a manually powered treadmill, | A "manually powered treadmill" is literally each of the Original and Redesigned Infringing Products.<br><br>The TrueForm™ Runner Low Rider Product is pictured. As described in the product specification, the "TrueForm … relies 100% on human power." (Product Specification, p. 2.) Each of the Infringing Products are non-motorized, powered by you." (*Id.* at p. 1.) |  |  | Plaintiffs admit that the image depicted is one of the products Woodway accuses of infringement (the "Accused Products"). Plaintiffs also admit that the Accused Products are human powered and non-motorized |

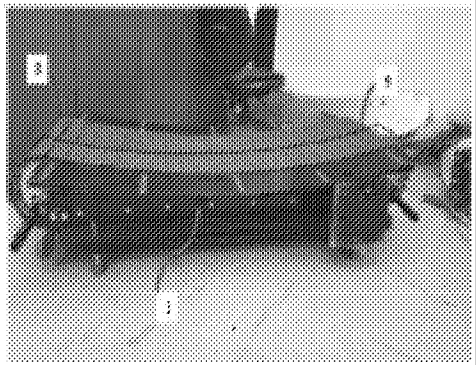
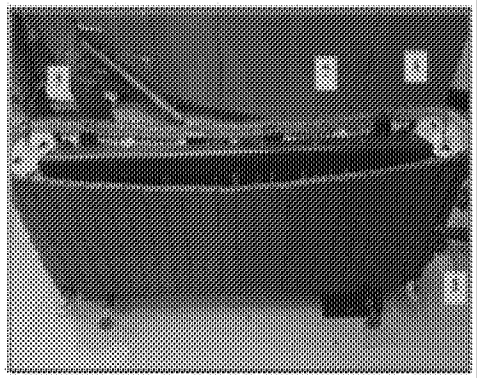
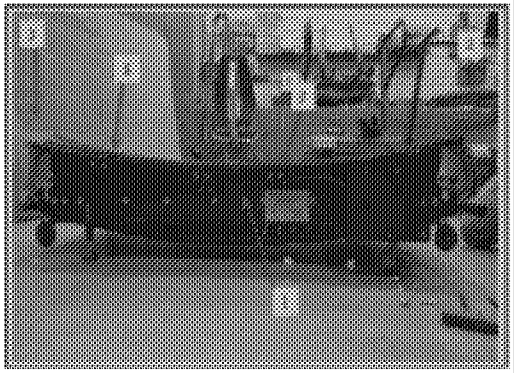
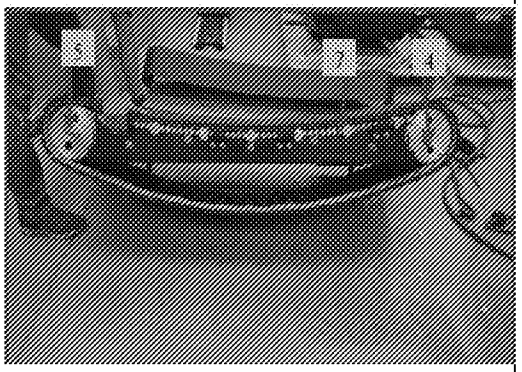
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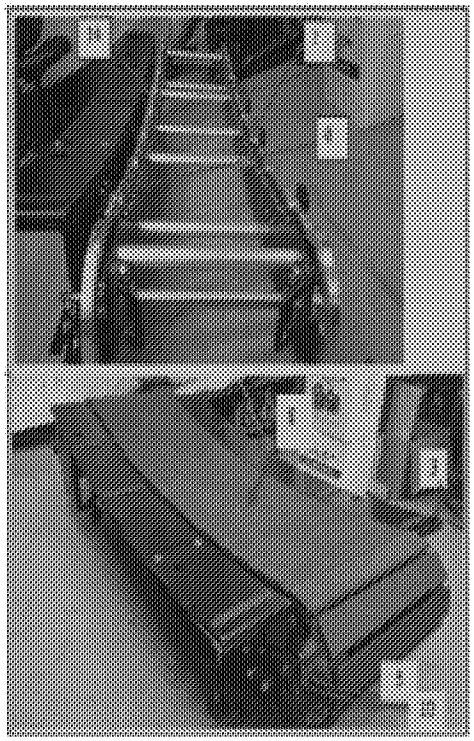
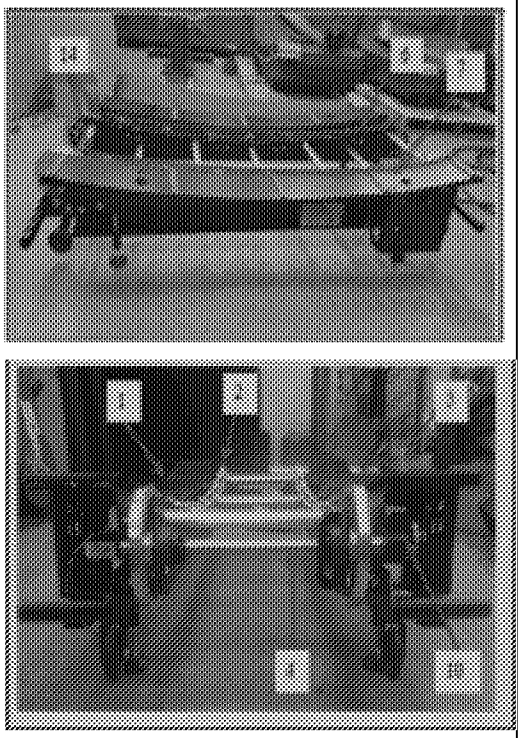
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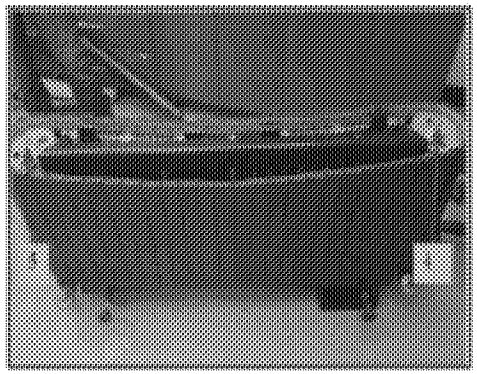
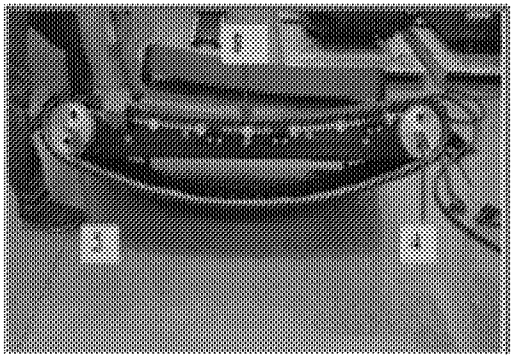
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| the manually powered treadmill having a frame with a front end and rear end; | A "frame having a front end and a rear end" is literally provided in each of the Original and Redesigned Infringing Products.<br><br>As shown, the frame [1, which designates the entire frame assembly not a single piece of metal] has a front end [2] and a rear end [3]. |  |  | Plaintiffs admit that the Accused Products include a frame having a front end and a rear end. |
| providing a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile; | A "first bearing rail" having "a plurality of bearings" and a "second bearing rail" having a "plurality of bearings" where "the first and second bearing rails define a curved top profile" and "extend[] longitudinally on the frame" is literally provided in each of the Original and Redesigned Infringing Products.<br><br>As shown, a first bearing rail is attached longitudinally to one side of the frame [1] (i.e., the |  |  | Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products.<br><br>The Accused Products do not provide bearing rails as the patent uses that term, and the image provided does not reflect first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame [1], nor do the first and second bearing rails define a curved top profile. |

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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | left side), while a second bearing rail is attached longitudinally to the other side of the frame [1] (i.e., the right side. As also shown, the top edge of the first bearing rail to which the plurality of bearings [6] are mounted and the top edge of the second bearing rail to which the plurality of bearings [7] are mounted define a curved top profile [14]. |   |  | |

| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| disposing a running belt on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails; | A "running belt" that is disposed "on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails" is literally present in each of the Infringing Products.<br><br>As shown, a running belt [8] follows a curved running surface [9]. The running belt [8] is disposed on the first bearing rail and the second bearing rail. Because the curved top profile [14] is proximate the curved running surface [9], the curved running surface [9] corresponds to the curved top profile [14]. |  <br>  |  <br>  | For the reasons set forth above with respect to the bearing rail limitations, Plaintiffs deny that a structure meeting this limitation is present literally in the Accused Products. The Accused Products do not include a running belt supported by bearing rails.<br><br>Additionally, the "running belt" identified as part [8] in this image does not appear correspond to the "running belt" (part 16) taught in the '580 patent. *See* Col. 14, ln. 1- Col. 15, ln. 28. |

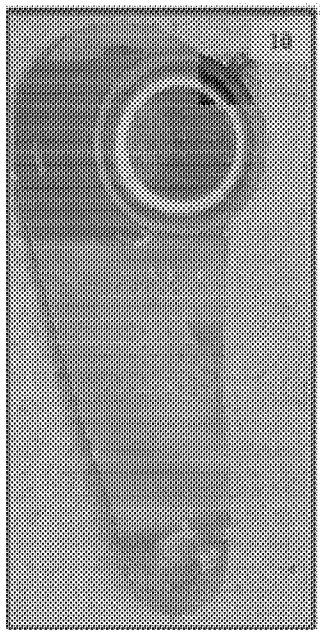
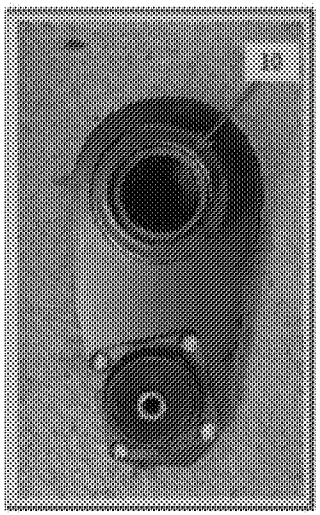
| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| permitting movement of the running belt in a first direction;<br><br>and<br><br>substantially preventing movement of the running belt in a second direction opposite the first direction. | The "running belt" being only permitted to move in one direction and "substantially prevent[ed]" from moving "in a second direction opposite the first direction" is literally present in each of the Original and Redesigned Infringing Products.<br><br>As shown in the Original Design, the safety device [10] is coupled to the rear shaft [5]. As shown in the Redesign, the safety device [10] is coupled to the front shaft [4]. |  |  | Plaintiffs admit that the Accused Products include a safety device. |

| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | As also shown, the safety device [10] of the Original Design is a Koyo brand with a model number of RCB-121616 while the safety device [10] of the Redesign is a Koyo brand with a model number of RCB-162117.<br><br>Each of these model numbers corresponds with a "regular clutch and bearing assembly" that "transmits torque between [the] shaft and housing in one direction and allows free overrun in the opposite direction." (*See* JTEKT Corp., *Koyo Needle Roller Bearings* at p. B-3-3 (2014), http://www.jtektna.com/assets/ce/Documents/(B2018E-1)%20Needle%20Roller%20Bearing%20Catalog.pdf).<br><br>In regard to the Original Design, because the safety device [10] is coupled to |  |  | |



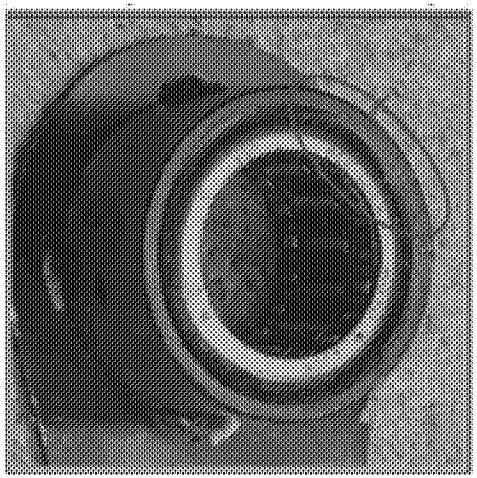
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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | the rear shaft [5] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is structured to substantially prevent rotation of the rear shaft [5] in a first rotational direction while permitting rotation of the rear shaft [5] in a second rotational direction opposite the first rotational direction. Because the running belt [8] is disposed about the rear shaft [5], rotational movement of the running belt [8] is affected/ constrained by movement of the rear shaft [5]. Thus, the safety device [10] is structured to substantially prevent movement of the running belt [8] in a first direction and permit movement of the running belt [8] in a second direction that is opposite the first direction.<br><br>In regard to the Redesign, because the safety device |  |  | |

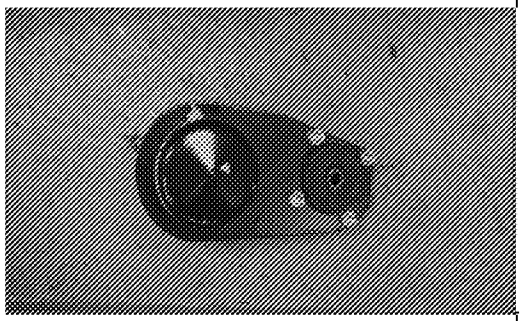


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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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| | [10] is coupled to the front shaft [4] and because the safety device [10] "allows free overrun," (*id.*), in one rotational direction, the safety device [10] is structured to substantially prevent rotation of the front shaft [4] in a first rotational direction while permitting rotation of the front shaft [4] in a second rotational direction opposite the first rotational direction. Because the running belt [8] is disposed about the front shaft [4], rotational movement of the running belt [8] is affected/ constrained by movement of the front shaft [4]. Thus, the safety device [10] is structured to substantially prevent movement of the running belt [8] in a first direction and permit movement of the running belt [8] in a second direction that is opposite the first direction. |  |  | |



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| Claims of the 9,039,580 Patent | Woodway's Supplemental Infringement Contentions | Image Woodway included Directed to Original Design | Image Woodway included Directed to Redesign | Supplemental Non-Infringement Position |
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LIFECORE Ex. 1002

# EXHIBIT 1

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

| | |
|---|---|
| CHAPCO, INC. AND SAMSARA FITNESS, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>WOODWAY USA, INC.,<br><br>Defendant. | Civil Action No. 3-15-CV-1665(JCH)<br><br>May 1, 2017 |

**DECLARATION OF ROBERT GIACHETTI**

I, Robert Giachetti, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I have personal knowledge of the facts set forth herein.

2. I have been engaged by Chapco, Inc. ("Chapco") and Samsara Fitness, LLC ("Samsara"), through counsel, as an expert to independently review the asserted claims of the and determine whether each asserted claim is valid.

3. I understand that Woodway has asserted claims 11-16 of the United States Patent No. 8,986,169 (the "'169 patent") and claims 1, 4-6, 10-14, 18-20, and 25 of United States Patent No. 9,039,580 (the "'580 Patent") (collectively "Asserted Claims" or "Patents-in-Suit"). I understand that the Patents-in-Suit were issued by the United States Patent and Trademark Office ("USPTO") and as such there is a presumption of validity.

4. I have read the Court's Claim Construction Ruling (Dkt. No. 76), and I have applied the Court's constructions for my analysis and opinion.

5. I am employed by Exponent, Inc. as a Managing Engineer. I joined Exponent in June 2008 after working in the Biomechanics Laboratory at University of Wisconsin-Madison

and University of Illinois at Chicago where I focused my research on the forces within the knee joint and coordination of lower limb musculature as it relates to foot forces and balance during walking, standing, running, etc.

6. I am a Licensed Professional Engineer in Illinois and Oklahoma, with over 10 years of experience in mechanical engineering. My experience in machinery and mechanisms spans numerous industries; I have worked directly designing mechanical systems and machinery and have consulted on the operation of machinery in various fields including rail, exercise equipment, and industrial machinery.

7. I am an active member of the ASTM International Committees F08 and F15 that oversee sports equipment and consumer products. I have been recognized as an expert in mechanical power transmission equipment and serve on the American Society of Mechanical Engineers (ASME) Power Transmission and Gearing Committee.

8. As part of my education and work experience, I am aware that several bodies publish voluntary and mandatory standards regarding treadmills, including those set forth below:

a. The Australian Competition & Consumer Commission's mandatory safety standard (supplier guide) from 2009[1] regarding treadmills defines a treadmill as "an exercise device that consists of an endless conveyor belt that is rotated either manually or by a motor and on which a person can walk or jog in one place."

b. The 2005 International Standards Organization ("ISO") standard regarding treadmills, ISO 20957-6, defines a treadmill as "training equipment with a unidirectional moving surface on which a walking or running activity can take place, where the feet are free to leave the moving surface." ISO 20957-6 also specifies that treadmills shall have handrails for safety, and shall be equipped

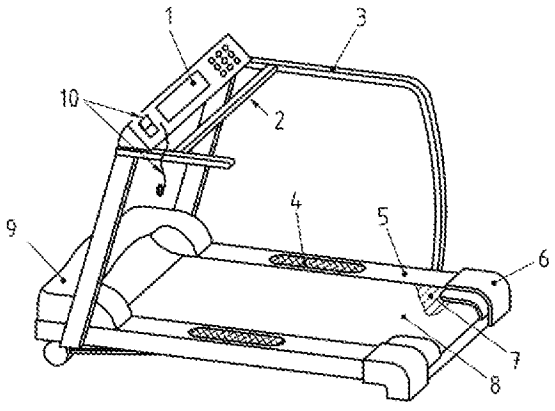
[1] "Treadmills: Supplier Guide" © 2010. Trade Practices (Consumer Product Safety Standard) (Treadmills) Regulations 2009.

with foot platforms. ISO 20957-6 states that side handrails may be attached to the foot platforms. Finally, ISO 20957-6 suggests using guards for transmission elements and rotating parts.

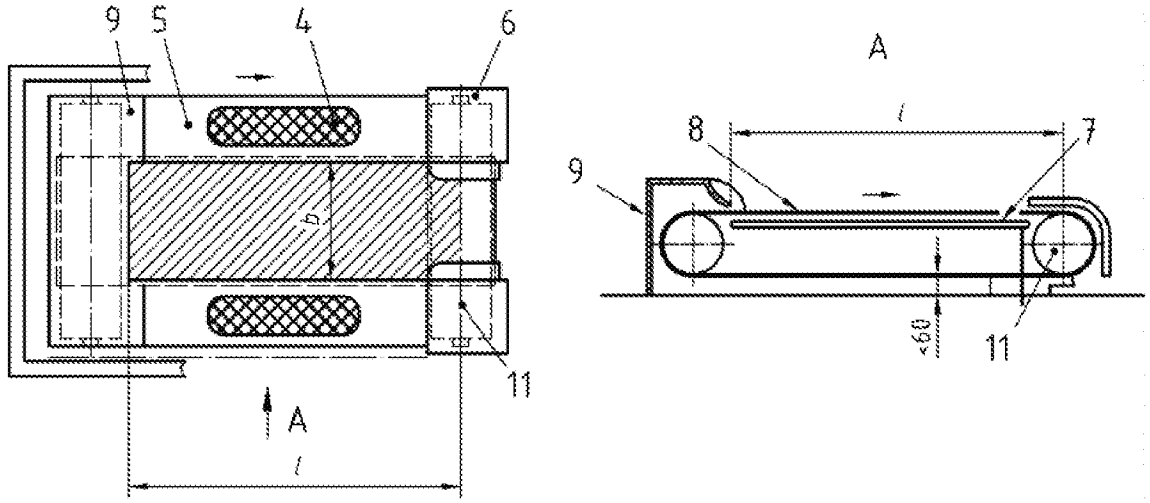
c. ASTM publishes several standards relating to fitness equipment and treadmills, specifically ASTM F2115-05, which states that a treadmill is a "motorized stationary exercise device that allows the user to walk, jog, or run by means of traversing a continuous moving surface." This standard states that treadmills shall be equipped with foot rails to facilitate user mounting and unmounting. It also states the design of rotating parts shall avoid shear, pinch or catch points by guarding, shielding, spacing, or other means. ASTM F2115-05 states that all treadmills shall be equipped with a handrail for user support. The side view illustration of a treadmill in ASTM F2115-05 (Fig.4 of the standard) reproduced below shows a treadmill with a handrail, a front roller, a rear roller and a running belt disposed about the front and rear rollers:

Key
1 Display
2 Front handlebar
3 Side handrail
4 Non slip surface
5 Foot platform
6 Rear roller guard (see Figure 2)
7 Running deck
8 Running surface (belt)
9 Front housing
10 Emergency stop
11 Rear roller (see Figure 2)

*l* length of running surface (belt)
*b* width of running surface (belt)




9.




10. The Patents-in-Suit relate to exercise devices constructed from old and well known mechanical power transmission components, mechanical hardware, and materials that are commonly available.

11. In my opinion, a person having ordinary skill in the art ("PHOSITA") for the purposes of the Patents-in-Suit is a mechanical engineer with at least one year of machine design experience related to power transmission equipment and a demonstrated understanding of the biomechanics of exercise, including knowledge in the field of anthropometry (i.e. the study of human proportion).

12. I am aware that Woodway USA, Inc. engaged Dr. Kim Blair, and I understand that Dr. Blair has opined that for the purposes of the Patents-in-Suit that a person who has either of two qualifications: (a) graduated with an undergraduate degree in Mechanical Engineering; or (b) at least two years of experience in the "treadmill industry" including a knowledge of "design, construction, testing, and operation of manual treadmills qualifies as a PHOSITA.

13. As part of my engagement, I assessed certain prior art, as that term is defined and understood pursuant to 35 U.S.C. § 103, some of which is identified below:

**United States Patent No. 3,637,206 ("Chickering")**

14. United States Patent No. 3,637,206 to Chickering, entitled Endless Belt Exerciser With Accelerating and Decelerating Tread Surfaces, issued on January 25, 1972. It is prior art to the Patents-in-Suit. A true copy of Chickering, highlighted for ease of reference, is attached hereto as Exhibit A.

15. Chickering discloses an exercise device to "accurately simulate the acts of walking, jogging, and running." Exh. A, Col. 1, ll. 1-7.

16. Chickering includes Figure 1, shown below:

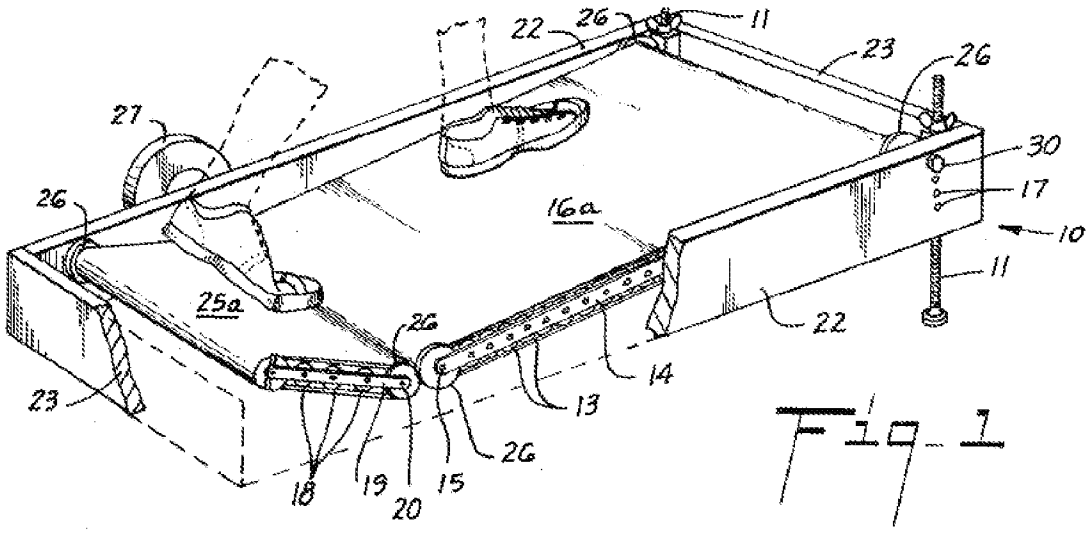



Fig. 1

17. Chickering discloses a "new type" of treadmill with a running surface with a concave profile comprised of a belt (16, 28), supported by a plurality of rollers (13, 18). Exh. A, Col. 1, ll. 1-7; Col. 2, ll. 14-21; Figs. 1, 3.

18. Chickering also includes Figures 2 and 3, below:

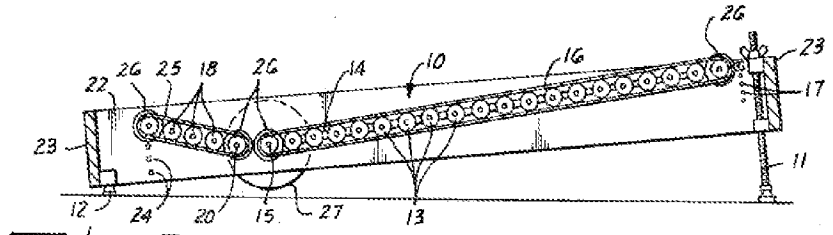



Fig. 2

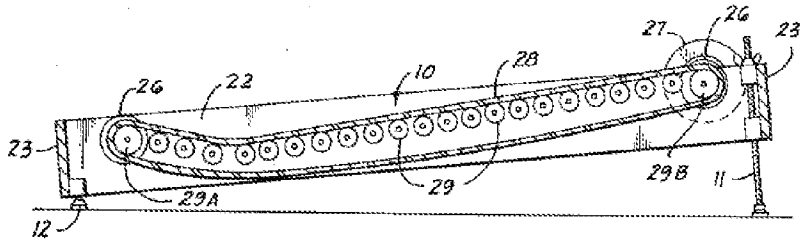



Fig. 3

19. Figures 2 and 3 disclose a treadmill with a running surface profile that corresponds to the concave surface of the plurality of rollers beneath it. Exh. A, Figs. 2, 3.

20. Chickering discloses a front shaft and a rear shaft (29a, b) coupled to the frame. Exh. A, Fig. 3.

21. The relative incline of the roller surfaces allows the user to "push off against the rear surface" at the end of each step. Exh. A, Col., 2, ll. 64-67.

22. The Chickering device comprises a "base" (10) that constitutes a frame element, that provides structure and support for the treadmill. The frame includes longitudinal side members (14) that are mounted to the frame (10), a plurality of anti-friction rollers with their ends journaled in the side members/arms (14) and supporting the running belt, which is partially disposed on the front and rear shafts (26). Exh. A, Col. 1, ll. 72 – Col. 2, ll. 22; Fig. 1.

23. Chickering also teaches that it was already well known in the art that roller-type belt supports on an inclined base have so little friction that an additional device or mechanism is

required because a person exercising on that "type of treadmill is likely to lose his balance because the frictionless surface offers no resistance to the movement of his feet… ." Exh. A, Col. 1, ll. 26-34.

24. The plurality of rollers (13) are rotatably coupled to the bearing rail (14) that is separate from the frame (10). Exh. A, Col. 1, ll. 14-35; Claim 4.

25. Although the Chickering device was usable without external supports, such as handles or railings, Chickering teaches that such supports may be provided without departing from the spirit of the invention. Exh. A, Col. 3, ll. 38-41. Although, because handrails and guards are required by the treadmill standards, as noted above, such elements would not need to be declared in the disclosure.

**United States Patent No. 5,709,632 ("Socwell")**

26. United States Patent No. 5,709,632 to Socwell, entitled Curved Deck Treadmill, issued on January 20, 1998. It is prior art to the Patents-in-Suit. (A true copy of Socwell, highlighted for ease of reference, is attached hereto as Exhibit B.)

27. Socwell includes Figure 2, below:

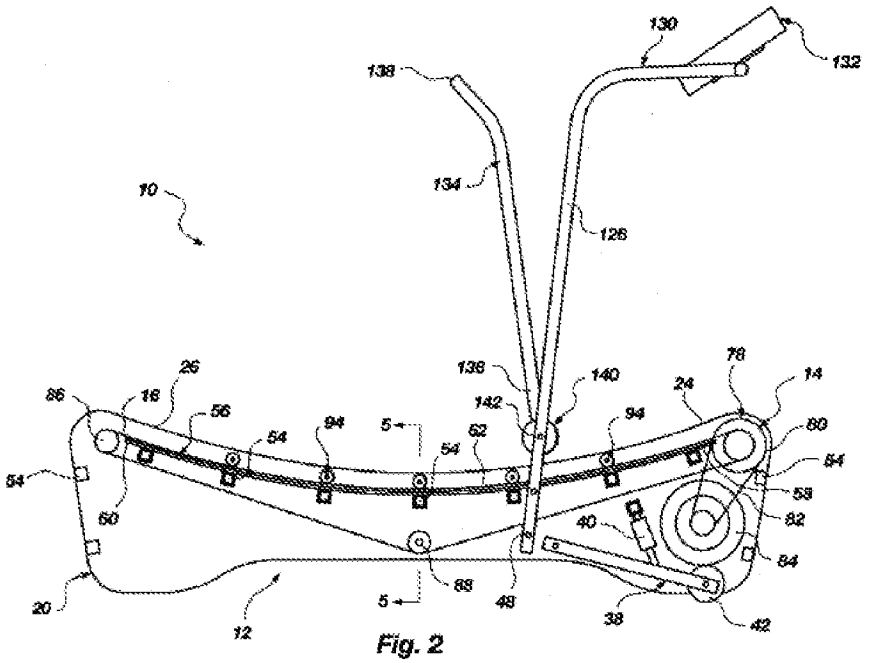


Fig. 2

28. According to the Brief Summary and Objects of the Invention, the object of Socwell was to provide (i) a curved deck treadmill which substantially prevents the user from falling off the back; (ii) a curved deck treadmill which is capable of providing meaningful walking, jogging, or running control in relation to the physiology of the user; (iii) a curved deck treadmill which provides a continuous, smooth exercising motion. Exh. B, Col. 1, ll. 28-35, 39-51, 57-59.

29. Consistent with those objectives, Socwell discloses a manual curved deck treadmill on a substantially flat surface that includes a support frame that provides structure and support for the treadmill with a first side and a second side; a front shaft assembly supported by the frame (12) that includes a front shaft (78) and a rear shaft (86) coupled to the frame (exh. B, Col. 4, ll. 61-64; Col. 5, ll. 4-12); a bearing rail (94) with a plurality of bearings (98 [roller], 96 [mounting bracket]) which provides a means for retaining the endless running belt (16) in a curved configuration at least partially around the front and rear shafts. Exh. B, Col. 9, l. 44-Col.

10, l. 4.

30. The frame (12) is disclosed as a "support frame" that could be adapted with additional reinforcement members. Exh. B, Col. 8, ll. 50-55.

31. Socwell discloses a display, to enable the user to monitor a variety of feedback (elapsed time, speed, distance, pulse rate). Exh. B, Col. 11, ll. 60-65.

32. Socwell also discloses various handrail configurations. Exh. B, Col. 12, ll. 39-59.

33. In describing the Background of the Art, Socwell discusses the rotation of free moving rollers rotatably engaging the belt. In particular, Socwell notes that "if the rollers supportably disposed in relation to the endless belt are so easily moveable, the user may potentially lose his equilibrium or balance and fall from the exercise treadmill resulting in possible injuries." Exh. B, Col., 1, ll. 23-32.

34. To address the safety issue Socwell claims that the running surface is selectively movable; "selectorized," is a term common to fitness equipment and fitness equipment standards indicating discrete and limited movement. Exh. B, claims 1 and 14.

**United States Patent No. 5,538,489 ("Magid")**

35. United States Patent No. 5,538,489 to Magid, entitled Walker Apparatus with Left and Right Foot Belts, issued on July 23, 1996. It is prior art to the Patents-in-Suit. (A true copy of Magid, highlighted for ease of reference, is attached hereto as Exhibit C.)

36. Magid teaches a non-motorized treadmill comprised of a continuous belt (4, 4') disposed around a front (41) and rear shaft (42). The front and rear shafts are rotatably joined directly or indirectly to longitudinal members attached to the frame/base. Exh. C, Col. 2, ll. 1-16; Col. 6, ll. 53-64; claim 1; Fig. 8.

37. Magid discloses a "functional support frame, said base having front left and right

sides, a pair of spaced front brackets disposed adjacent to said front left and right sides, a first shaft extending from said front left side to said front right side, said first shaft having two ends fixed respectively at said front brackets, rear left and right sides…and a second shaft extending from said rear left side to said rear right side." Exh. C, claim 1. That claimed frame provides structure and support for the treadmill.

38. Magid includes Figure 8, which shows the rollers/bearings, continuous belt (4, 4') disposed around a front (41) and rear shaft (42), and the bearing rail (24) separate from the frame (11):

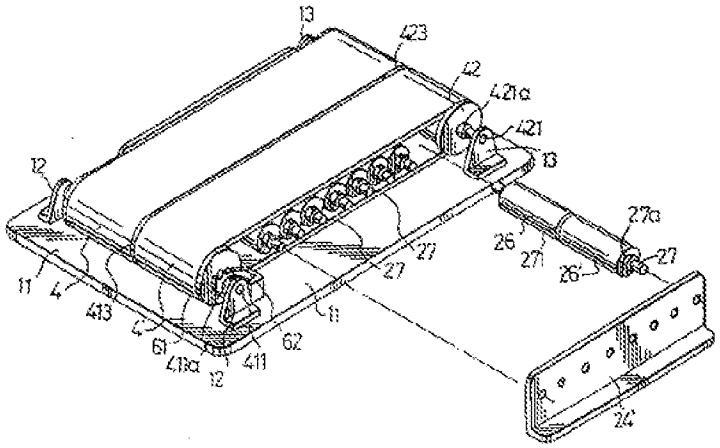



FIG. 8

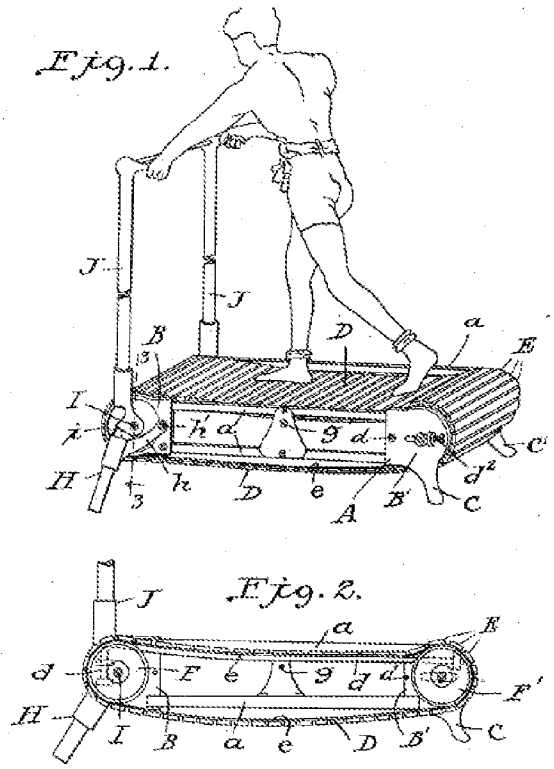
39. Magid discloses a "unidirectional control" mechanism designed to "permit only unidirectional movement of the left and right foot belts." This mechanism "includes a pair of ratchet gears attached to outer ends of the front rollers, thereby preventing bidirectional movement of the foot belts." Exh. C, Col. 4, ll. 47-60.

**United States Patent No. 1,211,765 ("Schmidt")**

40. United States Patent No. 1,211,765 to Schmidt, entitled Health Exerciser, issued on January 9, 1917. It is prior art to the Patents-in-Suit. A true copy of Schmidt, highlighted for

ease of reference, is attached hereto as Exhibit D.

41. Schmidt includes Figures 1 and 2 below:




42. As shown in those Figures, Schmidt teaches a frame to provide structure and support for the treadmill (part A) with longitudinal members and a flexible running belt with treads and a curved surface (part D) disposed about front and rear shafts that are rotatably joined (coupled) to the frame. The longitudinal members in Schmidt are intentionally flexible, to reduce shock to the legs and underlying tissues. Exh. D, p. 1, Col. 2, ll. 60-63, 75-76; p. 2, Col. 1, ll. 13-37; p. 3, Col. 1, ll. 27-35; Figs. 1, 2.

43. Schmidt also discloses that the curved running surface between the front and rear shafts is for ease and efficiency of running. The curved profile of the claimed running surface allows the user to push off the rear of the treadmill without fear of sliding off – a claimed novelty that Schmidt describes as having considerable merit. Ex. D, p. 2, Col. 2, ll. 99-117.

44. Schmidt teaches that the curvature is patterned after the path of the foot relative to

the hip, which negates the nature of the body to bob up and down while running. Ex. D, p. 3, Col. 1, ll. 1-6.

45. Schmidt also discloses curved bearing rails (d), that are separate from the frame, to provide a profile for the running belt. Exh. D, p. 2, Col. 1, l. 58-Col. 2, l. 71; p. 3, Col. 1, ll. 22-33. The curved running surface's profile is maintained by the weight of the belt, gravity and intentional slack in the running belt. Ex. D, Figs. 2, 3.

46. The rails in Schmidt (d) provides a similar friction and wear reduction function as the bearing claimed in the Patents-in-Suit. That is, both sliding and rolling allow one object to contact and move across another. With or without roller bearings as the friction reducing element, the running surface's profile corresponds to the shape of the bearing rail supporting it, and during operation, the running belt moves relative to the rails.

47. With respect to the use of rollers or roller bearings, users may seek to minimize friction. The mechanisms described in the references reduce friction between components, which is the purpose of bearings.

48. One of ordinary skill in the art would know that together with the curved running surface, Schmidt could have substituted wheels or roller bearings for the rails of the Schmidt device because this method was quite well known and understood.

49. Schmidt teaches a running belt comprised of an endless flexible treads made out of a plurality strips. Exh. D, p. 2, Col. 1, ll. 42-47; Figs. 2, 3.

50. The Schmidt apparatus includes adjustable "legs" or feet. Exh. D, p. 3, Col. 1, ll. 49-55; Fig. 1 (part H); claim 1.

51. The Schmidt apparatus includes a handrail. Exh. D, p. 3, Col. 1, ll. 59-62; Fig. 1 (part J).

52. Schmidt explicitly teaches an option for freely rotating or stationary front and rear shafts, as desired. Ex. D, p. 1, Col. 2, lns. 69-75. With this understanding of a stationary shaft, a person having ordinary skill would recognize that a roller could be made to rotate or be stationary by joining common power transmission elements to the roller or shaft; elements like a ratchet and pawl.

**Invalidity of the Asserted Patents:**

53. Each of the asserted independent claims generally includes the limitations of (a) curved running surface; (b) frame; (c) front shaft and rear shaft; (d) at least one bearing rail having a plurality of bearings, a running belt supported by the bearing rail and at least partially disposed about the front and rear shafts; and (e) a device to ensure unidirectional movement of the belt. (*E.g.*, claim 11 of the '169 patent; claims 1, 11, and 19 of the '580 patent).

54. None of these limitations is novel over the prior art alone or in combination.

55. Prior art manual treadmills include a frame to provide structure and support for the treadmill.

56. As set forth above, Schmidt, Socwell and Chickering all disclose a frame that provides structure and support for a manual treadmill with a curved running surface, and Magid discloses a "functional support frame" that provides structure and support for a manual treadmill. In light of the Court's claim construction, Magid also constitutes a curved treadmill.

57. As set forth above, Schmidt, Socwell, Chickering and Magid all disclose a front shaft and a rear shaft.

58. With respect to the bearing rail, Schmidt induces the running belt to assume and maintain the non-planar shape, and thus as recognized by subsequent prior art, teaches a simplified and streamlined system that keeps the belt from walking side-to-side during usage.

59. Schmidt taught that the weight of the belt, pulling down on it by gravity combined with slack in the belt causes the belt to maintain contact with the rails below it, allowing the profile of the running surface to conform to the rails below it.

60. One of ordinary skill in the art would know that together with the curved running surface, Schmidt could have used the pre-existing art and incorporated wheels or bearings into the rails of the Schmidt device because this method was well known and understood.

61. Schmidt discloses at least one bearing rail separate from the frame, a running belt supported by the bearing rail and at least partially disposed about the front and rear shafts. Two objects in relative motion to each other while in contact with one another will either slide or roll. Whether to use sliding or roller bearings is simply a matter of design choice.

62. With or without roller bearings as the friction reducing element, Schmidt's running surface's profile corresponds to the shape of the bearing rail supporting it; during operation, the running belt moves relative to the rails. Therefore a person having ordinary skill would recognize that the two means are equivalent and that the use of roller bearings or bearings without internal components represents substituting well known components to achieve the same results already achieved by the prior art.

63. Chickering expressly discusses the issue of retaining the belt in the curved profile is weighing the benefits of using a single belt with the rollers or the two belt system. Chickering discloses that if the user selects the one belt system, the belt must be fairly heavy because it would only remain in contact with the rollers by virtue of its weight alone. Ex. A, Col. 3, ll. 10-17. The bearing rail disclosed in Chickering, i.e., the longitudinal side members (14) that are pivotally mounted to the frame with a plurality of anti-friction rollers with their ends journaled in the side members/arms support the running belt, which are partially disposed on the front and

rear shafts (26).

64. Socwell also discusses systems to ensure retention of the curved running profile, including the structure that meet the bearing rail limitation. Exh. B, Col. 9, l. 43- Col. 10, l. 38.

65. Magid teaches a continuous belt (4, 4') disposed around a front (41) and rear shaft (42). The front and rear shafts are rotatably joined directly or indirectly to longitudinal members attached to the frame/base. Exh. C, Col. 2, ll. 1-16; Col. 6, ll. 53-64; claim 1; Fig. 8. Magid's Figure 8 shows the rollers/bearings, continuous belt (4, 4') disposed around a front (41) and rear shaft (42), and the bearing rail (24) separate from the frame (11).

**A Device to Ensure Unidirectional Movement of the Belt**

66. At least as early as 2005 and 2009 International Standards Organization ("ISO") and the European Standard Technical Committees ("EN") defined a treadmill as "training equipment with a unidirectional moving surface on which a walking or running activity can take place where the feet are free to leave the moving surface."

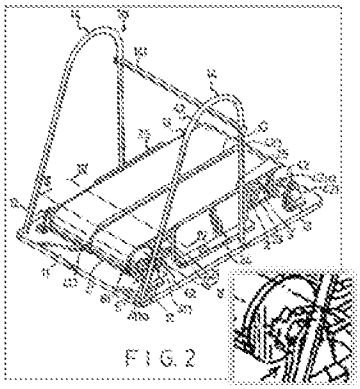
67. Based on this, it is obvious to a person having ordinary skill in the art as of 2009 that a unidirectional moving surface, including a unidirectional moving surface on a treadmill, is not novel.

68. A person having ordinary skill in the art as of 2009 would be aware of the commodity power transmission products that can ensure unidirectional movement of a belt, e.g., a one-way bearing assembly, locking systems, taper locks, user operated pin system, or a band brake with a lever.

69. Schmidt discloses a device to ensure unidirectional movement in that the reference by explicitly teaching an option for freely rotating or stationary front and rear shafts, as desired. The roller could be made to rotate or be stationary by joining common power

transmission elements to the roller or shaft; elements like a ratchet and pawl.

70. Magid explicitly teaches a ratchet and pawl "unidirectional control mechanism" on a rear shaft (Ex. D, Col. 4, ll. 47-49) that restricts the treadmill belt to movement in a single direction of travel:




71. The ratchet and pawl is an old and well known power transmission device that is commonly used in conjunction with bearings or rollers to maintain unidirectional motion. A one way bearing can also generally be used in the same circumstances to achieve unidirectional motion.

72. Socwell also expressly warns that "if the rollers supportably disposed in relation to the endless belt are so easily moveable, the user may potentially lose his equilibrium or balance and fall from the exercise treadmill resulting in possible injuries." Exh. B, Col., 1, ll. 23-32. To address the safety issue Socwell claims that the running surface is selectively movable; "selectorized," is a term common to fitness equipment and fitness equipment standards indicating discrete and limited movement. Exh. B, claims 1 and 14.

**Motivation to Combine**

73. All four references identified are analogous. All are in the same field of endeavor, regardless of the problem addressed, and to the extent the reference is not in the field of the inventor's endeavor, the reference is reasonably pertinent to the particular problem with

which the inventor is involved. Here, all references are in the same field: non-motorized, leg powered exercise equipment. The USPTO Field of Search for Magid is 482/54, 69; 198/783; the Field of Search for Socwell also includes 482/54, and Socwell cites to Schmidt.

74. Here, all of the limitations of the Patents-in-Suit are present in prior art references, as discussed above, and the inclusion of the safety device to ensure the undirectionality of the running surface addressed a known problem, i.e. the danger of injury from unexpected movement of the belt, identified expressly in the prior art.

75. The design need (including liability insurance requirements) and/or market pressure to sell a safe device all were known in the art, and there is a finite number of identified, predictable solutions to ensure that the running surface only moves in one direction. Each of the references identified noted the concern of a user becoming injured as a result of unexpected belt movement.

76. As a result, a person of ordinary skill in the art had good reasons to pursue the known options within his or her technical grasp (e.g., inclusion of a one-way bearing, or a ratchet and pawl), and it is clear that a skilled artisan would have perceived a reasonable expectation of success as a result of combining the elements of a non-motorized treadmill with a curved running surface and a safety device on one of the shafts to ensure the running surface moves in only one direction.

77. Technology prior to 2009 made one way bearing mechanisms smaller, reliable and cost-effective in comparison to the old and well known ratchet and pawl mechanism. As a result, one of ordinary skill in the art, a person who is certainly familiar with both types of devices, would accordingly recognize that those light weight, inexpensive and easy to install mechanisms would restrict the movement of the belt to one direction.

I declare, under the penalties of the law, the foregoing to be true and accurate to the best of my knowledge.

/s/ Robert Giachetti
Robert Giachetti

(Original, signed version dated May 1, 2017 available)

Dated: May 1, 2017

**CERTIFICATION OF SERVICE**

I hereby certify that on May 1, 2017, a copy of the foregoing Declaration of Robert Giachetti was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

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/s/ Christine K. Bush

# EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| CHAPCO, INC. and SAMSARA, LLC | : | CIVIL ACTION No. |
| | : | 3:15cv01665 (JCH) |
| Plaintiffs, | : | |
| | : | |
| v. | : | |
| | : | |
| WOODWAY USA, Inc. | : | |
| | : | |
| Defendant. | : | March 2, 2017 |

**OPENING EXPERT REPORT OF DR. ROBERT GIACHETTI RE: INVALIDITY OF UNITED STATES PATENT NO. 8,986,169 and UNITED STATES PATENT NO. 9,039,580**

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## I. INTRODUCTION AND SUMMARY OF MY OPINIONS

1. I, Robert S. Giachetti, have been retained in this matter by counsel for Samsara Fitness, LLC ("Samsara") and Chapco Inc. ("Chapco"). I have been informed that Woodway USA Inc. ("Woodway") has asserted that a non-motorized treadmill product manufactured and sold by Samsara, identified as the TrueForm Runner, infringes several claims of U.S. Patent 9,039,580 titled Manual Treadmill and Methods of Operating The Same (herein Bayerlein '580) as well as U.S. Patent 8,986,169 Manual Treadmill and Methods of Operating The Same (herein Bayerlein '169).

2. I have been asked by counsel for Samsara and Chapco to independently review the asserted claims of Bayerlein '580 and Bayerlein '169 and determine whether each asserted claim is valid. I understand that Bayerlein '169 and Bayerlein '580 patents were issued by the United States Patent and Trademark Office ("USPTO") and as such there is a presumption of validity. I have also been informed that clear and convincing evidence of invalidity is required to overcome this presumption.

3. I undertook that independent review of each asserted claim. It is my opinion to a reasonable degree of engineering certainty that there is clear and convincing evidence that each asserted claim of Bayerlein '169 and Bayerlein '580 patents is invalid under 35 U.S.C. §§ 102, 103 and/or 112. The clear and convincing evidence on which I rely is included in this Report:

U.S. Patent No. 8,590,169
(asserted claims 11, 12, 12, 13, 14, 15, 16)

| | | |
|---|---|---|
| 11, 12, 13 | Socwell (U.S. Patent No. 5,709,632 | 102(b) |
| 11, 12, 13, 14, 15 and 16 | Pasqualin Application 2006/0287165 in combination with Socwell | 103 |
| 11, 12, and 16 | Cutter (U.S. Patent No. 3,642,279) in combination with Haber (U.S. Patent No. 5,411,455) | 103 |
| 11, 12, 13, 14, 15 and 16 | Schönenberger (U.S. Patent No. 4,334,676) in combination with Haber | 103 |
| 11, 12, 13, 14, 15 and 16 | Schmidt (U.S. Patent No. 1,211,765) | 102/103 |

| | | |
|---|---|---|
| 11, 12, 13, 14, 15 and 16 | Schmidt (U.S. Patent No. 1,211,765) in combination with Chickering (U.S. Patent No. 3,637,206) | 102/103 |
| 11, 12, 13, 14, 15 and 16 | Schmidt (U.S. Patent No. 1,211,765) in combination with Magid (U.S. Patent No. 5,538,489) | 102/103 |
| 11, 12, 13, 14, 15 and 16 | Schmidt (U.S. Patent No. 1,211,765) in combination with Zeibell (U.S. Patent No. 641,424) | 102/103 |

U.S. Patent 9,039,580
(asserted claims 1, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 20, and 25)

| | | |
|---|---|---|
| 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, and 25 | Socwell (U.S. Patent No. 5,709,632) | 102(b) |
| 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, and 25 | Haber (U.S. Patent No. 5,411,455) in combination with Socwell | 103 |
| 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, and 25 | Magid (U.S. Patent No. 5,538,489) in combination with Socwell | 103 |
| 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 21, 22, and 25 | Cutter (U.S. Patent No. 3,642,279) in combination with Magid | 103 |
| 1, 2, 3, 4, 5, 6, 10, 11, 12, 18, and 25 | Schönenberger (U.S. Patent No. 4,334,676) in combination with Magid | 103 |
| 1, 4, 5, 6, 10, 11, 12, 18, and 25 | Abelbeck (U.S. Patent No. 6,042,514) in combination with Magid | 103 |

| | | |
|---|---|---|
| 1, 4, 5, 6, 10, 11, 12, 14, 18, and 25 | Eschenbach (U.S. Patent No. 6,053,848) in combination with Magid | 103 |
| 1, 4, 5, 6, 10, 11, 12, 14, 18, and 25 | Schmidt (U.S. Patent No. 1,211,765) | 102/103 |
| 1, 2, 3, 4, 5, 6, 10, 11, 12, 14, 18, and 25 | Schmidt (U.S. Patent No. 1,211,765) in combination with Zeibell (U.S. Patent No. 641,424) | 102/103 |
| 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 21, 22, and 25 | Chickering (U.S. Patent No. 3,637,206) in combination with Magid | 103 |

4. The opinions I provide herein are my own and are based on my independent review and on my education, experience, training, and skill accumulated in the practice of engineering. Between now and such time that I may be asked to testify at deposition and/or trial, I expect to continue my review, evaluation, and analysis.

5. I also expect to review reports submitted by Woodway's expert(s) and expressly reserve the right to amend or supplement this report, as appropriate, after considering the opinions set forth in those Woodway reports. I also expressly reserve the right to amend or supplement this report based on additional material information that may become available or result from our continuing investigation.

## II. QUALIFICATIONS AND EXPERIENCE

6. Bayerlein '580 and Bayerlein '169 both relate to exercise devices constructed from commonly available mechanical machinery hardware and structural elements. There are no electronics or software elements at issue in the asserted claims. Accordingly, in my opinion, a person having ordinary skill in the art ("PHOSITA") of these two patents is a mechanical engineer

with at least one year of machine design experience related to power transmission equipment[1] and a demonstrated understanding of the biomechanics of exercise, including knowledge in the field of anthropometry (i.e. the study of human proportion).

7. I am a Licensed Professional Engineer in Illinois, with over 10 years of experience in mechanical engineering. My experience in machinery and mechanisms spans numerous industries; I have worked directly designing mechanical systems and machinery and have consulted on the operation of machinery in various fields including rail, exercise equipment, and industrial machinery.

8. I am currently employed by Exponent, Inc. as a Managing Engineer. I joined Exponent in June 2008 after working in the Biomechanics Laboratory at University of Wisconsin-Madison and University of Illinois at Chicago where I focused my research on the forces within the knee joint and coordination of lower limb musculature as it relates to foot forces and balance during walking, standing, running, etc. While at the University of Wisconsin-Madison biomechanics lab, my research responsibilities included designing, developing and constructing equipment used to harness participants in efforts to analyze and characterize their lower limb force capabilities. These research responsibilities also involved the use and disassembly of treadmills to characterize force and balance capabilities of participants. As part of these research responsibilities I reviewed studies focused on using treadmills and similar devices as rehabilitation devices (e.g. the "Locomat"). During this time, I also assisted in the preliminary development of a force measuring treadmill intended to dissociate the foot forces used in walking from the requirements imposed by upright posture.

9. My responsibilities with Exponent include engineering consulting and testing with respect to exercise equipment, consumer product design and machinery design, product and machinery performance, accident reconstruction, and failure analysis.

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[1]Mechanical Power Transmission apparatus includes gears, belts, chains, bearings, rollers, flywheels, clutches, cranks, conveyors and couplings. See for example, Mechanical Power Transmission Handbook 2006. 4th ed.

10. Prior to attending graduate school, I worked as a project engineer, designing industrial machinery at Braner USA and I worked as an estimator and designer at Alloy Sling Chain, IND. LTD.

11. I am an active member of the ASTM International committees[2] that oversee sports equipment and consumer products. I have been recognized as an expert in mechanical power transmission equipment and serve on the American Society of Mechanical Engineers (ASME) Power Transmission and Gearing Committee. I have also participated, by invitation, in the National Council of Examiners for Engineering and Surveying (NCEES) Mechanical Professional Activities and Knowledge Studies (PAKS) committee. This committee reviews and evaluates the problems and problem types that appear on the Mechanical Engineering Professional Engineering exam.

12. For nearly 18 years, I have worked in the area of machine design and biomechanical applications of machine design. These machines have ranged from chairs, to standard consumer level treadmills, to commercial weightlifting equipment and other specialized types of exercise equipment.

13. My Curriculum Vitae is attached as Exhibit A along with my current four-year testimony list.

14. I am a salaried employee of Exponent. In 2017 Exponent charges an hourly rate of $315 for my time, plus reasonable expenses. I have no financial interest in the outcome of this case.

## III. MATERIALS CONSIDERED FOR THIS REPORT

15. I have attached as Exhibit B a list of materials that I considered and/or relied upon in reaching my opinion. I have examined a TrueForm Runner and I have also relied on my

[2] ASTM Committee F08 on Sports Equipment, Playing Surfaces, and Facilities; and ASTM Committee F15 on Consumer Products.

education, training, and professional experience in the design and testing of machinery and mechanisms, and my personal examination of the accused and similar equipment. I reserve the right to update this Exhibit and to rely on additional documents and testimony as I become aware of them and, if appropriate, to amend and/or supplement my opinions accordingly.

## IV. EXHIBITS

16. At any hearing or other proceeding in this case, I may provide and rely on visual aids and demonstrative exhibits to demonstrate basic principles of practical mechanical design and implementation, and the technologies that are the subject of Bayerlein '580 and Bayerlein '169. In addition, I may provide and rely on aids and demonstratives, such as charts, models or videos, to demonstrate my opinions and the bases for them. Examples of these visual aids and demonstrative exhibits may include claim charts, patent drawings, excerpts from patent specifications, file history, discovery responses, *Markman* materials, deposition testimony, deposition exhibits, or documents produced by the parties in this litigation, or obtained by various websites, as well as charts, models, diagrams, videos, and any materials or computer-generated videos. I reserve the right to rely on materials in the future not discussed herein. I have not yet selected which specific exhibits I may use, although the patents and images identified and incorporated within the report, in whole or in part, may be exhibits. Those exhibits have not yet been prepared.

## V. UNDERSTANDING OF THE LAW

17. I have been retained as an engineer, not as an expert on patent law. I have general familiarity with patent law principles from my professional experiences. Additionally, counsel to Samsara and Chapco has provided citations to legal principles relating to patents and patent infringement/validity that govern the issues on which I was asked to opine in this matter.

18. As noted above, I have been informed that there is a presumption of validity when a patent is issued. I have been informed that invalidity can only be demonstrated by clear and convincing evidence. I also understand that each claim of a patent is presumed to be valid independently of the validity of the other claims in the patent. I understand that for a particular claim to be deemed invalid, every element of this claim must be present in a single piece of prior art or in some obvious combination of prior art as that term is defined in 35 U.S.C. § 102.

19. I have been informed that in order to determine whether a patent claim is invalid, the claim terms must first be interpreted, and I understand that the Court conducted a claim construction hearing on November 28, 2016. I have read the Claim Construction Ruling that issued following that claim construction hearing.[3] In my analysis I have considered the claim terms using their plain and ordinary meaning as I believe a PHOSITA would have where the claim term has not been defined by the Court or is not indefinite. If the Court provided a construction, I have applied that construction to each applicable claim term in accordance with the Claim Construction Ruling dated December 8, 2016.

20. I understand that the parties disputed the construction of certain claim terms and that the Court construed disputed terms in the Claim Construction Ruling as follows:[4]

a. Bearing Rail
   - Means: "A rail with bearings whose top profile corresponds to the shape of the running surface"

b. A safety device cooperating with the rear shaft
   - Means: "A safety device adjoined to the rear shaft"

c. Coupled
   - Means: "the joining of two members directly or indirectly"

d. Running Surface

[3] Dkt. No. 76.

[4] Claim Construction Ruling, p. 28.

- Means: "The portion of the running belt upon which a user could place their foot during normal operation"[5]

21. The word "support" or a variant is used throughout Bayerlein '169 and Bayerlein '580 generally to indicate some manner of weight bearing or ability to bear weight though some manner of vertical force capability transmitted directly, element to element, in accordance with the Court's interpretation of this usage. Examples within the common specification suggest the plain meaning of support (i.e. weight bearing or vertical force capability) and include "supported by the front shaft" (Bayerlein '169 col. 2, 40-45), or "support member," (Bayerlein '169 col. 3, 25-30), "help support a user" (Bayerlein '169 col. 15, 15-17), or "supported in tension about." (Bayerlein '169 col. 16, 67).

22. However, in contrast to these uses of the support-based term, there are numerous other instances within Bayerlein '169 and Bayerlein '580 that are inconsistent with the plain uses of the word "support." A few examples of these instances include: "support wall" (Bayerlein '169 col. 22, 25-30), "supports an inner ring 1504..." (Bayerlein '169 col. 27, 19-20), "supports and outer ring..." (Bayerlein '169 col. 28, 10-15), "is supported outboard of and adjacent to the inner ring..." (Bayerlein '169 col. 28, 22-25), and "The housing 1502 is supported by a stud 1520 which is coupled to the frame 40. The stud 1520 may be separated or spaced apart from the housing..." (Bayerlein '169 col. 28. 26-30). Notably, stud 1520 does not provide weight bearing or "support" to housing 1502, as depicted in Fig. 38. Furthermore, housing 1502 does not "support" surface 1504, rather, shaft 68 "supports" the one way bearing element and the bearing element that is comprised of surface 1504 and 1506 supports the housing; without stud 1520 in place, the bearing

[5] Could also be defined as "part of" a foot

housing would not fall off due to lack of "support," as understood by the common usage of the word in the specification.

23. To a PHOSITA, "support" can be achieved by various structural elements. For example, one may "support" a machine element by welding it to the side of another element; bolting it to the underside of another machine element, laying it on top of a machine element; coupling it to another machine element; placing the machine element on the floor, and so on. Without clarification as to the structural nature of the "support", there is no viable way of narrowing the possibilities with reasonable certainty.

24. The claims, read in light of the specification delineating the patents in suit, and the prosecution history, fail to inform, with reasonable certainty, a PHOSITA, already familiar with machinery design and exercise equipment, about the scope of the invention because a PHOSITA would not be able to determine whether two structures are required to be in physical contact, directly joined, or whether intervening structural elements are necessary in order for one structure to "support" another, i.e. whether these "support" terms define the existence of a pair of structures wherein one structure captures the corresponding structure in a pair or whether the one structural element transmits the entire or partial load directly from the corresponding structure in the required pair.

**A. Invalidity**

**1. Anticipation**

25. I have been informed and understand that in order to demonstrate invalidity of a patent claim based on anticipation under 35 U.S.C. § 102, there must be clear and convincing evidence that (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent, or (b) the invention was patented or described in a printed publication in

this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States. 35 U.S.C. § 102(a), (b). The Bayerlein '580 patent priority date is March 17, 2009. The Bayerlein '169 patent priority date is also March 17, 2009.

26. I have been informed and understand that if every element in a claim is found—expressly or inherently—in a single prior art reference, then the claim is anticipated and invalid.[6] This is also true even where the prior art reference did not appreciate or recognize the "inventive concept" of the invention claimed in the challenged patent ("Our cases have consistently held that a reference may anticipate even when the relevant properties of the thing disclosed were not appreciated at the time."). [7]

**2. Obviousness**

27. I have been informed and understand that a patent claim is invalid if it can be shown by clear and convincing evidence that "the differences between the subject matters sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." 35 U.S.C. § 103(a).

28. I understand obviousness is a question of law that considers (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of skill of one in the art; and (4) where in evidence, so-called secondary considerations, such as commercial success, long-felt but unsolved needs, and the failures of others.[8]

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[6] See *Planet Bingo, LLC v. Gametech Int'l, Inc.*, 472 F.3d 1338, 1346 (Fed. Cir. 2006)

[7] *Verdegaal Bros., Inc. v. Union Oil Co. of Cal.*, 814 F.2d 628, 633 (Fed. Cir. 1987); see *also Abbott Labs. v. Baxter Pharm. Prods. Inc.*, 471 F.3d 1363, 1367 (Fed. Cir. 2006)

[8] See *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18 (1966).

### B. Combining References

#### 1. Reason to Combine

29. I have been informed that in order to combine prior art references in an obviousness analysis, motivation or reason to combine them must be articulated and made explicit. ("It is well established that "[t]he normal desire of artisans to improve upon what is already generally known can provide the motivation to optimize variables.");[9] ("[A]n implicit motivation to combine exists . . . when the 'improvement' is technology-independent and the combination of references results in a product or process that is more desirable, for example because it is stronger, cheaper, cleaner, faster, lighter, smaller, more durable, or more efficient.").[10]

30. An effort that merely makes a slight modification to the prior art using the same elements, performing the same functions, and achieving the same result is not novel.[11] "In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls."[12] Rather, "if a person of ordinary skill can implement a predictable variation [of a work], § 103 likely bars its patentability."[13]

31. I understand that it is improper to use hindsight as a reason to combine prior art references. In other words, it is improper to look to the patented invention, or references that post-date the patented invention, to find a reason to combine various references that pre-date the patented invention.

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[9] *In re Ethicon*, 844 F.3d 1344, 1351 (Fed. Cir. 2017).

[10] See *also DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006).

[11] *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007).

[12] *KSR*, 550 U.S. at 419.

[13] *KSR*, 550 U.S. at 401

**2. All Elements**

32. I understand that, even if a reason to combine prior art references were adequately articulated, the combination of prior art references must disclose every limitation of the claimed invention, in accordance with the Court's interpretations of the claim language, the plain and ordinary meaning of the terms, and/or the parties' agreed upon constructions.

**C. Indefiniteness**

33. I understand that a patent must conclude with one or more claims particularly pointing out and distinctly claiming the subject matter that the applicant regards as his invention. Counsel for Samsara and Chapco has informed me that claims are indefinite when "read in light of the specification delineating the patent, and the prosecution history," they "fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention."[14] Counsel for Samsara and Chapco has also informed me that even if a claim term's definition can be put into words, the claim is still indefinite if a person of ordinary skill in the art cannot translate the definition into meaningfully precise claim scope.[15]

**D. PHOSITA - Power Transmission Technology**

34. As stated above, the PHOSITA has a working knowledge of power transmission technology. Power transmission devices are at issue in the asserted patents and are also components of many different machines. Common mechanical power transmission elements are listed in resources publicly provided by the Federal Government[16] and reference manuals, among other sources. These machine elements include:

- Flywheels
- Friction clutches
- Sprag clutches
- Wheels
- Bearings

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[14] *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120 (2014).

[15] *Halliburton Energy Servs., Inc. v. M-I LLC*, 514 F.3d 1244 (2008).

[16] For example, see Occupational Safety and Health Administration (OSHA) code 1926.307 or OSHA 1926.219 Mechanical power-transmission apparatus for a list.

- Ratchets and pawls
- Pulleys
- Belts
- Couplings
- Spindles and rollers
- Chains
- Cranks
- Gears
- Connecting rods
- Conveyors

35. Because of their common usages across diverse types of machinery, terminology has been standardized, and their utility and limitations are well understood by a PHOSITA. A PHOSITA recognizes the relative merits of differing components, by virtue of education and/or design experience. The PHOSITA would also understand which components can be used in place of one another; selection of a suitable structure or mechanism may account for other selection factors such as durability, cost, reliability and other considerations that are not performance driven.

## VI. DESCRIPTION OF THE PRIOR ART

### A. Non-Motorized Treadmills

36. The purpose of any treadmill is to provide a localized surface (or, "running surface") upon which the user (whether human or animal) can exercise or generate power through a simulated act of locomotion, e.g. walking, jogging, running without gross body movement forward, rearward, or to the side relative to the running surface. Treadmills are sufficiently common that safety guidelines specific to their design/function have existed for some time and are standardized. For example, the International Standards Organization ("ISO") and the European Standard Technical Committees ("EN") defined what a treadmill is and set guidelines for the safety devices that should accompany treadmills years in advance of Bayerlein's submission to the USPTO. ISO/EN define a treadmill as "training equipment with a unidirectional moving surface on which a walking or running activity can take place where the feet are free to leave the moving

surface." ISO/EN also state that a treadmill shall be equipped with a handlebar (front, both sides, or both).[17]

37. The asserted Bayerlein patents relate to non-motorized treadmills powered by the efforts of the user of the treadmill, instead of an electric motor or other power source. These treadmills are generally referred to as "self-powered" or "manual."

38. Manual treadmills have existed for hundreds of years, as evidenced, for example, by manual treadmills used by the Romans to power cranes:

[17] ISO 20957-6:2005/EN 957-6:2001

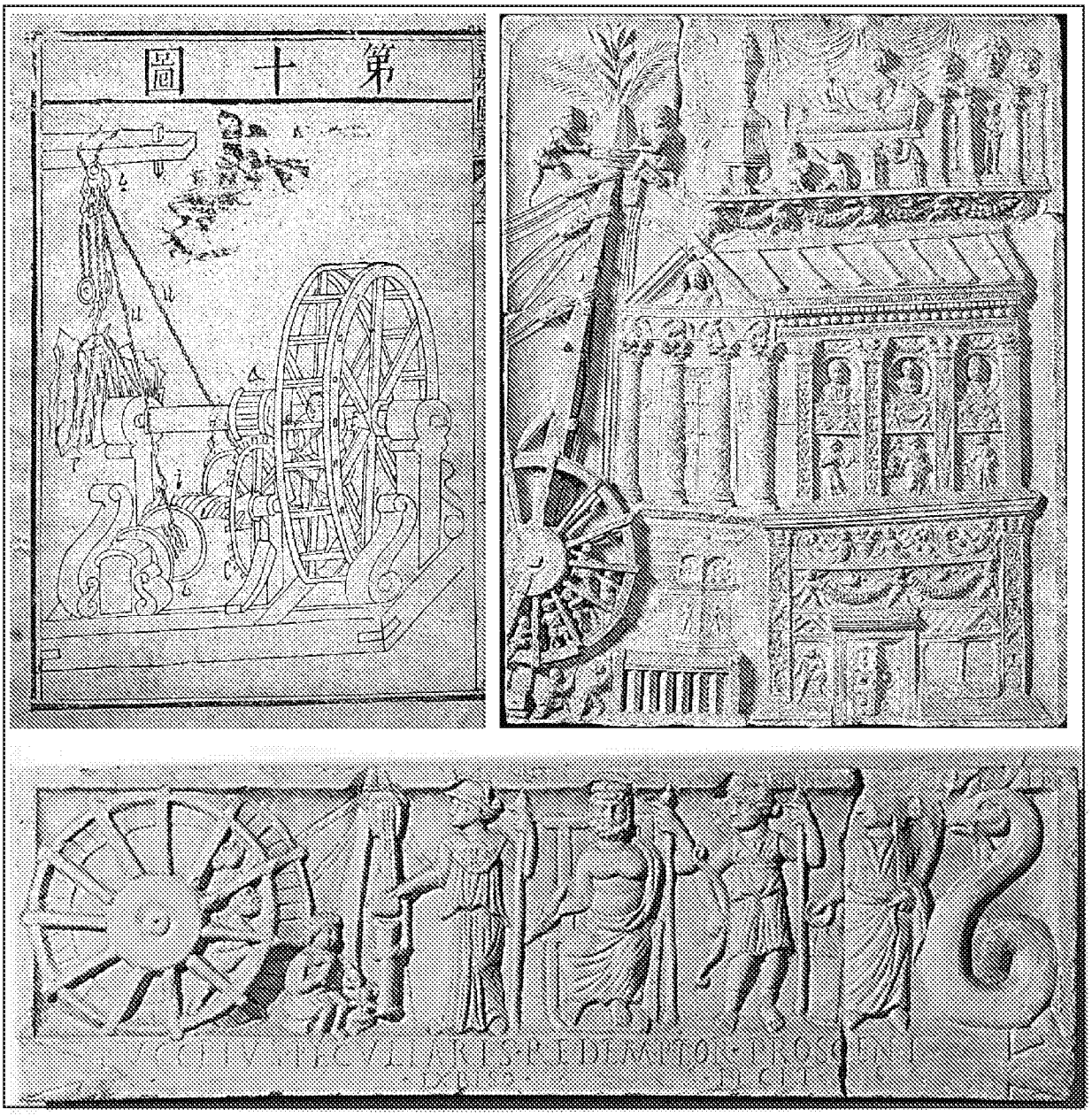



**Figure 1**. Top Left: "Hoisting machine with treadmill. Illustration from the Qiqi Tushuo, the earliest Chinese monograph on western mechanics (1627, the illustration is taken from the 1830 edition)." Bottom: "Hoisting machine with treadmill. Mould of relief from the Theatre of Capua (Museo della Civià Romana, Rome)." Images and descriptions from the Max Planck Institute.[18] Top Right: relief from the Vatican museum showing humans powering a treadmill crane from the 2nd Century AD.[19]

[18] http://www.mpiwg-berlin.mpg.de/resrep00_01/Jahresbericht_2_2_section.html

[19] http://www.museivaticani.va/content/museivaticani/en/collezioni/musei/museo-gregoriano-profano/Mausoleo-degli-Haterii.html

39. In terms of filings with the USPTO, treadmill art is also well known and includes numerous self-powered treadmill patent applications dating from the 1800's. For example, U.S. Patent 8308X granted to Eli Briggs ("Briggs") in 1834 teaches a non-motorized treadmill for horses.[20] Briggs' Figure 1 (below) depicts a self-powered treadmill with a frame, a continuous belt disposed about a front and rear shaft that are each joined to the frame, the running belt is comprised of transverse slats held together by an endless chain-like structure on each side. Figure 1 of Briggs also clearly shows a curved running surface.[21]

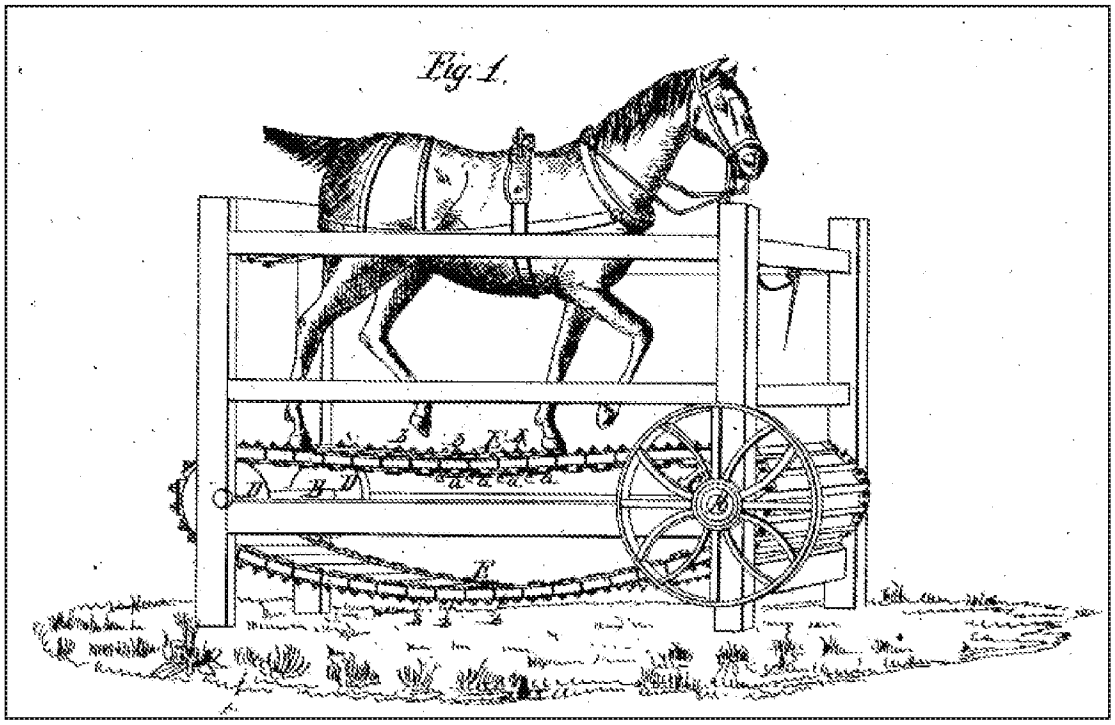



**Figure 2.** Briggs Figure 1. The curved running surface of the running belt is constructed of a continuous belt disposed over a front and a rear shaft rotatably joined to a frame. The running belt is comprised of laterally extending slats connected by endless belts on each side that are comprised of elements that interact with wheels spaced apart on the front and rear shafts. The running surface has a curved profile. A flywheel is joined to the front shaft.

[20] This patent was not cited during the prosecution of the '169 patent or the '580 patent.

[21] It is my understanding that the specification is not available from the USPTO because it was destroyed in a fire.

40. Two more examples are U.S. Patent No. 411,986, entitled "Animal Tread Power" issued in 1889 to David Frazeur and William Davis ("Frazeur"), and U.S. Patent No. 641,424, issues to Robert Ziebell ("Ziebell") on January 16, 1900, entitled "Animal Power." Neither were before the examiner during the prosecution of the '169 patent or the '580 patent.

41. Frazeur teaches a manual treadmill having a frame and a running surface that includes a running belt constructed of an endless belt comprised of transverse slats. The profile of the running surface corresponds to the top surface of transverse rollers beneath the running belt that are free to roll about a track fixed to the frame. Frazeur includes a device (i.e., a brake) to prevent the running belt from rotating.

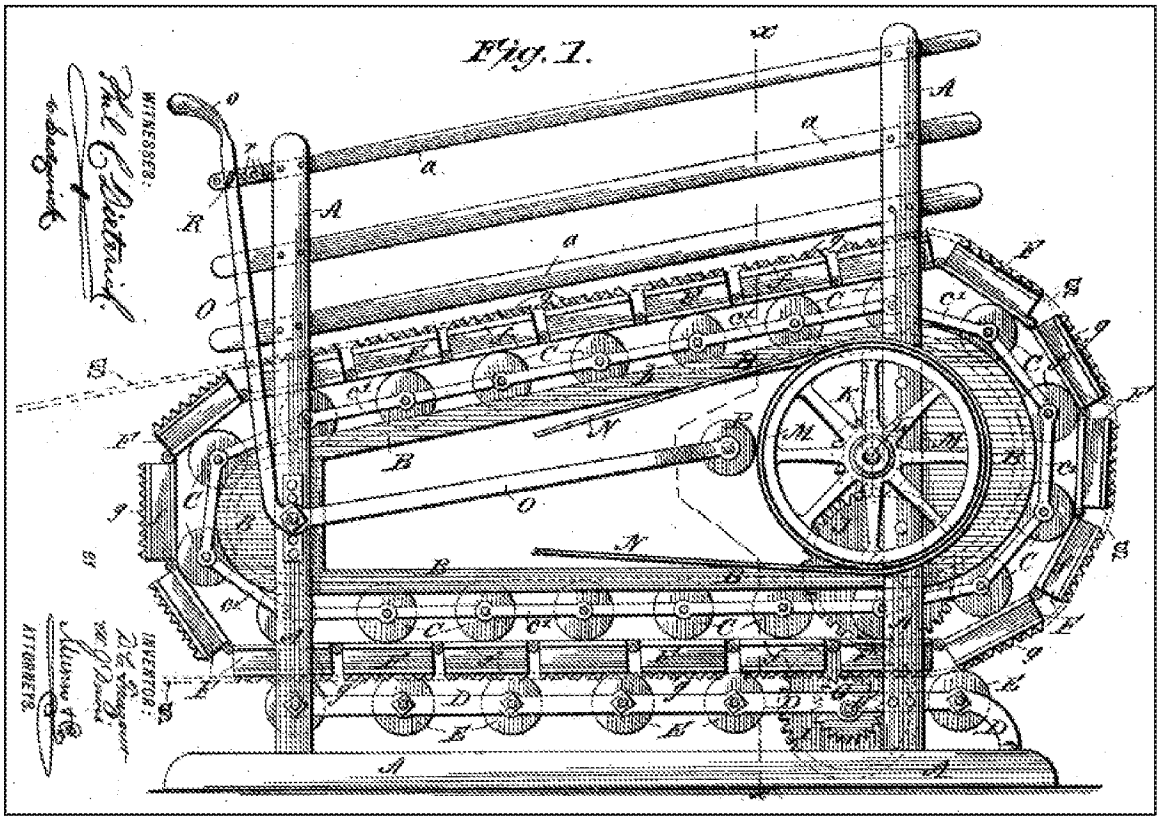



**Figure 3.** Frazeur Figure 1. The running belt includes a running surface whose profile corresponds to the shape of the plurality of rollers beneath it (C). The plurality of rollers is organized into an endless belt that operates within a track (B) coupled to the frame (A) of the treadmill. Frazeur teaches a handbrake (O) to stop the running belt from rotating through interference with fly wheel (M).

42. Ziebell teaches a treadmill with a frame and a running belt disposed about a front and rear shaft that each are rotatably joined to the frame. The front and rear shafts are part of an assembly that includes front and rear pulleys. Ziebell's running belt is comprised of endless belts and transverse slats. The running surface's profile corresponds to the top profile of bearings. The bearings or "bearing wheels" in Ziebell are rotatably joined to what Ziebell identifies as auxiliary frames on the left and right sides of the treadmill that are attached to, and are distinct from, the main frame which provides structure and support for the treadmill. The auxiliary frame of Ziebell is longitudinally aligned with the front and rear pulleys.

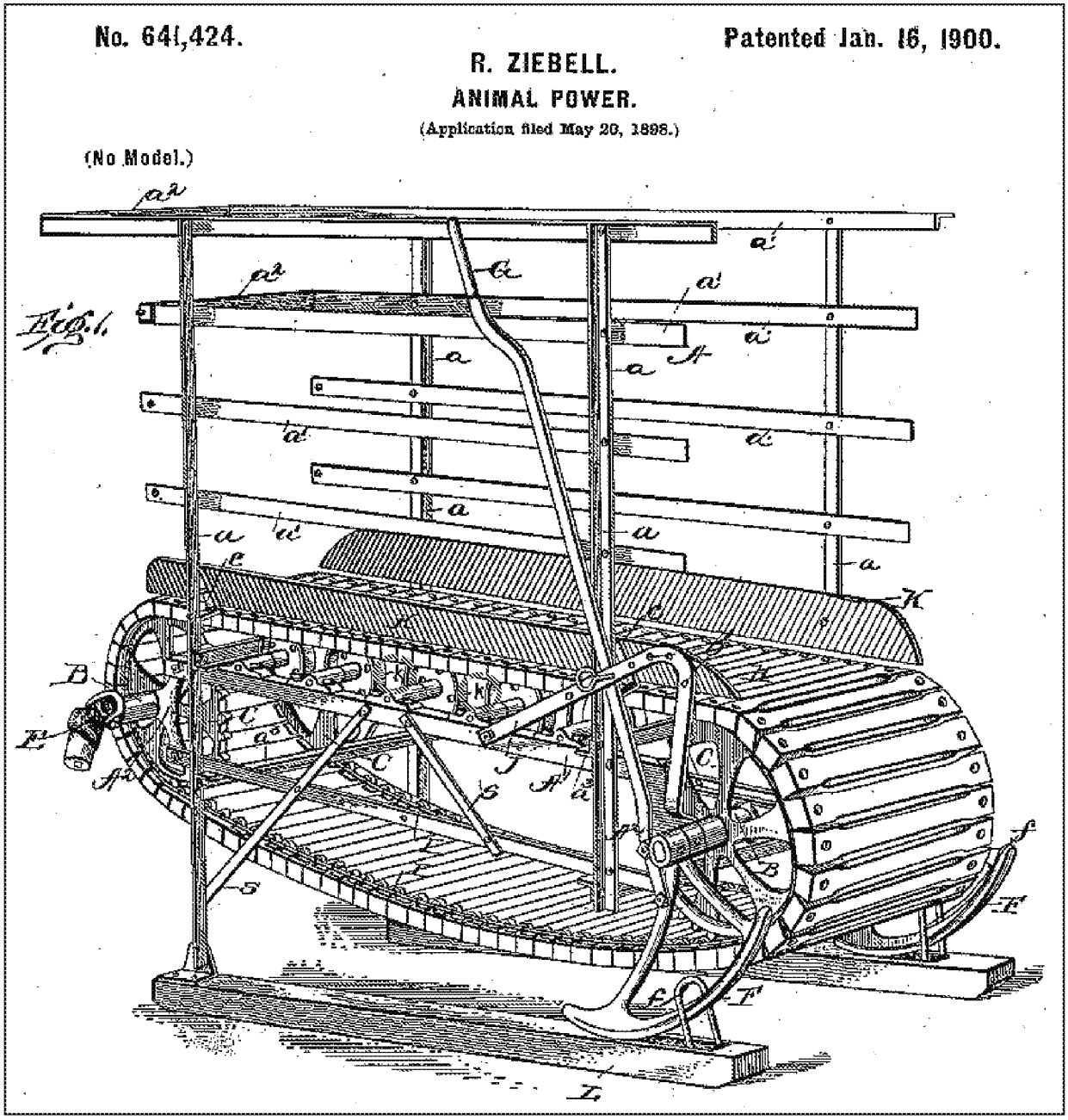



**Figure 4**. Ziebell Figure 1. The endless belt rests on bearings set in an "auxiliary frame" (A') that is longitudinally oriented to the treadmill on the left and right sides; A' is secondary to the main frame (A). The running belt (H) passes over front and rear wheels (C) mounted on front and rear shafts (B) rotatably attached to the main frame and at least partially support the endless belt. The profile of the running surface corresponds to the top surface of the bearings (k, circled for convenience), that are defined by their arrangement in the auxiliary frame. The auxiliary frame is longitudinally aligned with the front and rear pulleys. Ziebell teaches that a clutch may be connected to the front shaft to facilitate the transmission of the rearward motion of the running belt. The treadmill's incline and corresponding user effort level can be altered.

43. Later filings with the USPTO recognized that the benefits of treadmills are broader than harnessing animal power and include use in exercise. For example, in 1902 a patent application was filed that discloses benefits to animals and humans from treadmill use. This 1902 application matured to a patent granted in 1904 (U.S. Patent No. 767,221) to Hagen for a Training Machine intended for human use that "may be used with equal advantage for the training and exhibition of animals." (Hagen col. 1, 15-17). The Hagen patent was not cited during the prosecution of Bayerlein '169 patent or Bayerlein '580.

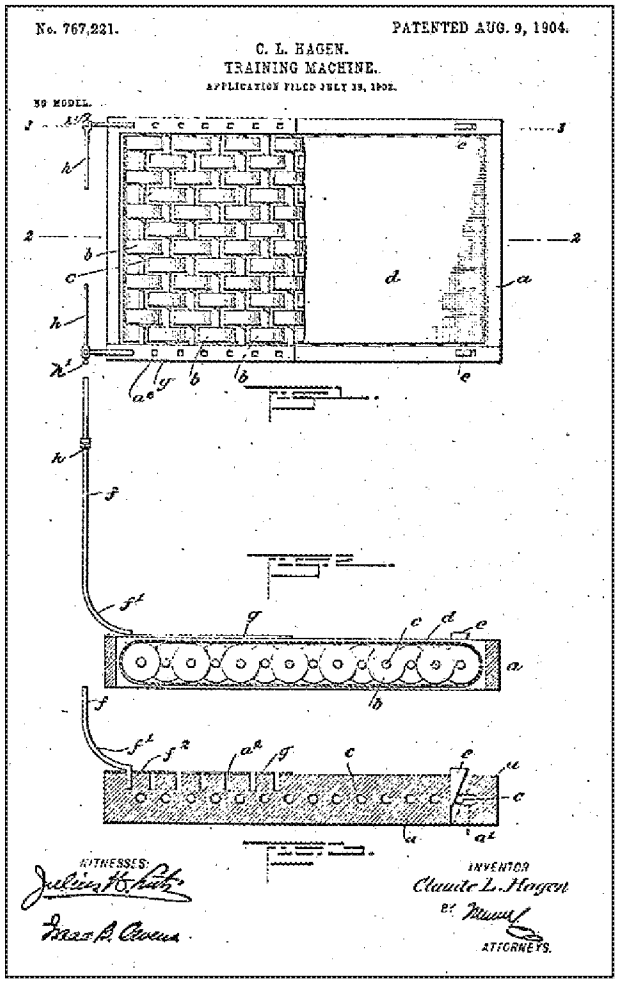



**Figure 5**. Hagen Figures 1 and 2. Running belt (d) has rollers beneath it. This treadmill has a frame, bearings rotatably coupled to the longitudinal members of the frame, and an endless belt disposed about a front and rear shaft. The top profile of the bearings beneath the endless belt corresponds to the profile of the running surface. Hagen describes his device as one whose physical effect is "exactly the same" as though the user "were running on a planar surface." Hagen does not disclose any powered equipment to drive the device.

44. In that same time frame, the USPTO granted patents covering self-powered exercise treadmills. For example, U.S. Patent No. 759,296 was granted in 1904 to Morairty for a self-powered exercise treadmill. Morairty was not cited during the prosecution of the '169 patent or the '580 patent. Morairty, like Ziebell, recognizes that a self-powered treadmill could allow the user to adjust effort by increasing or decreasing the incline of the running surface. Morairty also recognizes that it is advantageous for a user to be able to change effort levels while using the treadmill. Figure 1 from Morairty shows the running belt disposed about a front and rear shaft, a running surface comprised of an endless belt, and rollers mounted to the frame whose top surface corresponds to the profile of the running surface.

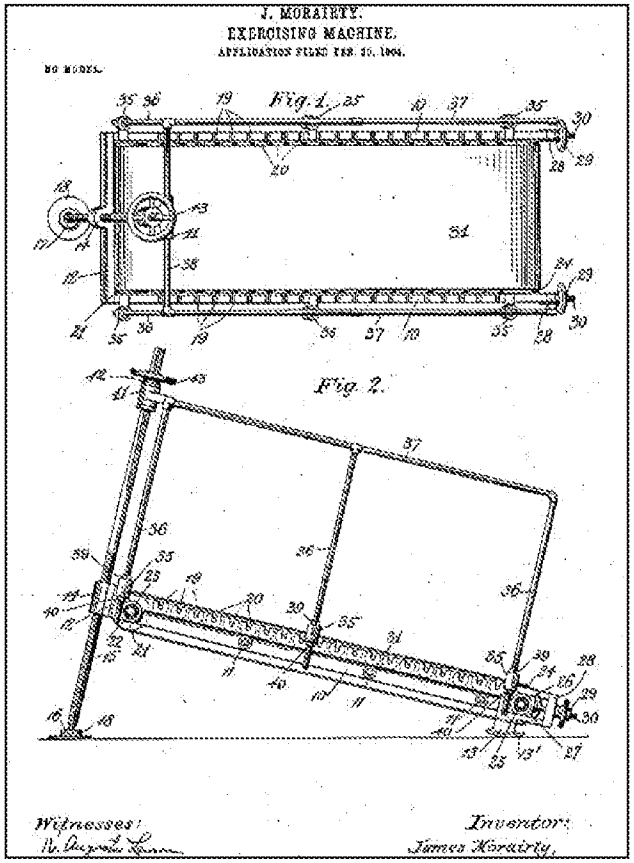



**Figure 6.** Morairty Figure 1. The running belt is disposed about a front and rear shaft, , rollers mounted to the frame with a top surface that corresponds to the profile of the running surface, and transverse members that join the left and right longitudinal members of the frame together.

45. In 1917, the USPTO granted U.S. Patent No. 1,211,765 to Schmidt for a self-powered "Health Exerciser" treadmill.

46. Schmidt Figures 1, 2, and 3 teach a frame with longitudinal members and a running belt disposed about front and a rear shafts that are rotatably joined to the frame. The longitudinal members in Schmidt are intentionally flexible in nature, to reduce shock to the legs and underlying tissues. (Schmidt, p. 3, col. 1, 27-35).

47. The curved profile of the claimed running surface allows the user to push off of the rear of the treadmill without concern for sliding off and claims that feature as a novel improvement over known treadmill technology. Schmidt describes this claimed novelty over existing treadmill technology as a feature of "considerable merit." (Schmidt, p.2, col. 2, 99-117).

48. Schmidt also discloses that the curved running surface between the front and rear shafts is for ease and efficiency of running. Schmidt teaches that the curvature is patterned after the path of the foot relative to the hip, which negates the nature of the body to bob up and down while running.[22]

49. Schmidt also discloses curved rails[23] to provide a profile for the running belt. The curved running surface's profile is enforced by the weight of the belt, the action of gravity and intentional slack in the running belt.

50. Finally, Schmidt explicitly teaches an option for freely rotating or stationary front and rear shafts, as desired.

[22] For example, see Schmidt p. 3, col. 1, 1- 6.

[23] This element, not part of the frame, is referred to in Schmidt as element "d" and it appears on the left and right sides of the Schmidt invention, as shown in Schmidt Figures 2 and 3.

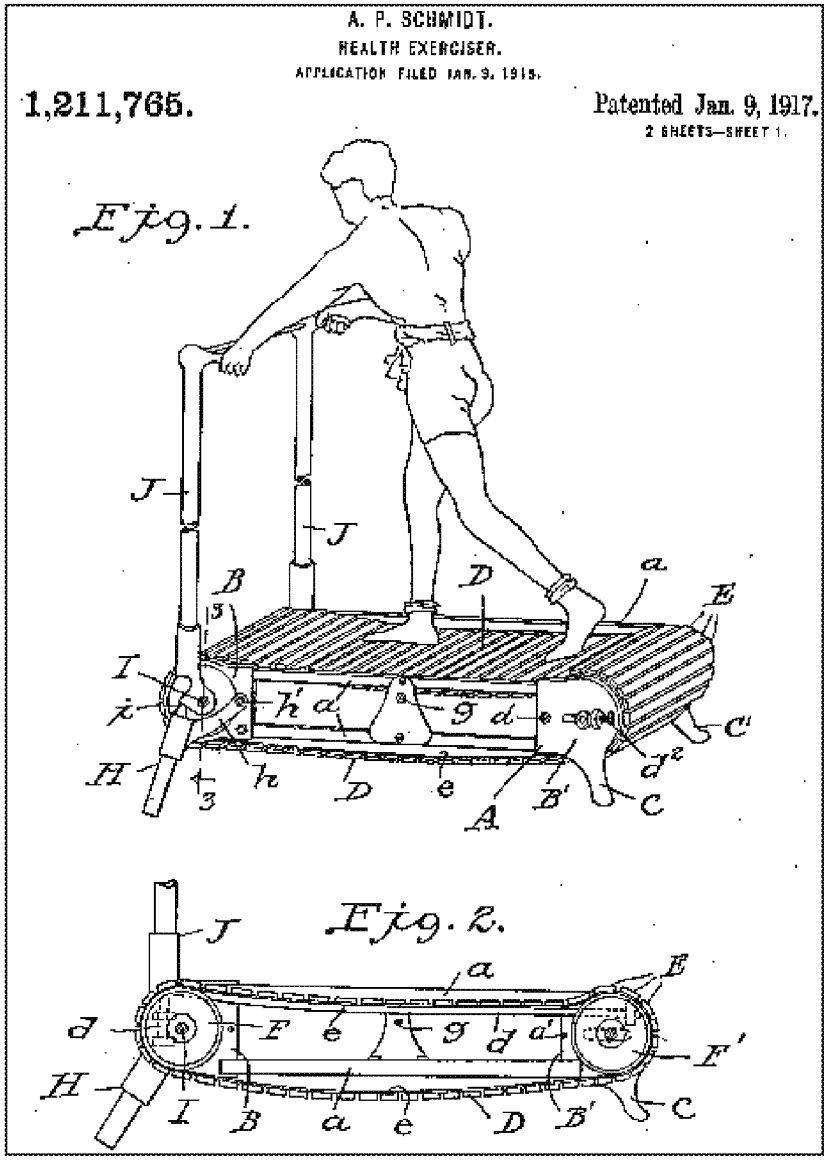



**Figure** 7. Schmidt Figures 1 and 2. Schmidt teaches a frame (A) with longitudinal members (a) on the left and right, a running belt disposed about front and a rear shafts rotatably joined to the frame, a running surface whose curved profile corresponds to the shape of the rails (d) beneath it. The curved running surface profile is enforced by the shape of the rails, the weight of the endless belt, the action of gravity and intentional slack in the endless belt. Schmidt also teaches an option for the front and rear rollers to be rotatable or stationary, as desired. Schmidt teaches that the curved profile of his running surface provides the ability of the user to push off of the rear of the treadmill without concern for sliding off as a novel improvement over previous treadmill technology.

51. U.S. Patent No. 3,642,279, granted to Cutter in 1972 for a "Treadmill Jogger," discloses a self-powered treadmill with a curved profile.[24] Cutter's curved treadmill solves the problem of restraining the user from running or falling off of the end of the treadmill. (Cutter, col. 1, 8-13). According to Cutter, the existing ways to keep the user from running or falling off of the end included 1) motorize the treadmill, 2) use a harness, or 3) require the use of a handhold (Cutter, col. 1, 13-23).

52. Cutter claims that with a "generally concave" shaped running surface where the front is higher than the rear, there is an advantage in that the position of the user while running becomes regulated by the incline, eliminating the need for motorization, harness, or handhold. (Cutter, col. 1, 54-70).

53. Cutter discloses a frame with longitudinal sides, rollers rotatably joined directly or indirectly to journaling sockets, a running belt (30) disposed about a front and rear shafts, a running surface that is curved and whose profile corresponds to the top edge of the rollers underneath it.

[24] Cutter was disclosed during the prosecution of the '169 patent and '580 patent.

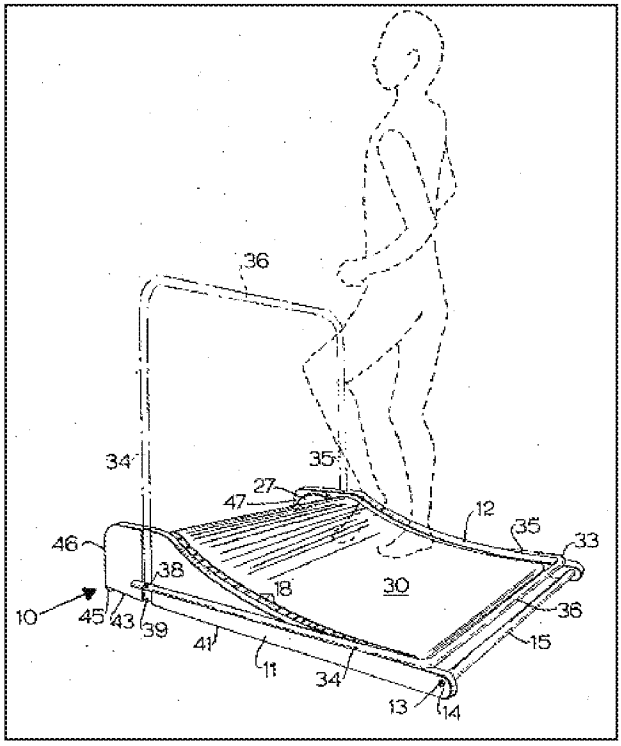



**Figure 8.** Cutter Figure 1. A self-powered treadmill with curved running surface profile. Cutter's running belt is disposed about a front and rear shaft. The running surface profile corresponds to the shape of the rollers mounted to the frame.

54. In 1972 U.S. Patent No. 3,637,206 was granted to Chickering for "Endless Belt Exerciser With Accelerating and Decelerating Tread Surfaces."[25] Chickering's self-powered exerciser discloses a device without the "necessity of external support means for the user" in order to "accurately simulate the acts of walking, jogging, and running." (Chickering, col. 1, 40-50). To address these needs, Chickering discloses a treadmill with a running surface comprised of a belt, supported by a plurality of rollers. The rollers correspond to the profile of the running surface that has a concave profile. The relative incline of the roller surfaces towards each other allows the user to "push off against the rear surface" (Chickering, col. 2, 65-70), at the end of step. Chickering teaches that roller type supports have so little friction that some other device or mechanism is required because a person exercising on that "type of treadmill is likely to lose his balance because

[25] Chickering was cited by the '169 and '508 patents.

the frictionless surface offers no resistance to the movement of his feet…" (Chickering col. 1, 30-35).

55. Chickering teaches an exercising device comprising a base (a frame) with longitudinal side members, a rail with a plurality of rollers supporting the running belt which is at least partially disposed on front and rear shafts.

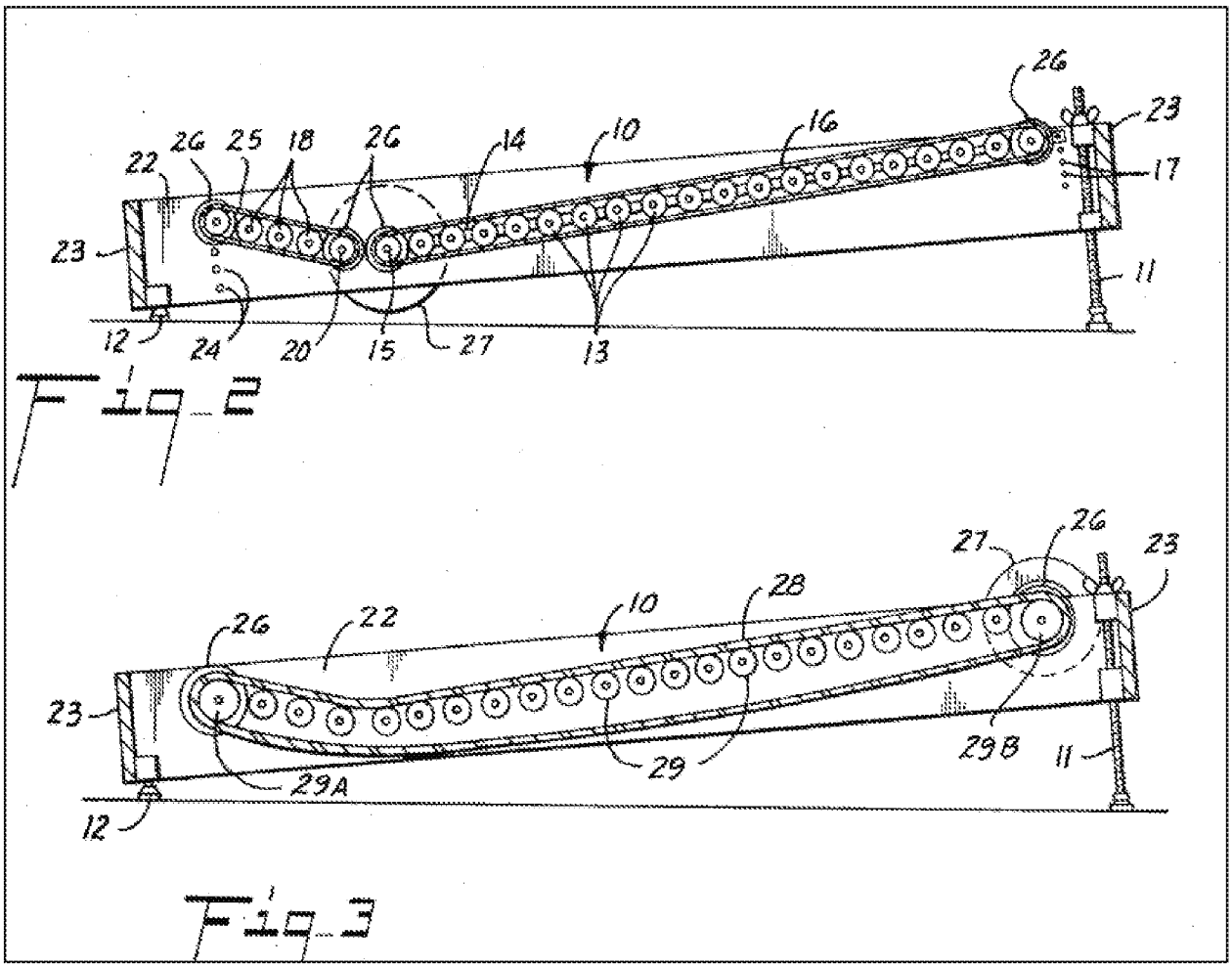



**Figure 9**: Chickering Figures 2 and 3. A treadmill with a running surface profile that corresponds to the top surface of a plurality of rollers beneath it. The running belt (16, 28) is disposed about front and rear rollers (26; 29B, 29A) that correspond to the shape of the running surface. In one embodiment, the plurality of rollers is rotatably coupled to the bearing rail 14 that is separate from the frame, while in another embodiment the plurality of rollers is housed within longitudinal members (22) of the base (10). Flywheel 27 is present in both embodiments. Figures 2 and 3 show the Chickering feet that appear slightly off vertical in this depiction, but depending on adjustment could be vertical, performing the same function as the feet claimed in the patents in suit.

56. In 1982, the USPTO granted U.S. Patent No. 4,334,676 to Schönenberger. Schönenberger discloses a manually operated treadmill, although this patent also teaches the ability of the invention to be motor driven as well. While the abstract discloses a motorized embodiment, the Schönenberger specification teaches the manual embodiment of the treadmill in at least two places: "...One of the drums 10 is driven by motor 33, or by gravity of earth or by any other suitable motive drive apparatus by means of a drive belt 43." (Schönenberger col. 4, 36-38); and "This invention allows a runner to use the apparatus in a 5% elevation without any external motor power." (Schönenberger col. 6, 15-18). Schönenberger also teaches a plurality of support rollers that are longitudinally aligned with the front and rear shaft and are mounted on "channel rails" that are supported on the frame (Schönenberger col. 5,35-45).

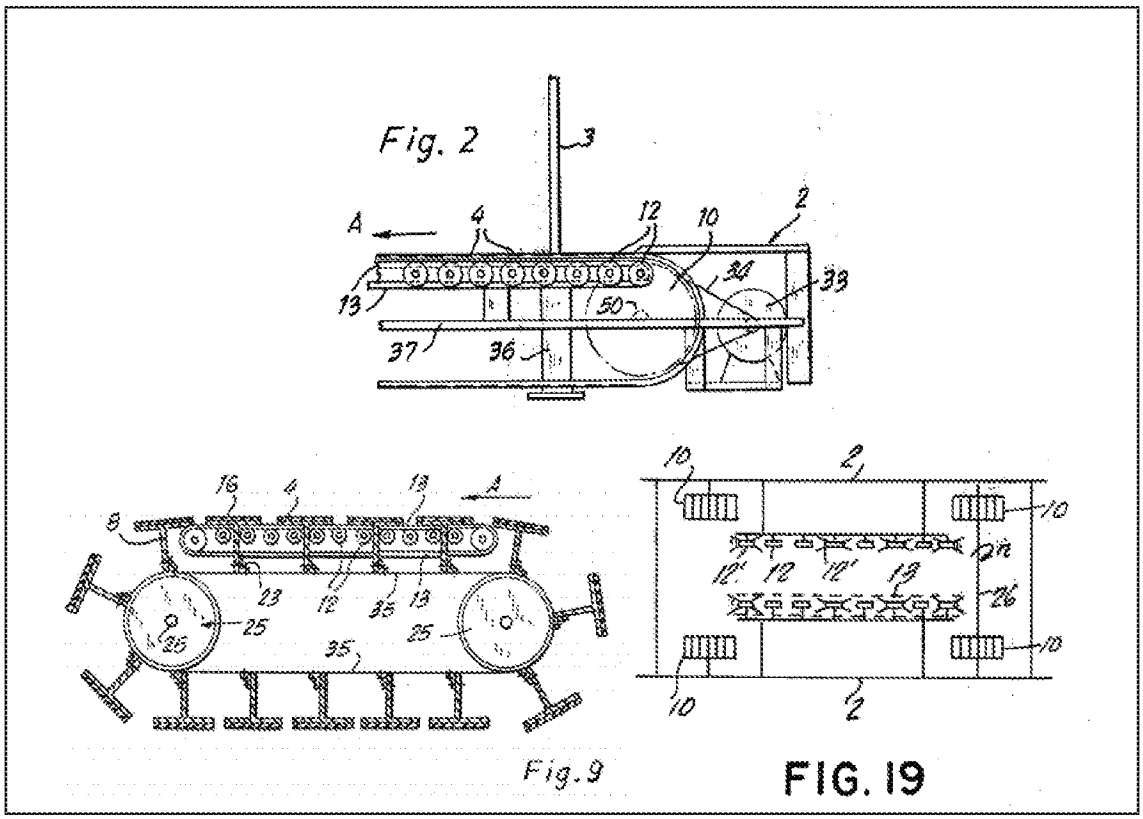



**Figure 10**: Schönenberger Figure 2, 9, and 19. A treadmill with a running surface profile that corresponds to the top surface of a plurality of rollers (12) beneath it. The running surface is comprised of a running belt (35) disposed about front and rear rollers (10). The plurality of rollers (12) are part of an assembly that is separate from the frame. The running surface profile corresponds to the top profile of the plurality of rollers.

57. In 1983, the USPTO granted U.S. Patent No. 4,389,047 to Hall[26] for treadmills shaped like the ancient Roman style crane treadwheel treadmill devices referenced above, where the user runs on the inside of a generally rigid endless belt, instead of running on the outside of a flexible endless belt.

58. That patent discloses an exercise treadmill where "the surface being run upon is round," so "the force of gravity will act to keep the runner at the bottom of the mill wheel when he is running. This eliminates the need for rails or restraining belts, and makes the rotary device a more comfortable way of running or jogging on an exercise machine." (Hall '047, col. 1, 58-63). In addition, Hall '047 includes a one-way clutch that is used to couple the motion of the treadmill to a generator, similar to the animal power clutch described in Ziebell (Hall '047 abstract; col. 6, 63; Ziebell lines 94-105).

59. Hall '047 also teaches a treadwheel with a minimum diameter of nine feet, or, in other words, the minimum radius of curvature of the running surface is 4 ½ feet. (Hall '047 col. 1, 55-56).

60. In 1997 U.S. Patent No. 5,669,856 was issued to Liu for "Exerciser."[27] Liu discloses a manual treadmill device with two running belts, one for each foot, and each running belt is comprised of an endless belt. The endless belts are disposed over a front and rear shaft. Liu teaches and claims that that the running belts move in only one direction. This feature is achieved by restricting the rotation of the front and rear shafts, around which the running belt is disposed.

[26] Bayerlein '169 and '580 cite U.S. Patent Nos. 6,500,097 and 6,740,009 also to Hall, granted in 2002 and 2004, respectively, for manually powered treadmills shaped like the ancient Roman style crane treadwheel treadmills. Hall's '097 patent includes a speedometer element.

[27] This patent was not cited during the prosecution of the '169 patent or the '580 patent.

Specifically, Liu teaches that the front and rear shafts rotate in a single direction. Liu does not limit the method by which the rear roller is permitted to only rotate in one direction.

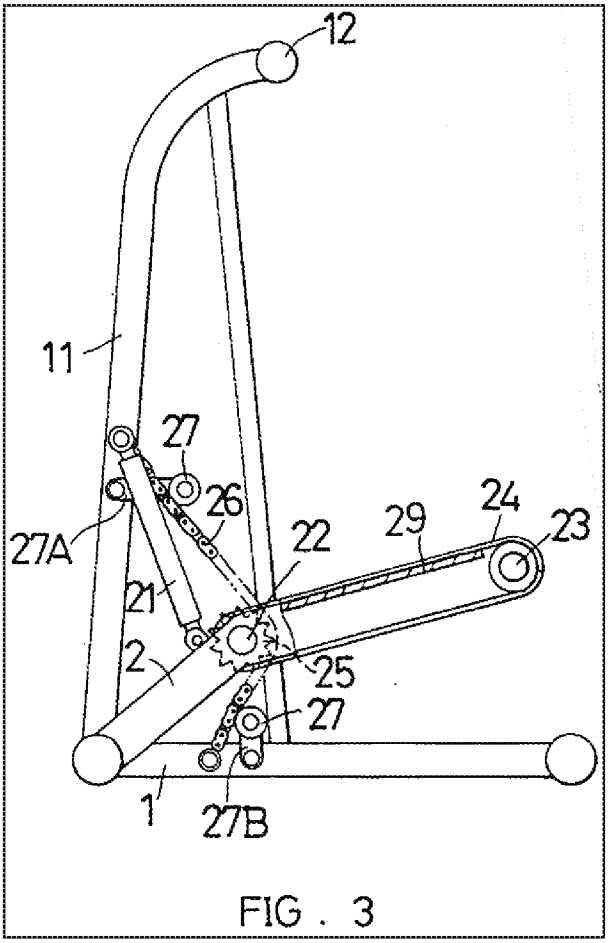



**Figure 11.** Liu Figure 3. A self-powered running belt (24) is disposed about a front and rear shaft (22 and 23). The running surface profile corresponds to the friction board (29). Liu teaches that shafts 22 and 23 are only permitted to rotate in one direction.

61. In 1998, the USPTO issued U.S. Patent No. 5,709,632 to Socwell. Socwell discloses a self-powered[28] curved deck treadmill on a substantially flat surface that includes a support frame; a front shaft assembly supported by the frame (12) that includes a front shaft (78) and at least one front running belt pulley supported by the front shaft and a rear shaft assembly (86) supported by the frame and comprising: a rear shaft (86). There is at least one front running

[28] Socwell col. 11 25-34

belt pulley supported by the rear shaft; a running belt (16) supported at least in part by the front shaft assembly and the rear shaft assembly; a safety device cooperating with the rear shaft to permit rotation of the rear shaft in only one direction; at least one bearing rail having a plurality of bearings (98) rotatably coupled to the at least one bearing rail (94, 96, 168).

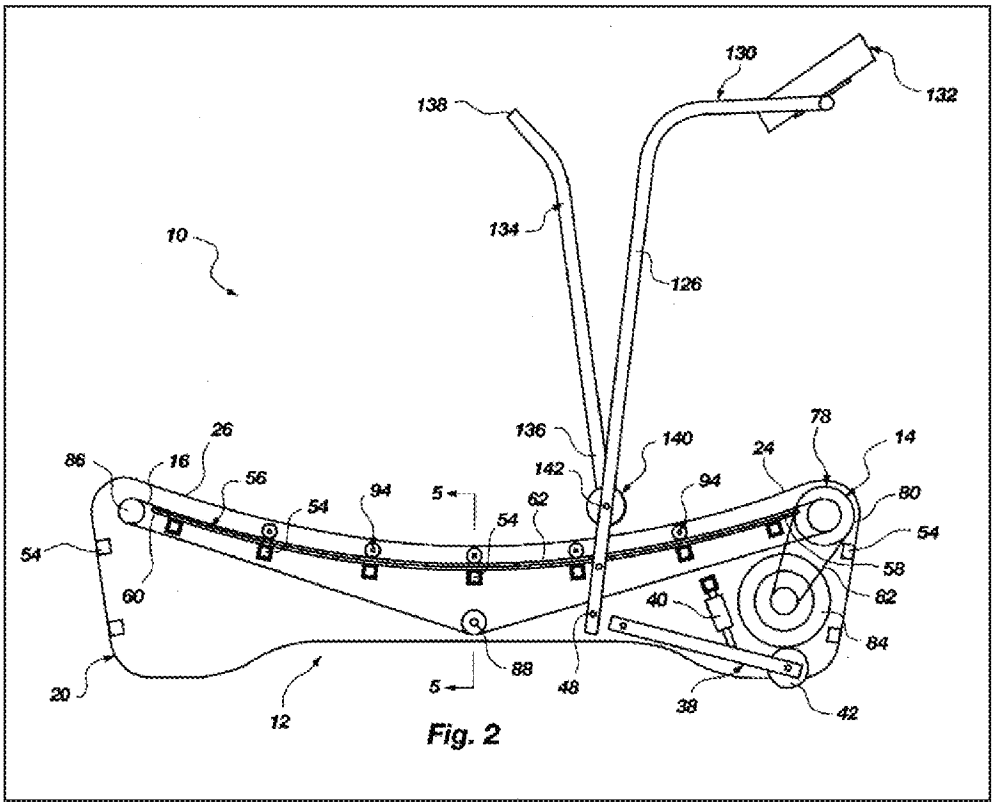
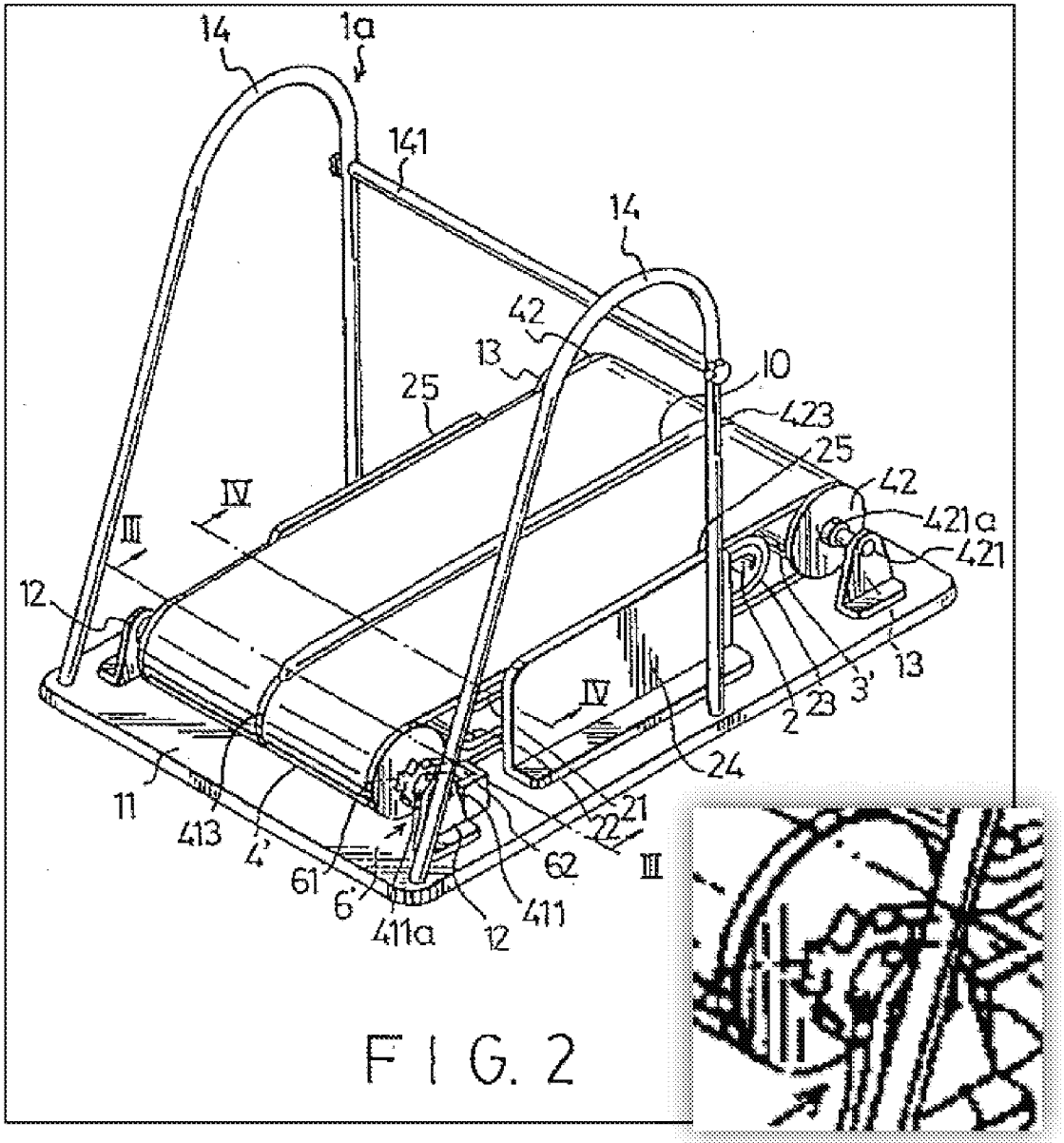



**Figure 12.** Socwell Figure 2. Socwell has a frame and a running belt disposed about front and rear shafts, whose running surface profile corresponds to the top profile of the bearing rail, partially shown in the figure as 94.

62. In 1995, the USPTO issued U.S. Patent No. 5,411,455 to Haber for "User Propelled Treadmill." Haber teaches a self-propelled treadmill with a running belt disposed about front and rear drums (19 and 20). Haber includes a one way clutch (22) of "conventional design" (Haber col. 3, 22) joined to the front drum. In addition, Haber discloses a control panel that outputs a display of the user performance. Haber includes a flywheel, which it terms an "inertia wheel."




F I G. 2

**Figure 13**. Magid Figure 2. Magid teaches a manual treadmill. Magid teaches a running belt comprised of a continuous belt disposed around a front and rear shaft. The front and rear shafts are rotatably joined directly or indirectly to a frame/base. Rollers between the front shaft and rear shaft are rotatably joined directly or indirectly to longitudinal members attached to the frame/base. Magid teaches a ratchet and pawl "unidirectional control mechanism" (Magid col. 4, 47-49) that restricts the running belts of the treadmill to movement in a single direction of travel. In the figure here, the ratchets and pawls are adjoined to the rear shafts based on the orientation of the handrails (14). Note that the Magid patent identifies part 411 as the front roller on the "front" of the device and 421 as the rear roller on the "rear" of the device. Magid's front/rear lexicography is opposite of the interpretation of the examiner who examined Bayerlein in view of Magid. The usual construction adopted by the prior art and the Bayerlein patents identify the "back" of the treadmill the side posterior to the user operating it. Magid's inverted lexicon is clear based on an inspection of the depiction of the ratchet gear (inset) and the orientation of the handlebars. See Magid col. 4, 34-40, Fig. 9.

63. In 1996, the USPTO issued U.S. Patent No. 5,538,489 to Magid, entitled "Walker Apparatus With Left And Right Foot Belts." Magid was before the examiner for the Bayerlein '169 and '580 patents. The Magid patent teaches an exercise device with independent running belts for the left and right foot. According to the specification, the device provides a means for walking exercise or training for individuals (such as the elderly, infants, or the disabled) whose foot movements may not be coordinated entirely and thus would have difficulty using a classically designed treadmill (Magid col. 1, 53-59).

64. Magid teaches a "unidirectional control" mechanism designed to "permit only unidirectional movement of the left and right foot belts." This mechanism "includes a pair of ratchet gears attached to outer ends of the front rollers[29] and mounted rotatably on the first shaft, and a pair of pawls secured to the base and engaging one of the ratchet gears to permit only unidirectional rotation of the front rollers, thereby preventing bidirectional movement of the foot belts."

65. Magid has "...a functional support frame, said base having front left and right sides, a pair of spaced front brackets disposed adjacent to said front left and right sides, a first shaft extending from said front left side to said front right side, said first shaft having two ends fixed respectively at said front brackets, rear left and right sides... and a second shaft extending from said rear left side to said rear right side." Additionally, Magid teaches "...a pair of front rollers mounted rotatably on said first shaft and disposed respectively on said front left and right sides; a pair of rear rollers mounted rotatably on said second shaft and disposed respectively on said rear left and right sides; endless left and right foot belts, each of which engage a respective one of said front rollers and a respective one of said rear rollers." Finally, Magid teaches the unidirectional control mechanism "wherein each of said front rollers includes an outer end with a ratchet gear

[29] "Front" in Magid's treadmill lexicon is the rear or back side in Bayerlein. This nuance of Magid's lexicon appears to have been overlooked by the examiner and Mr. Oblamski.

attached thereto, and said base further includes a pair of pawls which releasably and respectively engage said ratchet gears on said front rollers."

66. In 2000, the USPTO issued U. S. Patent No. 6,042,514 to Abelbeck, entitled "Moving Curface Exercise Device." Although Abelbeck includes references to a motor as a drive means, the focus of the invention is reduction in cost, and it also discloses a treadmill that includes a continuous segmented track (23) whose individual deck members (22) are supported by wheels or ball bearing "support members" (36) that can be operated using body weight (col. 10, 9-13) and are supported by side frames (38).

67. In 2000, the USPTO issued U.S. Patent No. 6,053,848 to Eschenbach, entitled "Treadmill Deck Suspension." Eschenbach teaches a curved, self-powered treadmill. This patent teaches a running surface comprised of an endless belt trained abut a first and second roller assembly (26, 28; or 60, 62). (Eschenbach col. 2, 18-24). Support for the running surface is provided by a flexible linking. (Eschenbach col. 2, 25-30).

68. In 2006, Pasqualin filed U.S. Patent Application 2006/0287165, entitled "Muscle-Powered Vehicle." Pasqualin discloses a manually operated treadmill supported by a chassis (18). The treadmill (11) is constituted by two rollers, a first front roller (13), relative to the travel direction of the vehicle, and a second rear roller (14). The two rollers 13 and 14 are surrounded by a continuous belt (15), which is stretched between the rollers. An upper portion 15a of the belt 15 slides over a supporting surface 16 for the user 12, who walks or runs thereon. The belt 15 transmits its motion, imparted by the thrust of the feet of the user 12, to the two front and rear rollers 13 and 14.

### B. The Asserted Patents

#### 1. U.S. Patent No. 8,986,169 ("Bayerlein '169")

69. I have reviewed the '169 Bayerlein patent and the specific claims asserted (11, 12, 13, 14, 15, and 16). In general, the 169' patent describes manually operated treadmills having

front shaft rotatably coupled to the treadmill and a rear shaft rotatably coupled to the treadmill frame at the rear end. The treadmills also have a rear shaft unidirectional device permitting rotation of the rear shaft in only one direction. Additionally, the running belt includes a curved running surface upon which a user of the treadmill may run, configured to allow the user to manually control the speed of the running belt and to facilitate maintenance of a contour." (Bayerlein '169 col. 2. 5-25).

70. All of the asserted claims in the Bayerlein '169 require a manually operated treadmill having a frame, a front shaft assembly supported by the frame, a rear shaft assembly supported by the frame, and a bearing rail, among other limitations. According to Bayerlein, a number of different support types may be used to shape the profile of the running surface for several advantageous benefits (e.g. a track, see Fig. 18). In claim 11 Bayerlein describes using a plurality of bearings at various elevations to provide a desired shape to the profile of the running surface (Bayerlein '169 col. 34 lines 13-23). Thus, the upper point of the bearing forms the desired contour.

71. This is consistent with the Court's claim construction: "the running surface substantially corresponds to the shape of the top profile of the rail with bearings." Claim Construction Ruling, p. 9. The profile of the running surface is enforced by gravity and slack in the running belt. (Bayerlein '169, col. 13, 50-58; col. 34, 13-22). Following the claim construction process, and consistent with the asserted patents' specifications and claims, the frame and the bearing rail are separate elements.[30]

72. The bearing rail, whose top surface corresponds to the desired contour to the running surface, must be fixed relative to the running surface to perform this function. One way to fix the bearing rail is to attach it to a frame, a separate structure that provides the geometry and load support for the entire structure. (See Claim Construction Ruling, p. 7).

[30] "As conceded by Woodway, the bearing rails are 'elements separate and distinct from the treadmill frame.'"

73. Bayerlein '169 teaches that it is advantageous for safety to constrain the rear shaft to rotate in only one direction (Bayerlein '169 col. 26, 65-67; col. 27, 1-6); a PHOSITA understands that this result could be accomplished several ways, and restricting belt rotation to one direction through the use of standard power transmission components is well known. Liu (above) recognized the safety and utility in constraining a running belt in this way in manual exercise equipment in 1997. Other prior art inventions cite unidirectional elements such as a ratchet and pawl, e.g., Magid. Exchanging different components to achieve the same results is nothing more than a predictable variation, and there is nothing novel in recognizing the benefit of directional control of a shaft in an endless belt exercise device because the art of unidirectional control is well known and includes a number of viable options. [31]

74. The claims of the '169 patent that require a unidirectional device joined to the rear shaft (exclusively), even though the specification teaches a unidirectional device joined to either the front or rear shaft. The prosecution history reflects that during prosecution, the applicant represented that it is an improvement over Magid to place the safety device on the rear shaft, an argument the examiner accepted in the context of that application.

75. However, Magid does not teach a "front" shaft mounted unidirectional device in the treadmill embodiment. To the contrary, the image from Magid above reflects otherwise.[32] In addition, the Liu patent teaches front and rear unidirectional front and rear shafts/rollers. Put

[31] See, for example, Liu, Magid, Hall, the Power Transmission Handbook or any standard material handling reference.

[32] Figure 2 and Figure 9 of Magid depicting the treadmill embodiment show the ratchet and pawl mechanism on the rear shaft when considered in the lexicon of Bayerlein. In contrast, Magid's stroller embodiment depicts a front mounted ratchet and pawl.

simply, making the design change to move the unidirectional device to the rear shaft, or to the front shaft, is not novel.

76. Bayerlein's other asserted claims include the following limitations: the bearing rail longitudinally extends along the frame and is longitudinally aligned with the pulley element of the front and rear shaft assemblies; the running belt is comprised of an endless belt that is comprised of a plurality of lateral slats and other endless belts.

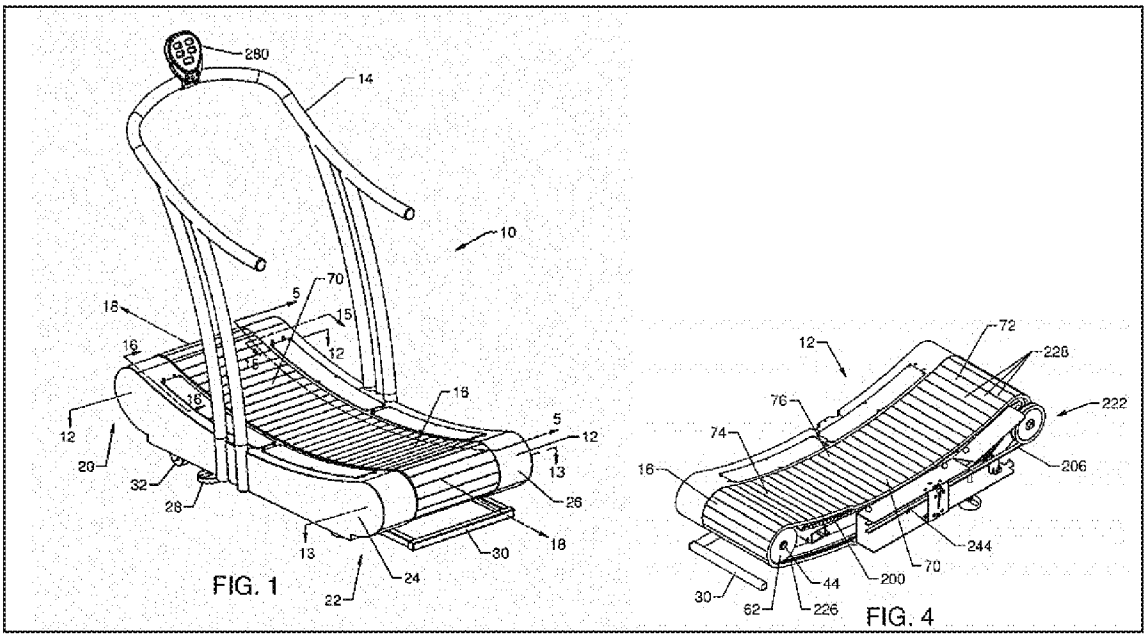



**Figure 14.** Bayerlein's '169 Figures 1 and 4.

77. Bayerlein '169 recognizes that other treadmills use motorized running belts to maintain the user in a somewhat constant location relative to the running surface while manual treadmills have to find a similar force from something other than a motor. (Bayerlein '169, col. 1, 60 – col. 2, 2). Bayerlein '169 teaches that the curved profile of '169's running surface provides the ability for a user to walk or run, by the action of gravitational force upon weight of the user's body to keep the user in the somewhat constant location relative to the running surface. This is due to the user's foot interacting with the running belt relative to the lowest point of the running belt, causing rotation of the running belt.

78. Bayerlein '169 teaches a definition of the running surface's profile, substantially speaking, to be set by a radius of curvature greater than five feet, within Hall's prior art teaching of a profile having a radius of curvature greater than 4 ½ feet. No asserted claims include a limitation relating to specific curvature of the running surface.

79. Bayerlein '169 also identifies that without slack, the running belt and therefore running surface would not take the shape of the structure beneath it. (Bayerlein '169, col. 13, 50-58). Bayerlein '169 teaches that the weight of the running belt acts in conjunction with the length of the endless belt and the distance between the front and rear pulleys to maintain the curved running surface shape. Bayerlein also allows for the use of a fore-aft shaft synchronizing system to enforce a differential in running surface speed between the front and rear of the running belt to create slack in what would otherwise default to a taught belt system.

**2. U.S. Patent No. 9,039,580 ("Bayerlein '580")**

80. I have reviewed the asserted claims for the self-powered treadmill taught by Bayerlein '580 (1, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 20, and 25), which is a continuation of the '169 and has the same specification. Bayerlein '580 describes manually operated treadmills having a treadmill with a front shaft rotatably coupled to the treadmill and a rear shaft rotatably coupled to the treadmill frame at the rear end. The treadmill also has a safety device permitting rotation of the shaft in only one direction. Additionally, the running belt includes a curved running surface upon which a user of the treadmill may run, configured to allow the user to manually control the speed of the running belt and to facilitate maintenance of a contour of the running belt. The '580 patent does include some other limitations in addition to those asserted from the '169, including adjustable feet(see, for example Claims 19 and 20).

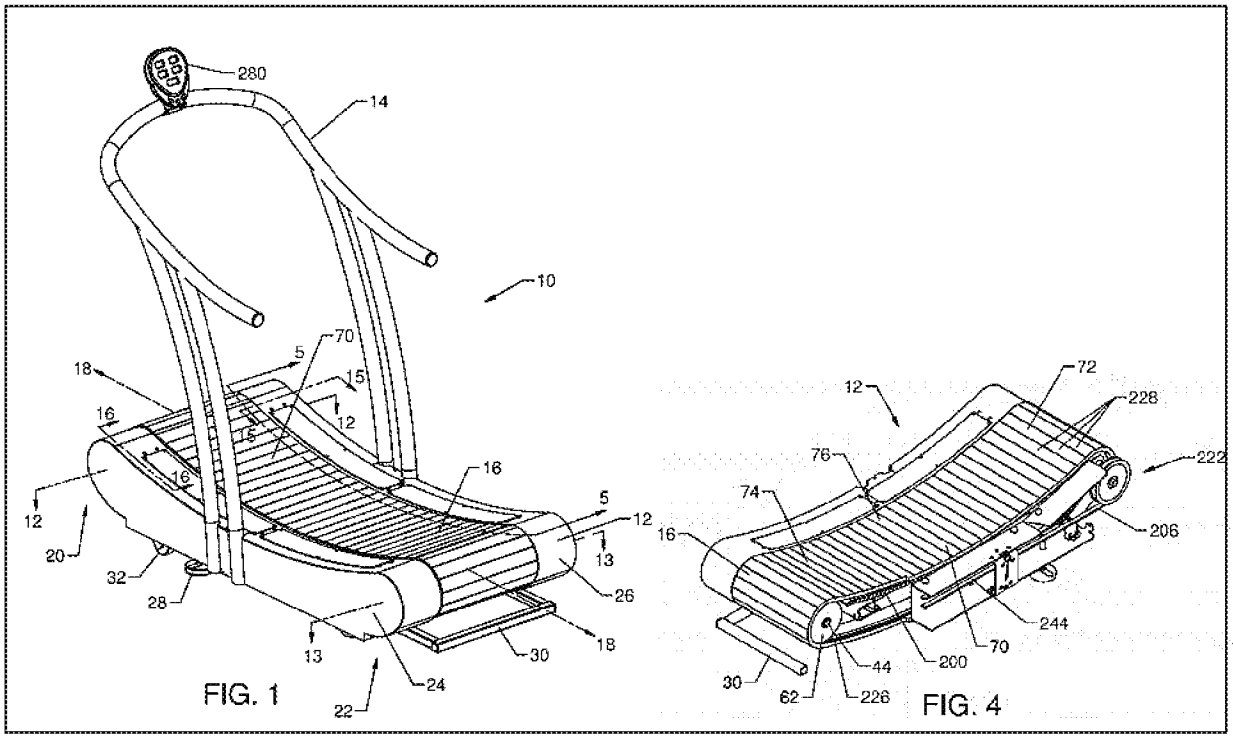



**Figure 15.** Bayerlein '580 Figures 1 and 4.

81. Consistent with the prior art, Bayerlein '580 recognizes that other treadmills use the force of motorized running belts to maintain the user in a somewhat constant location while manual treadmills have to find a similar force from something other than a motor. Bayerlein '580 notes that motorized treadmill belts must overcome "significant" sources of friction and later on teaches a secondary idler pulley mechanism to increase the Bayerlein '580 running belt's friction (Bayerlein '580, col. 1, 56-60; col. 21, 19-22). Bayerlein '580 teaches that the curved profile of the running surface provides the ability of a user the ability to walk or run, by the action of gravitational force upon weight of the user's body. This is due to the user's foot interacting with the running belt relative to the lowest point of the running belt; causing rotation of the running belt[33] (Bayerlein '580, col. 1, 58-62) consistent with the prior art.

82. Bayerlein states that the curvature of the running surface, substantially speaking, may be defined by more or less than three portions, leaving the mathematical description (a

[33] The user "may walk or run, wherein gravitational force acting upon weight of the user's body on the running belt relative to the lowest point of the running belt causes rotation of the running belt, front shaft, and the rear shaft without the aid of a motor."

"polynomial" between orders 1 and 4) of the running surface profile open to an unlimited collection of any straight or curved shape. Bayerlein also allows a definition of the running surface's profile, substantially speaking, to be set by a radius of curvature greater than five feet. Bayerlein describes potential lengths of a treadmill from 10 feet to 25 feet. A PHOSITA understands that if human user ran at the front of a 25-foot treadmill, there would be no difference detected between Cutter and either asserted patent.

83. Bayerlein '580 also identifies that without slack, the running belt and therefore running surface would not take the shape of the secondary support structure beneath it. Bayerlein '580 teaches that the weight of the running belt acts in conjunction with the length of the endless belt and the distance between the front and rear pulleys. Bayerlein '580 also allows for the use of a fore-aft shaft synchronizing system to enforce a differential in running surface speed between the front and rear of the running belt during usage that would create slack in the endless belt that is between the front and rear shaft but is otherwise taught.

84. In addition, Bayerlein '580 equates the use of a shaft assembly and pulleys with a roller to perform the same function (Bayerlein '580, col. 21, 54-63)[34]. Furthermore, the same portion also teaches that any number of pulleys may be used. In summary, Bayerlein '580 teaches that there is no difference between a roller and a plurality of pulleys in performing the function required of those components in the front and rear shaft assemblies.

85. Bayerlein '580 permits a track system instead of a front and rear shaft assembly or bearing rails. This embodiment teaches that the running belt profile is defined by the track and implemented with a "plurality of roller or wheel assemblies" (Bayerlein '580, col. 22, 20-67). Viewed in light of the equivalence between pulleys (wheels) and rollers as noted in the previous paragraph, a PHOSITA would readily understand the use of a single track with rollers instead of two tracks each having with bearings since bearings and pulleys function the same.

[34] "In the exemplary embodiment shown, the one or more front running belt pulleys is shown as a single, front running belt pulley 604 that is substantially a large roller.... According to other exemplary embodiments, any multiple of running pulleys may be used at one or both of the front end and the rear end, such as front running belt pulleys 62."

## VII. COMPARISON OF THE PRIOR ART TO THE ASSERTED CLAIMS

86. As set forth above, Woodway asserts claims 11, 12, 12, 13, 14, 15, 16 of '169 Bayerlein and claims 1, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 20, and 25 of '580 Bayerlein.

87. Each asserted independent claim generally includes the limitations of (a) curved running surface; (b) frame; (c) front shaft and rear shaft; (d) at least one bearing rail having a plurality of bearings, a running belt supported by the bearing rail and at least partially disposed about the front and rear shafts; and (e) a device to ensure unidirectional movement of the belt. (E.g., claim 11 of the '169 patent; claims 1, 11, and 19.[35] None of these limitations is novel over the prior art alone or in combination.[36]

### A. Curved manual treadmills

88. As is apparent from the face of the asserted patents Woodway does not claim to have invented a manual treadmill with a curved running surface. See, e.g., '169 patent, p. 2 (citing, among others, Chickering, Cutter, Schonenberger, Socwell (Fig. 1. depicted below, left), Schmidt (Fig. 1. depicted below, right). As already discussed, manual treadmills with a curved running surface pre-date both patents in suit:

[35] There are other additional limitations in dependent claims discussed further herein.

[36] This Report incorporates by reference Plaintiffs' Invalidity Contentions and the exhibits thereto.

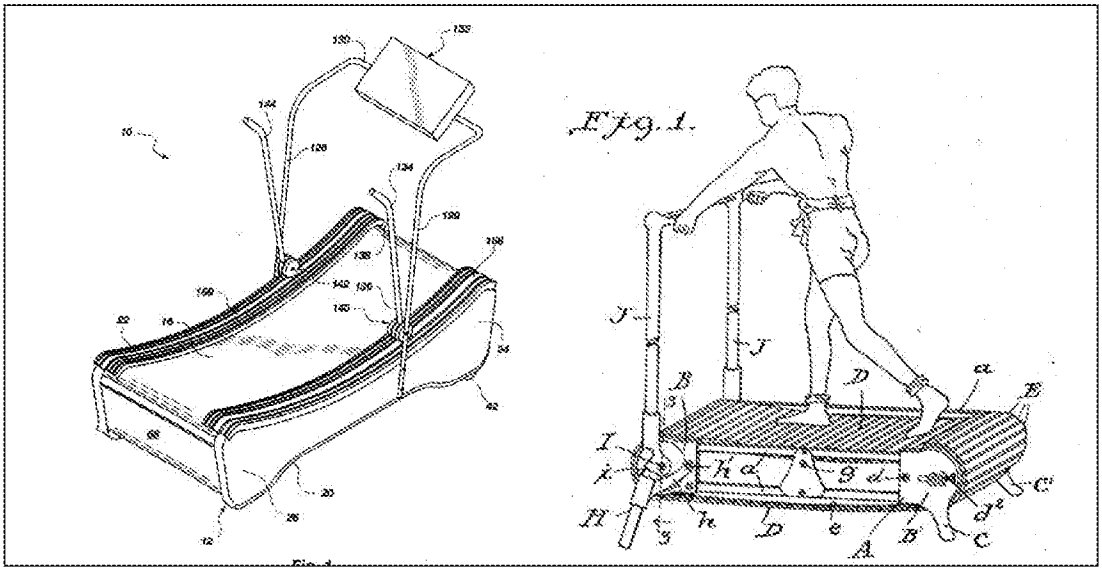



**Figure 16.** Figures from Socwell and Schmidt (left and right, respectively)

### B. Frame that provides structure and support for the treadmill

89. Woodway also did not invent a manual treadmill with a curved running surface that includes a frame for support. As part of claim construction, the Court determined that the term "frame" should be given its plain and ordinary meaning in light of the specification, which states that the frame "provid[es] structure and support for the treadmill."[37]

90. As described above, there are numerous prior art manual treadmills (with curved running surface and/or straight running surface profiles) that include a frame to provide structure and support for the treadmill. For example, Schönenberger (Fig. 2.) includes a frame "which provides for physical and structural support" using frame members (37) in any suitable profile (Schönenberger col. 4, 12-15):

[37] Claim Construction Ruling, p. 5-7.

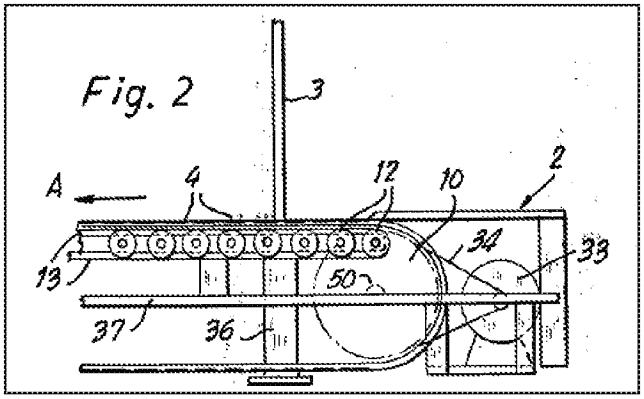



**Figure 17.** Figure 2 from Schönenberger

91. Schmidt discloses a curved running surface and a frame to provide structure and support for the treadmill (part A), which it describes as a "framework" that is "preferably provided with suitable supporting means" (Schmidt col. 1, 60-63, 75-76).

92. Cutter discloses a curved running surface and a frame as part of claim 1, which claims "a rigid frame having a pair of rigid frame members" as depicted in Fig. 1; a PHOSITA understands that rigid frame to provide structure and support for the treadmill:

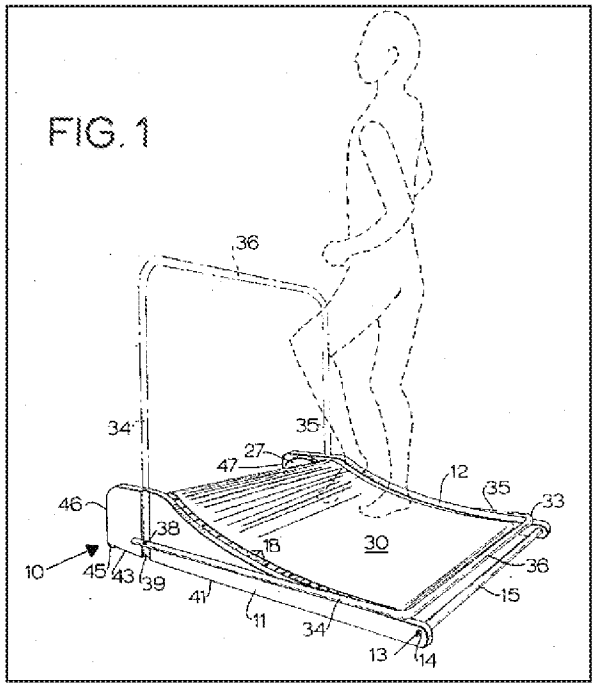



**Figure 18.** Figure 1 from Cutter.

93. Chickering discloses a treadmill whose running surface profile is not straight that includes a base (10) "which comprises an inclined rectangular frame" (Chickering col. 1, 65-68) made of any suitable material, including wood or metal as shown in the figure below:

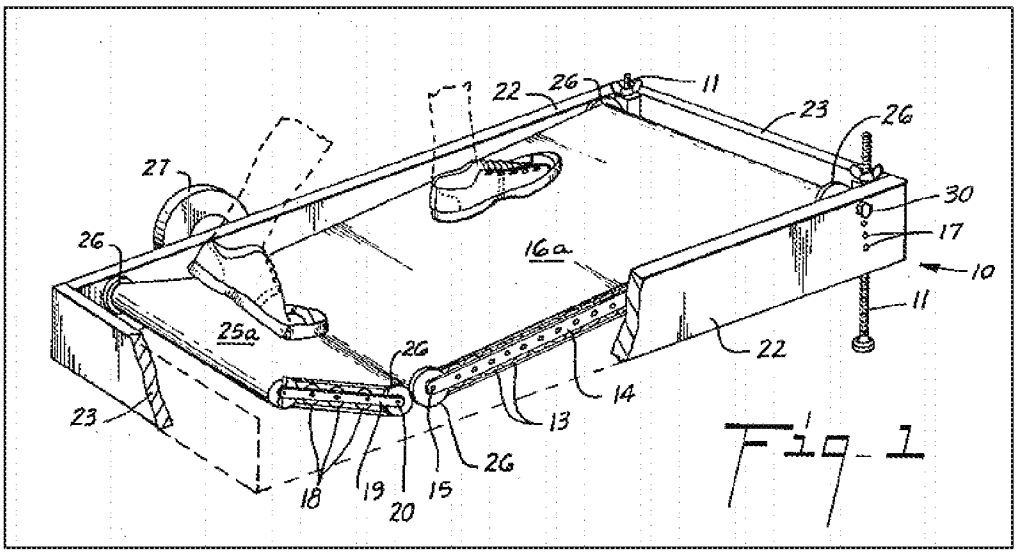



**Figure 19.** Figure 1 from Chickering.

94. Socwell discloses a support frame (part 12) with a first side and a second side for a "curved deck treadmill" (Socwell col. 4, 61-6 as shown in Figures 1 and 2):

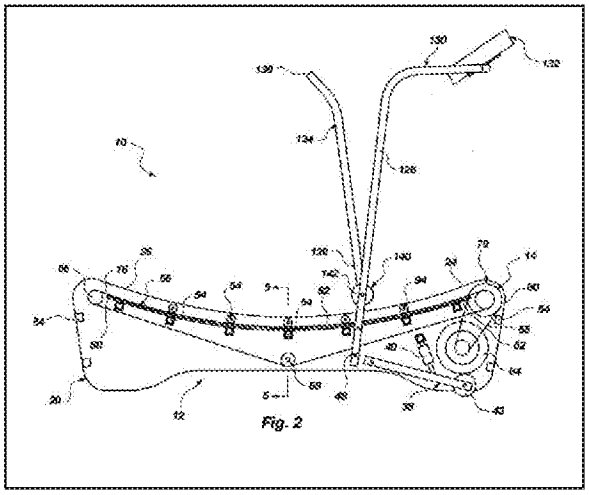



**Figure 20.** Figure 2 from Socwell.

95. Pasqualin discloses a leg powered device supported by a frame described as a "chassis," i.e., part 18, which a PHOSITA understands provides structure and support for the device (e.g., 0024), shown in Fig. 2.

96. Frazeur discloses a leg powered treadmill that includes "the machine frame A [which] consists of suitable side sills and uprights connected by cross-bars in a substantial structure adapted to support the operating parts." (Frazeur col. 1, 34-38).

97. Ziebell discloses and claims a leg powered treadmill that includes "the main frame [A] ... is constructed of any suitable material, preferably of bar-steel and comprises vertical uprights or supports..." (Ziebell col. 1, 34-37, claim 1).

98. Abelbeck discloses a treadmill that can be operated using body weight (Abelbeck col. 10, 9-13) and that includes a frame (part 38) that supports "support members" that include an upper race and a lower race (col. 6, 48-51) as shown in Figs. 2 and 3.

99. Eschenbach discloses a treadmill with a curved running surface that includes a frame with first and second roller assemblies rotatably mounted on the frame, and an endless belt trained about the first and second roller assemblies. (Eschenbach col. 2, 17-20).

### C. Front and Rear Shafts

100. As described above, there also are numerous prior art manual treadmills (with curved running surfaces and/or linear running surfaces) that include a front shaft and a rear shaft joined to the frame at each end.

101. For example, Schönenberger (see Figs. 3, 12) discloses a front shaft and a rear shaft coupled to the frame: "At either end of the apparatus (see FIGS. 3 and 12), and within the housing 2 are located rotatable drums, rollers, sheaves, sprockets, or the like, about which the surface 1, which is an endless loop, is placed. The rotatable elements, preferably in the form of two operating drums or rollers 10, are suitably journalled in the frame as seen at 50, FIG. 3." (Schönenberger, col. 4, 12-23).

102. Schmidt (Figs. 1 and 2) discloses a front shaft and a rear shaft coupled to the frame:

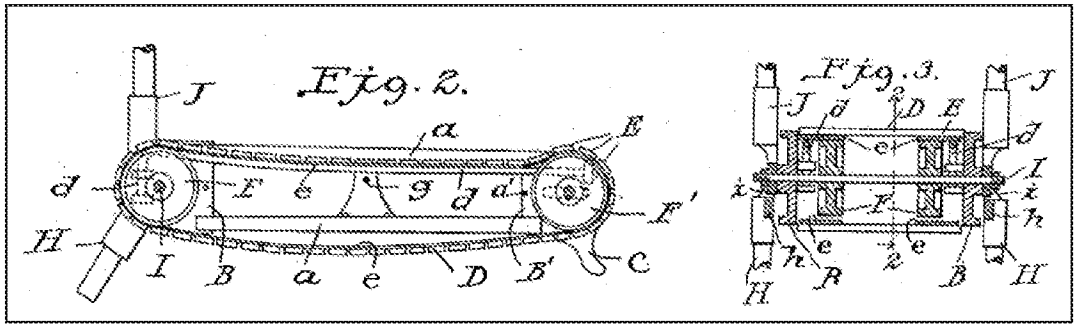



**Figure 21.** Figures 2, 3, from Schmidt.

103. Cutter discloses a front shaft (25) and a rear shaft (20) coupled to the frame at each end. (Cutter, col. 3, 1-6, 8-11).

104. Chickering discloses a front shaft and a rear shaft (29a, b) coupled to the frame (Fig. 3).

105. Socwell discloses a front shaft (78) and a rear shaft (86) coupled to the frame (12) at each end. (Socwell, col. 5, 4-12).

106. Pasqualin discloses a front shaft (13) and a rear shaft (14) coupled to the frame: "The treadmill 11 is constituted by two rollers, a first front roller 13, relative to the travel direction of the vehicle, and a second rear roller 14. The two rollers 13 and 14 are surrounded by a walkable belt 15, which is stretched between the rollers... the two rollers 13 and 14 and the supporting surface 16 are supported by the chassis 18." (Pasqualin, [0020-0026]).

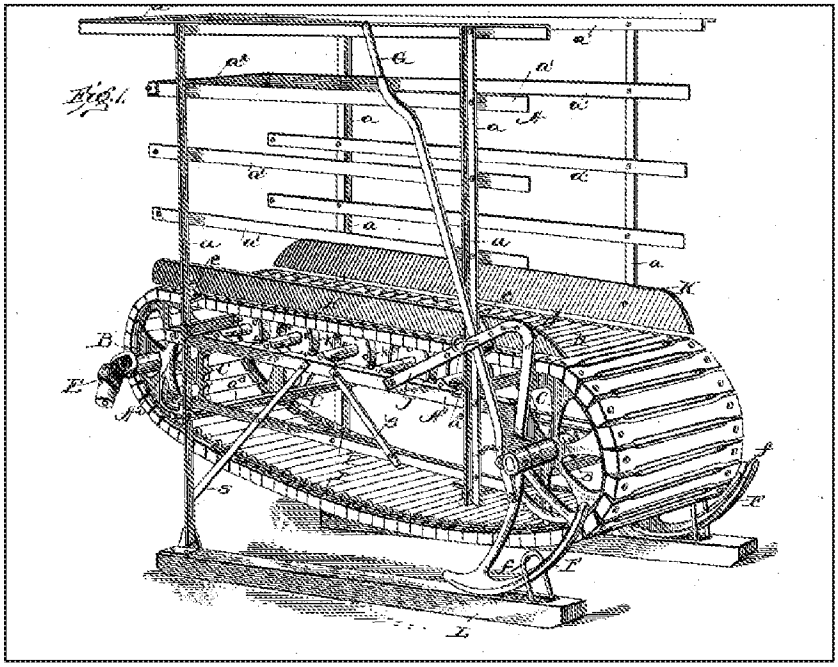


**Figure 22.** Figure 1 from Ziebell.

107. Ziebell (Fig. 1) discloses a front shaft and a rear shaft (B, B) coupled to the frame.

108. Abelbeck (Fig. 2) discloses a front shaft and a rear shaft coupled to the frame.

109. Eschenbach discloses a front shaft and a rear shaft coupled to the frame: "Belt 260 is trained to engage rollers 262, 264 which are rotatably attached at shafts 259, 261 to the framework (not shown)." (Eschenbach col. 6, 59-61).

### D. At Least One Bearing Rail Having A Plurality Of Bearings, A Running Belt Supported By The Bearing Rail And At Least Partially Disposed About The Front And Rear Shafts

110. During claim construction, the Court found that a bearing is "a device that supports, guides and reduces the friction of motion between fixed and moving machine parts. Claim Construction Ruling, p. 12. Woodway conceded that the bearing rails are "elements separate and distinct from the treadmill frame." Claim Construction Ruling, p. 7.

111. The Court further determined that "rotatably coupled" (found in claim 11 of the '169 patent) would be "understood by a person of ordinary skill in the art to contemplate a device connected such that one part of the connected element would remain stationary while another part

would rotate, because a person of ordinary skill would understand that bearings commonly have a stationary component and a rotatable component." Claim Construction Ruling, p. 20.

112. Finally, the Court found that "all four independent claims of the '580 Patent require the running belt to be supported, at least partially, by the bearing rail, in order to provide the running belt with its curved surface." Claim Construction Ruling, p. 23.

113. Roughly a century ago, Schmidt solved the same problem as Woodway claims it solved with the '169 patent and the '580 patent, i.e. inducing the running belt to assume and maintain the non-planar shape. (Schmidt col. 11, 17-29). The Schmidt invention, as recognized by art that followed, teaches a simplified and streamlined system that keeps the belt from walking side to side during usage.

114. Manual treadmills available circa Schmidt included substantially flat running surfaces that used rollers or wheels. Schmidt recognized that by using a curved running surface, a treadmill would keep the user in a relatively constant location relative to the running surface without the need for a motor or harness. Schmidt recognizes that a curved shape related to human anthropometric properties keeps a user in a relatively stable position on a manual treadmill, consistent with Hall's treadwheel style treadmills that came nearly 70 years later and were cited during the prosecution of both the '169 and '580 patents. As a result, Woodway's statement in the specification (Bayerlein '169 col. 6, 49-63) identifying advantages of a non-planar running surface is only a restatement of well-known principles.

115. In addition, Schmidt allows for a concave shape of the rails curved in accordance with the anthropometry of the user, as taught by Schmidt, but not limited to a specific curvature. Schmidt also includes an adjustment device in his treadmill that can alter the perceived rigidity of the running surface, but in fact, is accomplished by enforcing a change in shape of the support rails.

116. More importantly, Schmidt was the first to teach that the weight of the belt, pulling down on it by gravity combined with slack in the belt causes the belt to maintain contact with the rails below it, allowing the profile of the running surface to conform to the rails below it.

117. Together with the curved running surface, Schmidt could have used the pre-existing art and incorporated wheels or bearings into the rails (d) of the Schmidt device because this method was well known and understood. As articulated above, even before Schmidt, several teachings disclosed running belts, lateral slats and an endless belt mechanism to ensure running belt tracking. E.g., Briggs, Ziebell.

118. Schönenberger discloses (Figs. 3, 7) at least one bearing rail having a plurality of bearings, a running belt supported by the bearing rail and at least partially disposed about the front and rear shafts. Specifically, Schönenberger discloses a bearing rail (part 32), described as transversely located angle irons, T-rails, or channel rails or other suitable structural members supported on separate frame members (36, 37), a plurality of bearings (12), and a running belt ("U-belt") supported by the bearing rail and at least partially disposed about the front and rear shafts (col. 5, 36-63):

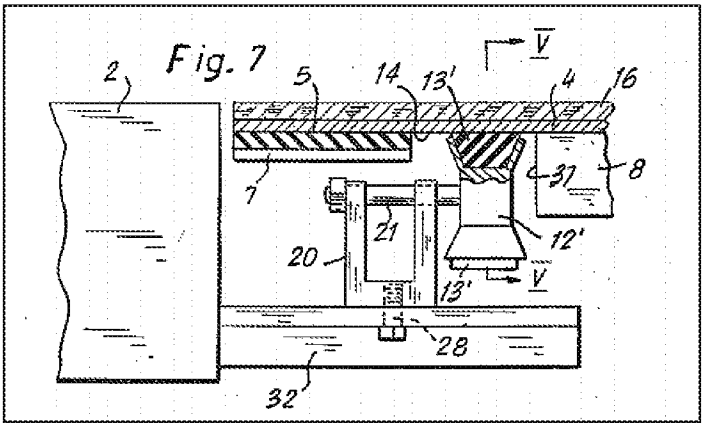



**Figure 23.** Figure 7 from Schönenberger.

119. Schmidt discloses at least one bearing rail, a running belt supported by the bearing rail and at least partially disposed about the front and rear shafts. As the Court noted and in accordance with ordinary power transmission technology, component (d), as described in Schmidt, provides a similar friction and wear reduction function taught as part of Bayerlein, see Bayerlein '580 col. 13, 1-12. That is, both sliding and rolling allow one object to contact and move across another. An explicit indication of anti-friction is not provided or claimed in Bayerlein. Therefore,

in accordance with the Court, in this instance a bearing rail with roller bearings is equivalent to a bearing rail with a bearing plate intended for sliding contact.

120. With or without roller bearings as the friction reducing element, the running surface's profile corresponds to the shape of the bearing rail supporting it, and during operation, the running belt moves relative to the rails. In sum, a PHOSITA would recognize that the two means are equivalent and that the use of roller bearings is substituting well known components to achieve the same results already achieved by the prior art.

121. Cutter discloses at least one bearing rail having a plurality journaling sockets located on the inside face of the frame side members and arranged to provide a curving path; and part 18 described as rollers), a continuous running belt (30) supported by the bearing rail and at least partially disposed about the front and rear shafts (25, 20). (Cutter col. 3, 1-11, 33-34).

122. Chickering discloses at least one bearing rail (14, shown in Fig. 1 as distinct from the side wall of the frame (22)) having a plurality of bearings (13), a running belt (16, 28) supported by the bearing rail and at least partially disposed about the front and rear shafts (26, 29a, b). (Chickering col. 2, 27-49; Fig. 3).

123. Socwell discloses at least one bearing rail (94, described as one or more belt securing assemblies which provide a means for retaining the endless belt 16 in a curvilinear configuration) having a plurality of bearings (98 [roller], 96 [mounting bracket]), a running belt (16) supported by the bearing rail and at least partially disposed about the front and rear shafts (78, 86). Col. 9, 44-65. Socwell expressly recognizes that "it will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein." (Socwell, col. 9, 6- col. 10, 2).

124. Pasqualin discloses at least one bearing rail (17) having a plurality of bearings (17a), a running belt (15) supported by the bearing rail and at least partially disposed about the front and rear shafts (13, 14). (Pasqualin [0020-0026]).

125. Frazeur discloses at least one bearing rail (track, B which is bolted to the frame) having a plurality of bearings (C, which travel around the track), a running belt (endless belts of lags, F) supported by the bearing rail and at least partially. See Frazeur Fig. 4.

126. Ziebell discloses (in claim 4) at least one bearing rail (identified as an auxiliary frame [A'] mounted and maintained "upon said main frame or support [A]") having a plurality of bearings (described as sprockets or bearing wheels, k), a running belt supported by the bearing rail and at least partially disposed about the front and rear shafts (B). See Ziebell Fig. 1.

127. Abelbeck discloses at least one bearing rail (identified as the upper race 40 and lower race 42) having a plurality of bearings (identified as a support member (36) which can be a wheel or a ball bearing), a running belt (identified as deck members) supported by the bearing rail and at least partially disposed about the front and rear shafts. See Abelbeck Figs. 2, 4.

128. Eschenbach discloses at least one bearing rail (described as flexible linking) having a plurality of bearings (described as idlers), a running belt (described as an endless belt 12) supported by the bearing rail and at least partially disposed about the front and rear shafts. (Eschenbach, Col. 2, 26-38, 48-55).

**E. A Device to Ensure Unidirectional Movement of the Belt**

129. As described above, at the relevant period of time (i.e. before the priority date of the patents in suit), ISO/EN defined a treadmill as "training equipment with a unidirectional moving surface on which a walking or running activity can take place where the feet are free to leave the moving surface." ISO 20957-6:2005/EN 957-6:2001 (emphasis added.)

130. As a result, it is obvious to a PHOSITA that a unidirectional moving surface is not a novel concept. Bayerlein '169 suggests a number of well known, commodity power transmission products that can ensure unidirectional movement of a belt: a one-way bearing assembly, locking systems, taper locks, user operated pin systems, or a band brake with a lever. Bayerlein col. 29, 23-27.

131. Prior art almost 100 years old teaches the basic principle of using a device to ensure unidirectional movement of a moving belt.

132. For example, the Briggs patent described above discloses a flywheel device to ensure consistent and expected movement of the belt. The flywheel is joined to the front shaft.

133. Frazeur also discloses a device to ensure unidirectional movement of the belt in the form of a flywheel as well as a handbrake (O) to stop the running belt from moving through interference with the flywheel (M). See Frazeur Fig. 1 (Fig. 3 of this Report).

134. Schmidt also discloses a device to ensure unidirectional movement in that the reference explicitly teaches an option for freely rotating or stationary front and rear shafts, as desired. (Schmidt, col. 1, 73-74.) With this insight, a PHOSITA would recognize that a roller could be made to rotate or be stationary by joining common power transmission elements to the roller or shaft; elements like a ratchet and pawl.

135. Liu teaches and claims that the continuous belts are wound around rotary shafts (22, 23) which "can rotate in only one direction," so the "rolling belt 24 can only be moved rearward." (Liu, col. 2, 11-16, 31-36).

136. The Haber patent, entitled "User Propelled Treadmill" teaches a self-propelled treadmill with a one-way clutch (22) "of conventional design," i.e. a design understandable to a PHOSITA to perform the same function as the other unidirectional devices available by that 1995 time frame.

137. Magid also teaches a ratchet and pawl "unidirectional control mechanism" on a rear shaft (Magid col. 4, 47-49) that restricts the running belts of the treadmill to movement in a single direction of travel.

138. In sum, a PHOSITA would understand the utility of a one way clutch to enforce a desired shaft rotation as noted in Schmidt. Liu's unlimited teaching conveys to a PHOSITA that there exists a known method to enforce the single direction of rotation. Magid also discloses an explicit method to enforce the single direction of shaft rotation: the ratchet and pawl joined to the shaft. The ratchet and pawl is a simple power transmission device similar to a one way bearing.

The one way bearing is also a common power transmission component used in mechanical devices like conveyors.[38]

**F. Additional Dependent Claim Limitations.**

139. Dependent claim 12 of Bayerlein '169 adds an additional limitation of "the bearing rail longitudinally extends along the frame and is longitudinally aligned with at least one front belt pulley and one of the at least one rear belt pulley. As set forth above Ziebell meets that limitation and teaches a treadmill with a frame and a running belt disposed about a front and rear shaft that each are rotatably joined to the frame. The front and rear shafts are part of an assembly that includes front and rear pulleys. See Ziebell Figure 1. As previously described and in Plaintiffs' Invalidity Contentions, this limitation is a predictable variation that achieves the same result as the cited prior art (e.g., Socwell, Pasqualin).

140. Furthermore, rails (d) in Schmidt are also longitudinally aligned with the front and rear pulleys.

141. Dependent claims 13 and 14 of Bayerlein '169 adds an additional limitations of a running belt that comprises a plurality of laterally extending slats including endless belts. As set forth above, and in Plaintiffs' Invalidity Contentions, at least Briggs, Frazeur, and Ziebell meet this limitation.

142. Dependent claims 13 and independent claim 19 of Bayerlein '580 add an additional limitation of wheels. As set forth above and in Plaintiffs' Invalidity Contentions, this limitation is a predictable variation that achieves the same result as the cited prior art (e.g., Socwell, Cutter, Magid). Nevertheless, wheeled devices abound that engage with the floor at will and are not unique (for example, a quick google image search, not a patent search, located US6241638 filed in 1998 for a treadmill that also has wheels not in contact with the floor while in use).

[38] See, for example, page 5-79 of the Power Transmission Handbook. Copyright 2006

143. Dependent claim 14 and independent claim 19 of Bayerlein '580 include a limitation of feet that are adjustable. Not only is that limitation met by the references included herein and in Plaintiffs' Invalidity Contentions, but it is also expressly shown by Chickering. For other examples of adjustable feet see Ziebel, Morairty, and Schmidt. Even Magid allows for the base to be mounted on other objects so that it is off the ground, Magid calls these supporting frame. Adjustable feet are presented in a number of ways, with Ziebel, it is a cam system, with Morairty it is a single screw adjustment.

144. Dependent claims 10, 14 and independent claim 19 of Bayerlein '580 include a limitation of a handrail to provide a support structure for a use. As set forth above, and in Plaintiffs' Invalidity Contentions, at least Eschenbach, Frazeur, and Cutter meet this limitation. In addition, ISO/EN (2005) requires that treadmills have a handrail either on the front, or on each side.

### G. Motivation to Combine References

145. Manually operated treadmills are perceived as more environmentally friendly devices (e.g. Hall '047) that do not necessarily require external power sources or motors or flywheels to maintain motion. There are also gyms in the United States that advertise power generation through the use of self-powered exercise equipment as a gym feature or benefit.[39] Power generation using treadmills goes back to the earliest patents cited above and frequently include clutches as part of the invention (e.g. Briggs, Frazeur, Ziebell, Hall).

146. As clearly laid out in the prior art (e.g. Hall, Morairty, Schmidt, Cutter, Chickering) a curved surface can be implemented as an effective means to keep the user in a relatively stable position relative to the running surface. As described by Hall, Schmidt, and Cutter, curving the surface in relation to the runner provides many positive attributes in a treadmill device.

147. Schmidt's solution, patented in 1917, simplifies the existing treadmill art. Modern treadmills generally follow this advance and utilize a friction board, or friction bed, similar to

[39] http://content.time.com/time/business/article/0,8599,2032281,00.html (2010)

conveyor technology which is generally more cost effective and weight saving. However, as is known, even with low friction surfaces on the friction bed and belts impregnated with lubricant, sliding frictional forces do increase with increased compressive force between the belt and the friction bed. In the age when obesity is a health concern since more than a third of United States adults are obese[40] increased effort due to friction may be a perceived concern. A PHOSITA understands that such a concern may motivate use of rollers or roller bearings despite the increase the cost and complexity of their device in an effort to minimize friction that may not have been required for typical users in 1917.

148. Furthermore, as is well known in the art, flywheels are commonly used to store kinetic energy of moving devices, e.g. belts. It is known that a flywheel attached to a moving belt will cause the motion of the belt to be resistive to changes in speed, useful for a treadmill. As part of this resistance to change in speed is also a resistance to changing direction. A flywheel is a simple device and present on a number of the earliest treadmill patents (e.g. Briggs). The drawback of using a flywheel is that it is potentially heavy, large, and needs to be balanced for the speed ranges at which it will be used. One way bearings and ratchet and pawls do not have the large weight and size requirements of flywheels. Modern technology has made ratchets and one way bearings reliable and cost effective. Combined with their small relative size and light weight they are obviously ideal to combine with devices that have heavy running belts.

[40] https://www.cdc.gov/obesity/data/adult.html, Last accessed February 27, 2017

149. It is my opinion that a PHOSITA would appreciate and understand the combination of references cited herein to meet the limitations of the asserted claims of the patents in suit.

## A. CONCLUSION

150. Based on my education, training, experience, and review of the prior art and the other documents considered, it is my opinion that each of the asserted claims of the '580 and '169 Patents is invalid.

Dated: March 2, 2017



Robert S. Giachetti

# Exhibit A

## Curriculum Vitae of Robert Giachetti, Ph.D., P.E.

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## Professional Profile

Dr. Giachetti has experience solving technical problems in a variety of industries including product development, evaluation, assistance with recalls, and mechanical performance of systems. His academic emphasis included topics in mechanics of materials, non-linear continuum mechanics, non-linear dynamics, vibrations, and finite element analysis. His background in mechanics and instrumentation allows him to easily build, monitor, or analyze complex systems. These systems have ranged from wire ropes, cookware, and child carriers to transducers, machine presses and railcars.

Prior to joining Exponent, Dr. Giachetti worked in industry designing steel coiling machinery and overhead lifting devices. While performing his graduate research, he worked in the Biomechanics laboratory at the University of Illinois investigating factors which increase the contact stresses between adjacent components in total knee replacements through three dimensional computer modeling and finite element analysis. His doctoral research in the University of Wisconsin's Biomechanics Laboratory involved characterizing the underlying control strategy of bipedal stability based on the end-point force output of the lower limbs.

Dr. Giachetti has substantial experience utilizing LabView to create specialized data acquisition solutions that implement multiple, simultaneous sensing technologies for real-time analysis. His acquisition solutions have included accelerometers, potentiometers, thermocouples, GPS devices, pressure transducers, force plates, and low-cost web cams. This technology has been used in various ways, including: two-dimensional optical motion capture, custom whole body occupant vibration analysis, custom cyclic load testing, and temperature acquisition.

Dr. Giachetti also has extensive experience utilizing AutoCAD, Ansys, Matlab, Mathcad, EES, and 3DSSPP.

## Academic Credentials & Professional Honors

Ph.D., Mechanical Engineering, University of Wisconsin, Madison, 2008

M.S., Mechanical Engineering, University of Illinois, Chicago, 2000

B.S., Mechanical Engineering, Marquette University, 1997

## Licenses and Certifications

Licensed Professional Engineer, Illinois, #062062996

ASTM Committee F08 on Sports Equipment, Playing Surfaces, and Facilities - voting member

ASTM Committee F15 on Consumer Products - voting member

Session Organizer: ASME 2015 Power Transmission and Gearing Conference

## Academic Appointments

University of Wisconsin-Madison, Departments of Mechanical Engineering and Kinesiology

- Lecturer, Introduction to Dynamic Systems (Vibrations)
- Teaching Assistant, Introduction to Biomechanics
- Teaching Assistant, Introduction to Dynamic Systems

University of Illinois at Chicago, Department of Mechanical Engineering

- Teaching Assistant, Engineering Economy

Marquette University, Department of Physics

- Teaching Assistant, General Physics

## Prior Experience

Intern, BioTechPlex, 2001

Project Engineer, Braner USA, 1998-1999

Estimator and Engineer, Alloy Sling Chain Industries LTD., 1998

## Publications

Perlmutter, S, Cades DM, Heller, MF, Giachetti, RS, Sala JB, Arndt, SA. Effects of mobile technology use on walking. Proceedings, 58th Human Factors and Ergonomics Society Annual Meeting, 2014.

Giachetti R, Danek K. Analytical model for estimating knee loads during ladder climbing. ASME 2013 International Mechanical Engineering Congress & Exposition, 2013.

Giachetti R, Weaver B, Trimble J. Real-time monitoring and analysis of whole body vibration in locomotive engineers. 4th International Conference on Whole-Body Vibration Injuries, 2009.

Gruben KG, Giachetti RS, Lazarus JA. Directional control of foot force in Parkinson disease. The Movement Disorder Society's 12th International Congress of Parkinson 's Disease and Movement Disorders, 2008.

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Amirouche FM, Gonzalez M, Aram L, Giachetti RS, Mahr C. A contact pressure based prosthetic fitting device for a Total Knee Arthroplasty (TKA). Proceedings, Engineering of Sport 3rd International Conference and Exhibition, 2000.

Giachetti R, Amirouche F, Aram L, Gonzalez M. Biomechanical problems with contact pressure distribution in the knee joint after total knee arthroplasty. Proceedings, ASME Winter Conference, 2000.

## Additional Education & Training

American Gear Manufacturers Association (AGMA) Training: Detailed Gear Design - Beyond Simple Service Factors

## Peer Reviewer

ASME 2013 International Mechanical Engineering Congress & Exposition (IMECE), San Diego CA, November 15-21. Track: Dynamics, and Control in Biomechanical Systems.

ASME 2011 International Design Engineering Technical Conference & Computers and Information in Engineering Conference (IDETC/CIE),Washington, DC, August 28-31. Track: Surface Engineering and Tribology.

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**Robert S. Giachetti Ph.D., P.E.,**
**Managing Engineer**

**Testimony**

*Rouse v. Borkwoski*, Circuit Court of the Nineteenth Judicial Circuit, Lake County Illinois.

*Jenkins v. United Access of Kansas City, LLC, et al.*, District Court of Wyandotte County, Kansas Civil Court Department.

# Exhibit B

## Documents Considered

# Documents Considered:

1. Complaint, *Woodway USA Inc. v. Samsara Fitness LLC*, filed Aug. 11, 2015 in the United States District Court for the Eastern District of Wisconsin
2. Complaint, *Chapco Inc. and Samsara Fitness, LLC v. Woodway USA, Inc.*, filed November 16, 2015 and December 29, 2015 (to correct error in caption) in the United States District Court for the District of Connecticut (the "Connecticut litigation")
3. Woodway USA Inc. ("Woodway") Counterclaim, filed July 26, 2016
4. Woodway's Proposed Amended Counterclaim, filed February 27, 2017
5. Woodway's Preliminary Infringement Contentions, dated April 18, 2016, including Appendix A and Appendix B
6. Plaintiffs' Preliminary Non-Infringement Contentions, dated May 27, 2016, including Exhibits A and B
7. Woodway's Supplemental Preliminary Infringement Contentions, dated July 18, 2016, including Appendix A
8. Plaintiffs' Supplemental Non-Infringement Contentions, dated August 8, 2016, including Exhibits A through D
9. Claim Construction Ruling, Filed Dec. 8, 2016
10. Plaintiffs' Opening Claim Construction Brief, filed July 25, 2016
11. Plaintiffs' Opening and Responsive Claim Construction Brief, filed August 22, 2016
12. Woodway's Responsive Claim Construction Brief, filed September 6, 2016
13. Plaintiffs' Disclosure of Disputed Claim Terms, Proposed Constructions and Intrinsic Evidence, dated June 17, 2016, including Exhibit A
14. Plaintiffs' Preliminary Invalidity Contentions, dated May 27, 2016, including Exhibits A-I

15. Plaintiffs' Supplemental Invalidity Contentions, dated August 8, 2016, including Exhibits J and K
16. Woodway Curve Owner's Manual, p. 22
17. File history of U.S. Patent No. 8,986,169
18. File history of U.S. Patent No. 9,039,580
19. Patents and Patent Applications:
    a. U.S. Patent No. 8308X (Briggs) 1834
    b. U.S. Patent No. 411,986 (Frazeur), 1889
    c. U.S. Patent No. 641,424 ( Ziebell) 1900
    d. U.S. Patent No. 767,221 (Hagen) 1904
    e. U.S. Patent No. 759,296 (Morairty) 1904
    f. U.S. Patent No. 783,769 (Wright) 1905
    g. U.S. Patent No. 931,394 (Day) 1909
    h. U.S. Patent No. 1,211,765 (Schmidt) 1917
    i. U.S. Patent No. 2,117,957 (Heller) 1938
    j. U.S. Patent No. 2,842,365 (Kelley) 1958
    k. U.S. Patent No. 3,637,206 (Chickering) 1972
    l. U.S. Patent No. 3,642,279 (Cutter) 1972
    m. U.S. Patent No. 4,334,676 (Schonenberger) 1982
    n. U.S. Patent No. 4,389,047 (Hall) 1983
    o. U.S. Patent No. 4,544,152 (Taitel) 1985
    p. U.S. Patent No. 4,659,074 (Taitel) 1987
    q. U.S. Patent No. 5,411,455 (Haber) 1995
    r. U.S. Patent No. 5,432,612 (Holden) 1995
    s. U.S. Patent No. 5,470,293 (Schoenenberger) 1995
    t. U.S. Patent No. 5,538,489 (Magid) 1996
    u. U.S. Patent No. 5,575,7402 (Piaget) 1996
    v. U.S. Patent No. 5,577,598 (Schoenenberger) 1996
    w. U.S. Patent No. 5,669,856 (Liu) 1997
    x. U.S. Patent No. 5,709,632 (Socwell) 1998
    y. U. S. Patent No. 6,042,514 (Abelbeck) 2000
    z. U.S. Patent No. 6,053,848 (Eschenbach) 2000
    aa. U.S. Patent No. 6,500,097 (Hall) 2002
    bb. U.S. Patent No. 6,740,009 (Hall) 2004
    cc. U.S. Patent No. 6,893,382 (Moon) 2005
    dd. U.S. Patent No. 8,986,169 (Bayerlein) 2015
    ee. U.S. Patent No. 9,039,580 (Bayerlein) 2015
    ff. Chinese Patent 201333278, 蔡岳璋, Oct 28. 2009

gg. German Patent No. 202006005995 (Zeitler) 2006
hh. U.S. Patent Application US 2007/0123396 (Ellis) 2005
ii. U.S. Patent Application US 2005/0009668 (Savettiere) 2005
jj. U.S. Patent Application US 2006/0287165 (Pasqualin) 2006
kk. U.S. Patent Application US 2008/0020907 (Lin) 2008
ll. U.S. Patent Application US 2010/0216607 (Mueller) 2010
mm. U.K. Patent Application, 2,223,685 (Chen) 1988

20. "Appendix A" Claim Chart for U.S. Patent No. 8,986,169
21. "Appendix B" Claim Chart for U.S. Patent No. 9,039,580
22. "Exhibit A" to Non-Infringement Contentions for U.S. Patent No. 8,986,169
23. "Exhibit B" to Non-Infringement Contentions for U.S. Patent No. 9,039,580
24. Owners Manual for NordicTrack WalkFit Classic Treadmill
25. ISO 20957-6:2005
26. OSHA 1926.307
27. OSHA 1926.219
28. "Power Transmission Handbook" 2009, Fourth Edition, 2nd Printing, by Power Transmission Distributors Association
29. http://www.mpiwg-berlin.mpg.de/resrep00_01/Jahresbericht_2_2_section.html
30. http://www.museivaticani.va/content/museivaticani/en/collezioni/musei/museo-gregoriano-profano/Mausoleo-degli-Haterii.html
31. www.gettyimages.com/detail/463782507 Animal treadmill c. 1872, Museum of Science and Industry, Chicago.
32. http://www.gettyimages.com/license/542395667 1930 era treadmill

# EXHIBIT 2

UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| CHAPCO, INC. and SAMSARA, LLC | : | CIVIL ACTION No. |
| | : | 3:15cv01665 (JCH) |
| Plaintiffs, | : | |
| | : | |
| v. | : | |
| | : | |
| WOODWAY USA, Inc. | : | |
| | : | |
| Defendant. | : | March 30, 2017 |

**EXPERT REPORT OF DR. ROBERT GIACHETTI**



1508167.000 - 8215

## I. INTRODUCTION AND SUMMARY OF MY OPINIONS

I have been retained by counsel for Samsara Fitness, LLC ("Samsara") and Chapco Inc. ("Chapco") to analyze the expert report of Kim Blair, Ph.D., dated March 2, 2017 (the "Blair Report"), regarding Woodway USA, Inc.'s ("Woodway") allegations that Chapco and Samsara infringe certain claims of U.S. Patent 9,039,580 titled Manual Treadmill and Methods of Operating The Same (herein the '580 patent), as well as U.S. Patent 8,986,169 Manual Treadmill and Methods of Operating The Same (herein the '169 patent).

In forming my opinion, I considered the documents listed in Appendix A, including the Blair Report and the Exhibits therein. I relied on my education, training, and experience. I also examined a TrueForm Runner Treadmill. My first hand detailed examination of the TrueForm Runner included photo documentation and disassembly of the unit. Thumbnails of my photographs of my examinations of the TrueForm Runner Treadmill are attached in Appendix B.

I have not prepared exhibits or demonstratives for trial at this time; I reserve the right to prepare them, as necessary, in accordance with the materials presented as part of this report.

## II. SUMMARY OF OPINIONS

Based on my research, analysis and examination of the accused TrueForm Runner Treadmill, it is my opinion, to a reasonable degree of scientific and engineering certainty, that the accused TrueForm Runner treadmills do not literally infringe Claims 11-15 of the '169 patent or Claims 1, 4-6, 10-14, 18-20 or 25 of the '580 patent. The details of this opinion are set forth herein.

In evaluating Dr. Blair's infringement report, I have found points that are incorrect or unsupported by evidence. While the rationale for my opinion on these points is provided within this report, the points themselves are briefly identified below:

a. Dr. Blair's definition of a person having ordinary skill in the art is a person who is underqualified and, therefore, Dr. Blair's definition is incorrect.

b. Dr. Blair does not provide a basis for his opinion regarding the component of the accused devices he opines meets the frame limitation in the asserted claims.

c. The Blair Report inconsistently labels the element that it identifies as the bearing rail in the accused devices. Dr. Blair identifies "a bearing rail" in some places as Blair elements [6] and [7] in Exhibit F, for example, and then later identifies the "plurality of bearings" elements also as [6] and [7] in Exhibit F.[1] Despite the

[1] For example, see page 4 of Exhibit F: "via bearing rail [6] or [7]" and then later on page 8: "is supported by the plurality of bearings [6] and [7]"

inconsistent identification provided by Dr. Blair, neither of these elements meet a separate and distinct bearing rail limitation in the accused treadmills.

d. Contrary to Dr. Blair's assertion, it is my opinion that the term "support," as used in these patents, **does** require direct contact in this art[2].

e. Dr. Blair conflates the claim terms "having,[3]" "support,[4]" "couple,[5]" and "attach[6]" in his analysis (Blair Exhibits E and F). For example, the Blair Report purports that the term "couple" is "analogous" to the term "attach" (See for example, Exhibit F p. 21)). That is inaccurate. Although Dr. Blair opines that the terms "having," "support." "couple." and "attach" are all interchangeable, it is my opinion that these terms are not interchangeable.

f. I disagree with Dr. Blair's opinion on page 6 that the '169 and '580 patents present "novel safety enhancements" that solve the problem of unpredictable movement of a manual treadmill's running belt. At least one other patent (Magid) presented a one way rotary mechanism that cooperated with the rear shaft of a manual treadmill before the '169 and '580 priority dates. In regards to other safety features present on the accused devices, industry standards published before these patents' priority date require guards, foot platforms, and handrails.

The Blair Report, at Exhibits E and F, depicts the original and redesigned TrueForm Runner for the purposes of Dr. Blair's infringement analysis. Dr. Blair opines that the redesigned TrueForm Runner literally infringes claims 1,4-6,10-14,18-20, and 25 of the '580 patent,[7] and I disagree with that opinion for the reasons set forth below that are based, in part, on an analysis of the frame and bearing rail limitations, an analysis absent in the Blair Report.

Dr. Blair also opines that the original TrueForm Runner literally infringes the asserted claims of the '169 patent.[8] I disagree with that opinion for the reasons set forth below that are based, in part, on an analysis of the frame and bearing rail limitations, an analysis absent in the Blair Report. Dr. Blair does not opine that the redesigned TrueForm Runer device infringes any claim of the '169 patent.

I also understand that Woodway (as the plaintiff) has the burden of proving infringement by a preponderance of evidence. In my opinion, Dr. Blair has not provided objective evidence sufficient to support his infringement opinion, much less the quantity of evidence necessary to show infringement by a preponderance of evidence.

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[2] Other technologies not included in the patents, such as levitating magnetic bearings, may support without direct physical contact but instead rely on direct electromagnetic interaction, which would also constitute "direct support."

[3] Ex F page 7. Ex F, page 38. Having → Support.

[4] Ex E page 2, Support→Couple.

[5] Ex E page 2, Support → Couple.

[6] Exhibit F page, 22 Couple→Attach.

[7] Blair Report Page 1.

[8] Blair Report Page 1.

## III. EXPERT QUALIFICATIONS AND EXPERIENCE

I am a Licensed Professional Engineer in Illinois, with over 10 years of experience in mechanical engineering. My experience in machinery and mechanisms spans numerous industries; I have worked directly designing mechanical systems and machinery and have consulted on the operation of machinery in various fields including rail, exercise equipment, and industrial machinery.

I am currently employed by Exponent, Inc. as a Managing Engineer. I joined Exponent in June 2008 after working in the Biomechanics Laboratory at University of Wisconsin-Madison and University of Illinois at Chicago where I focused my research on the forces within the knee joint and coordination of lower limb musculature as it relates to foot forces and balance during walking, standing, running, etc. While at the University of Wisconsin-Madison biomechanics lab, my research responsibilities included designing, developing and constructing equipment used to harness participants in efforts to analyze and characterize their lower limb force capabilities. These research responsibilities also involved the use and disassembly of treadmills to characterize force and balance capabilities of participants. As part of these research responsibilities, I reviewed studies focused on using treadmills and similar devices as rehabilitation devices (e.g., the "Locomat"). During this time, I also assisted in the preliminary development of a force measuring treadmill intended to dissociate the foot forces used in walking from the requirements imposed by upright posture.

My responsibilities with Exponent include engineering consulting and testing with respect to exercise equipment, consumer product and machinery design, product and machinery performance, accident reconstruction, and failure analysis. Prior to attending graduate school, I worked as a project engineer, designing industrial machinery at Braner USA and I worked as an estimator and designer at Alloy Sling Chain, IND. LTD.

I am an active member of the ASTM International committees[9] that oversee sports equipment and consumer products. I have been recognized as an expert in mechanical power transmission equipment and serve on the American Society of Mechanical Engineers (ASME) Power Transmission and Gearing Committee. I have also participated, by invitation, in the National Council of Examiners for Engineering and Surveying (NCEES) Mechanical Professional Activities and Knowledge Studies (PAKS) committee. This committee reviews and evaluates the problems and problem types that appear on the Mechanical Engineering Professional Engineering exam.

For nearly 18 years, I have worked in the area of machine design and biomechanical applications of machine design. These machines have ranged from chairs, to standard consumer level treadmills, to commercial weightlifting equipment and other specialized types of exercise equipment.

[9] ASTM Committee F08 on Sports Equipment, Playing Surfaces, and Facilities; and ASTM Committee F15 on Consumer Products.

My Curriculum Vitae is attached to my March 2, 2017, Report as Exhibit A along with my current four-year testimony list.

I am a salaried employee of Exponent. In 2017 Exponent charges an hourly rate of $315 for my time, plus reasonable expenses. I have no financial interest in the outcome of this case.

## IV. ANALYSIS

It is my understanding that a claim consists of a discrete number of required limitations or elements. For an accused device to infringe a patent claim, I understand that each and every element must be present in the accused device. Accordingly, if the accused device is missing one or more of the required limitations or elements, it does not literally infringe that claim.

I understand that Woodway is asserting independent and dependent claims. I understand that dependent claims are understood to include all of the limitations of the independent claim or claims from which they depend. Therefore, if a dependent claim incorporates another claim that the accused device does not infringe, then the accused device does not infringe the dependent claim, either.

My general approach in this report is to evaluate each of the asserted claims and to identify any missing required elements in the accused devices. In generating these rebuttal opinions, I have applied the constructions from the Court's Claim Construction Order to the asserted claims:

| **Disputed Term/Phrase** | **Court's Construction** |
|---|---|
| Frame | No further construction necessary. |
| Bearing Rail | A rail with bearings whose top profile corresponds to the shape of the running surface. |
| A safety device cooperating with the rear shaft | A safety device adjoined to the rear shaft. |
| Coupled | The joining of two members directly or indirectly. |
| Rotatably coupled | No further construction necessary. |
| A bearing rail having a plurality of bearings rotatably coupled to the at least one bearing rail | No further construction necessary. |
| Running belt | No further construction necessary. |
| Running surface | The portion of the running belt upon which a user could place their foot during normal operation. |

## A. Treadmills

Several bodies publish voluntary and mandatory standards regarding treadmills. The standards regarding treadmills described below have been iteratively published years before the patents' priority date and after; brief overviews of the versions published before the priority date are below:

- The Australian Competition & Consumer Commission's mandatory safety standard (supplier guide) from 2009[10] regarding treadmills defines a treadmill as "an exercise device that consists of an endless conveyor belt that is rotated either manually or by a motor and on which a person can walk or jog in one place."
- The 2005 International Standards Organization standard regarding treadmills, ISO 20957-6 defines a treadmill as "training equipment with a unidirectional moving surface on which a walking or running activity can take place, where the feet are free to leave the moving surface." ISO 20957-6 also specifies that treadmills shall have handrails for safety, and shall be equipped with foot platforms. ISO 20957-6 states that side handrails may be attached to the foot platforms. Finally, ISO 20957-6 suggests using guards for transmission elements and rotating parts.
- ASTM publishes several standards relating to fitness equipment and treadmills, specifically:
    - ASTM F2276-05 states that squeeze shear and crush points shall be guarded. It also states that chain or gear drives shall be guarded.
    - ASTM F2115-05 is the specification for motorized treadmills. ASTM F2115-05 states that a treadmill is a "motorized stationary exercise device that allows the user to walk, jog, or run by means of traversing a continuous moving surface." This standard states that treadmills shall be equipped with foot rails to facilitate user mounting and unmounting. It also states the design of rotating parts shall avoid shear, pinch or catch points by guarding, shielding, spacing, or other means. ASTM F2115-05 states that all treadmills shall be equipped with a handrail for user support. The side view illustration of a treadmill in ASTM F2115-05 (Fig.4 of the standard) shows a treadmill with a handrail, a front roller, a rear roller and a running belt disposed about the front and rear rollers.

[10] "Treadmills: Supplier Guide" © 2010. Trade Practices (Consumer Product Safety Standard) (Treadmills) Regulations 2009.

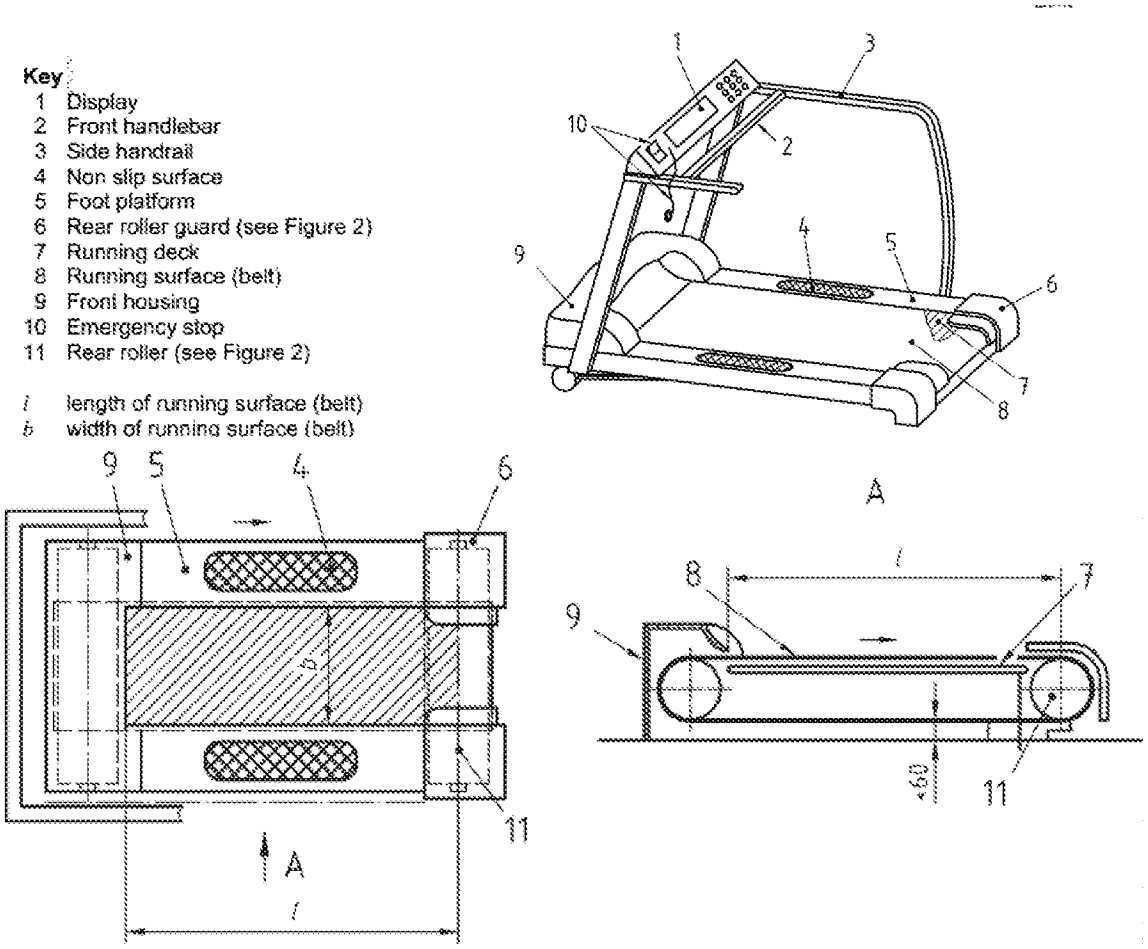



Figure 1. Figure 1 from ISO 20957-6 from 2005.

**B. The Accused Devices**

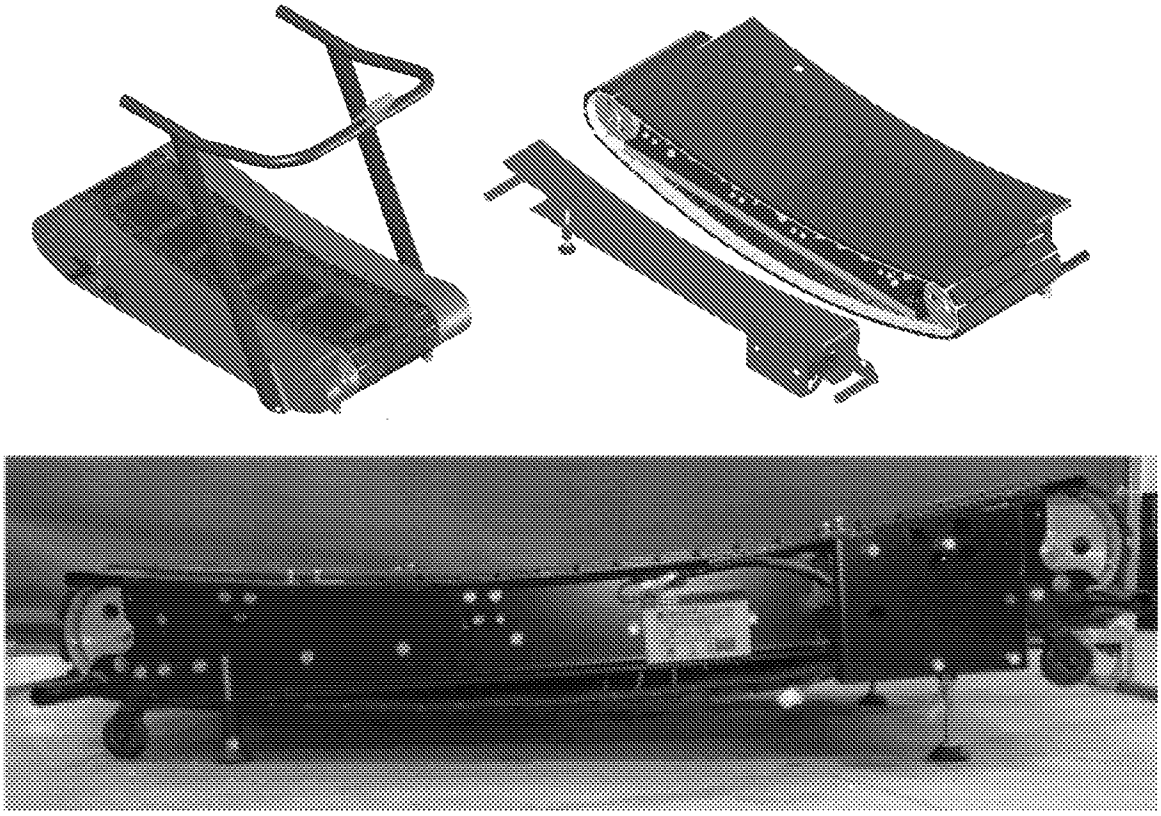


Figure 2. TrueForm Runner treadmill. Top renderings from the Chapco CAD schematics: the frame and shaft assemblies are shown highlighted in red while the non-structural foot platform(s) is highlighted in green, and the covers of the foot platform(s) are left as translucent gray. This foot platform provides the indirect path by which the support feet and handrail are joined to the frame. Bottom image shows the TrueForm Runner on a horizontal surface in an operating position with the foot platform cover removed. The front is on the right side of the image and it can be distinguished from the back by the four bolts used to attach the handrail to the foot platform.

As part of my evaluation, I disassembled a TrueForm Runner, see Figures 2 and 3. The TrueForm Runner that I dissasembled includes a one way bearing assembly adjoined to the front shaft, consistent with what I understand is the redesigned version. I understand that Dr. Blair has concluded that at some point after March 2015 (i.e., shortly after the '169 patent issued), Chapco and Samsara redesigned the TrueForm Runner and moved the one way bearing assembly from the rear shaft assembly to the front shaft assembly.[11] I understand that Samsara did not offer the TrueForm Runner with the one way bearing

[11] Blair Report at 19.

assembly adjoined to the rear shaft at the time this litigation was brought and does not offer it currently.



Figure 3. Front photo of the TrueForm Runner treadmill that I dissasembled showing the one way bearing adjoined to the front shaft assembly (arrow).

## C. Analysis

### PERSON HAVING ORDINARY SKILL IN THE ART "PHOSITA"

I disagree with Dr. Blair's definition of a hypothetical person having ordinary skill in the art ("PHOSITA").[12] Dr. Blair defines a PHOSITA as a person who has **either** of two qualifications:

a. graduated with an undergraduate degree in Mechanical Engineering; Dr. Blair does not require this person to have industry or technical experience[13] with treadmills.[14]

b. at least two years of experience in the "treadmill industry," including a knowledge of "design, construction, testing, and operation of manual treadmills."

A person who has only either "a" or "b" criterion would have an incomplete set of expertise necessary to fully comprehend the claimed art and to be able to reduce the "inventions" to practice. Dr. Blair's hypothetical PHOSITA would lack skills/expertise in

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[12] Blair Report at 17-18.

[13] This technical experience includes an understanding of biomechanics and anthropometry, and knowledge of industry standards.

[14] Paragraphs 39 and 40 of the Blair Report: "In my opinion, one of ordinary skill in the art of designing manual treadmills would have a bachelor of science degree in mechanical engineering or at least two years of experience in the treadmill industry, including experience and knowledge of the design, construction, testing, and operation of manual treadmills."

one or more of the following areas: biomechanics, gait, anthropometry, dynamics, machine design, reliability, mathematical analysis of factors related to design, and/or regulatory/compliance.[15] Accordingly, it is my opinion that Dr. Blair's PHOSITA would be underqualified to read, fully understand, and reduce to practice the devices described and claimed in the '580 patent and/or the '169 patent. Therefore, it is my opinion that Dr. Blair's definition of a PHOSITA is incorrect.

It is my opinion that a PHOSITA has a Bachelor of Science degree in mechanical engineering with at least one year of machine design experience related to power transmission equipment[16] and a demonstrated understanding of the biomechanics of exercise, including knowledge in the field of anthropometry (i.e., the study of human proportion). (Expert Report of Dr. Robert Giachetti, at 6.)

**FRAME AND BEARING RAIL**

The asserted claims of the '169 and '580 all include the limitation of a "frame" and at least one separate and distinct "bearing rail." For example, asserted claim 11 of the '169 patent is reproduced below with the term "frame" single underlined and the term bearing rail double underlined. Each element of claim 11 has been lettered for convenience:

11. A manually operated treadmill comprising:
    a. a frame supported on a substantially horizontal surface;
    b. a front shaft assembly supported by the frame and comprising:
        - a front shaft;
            - and at least one front running belt pulley supported by the front shaft;
    c. a rear shaft assembly supported by the frame a spaced distance from the front shaft and comprising:
        - a rear shaft;
            - and at least one rear running belt pulley supported by the rear shaft;
    d. a running belt supported at least in part by the front shaft assembly and the rear shaft assembly;
        - the running belt including a front portion adjacent the front shaft assembly;
        - a rear belt portion adjacent the rear shaft assembly;
        - and a central belt portion intermediate the front belt portion and the rear belt portion;
        - the front belt portion and the rear belt portion being positioned vertically higher than a lowest point found in the central belt portion to form a curved running surface upon which a user of the treadmill may walk or run, wherein gravitational force acting upon weight of the user's body on

[15] E.g. ASTM/UL/ANSI/ISO.

[16] Mechanical Power Transmission apparatus includes gears, belts, chains, bearings, rollers, flywheels, clutches, cranks, conveyors and couplings. See for example, Mechanical Power Transmission Handbook 2006. 4th ed.

the running belt relative to the lowest point of the running belt causes rotation of the running belt, front shaft, and the rear shaft without the aid of a motor;

e. a safety device cooperating with the rear shaft to permit rotation of the rear shaft in only one direction;
f. and at least one *rail with bearings whose top profile corresponds to the shape of the running surface* having a plurality of bearings rotatably *joined directly or indirectly* to the at least one rail with bearings *whose top profile corresponds to the shape of the running surface* and forming a top profile;
    - the top profile defined by a front profile portion adjacent the front shaft assembly;
    - a rear profile portion adjacent the rear shaft assembly;
    - and a central profile portion intermediate the front profile portion and the rear profile portion, the central profile portion having a concave curve;
    - and the front profile portion and the profile rear portion being continuations of the concave curve;
g. wherein the running surface of the running belt is supported by the top profile of the at least one *rail with bearings whose top profile corresponds to the shape of the running surface* such that the running surface substantially corresponds to the shape of the top profile of the at least one *rail with bearings whose top profile corresponds to the shape of the running surface*.

**The *Bearing Rail* and *Frame* are separate and distinct structures**

During the claim construction proceedings, Woodway argued that "the claims are clear that a 'frame' is the structure and supporting members of the manually operated treadmill." (Woodway Reply Claim Construction Brief, at 3 citing the specifications of the '169 and '580 patents). In its Claim Construction Ruling, the Court stated that the "frame" provides structure and support for the treadmill and cited Webster's II New College Dictionary for the ordinary and customary meaning of the term "frame" as: "A skeletal structure designed to shape or support." (Claim Construction Ruling, at 6.) The Court noted that Woodway had conceded that the bearing rails are elements separate and distinct from the treadmill frame[17] and distinguished between the bearing rail and the frame:

> "In both patents at issue, it is clear that the "frame" limitation is different from the "bearing rail" limitation because there are numerous claims that contain the frame element without mentioning bearing rails." (Claim Construction Ruling, at 7);
>
> "It remains apparent that the bearing rail is a distinct element from the frame without the need for construction by the court." (Claim Construction Ruling, at 8); and
>
> "As noted above, both parties acknowledge that the frame and the bearing rails are distinct parts, and as such construing the term "bearing rail" to mean a "rail

[17] Claim Construction Ruling, at 7 (quoting Woodway Reply Claim Construction Brief, at 5).

with bearings" will clarify this latent ambiguity." (Claim Construction Ruling, at 13).

Because the structures are separate and distinct, the "frame" limitation and the "bearing rail" limitation both cannot be met by the same structure on the accused TrueForm Runner products. This is also consistent with a mechanical engineering interpretation of separate and distinct structures.

**Dr. Blair does not clearly identify the particular structure(s) in the accused devices that he believes literally meet the required limitation for frame and bearing rail**

Dr. Blair does not provide a textual analysis regarding which particular structures he opines literally meet the limitations of the asserted claims. Instead, Dr. Blair primarily relies on figures and arrows in Exhibits E and F of his Report.

Dr. Blair vaguely identifies [1] as the "entire frame assembly" (for example, see Exhibit E at 1 or Exhibit F at 19). Dr. Blair provides no analysis that explains how this vaguely defined element provides structure or shape, or "structure and support" to the accused treadmill.

Dr. Blair also does not consistently identify the particular structure that he opines meets the bearing rail limitation when using Blair Exhibits E and F. In Exhibit E, the Blair Report identifies a plurality of bearings [16] on page 9, and on page 12, but switches on page 14 to calling [16] the bearing rail. Likewise, in Exhibit F, the Blair Report calls [6] and [7] bearing rails on page 4 but flips to a "plurality of bearings"[18] on pages 6 and 7. Instead of being precise, Dr. Blair again chooses to vaguely identify a critical element of the asserted claims and the accused device.

[18] A "plurality of bearings," is not a bearing rail as construed by the Court, rather, a bearing rail is separate and distinct from the frame and is a *rail with bearings whose top profile corresponds to the shape of the running surface.*

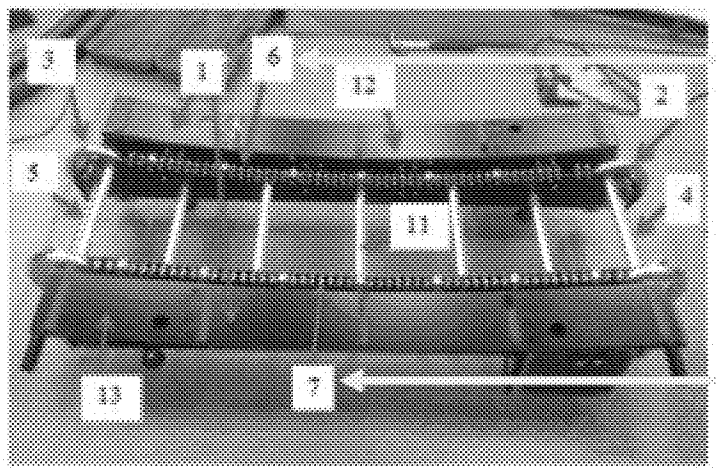



Figure 4. Figure from Blair Exhibit F, at 3. The imprecise descriptions in the Blair Report fluctuate between what Dr. Blair opines is a bearing rail and what he opines is a plurality of bearings.

The Blair Report recognizes that the '580 patent teaches that "the frame may have substantially any configuration suitable for providing structure and support for the manual treadmill;" consistent with the '580 patent and the plain and ordinary meaning of "frame." Therefore, a straightforward test to determine if a component is a "bearing rail" or a "frame" is to consider whether or not the treadmill collapses if the component under consideration is instantly removed.

In the case of a treadmill constructed according to the '169 or '580 patents' specifications, the bearing rails (structures distinct from the frame) may be removed and the treadmill does not collapse; that is consistent with the Court's interpretation of frame and bearing rail, and also the concept of what is a frame and what is not a frame.[19] In contrast, if the components that the Blair Report identifies as bearing rails are removed from the accused TrueForm Runner treadmills, they fall apart. That is, the TrueForm Runner loses its structure and collapses.

Therefore, in accordance with the plain and ordinary meaning of the word frame, what the Blair Report labels as frame[20] in the accused devices is not the frame and what the Blair Report identifies as bearing rails are not bearing rails as that term was construed by the Court. Instead, the component the Blair Report identifies as bearing rail is, in fact, a frame with bearings. In sum, it is my opinion that the accused TrueForm Runner products do not include the bearing rail limitation.

[19] A similar bearing rail free embodiment is depicted in Eli Briggs' 8308X Patent from 1834.
[20] For example [1] at page 51 in the Blair Report Exhibit F.

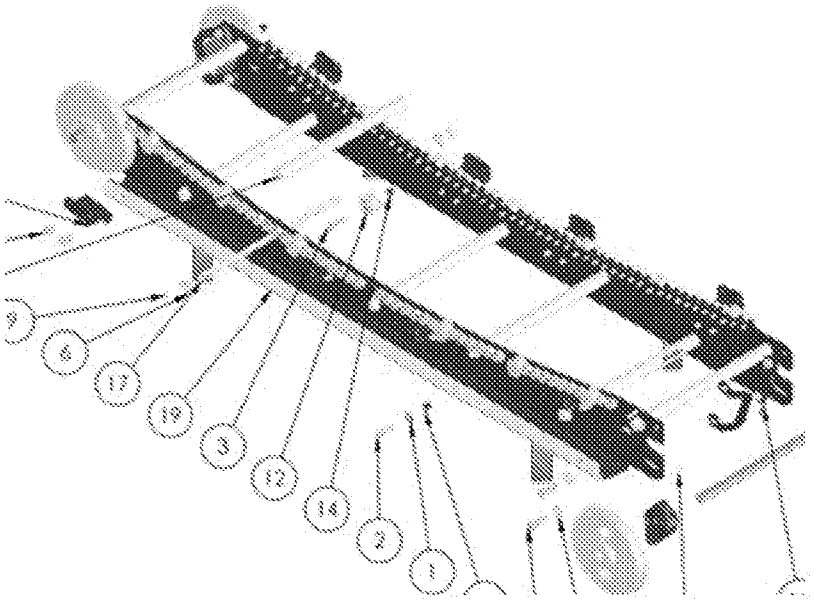


Figure 5. Support feet (blue graphic) coupled to the frame without the foot platforms attached to the frame. Exploded view of frame image adopted from Chapco schematics.

**The claim term "*support*" is indefinite**

Dr. Blair incorrectly opines that the plain and ordinary meaning of support includes direct contact or indirect connection (see Exhibit E, at 2, for example). Dr. Blair provides no evidence that the plain and ordinary meaning of "support" includes indirect connection. Furthermore, such an interpretation renders the term "support" limitless and, accordingly, the patent becomes indefinite. Each usage of the word "support" within the specifications that are the subject of this Report involves element to element contact. Dr. Blair does not provide a basis for his opinion of the plain and ordinary meaning of the word "support." Common dictionaries define "support" without an allowance for indirect contact:

- Merriam-Webster:
  - v. "to hold up or serve as a foundation or prop for"
  - n. "one that supports"
- Oxford:
  - v. "bear all or part of the weight of; hold up"
  - n. "a thing that bears the weight of something or keeps it upright"
  - n. "the action of supporting something or someone or the state of being supported"

**Having, support, coupled, and attached are not interchangeable**

The Blair Report inappropriately uses the word "support" and "coupled" interchangeably.[21] In portions of the specification where the word "support" could be used for objects that do not touch, the applicants take steps to separate elements into pairs that touch when using "support."[22] For example, the asserted claims and the specifications do not include any description indicating that the frame supports the running belt; instead, the bearing rail, or the front and rear shaft assemblies support the running belt.

Interpreting "support" to mean direct or indirect force transmission conforms to what the Court construed as the term "coupled" and the applicant would have used the word coupled instead, but did not because "support" and "couple" are different.

Later in his report, Dr. Blair equates the term "coupled" with "attached." (Page 21 of Exhibit F). Dr. Blair cites no evidence that these terms could be used interchangeably and it is unreasonable to interchange them according to both the Court's construction of the term "coupled" and the plain and ordinary meaning of "attach."

Finally, the Blair Report takes the claim language "a first bearing rail having a plurality of bearings…" and then repackages it as "As shown, a plurality of bearings [6] are supported by a bearing rail…" on page 6 of Exhibit F. "Support" and "have" cannot be interchangeably used. To the PHOSITA and to a reading of the plain and ordinary meanings of these terms, they are not synonymous.

Given the usage of terms in the Blair Exhibits, Dr. Blair interprets the terms "have," "support," "couple," and "attach" synonymously, which is inaccurate because the specification would be rendered nonsensical if these terms were interchanged within.

## 1. The Accused Products Do Not Infringe the Asserted Claims of the '169 Patent

**The accused products do not infringe independent Claim 11 of '169**

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[21] Claim 11 states "a front shaft assembly supported by the frame…" in his opinion regarding this teaching on page 2 of Exhibit E, the Dr. Blair first states that "As shown, the frame [1] supports a shaft assembly [3]" and "a bearing rail is coupled to the front shaft assembly." This interpretation reinforces that the term support and the term couple function differently; the handrail is coupled to the frame, and the support foot, and the one way bearing, and the cross members, and the shaft assemblies, and the bearing rails. However, in the specification, the handrail is not supported by the bearing rail nor does the bearing rail support the handrail.

[22] '580 Col. 14, 4-12 "The **endless belts** 226 are configured to provide **support** for the **running belt** 16 in order to **support** the **weight of a user**. The endless belts 226 are shown disposed on opposite sides of the running belt 16, generally interior to the outer, lateral edge of the slats 228. The endless belts 226 are themselves reinforced, and thus help stabilize the sides of the running belt and help prevent stretching of the running belt 16." Endless belts touch/comprise the running belt and the running belt touches the user. Had the applicant wanted an indirect meaning to be associated with the word support, this citation would have read: the endless belts are configured to support the user.

a) **Claim 11.** The accused products do not literally infringe **for at least** the reason that the required bearing rail element in the '580 and the '169 treadmill is not present in the accused device.

Elevation: Dr. Blair indicates [10] and [11] (Exhibit E) are the front and rear portions of the running belt. Because the Court construed the running surface as the portion of the running belt where a user could place their foot during use, Dr. Blair's front/rear limits are inboard of the front and rear portion. The front and rear are labeled in the figure below and are at the same elevation as the central portion of the belt, not above it (see Fig. 6.). Therefore, the required curvature element of Claim 11 is not present in the accused devices.

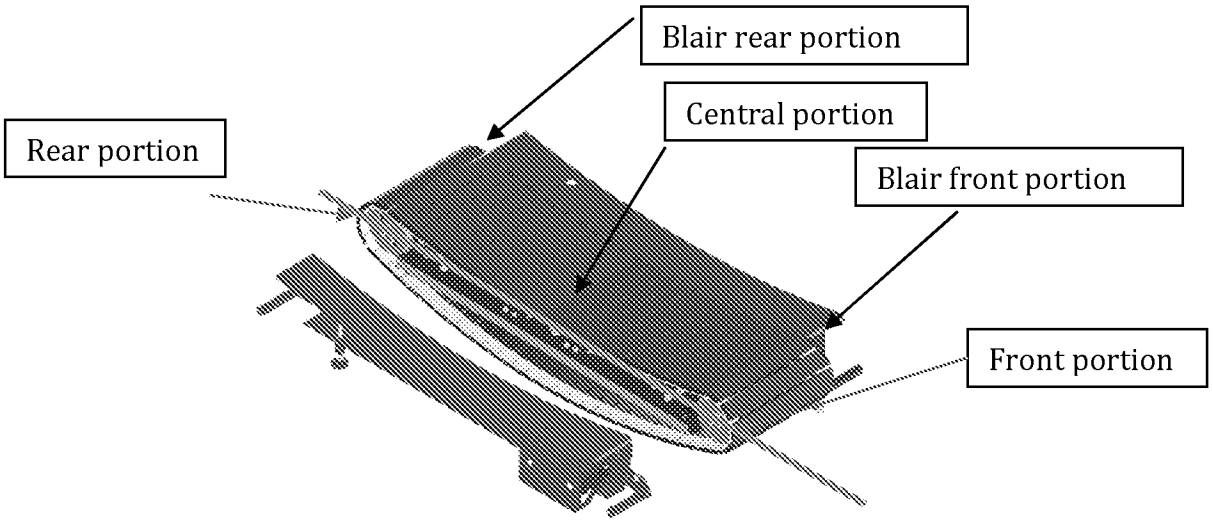



Figure 6. Schematic showing that the front portion of the running surface is at the same elevation as the central portion of the running surface.

Claim 11 states that "gravitational force acting upon the weight of the user's body on the running belt relative to the lowest point of the running belt causes rotation of the running belt, front shaft, and rear shaft without the aid of a motor." Dr. Blair opines on page 7 of Exhibit E that he agrees that this statement explains how the accused devices operate, ostensibly based on the photographs he was provided. Dr. Blair opines "gravitational force acting upon the weight of the user's body" causes the running belt to turn. Dr. Blair does not provide a rationale for his new interpretation of gravitational action that contradicts accepted scientific principles. Accordingly, I disagree with his opinion.

**The accused products do not infringe dependent Claims 12-15 of the '169 Patent**

b) **Claim 12.** Asserted Claim 12 of the '169 patent depends from Claim 11 and requires each and every element of Claim 11 in addition to the additional required elements of Claim 12. Since the accused products do not have each and every element of Claim 11, there can be no infringement of claim 12 for at least this reason alone.

Because the accused products do not have a bearing rail, there is not a way to extend a bearing rail along the frame or align it with a pulley.

c) **Claims 13-15.** Asserted Claims 13-15 of the '169 patent depend from Claim 11 and require each and every element of Claim 11 in addition to the additional required elements of the dependent claims. Since the accused products do not have each and every element of Claim 11, there can be no infringement of claims 13-15 for at least this reason alone.

2. **The Accused Products Do Not Infringe the Asserted Claims of the '580 Patent**

a) **Claim 1.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame. The frame cannot be a bearing rail because the frame element and bearing rail element are separate and distinct.

b) **Claim 4.** The accused products do not have a bearing rail; therefore, there is not a way to attach a bearing rail longitudinally to the frame or align it with a pulley. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame. Furthermore, if the element Dr. Blair accuses of being a bearing rail were a bearing rail, this element is not "between" the shaft assemblies.

c) **Claim 5.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

d) **Claim 6.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

e) **Claim 10.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

Furthermore, the handrail is not attached to the frame in the accused products. The handrail is attached to the foot platform assembly, in accordance with industry standards.

f) **Claim 11.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

Furthermore, Dr. Blair inappropriately equates the term "coupled" with "attached" in his interpretation of this claim. Accordingly, it inappropriate to change the claim language "a front shaft attached to the frame adjacent the front end" to "a front shaft coupled to the frame adjacent the front end" as Dr. Blair does on Page 21 of Exhibit F.

g) **Claim 12.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

h) **Claim 13.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

The accused devices do have wheels, but the wheels can be in contact with the ground surface when the treadmill is in an operating position.

i) **Claim 14.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

The support feet in the accused product are adjustable in a direction perpendicular to the base of the accused treadmill. Depending on their adjustment, they may or may not be oriented vertically. See Fig. 2 above.

j) **Claim 18.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

k) **Claim 19.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

l) **Claim 20.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

m) **Claim 25.** The accused products do not have a bearing rail. The element Dr. Blair accuses of being a frame is not a frame, and the element Dr. Blair accuses of being a bearing rail is a frame.

## V. ISSUES ON WHICH DR. BLAIR DID NOT OFFER AN OPINION

### A. SkillMill device

Dr. Blair discusses a device that he calls the SkillMill.[23] Dr. Blair performed an incomplete infringement analysis on the SkillMill device, and the rationale for its inclusion in his Report is unclear; Dr. Blair does not articulate a rationale. It is my understanding that the SkillMill is not an accused device in this litigation nor is it manufactured or sold by the parties in this suit. I have not obtained a SkillMill for study nor have I performed any analysis on this device. I reserve the right to perform an infringement analysis on the SkillMill once its relevance has been clarified.

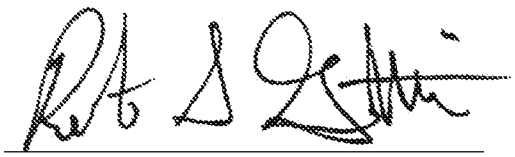
### B. Dr. Blair offered no opinion on the alleged infringement of the design patents

It is my understanding that Woodway has asserted design claims in addition to the utility claims asserted and examined within this report. The Blair Report is silent on design claims. Should Dr. Blair or Woodway develop or attempt to offer design claim opinions, I reserve the right to perform an analysis of the design claims that I have not performed at present in the context of this rebuttal Report.

## VI. CONCLUSION

Based on the analysis presented above it is my opinion, to a reasonable degree of engineering certainty, that the accused TrueForm Runner treadmill products do not literally infringe the asserted claims of the '580 and/or '169 patents.

I reserve the right to amend or supplement this report should additional material facts or new opinions emerge during future discovery or in testimony.



Signature

March 30, 2017
Date

[23] See Blair Expert Report at 49-51.

# Appendix A

## Materials Considered

## Materials Considered:

1. Report of Kim B. Blair, Ph.D
2. Complaint, *Woodway USA Inc. v. Samsara Fitness LLC*, filed Aug. 11, 2015 in the United States District Court for the Eastern District of Wisconsin
3. Complaint, *Chapco Inc. and Samsara Fitness, LLC v. Woodway USA, Inc.*, filed November 16, 2015 and December 29, 2015 (to correct error in caption) in the United States District Court for the District of Connecticut (the "Connecticut litigation")
4. Woodway USA Inc. ("Woodway") Counterclaim, filed July 26, 2016
5. Woodway's Proposed Amended Counterclaim, filed February 27, 2017
6. Woodway's Preliminary Infringement Contentions, dated April 18, 2016, including Appendix A and Appendix B
7. Plaintiffs' Preliminary Non-Infringement Contentions, dated May 27, 2016, including Exhibits A and B
8. Woodway's Supplemental Preliminary Infringement Contentions, dated July 18, 2016, including Appendix A
9. Plaintiffs' Supplemental Non-Infringement Contentions, dated August 8, 2016, including Exhibits A through D
10. Claim Construction Ruling, Filed Dec. 8, 2016
11. Plaintiffs' Opening Claim Construction Brief, filed July 25, 2016
12. Plaintiffs' Opening and Responsive Claim Construction Brief, filed August 22, 2016
13. Woodway's Responsive Claim Construction Brief, filed September 6, 2016
14. Plaintiffs' Disclosure of Disputed Claim Terms, Proposed Constructions and Intrinsic
15. Evidence, dated June 17, 2016, including Exhibit A
16. Plaintiffs' Preliminary Invalidity Contentions, dated May 27, 2016, including Exhibits A-I
17. Plaintiffs' Supplemental Invalidity Contentions, dated August 8, 2016, including Exhibits J and K
18. Deposition Transcript of Jeremiah Rabe, October 18th, 2016
19. Deposition Transcript of Brian Weinstein, October 20th, 2016
20. Deposition Transcript of Brian Weinstein, November 1st, 2016
21. Technical Specification Comparison Chart of Woodway Curve Models and TrueForm Enduro Model
22. Technical Specification Comparison Chart of Woodway Curve Models, TrueForm Enduro Model, and SkillMill Device
23. Woodway Curve Owner's Manual, p. 22
24. File history of U.S. Patent No. 8,986,169
25. File history of U.S. Patent No. 9,039,580
26. Patents and Patent Applications:
    a. U.S. Patent No. 8308X (Briggs) 1834
    b. U.S. Patent No. 411,986 (Frazeur), 1889
    c. U.S. Patent No. 641,424 ( Ziebell) 1900
    d. U.S. Patent No. 767,221 (Hagen) 1904
    e. U.S. Patent No. 759,296 (Morairty) 1904
    f. U.S. Patent No. 783,769 (Wright) 1905
    g. U.S. Patent No. 931,394 (Day) 1909
    h. U.S. Patent No. 1,211,765 (Schmidt) 1917
    i. U.S. Patent No. 2,117,957 (Heller) 1938

j. U.S. Patent No. 2,842,365 (Kelley) 1958
k. U.S. Patent No. 3,637,206 (Chickering) 1972
l. U.S. Patent No. 3,642,279 (Cutter) 1972
m. U.S. Patent No. 4,334,676 (Schonenberger) 1982
n. U.S. Patent No. 4,389,047 (Hall) 1983
o. U.S. Patent No. 4,544,152 (Taitel) 1985
p. U.S. Patent No. 4,659,074 (Taitel) 1987
q. U.S. Patent No. 5,411,455 (Haber) 1995
r. U.S. Patent No. 5,432,612 (Holden) 1995
s. U.S. Patent No. 5,470,293 (Schoenenberger) 1995
t. U.S. Patent No. 5,538,489 (Magid) 1996
u. U.S. Patent No. 5,575,7402 (Piaget) 1996
v. U.S. Patent No. 5,577,598 (Schoenenberger) 1996
w. U.S. Patent No. 5,669,856 (Liu) 1997
x. U.S. Patent No. 5,709,632 (Socwell) 1998
y. U. S. Patent No. 6,042,514 (Abelbeck) 2000
z. U.S. Patent No. 6,053,848 (Eschenbach) 2000
aa. U.S. Patent No. 6,500,097 (Hall) 2002
bb. U.S. Patent No. 6,740,009 (Hall) 2004
cc. U.S. Patent No. 6,893,382 (Moon) 2005
dd. U.S. Patent No. 8,986,169 (Bayerlein) 2015
ee. U.S. Patent No. 9,039,580 (Bayerlein) 2015
ff. Chinese Patent 201333278, 蔡岳璋, Oct 28. 2009
gg. German Patent No. 202006005995 (Zeitler) 2006
hh. U.S. Patent Application US 2007/0123396 (Ellis) 2005

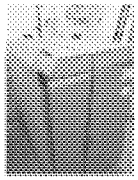
27. U.S. Patent Application US 2005/0009668 (Savettiere) 2005
28. U.S. Patent Application US 2006/0287165 (Pasqualin) 2006
29. U.S. Patent Application US 2008/0020907 (Lin) 2008
30. U.S. Patent Application US 2010/0216607 (Mueller) 2010
31. U.K. Patent Application, 2,223,685 (Chen) 1988
32. "Appendix A" Claim Chart for U.S. Patent No. 8,986,169
33. "Appendix B" Claim Chart for U.S. Patent No. 9,039,580
34. "Exhibit A" to Non-Infringement Contentions for U.S. Patent No. 8,986,169
35. "Exhibit B" to Non-Infringement Contentions for U.S. Patent No. 9,039,580
36. Owners Manual for NordicTrack WalkFit Classic Treadmill
37. ISO 20957-6:2005
38. OSHA 1926.307
39. OSHA 1926.219
40. ASTM F2276-05
41. ASTM F2115-05
42. The Australian Competition & Consumer Commission's Mandatory Safety Standard For Treadmills (Suppliers Guide) 2009
43. "Power Transmission Handbook" 2009, Fourth Edition, 2nd Printing, by Power Transmission Distributors Association
44. http://www.mpiwg-berlin.mpg.de/resrep00_01/Jahresbericht_2_2_section.html
45. http://www.museivaticani.va/content/museivaticani/en/collezioni/musei/museo-gregoriano-profano/Mausoleo-degli-Haterii.html

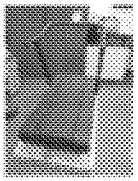
46. www.gettyimages.com/detail/463782507 Animal treadmill c. 1872, Museum of Science and Industry, Chicago.
47. http://www.gettyimages.com/license/542395667 1930 era treadmill
48. High Resolution Schematics of TrueForm Runner, from Chapco

# Appendix B

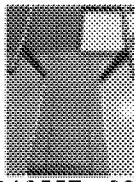
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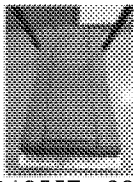
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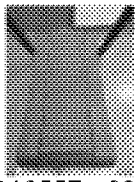

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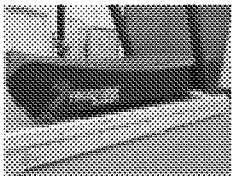

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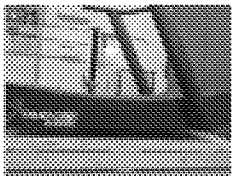

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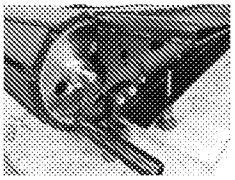

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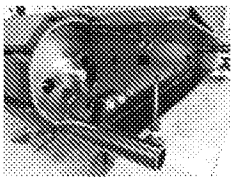

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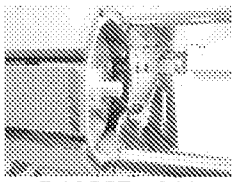

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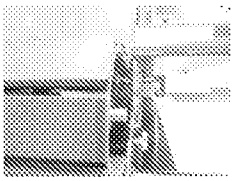

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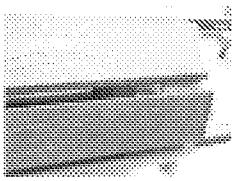

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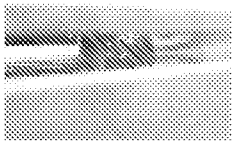

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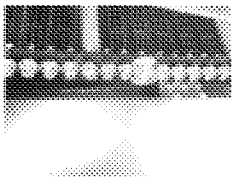

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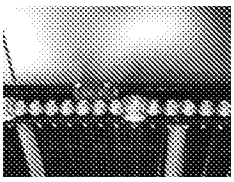

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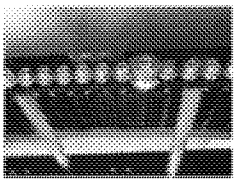

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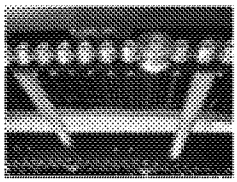

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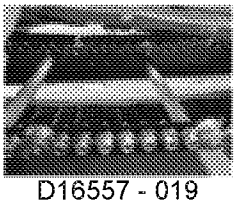
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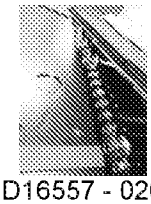
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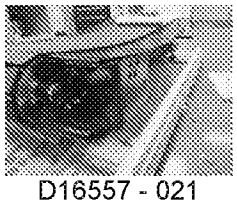

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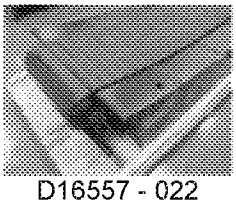

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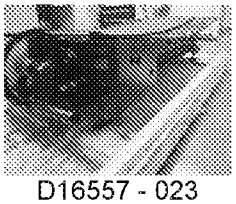

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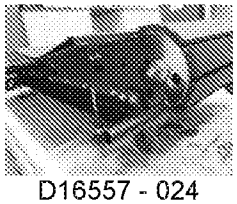

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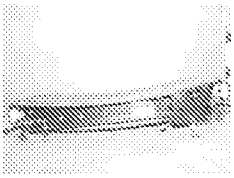

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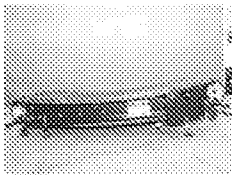

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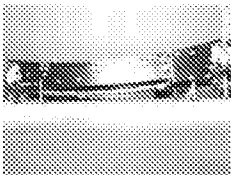

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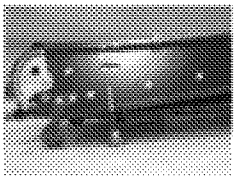

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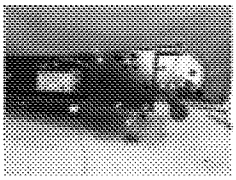

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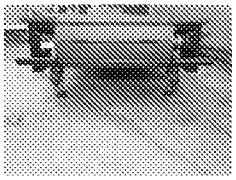

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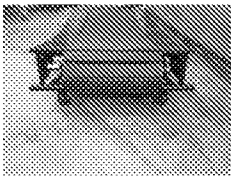

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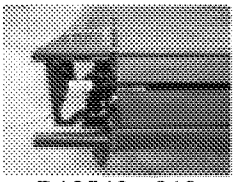

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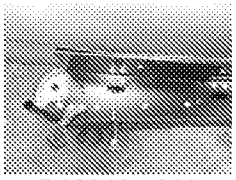

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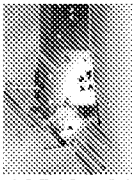

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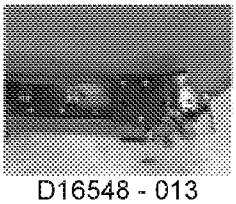

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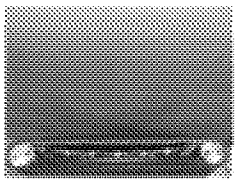

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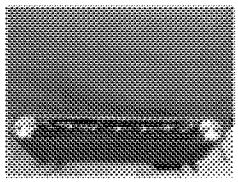

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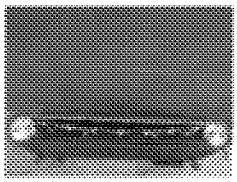

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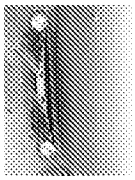
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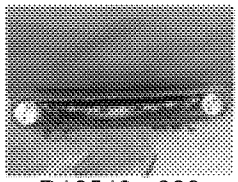
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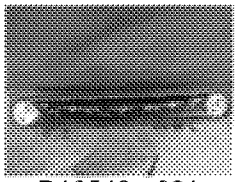

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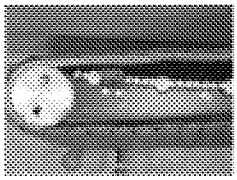

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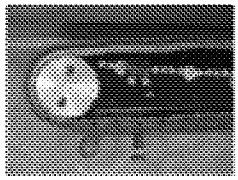

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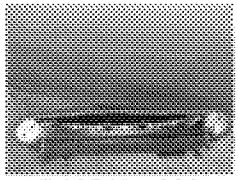

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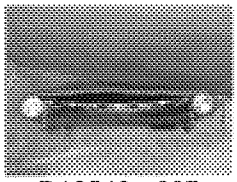

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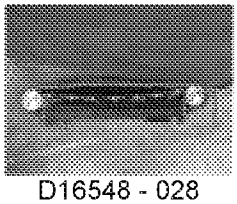

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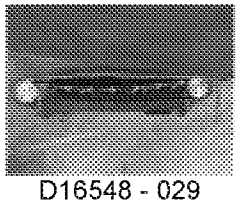

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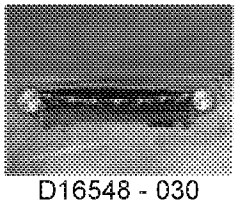

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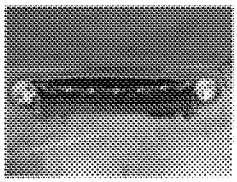

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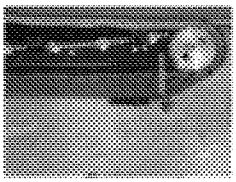

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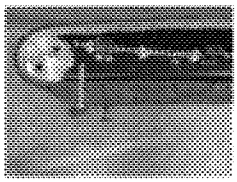

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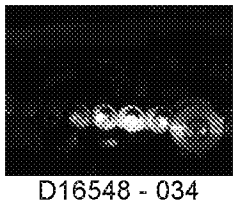

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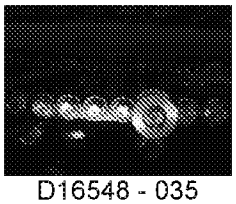
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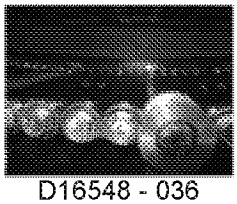

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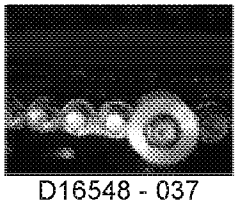

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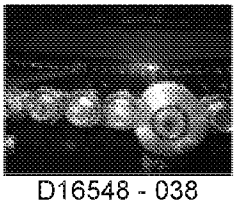

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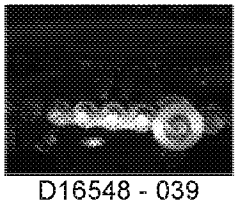

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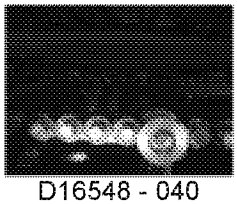

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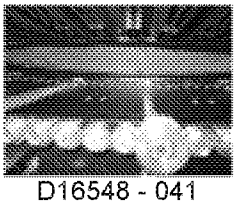

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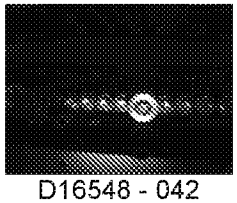

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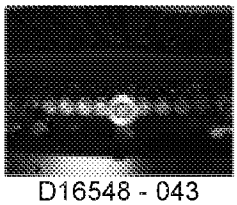

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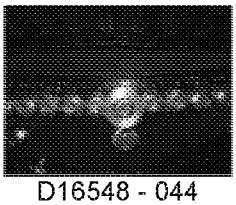

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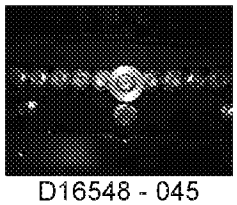

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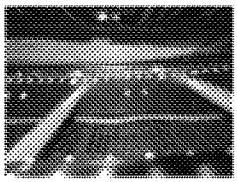

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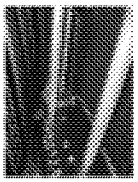

D16548 - 044


D16548 - 045

Exponent, Inc.



D16548 - 046



D16548 - 047

UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| CHAPCO, INC. and SAMSARA, LLC | : | CIVIL ACTION No. |
| | : | 3:15cv01665 (JCH) |
| Plaintiffs, | : | |
| | : | |
| v. | : | |
| | : | |
| WOODWAY USA, Inc. | : | |
| | : | |
| Defendant. | : | May 14, 2018 |

**SUPPLEMENTAL REBUTTAL EXPERT REPORT OF DR. ROBERT GIACHETTI RESPONSIVE TO SUPPLEMENTAL EXPERT REPORT OF DR. KIM BLAIR DATED MARCH 15, 2018**

## I. INTRODUCTION AND SUMMARY OF MY OPINIONS

1. I have been retained by counsel for Samsara Fitness, LLC ("Samsara") and Chapco Inc. ("Chapco") to analyze the Supplement Expert Report of Kim Blair, Ph.D. dated March 15, 2018 (the "Supplemental Blair Report") regarding Woodway USA, Inc.'s ("Woodway") allegations that the Assault Air Runner ("Air Runner") infringes Claim 1 of U.S. Patent 9,039,580 titled Manual Treadmill and Methods of Operating The Same (herein the '580 patent).

2. In forming my opinion, I considered my examination of the Air Runner on May 11, 2018 and the Second Blair Report including Exhibit A referenced therein. The opinions I provide herein are my own and are based on my independent review and on my education, experience, training, and skill accumulated in the practice of engineering. Between now and such time that I may be asked to testify at deposition and/or trial, I expect to continue my review, evaluation, and analysis.

3. I also examined an Air Runner. Specifically, on May 11, 2018, I traveled to W229 N591 Foster Court, Waukesha, Wisconsin to examine the Air Runner depicted in the Supplemental Blair Report.

4. I have not prepared the final versions of exhibits or demonstratives for trial at this time, but I reserve the right prepare them, as necessary, in accordance with the materials presented as part of this report and consistent with the substance of the other reports I have provided in this matter.

5. I am explicitly incorporating by reference all prior reports I have submitted in this matter. I continue to express those opinions as true based on fundamental engineering principles outlined therein.

## II. SUMMARY OF OPINIONS

6. Based on my understanding of the law, and my research, analysis and examination of the Air Runner, it is my opinion that the Air Runner does not infringe Claim 1 of the '580 patent. The details of this opinion are set forth herein.

7. In evaluating Dr. Blair's Supplemental Report, I have found points that are incorrect or unsupported by evidence. While the rationale for my opinion on these points is provided within this report, the points themselves are briefly identified below:

a. Dr. Blair does not cite intrinsic evidence or provide an analysis to support his construction of the term "rotatably coupled," and the term "shaft" even though that claim term is an integral part of Dr. Blair's infringement analysis of Claim 1. For that reason alone, Dr. Blair's opinion is incomplete and unsubstantiated. I disagree with his unsubstantiated proposed constructions and his opinion based on them.

8. The Supplemental Blair Report, at Exhibit A, depicts the Air Runner for the purposes of Dr. Blair's infringement analysis. Dr. Blair opines that the Air Runner literally infringes Claim 1 of the '580 patent,[1] and I disagree with that opinion, for the reasons set forth below.

## III. EXPERT QUALIFICATIONS AND EXPERIENCE

9. I am the same Dr. Robert Giachetti, a licensed professional engineer, engaged by Chapco and Samsara earlier in this case. I am currently employed as a Senior Managing Engineer at Exponent. A copy of my current curriculum vitae was provided in my report submitted last week, dated May 7, 2018.

## IV. ANALYSIS

### A. Understanding of the Law

10. I have been retained as an engineering consultant, not as an expert on patent law. However, I have general familiarity with patent law principles from my professional experiences. Additionally, counsel to Chapco and Samsara have provided citations to legal principles relating to patents and patent infringement/validity that govern the issues on which I was asked to opine in this matter.

11. I understand that in making a determination of infringement, the first step is to determine the scope of the asserted claim by reading the claim language, limitation by limitation, as they are construed by the Court or, if not interpreted by the Court, according to their ordinary meaning as understood by one of ordinary skill in the art.

12. I am informed that the party asserting infringement (Woodway) bears the burden to prove infringement by establishing the existence of each limitation of Claim 1of the '580 patent.

### B. The Claim Construction Hearing and Order

13. I understand that the Court conducted a claim construction hearing on November 28, 2016. I have read the Claim Construction Ruling that issued following that claim construction hearing. In my analysis I have considered the claim terms using their plain and ordinary meaning as I believe a PHOSITA would have where the claim term has not been defined by the Court. If the Court provided a construction, I have applied that construction to each applicable claim term in accordance with the Claim Construction Ruling dated December 8, 2016.

[1] Supplemental Blair Report, ¶ 4.

| Disputed Term/Phrase | Court's Construction |
|---|---|
| Frame | No further construction necessary. |
| Bearing Rail | A rail with bearings whose top profile corresponds to the shape of the running surface. |
| A safety device cooperating with the rear shaft | A safety device adjoined to the rear shaft. |
| Coupled | The joining of two members directly or indirectly. |
| Rotatably coupled | No further construction necessary. |
| A bearing rail having a plurality of bearings rotatably coupled to the at least one bearing rail | No further construction necessary. |
| Running belt | No further construction necessary. |
| Running surface | The portion of the running belt upon which a user could place their foot during normal operation |

**C. Description of the '580 patent**

14. The '580 patent generally describes a manual treadmill with a curved running surface, and a method or device to ensure the user operates the treadmill in a unidirectional fashion. '580 patent, Col. 2, ll. 7-37.

**D. Claim 1 of the '580 patent**

15. Claim 1 of the '580 patent reads:

A manually powered treadmill comprising:

**[Element a]** a frame having a front end and a rear end positioned opposite the front end;

**[Element b]** a front ***shaft*** **rotatably coupled** to the frame at the front end;

**[Element c]** a rear ***shaft*** **rotatably coupled** to the frame at the rear end;

**[Element d]** a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame;

**[Element e]** a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame;

**[Element f]** a running belt supported by the first bearing rail and the second bearing rail and disposed about the front shaft and the rear shaft, wherein the running belt follows a curved running surface; and

**[Element g]** a safety device coupled to at least one of the front shaft and the rear shaft, wherein the safety device is structured to substantially prevent rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction.

('580 patent, Claim 1, emphasis and element annotations added.)

**E. Element [a] "a frame having a front end and a rear end positioned opposite the front end"**

16. The first step, Element [a] of Claim 1, includes the limitation of "a frame having a front end and a rear end positioned opposite the front end."

17. In the Claim Construction Ruling, the Court adopted the position that "frame" did not require further construction, reasoning that the patents "explicitly state that the frame was to 'have substantially any configuration suitable for providing structure and support for the treadmill.'" (Dkt. No. 76, at pp. 5-6.)

18. In his March 2, 2017 Opening Report, Dr. Blair provides no analysis for the basis of his opinion that the structure he identifies as the "frame" provides structure and/or support for the treadmill. (Opening Blair Report, at Exhibit F.) Instead, Dr. Blair opined that the frame does not need to be a single unitary structure, which does not address structure or support, and he includes no analysis concerning support or structure. (*See* March 30, 2017 Rebuttal Report of Robert Giachetti, at pp. 12-13.) The Supplemental Blair Report also fails to explain the basis for Dr. Blair's statement that the structures he identified as meeting the frame limitation provide structure and support.

19. For claim 1, Element [a], Dr. Blair relies on the inclusion of a cross-member to support his conclusion that the Air Runner meets the frame limitation. (Supplemental Blair Report, at 10) ("The at least one cross-member [11] is included with

the frame.") Claim 1, however, does not include that cross-member as part of the frame limitation, or otherwise; "cross-member" is found only in the dependent claims (e.g., claims 2, 3). I understand that it is improper to read limitations from dependent claims into the independent claim. Dr. Blair has only identified Claim 1 in the context of his Supplemental Opinion regarding the Air Runner. Accordingly, I disagree with Dr. Blair on his analysis of the frame limitation.

**F. Elements [b] and [c]: "a front shaft rotatably coupled to the frame at the front end" and "a rear shaft rotatably coupled to the frame at the rear end."**

20. Element [b] of Claim 1 includes the limitation of "a front shaft rotatably coupled to the frame at the front end."

21. As set forth above, the Court did not construe the term "rotatably coupled." The '580 patent does not define term "rotatably coupled." I understand that term "rotatably coupled" will have its plain and ordinary meaning as understood by a PHOSITA.

22. In the Supplement Report, Dr. Blair does not explain the meaning he is affording the term "rotatably coupled" for the purposes of his analysis of the Air Runner.

23. In this case, the shaft, as identified by Dr. Blair as parts [4] and [5], is a tubular spacer that is fixed to pulleys on the front and rear of the treadmill. On the front and rear of the treadmill there also are solid rods that are immobile relative to the treadmill (screwed to the component Dr. Blair identifies as the frame); those solid rods run transverse to the element Dr. Blair has identified as the frame. Each of the two pulleys on the front and rear are disposed about and spin about this solid rod, respectively. In between the two pulleys, transversely, is the tubular spacer. Dr. Blair identifies this tubular spacer as the component that meets the "shaft" limitation. Without a construction provided for the term "shaft," the plain and ordinary meaning must be used, but Dr. Blair does not provide one for the basis of his analysis. I disagree with Dr. Blair that the tubular spacer meets the limitation of shaft as that term is taught and claimed in the '580 patent; see, for example: col. 6, ll. 1-4; col. 27, ll. 16-18; col. 27, ll. 44-46; col. 28, ll. 7-9; col. 28, ll. 38-41.

24. The specification of the '580 patent uses the word "fixed to" to describe the relationship of certain components. For example, in one embodiment of the track system, magnetic hangers have one transverse portion received in the channel and the other transverse portion **fixed to** an interior side of a slat. ('580 patent, col. 26, ll. 32-35.) As another example, the specification describes an embodiment of the one way bearing assembly with a housing **fixed to** a bracket. ('580 patent, col. 27, ll. 25-26.) As a third example, the specification teaches that Figures 1-6 show "a plurality of nuts 270 [that] are **fixed**, and more preferably welded, to the bottom of the frame 40 to allow the feet 28 to be adjusted." ('580 patent, col. 29, ll. 41-42.) Additionally, in claim 11 of the '580 patent, the front and rear shafts are "attached" to the frame.

25. Based on the intrinsic evidence, including the specification of the '580 patent, a PHOSITA would understand that fixed means immobile while the treadmill is in normal use.

26. Based on my understanding of the law and engineering, a PHOSITA would understand "rotatably coupled" and "fixed" to have different meanings.

27. In his March 2, 2017 Opening Report, relating to the Generation II True Form Runner, Dr. Blair wrote that:

> As shown, to a person of ordinary skill in the art, a front shaft [4] is rotatably coupled to the frame [1] at the front end [2]. In this regard, "the term 'coupled' means the joining of two members directly or indirectly to one another. … Such joining may be achieved with the two members or the two members and any additional intermediate members."
>
> Thus, coupling of the front shaft [4] to the frame [1] may be directly or indirectly, such as through an intermediary component or series of components (e.g., via bearing rail [6] or [7]).
>
> It is not required that each part be connected in such a way to permit rotation of one entire element relative to the other element.

(Blair Opening Report, at Exhibit F, pp. 3-4.)

28. In his Opening Report, I understood Dr. Blair to opine that the front and the rear shafts of the Generation II TrueForm Runner were "indirectly" coupled, meaning that there can be an unlimited number of intermediate components, and that each shaft rotated relative to the part of the treadmill Dr. Blair identifies as the frame under normal use.

29. When I examined the Air Runner that is the subject of the Supplemental Blair Report, I confirmed that the solid rod in the rear does not rotate, relative to the part of the Air Runner treadmill Dr. Blair identifies as the frame under normal use. I have annotated the solid rods in the image below with large yellow arrows.

30. I have reproduced, below, the image Dr. Blair includes in his Supplemental Report, which he annotated with [5] for the rear shaft, [1] for the frame, and [3] for the rear end:

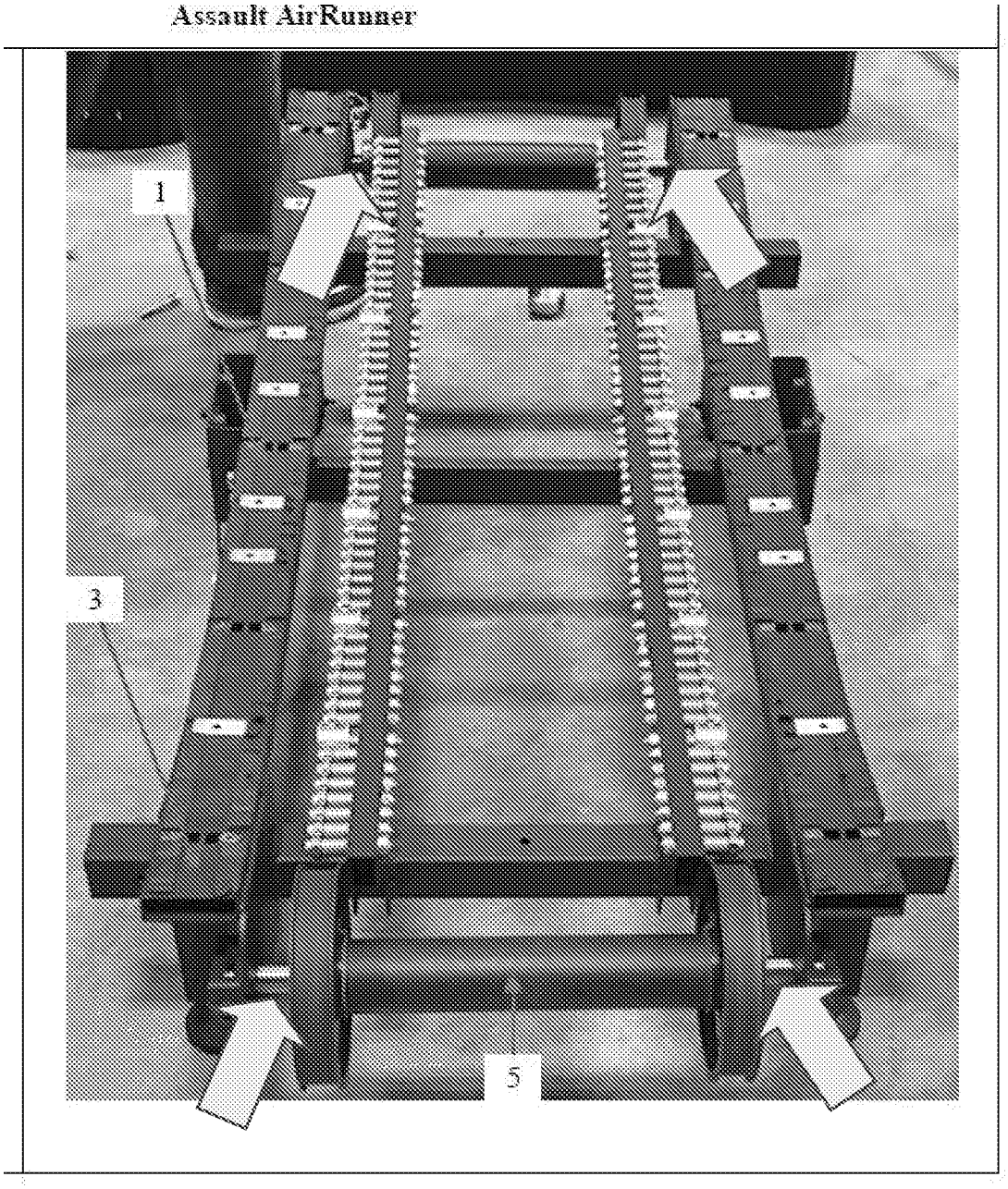



Figure 1. Annotated image from the Supplemental Blair Report. Yellow arrows indicate the solid rods.

31. When I examined the Air Runner that is the subject of the Supplemental Blair Report, I confirmed that the solid rod in the front does not rotate, relative to the part of the treadmill Dr. Blair identifies as the frame under normal use.

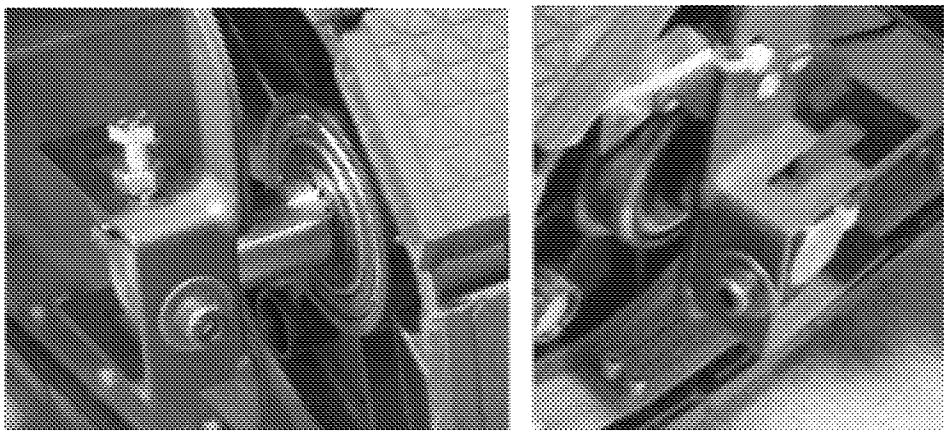


Figure 2. Representative images that I took on May 11, 2018 showing how the solid rods are fixed and how the pulley bearings are disposed about the solid rods. Rear is depicted on the left, and front is depicted on the right.

32. I disagree that Dr. Blair has shown that the Air Runner meets the limitations of Elements [c] and [d] of Claim 1.

**G. Elements [d] and [e]: "a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame" and "a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame"**

33. In his Supplemental Report, Dr. Blair writes:

> A "first bearing rail having a plurality of bearings" and "**attached** to a left side of the frame" are literally present in the Infringing Product.
>
> As shown, a first bearing rail [6] includes a plurality of bearings [16].
>
> As also shown, the first bearing rail [6] is **coupled** to at least one cross-member [11]. The at least one cross-member [11] is included with the frame [1]. (See, e.g., claim 3 and col. 5, lines 56-61 stating that "The frame 40 comprises ... one or more lateral or cross-members 56 ...").
>
> Therefore and as shown, the first bearing rail [6] is attached to one side of the frame [1] (i.e., the left side), while the second bearing rail [7] is attached to the other side of the frame

(Supplemental Blair Report, at 10.)

34. In his Supplemental Report, Dr. Blair also writes:

> A "second bearing rail having a plurality of bearings" and "**attached** to a right side of the frame" are literally present in the Infringing Product.
>
> As shown, a second bearing rail [7] includes a plurality of bearings [17].
>
> As also shown, the second bearing rail [7] is **coupled** to at least one cross-member [11]. The at least one cross-member [11] is included with the frame [1]. (See, e.g., claim 3 and col. 5, lines 56-61 stating that "The frame 40 comprises ... one or more lateral or cross-members 56 ...").
>
> Therefore and as shown, the first bearing rail [6] is attached to one side of the frame [1] (i.e., the left side), while the second bearing rail [7] is attached to the other side of the frame [1] (i.e., the right side).

(Supplemental Blair Report, at 12.)

35. As is clear from the quoted language above, Dr. Blair does not explain how the part he identifies as the bearing rail is physically **attached** to the part he identifies as the frame. Instead, Dr. Blair's analysis, above, appears to equate "coupled" with "attached." That is not proper, in light of the Court's Claim Construction Ruling, therefore I disagree that a PHOSITA would understand "coupled" to have the same meaning as "attached."

36. Specifically, the Court construed "coupled" to mean "The joining of two members directly or indirectly." That Claim Construction credited Woodway's argument that it acted as its own lexicographer for that term by defining it in the specification:

> For the purpose of this disclosure, the term "coupled" means the joining of two members directly or indirectly to one another. Such joining may be stationary or moveable in nature. Such joining may be achieved with the two members or the two members and any additional intermediate members being integrally formed as a single unitary body with one another or with the two members or the two members and any additional intermediate members being attached to one another. Such joining may be permanent in nature or may be removable or releasable in nature.

('580 patent, col. 32, ll. 10-19.)

37. I also do not agree that the part Dr. Blair identifies as the bearing rail is attached to the part he identifies as the frame. The '580 teaches that the left and right sides of the treadmill frame are distinct, yet Dr. Blair's Supplemental Report interprets "left side of the frame" and "right side of the frame" to mean, respectively, "anything left of center" and "anything right of center," relative to the treadmill as a whole, but not necessarily physically attached. None of the images Dr. Blair provides shows a "bearing

rail" (as he describes that term in his previous reports) attached to the left side of the frame, or the right side of the frame. To the contrary, the "bearing rails" Dr. Blair identifies are spaced apart from the frames and welded to the cross-pieces, not the sides of the frame.

38. Accordingly, I disagree that Dr. Blair has provided adequate evidence or analysis for his conclusion that the Air Runner meets the limitations of Elements [d] and/or [e], and I disagree that the Air Runner meets those limitations, even accepting Dr. Blair's bearing rail and frame analysis.

**H. Element [f]: "a running belt supported by the first bearing rail and the second bearing rail and disposed about the front shaft and the rear shaft, wherein the running belt follows a curved running surface"**

39. In Claim 1 of the '580 patent, the running belt is "supported by" the first bearing rail and the second bearing rail and "disposed about" the front shaft and the rear shaft. '580 patent, Col. 32, ll. 57-59. In his Opening Report, Dr. Blair opined that the earlier versions of the TrueForm Runner infringe Claim 1 of the '580 patent because – according to Dr. Blair – the "running belt [] is supported by the plurality of bearings … which are in turn supported by the first bearing rail and the second bearing rail…" (March 2, 2017 Opening Blair Report, at Exhibit F, p. 8.) Dr. Blair continued, opining that the term "support" does not require that components must be directly or physically connected or touching. "Support" may be provided directly, may be provided indirectly via an intermediate component or series of components, may bear some of the weight of another component or a series of components, and/or may bear all of the weight of another component or series of components.

(March 2, 2017 Opening Blair Report, at Exhibit F, p. 8.)

40. Dr. Blair appears to apply that same approach to the Air Runner. I disagree with his opinion of "support" for the reasons articulated in my Rebuttal Report. (*See* March 30, 2017 Rebuttal Report of Robert Giachetti, at p. 15.)

**I. Element [g]: "a safety device coupled to at least one of the front shaft and the rear shaft, wherein the safety device is structured to substantially prevent rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction."**

41. In his analysis of Element [g], Dr. Blair focuses on the fact that the claim is broad enough to encompass a safety device on either the front or the rear shaft and he has identified the safety device as an Altra Industrial Motion brand sprag type freewheel. (Supplemental Blair Report, at 16-17.)

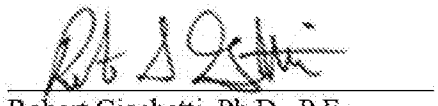
42. Because I disagree with the interpretation of "shaft" as described above, I also disagree that a safety device is structured to substantially permit the rotation of said "shaft" in one rotational direction only. Accordingly Dr. Blair has not proven that the Air Runner treadmill infringes Element g of Claim 1.

## V. EXHIBITS

43. At the trial, I may provide and rely on visual aids and demonstrative exhibits to demonstrate basic principles of practical mechanical design and implementation and the technologies that are the subject of the '580 patent. In addition, I may provide and rely on aids and demonstratives, such as charts, models or videos, to demonstrate my opinions and the bases for them. Examples of these visual aids and demonstrative exhibits may include claim charts, patent drawings, excerpts from patent specifications, file history, discovery responses, Markman materials, deposition testimony, deposition exhibits, or documents produced by the parties in this litigation, or obtained by various websites, as well as charts, models, diagrams, videos, and any materials or computer-generated videos. I reserve the right to rely on materials in the future not discussed herein. I have not yet selected which specific exhibits I may use, although the patents and images identified and incorporated within the report, in whole or in part, may be exhibits. Those exhibits have not yet been prepared.

## VI. Conclusion

It is my opinion that the Air Runner does not infringe Claim 1 of the '580 patent. I reserve the right to amend or supplement this report should additional material facts or new opinions emerge during future discovery or in testimony.



Robert Giachetti, Ph.D., P.E.
Senior Managing Engineer

May 14, 2018
Date

# EXHIBIT 4

UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| CHAPCO, INC. and SAMSARA, LLC | : | CIVIL ACTION No. |
| | : | 3:15cv01665 (JCH) |
| Plaintiffs, | : | |
| | : | |
| v. | : | |
| | : | |
| WOODWAY USA, Inc. | : | |
| | : | |
| Defendant. | : | May 7, 2018 |

**SUPPLEMENTAL REBUTTAL EXPERT REPORT OF DR. ROBERT GIACHETTI RESPONSIVE TO SECOND SUPPLEMENTAL EXPERT REPORT OF DR. KIM BLAIR DATED APRIL 13, 2018**

## I. INTRODUCTION AND SUMMARY OF MY OPINIONS

1. I have been retained by counsel for Samsara Fitness, LLC ("Samsara") and Chapco Inc. ("Chapco") to analyze the Second Supplemental Expert Report of Kim Blair, Ph.D. dated April 13, 2018 (the "Second Supplemental Blair Report") regarding Woodway USA, Inc.'s ("Woodway") allegations that the Generation III TrueForm Runner ("Gen III") infringes Claim 25 of U.S. Patent 9,039,580 titled Manual Treadmill and Methods of Operating The Same (herein the '580 patent) and to independently review the asserted claim and determine whether Claim 25 of the '580 patent is infringed.

2. In forming my opinion, I considered the documents and information listed in Appendix A, including the Second Supplemental Blair Report and the Exhibit A referenced therein. The opinions I provide herein are my own and are based on my independent review and on my education, experience, training, and skill accumulated in the practice of engineering. Between now and such time that I may be asked to testify at deposition and/or trial, I expect to continue my review, evaluation, and analysis.

3. I also examined a TrueForm Runner Treadmill. I have reviewed photographs and detailed drawings for Gen III, and a performed a detailed examination of the earlier Generation II TrueForm Runner, which included photo documentation.

4. I have not prepared the final versions of exhibits or demonstratives for trial at this time, but I reserve the right to prepare them, as necessary, in accordance with the materials presented as part of this report and consistent with the substance of the other reports I have provided in this matter.

5. I am explicitly incorporating by reference all prior reports I have submitted in this matter. I continue to express those opinions as true based on fundamental engineering principles outlined therein.

## II. SUMMARY OF OPINIONS

6. Based on my understanding of the law, and my research, analysis and examination of the Gen III, it is my opinion that Chapco and Samsara, and the accused Gen III treadmill, do not infringe Claim 25 of the '580 patent. The details of this opinion are set forth herein.

7. In evaluating Dr. Blair's Second Supplemental Report, I have found points that are incorrect or unsupported by evidence. While the rationale for my opinion on these points is provided within this report, the points themselves are briefly identified below:

a. Dr. Blair and I continue to disagree regarding the background of a person having ordinary skill in the art ("PHOSITA"). Dr. Blair reiterates in

Paragraph 14[1] that his PHOSITA is qualified after having only 2 years of work in the treadmill industry with NO other previous engineering or technical training. I disagree that such a limited amount of experience is sufficient and incorporate the PHOSITA qualifications outlined in my March 2, 2017 Opening Expert Report.

b. Dr. Blair does not cite intrinsic evidence or provide an analysis to support his construction of the terms "providing," "disposing…on," "permitting," and/or "substantially preventing," even though those claim terms are an integral part of Dr. Blair's infringement analysis of this method claim. For that reason alone, Dr. Blair's opinion is incomplete and unsubstantiated. I disagree with his unsubstantiated proposed constructions and his opinion based on them.

c. Dr. Blair also does not reference evidence or provide a basis for his opinion that "assembly" of the Gen III TrueForm Runner meets the limitations of the asserted claim. I disagree with that opinion.

8. The Second Supplemental Blair Report, at Exhibit A, depicts the Gen III TrueForm Runner for the purposes of Dr. Blair's infringement analysis. Dr. Blair opines that the Gen III TrueForm Runner literally infringes Claim 25 of the '580 patent,[2] and I disagree with that opinion, for the reasons set forth below.

9. I have been informed that the Court granted Plaintiffs' Motion for Summary Judgment as to Woodway's claims for indirect infringement under 35 U.S.C. § 271(b) (Dkt. No. 144, at p. 10), and the Second Supplemental Blair Report does not reference or address indirect infringement under 35 U.S.C. § 271(b), so my rebuttal is limited to an analysis of direct infringement.

## III. EXPERT QUALIFICATIONS AND EXPERIENCE

10. I am the same Dr. Robert Giachetti, a licensed professional engineer, engaged by Chapco and Samsara earlier in this case. I am currently employed as a Senior Managing Engineer at Exponent.

## IV. ANALYSIS

### A. Understanding of the Law

11. I have been retained as an engineering consultant, not as an expert on patent law. However, I have general familiarity with patent law principles from my professional experiences. Additionally, counsel to Chapco and Samsara have provided citations to legal principles relating to patents and patent infringement/validity that govern the issues on which I was asked to opine in this matter.

[1] Second Supplemental Blair Report.
[2] Second Supplemental Blair Report, ¶ 18.

12. I am informed that a method patent claims a number of steps, and that the method patent claim is not infringed unless all steps are carried out.

13. I further understand that in making a determination of infringement, the first step is to determine the scope of the asserted claim by reading the claim language, limitation by limitation, as they are construed by the Court or, if not interpreted by the Court, according to their ordinary meaning as understood by one of ordinary skill in the art.

14. I am informed that the party asserting infringement (Woodway) bears the burden to prove infringement by establishing the existence of each limitation of Claim 25 of the '580 patent.

15. I understand that because Claim 25 is a method claim, sales of Gen III, even a Gen III as depicted in the chart included in Dr. Blair's Second Supplemental Report, without more, do not infringe Claim 25 of the '580 patent. Dr. Blair is not opining that "sale" of the Gen III constitutes infringement of Claim 25 and I understand that direct infringement occurs only when someone performs all steps taught in the claimed method. I further understand that direct infringement of a method claim requires a showing that each every step of the claimed method has been carried out by the "direct infringer."

**B. The Claim Construction Hearing and Order**

16. I understand that the Court conducted a claim construction hearing on November 28, 2016. I have read the Claim Construction Ruling that issued following that claim construction hearing. In my analysis I have considered the claim terms using their plain and ordinary meaning as I believe a PHOSITA would have where the claim term has not been defined by the Court. If the Court provided a construction, I have applied that construction to each applicable claim term in accordance with the Claim Construction Ruling dated December 8, 2016.

| Disputed Term/Phrase | Court's Construction |
|---|---|
| Frame | No further construction necessary. |
| Bearing Rail | A rail with bearings whose top profile corresponds to the shape of the running surface. |
| A safety device cooperating with the rear shaft | A safety device adjoined to the rear shaft. |

| | |
|---|---|
| Coupled | The joining of two members directly or indirectly. |
| Rotatably coupled | No further construction necessary. |
| A bearing rail having a plurality of bearings rotatably coupled to the at least one bearing rail | No further construction necessary. |
| Running belt | No further construction necessary. |
| Running surface | The portion of the running belt upon which a user could place their foot during normal operation |

**C. Description of the '580 Patent**

17. The '580 patent generally describes a manual treadmill with a curved running surface, and a method or device to ensure the user operates the treadmill in a unidirectional fashion. '580 patent, Col. 2, ll. 7-39.

**D. Claim 25 of the '580 Patent**

18. Claim 25 of the '580 patent is a method claim that reads:

A method, comprising:

> **[Element a] providing** a manually powered treadmill, the manually powered treadmill having a frame with a front end and rear end;
>
> **[Element b] providing** a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile;
>
> **[Element c] disposing** a running belt on the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails;
>
> **[Element d] permitting** movement of the running belt in a first direction;

and

**[Element e] substantially** preventing movement of the running belt in a second direction opposite the first direction.

('580 patent, Claim 25, emphasis and element annotation added.)

**E. Element [a] "Providing" a Manually Powered Treadmill**

19. The first step, Element [a] of Claim 25, includes the limitation of "providing a manually powered treadmill."

20. The Court did not construe the term "providing." The '580 patent does not define term "providing." Therefore, I understand that term will have its plain and ordinary meaning.

21. I have been informed that the term "providing" has been interpreted by the United States Court of Appeals for the Federal Circuit to mean "furnishing, supplying, making available or preparing." That is consistent with my understanding of the plain and ordinary meaning of that term. Accordingly, for the purposes of this analysis, I interpret "providing" in the '580 patent to mean "furnishing, supplying, making available or preparing."

22. In his Second Supplemental Report, Dr. Blair writes that the Gen III meets this limitation simply because it "***is*** a 'manually powered treadmill.'" (Second Supplemental Blair Report, Exhibit A, p. 1) (emphasis added.) I disagree with Dr. Blair's opinion for the reasons set forth below.

23. Dr. Blair elects to omit the meaning of "providing" in his Second Supplemental Report. His analysis conflates the "providing" limitation in Element [a] of Claim 25 with "being." This conflation is contrary to the plain and ordinary meanings of each term. Dr. Blair does not identify any support for this conclusion (either intrinsic or extrinsic evidence), and it is also contrary to my understanding of the law of method patents, which requires the active execution of **steps** by the direct infringer. Dr. Blair has not identified any execution of steps. The limitation of "being" is not in Claim 25 of the '580 patent.

24. With respect to the "providing a manually powered treadmill" step, Dr. Blair also does not identify which of Chapco or Samsara allegedly "provides" the manually powered treadmill identified as the Gen III. To my knowledge at present, Dr. Blair has not opined at any time in this proceeding which company "provides" "a manually powered treadmill" in the form of Gen III.

25. I have reviewed the Bill of Materials for the Gen III, and I have also reviewed the Assembly Drawings for Gen III (e.g., SAM0014113 (Assembly Step 1), SAM0014137 (Assembly Step 2), and SAM0014143 (Assembly Step 3).) I note that not

only does Dr. Blair confirm that he studied the content of the above-referenced assembly drawings prior to issuance of the Second Supplemental Blair Report, but he also states that he viewed the Gen III "in various stages of assembly/disassembly." (Second Supplemental Blair Report, at p. 6, ¶ 15.) As part of my initial reports in this matter, I personally disassembled, reassembled and disassembled a TrueForm Runner to familiarize myself with its structure and components.

26. The Step 2 Assembly Drawing (SAM0014137) reflects that the running belt is excluded from the bill of materials. In this drawing, mounting the running belt is also excluded. It is my understanding, based on my review of the Bill of Materials and the declaration of Mr. Weinstein, that Chapco does not furnish or supply the components for the running belt assembled as a whole (e.g., the treads/overmolds, etc.), nor does Chapco assemble the running belt.

27. Without a running belt, there is no "manually powered treadmill" that meets the first step of Claim 25. Because Chapco does not "provid[e] a manually powered treadmill," or a treadmill at all, i.e., Chapco does not have a running belt to furnish, supply, make available or prepare a manually powered treadmill, Chapco does not perform the first step of Claim 25.[3]

28. Dr. Blair states that he "believes" that "the assembly of the Gen III" TrueForm Runner meets the limitation of "providing." (Second Supplemental Blair Report, at p. 7, at ¶ 18 and Exhibit A to Second Supplemental Blair Report, at p. 1.) As identified above and herein, the Court did not construe "providing," and Dr. Blair does not identify any basis for equating "providing" with "assembly[4]." This is, again, contrary to the plain and ordinary meanings of these two terms. Accordingly, I disagree with Dr. Blair.

29. Nevertheless, based on my review of the material provided in the context of the summary judgment briefing, including the Declaration of Brian Weinstein, I understand that Chapco does not assemble the TrueForm Runner. I understand all of this to be true for the Gen III as well, i.e., Chapco does not assemble the Gen III. Thus, even if inappropriately accepting that "providing" means "assembly," Chapco still does not perform this step.

30. Accordingly, it is my opinion that Chapco does not perform at least one step of Claim 25.

---

[3] This is not the sole basis for my opinion of non-infringement. I also understand, based on the summary judgment briefing, including the Declaration of Brian Weinstein, that Chapco does not furnish, supply, make or prepare all parts of the treadmill, including the bearings and/or the hardware (screws, nuts) used for assembly of the treadmill. (See Dkt. No. 90-1, Declaration of Brian Weinstein, at ¶¶ 23, 24.)

[4] Merriam-Webster's dictionary: (v) the fitting together of manufactured parts into a complete machine, structure, or unit of a machine (n) a collection of parts so assembled.

31. Additionally, and for the reasons articulated in my March 30, 2017, Rebuttal Non-Infringement Report, I continue to disagree with Dr. Blair's opinion concerning the "frame" limitation.

32. In the Claim Construction Ruling, the Court adopted the position that "frame" did not require further construction, reasoning that the patents "explicitly state that the frame was to 'have substantially any configuration suitable for providing structure and support for the treadmill.'" (Dkt. No. 76, at pp. 5-6.)

33. In his March 2, 2017 Opening Report, Dr. Blair provides no analysis for the basis of his opinion that the structure he identifies as the "frame" provides structure and/or support for the treadmill. (Blair Opening Report, at Exhibit F.) Instead, Dr. Blair opined that the frame does not need to be a single unitary structure, which he did not address structure or support, and he included no analysis concerning support or structure. (*See* March 30, 2017, Rebuttal Report of Robert Giachetti, at pp. 12-13.) The Second Supplemental Blair Report also fails to explain the basis for Dr. Blair's statement that the structures he identified as meeting the frame limitation provide structure and support.

34. As set forth in my Rebuttal Non-Infringement Report, incorporated herein, I disagree with Dr. Blair's opinion that the structure(s) he identifies as the frame meets that limitation. Consistent with my initial analysis, the components he indicates as "frame [1]" in his Second Supplemental Report are appendages that are used to facilitate the coupling of the hand rails, feet/wheels, and the foot platforms to the frame, as evidenced by Dr. Blair's photo on page 8 of Exhibit A in his Second Supplemental Report; the non-structurally-essential left and right foot platforms are present as safety components required by treadmill standards. Accordingly, I continue to disagree with Dr. Blair.

**F. Element [b]: "Providing" a First Bearing Rail…**

35. The second step, Element [b], of Claim 25 includes the limitation of "providing a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile."

36. As set forth above, the Court did not construe the term "providing." The '580 patent does not define term "providing." I understand that term will have its plain and ordinary meaning. For the reasons articulated for Element [a], for the purposes of this analysis, I assume that "providing" in the '580 patent is understood to mean "furnishing, supplying, making available or preparing."

37. In the Second Supplemental Report, Dr. Blair writes that the Gen III TrueForm Runner meets this limitation because "[t]he assembly of the Gen III treadmill, which includes providing two bearing rails, meets this limitation." (Second Supplemental Blair Report, Exhibit A, p. 4.) I disagree with Dr. Blair's analysis.

38. In this section of the Second Supplemental Blair Report, it appears that Dr. Blair's analysis distinguishes the limitation of "providing" in Element [b] of Claim 25 from "assembly" because he uses both terms in his analysis. Dr. Blair's imprecision underscores the impropriety of his use of the word "assembly" to meet some of the "providing" limitations. The ambiguity Dr. Blair creates means that "assembly of" could be a noun meaning a grouping of parts or elements as Dr. Blair is using it, or it could also be used as a verb meaning "to put together." In the first case, he must mean the entire treadmill[5], completely put together, which indicates his analysis is ignoring the step-by-step nature of method claims. In the second case, his analysis indicates that by putting the Gen III together, whole, is the same as "providing." Neither interpretation comports with "providing," however. Accordingly, I disagree with Dr. Blair.

39. I understand that Chapco machines and bends part of the structures that Dr. Blair has identified as the "frame" and the "bearing rail," although I disagree with Dr. Blair's analysis leading to the identification of those parts for the reasons articulated in the March 30, 2017, Rebuttal Non-Infringement Report.[6]

40. Again, Dr. Blair does not identify which of Chapco or Samsara allegedly "provides" the structures to meet the "bearing rail" limitations of Element [b].

41. I understand that Chapco machines and bends part of the assembly that Dr. Blair identifies as the bearing rail.[7] However, I also understand that Chapco does not furnish, supply, make or prepare the bearings on that assembly[8] that Dr. Blair identifies, but that, instead, Samsara purchases those bearings and installs them.

42. I have reviewed the Samsara "Timed Build" document, which I understand reflects the construction process of treadmill sub-assemblies, including the Gen III. (SAM0006695.) It starts with a sub-assembly, which Dr. Blair identifies as the bearing rail. As is evident from the image below, the sub-assembly does not include a plurality of bearings associated with a bearing rail element.

[5] Per Dr. Blair, "The assembly of the Gen III treadmill, which includes providing two bearing rails, meets this limitation" page 4, Exhibit A.
[6] Blair Supplemental Report, Exhibit A, pp. 4-5.
[7] As set forth herein and in my prior reports, I do not agree that the part Dr. Blair identifies meets the limitation of bearing rail.
[8] Declaration of Brian Weinstein.




Figure 1. A plurality of bearings are absent on the assembly.

43. As a result, Chapco does not perform at least one step of Claim 25: providing a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings.

**G. Element [c]: "Disposing" a Running Belt**

44. The third step, Element [c] of Claim 25, includes the limitation of "disposing a running belt **on** the plurality of bearings of the first bearing rail and the second bearing rail such that the running belt follows a top curved running surface corresponding to the curved top profile of the first and second bearing rails."

45. In his Second Supplemental Report, Dr. Blair writes that the Gen III TrueForm Runner meets this limitation because "The assembly of the Gen III treadmill, which includes providing a running belt and locating it above the bearing rails, meets this

limitation." (Second Supplemental Blair Report, Exhibit A, pp. 6-7.) I disagree with Dr. Blair's analysis.

46. Dr. Blair's analysis equates the limitation of "disposing" in Element [c] of Claim 25 with "assembly," "providing a running belt," and "locating [the running belt] above the bearing rails," without any citation to the specification or the file history of the '580 patent for that construction of "disposing."

47. The Court did not construe the term "disposing." The '580 patent does not define term "disposing." I understand that term will have the plain and ordinary meaning as a PHOSITA would understand it.

48. I have been informed that the case law and definition of "dispose" suggest that to meet the limitation, a party would need to actively place the belt in the referenced location. The definition of "dispose" in Merriam Webster includes "to put in place: set in readiness." Based on my education and experience, it is my opinion that "disposing," as that term is used in the '580 patent, would be understood by a PHOSITA to mean actively "placing," which is the engineering equivalent of Dr. Blair's term "locating." (*See* Second Supplemental Blair Report, at Exhibit A, p. 6.)

49. I understand that when the parts arrive at Samsara, the running belt is in pieces. Samsara assembles those pieces and then installs those connected parts. As is reflected in the Samsara Timed Build document, Chapco does not place or "locate" a running belt on Gen III. (*See* Samsara Timed Build.) As a result, Chapco does not perform at least one step of Claim 25.

50. Additionally, Dr. Blair writes that "providing a running belt and locating it **above** the bearing rails" meets this limitation. (*See* Second Supplemental Blair Report, at Exhibit A, p. 6, emphasis added.) I disagree. I also disagree that simply being present is enough to infringe a method claim.[9]

51. During the *Markman* briefing, the Court considered the terms "running belt"[10] and "endless belt."[11] (Claim Construction Ruling, at pp. 21-22.) The specification explains that Figures 5-6 show the running belt (part 16) and that an exemplary embodiment of the running belt includes endless belts configured to provide support for the running belt in order to support the user. ('580 patent, Col. 14, ll. 5-7.) According to the specification, "more or less than two endless belts may be used," and "other suitable support elements may be used to provide support for the running belt." ('580 patent, Col. 14, ll. 12-16.) During the *Markman* briefing, the Court looked to the claims for the distinction between the "endless belts" and the "running belt" and "running surface."

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[9] "A "running belt" that is disposed "on the plurality of bearings of the first bearing rail and the second bearing rail … first and second bearing rails" ***is literally present in the Gen III treadmill***." Exhibit A, page 6.

[10] Identified as part 16 in the specification, e.g., '580 patent, Col. 14, ll. 1-4.

[11] Identified as part 226 in the specification, e.g., '580 patent, Col. 14, ll. 5-7.

52. Dr. Blair does not explain the basis for his substitution of the term "on" with "above," nor does he cite any intrinsic evidence or extrinsic evidence for that substitution. In that portion of his March 2, 2017. Opening Report relating to Claim 25, Dr. Blair did not use the term "above," and he does not explain why his analysis apparently has changed in the interim. The Court did not construe the term "on" during the claim construction process.

53. On page 9 of Exhibit A to the Second Supplemental Blair Report, Dr. Blair includes an image, below:

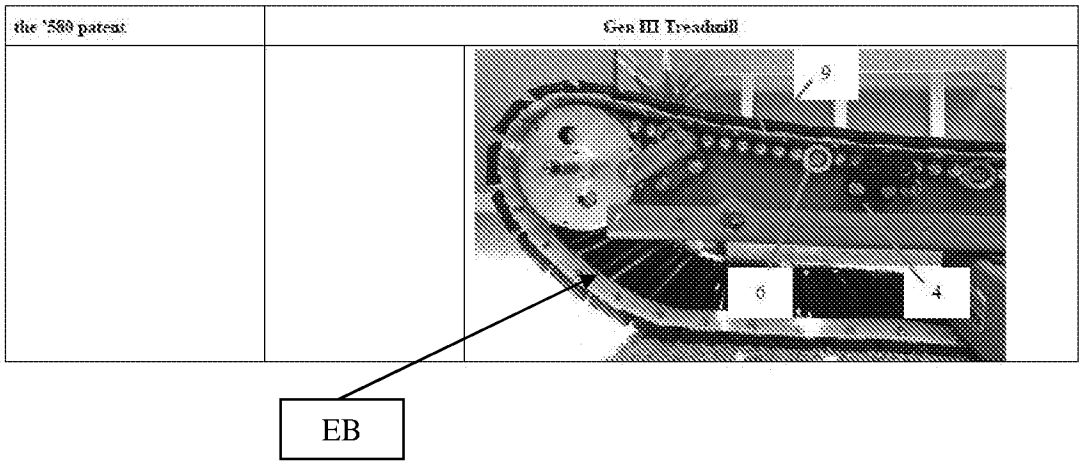



Figure 2. Figure from Second Supplemental Blair Report page 9 showing the GenIII treadmill structure.

54. The image above shows dark colored, segmented treads (which Dr. Blair identifies as part 9, to reflect the "running belt") and a light colored endless belt, annotated as "EB." Based on Dr. Blair's image above, Dr. Blair identifies the treads as the "running belt," because that is the part "upon which the user runs." (*See* Claim Construction Ruling, at p. 22.) But no tread (part 9) is "on" the bearings, i.e., the running belt Dr. Blair identifies is not "on" the bearings. Instead, the endless belt is "on" the bearings.

55. In Claim 1 of the '580 patent, the running belt is "supported by" the first bearing rail and the second bearing rail and "disposed about" the front shaft and the rear shaft. '580 patent, Col. 32, ll. 57-59. In his Opening Report, Dr. Blair opined that the earlier versions of the TrueForm Runner infringe Claim 1 of the '580 patent because – according to Dr. Blair – the "running belt [] is supported by the plurality of bearings … which are in turn supported by the first bearing rail and the second bearing rail…" (March 2, 2017, Opening Blair Report, at Exhibit F, p. 8.) Dr. Blair continued, opining that the term "support"

> does not require that components must be directly or physically connected or touching. "Support" may be provided directly, may be provided indirectly via an intermediate component or series of components, may bear some of the weight of

another component or a series of components, and/or may bear all of the weight of another component or series of components.

(March 2, 2017 Opening Blair Report, at Exhibit F, p. 8.)

56. In Claim 11 of the '580 patent, the running belt is "at least partially supported by the first bearing rail and the second bearing rail." '580 patent, Col. 33, ll. 53-54. In his Opening Report, Dr. Blair opined that the earlier versions of the TrueForm Runner infringe Claim 11 of the '580 patent because – according to Dr. Blair – a "running belt [] is supported by the first bearing rail and the second bearing rail." (March 2, 2017, Opening Blair Report, at Exhibit F, p. 24.)

57. Then in Claim 19 of the '580 patent, the running belt is "supported by the first bearing rail and the second bearing rail." '580 patent, Col. 34, ll. 52-53. In his Opening Report, Dr. Blair opined that the earlier versions of the TrueForm Runner infringe Claim 19 of the '580 patent because – according to Dr. Blair – the "running belt [] is supported by the plurality of bearings [] of the first bearing rail [] and the plurality of bearings [] of the second bearing rail []." (March 2, 2017 Opening Blair Report, at Exhibit F, pp. 41-42.)[12]

58. The word "support" is not used in Claim 25 in regard to the running belt, however. "Disposing" is used. The plain and ordinary meaning of "disposing" a running belt "on" is locating the running belt on the plurality of bearings so that the running belt touches the plurality of bearings and may circulate around the bearings. Claim 25 claims "disposing on." The term "disposed on" is used in a single place within the specification (Col. 14 l. 7) to describe complete circumferential contact between the two objects (i.e., running belt and endless belt), while "disposed about" is used throughout the specification to indicate the running belt encircling the front and rear shafts. Claim 25 requires that the alleged infringer perform the step of "disposing" a running belt "**on**" the plurality of bearings.

59. Therefore, neither Samsara nor Chapco perform the third step of Claim 25, i.e., "disposing a running belt on the plurality of bearings of the first bearing rail and the second bearing rail."

**H. Element [d]: "permitting movement of the running belt in a first direction"**

60. The fourth step, Element [d] of Claim 25 includes the limitation of "permitting movement of the running belt in a first direction."

61. In his Second Supplemental Report, Dr. Blair writes that the Gen III meets this limitation because "The assembly of the Gen III treadmill, which includes the **coupling** of a safety device, meets this limitation." (Second Supplemental Blair Report, Exhibit A, p. 10.) Dr. Blair writes that because the safety device [11] is coupled to the shaft [12] and because the safety device [11] "allows free overrun," in one rotational

[12] I continue to disagree with Dr. Blair's interpretation of "support."

direction, the safety device [11] is structured to substantially prevent rotation of the shaft [12] in a first rotational direction while permitting rotation of the shaft [12] in a second rotational direction opposite the first rotational direction. I disagree with Dr. Blair's analysis.

62. Claim 25 does not reference use of a safety device, or any specific device whatsoever, or the location of that device. Samsara installs the safety device Dr. Blair references, not Chapco. Since Dr. Blair opines that the alleged infringer performs the step of "coupling" a safety device to a shaft as part of the "assembly" process to meet this limitation, Chapco does not perform at least one step of Claim 25, i.e., "permitting movement of the running belt in a first direction."

### I. Element [e]: "substantially preventing movement of the running belt in a second direction opposite the first direction."

63. The fifth step, Element [d] of Claim 25 includes the limitation of "substantially preventing movement of the running belt in a second direction opposite the first direction."

64. In his Second Supplemental Report, Dr. Blair conflates the fourth and fifth steps, writing that "because" the safety device he identifies is "coupled" to the shaft and allows free overrun in one rotational direction, that safety device is structured "to substantially prevent movement of the running belt [9] in a first direction and permit movement of the running belt [9] in a second direction that is opposite the first direction." (Second Supplemental Blair Report, at Exhibit A, pp. 11-12.)

65. As with Element [d], that analysis focuses on an unclaimed safety device rather than performance of a step. Dr. Blair's analysis of the fifth element states only that "coupling" a safety device meets this limitation, but Samsara installs the referenced safety device, not Chapco. Since Dr. Blair opines that the alleged infringer must perform the step of "coupling" a safety device to a shaft to meet this limitation, Chapco does not perform at least one step of Claim 25, i.e., "substantially preventing movement of the running belt in a second direction opposite the first direction."

## V. EXHIBITS

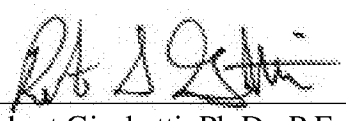
66. At the trial, I may provide and rely on visual aids and demonstrative exhibits to demonstrate basic principles of practical mechanical design and implementation and the technologies that are the subject of the '580 patent. In addition, I may provide and rely on aids and demonstratives, such as charts, models or videos, to demonstrate my opinions and the bases for them. Examples of these visual aids and demonstrative exhibits may include claim charts, patent drawings, excerpts from patent specifications, file history, discovery responses, Markman materials, deposition testimony, deposition exhibits, or documents produced by the parties in this litigation, or obtained by various websites, as well as charts, models, diagrams, videos, and any

materials or computer-generated videos. I reserve the right to rely on materials in the future not discussed herein. I have not yet selected which specific exhibits I may use, although the patents and images identified and incorporated within the report, in whole or in part, may be exhibits. Those exhibits have not yet been prepared.

## VI. CONCLUSION

Dr. Blair has not identified a direct infringer of Claim 25 in his analysis. Based on the analysis presented above, i.e., that Chapco does not perform all steps of Claim 25, and Samsara does not perform all steps of Claim 25, it is my opinion that there is no direct literal infringement of Claim 25.

I reserve the right to amend or supplement this report should additional material facts or new opinions emerge during future discovery or in testimony.



Robert Giachetti, Ph.D., P.E.
Senior Managing Engineer

May 7, 2018
Date

**APPENDIX A**
**MATERIALS RECEIVED**

## VII. MATERIALS RECEIVED

1. Second Supplemental Expert Report of Kim B. Blair, Ph.D. April 13, 2018
2. SAM0006695 Timed Build #1 57670715.PDF
3. Technical Drawings/BOM:
    a. Assembly Stage 1 #1 57670001
    b. Assembly Stage 2 #1 57669997
    c. Assembly Stage 3 #1 57669995
    d. SAM0014105 (Native Render).pdf
    e. SAM14106_PROD012
    f. SAM14107_PROD012
    g. SAM14109_PROD012 - SAM14113_PROD012
    h. SAM14115_PROD012 - SAM14117_PROD012
    i. SAM14119_PROD012 - SAM14122_PROD012
    j. SAM14124_PROD012
    k. SAM14126_PROD012
    l. SAM14129_PROD012
    m. SAM14130_PROD012
    n. SAM14132_PROD012
    o. SAM14134_PROD012
    p. SAM14135_PROD012
    q. SAM14137_PROD012
    r. SAM14139_PROD012 - SAM14143_PROD012
4. Coconut Grove Pads Inc. v. Mich and Mich TGR Inc.
5. Declaration of Brian Weinstein May 1, 2017

# EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| SPEEDFIT LLC,<br><br>Plaintiff,<br><br>vs.<br><br>WOODWAY USA, INC.,<br><br>Defendant. | Case No. 2:17-cv-00768 (KAM) (AKT) |

**WOODWAY USA, INC.'S FIRST SUPPLEMENTAL RESPONSES AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES (NOS. 1-7)**

Pursuant to Fed. R. Civ. P. 26 and 33 and the Local Civil Rules of this District, Defendant Woodway USA, Inc. ("Woodway"), by and through its attorneys, hereby responds and objects to Plaintiff Speedfit LLC's ("Speedfit") First Set of Interrogatories as follows:

**GENERAL OBJECTIONS**

1. Woodway objects to each and every interrogatory, definition, and instruction to the extent Plaintiff seeks to impose requirements or any burdens inconsistent with or in addition to Woodway's obligations under the applicable rules, including the Federal Rules of Civil Procedure and the Local Rules of this Court, any order of this Court, or any stipulation or agreement between the parties.

2. Woodway objects to each and every interrogatory, definition, and instruction to the extent Plaintiff seeks information that is protected under, without limitation, the attorney-client privilege, the work product immunity doctrine, and/or any other applicable privilege, prohibition, limitation, or immunity from disclosure. Inadvertent production of such information shall not constitute the waiver of any applicable privilege, doctrine, immunity, or objection,

including, but not limited to, objections on the basis of competency, confidentiality, relevancy, materiality, work product, privilege, and/or admissibility as evidence.

3. Woodway objects to each and every interrogatory, definition, and instruction to the extent Plaintiff calls for information or the production of documents or things not in Woodway's possession, custody, or control, and/or not obtainable by means of a reasonably diligent search, including, without limitation, documents or things that are not maintained by Woodway in the normal course of business or that are no longer maintained by Woodway.

4. Woodway objects to each and every interrogatory, definition, and instruction to the extent Plaintiff seeks information that is a trade secret and/or confidential or proprietary business information of Woodway that cannot be adequately protected by the Stipulated Protective Order that has been entered in this case. (Dkt. No. 19-1.)

5. Woodway objects to each and every interrogatory, definition, and instruction to the extent Plaintiff seeks information that is already in its possession or available from a public source as to which the burden of obtaining such information is the same for Plaintiff as it would be for Woodway. Woodway further objects to each interrogatory, definition, and instruction to the extent that Plaintiff seeks to require Woodway to produce back to Plaintiff the same documents that Plaintiff has produced to Woodway.

6. Woodway objects to each and every interrogatory, definition, and instruction to the extent it is overly broad, unduly burdensome, oppressive, and/or irrelevant to the subject matter of this action.

7. Woodway objects to each and every interrogatory, definition, and instruction to the extent it is vague, ambiguous, or confusing by failing to adequately define terms or failing to describe the information with reasonable particularity. Subject to the General and Specific

Objections, Woodway will produce reasonable available, relevant, responsive, non-privileged information only to the extent that Woodway understands each request and to the extent such information is available after a reasonable search.

8. Woodway objects to each and every interrogatory to the extent it seeks identification of "all" information or documents that relate to the particular subject on the grounds of overbreadth, undue burden, and expense.

9. Woodway objects to each and every interrogatory to the extent it is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less costly. Woodway further objects to each and every interrogatory to the extent the burden of discovery sought outweighs its likely benefit.

10. Woodway objects to each and every interrogatory to the extent that it improperly contains multiple subparts in one interrogatory request.

11. Woodway objects to each and every interrogatory, definition, and/or instruction to the extent it requires Woodway to provide a legal determination, opinion, or conclusion.

12. Woodway objects to Plaintiff's definitions of "you" and "your" to the extent that Plaintiff seeks to compel Woodway to collect or produce information or documents from parties from whom Woodway has no right or obligation to collect information or documents. Woodway also objects to these definitions insofar as they seek information that is (a) not within Woodway's possession, custody, or control, and/or (b) protected from discovery by the attorney-client privilege, work product doctrine, or any other applicable privilege, immunity, or protection. Woodway further objects to the definition of the terms "you" and "yours" as being vague, overbroad, and unduly burdensome to the extent that each term includes all "parent companies or entities, subsidiaries, affiliates, predecessors, successors, and/or assigns and their

employees, officers, directors, agents and other persons purporting to act at the direction and/or on its behalf of any of them." Woodway further objects to the definition to the extent Plaintiff seeks to impose obligations on Woodway beyond those required by the Federal Rules of Civil Procedure, the Local Rules of this Court, and any applicable orders of this Court. Woodway USA, Inc. is the defendant and assignee of the patents-in-suit. As such, Woodway USA, Inc. is the party responding to these requests.

13. Woodway objects to Plaintiff's definition of "Curve" as being vague and ambiguous as this definition fails to adequately define or otherwise identify with particularity or specificity the Woodway products that fit within its definition. Woodway manufactures and sells multiple motorless, leg-powered treadmill products, some of which have a curved running surface.

14. Woodway objects to Plaintiff's definition of "Period" to the extent it is overbroad, unduly burdensome, and not proportional to the needs of this case. As this case relates solely to Plaintiff's claims of inventorship surrounding a Woodway patent application filed in March 2009, the time period January 1, 2008 through the present is not narrowly tailored to the specific issues in the case. Given the initiation of Plaintiff's first lawsuit in 2013, when Plaintiff raised a challenge to Woodway's patent rights in its initial complaint, *Speedfit LLC, et al. v. Woodway USA*, Case No. 13-cv-1276-KAM-AKT (E.D.N.Y.), any responsive documents after the 2013 lawsuit was filed are likely to be protected from discovery by at least the attorney-client privilege.

15. Woodway objects to Plaintiff's definition of "communication" to the extent it calls for production or identification of electronic mail, which should be treated separately under the proposed ESI order in this case. (*See* Dkt. Nos. 24-2, 24-3.) Woodway further objects to

Plaintiff's definition of "communication" to the extent "other forms of communications" is vague and ambiguous.

16. Woodway objects to Plaintiff's instruction regarding requests to "identify a document" to the extent Plaintiff seeks to impose obligations on Woodway beyond those required by the Federal Rules of Civil Procedure, the Local Rules of this Court, and any applicable orders of this Court.

17. Woodway objects to Plaintiff's instruction regarding requests to "identify an agreement or communication" to the extent Plaintiff seeks to impose obligations on Woodway beyond those required by the Federal Rules of Civil Procedure, the Local Rules of this Court, and any applicable orders of this Court.

18. Woodway objects to Plaintiff's instruction regarding requests to "identify a person" to the extent Plaintiff seeks to impose obligations on Woodway beyond those required by the Federal Rules of Civil Procedure, the Local Rules of this Court, and any applicable orders of this Court.

By responding to Plaintiff's First Set of Interrogatories, Woodway does not waive any objection that may be applicable: (a) the use, for any purpose, by Plaintiff of any information provided in response; or (b) the admissibility, relevance, or materiality of any of the information to any issue in this case. Moreover, a response stating that Woodway will provide information regarding an interrogatory does not constitute an admission that any information regarding that interrogatory exists or can be located after a reasonable search, or is known, or reasonably available to Woodway.

Each and every General Objection shall be deemed to be incorporated in full into each of the individual responses set forth below. Any specific objections to an interrogatory are made in addition to the General Objections, not as a replacement for them.

Discovery is ongoing in this action, and Woodway has not completed its investigation into the parties' claims and defenses. In addition, Plaintiff seeks leave to amend the Complaint. (Dkt. No. 26.) Woodway therefore objects and responds to these interrogatories based upon the information in its possession after diligent inquiry at the time of preparation of these responses. Woodway reserves the right to amend, supplement, modify, and/or correct its objections or responses as additional information becomes available to Woodway in the course of its investigation and as discovery in this case progresses.

**FIRST SUPPLEMENTAL OBJECTIONS AND RESPONSES TO INTERROGATORIES**

Subject to and without waiving the foregoing General Objections, Woodway objects and responds to Plaintiff's First Set of Interrogatories as follows:

**INTERROGATORY NO. 1:**

Identify all witnesses with knowledge of the allegations set forth in the Complaint.

**RESPONSE TO INTERROGATORY NO. 1:**

In addition to its General Objections, Woodway objects to this Interrogatory as overly broad, unduly burdensome, and not proportional to the needs of this case to the extent it requests identification of "all witnesses" and to the extent it seeks information not relevant to any party's claims or defenses.

Subject to and without waiving its General and Specific Objections, Woodway responds as follows: *See* Section (i) of Woodway's Initial Disclosures, served on October 26, 2017. In identifying these witnesses, Woodway is referencing individuals who may have discoverable information that Woodway may use to defeat Plaintiff's claims and/or support any

of Woodway's defenses. Woodway does not consent to Plaintiff contacting any of its current or former employees directly. Instead, any such contact should be through Woodway's counsel of record at Foley & Lardner LLP.

**INTERROGATORY NO. 2:**

Identify all documents in your possession that support invention of the subject matter claimed in each of the '276 patent, the 'D866 patent, the 'D245 patent and the 'D776 patent, including internal email communications, by each of the named inventors.

**RESPONSE TO INTERROGATORY NO. 2:**

In addition to its General Objections, Woodway specifically objects to Plaintiff's characterization of this request as one interrogatory because it contains multiple subparts. Each subpart of this Interrogatory should be counted towards Plaintiff's limit under the Federal Rules of Civil Procedure, or any applicable court order.

Woodway objects to this Interrogatory as overly broad, unduly burdensome, and not proportional to the needs of this case to the extent it requests identification of "all documents." In addition, Woodway objects to this Interrogatory as cumulative and duplicative of other discovery requests propounded by Plaintiff in this litigation.

Woodway objects to this Interrogatory to the extent it seeks information that is protected by the attorney-client, work product, and/or other applicable privilege. Woodway also objects to this Interrogatory to the extent "support invention" calls for a legal conclusion.

Finally, Woodway objects to this Interrogatory to the extent it includes "email communications," which should be treated separately under the proposed ESI order in this case. (*See* Dkt. Nos. 24-2, 24-3.)

Subject to and without waiving its General and Specific Objections, Woodway responds as follows: Pursuant to Fed. R. Civ. P. 33(d), Woodway will produce non-privileged

documents and tangible things in its possession, custody, or control sufficient to respond to this Interrogatory.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 2:**

Subject to and without waiving its General and Specific Objections, Woodway responds, pursuant to Fed. R. Civ. P. 33(d), by identifying at least the following documents produced by Woodway from which the answer to this interrogatory may be ascertained: WWUSA0000043-WWUSA0000045; WWUSA0000062-WWUSA0000064; WWUSA0000188-WWUSA0000189; WWUSA0000193-WWUSA0000195; WWUSA0000230-WWUSA0000231; WWUSA0000439-WWUSA0000440; WWUSA0000536-WWUSA0000538; WWUSA0000551-WWUSA0000552; WWUSA0000846-WWUSA0000849; WWUSA0003118-WWUSA0003120; WWUSA0003393-WWUSA0003397; WWUSA0008029-WWUSA0008032; WWUSA0008074-WWUSA0008077; WWUSA0008845-WWUSA0008850; WWUSA0008869-WWUSA0008870; WWUSA0008876-WWUSA0008877; WWUSA0008917-WWUSA0008921; WWUSA0009786-WWUSA0009787; WWUSA0009815-WWUSA0009820; WWUSA0009931; WWUSA0017780-WWUSA0017782; WWUSA0017942-WWUSA0017945; WWUSA0017988-WWUSA0017990; WWUSA0018260-WWUSA0018265; WWUSA0018475; WWUSA0019571-WWUSA0019572; WWUSA0019679-WWUSA0019680; WWUSA0020206-WWUSA0020207; WWUSA0020215-WWUSA0020217; WWUSA0020226-WWUSA0020227; WWUSA0020235; WWUSA0020868-WWUSA0023668; WWUSA0023669-WWUSA0025900; PLTFESI002203-PLTFESI002204(2013 Speedfit Litigation).

**INTERROGATORY NO. 3:**

Identify any product sold by Woodway marked with any of US Patent No. 9,114,276, US Patent No. D736,866, D753,245 and US Patent No. D753,776, to comply with 35 USC §287.

**RESPONSE TO INTERROGATORY NO. 3:**

In addition to its General Objections, Woodway objects to this Interrogatory as irrelevant to any party's claims or defenses and beyond the scope of discovery in this case. During the parties' October 30, 2017 Initial Conference, Plaintiff was ordered to remove certain topics from its proposed list of discovery topics. (Dkt. No. 20 at ¶ 6.) Following this order, Plaintiff removed the topic "technical, marketing, and financial information relating to Defendant's product(s) marked with one or more of the patent numbers of the patents in suit," which encompasses the information sought by this Interrogatory. Any marking of the patents-in-suit is irrelevant to the issue of inventorship.

Woodway additionally objects to this Interrogatory to the extent the term "marked" calls for a legal conclusion. Woodway also objects to this Interrogatory to the extent it seeks information that is protected by and subject to the rules governing any applicable privilege or protection, including, but not limited to, the attorney-client privilege and the work-product immunity doctrine.

Subject to the foregoing, Woodway does not intend to respond further.

**INTERROGATORY NO. 4:**

Identify the first sale date of the products identified in Interrogatory No. 3.

**RESPONSE TO INTERROGATORY NO. 4:**

In addition to its General Objections, Woodway objects to this Interrogatory as irrelevant to any party's claims and defenses and beyond the scope of discovery in this case. During the parties' October 30, 2017 Initial Conference, Plaintiff was ordered to remove certain topics from its proposed list of discovery topics. (Dkt. No. 20 at ¶ 6.) Following this order, Plaintiff removed the topic "technical, marketing, and financial information relating to Defendant's product(s) marked with one or more of the patent numbers of the patents in suit,"

which encompasses the information sought by this Interrogatory. Sales of any marked products are irrelevant to the issue of inventorship.

Subject to the foregoing, Woodway does not intend to respond further.

**INTERROGATORY NO. 5:**

Identify all privileged and non-privileged communications, internal to Woodway, that refer to the inventions, or the inventive subject matter of the '276 patent, the 'D866 patent, the 'D245 patent and the 'D776 patent, the products identified in Interrogatory 3, or that refer to the preparation and filing of the patent applications that issued as the '276 patent, the 'D866 patent, the 'D245 patent and the 'd776 [sic] patent, respectively.

**RESPONSE TO INTERROGATORY NO. 5:**

In addition to its General Objections, Woodway specifically objects to Plaintiff's characterization of this request as one interrogatory because it contains multiple subparts. Each subpart of this Interrogatory should be counted towards Plaintiff's limit under the Federal Rules of Civil Procedure, or any applicable court order.

Woodway objects to this Interrogatory as overly broad, unduly burdensome, and not proportional to the needs of this case to the extent it requests identification of "all privileged and non-privileged communications" that "refer" to the requested subtopics. Additionally, Woodway objects to this Interrogatory to the extent that "inventive subject matter" is vague and ambiguous. Woodway further objects to this Interrogatory as cumulative and duplicative of other discovery requests propounded by Plaintiff in this litigation.

Woodway also objects to this Interrogatory to the extent the phrases "inventive subject matter," and "inventions" call for a legal conclusion. Woodway further objects to this Interrogatory to the extent it seeks information that is protected by the attorney-client, work product, and/or other applicable privilege.

Additionally, Woodway objects to the phrase "the products identified in Interrogatory 3" because as explained above, this topic is inappropriate and outside the scope of discovery.

Finally, Woodway objects to this Interrogatory to the extent it calls for electronic mail, which should be treated separately under the proposed ESI order in this case. (*See* Dkt. Nos. 24-2, 24-3.)

Subject to and without waiving its General and Specific Objections, Woodway responds as follows: Pursuant to Fed. R. Civ. P. 33(d), Woodway will produce non-privileged documents and tangible things in its possession, custody, or control sufficient to respond to this Interrogatory.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 5:**

Subject to and without waiving its General and Specific Objections, Woodway responds, pursuant to Fed. R. Civ. P. 33(d), by identifying at least the following documents produced by Woodway from which the answer to this interrogatory may be ascertained: WWUSA0000043-WWUSA0000045; WWUSA0000062-WWUSA0000064; WWUSA0000188-WWUSA0000189; WWUSA0000193-WWUSA0000195; WWUSA0000230-WWUSA0000231; WWUSA0000439-WWUSA0000440; WWUSA0000536-WWUSA0000538; WWUSA0000551-WWUSA0000552; WWUSA0000846-WWUSA0000849; WWUSA0003118-WWUSA0003120; WWUSA0003393-WWUSA0003397; WWUSA0008029-WWUSA0008032; WWUSA0008074-WWUSA0008077; WWUSA0008845-WWUSA0008850; WWUSA0008869-WWUSA0008870; WWUSA0008876-WWUSA0008877; WWUSA0008917-WWUSA0008921; WWUSA0009786-WWUSA0009787; WWUSA0009815-WWUSA0009820; WWUSA0009931; WWUSA0017780-WWUSA0017782; WWUSA0017942-WWUSA0017945; WWUSA0017988-

WWUSA0017990; WWUSA0018260-WWUSA0018265; WWUSA0018475; WWUSA0019571-WWUSA0019572; WWUSA0019679-WWUSA0019680; WWUSA0020206-WWUSA0020207; WWUSA0020215-WWUSA0020217; WWUSA0020226-WWUSA0020227; WWUSA0020235; WWUSA0023498-WWUSA0023509; WWUSA0023517-WWUSA0023524; WWUSA0023563-WWUSA0023618; WWUSA0023621-WWUSA0023623.

**INTERROGATORY NO. 6:**

Separately, for each claim of the '276, the D866, D245 and D776 patents, state the date (day, month, and year), and describe in detail and with particularity, including the identities of any person involved, the circumstances under which the subject matter of the claim was: (i) conceived; (ii) first reduced to practice in the United States; (iii) first manufactured (a) in the United States and (b) outside the United States; (iv) first described in a printed publication in the United States or a foreign country; (v) first in public use or on sale in the United States; and (vi) first known or used by others in the United States.

**RESPONSE TO INTERROGATORY NO. 6:**

In addition to its General Objections, Woodway specifically objects to Plaintiff's characterization of this request as one interrogatory because it contains multiple subparts. Each subpart of this Interrogatory should be counted towards Plaintiff's limit under the Federal Rules of Civil Procedure, or any applicable court order.

Woodway additionally objects to this Interrogatory to the extent subparts (ii), (iii), (iv), (v), and (vi) are irrelevant, overly broad, unduly burdensome, not proportional to the needs of this case, and outside the scope of discovery in this case. During the parties' October 30, 2017 Initial Conference, Plaintiff was ordered to remove certain topics from its proposed list of discovery topics. (Dkt. No. 20 at ¶ 6.) Following this order, Plaintiff removed the topics "technical, marketing, and financial information relating to Defendant's product(s) marked with one or more of the patent numbers of the patents in suit" and "Defendant business and/or plans relating to products marked with one or more of the patent numbers of the patents in suit," which encompass the information sought by this Interrogatory. Information regarding Woodway's

reduction to practice, manufacture, descriptions in printed publications, public use, sale, and knowledge or use by others is irrelevant to the issue of inventorship.

Woodway also objects to this Interrogatory to the extent the terms "conceived," "reduced to practice," "printed publication," "public use," "on sale," and "first known" call for a legal conclusion. Furthermore, Woodway objects to this Interrogatory to the extent it seeks information that is protected by the attorney-client, work product, and/or other applicable privilege.

Subject to and without waiving its General and Specific Objections, Woodway responds as follows: The inventors named on the Woodway patents-in-suit are presumed to be correct, and Plaintiff, as "a person seeking to add his name must meet the heavy burden of proving its case by clear and convincing evidence." *See Shum v. Intel Corp.*, 633 F.3d 1067, 1083 (Fed. Cir. 2010) (internal quotations omitted). Further, in internal discussions regarding potential areas of innovation within the fitness and treadmill industry, Woodway personnel Douglas Bayerlein, Vance Emons, Nicholas Oblamski, Scott Hoerig, Matthew Zank, Robert Zimpel, and former Woodway employee, Joel Richards, conceived of and/or contributed to the inventions claimed in the '276 patent. Nicholas Oblamski and Robert Zimpel both conceived of and contributed to the designs claimed in the '886, '245, and '776 patents.

The subject matter of Woodway's claimed inventions originated from Woodway's independent conception and design of improvements and enhancements to the publicly known, basic concept of a manually operated curved treadmill. The innovations claimed in the patents-in-suit were conceived of, designed, developed, and reduced to practice at Woodway's facility in Waukesha, Wisconsin beginning as early as December 2008.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 6:**

Subject to and without waiving its General and Specific Objections, Woodway responds as follows: The inventors named on the Woodway patents-in-suit are presumed to be correct, and Plaintiff, as "a person seeking to add his name must meet the heavy burden of proving its case by clear and convincing evidence." *See Shum v. Intel Corp.*, 633 F.3d 1067, 1083 (Fed. Cir. 2010) (internal quotations omitted). Further, in internal discussions regarding potential areas of innovation within the fitness and treadmill industry, Woodway personnel Douglas Bayerlein, Vance Emons, Nicholas Oblamski, Scott Hoerig, Matthew Zank, Robert Zimpel, and former Woodway employee, Joel Richards, conceived of and/or contributed to the inventions claimed in the '276 patent. Nicholas Oblamski and Robert Zimpel both conceived of and contributed to the designs claimed in the '886, '245, and '776 patents.

The subject matter of Woodway's claimed inventions originated from Woodway's independent conception and design of improvements and enhancements to the publicly known, basic concept of a manually operated curved treadmill. The innovations claimed in the patents-in-suit were conceived of, designed, developed, and reduced to practice at Woodway's facility in Waukesha, Wisconsin beginning as early as December 2008.

In addition, Woodway responds, pursuant to Fed. R. Civ. P. 33(d), by identifying at least the following documents produced by Woodway from which the answer to this interrogatory may be ascertained:

WWUSA0000043-WWUSA0000045; WWUSA0000062-WWUSA0000064; WWUSA0000188-WWUSA0000189; WWUSA0000193-WWUSA0000195; WWUSA0000230-WWUSA0000231; WWUSA0000439-WWUSA0000440; WWUSA0000536-WWUSA0000538; WWUSA0000551-WWUSA0000552; WWUSA0000846-WWUSA0000849; WWUSA0003118-WWUSA0003120;

WWUSA0003393-WWUSA0003397; WWUSA0008029-WWUSA0008032; WWUSA0008074-WWUSA0008077; WWUSA0008845-WWUSA0008850; WWUSA0008869-WWUSA0008870; WWUSA0008876-WWUSA0008877; WWUSA0008917-WWUSA0008921; WWUSA0009786-WWUSA0009787; WWUSA0009815-WWUSA0009820; WWUSA0009931; WWUSA0017780-WWUSA0017782; WWUSA0017942-WWUSA0017945; WWUSA0017988-WWUSA0017990; WWUSA0018260-WWUSA0018265; WWUSA0018475; WWUSA0019571-WWUSA0019572; WWUSA0019679-WWUSA0019680; WWUSA0020206-WWUSA0020207; WWUSA0020215-WWUSA0020217; WWUSA0020226-WWUSA0020227; WWUSA0020235; WWUSA0020868-WWUSA0023668; WWUSA0023669-WWUSA0025900; PLTFESI002203-PLTFESI002204(2013 Speedfit Litigation).

**INTERROGATORY NO. 7:**

Identify by name, part number, and any other internal or other designation, any product, including every type and variation thereof, made, used, sold, or offered for sale by or on behalf of You or others that embodies the alleged invention(s) claimed in each of the '276, the D866, D245 and D776 patents, and identify the specific claim(s) of the 276, the D866, D245 and D776 patents, whose subject matter You contend is embodied in each such product.

**RESPONSE TO INTERROGATORY NO. 7:**

In addition to its General Objections, Woodway specifically objects to Plaintiff's characterization of this request as one interrogatory because it contains multiple subparts. Each subpart of this Interrogatory should be counted towards Plaintiff's limit under the Federal Rules of Civil Procedure, or any applicable court order.

Woodway also objects to this Interrogatory as irrelevant to any party's claims and defenses and beyond the scope of discovery in this case. During the parties' October 30, 2017 Initial Conference, Plaintiff was ordered to remove certain topics from its proposed list of discovery topics. (Dkt. No. 20 at ¶ 6.) Following this order, Plaintiff removed the topic "technical, marketing, and financial information relating to Defendant's product(s) marked with

one or more of the patent numbers of the patents in suit," which encompasses the information sought by this Interrogatory. Such information is irrelevant to the issue of inventorship.

Woodway additionally objects to this Interrogatory to the extent the terms "embodies" and "invention" call for a legal conclusion. Woodway also objects to this Interrogatory to the extent it seeks information that is protected by and subject to the rules governing any applicable privilege or protection, including, but not limited to, the attorney-client privilege and the work-product immunity doctrine.

Subject to the foregoing, Woodway does not intend to respond further.

**AS TO OBJECTIONS:**

Dated: February 26, 2018

**FOLEY & LARDNER LLP**

/s/ Kadie M. Jelenchick
Jeffrey N. Costakos, admitted *pro hac vice*
Kadie M. Jelenchick, admitted *pro hac vice*
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*Attorneys for Defendant Woodway USA, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **WOODWAY USA, INC.'S FIRST SUPPLEMENTAL OBJECTIONS AND RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES (NOS. 1-7)** to be served on counsel of record via electronic mail on February 26, 2018.

/s/ Matthew W. Peters
Matthew W. Peters

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
SPEEDFIT LLC,

Plaintiff,

-against-

Case No.
2:17-CV-00768
KAM-AKT

WOODWAY USA, INC.,

Defendant.
----------x

July 10, 2018
9:35 a.m.

Videotaped deposition of ALEX ASTILEAN, taken by Defendant, pursuant to Notice in accordance with Rule 30, held at the Law Offices of John F. Vodopia, PC, 191 New York Avenue, Huntington, New York 11743, before Anneliese R. Tursi, a Registered Professional Reporter and Notary Public within and for the State of New York.

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APPEARANCES

LAW OFFICES OF JOHN F. VODOPIA, PC
Attorneys for Plaintiff
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Huntington, New York 11743
BY: JOHN F. VODOPIA, ESQ.

FOLEY & LARDNER LLP
Attorneys for Defendant
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
BY: KADIE M. JELENCHICK, ESQ.

ALSO PRESENT:

JOSE RIVERA, Videographer

SERBAN RUSE, Romanian Interpreter

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STIPULATIONS

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein that filing and sealing be and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, shall be reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be signed and sworn to before any officer authorized to administer an oath with the same force and effect as if signed and sworn to before the Court.

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THE VIDEOGRAPHER: This is media unit No. 1 in the video deposition of Alex Astilean in the matter of Speedfit LLC, plaintiff, versus Woodway USA, Inc., defendant, in the United States District Court, Eastern District of New York, Case No. 2:17-CV-00768 KAM-AKT.

This deposition is being held at the law office of John F. Vodopia, PC, in Huntington, New York on July 10th, 2018 at approximately 9:36 a.m.

My name is Jose Rivera from the firm of US Legal Support, and I am the legal video specialist.

The court reporter is Liese Tursi, also in association with US Legal Support.

For the record will counsel please introduce themselves.

MR. VODOPIA: John Vodopia, counsel for plaintiff, Speedfit.

MS. JELENCHICK: Kadie Jelenchick, Foley & Lardener LLP, counsel for defendant, Woodway USA, Inc.

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Now, would the court reporter please swear in the interpreter and the witness.

SERBAN RUSE,
called as the interpreter in this action, was sworn by the Notary Public (Anneliese R. Tursi) to accurately and faithfully translate the questions propounded to the witness from English into Romanian, and the answers given by the witness from Romanian into English.

ALEX ASTILEAN,
residing at 196 Buckskill Road, East Hampton, New York 11957, having been first duly sworn/affirmed by the Notary Public (Anneliese R. Tursi), was examined and testified as follows:

EXAMINATION BY MS. JELENCHICK:

Q. Good morning, Mr. Astilean.

A. Good morning.

Q. We have an interpreter here with us today, Mr. Ruse. Have you had an opportunity to meet Mr. Ruse before today?

A. Never in my life.

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A. ASTILEAN

Q. So you don't know Mr. Ruse, do you?
A. No.
Q. We can conduct the deposition in English, or translate back and forth between English and Romanian. It is entirely your preference, Mr. Astilean.
How would you like to proceed?
A. In English, but I will use him for some slang expressions.
Q. So because we are going to proceed in English, to the extent that you would like the assistance of Mr. Ruse, please just let me know.
A. Thank you.
(Witness/translator colloquy.)
Q. What did Mr. Ruse just say to you in Romanian?
A. Say to me? If I need any questions, if I have any questions, I can ask him any time.
Q. You will recall, Mr. Astilean, that I have taken your deposition previously. Right?
A. Right.
Q. Just as I did before, I'm going to be asking you a series of questions today while

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you are under oath. This is the same oath that you will make in court before testifying. Do you understand that?
A. I understand.
Q. My questions and your answers today will be recorded by Ms. Tursi, our court reporter.
You understand that you need to speak up and to answer orally in response to my questions. Correct?
A. Correct.
Q. Will you agree to provide verbal responses to my questions today?
A. Yes.
Q. I may ask a question that I don't state well, or if for some reason you don't understand what I'm asking, if you don't understand or you have some question with the question that I've posed to you, will you agree to let me know?
A. Yeah. Yes.
Q. In that circumstance I will do my best to rephrase my question, or ask a different or a better question.

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A. ASTILEAN

I will assume that if you answer my question, you heard my question and you understood my question. Is that fair?
A. Fair.
Q. When you are responding, if you would just please let me finish my question before jumping in with your answer, and I will similarly try to do the same. Today will run much more smoothly, and Ms. Tursi will be much happier with us if we talk one at a time.
Will you agree to do that?
A. Agreed.
Q. Of course, if you need to take a break for any reason, please just let me know and I will be happy to do that. I will only ask that you not request a break while a question is pending. Does that sound fair?
A. Fair.
Q. Do you understand these ground rules for today?
A. I do.
Q. Do you have any questions with respect to these ground rules?
A. No.

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A. ASTILEAN

Q. Is there anything about your health that may in any way impact your ability to answer any questions today?
A. No.
Q. Have you taken any medications that might in any way impact your ability to answer questions today?
A. No.
Q. Is there any other reason you cannot testify truthfully and fully today?
A. No.
Q. Mr. Astilean, you understand that you are providing testimony today in your personal capacity?
A. Yes.
Q. You also understand that you have been designated as a representative of Speedfit LLC to provide deposition testimony?
A. Correct.
Q. My intention is that we will start this morning with the deposition of you in your personal capacity. And at the conclusion of that deposition, we can take a break if you would like, and then switch into the deposition

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of Speedfit LLC. If that's acceptable to you?

A. Yes.

(Astilean Deposition Exhibit 1, Notice of Deposition of Aurel A. Astilean marked for identification, as of this date.)

Q. For housekeeping, I've handed you what's been marked as Astilean Deposition Exhibit No. 1 which is a document entitled Notice of Deposition of Aurel A. Astilean.

Did I describe this document correctly?

A. Yes.

Q. Before receiving this document a few moments ago, have you seen this before?

A. No.

Q. What is your current occupation, Mr. Astilean?

A. Personal trainer.

Q. Do you ever characterize yourself as the CEO of Speedfit LLC?

A. Yes.

Q. Do you ever characterize yourself as the president of Speedfit LLC?



A. ASTILEAN

A. Yes.

Q. In your mind is there a difference between CEO and president of Speedfit LLC?

A. In my conception? In my mind?

Q. Correct.

A. Yes.

Q. What is the difference?

A. The CEO is the chief executive office, and the president is the president.

Q. What are your duties as the CEO of Speedfit LLC?

A. To manage day by day the company.

Q. What are your duties as the president of Speedfit LLC?

A. Make some representation on behalf of Speedfit, certain places, shows.

Q. What do you mean when you say make representations on behalf of Speedfit?

A. When I go to a show, I present myself as the president of Speedfit.

Q. When you say show, you are talking about trade shows?

A. Trade shows.

Q. Do you have any other



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responsibilities as the president of Speedfit?

A. Yes.

Q. What are they?

A. Make the company successful.

Q. How long have you been CEO of Speedfit LLC?

A. Since 2001.

Q. And how long have you been president of Speedfit LLC?

A. Since 2006.

Q. Prior to 2006 did Speedfit LLC have a president?

A. Yes.

Q. Who was that?

A. My former partner.

Q. Is that Tami Mack?

A. Yes.

Q. As CEO of Speedfit LLC in the last year, what have been your day-to-day responsibilities?

A. To seek investors in the company. To take the company to the next level.

Q. Any other day-to-day responsibilities as the CEO of Speedfit LLC?



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A. Yes. Dealing with production of the products.

Q. Any other day-to-day responsibilities as CEO?

A. Yeah. Structure the company in a way to have, like, more than one employee.

Q. Any other day-to-day responsibilities?

A. Yes. Prepare for meetings with investors.

Q. Anything else?

THE WITNESS: Louder?

Q. Audible.

A. Audible.

No.

Q. In the last year how many investors have you met with in your role as CEO?

A. Five.

Q. What are the names of those investors?

A. I only know the firms, but I don't know by names all the investors from the firms.

Q. The firms are fine.

A. Miller & Tabak.

A. ASTILEAN

Q. Is that one firm, or two firms?
A. That's one firm.
Q. What are the names of the other firms?
A. I don't recall in my head. I have to look at it.
Q. What types of firms are these that you are naming?
A. Wall Street capital investors.
York Capital is another one.
Q. Have any of the investors that you have met with in the last year been fitness equipment companies?
A. No, they are not.
Q. Is it fair to say that the five firms that you have met with in the last year are potential sources for financial capital for Speedfit LLC?
A. Two of them, three of them. But two of them they were like manufacturer, treadmill manufacturers.
Q. So two of the firms that you met with were investment companies?
A. Yes.



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Q. The remaining three were treadmill manufacturers?
A. Yes.
Q. Which treadmill manufacturers did you meet with in the last year?
A. Two from Korea and one from the United States.
Q. You don't recall the names of those entities?
A. Yes, I do.
Q. What are the names of those entities?
A. Kaesun Sports.
Q. How do you spell that, if you know?
A. K-A-E-S-U-N Sports.
Q. Is that a Korean company?
A. It's a Korean company.
Q. What is the name of the other Korean company that you met with?
A. Drax.
Q. How do you spell that?
A. D-R-A-X.
Q. What's the name of the US manufacturer?



A. ASTILEAN

A. Rally Fitness.
Q. Where is Rally Fitness located in the United States?
A. California.
A. I think the business is Florida, but the warehouse is in California and the headquarters in Florida. I'm really not sure. The owner lives in Virginia. So the owner lives in Virginia, has an office in Florida, and a warehouse in California.
Q. How many meetings did you have with the Miller firm?
A. Three at least.
Q. Are you still in discussions with the Miller firm?
A. Yes.
Q. How many meetings have you had with York Capital?
A. One.
Q. Are you still in discussions with York Capital?
A. Yes.
Q. How many meetings have you had with Kaesun Sports?



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A. Three.
Q. Are you still in discussions?
A. Yes.
Q. How many meetings have you had with Drax?
A. Two.
Q. Are you still in discussions with Drax?
A. Yes.
Q. How many meetings have you had with Rally Fitness?
A. One.
Q. Are you still in discussions with Rally Fitness?
A. Yes.
Q. Do you have the intention to work with each of these firms, or --
A. Why do I have a meeting with them if I don't have intention to work with them?
MR. VODOPIA: Kadie, may I interrupt?
I don't mean to be rude, but I object for the record. What's the relevance of all this to inventorship?

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MS. JELENCHICK: It is certainly relevant to the extent that Mr. Astilean intends to commercialize or is in some way seeking to license technology that he's claiming that he invented.

MR. VODOPIA: He didn't say -- which technology did he say he was seeking to license? I didn't hear him discuss that at all.

MS. JELENCHICK: I haven't asked those questions yet.

MR. VODOPIA: So, Kadie, I would like you to move on. There is no need to be talking about his confidential business dealings. We are talking about inventorship here. I would appreciate it if you'd keep it to inventorship.

And, also, you are talking about Speedfit, and you said before you were going to separate these depositions, and in the afternoon we are going to do the 30(b)6. Don't you think that these would be more appropriate for the 30(b)6 deposition, asking him about Speedfit?

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MS. JELENCHICK: They may. These questions were directed to meetings that Mr. Astilean personally had.

MR. VODOPIA: But they are not about -- they are about the workings of the firm. They are not about inventorship. I would appreciate it if you would move on.

MS. JELENCHICK: Are you finished?

MR. VODOPIA: I am.

THE WITNESS: John, it is cool, man. They have to justify the payroll.

Please continue, Ms. Jelenchick.

Q. Mr. Astilean, the five firms that you've met with in the last year, is it your intention to work with one of them exclusively?

MR. VODOPIA: Objection: form.

He didn't say he met with them in the last year.

A. I'm not sure.

Q. Perhaps I misheard you, but I did ask you in the last year.

A. Yeah.

Q. Have you --

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A. Yes, and I said yes.

Q. So the five firms --

A. I'm not sure if I want to give an exclusive to one of these.

First of all, how you can give exclusive to investment bank? How you want to give them exclusive?

You are talking about manufacture company, or invest company? Who you want to refer as an exclusive?

Q. Any company. Is it your intention to exclusively work with one over the other?

MR. VODOPIA: Objection.

Kadie --

A. No, when you --

MR. VODOPIA: Alex, could you please stop for a second.

THE WITNESS: Yes.

MR. VODOPIA: Kadie, I just want to object.

We agreed months ago before Judge Tomlinson that we are not going to talk about business, that we are not going to talk about marketing products and the

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like. I don't want you to ask him questions about Speedfit and its marketing practices. Please keep it to the invention and his contribution to the invention. It is that correction of inventorship.

You know, we are too far off course here. I think we did this with Judge Tomlinson. Do you recall?

MS. JELENCHICK: No, I do not have the same recollection of any conversation with Judge Tomlinson on those particular issues as it relates to Speedfit.

We served our deposition notices. No written objections were served in advance of today's deposition.

MR. VODOPIA: Yes. There was, Kadie.

MS. JELENCHICK: You are entitled to --

MR. VODOPIA: Where in here -- here is the deposition notice. Would you point out in the deposition notice

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where you talked about asking him about Speedfit and his business plans and who he is meeting with and who he is getting financed with.

This is about correction of inventorship.

Please point it out. Here is the document. Show me where you gave us notice.

MS. JELENCHICK: The notice of Mr. Astilean's deposition allows me to ask questions about, and seek discovery, relating to relevant information.

You may lodge your objections consistent with the federal rules.

MR. VODOPIA: It is not relevant. These questions are not relevant to correction of inventorship.

MS. JELENCHICK: That may be your position, and you can lodge your objections. I ask you to stop making speaking objections.

MR. VODOPIA: Okay. So I object for the record that it is totally

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irrelevant, and please continue.

Q. Do you have any meetings scheduled with any additional firms?

MR. VODOPIA: Objection: relevance.

Q. Beyond the five that we have discussed.

A. It is good that you ask me those questions because due to your client, after ten years of inventing this product, I have one employee and one CEO and one president of Speedfit and not have the resources to hire one secretary. Due to your client, Woodway, I get to this point in turmoil financial because of your client.

That's why I am seeking for people to invest in this company after ten years because I couldn't get it off the ground because of your client.

It is good to ask these questions, and I'll answer these questions.

MS. JELENCHICK: Move to strike as nonresponsive.

A. What do you mean not responsive? I

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response to you very correctly to your question.

MR. VODOPIA: Keep it in, please. You can move to strike it.

A. What? Keep it in. What do you mean strike it out of the content? You ask me a question. I'll answer your question.

MR. VODOPIA: Alex, don't be argumentative.

THE WITNESS: I'm not.

Q. Mr. Astilean, I asked if in addition to the five firms that we have discussed, if you had any additional meetings scheduled with other firms.

A. I probably had.

Q. What are the names of those firms?

A. I don't remember.

Q. In the future, scheduled in the calendar? Do you have any meetings --

A. Plenty.

Q. -- with any additional firms?

A. Plenty.

MR. VODOPIA: Objection: relevance.

Q. But you don't know the names of

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those firms?

A. Yes, I do.

Q. What are the names?

A. Miller & Tabak, one. Rally Fitness. Ziva. HREO.

Q. Any others?

A. Yes. I don't remember the names.

Q. You mentioned a Ziba. How do you spell that?

A. Ziva, Z-I-V-A.

Q. What type of entity is Ziva?

A. A fitness equipment.

Q. HREO, what type of entity is that?

A. Fitness equipment.

Q. You mentioned that you are a personal trainer. Where do you work and do your personal training?

A. In East Hampton, New York.

Q. Do you work out of your home?

A. Yes. And I have a space in town.

Q. Does the space in town have a name?

A. It's right now it is sublet to a different business. Now it is Silich Strength.

Q. Do you provide personal training

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services out of the Silich Strength location?
A. There, and also private, the personal.
Q. In the last month approximately how many hours a week do you spend on personal training?
A. 15.
Q. In the last month approximately how many hours a week do you spend on matters relating to Speedfit?
A. 14 a day. 14 hours a day.
Q. In the last year how many hours per week would you say on average you are spending on personal training?
A. A hundred hours.
Q. A hundred hours a week on personal training?
A. No. Like, a hundred hours a month. A hundred hours an hour. A month.
Q. And in the last year approximately how many hours per month are you spending on matters relating to Speedfit?
A. 14 hours a day. Calculate that.
Q. Do you currently have any other

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employment?
A. No, I don't.
Q. Do you receive any monthly income from Speedfit?
MR. VODOPIA: Objection: relevance.
A. Whatever money I make, whatever is left, I spend it.
Q. So you do receive monthly income from Speedfit LLC?
MR. VODOPIA: Objection: relevance.
A. I do receive, yes.
Q. For your personal training services do you charge by the hour?
A. By the hours.
Q. What is your hourly rate?
A. Depends on the location.
Q. What is the range of hourly rates that you offer your personal training services to --
A. Between $60 and 150.
Q. In calendar year 2018 have you made any capital contributions to Speedfit?

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MR. VODOPIA: Objection: relevance.
A. In which calendar year?
Q. 2018.
A. Yes.
Q. What has been the capital contribution to Speedfit that you have made in 2018?
MR. VODOPIA: Objection: relevance.
A. 94,000.
Q. In calendar year 2017 have you made any capital contribution to Speedfit?
A. Yes.
Q. What was that capital contribution in 2017?
A. 200,000.
Q. In calendar year 2016 did you make any capital contribution to Speedfit?
A. Yes.
Q. What was that capital contribution in --
A. 165,000.
Q. Since the last time I deposed you

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which was in March of 2015, have you been deposed in any other case?
A. Yes, I was in other case.
Q. How many depositions have you given?
A. One.
Q. Do you know when that deposition was?
A. In here in this office last year.
Q. Was that deposition given in connection with your litigation involving Chapco --
A. Correct.
Q. -- and Mr. Weinstein?
A. Correct.
Q. How many days of deposition did you offer in that case?
A. I think one.
Q. Is that case still pending?
A. Yes.
Q. Do you know what the status of that case is beyond that it is still active?
A. What I know is that I left Woodway and I went to Chapco to do another product, and then Woodway sued Chapco for infringement and

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won the case. That's what I know.

So after I left Woodway I went to Chapco and I made a better product. Woodway stole it and then sued Chapco, and won for infringement. That's what I know for sure.

Q. What is that understanding based on?

A. Based on the product like Woodway stole it and copied what the product I made with Chapco, and then they sued Chapco for infringement and they won the case. That I know.

Q. Mr. Astilean, when is the last time you spoke to Mr. Bostan?

A. December 2016.

Q. Have you seen Mr. Bostan?

A. I did see him.

Q. When was the last time you have seen him?

A. December 2016.

Q. You had no occasion to speak or see Mr. Bostan since December of 2016?

A. No.

Q. Where did you meet Mr. Bostan in December of 2016?

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A. In Montreal, Canada.

Q. Did you meet at Mr. Bostan's home?

A. No.

Q. Where did you meet?

A. Some restaurant.

Q. What was the purpose of the meeting?

A. To convince him to join the lawsuit.

Q. You weren't successful in convincing him, were you?

A. I was. At the meeting he said he will, but then he changed his mind.

Q. Do you know whether Mr. Bostan intends to join the lawsuit?

A. I have no idea.

Q. How long was your meeting with Mr. Bostan?

A. Couple of hours.

Q. Did you have dinner?

A. Yes, we served something. It was more like a coffee shop, not a restaurant, tea or something.

Q. Was anybody else at the meeting?

A. My wife.

Q. Anybody else?

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A. No.

Q. Mr. Bostan's wife wasn't there?

A. She wasn't.

Q. Would you say your meeting was cordial?

A. Yes.

Q. How were things left with Mr. Bostan after that meeting?

A. We keep in touch.

Q. But you haven't spoken to him since December of 2016?

A. We communicate through e-mail, but not speak on the phone.

Q. When is the last time you had an e-mail with Mr. Bostan?

A. 2017. I don't remember.

Q. What was the purpose of the e-mail?

A. Still the issue of joining the lawsuit.

Q. Did you e-mail him, or did Mr. Bostan e-mail you?

A. Back and forth, was back and forth.

Q. Have you provided copies of those e-mails to your lawyers in this case?

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A. They all cc'ed. They have them.

Q. Would you say you are still trying to convince Mr. Bostan to join the lawsuit?

A. I think it's, we're beyond that at this point.

Q. Why do you say that we're beyond that?

A. As I understood, he didn't want to join, and I move forward myself.

Q. Did you offer any incentives for Mr. Bostan to join the lawsuit?

A. Probably I did. I don't remember exactly.

Q. Do you have any plans to see Mr. Bostan in the future?

A. Probably.

Q. Do you have anything scheduled with Mr. Bostan at this moment?

A. At this moment, no.

Q. During your meeting in December of 2016 with Mr. Bostan, did you discuss entering into any agreements with him?

A. We had some agreements before.

Q. Did you discuss modifications to

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your previous agreements with Mr. Bostan during that meeting?

A. I don't think so.

MS. JELENCHICK: Mark this as Exhibit 2.

(Astilean Deposition Exhibit 2, document entitled Agreement, production numbers PLTFESI 002532-2535 marked for identification, as of this date.)

Q. Mr. Astilean, Ms. Tursi just handed you what's been marked as deposition exhibit Astilean No. 2. It is entitled Agreement, and it bears the production numbers PLTFESI 002532 through 2535.

MR. VODOPIA: I'm sorry, what exhibit number? It is Exhibit 2?

Thank you. Sorry.

Q. Do you recognize this document?

A. I do.

Q. What is this document?

A. It's an agreement.

Q. Reviewing this agreement over the last few minutes, does this refresh your

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recollection as to whether this was discussed during your December 2016 meeting with Mr. Bostan?

A. No.

Q. You don't believe you discussed this agreement during that meeting?

A. No.

Q. Has this May 14th, 2009 agreement been modified in any way?

A. No.

Q. As far as you know, this agreement is still in effect?

A. No. I think we had another agreement in 2015 between Bostan, myself, then Bostan and Speedfit.

Q. So you don't know whether this 2009 agreement is still in effect?

A. I don't think it is in effect since we have an agreement in 2015.

Q. What's that understanding based on?

A. Memory. The memory I have we had an agreement in 2015.

Q. So you referenced this agreement in 2015. Do you have any other agreements with Mr.

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Bostan?

A. Not that I remember.

MS. JELENCHICK: Mark this as Exhibit 3.

(Astilean Deposition Exhibit 3, cover page labeled Exhibit H with 2-page document titled Agreement attached marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as Astilean Exhibit No. 3. There is a cover page bearing the label Exhibit H. And it has been previously marked as Bostan Deposition Exhibit 15.

Do you recognize deposition Exhibit 3?

A. Yes.

Q. Is this the other agreement that you believe you have with Mr. Bostan?

A. Um-hmm.

Q. Was that a yes?

A. Yes. Sorry.

Q. Referring to page 1 of deposition Exhibit 3 entitled Assignment. In the first

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paragraph it says:

"For good and valuable consideration, receipt of which is hereby acknowledged and in accordance with the 'brief agreement' agreed to, executed by and between Alex Astilean and Dan Bostan on March 30th, 2008 and in accordance with the 'written agreement' agreed to and executed by and between the parties on May 16, 2009, and in accordance with the 'agreement of indemnification' agreed to and executed by and between Aurel A. Astilean and Dan Bostan on June 1st, 2015, the terms of which brief agreement, the written agreement, and the agreement of indemnification incorporated and relied upon for consideration herein, we:"

Did I read that correctly?

A. Yes.

Q. What do you understand that paragraph to mean, if anything?

MR. VODOPIA: I object if you are asking for him to --

THE WITNESS: Yeah.

MR. VODOPIA: -- give you a legal conclusion or a legal opinion on what

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this means, Kadie.

Q. Do you understand that first paragraph?

A. No, I don't.

Q. Flip to page 2 on deposition Exhibit 3. It has a signature block. It says Aurel A. Astilean.

A. Yes.

Q. And that's you, isn't it?

A. Yes.

Q. And you signed this agreement?

A. I did.

Q. And you signed it on June 1st of 2015?

A. Yes, I did.

Q. And you signed it even though you don't know what the agreement says?

A. No. You asked me about legal meaning of the words, and I said I can't explain to you what exactly means.

I know exactly what the contract means, the whole contract, but that phrase you just -- in order for me to explain to you in the legal terms, I don't know how to do it.

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Q. Well, I didn't ask for your explanation in legal terms. I asked for what your understanding --

A. Okay. Then rephrase your question again. What is your question?

Q. What do you understand the first paragraph of this assignment to mean?

A. Can you read it again. Which paragraph?

Q. The first paragraph beginning at "for good and valuable consideration."

A. Based on the contract we had before, we sign this contract. That's what I understood.

Q. So to you the 2009 agreement which is deposition Exhibit No. 2 should be read in conjunction with deposition Exhibit 3?

A. Correct.

MS. JELENCHICK: Mark this as 4.

(Astilean Deposition Exhibit 4, Agreement of Indemnification dated June 1st, 2015 between Dan Bostan and Speedfit LLC, production number PLTFESI 013698 marked for identification, as of this date.)

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Q. Mr. Astilean, you have been handed Deposition Exhibit 4 which is a document branded with production number PLTFESI 013698, and at the top it states: Agreement of Indemnification, dated June 1st, 2015 between Dan Bostan and Speedfit LLC.

Did I describe that correctly?

A. Correct.

Q. And you will agree with me that paragraph 1 of deposition Exhibit 3 references an agreement of indemnification between Mr. Astilean and Dan Bostan?

A. Can I ask the interpreter a question?

MS. JELENCHICK: Of course.

(Witness/translator colloquy.)

A. Agreement of indemnification.

MS. JELENCHICK: Excuse me. Mr. Ruse, if you could translate Mr. Astilean's question to you back to us so it could be put on the record before you answer.

THE INTERPRETER: Yes, the question was what do I understand by agreement of indemnification.

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THE WITNESS: No, the word indemnification. That's an interesting word to have an explanation of the word indemnification.

THE INTERPRETER: Can I translate to him what indemnification means?

MS. JELENCHICK: No. No.

Q. Mr. Astilean, do you know what the term indemnification means?

A. I don't.

(Translation.)

A. No.

A. (Through interpreter:) No, I don't.

Q. That's fine. You can set it aside.

(Witness/translator colloquy.)

A. (Through interpreter:) Yeah, I understand, but I would like you to explain to me in our language, in the terms of our language, what that term means really.

MS. JELENCHICK: Is there a term in the Romanian language for indemnification?

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A. That's why I ask. That's why I ask.

THE INTERPRETER: Yes, there is a similar term which in Romanian is indemnificari (ph.). indemnificari (ph.). It is a legal word in the Romanian language.

Q. Mr. Astilean, putting aside maybe you don't understand what the term indemnification means, will you agree with me that deposition Exhibit 3, the assignment document, references that an agreement of indemnification was entered into between you and Mr. Bostan on June 1st of 2015?

A. Yes, I do.

Q. Do you know whether deposition Exhibit 4, the agreement of indemnification, is the agreement that is referenced in deposition Exhibit 3?

A. Can you rephrase again the question.

Q. Sure. Is deposition Exhibit 4, agreement of indemnification, the document that is referenced in the first paragraph of deposition Exhibit No. 3?

A. Can you explain to him to explain to

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me in Romanian.

MS. JELENCHICK: Can you.

(Witness/translator colloquy.)

A. (Through interpreter:) Yes, indemnification in Romania means when you give some power to somebody to act or represent you in some proceedings.

Q. I think we are maybe talking past each other. Because I'm asking something different.

If you look at deposition Exhibit 3 in the first paragraph, it identifies an agreement of indemnification that's entered into between Aurel A. Astilean and Dan Bostan on June 1st.

A. Correct.

Q. If you look at deposition Exhibit 4, it is entitled Agreement of Indemnification dated June 1st, 2015 between Dan Bostan and Speedfit LLC.

A. Yes. Refer to these documents. Ask the question.

Q. I would like to understand if there is an additional agreement of indemnification

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between you, personally, and Mr. Bostan.

(Translation.)

A. No.

MS. JELENCHICK: You can set that aside.

Exhibit 5.

(Astilean Deposition Exhibit 5, Declaration of Aurel A. Astilean marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as Astilean Deposition Exhibit 5, what's entitled Declaration of Aurel A. Astilean, which appears to have been signed on the 1st day of June 2015. It is also branded as Bostan Deposition Exhibit 16.

Do you recognize this document?

A. I don't -- yes. Yes. I'm ready.

Q. And this is your declaration, isn't it?

A. Yes.

Q. I'll direct you to paragraph 8. And in paragraph 8 it identifies the treadmill embodying what is referred to as a new design.

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Do you see where I am --

A. Paragraph 8 you said?

Q. Paragraph 8.

A. 8, okay.

Q. It references the treadmill embodying the new design?

A. In the lengthy stage of development work, that's paragraph 8?

Q. Yes.

A. Okay.

Q. You see where I'm talking about, correct?

A. Yes. The --

Q. I'm going to ask you a question. I haven't asked you a question.

A. Okay.

Q. I just was directing you to that paragraph.

(Astilean Deposition Exhibit 6, e-mail from AlexSpeedfit at AOL.com to MA at MyronAmer.com, October 6th, 2008, production numbers PLITESI 001689 through 1694 marked for identification, as of

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this date.)

Q. Mr. Astilean, you have been handed what's been marked as Deposition Exhibit Astilean 6 which is documents produced by your lawyers branded with production numbers PLTFESI 001689 through 1694 which is an e-mail from Alex Speedfit at AOL.com to MA at MyronAmer.com sent on Monday, October 6th, 2008 at 10:41 a.m.

Did I describe this document correctly?

A. Correct.

Q. Do you recognize this document?

A. Yes.

Q. Is your e-mail AlexSpeedfit at AOL.com?

A. Correct.

Q. Did you send this e-mail to MA at MyronAmer.com?

A. Correct.

Q. And Mr. Amer --

MR. VODOPIA: Amer.

Q. Mr. Amer, excuse me, he was your patent lawyer in 2008?

A. Yes.

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Q. Reviewing the photographs that were sent to Mr. Amer on October 6, 2008, are those photographs of the new design referenced in paragraph 8 of your declaration?

A. Yes. The wooden prototype, yes.

Q. So deposition Exhibit 6 includes photographs of the wooden prototype.

A. Yes.

Q. Is the phrase new design No. 6 synonymous with wooden prototype?

(Translation.)

Q. Let me ask you a different question.

A. Yes.

Q. If I used the phrase new design No. 6, does that mean the same thing to you as the wooden prototype.

(Translation.)

A. I still don't understand the question. What's exactly your question? I have to look at No. 8 on the --

Q. No. No.

If I use the phrase new design No. 6, does that mean the same thing to you as if I would say the wooden prototype? Are those words

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interchangeable?

A. What mean new design No. 6?

Q. In paragraph 8 it states:

"During the lengthy stage of development work I was not convinced of the viability of the treadmill embodying the new design until Bostan presented me with a sixth wooden model or prototype built in August 2008, hereinafter, the wooden prototype."

(Translation.)

MS. JELENCHICK: What did you just say?

A. Yeah. Yes. Yes.

MR. VODOPIA: There is, paragraph 6 sort of defines the new design.

MS. JELENCHICK: Mr. Vodopia --

MR. VODOPIA: If that helps.

Q. The photographs in deposition Exhibit No. 6 of what you are calling the wooden prototype, the running belt, that's included in the wooden prototype?

A. Yes.

Q. Is that a Woodway running belt?

A. It is a Woodway running belt, yes.

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Q. In the rest of paragraph 8 of your declaration, it indicates that the wooden prototype was operational because it included a means for slackening the upper portion of the running belt.

What structure was used to keep the upper portion of the running belt --

A. It is the last picture.

Q. When you say the last picture --

A. The last picture on Exhibit 6.

Q. The last picture which was marked with production number PLTFESI 001694. This photograph is the means for slackening that was included in the wooden prototype?

A. Um-hmm.

Q. What would you call this structure?

A. It is a tension timing belt mechanism. Tension timing belt -- timing belt tension mechanism.

Q. What do you mean by a tension timing belt mechanism?

A. So this timing belt was stretched and support the belt under.

Q. What's it timing?

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A. Hmm?

Q. What is it timing? What is this belt timing?

A. No. It is a timing belt. It doesn't mean like it is timing anything. It is a timing belt, and that timing belt just supports the belt, the Woodway belt, create a slacking mechanism.

Q. So is it fair to say that this --

A. These two are similar to you? This is a timing belt. These are the posts. Those are rollers. They look similar to you?

This is under the wooden prototype. This is the timing system. And then --

Q. What is the document number in the bottom corner of that color photograph?

A. 49744. 00049744.

MR. VODOPIA: Can we get that in the record?

MS. JELENCHICK: We can mark that.

MR. VODOPIA: Okay.

MS. JELENCHICK: Let's go ahead and mark it.

MR. VODOPIA: Do you want to give

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it Exhibit 6? I'm sorry. Exhibit 7.

MS. JELENCHICK: Why don't we call that Exhibit 7.

MR. VODOPIA: Exhibit 7. I will take one, call it Exhibit 7. You have to give one to the court reporter.

MS. JELENCHICK: I would like to pull out this particular document and mark it as Exhibit 7.

MR. VODOPIA: I would like to keep the whole thing in.

MS. JELENCHICK: That's fine. That may be your preference, but this is my deposition. So we're going to pull out that particular page and mark it as an exhibit.

MR. VODOPIA: Well, we already marked the entire document. I think it is 33 pages in Exhibit 7. You could pull it out if you want, but let's keep this entire 33-page document as Exhibit 7. I believe we marked it as Exhibit 7. Am I missing something, Kadie?

MS. JELENCHICK: No, I would like

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to mark the photograph as Exhibit 7.

THE WITNESS: Can you make a copy of just that page and mark it as Exhibit 7, and then mark the whole thing?

MR. VODOPIA: Yeah, you know what I will do, Kadie? I will make three copies of this page. Pardon me one second.

MS. JELENCHICK: Perfect. Why don't we just go off the record here.

THE VIDEOGRAPHER: The time is 10:42 a.m., and we're going off the record.

(Discussion off the record.)

(Astilean Deposition Exhibit 7A, copy of photograph production No. 49744 marked for identification, as of this date.)

(Astilean Deposition Exhibit 7B, copy of photograph, production No. 49746 marked for identification, as of this date.)

THE VIDEOGRAPHER: The time is 10:44 a.m., and we're back on the

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record.

BY MS. JELENCHICK:

Q. Mr. Astilean, you offered us copies of a couple of photographs and we have marked them as Astilean Deposition Exhibits 7A and 7B.

Are the photographs in 7A and 7B additional --

A. It is not addition. It is exactly the same thing. It is the same, what is in last picture, Exhibit 1694, it is on Exhibit 7A and 7B.

Q. So PLTFESI 001694 is the same as 7A and 7B?

A. The system, yes.

Q. And you indicated that the belt that's illustrated, perhaps you can circle the belt that you are talking about, and identify what it is on one of the documents.

A. So this portion support the belt under, this part of the belt, supports the whole belt under and creates a slacking mechanism on top. This is the part.

Q. So you indicated deposition Exhibit 7A. Why don't you put your initials and a lead

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line.

Would it be fair to characterize that belt as a secondary belt system?

A. Yes.

Q. And that's, in fact, what Mr. Bostan described this system as. Isn't it?

A. Yes. He came up with this, yes.

Q. Was it Mr. Bostan's idea to use a secondary belt in the wooden prototype?

A. It was his idea.

Q. So the running belt --

A. Yes.

Q. -- runs on top of that secondary belt?

A. The lower portion. The lower portion of the running belt runs on top of that. So the lower portion of the running belt runs on that.

Not -- not this part. Not this part. The one goes under rolls on top of that.

Q. You referred to that particular belt and the secondary belt system as a timing belt, but you will agree with me that that belt is not actually timing anything. Correct?

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A. It just creates a slacking mechanism. But it is a timing belt, but it's creating a slacking mechanism.

Q. What does the phrase timing belt mean to you?

A. Timing means when you put this belt in some mechanism and it creates a certain period of time between something happens.

For instance, they use the timing belt on the engines to make sure the pistons work in the same range, the ignition and evacuation of the pistons in the engine, they work properly. That's why they use the timing belt.

Q. But in the structure in deposition Exhibit 7A and 7B, there is no such timing?

A. There is no timing. Is using as a supporting.

Q. So in paragraph 9 of your declaration --

A. Which exhibit? Which exhibit?

Q. That's Exhibit 5.

A. Okay.

Q. You state: "I further suggested an

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improved means for slackening including springs to keep the lower surface tightened, or, alternatively, embodying a timing belt to keep the pulleys used with the running belt synchronized. The means for slackening were required to maintain the running surface in its curved state. Without the means for slackening, the upper portion of the belt would float up rendering the treadmill nonoperational."

Did I read that correctly?

A. Correct.

Q. So in paragraph 9 you identify structures in addition to the secondary belt system that was included in the wooden prototype. Is that correct?

A. Correct.

Q. One additional structure you identified was the use of springs. Is that right?

A. That's one. Yes.

Q. Were springs ever added to the wooden prototype?

A. We created in fact by just tension, tension of the belt, add the springs, and we

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screw it the wood, but it was not included.

Q. Did you ever use a timing belt to keep the pulleys synchronized in the wooden prototype?

A. No. The tension is the rod on the bottom. That makes the tension on the belt. It is a rod with a roller and that's at different holes here, and by putting in the lower hole, that will stretch more and more the belt, the timing belt.

Q. I was asking a different question.

A. Okay.

Q. So in paragraph 9 you identify additional examples --

A. Yes.

Q. -- of ways to slacken the running belt into a concave shape. Is that correct?

A. Yes. Correct.

Q. And the wooden prototype contains one example, the secondary belt system. Correct?

A. Yes.

Q. In paragraph 9 you identified two additional examples.

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A. I did, but I did it not at the time, but I did it with a bicycle chain. And -- yeah.

Q. When you say you did it with a bicycle chain, what do you mean?

A. When I explain in August to Dan, it was then. If we keep both pulleys in the same pace, we will always keep the slack in between, always the belt will stay curved in the middle.

Q. Which pulleys are you referring to?

A. These pulleys.

Q. Maybe if you can identify them in the document and annotate it.

Will you please write pulley.

Did you ever mock up a version of a treadmill that included this bicycle chain concept?

A. No. But I presented them at a meeting with Doug Bayerlein and Eric Weber.

Q. How did you present it to Mr. Bayerlein in this meeting?

A. May I draw?

Q. No.

A. No? Okay.

Q. Please explain to me what you

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presented to Mr. Bayerlein in this meeting.

A. I think it will be better if I draw. You're not going to understand.

Q. Well, why don't you try me and explain it to me, and if I don't understand, I will ask you to draw it.

A. First I told him everybody seen a bicycle upside down. When you put a bicycle upside down and you start biking around the pedals, always it becomes a slack on the bike, but this is not what I design on the board there.

I design two wheels and a connection in between two wheels with a chain, and I said if those two wheels, they go in the same ratio, always you will keep the belt slacking.

Q. Did you present any documents to Mr. Bayerlein of this concept?

A. No. I just -- he was not happy with this tension belt under because we ruin the rubber on the slats.

And I said no problem. We can make with this synchronized mechanism on the side, and we're still going to keep the belts in place

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with slacking.

Q. So you have no documents of this concept?

A. I don't have.

Q. Does Mr. Bostan have any documents of this concept?

A. No. But he remembers. I remember his testimony. He remember when we discussed this in August.

Q. Do you have any photographs of the board that you used at Woodway?

A. No, I don't.

Q. You never took this bicycle chain concept and added it to the wooden prototype. Did you?

A. No, we didn't.

Q. Did Mr. Bostan do that modification?

A. No, we didn't. But Woodway went directly to order parts for the new mechanism, what we discussed in the meeting. Not even built one prototype. They just ordered parts for the production model with the new mechanism.

Q. How do you know that?

A. Because I know. I spoke with,

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constantly with the engineer, with Nick Oblamski.

Q. Were these conversations over the phone?

A. Yes.

Q. Did you ever meet with Mr. Oblamski to discuss this concept?

A. No. I met with Doug which is an engineer, and he knew how to convey this to whoever was there, was working on the project. He conveyed the new mechanism to them and then they built it.

Q. How do you know that?

A. How do I know that? I've seen, the first prototype was 30 days after we discuss this in a meeting, they made the first iteration of the product, metal work directly with a new concept of slacking mechanism.

Q. When was your meeting with Mr. Bayerlein?

A. Around December 10, 2008.

Q. And were you involved in any conversations that Mr. Bayerlein may have had with his engineering team after your meeting in

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December of 2008?

A. Am I aware?

MR. VODOPIA: Objection to form.

A. Am I aware?

Q. No, were you involved in any discussions that Mr. Bayerlein may have had with his engineering team following your meeting with him in December of 2008?

A. No.

Q. Have you seen copies of the invoices for the parts that you claim Mr. Oblamski ordered?

A. I've seen the process through the e-mails. I seen what was done, and I communicate with Nick. And he was built directly with a new mechanism, what was discussed at the meeting, but never built to the mechanism, the wooden prototype.

Q. Mr. Astilean, do you know what the term synonym means?

A. Synonym? Identical.

Q. Is a synchronizing belt the same thing as a timing belt? Are they synonyms to you?

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A. Synchronize, it's a term, yes, it's a timing belt does a synchronized system.

Q. Going back to your declaration --

A. Yes.

Q. -- which is Exhibit 5. In paragraph 8 you state:

"After I tested the wooden prototype, I found it acceptable."

Why was the wooden prototype acceptable to you?

A. It did what supposed to do. Was good enough as a prototype.

Q. And in your mind what was it supposed to do?

A. So the pure unique of this invention is I put my son, I put my wife and myself on it without touching anything, we both, all around on the treadmill, which was not available before. That's the unique invention of this treadmill.

Q. And the secondary belt system that was used in the wooden prototype was acceptable for that purpose?

A. It was acceptable as the wooden

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prototype. It kept the belt taunt on the bearings.

MS. JELENCHICK: Taut, T-A-U-T.

A. It was to run the bearings, which the belt rolls over to run the bearings.

THE INTERPRETER: Excuse me. You mean taut?

THE WITNESS: Taunt, taunt. They call it taunt. When they push it down. Taunt.

Q. T-A-U-T?

A. Yeah. Taunt.

Q. No n. Taut.

THE INTERPRETER: Taut. In English taut means tight.

THE WITNESS: Yeah.

MS. JELENCHICK: Yes.

Q. So I would like to show you a couple of videos, if I may.

MR. VODOPIA: Can we go off the record for one second.

MS. JELENCHICK: Sure, of course.

THE VIDEOGRAPHER: The time is 11 a.m., and we're going off the record.

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(Discussion off the record.)

THE VIDEOGRAPHER: The time is 11 a.m., and we're back on the record.

Q. So, Mr. Astilean, I'm going to show you a video here.

MR. VODOPIA: What is the exhibit number?

MS. JELENCHICK: We haven't marked it yet.

MR. VODOPIA: 8.

Is there a number of them, or just 8?

MS. JELENCHICK: 8.

MR. VODOPIA: Great. Thank you.

(Astilean Deposition Exhibit 8, video disk labeled Speedfit_Video_02 marked for identification, as of this date.)

THE WITNESS: The kid is already married. The kid. And we still didn't make a penny. Part of the story.

(Video playing.)

A. So basically that two big parts of this invention. One is you can adjust

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everybody's weight, height, doesn't matter. You can walk, jog, run.

And one is each individual can sprint, jog, walk without touching anything, and stop instantly without touching anything.

So it not just adjust to each individual weight, it also have the capability of sprint, jog, run, walk, instant.

Q. Okay. So the video I just showed you, we marked as Astilean Deposition Exhibit 8, and it was entitled Speedfit_Video_02.

Was the wooden prototype depicted in that video?

A. Yes, it was. But it was on the video with a door in front of it. You should have that exhibit, too.

Q. During the video we saw several individuals run on the wooden prototype. Is that correct?

A. Correct.

Q. And this was the wooden prototype with the secondary belt system?

A. Yes.

Q. Do you recall when that video was

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made?

A. It was 2008.

Q. Do you know who filmed the video?

A. My friend Dan Bostan.

Q. And one of the individuals running in this video was you, wasn't it, Mr. Astilean?

A. It was me, my wife, and my two kids.

Q. Do you recall what time of year this video was filmed?

A. August between 15 to 20, 2008.

Q. Whose backyard was this video filmed in?

A. My friend Dan Bostan.

Q. So the video was shot in Canada?

A. Canada.

Q. During this August 2008 time period was this the first time you had seen the wooden prototype?

A. Seen it tested, yes.

Q. When you say tested, what kind of testing was done?

A. Besides the little test, I want to make sure I could have run on it 10 minutes straight.

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Q. And did you do that?

A. I did.

Q. And what were you testing exactly?

A. It will be, not be reliable product if you cannot sprint, jog, but also run some distance on it.

Q. You will agree with me that in video that we just saw, at no point is the secondary belt system illustrated. Right?

A. It is not illustrated. The point is, nobody is using that system today any more. It is obsolete. It is just the belt now. Woodway stole that product and make it with the timing belt mechanism, and then they built it for five years until they realize Alex Astilean built another one without any belt timing mechanism, and they stole that one, too.

And now we are fighting about something, it doesn't exist any more. Nobody is using any more in any of the treadmills. But this is the procedure. We have to go through it. We have to identify who invent this.

Q. Does the running belt in the wooden prototype, did it have the ability to go in the

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forward and backward direction?

A. It didn't. That's another issue of the -- of that wooden prototype. On the wooden prototype we didn't anticipate it might need a stopping mechanism because the belt was so tilted up, and when you step on it, like you see in the video, my kids, my wife step on it, so it didn't have the effect of sliding forward and be a -- jeopardize the fact if you step from behind. So that's -- it was not fluid enough in order to have that effect of sliding.

And when Nick built it, says we can't put that on the floor. We have to have something to go just one direction, but was used as a hazard, as an insurance not as a liability, not as a part of the invention. The treadmill can function with or without it. It was add later on just as a safety device.

Q. So the wooden prototype never had a safety device to --

A. It wasn't -- it didn't have to have a safety device, because it was so inclined and the portion in the back, it did not have it.

Now, when I cut the design and make

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it flat, home, it didn't even have the slacking mechanism, the time mechanism. So it went even slower. So that even we didn't need it in order to -- as to get in a concept of a safety device.

Q. The safety device was Woodway's idea, though, wasn't it?

A. It was not a Woodway idea. It was a necessity. It was not an idea. It was a necessity. If you call that invention, yes. But it was a necessity, not an invention.

Q. It wasn't your idea, was it?

A. No, because I didn't get to that point. I didn't get a hands on the treadmill on the first production model, the first time to step in. If I would have step on the first time in, probably would be my idea to put something on it as a safety device.

It was Nick who was the first one put it together and tested, and that's why he said we cannot this put on the floor. It's hazard. So we need a safety device on it. So.

Q. Is this the video that you claim was shown to Woodway in December of 2008?

A. Yes.

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Q. So I have another video that I'm going to show you, and we will mark it as Astilean Deposition Exhibit 9.

(Astilean Deposition Exhibit 9, video disk labeled Speedfit_ Video_01 marked for identification, as of this date.)

MS. JELENCHICK: And it is entitled Speedfit_Video_01.

(Playing video.)

Q. Have you seen that video before?

A. Yes.

Q. In fact, you are in the video, aren't you?

A. Yes.

Q. Is this a video that you claim was shown to Woodway in December of 2008?

A. I saw this one initially, yes.

Q. How many videos did you show to Woodway in 2008?

A. I believe two.

Q. In deposition Exhibit 9 no treadmill is actually apparent in the video. Is it?

A. No treadmill, yes.

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Q. The treadmill is obscured by the piece of wood, right?

A. By the door, yes.

Q. Was the piece of equipment that you and the other members of your family were running on, was that the wooden prototype?

A. It was.

Q. Was this video also filmed by Mr. Bostan?

A. Yes.

Q. And was this video done around the same time as the first video that we looked at?

A. Same day.

Q. Do you know when Mr. Bostan came up with the idea for the secondary belt structure for the wooden prototype?

A. The idea came when he was building the 6 prototype. He needed this type of belt. It was heavy, and in order to be taut on the bearings, he needed a support under.

Q. Would it be fair to say that Mr. Bostan came up with the idea for the secondary belt before these videos were shot in August of 2008?

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A. Well, we had discussion about that the belt is too heavy and needs the support under.

Q. Do you recall when those discussions were?

A. Yeah, I think it is in the record. There are some e-mails between me and him.

Q. But it was some time before August of 2008?

A. It was, yeah.

Q. Did those discussions predate your visit to Canada?

A. Um-hmm. Yes. Sorry.

Q. Did Mr. Bostan share any documents with you illustrating the secondary belt structure during your visit in August of 2008?

A. He shared some pictures and videos about previous models.

Q. When was your discussion, if you had one, with Mr. Bostan about the spring method?

A. Then, in August. This prototype had the spring system, had, but it was not actually the spring, but the same effect.

Q. When was your discussion, if you had

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one, with Mr. Bostan about the use of a timing belt to synchronize the pulleys?

A. Still August of 2008.

Q. Did you have discussions after August of 2008 involving the timing belt and synchronization of the pulleys?

A. Yes.

Q. When were those discussions?

A. In between August and December before the meeting with Woodway.

Q. Were those discussions ever in person?

A. After, no. After August, no.

Q. Were there discussions over the phone?

A. Over the phone.

Q. Were there any discussions via e-mail?

A. I don't think so about that, no.

Q. How many discussions over the phone did you have with Mr. Bostan between August of 2008 and the meeting with Woodway?

A. Weekly.

Q. So you had a conversation with Mr.

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Bostan every week?

A. Almost.

Q. How long --

A. Every other week maybe.

Q. On average, how long did these conversations last?

A. Sometimes an hour.

Q. In your first conversation with Mr. Bostan after you left his home in August of 2008, what did you talk about?

A. To file for a patent.

Q. Did you talk about anything else?

A. Many things. I don't remember.

Q. Do you recall any specific conversation that you had with Mr. Bostan between August of 2008 and December of 2008?

A. Specific about what? Specific about what?

Q. Do you recall any specific conversation with Mr. Bostan between August of 2008 and the time of your meeting with Woodway relating to the use of a timing belt to synchronize the pulleys?

A. I did talk with him at the meeting

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in August about the new mechanism, the new system.

Q. How many other conversations did you have with Mr. Bostan about that mechanism between August of 2008 and December of 2008 at the time of your meeting with Woodway?

A. I don't remember. I can't recall the number.

Q. Do you keep a date book, Mr. Astilean?

A. A date book? No.

Q. Do you know what a date book is?

A. I -- people write everything they do in one day, yes.

Q. Do you do that?

A. No.

Q. Have you ever done that?

A. No.

Q. Do you still have the wooden prototype?

A. I do.

Q. Where is it?

A. At my house.

Q. Did you leave Canada in August of

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2008 with the wooden prototype?

A. Correct.

Q. Has the wooden prototype been in your exclusive possession between August of 2008 and today?

A. No. I lend it to another company in Connecticut.

Q. Which company was that?

A. Chapco

Q. And when was that?

A. 2010.

Q. How long did Chapco have it?

A. Until this year, last year, December when we had the testimony, we pick it up. When we had the deposition in Connecticut.

Q. So Chapco had the wooden prototype from approximately 2010 until 2016, December 2016?

A. '17.

Q. So Chapco had the wooden prototype from approximately 2010 until December of 2017?

A. Correct.

Q. During the period of time that Chapco had possession of the wooden prototype,

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did you have occasion to see it?
A. I ask for it, but they never want to give it to me.
Q. Why did you give it to Chapco?
A. They want to look at it.
Q. When you got it back in December of 2017, how was it delivered to you?
A. I pick it up myself.
Q. You picked it up from their facility in Connecticut?
A. Yes.
Q. When you loaned it to Chapco --
A. Yes.
Q. -- how did you send it to them?
A. It was an exchange. They gave me one of the prototypes, and I gave them this in a truck. I think the truck came to my house with some prototypes, and I gave this prototype, wooden prototype, to go back.
Q. When you are referencing prototypes that Chapco gave you, you are talking about prototypes of treadmills?
A. Of treadmills, yeah.
Q. Before you sent the wooden prototype

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to Chapco, did you document how the wooden prototype looked in any way? Did you take photographs or take any video?
A. We had plenty of pictures with it.
Q. The photographs that you had of the wooden prototype, when were those taken?
A. At Dan's house, and then later on when we -- I create the side covers, the wood side covers for it, we took pictures.
Q. So you took photographs at the time that you were at Mr. Bostan's house in August of 2008, of the wooden prototype?
A. Yes.
Q. Correct?
A. Yes.
Q. And you took photographs of the wooden prototype some time later as you were developing side covers. Is that correct?
A. Correct.
Q. When were you developing the side covers?
A. January 2009.
Q. After January of 2009 did you document what the wooden prototype looked like

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in any way before it was delivered to Chapco?
A. It was delivered to Chapco without the side covers. I kept the side covers.
Q. What, if anything, did Chapco do with the wooden prototype?
A. Nothing. Just missing some slats. When they return, they don't have some slats. Somebody took it. Somebody stole it. I don't know. But some slats of the belt, they're not there that provide.
Q. So there are missing slats on the running belt, on the wooden prototype?
A. On the wooden prototype, yes.
Q. So there are missing Woodway slats?
A. Yes.
Q. Were there any other modifications to the wooden prototype?
A. No.
Q. Did you evaluate the wooden prototype once it was back in your possession to see what, if anything, Chapco did to it?
A. They didn't do anything to it. I mean, when I changed the side covers, I took the slacking mechanism out. The timing belt under,

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in order to me to use it with the new side covers, I took completely out. So it didn't have any more the timing belt under. I took it myself, not Chapco.
Q. So the version of the wooden prototype that Chapco --
A. Had. They never had this system under, was never in the prototype.
Q. At some point after the video of the wooden prototype was taken in August of 2008, you removed the secondary belt system?
A. After Discovery Channel was showing. When I cut the covers, I remove it.
Q. You referenced the Discovery Channel. Are you talking about the video that the Discovery Channel did of you?
A. Yes.
Q. Do you recall when that was shown on TV?
A. December 30th, and it was shown January 15th I think, or February 15, I don't know.
Q. So it was --
A. Shot in December 30th, 2008 at my

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house.

Q. The Discovery Channel video was shot at your home some time in December of 2008?

A. 30 December. Not some. 30 December 2008, 30th.

Q. And do you know when it was shown on TV?

A. Between 15, January 15 and February 15.

Q. So some time after the Discovery Channel video was shown, you removed the secondary belt system from the wooden prototype?

A. I did, and I modified the design of the covers.

Q. So does the Discovery Channel video illustrate the wooden prototype?

A. It did, but was inside the covers. You don't see it any more. It is the same wooden prototype in the Discovery Channel, was the same, same piece of equipment. The wooden prototype was feature in Discovery Channel, was just covered by some side covers, which you don't see it. It's inside. Was inside. But was the wooden prototype on the show. It was

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not a --

Q. So the version of treadmill on the Discovery Channel video contained the secondary belt system?

A. Contained, yes.

Q. And what differences, if any, were there between the wooden prototype that was illustrated in the video in August of 2008 --

A. We couldn't put two by 16, two sides, with the belt on Discovery Channel. It had to have some face, and we -- I went to a shop in my town and I said I need to cast this into some sort of covers, it looks decent. And they came up with kind of the design which I was not happy in the beginning, but was the best we can do in the time manner.

Q. So the treadmill in the Discovery Channel video had side covers?

A. Had side covers.

Q. And the wooden prototype as illustrated in the August 2008 video did not have side covers?

A. Did not have, no.

Q. Were there any other differences

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between the two treadmills?

A. No. I put some guide rollers also, because in the video you can tell by the noise the belt was moving on the bearings and slacking side to side. So I put guide rollers in order to guide the belt, go on the bearings.

Q. Do all treadmills have side covers?

A. Yeah.

Q. They are required, aren't they?

A. I mean, you have to step from the treadmill on the side. You have to have some covers.

MS. JELENCHICK: One more video. We are going to mark as Astilean Deposition Exhibit 10, a video that was produced to us by your lawyers and marked PLTFESI 012011.

(Astilean Deposition Exhibit 10, video bearing production No. PLTFESI 012011 marked for identification, as of this date.)

(Video playing.)

MS. JELENCHICK: Why don't we take a quick break to change the tape.

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THE VIDEOGRAPHER: The time is 11:46 a.m., and we're going off the record.

(Recess taken.)

THE VIDEOGRAPHER: This begins media unit No. 2. The time is 11:54 a.m., and we're back on the record.

BY MS. JELENCHICK:

Q. Mr. Astilean, over the break did you have an opportunity to talk to your counsel about the substance of your deposition testimony?

A. No.

Q. Just prior to the break you reviewed a video which was marked as Astilean Deposition Exhibit No. 10. Was that the Discovery Channel video that we had been discussing?

A. Right.

Q. You authorized the Discovery Channel to show that video on TV. Correct?

A. Correct. I signed a release form something.

Q. A variety of your ideas were featured in the Discovery Channel video.

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Correct?

A. Correct.

Q. And one of your ideas that was featured was the wooden prototype?

A. Yes.

Q. The wooden prototype in the Discovery Channel video had the side covers on that you testified about. Correct?

A. Correct.

MS. JELENCHICK: We're going to mark certain documents from this notebook that I have in front of me. Mark this 11.

(Astilean Deposition Exhibit 11, document production No. PLTF 00049542 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as Astilean Deposition Exhibit 11, and it was taken from a notebook of documents that your lawyers had identified in response to Woodway's interrogatory No. 6. It is branded with document production No. PLTF 00049542.

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Do you recognize this document?

A. I do.

Q. What is it?

A. It came in an attachment in an e-mail from Nick Oblamski.

Q. Is this the version of the wooden prototype that was featured in the Discovery Channel video?

A. The layout of this product, yes, it was sent to Nick, and Nick was laying out their belts and everything on this type of side covers and tried to construct as a metal.

Q. The specific side covers that are identified in deposition Exhibit 11, these were the side covers that were added over the wooden prototype?

A. No. No. This is an e-mail, an attachment sent from Nick Oblamski to me with the specs of the side covers, how will look as production model.

Q. Did the production model ultimately look the way that it does in deposition Exhibit 11?

A. No.

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(Astilean Deposition Exhibit 12, production numbers PLTF 00049627 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 12 which is a document branded with production numbers PLTF 00049627. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's an e-mail from the Sign Language from -- sent on to me. From Sign Language. It is a shop, a sign shop in East Hampton.

Q. How do you know this is an e-mail?

A. I'm assuming. But I know it is from there, but I don't know if it is an e-mail or a piece of paper, but it is coming from there.

Q. Looking at the top of the deposition Exhibit 12. Is that the wooden prototype?

A. Yes. But it is already, it is cut, the wood, to the shape of the belt.

Q. If you could just annotate on

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deposition Exhibit 12 the wooden prototype.

And when you said it was already cut to the shape of the belt, what did you mean?

A. It was straight. The wood was straight, and I cut it in order to fit the side covers. Initially was, the wood was straight going forward.

Q. Could you just sketch on top of the drawing what it originally looked like, if you can.

Can you just annotate with a lead line what that is so months from now we will remember what that is.

So the version of the wooden prototype that was in the video in August of 2008, had not yet been cut to the shape of the belt?

A. Say it again, please.

Q. The version of the wooden prototype in August of 2008 --

A. No, it wasn't. We didn't have the wood cut.

Q. So some time between August of 2008 and the Discovery Channel video, you cut the

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shape of the side covers?
A. Yes.
Q. The other illustrations on deposition Exhibit 12, do those reflect the shape of the side covers that were --
A. It does.
Q. That were illustrated in the Discovery Channel video?
A. Yes, here, here, here, here. They are all inside. You see the shape of the prototype.
Q. So the three figures on the left side of this document, maybe you could circle them and indicate Discovery Channel.
A. No. It is not Discovery Channel. This is not the final design for the Discovery Channel.
Q. So the version of the side covers illustrated on deposition Exhibit 12 was not the shape of the side covers in the Discovery Channel?
A. No, they were not. They were some iteration, but this is not the final design.
Q. And how do you know that?

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A. Because of the shape.
MS. JELENCHICK: Mark that.
(Astilean Deposition Exhibit 13, document containing three color versions of side cover designs, production number PLTF 0049628 marked for identification, as of this date.)
Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 13 which is a document branded with production number PLTF 00049628.
Do you recognize this document?
A. Yes.
Q. And what is it?
A. Still from the same company, a different design.
Q. These are different versions of side cover shape that you were considering?
A. This is the final one. This was featured in Discovery Channel.
I don't know if I should mention something here or not.
MR. VODOPIA: Then don't.

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THE WITNESS: Okay.
Q. So if you could circle the final design featured in the Discovery Channel video on deposition Exhibit 13 and annotate it, that would be great.
A. This one is inside here, and this one is, and this is the final version.
Q. So the illustration at the bottom of the page --
A. Yes.
Q. -- in color, that says Speedfit SpeedBoard Non-Motorized, that's the version that was featured on the Discovery Channel?
A. Yes. I should circle completely?
Q. Sure.
Was the side cover shape that you identified as being featured on the Discovery Channel video, ever shared with Woodway?
A. If is the picture coming from Nick, what do you think?
Q. So you are referring to deposition Exhibit 11?
A. Yes. This is the picture came from Nick. Nick already put it as a production

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model, how to look, but I was not happy with the shape, and I changed the design right after the show.
Q. What show are you referring to?
A. The Discovery Channel shooting.
Q. So you believe that deposition Exhibit No. 11 is a CAD mockup of the side cover shape that was illustrated on the Discovery Channel show?
A. It came from Nick Oblamski, yes.
(Astilean Deposition Exhibit 14, color photo containing a SpeedBoard Non-Motorized treadmill, production number PLTF 000049566 marked for identification, as of this date.)
A. But after we send him the layout.
Can we stipulate in the record? It came from Nick Oblamski but after we gave him the specs. He sent it to us, but after we gave him the specs. He sent it to us how it looks in a macro version, but before, we sent him the specs of this. Not came from Nick Oblamski this. Nick Oblamski didn't even know about

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curved treadmill when Discovery Channel was shooting the video. Just to state it straight in the record.

We give him the specs for this layout. We give him the specs, and he put the specs from me into the production model and send me these pictures. This came from Nick, but with my layouts, with my -- I put the CAD file with the dimension. He took it from the image. I send it from the Sign Language to him.

Q. Okay.

A. Just to be correct in the record.

Q. Are you finished?

A. Yes.

Q. You have been handed deposition Exhibit Astilean 14 which is document branded with the production number PLTF 000493 -- I think 65?

A. It is 566. 586.

Q. Stay the number again. Your eyes appear to be better than mine.

A. It is 49586 I think, not 56. Or 66. It is either 566 or 556.

Q. I believe the production number is

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PLTF 00049566.

A. 66, yes.

MR. VODOPIA: I think that's right.

Q. Do you recognize this document?

A. Yes, I do.

Q. And what is it?

A. Is the first production model made by Woodway, first Speedfit.

Q. And how do you know that?

A. Because it says on it Speedfit, SpeedBoard Non-Motorized treadmill.

Q. Do you know where this photo was taken?

A. Yes.

Q. Where was it taken?

A. In 2009 IHRSA show in San Francisco.

Q. How do you know that?

A. Because I know the first time I've seen also the green treadmill on the background there which used to be SpeedBoard 1, and after one season they call it EcoMill SpeedBoard, Woodway EcoMill. That was the first Woodway, first Speedfit treadmill, the SpeedBoard, the

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first SpeedBoard 1. That green treadmill is the SpeedBoard 1. It's an EcoMill Woodway now. It's a manual treadmill, name it EcoMill by Woodway, but was SpeedBoard, Speedfit a year before in 2008.

Q. Was this particular treadmill with the blue side cover, positioned in Woodway's booth at IHRSA?

A. It was.

Q. And you know that because you were in Woodway's booth at IHRSA --

A. I was, yes.

Q. -- that year?

Do you know if this version of the SpeedBoard Non-Motorized contained the secondary belt system from the wooden prototype?

A. Contained a new system, the synchronized system which we discussed at the meeting.

Q. Were you involved in the production of this treadmill that was illustrated at, or that was demonstrated at IHRSA in 2009?

A. What do you think if it says Speedfit SpeedBoard? Where I was? Or what do

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you think? Where I was?

Of course I was. They made this for Speedfit.

Q. Were you physically present at Woodway's facility when it was manufactured?

A. No, I was not.

Q. After the video of the wooden prototype was taken in August of 2008, where did you store the wooden prototype?

A. My house.

Q. Where within your house was it stored?

A. In the garage.

Q. And was it always in the garage up until the point in time that you loaned it to Chapco?

A. Correct.

(Astilean Deposition Exhibit 15, e-mail chain, bearing production numbers PLTFESI 001815-1818 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 15

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which is a document branded with production numbers PLTFESI 001815 through 1818. It also was previously marked as Speedfit deposition Exhibit 6 in the earlier litigation. That appears to be at the top an e-mail from Kevin Lamar, KLamar at Startrac.com to Alex Speedfit at aol.com sent January 16, 2009, 12:57 p.m.

Did I describe this document correctly?

A. Correct.

Q. Do you recognize this document?

A. I do.

Q. And what is it?

A. We tried to sell our invention. Kevin Lamar was part of the staff at that time, and when I went to Woodway I said, I would like you to build it, but I think we are going to license to somebody else this treadmill, and he was agreed to just build it for the show.

Q. So as of January 16th, 2009 you were attempting to sell --

A. To sell, yes, the invention.

Q. As of January 16, 2009 you were soliciting companies for the sale of the

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invention and the wooden prototype?

A. For the license, yes, of the invention to, was two companies, Startrac and Life Fitness. We had conversation with.

Q. When were your conversations with Life Fitness?

A. They start in October of 2009 before even Woodway knew about the curved treadmill. They didn't even know the curved treadmill exist.

We didn't tell Life Fitness also there is a curved treadmill involved. We just told them we have a new invention in October of 2009.

MR. VODOPIA: 2009 or 2008?

A. 2008. 2008. I'm sorry.

Q. So your conversations with Life Fitness offering to sell the curved treadmill with Life Fitness --

A. Yes, but we didn't mention the curved treadmill.

I'm sorry to interrupt you. Okay, finish your thoughts and then I'll....

Q. Your conversations with Life Fitness

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were in October of 2008?

A. Correct.

Q. Did you disclose any of the details of your invention?

A. No. No. Not to none of them I didn't disclose.

Just when the video with Discovery Channel came, then I cc'd to everybody. That was before the show.

Q. So you sent the Discovery Channel video to your contact at Life Fitness?

A. No. To everybody. I just put it public when the Discovery Channel was air it, the video, then I made a copy. I put it on the video tube, and I made a copy. I mean, I made a link copy and I cc'ed to everybody I knew it. That was before the show. I don't remember when, but it was before the show in March 2009. Before even Woodway filed for the patent; for the provision.

Q. If you will look on the second page of this e-mail at page 1816 at the very bottom, it is an e-mail from AlexSpeedfit at aol.com to Kevin Lamar sent Wednesday, January 14, 2009 at

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1:54 p.m. Do you see where I'm referring?

A. Where? On which page?

Q. The second page, PLTFESI 001816.

A. Okay.

Q. The very bottom there is an e-mail from AlexSpeedfit at aol.com to Kevin Lamar.

A. Yes.

Q. Do you see where I'm pointing?

A. Kevin, just came out of the sky? Where lower?

Q. The last e-mail on the bottom of the page. It says: "Kevin, what technology you are talking about it?"

A. "What technology you are talking about?"

Q. Do you see the e-mail I'm referring to?

A. "It's right there in the video."

Q. On Wednesday, January 14th, 2009 at 1:54 p.m. you will agree with me that you sent an e-mail to Kevin Lamar?

A. Yes, I agree.

Q. "Kevin, what technology you are talking about it? It's right there in the

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video. The concave elliptical new shaped treadmill will replace the existing regular electrical treadmill. The whole idea is in the shape of the treadmill not in the technology how the belt rolls. We made it in both ways with Woodway belt and also with the regular belt. One of the company is not even interesting in any of our technologies but they want the patent in exclusivity. They said they have a better way to make this roll. The whole idea is in the concave shape and they want to have the exclusivity on that one. Alex."

Did I read that correctly?

A. Correct.

Q. And you drafted that e-mail to Mr. Lamar?

A. I did.

Q. You mentioned a patent at the present time. Did you have a patent as of January of 2009 on the wooden prototype?

A. We had a provision.

Q. So you had a patent application in 2009?

A. Yes. But my lawyer the day I file

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it said, you can stop shopping tomorrow. Mr. Amer, God forbid. Tomorrow you can shop around.

MR. VODOPIA: May he rest in peace.

THE WITNESS: May he rest in peace.

(Astilean Deposition Exhibit 16, provisional patent application bearing cover page of Exhibit C marked for identification, as of this date.)

MS. JELENCHICK: The court reporter will take the exhibits.

THE WITNESS: Those, too?

MS. JELENCHICK: The court reporter at the end of this deposition will take all the exhibits.

THE WITNESS: Will take all of them.

Q. Mr. Astilean, you have been handed a document that's been marked as deposition Exhibit No. 16. It bears a cover page of Exhibit C, and it has been previously marked as Bostan Deposition Exhibit 5 in the previous

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litigation.

Do you recognize this document?

A. Yes.

Q. Is this the provisional patent application that you had filed?

A. Yes.

Q. You will agree with me that it has a filing date of November 7th of 2008. Is that correct?

A. It is November 6, but its okay. It's November 6. November 7, yes. Stamped November 7. Correct. November 7th.

Q. The patent application that's been marked as deposition Exhibit 16, that is the patent that you referenced in the previous deposition exhibit exchange with Mr. Lamar?

A. Can you say one more time.

Q. Sure.

A. Yes, I refer to this. Yes, Mr. Lamar.

Q. So in your e-mail on January 14th of 2009 to Mr. Lamar at Startrac, you referenced a particular patent. Is deposition Exhibit 16 the patent that you referenced?

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A. Yes. I'm talking about this provision application, yes.

Q. If you flip to the last page of deposition Exhibit No. 16. There is a photograph. Do you know what this photograph is?

A. The wooden prototype.

Q. And is this the same wooden prototype --

A. Absolutely the same.

Q. The wooden prototype that is illustrated on the last page of deposition Exhibit 16, it contains the secondary belt system. Doesn't it?

A. Correct. It was sent to our patent attorney, but he didn't file it. It was his mistake, or whose mistake is it?

(Astilean Deposition Exhibit 17, copy of patent application No. 61/280,265 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what has been marked as deposition Exhibit 17 which is a copy of application No. 61/280,265.

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Do you recognize this document?

A. Yes.

Q. What is this document?

A. I reapply the provision.

Q. Is the application included at deposition Exhibit 17 in all respects the same as the application in deposition Exhibit 16?

A. Absolutely, yes.

Q. The photograph of the wooden prototype in the application, that was taken in August of 2008. Correct?

A. Correct.

Q. Looking at the page at the top that states leg-powered treadmill --

A. Yes.

Q. This includes the brief description of several views of the drawing. Doesn't it?

A. Not supposed to discuss here about Woodway patent. The question, this is my application. What is this deposition for? Not correcting the inventorship of Woodway patent?

MR. VODOPIA: I got you, Alex. I understand your complaint.

What was the question again?

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THE WITNESS: Okay, no problem.

Q. Does the page entitled Leg-Powered Treadmill describe the views of the drawing, as you understand it?

A. Yes. I know.

Q. Will you agree with me that the phrase timing belt is not included in this description?

A. It is. It is talking about here about the slacking.

I have to review it to point you exactly to the expression what Mr. Amer used which enabled my second lawyer to file the final patent. I don't know exactly where it is, but if I have enough time I will point you exactly to the phrase which he mentions that.

It says here: Spring not shown exert spring urgency in opposite direction holding taut length of the lower belt portion 26A.

He was referring to the timing belt under, springs not shown. That's what he was referring to.

Q. But he doesn't use the phrase timing belt, does he?

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A. He doesn't.

Q. And this description also doesn't include any reference to a synchronizing belt, does it?

A. No. But it refers to the point like, whatever it does here, does exactly the same thing like synchronized system. It is exactly the same species. Different species, but it's the same matter.

Q. But it doesn't say that in the description, does it?

A. It does not say.

Q. This description also doesn't include any discussion of slats, does it?

A. No, because what is used in here can be used in any type of belt, not just with slats. Why should put slats when you can use a regular belt and use the same system with a belt, with a regular belt? It doesn't have to be a belt with slats.

Q. This description doesn't say anything about the slats being resilient, does it?

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A. No. It does not. But you can tell there are slats in the picture.

Q. But it doesn't say anything about slats, does it?

A. No. It doesn't say, but you can clearly see the pictures is the belt with the slats.

Q. When was deposition Exhibit 17 filed with the patent office, if you know?

A. November 2nd, 2009.

Q. Deposition Exhibit 17 was filed after the trade show in March of 2009. Correct?

A. It was, and after an e-mail from Doug Bayerlein saying, like, Alex, I don't know what you invented, and that's, of course, even I wrote to him, he saw my intelligence. I counsel with my patent attorney. He says, Alex, you can reapply for the provision again one more time, and we're not going to go back to the date of 2008, but if you are going to be a lawsuit, it will count that provision of 2008, it will count the day as 11 -- November 2nd of 2009.

That was his comments, my lawyer comments at that time. But I was not sure what

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I do, to file the patent or go for another year with a provision.

(Astilean Deposition Exhibit 18, copy of patent application that was filed by Mr. Walker marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 18 which is a copy of patent application that was filed by Mr. Walker on October 29th, 2010. Do you recognize this document?

A. I do recognize, and we go over again the circle, and thank God you put the camera in front of me. For how long you can keep like this, asking questions like this and not go straight to the merit?

We supposed to have a deposition about correcting inventorship on the patents issued by Woodway. I respond all these question when you -- when you deposed me on the first case. I have no mind to answer all the question and stay with you five days, but in the end, the end of the day, you still have to conclude your business. So I have patience and answer you all

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your questions, but, again, going like this, you can go for how long until you have to come to the table.

Please ask me the question.

MR. VODOPIA: So I will just object for the record that there is nothing relevant.

A. No, this is the same question, I'm asking the same questions, answering again from the previous deposition which is about Speedfit patents which they tried to put Oblamski on Speedfit patents. That's why Mrs. Kadie told the judge last time, said, no, that's another case which the judge pointed out, looks like it is about the same case.

And, obviously now, it's about the same case because you ask me questions about my patents, and we supposed to talk about correcting inventorship about Woodway patents. So obviously they are the same thing. It's the same case.

Okay, no problem. We go ahead and ask me the question and I answer. I have all the time in the world.

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Q. So you know, Mr. Astilean, the reason it is not part of the same case --

A. Yes.

Q. -- is because your lawyers wanted it to be in a separate case. This has nothing to do with Woodway's choice to file a second case. This was your lawyers.

MR. VODOPIA: See, we didn't want to conflate --

MS. JELENCHICK: We don't need to get into it. Let's --

MR. VODOPIA: No, you were speaking to the record. Let me just correct the record.

We didn't want to conflate Alex's provisionals with Woodway's provisionals. It is so easy, for example, in the 2013 case there is a limitation with respect to extrinsic evidence. There is absolutely no limitation with respect to the intrinsic evidence that he has as the inventor of the Woodway patents.

THE WITNESS: That's why we answer

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all the questions you need to --

MR. VODOPIA: You want to focus on --

THE WITNESS: Focus on anything you want.

MR. VODOPIA: It is conflating. That's why we separated the case. We had a feeling you were going to try to confuse things.

THE WITNESS: No, it is fine.

MR. VODOPIA: How can you confuse them.

THE WITNESS: We are here to answer all the question.

MS. JELENCHICK: Thank you.

Q. If you will flip to the document deposition Exhibit 18, page 3 at the top. It may be page 7, but it says No. 3 at the top.

A. Okay.

Q. Starting at line 15 it states:

"Several methods of controlling the treadmill belt configuration in a low friction manner are described. One method is to use a support belt under the treadmill belt lower

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portion. This support belt is kept in a taut configuration with a horizontal section by using springs pulling pulleys in opposite directions."

Did I read that correctly?

A. Correct.

Q. Is this the method that the wooden prototype used?

A. Correct.

Q. Going back to your patent application at line 19, it states:

"Another method uses the timing belt linking the treadmill belt end rollers such that after the desired configuration is achieved, the treadmill belt and end rollers must move synchronously, thereby denying the treadmill belt the opportunity to have its lower section droop down."

Did I read that correctly?

A. Correct.

Q. Is this the first description of the method using the timing belt to synchronize the pulleys?

A. No.

Q. That you have?

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A. The first description I had it on the board on Woodway meeting with Doug on December of 2008. This is not the first one in -- when was this filed? In November of 2008.

In December of 2008 I had the first description of it.

Q. But you don't have any --

A. Any what?

Q. Any evidence of that description from December of 2008. Do you?

MR. VODOPIA: Objection. He just articulated the evidence.

A. Yes, I just said.

Q. What is your evidence?

A. Like I draw it on the board and I discuss with Doug, and the evidence is they order parts not the next day, but they order parts directly for that mechanism. They didn't order parts for the first mechanism. They ordered directly for the new system, not the old one.

Q. You have no physical documentation of --

A. I do not have.

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Q. Mr. Astilean, you do not have any physical documentation of your discussion with Woodway in December of 2008 about the timing belt synchronizing the pulleys. Do you?

A. No, I do not, and I answer this question before.

Q. Turning back to the patent application, line 23:

"Yet another method is to support the lower section of the treadmill belt from drooping down by directly supporting this section with one or more linear arrays of low friction bearings at the peripheral edges of the belt below the lower section."

Did I read that correctly?

A. Correct.

Q. Is this the first documentation of this particular method that you have?

A. Yes.

Q. If you will look at page 6 of the 2010 patent application at the bottom starting at line 24.

A. Yes.

Q. It states:

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"The method shown in figure 3 shows the use of a timing belt 67 in achieving a similar result. Here end rollers 60 and 64 are attached to timing belt pulleys 62 and 66 respectively. Timing belt idlers 68 are simply used to configure timing belt geometrically to fit within the constraints of the side contours of treadmill 10. If belt 26 is prevented from slipping relative to end rollers, 60 and 64 by high friction coefficient (or by the use of integral timing belt on the inside of belt 26 and rollers with timing belt engagement grooves), once configured as shown, timing belt 67 will not permit drooping down of section 26A since all motion is now synchronous."

Did I read that correctly?

A. Correct.

Q. Looking back at deposition Exhibit 17 which is the 2009 provisional patent application, does the 2009 application reference timing belt idlers?

A. It did not.

Q. Does the 2009 provisional application reference a high friction

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coefficient concept?
A. Implies.
Q. Where?
A. The whole point of all these terms is the high efficient frequency. They eliminate the friction.
Q. Where does it say that in the provisional?
A. The whole concept is about that.
Q. Do you explain that concept in the provisional application?
A. Yes. So in order --
Q. Where in the provisional application? Point me to the words where you explain that concept.
A. The whole description of the provision does that.
Q. What does the phrase high friction coefficient mean to you?
A. High friction coefficient? Let's use the translator.
THE INTERPRETER: High friction coefficient?
(Translation.)

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A. The whole purpose of this invention is to have a lower friction, not a high friction; the lower friction.
Q. What does the phrase high friction coefficient mean to you, Mr. Astilean? Do you know what that phrase means?
A. No. Explain to me, please.
Q. Do you reference a synchronous concept in the 2009 provisional?
A. Which one?
Q. Do you reference a synchronous concept in the 2009 provisional patent application?
A. No.
(Translation.)
A. Well, we had to achieve the lowest possible here.
Q. If you will flip to the drawings in deposition Exhibit 18.
(Translation.)
A. I want to take my time to read this, and I will point it exactly what it means about the expression you just said.
It says: "It is known from common

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experience that in prior art treadmills, the upper length portion of their closed loops are flat due, it is believed, because of inability to maintain the concave shape 34 in the length portion 26B. This shortcoming is overcome by the weight 30 which in practice has been found to hold the concave shape 34 during the uphill running of the exerciser 36."
So there it explains in the last phrase.
Q. And so you were reading the last paragraph --
A. Yes.
Q. -- of the provisional patent application, deposition Exhibit 17?
A. Yes.
Q. And why were you reading that?
A. To explain to you what addresses your concern in the application.
Q. My question was a little bit different, Mr. Astilean. I asked what the phrase high friction coefficient meant to you. If you don't know, that's fine. We can move on. I'm ready to move on.

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A. I'm ready to move on, too.
MR. VODOPIA: But do you know?
(Translation.)
THE WITNESS: No. She said to me if that high friction coefficient, high friction is somewhere in application.
And this treadmill it did lower the friction, the coefficient of friction, it lowered to the point like it can be used. That's why it was successful because was the only one function, none of them before, it did not function. But because this coefficient was so low friction in the concave shape, this treadmill was operating, was the first one in the world operating.
The one before they had such a big coefficient of friction, that it didn't work. And I tried to explain to the other side that the way it was used this, with this type of technology, was able to be used in the concave shape and be able to be used by the athlete to run

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freely and adjust the speed of the movement, was just with this low coefficient of frequency -- of friction, not frequency.

THE INTERPRETER: Yes.

A. I'm ready.

Q. All finished?

A. I'm finished.

Q. Mr. Astilean, do you recall the specific date that you came up with the idea to use a synchronizing belt to keep the lower portion of the running belt taut and the upper portion of the running belt concave?

A. Yes. August 2008 we discuss on the e-mails and on the phone with Dan Bostan, but when I saw it in August 2008, I said, Dan, we can do it easier way with a synchronized mechanism on the side. And then when Doug pointed out this is going to ruin the belt, I said here is the -- an option.

Q. So it was the same date that you were visiting Mr. Bostan to film the videos?

A. Yes. And he testified, too.

Q. Did Mr. Bostan contribute in any way

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to the concept of a synchronizing belt?

A. No. That's why I finally I -- first of all, I file for a patent in my name because I felt he didn't contribute a timing belt mechanism, but then when I realize in the patent also is the one option with the springs which he created, I said I think we should both join this patent because you are part of it. So that's why we came to agreement that he should be part of the patent as well.

Q. Did you tell anybody else besides Mr. Bostan about the synchronizing belt concept?

A. Your client, Bayerlein, and Eric Weber was in the meeting.

Q. Eric?

A. Eric Weber was in the meeting.

Q. Did you tell anybody else?

A. Not that I remember.

Q. Did you do any experimentation with the synchronizing belt?

A. As I told you and Doug and Dan, the system of the bike, upside down bike, it is right there, the experiment.

Q. Did you conduct a physical

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experiment involving the synchronizing belt?

A. As I told you and I'm mention again, you put the bike upside down which we going to have in court, and lame Blow Joe will get it. That's the experiment I had.

Q. Did you do that experiment with Mr. Bostan?

A. Yes. We know about this because we both repair bikes, and we always had the bike upside down. When you have the bike upside down, always the chain is in slacking position.

Q. What kind of bike did you use in the experiment with Mr. Bostan?

A. I didn't have to use any bike with Mr. Bostan. I just explained to him about the system when you turn bike upside down, and he recognize right away instantly, including your client, Doug Bayerlein, who got it instantly.

Q. Did you have a bike at the meeting with --

A. I didn't.

Q. Did you do any testing of the synchronizing belt?

A. I told you I did test it as a kid,

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this synchronized system as a kid, I watch it million times when I turn up side down the bike. That's why I came up with this idea when I saw it in Dan's house. I said, Dan, we could have done it better this way with a synchronized mechanism.

Q. Did you ever put a synchronizing belt onto a treadmill prototype and test it?

A. No.

Did Woodway did? No. They built the production model right away after.

They get it from the sky? Maybe. God give it to them, the instruction, overnight, and they build it.

They had it from somewhere. They get all the parts right away and they build the production model with a synchronized mechanism instantly.

And by the way, Woodway haven't done anything on that project without asking my approval. So even the timing mechanism, they had to be approved by me. And the side covers.

(Astilean Deposition Exhibit 19, e-mail chain, production

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numbers PLTFESI 002203-2204 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed a document that's been marked as deposition Exhibit 19 which is an e-mail branded with production numbers PLTFESI 002203 through 2204. This was also marked at your previous deposition as Exhibit 9.

Do you recognize this document?

A. I recognize, and also you very surprised me not know what's the idler means. I remember even that.

Q. Was this the first time you had seen a synchronizing belt on a treadmill prototype?

A. Yes. As soon as it was done, Nick sent me up a picture.

Q. And the photograph in deposition Exhibit 19 originated with Mr. Oblamski, didn't it?

A. What do you mean originate with Mr. Oblamski?

Q. Mr. Oblamski sent you the photograph in Exhibit 19.

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A. Correct.

(Astilean Deposition Exhibit 20, copy of photograph bearing production numbers PLTFESI 002204 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 20 which is a clean version of a photograph that was part of deposition Exhibit 19.

Will you agree with me that the photograph in Exhibit 20 is the same as the photograph in Exhibit 19, but without the writing?

A. Agreed.

Also, I agree what he says here, you can see the long belt synchronizes the front and rear shaft and work great. So obviously we discuss about it.

Q. Why is it obvious that you discussed it based on his statement?

A. Because it was, from the start it was planned to go this way with a new system to synchronize the belt. And the bottom line and

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the point is, and I like to mention now here because I get it off of my chest, I don't want to have a heart attack, you see, Mr. Bayerlein and his firm, they stole this concept, they build this treadmill, and they went into production and made a lot of money with, and, you know, that was done in their part. And they move onto the next project.

Me, I get this treadmill exactly what you see in this picture in my garage and I was continue to work, and I eliminate that timing belt mechanism, and now the treadmill in Woodway shop is without that timing belt due to me, Alex Astilean. And that's the reality.

But Woodway was a done deal. They stole it, they built it, and they start to make money and they finish with, they never put any thought into it.

But me, I had to take this piece apart in my garage and come with an idea how to eliminate this timing belt. And eventually I did, Miss.

I'm finished.

Q. The idea for a curved treadmill,

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that was Mr. Bostan's idea?

A. No. No. It wasn't.

Q. Whose idea was that?

A. Mine.

Q. Mr. Bostan didn't contribute to the idea of having a curved treadmill?

A. He did. He came with a concave. I came with a curve the other way. He came with a concave, but I came with a round as a first.

Q. So your idea was to have a convex treadmill?

A. No, it worked. It changed the speed. In a circle treadmill, it changes, adjusted the speed, and I had an antique wheel on my house and he look on top of the wheel and he went inside and says the way it works on top will work on the bottom, too.

So that's, will work on the curve as a concave, not as a convex. So the initial start idea, that started from me initially, and of course he contribute.

THE INTERPRETER: You don't mind I look at the picture.

THE WITNESS: Of course.

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Q. After you visited Woodway in December of 2008, did you make any in-person visits to Woodway at any point in time before March 17th of 2009?

A. No, I didn't.

Q. You mentioned you had phone calls with Mr. Oblamski.

A. Was all set in stone at the meeting with Doug, how we going to pursue.

Q. How long was that meeting?

A. A lot.

Q. How long was it? How many minutes?

A. I don't know but, as soon as he got idea, as soon as he didn't know how to get rid of me, that's what exactly the truth. As soon as he click in his mind, he didn't know how to get rid of me.

Q. What time did the meeting start?

A. I don't know. 11 o'clock, 12.

Q. What time did it end?

A. 2, 3 o'clock.

Q. Did you share a meal?

A. I don't remember. Maybe long time, maybe we did, I don't know. I had a late

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flight. Probably we had dinner.

Q. Did you have dinner?

A. Probably, yes.

Q. Do you specifically recall having dinner with Mr. Bayerlein?

A. I had dinner since I was there. I don't remember exactly when, but probably not that time.

Q. Was Mr. Oblamski at this meeting?

A. No, he wasn't, but his name as an inventor, and somehow he got to him the directive how to do it. Somebody told him.

Q. So you don't know how long the meeting was?

A. I don't remember.

Q. Were there any documents that were created during the meeting?

A. There was a lot of pictures took with Mr. Bayerlein in front of the screen with the curved treadmill. I think there was a video, too, but I lost it. There was a video also, not just the pictures.

Q. What was the video of?

A. Of him watching the first time when

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he was seen in his life curved treadmill operating.

(Astilean Deposition Exhibit 21, full page copy of color photograph marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 21 which is a photograph. Is this an example of one of the photographs that was taken that day at Woodway?

A. Yes. But I was so paranoid about him claiming that I photo-shopped this picture then I put him next to the screen to be part of the screen and he short, and some of the pictures they are part of the screen. It's reflecting he's short from the projector to make sure that nobody is going to say this is a fake picture. I was so paranoid to make sure he's not going to claim that.

(Astilean Deposition Exhibit 22, copy of full page color photograph marked for identification, as of this date.)

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Q. Mr. Astilean, what's been handed to you is a photograph that's been marked as deposition Exhibit 22.

Is this also a sample of the photographs that you recall taking that day at Woodway?

A. Yes.

Q. And both of these photographs, deposition Exhibit 21 and 22, they reflect Mr. Bayerlein standing in front of a screen?

A. Projector screen.

Q. What's being shown on the screen in deposition Exhibit 21?

A. The curved treadmill which my son is running on it.

Q. And deposition Exhibit 21, the image on the projection screen is an excerpt of the video that you showed to Mr. Bayerlein. Isn't it?

A. Correct.

Q. And in deposition Exhibit 21 it's an excerpt of the video where the treadmill is obscured by a piece of wood. Correct?

A. Correct.

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A. ASTILEAN

Q. In deposition Exhibit 22 the wooden prototype is illustrated. Correct?

A. It is still a video. It is a video on the projector. It is not an illustrated picture.

Q. You didn't bring the wooden prototype to the meeting at Woodway, did you?

A. No, I didn't. But I sent the most important part to Woodway to take measurements. I sent the most important part of that treadmill to Woodway to take measurements, because what do I send? The belt? They had tons of belts there. Two pieces of 2 by 16? Plenty in the wood stores.

So what do I have to send to them in order to create this metal version? The rails with bearings which they need to measure the curve. That's what was sent to Woodway.

Q. Do any of Woodway's patents claim the specific radius of curvature for the treadmill?

A. No, I don't remember. No. No, I don't think so, no.

MR. VODOPIA: Think before you

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A. ASTILEAN

answer.

THE WITNESS: They are?

MR. VODOPIA: I don't know.

MS. JELENCHICK: Mr. Vodopia, your coaching of the witness is highly inappropriate.

A. Okay. Certainly does mine. Some of my patent certainly specifies the certain radius need to have in order for something to happen.

Q. But you don't believe Woodway's patents have such a claim, do you?

A. Not really clearly specifically, I can't say under oath I remember seeing such a specific radius in their patent.

Q. Where did the meeting take place with Woodway in December of 2008?

A. In the conference room in Woodway manufacture.

Q. Do you know the address of the location you were at?

A. I was always picked up at airport and drove there, and drove back to the airport.

Q. Going back to the phone calls you mentioned you had with Mr. Oblamski. Did you

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A. ASTILEAN

speak with anybody else at Woodway over the telephone?

A. Not about this project, no. Just with Nick.

I would -- I sent it to Doug and Eric, the side covers, yes.

Q. So between the time that you met at Woodway in December of 2008 through March 17, 2009, the only person at Woodway you spoke to about this project was Mr. Oblamski?

A. I'm sorry, what is your name? What is your name?

Q. Kadie Jelenchick?

A. Mrs. Jelenchick, can I ask, may I answer your question?

Q. You may ask. I don't know that I will answer.

A. After the meeting of 2010 -- 2008, Mr. Bayerlein acted and instruct his team to act in a way to be covered later in life, because he knew this treadmill is never going to be a Speedfit product. They file a trademark name curve on March 16 before, two days before the show. So after that meeting he knew exactly the

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path he was taking it, Mr. Bayerlein, and, of course, what does, what does the best, cover his trace, and he was doing it from the day one. From the day one he was doing it in a way like when he answered me back, I send him the side covers, he didn't put back the side covers, but Nick did it.

Nick sent back an e-mail with the side covers. I sent it to him. But not Doug Bayerlein. Doug Bayerlein didn't send back the side covers which I sent it to him and Eric Weber, the side covers, the new layout.

So I don't have to repeat to you and to make you understand because you know very well, you represent this company, how a company wants to do and hide something, how they acting.

Yes, I don't have many -- I have all this case is related to one e-mail. Just one e-mail. All these books here, doesn't mean nothing. It means one e-mail. All the case will stand on one e-mail.

Q. And which e-mail is that?

A. It's an e-mail from January 16th sent to Doug and Eric Weber and Nick Oblamski,

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January 16 of 2009. That's the whole case stays in one e-mail.

MR. VODOPIA: In your opinion.

A. In my opinion.

It is the turning point of everything, because basically that's the bottom line correct inventorship of treaties and patents.

Q. Do you have a copy of that e-mail?

A. I have.

Q. May I have it?

A. I think you have it in your --

MR. VODOPIA: I can get three copies of that.

MS. JELENCHICK: Why don't we take a break, and you can go get it.

MR. VODOPIA: Do you want to take a lunch break? It is 1 o'clock.

MS. JELENCHICK: Sure.

THE VIDEOGRAPHER: The time is 1:10 p.m., and we're going off the record.

(Lunch recess: 1:10 p.m.)

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AFTERNOON SESSION

2:30 p.m.

SERBAN RUSE,

called as the interpreter in this action, resumed, having been previously sworn.

ALEX ASTILEAN,

having been previously duly sworn/affirmed, was examined and testified further as follows:

THE VIDEOGRAPHER: This begins media unit No. 3. The time is 2:30 p.m., and we're back on record.

CONTINUED EXAMINATION

BY MS. JELENCHICK:

Q. Mr. Astilean, over the lunch hour did you have occasion to speak with your Mr. Vodopia about the substance of your deposition testimony?

A. No.

Q. Before we broke for lunch you referenced an e-mail that you claimed to have sent to Woodway on January 16th of 2009. Did you bring back a copy of that e-mail for me?

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A. Yes, my lawyer bring it. It is not January 16th. It is January 21. I forgot to mention. Not 16. 21.

MR. VODOPIA: I assume this is Exhibit 23.

(Astilean Deposition Exhibit 23, e-mail chain bearing production numbers PLTF 00049737 marked for identification, as of this date.)

A. So the 26 return from Nick Oblamsky to me, but I still send 21 to them. It was 16. I received the 16, I remember the 16 of January, the new layout, the new design of the treadmill, the final design basically. It was the 16 received. I sent it the 21st, and I receive feedback from Nick on the 26th.

Q. So I'm going to hand you what's been marked as Astilean Deposition Exhibit 23 which is printed double-sided.

A. This one is.

Q. And it is document branded with production numbers --

MR. VODOPIA: Is that the same one?

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MS. JELENCHICK: I don't know.

Q. It is document branded with production numbers PLTF 00049737.

A. It is the same one.

MR. VODOPIA: Is it the same one?

THE WITNESS: Same one, yes.

Q. Deposition Exhibit 23 is document branded with production numbers PLTF 00049737 through 738.

MR. VODOPIA: Can I get a copy of that?

MS. JELENCHICK: It is in your notebook, tab 108.

MR. VODOPIA: Tab 108.

Q. Mr. Astilean, you recognize Exhibit 23?

A. Yes.

MR. VODOPIA: Wait a minute. 108 I seem to have this. It is a little different.

I'm sorry, I'm doing 107. Forgive me.

Q. So the first e-mail in the string in deposition Exhibit 23 is an e-mail that you

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sent, Mr. Astilean, to Mr. Weber, Mr. Bayerlein and Mr. Oblamski on January 21st, 2009. Is that correct?

A. That's correct.

Q. It reads: "Doug, I spoke with Nick the other day and I told them that the new SpeedBoard works even flat. So here is the new design. Nick, can you put it on CAD and see how it will look. The only problem you need to resolve is the belt rolling under in order to be a slick machine. I will send you pictures to show you how I did it. Thanks. Alex."

Did I read that correctly?

A. Correct.

Q. What did you mean when you said that you had pictures to show you how you did it? What were you referring to?

A. On this one I took off completely, yes. I took off completely the slacking, the synchronized mechanism -- I mean the supporting mechanism under, I took it out and I suspend the treadmill in order to be able to -- this is, when I meant flat, means flat, yes. So it was not the incline any more, the treadmill.

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A. ASTILEAN

So I raised the treadmill up in order to be able to use it, and it worked. And I said I don't see it where I send you, or I did send them the picture how I did it to raise up the treadmill.

Q. So the photographs that you are referring to --

A. Is the new design.

Q. Which design?

A. This is the new design. That was the new design.

Q. You are referring to the shape of the side covers?

A. Yes. No. I was referring to how I did it in order to be able to test it. Because on this shape, yes, I'm referring to mine. See, this is the way it looked with under.

But was flat now. So this mechanism is under, it couldn't do it any more. So you had to test it in a way, like, to be able to still test if it works at this level instead of this way.

Q. So that particular design that you are referencing in your January 21, 2009

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e-mail --

A. Yes.

Q. -- what was the specific means for slackening that was used?

A. On the -- was using the same thing but not the way it was tensioned, not the way it was tensioned, or probably I didn't use it at all. I just test it. I say it works, but I cut it off so everything went off. After the show I take it off. And I put it flat, and I raise it up, and I test it works even flat. And I send him the picture. I said this is the new design.

Q. So the new SpeedBoard design that you are referring to in your January 21st, 2009 e-mail --

A. Yes.

Q. -- may not have had any means for slackening. Correct?

A. As a test for a couple of hours, or half hour, or whatever I did after that probably didn't have any. Probably, yes.

Q. So what photos, if any, did you send to Woodway illustrating --

A. I don't know if I sent or I didn't

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send. I don't remember. I don't remember if I follow through to send them, how I did to test it.

I did send an e-mail say I will send you, but I don't remember if I did or not send. But I remember I tested, and I tell him it's working. So that was, I said this is the new shape of the treadmill.

Q. But any photos that you had were photographs of the exterior side cover shape --

A. Correct.

Q. -- of the treadmill?

A. Correct.

Q. There were no photographs of the interior workings of the treadmill?

A. No. And any responses, I know you like to have that shape, but we have to adjust for the belt, and he did raise both sides. This is Nick contribution. He raise this side and this side, which I don't remember when he sent, but this was sent by Nick to me, and I thought in the same e-mail was a second attachment besides this, I remember those two sent like this as I remember.

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Q. Mr. Oblamski rejected your shape. Correct?

A. No, didn't reject it. Actually, they embraced it very well.

Q. Looking at Mr. Oblamski's e-mail on January 26, 2009, he states: "I know you wish to have something similar to the photo you sent, but I'm sending you a file of the belt dimensions we need to use."

Did I read that correctly?

A. Correct. But let's ask a person here. Doesn't this look similar to you?

MS. JELENCHICK: Do not answer that.

A. You don't have to answer, but we ask any person on the street. It is not different. It is the same shape. It is the same design.

Q. But Mr. Oblamski notified you on January 26, 2009 that he was not using your shape. Correct?

A. No. He was using my shape. I'm sorry. I have to correct you on this.

Q. So you disagree with Mr. Oblamski's e-mail?

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A. No, I disagree, and I said, please either approve the side cover shape, or to get me a new side cover shape you will like to use. So what means, said either approve the side cover shape or get me the new side cover shape? What's that means? If you ask me for approval, what's that mean in your words? In English words, what's that mean? Please either approve the side cover shape, or get me a new side cover shape.

Q. Did you respond to Mr. Oblamski's e-mail?

A. Of course I responded. If I made a decal, it's based on this cover.

Q. Did you approve the Woodway side cover shape, or did you give him a new side cover shape?

A. Sorry, but it is not Woodway cover shape.

MR. VODOPIA: It doesn't say Woodway.

A. It doesn't say Woodway.

MR. VODOPIA: It says Astilean.

A. It says Astilean, not Woodway.

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I sent this picture and was applied to this picture with this now. See. This was sent by me, and then Nick lift up just to match the belt. He didn't design anything. He didn't design anything. Nick Oblamski did not design this shape. Okay? Just to be straight on the record.

He fit the belt on my design, basically, and he ask me, do you approve the way it is? And of course, because I did already decal. I did it, so obviously I approve it and I make the decal for the shape of the side covers.

Q. Does Woodway have any patents directed to the shape of the side covers?

A. Of course.

Q. Which patents are those?

A. I don't remember exactly specific. I don't know, but they have three ornamental design patents, that's why we are here and meeting here to correct those inventorships. That's why we are here today.

Q. Mr. Astilean, do you have any design patents directed to the shape of the side cover?

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A. I will have after I put my name on Woodway patent.

Q. As you sit here today, are there any patents in your name directed to the shape of the side cover?

A. Right now there are not.

(Astilean Deposition Exhibit 24, e-mail dated 8/28/2008 bearing production number Woodway 0032256 marked for identification, as of this date.)

Q. Ms. Astilean, you have been handed what's been marked as deposition Exhibit 24, and it is document branded with production number Woodway 0032256. It has also been previously designated as Astilean Deposition Exhibit No. 14 from the previous litigation.

Do you recognize this document?

A. Yes.

Q. And what is it?

A. The essence I just spoke for three hours, that's the e-mail. That's the e-mail says, the essence of my testimony today.

Q. The, quote, new treadmill that I

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just patented in US and Europe, end quote, that you reference in deposition Exhibit 24, is that referring to deposition Exhibit 16?

A. What's, can you say that again, your question.

Q. In your e-mail to Mr. Weber --

A. Yes.

Q. -- you reference a new treadmill that you just patented in US and Europe. The patent that you are referencing, is that deposition Exhibit 16?

A. You mean the provision from November of 2008? Yes. You want me to go in details why it took to me from August to November to be filed, I can do that, too.

Q. Numerous times before the lunch break you referenced phone calls that you had with Mr. Oblamski. Did you record any of those telephone calls?

A. There were more e-mails than phone calls. Probably I had one or two phone calls. I had a lot of phone calls with him for various products.

(Discussion off the record.)

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A. ASTILEAN

Q. So you think you had two phone calls with Mr. Oblamski?

A. No, I don't know I said. I don't know how many phone calls I had.

Q. Did you record any of the phone calls that you had with Mr. Oblamski?

A. I should have.

MR. VODOPIA: Asked and answered.

Q. Did you keep track of these phone calls that you had in any way?

A. No.

Q. Did you make any notes at the time of the phone calls?

A. Not that I recall.

Q. Who initiated these phone calls with Mr. Oblamski?

A. It was back and forth. I don't remember exactly who initiated, who called and who called back.

Q. Do you have any phone records indicating that these calls took place?

A. No. But if you look at the evidence, there are plenty of evidence shows what is coming these treadmills all. I think we

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covered the phone calls.

Q. Collectively --

A. Yes.

Q. -- approximately how much time do you think you spent speaking to Mr. Oblamski over the phone between December of 2008 and March 17th of 2009?

A. I refer to the behavior of Woodway before the lunch, and I'm referring you again, when they get a grasp on the new invention, they were acting as a team, as a family, to make sure there will be minimum conversation between Speedfit and Woodway because they knew were going to come the day of the testimony and litigation on this product. So if I had any or if I have none, I'm sure there are in the records already e-mails, which gathered altogether they are evidence.

When I ask, when I repeat myself when you ask me about any evidence of you disclosing to Doug Bayerlein on the meeting in the conference office about the slackening, I said no, there is not evidence. I was wrong. There are evidence. There are evidence.

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Accumulated all the documents, if you look at them as a bigger macro picture, it can tell you that there was evidence that I spoke with him about this synchronized mechanism at a meeting. Out of the blue by him by looking at a video, how he knew if he even had to put a synchronized mechanism, if I wouldn't tell him? How he knew he had to order parts for a synchronized mechanism if he wouldn't even built one to see it, the belt doesn't go straight down on the bearings, unless I would have told him? It is common sense. It is obvious it was discussed at the meeting.

I'm done. I'm finished.

Q. So you don't know collectively how much time you spent talking to Mr. Oblamski over the telephone?

A. No. No, I don't remember.

(Astilean Deposition Exhibit 25, May 1, 2009 e-mail with attachment bearing production numbers PLTFESI 002435-2443 marked for identification, as of this date.)

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Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit No. 25 which is document branded with production numbers PLTFESI 002435 through 2443. This was also previously designated as Exhibit 18 to your deposition in the prior litigation, as well as deposition Exhibit 10 to Mr. Bostan's previous deposition.

Do you recognize this document?

A. Yes.

Q. What is it?

A. It is a, Dan make this description to understand, to people understand how this treadmill operates.

Q. Do you agree that this description as to how the treadmill operates is true and correct?

A. I would not agree in totally on the whole document. That's why it was never published, but, yes, I agree on descriptions, yes, most part.

Q. Do you agree that, with the statement included in deposition Exhibit 25 that in reality Alex and Dan recently found out that

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A. ASTILEAN

they practically reinvented an already existing invention without knowing it. The original invention was registered by John W. Cutter in 1972?

A. You are completely wrong here. You are completely wrong. Was never invention about the curved treadmill with the Woodway technology. The Cutter had nothing to do with how a belt with slats operates in the treadmill. That was your client Doug Bayerlein impression, and sent to me and said, Alex, I don't know why you invent it because this treadmill was invented from 1917, whatever.

No, actually it wasn't. It was a different technology. It was a curved treadmill but not with this technology.

Q. So you'll agree with me that the Cutter patent from 1972 disclosed a curved treadmill?

A. Yes, disclosed a curved treadmill, but the invention is not based just a curved treadmill. It is how that treadmill moves. How that treadmill operates. It is not just curved treadmill.

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A. ASTILEAN

There are 20 pictures with Mona Lisa, but 21 is original. Same thing with this.

Q. What do you mean when you say 21 is original?

Mr. Astilean, you just referenced 21 being original. What are you talking about?

A. I said there are 20 pictures with Mona Lisa and just one is original.

Q. You are referring to the painting, the Mona Lisa?

A. The painting, yes.

Q. Understood. Did you tell Mr. -- who drafted --

A. Dan Bostan draft it. I correct it.

Q. Did you notify Mr. Bostan that you disagree with that statement --

A. I don't know which version you have. I had my version and he had his version. So I don't know which one you have. I have to look in my records to see which version of the drafting you have. Which one is exhibit here. And also it is from Dan, so probably it is his. I also had mine to him.

Q. Deposition Exhibit 25 is the version

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that was produced by your lawyer.

A. Okay.

Q. So that's what I have.

A. Okay.

Q. Do you recall letting Mr. Bostan know that you disagreed with his statement about your purported reinvention of the Cutter patent?

A. Correct, I did. Yes, I did.

Q. And how did you notify Mr. Bostan of that?

A. By e-mail, or by talking on the phone. I don't exactly remember, recall it.

(Astilean Deposition Exhibit 26, copy of United States Patent No. 3,642,279 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 26 which is a copy of United States Patent No. 3,642,279 issued to John W. Cutter on February 15th of 1972.

Did I describe this correctly?

A. Correct.

Q. Is this the Cutter reference that

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Mr. Bostan was referring to in deposition Exhibit 25? If you know.

A. No. I don't know what you are saying, what the phrase, Mr. Bostan refers to -- what's the paragraph Mr. Bostan refers to?

Q. On the page marked 2440.

A. 2440. Which paragraph?

Q. Under the heading "So What's Next?"

A. Okay. I read carefully. The only thing is that someone, no one knew about this invention, and certainly as well as now, none of, like, is huge benefit.

Why not? If he was invented, why nobody know this about it? Because did not work.

The only curved treadmill worked was with the slats, belt with the razor bearings, that's the last friction system, and is the only system that worked, the curved treadmill. It says no one realized issues benefit. Why? Because it didn't work.

Q. How do you know that the patent describing the Cutter invention didn't work?

A. Because was, if it was in the

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market, the treadmill, curved treadmill wasn't in the market before we developed it.

Q. Well, will you agree with me there could be any number of reasons why a product described in a patent hasn't been commercialized?

A. First of all, I told you, they are completely two different technologies. Right now we have, Woodway has the patent on the curved treadmill, and Speedfit has a patent with the same technology. So you tell me there was another patent with a completely different technology. How about Woodway has the same patent like Speedfit has with the same technology? How is that possible?

Q. You will agree with me that the United States patent office granted a patent to Mr. Cutter in 1972 directed to a curved manual treadmill. Correct?

A. Correct. But has nothing to do with the Speedfit treadmill.

Q. Was the Cutter reference disclosed to the patent office in connection with the prosecution of any of your patents?

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A. It was.

Q. Do you know why?

A. Do you know why?

Q. Do you know why?

A. I'm assuming because as a documentation you have to show the similarity or something like it is close enough, but it's different. You have to present to the patent office another patent which is similar to it but not the same. That's the rule on the patent office.

Is that right, Mr. IP patent lawyer?

MR. VODOPIA: Well --

THE WITNESS: No?

MR. VODOPIA: You're trying.

MS. JELENCHICK: Mark this as 27.

(Astilean Deposition Exhibit 27, copy of United States Patent No. 5,709,632 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 27 which is United States Patent No. 5,709,632 issued to Jeff D. Socwell on January 20th, 1998.

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A. ASTILEAN

Have you seen this document before?

A. I seen it, yes.

Q. In what circumstances have you seen it?

A. Mr. Bayerlein sent me a copy of all four patents with the curved treadmills. Says, Alex, I don't know what he invented. That's why I know.

Q. You referenced four patents. I have shown you the Cutter patent. Did Mr. Bayerlein send you that patent?

A. Yes.

Q. Mr. Bayerlein sent you the Socwell patent?

A. Yes. And another two.

Q. Do you recall which patents those were?

A. Probably one with S. Sockolow or something like that, Sockolow, and another one. But there were four. I go by the names of the other ones. Yeah, there were four patents. He sent me four patents with a curved treadmill. There were four treadmills.

So what? There can be ten. If they

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are all different, they all going to get patent.
Q. Would you agree with me that the treadmill disclosed in the Socwell patent is a curved treadmill?
A. I agree.
Q. Will you agree with me that this is a curved manual treadmill in the Socwell patent?
A. I agree.
Q. Do you know how the treadmill disclosed in the Socwell patent maintained the curvature of the running belt?
A. On top of my head, no. I have to remember. I read it. There are some rollers that kept the belt into curved shape, probably.
Q. Will you agree with me that the Socwell treadmill used a means for slackening to maintain the curvature of the running belt?
A. That I cannot be able to do with you.
MR. VODOPIA: Umm --
Q. Do you know --
A. There is too much difference, yeah? Absolutely.
MR. VODOPIA: You got to read the

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stuff.
MS. JELENCHICK: Mr. Vodopia.
MR. VODOPIA: If you don't know, don't answer.
MS. JELENCHICK: Now is not the time to be instructing your client unless you are instructing him not to answer.
MR. VODOPIA: Okay.
Q. Mr. Astilean, do you know how, if at all, Mr. Cutter maintains the curvature of the running surface in the treadmill disclosed in his patent?
A. At one point I read it. But right now I can't recall it how. But I did read them both.
Q. Do you believe that the Cutter treadmill has a means for slackening?
A. I just told you, I don't remember. It is a long time since I read them.
Q. Would you like to read it now?
A. We have time?
Q. Sure.
A. Which one you want me to read?

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Q. Your preference. You can read them both.
A. Okay.
Q. Let's start with the Cutter reference.
MR. VODOPIA: I wonder if we should define means for slackening.
MS. JELENCHICK: I don't think that is necessary.
Please go ahead, read.
A. Loud or --
Q. To yourself.
MR. VODOPIA: I just want to object for the record. He is not a patent attorney, and means for slackening is a patent term. I would like to get the -- I would like to get a definition of the means for slackening so that he can read the means for slackening.
THE WITNESS: I know what means for slackening means.
MR. VODOPIA: Okay. All right.
A. It doesn't mention anything about

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means for slackening on this patent, Cutter. It doesn't.
Q. You will agree with me that based on the disclosure of Cutter, the running belt is curved in the Cutter reference?
A. Yes. You want me to go to the next one, Socwell?
Q. Sure. Please.
A. He mentions like, in operation an endless belt might be rotatably mounted in relation to the roller assembly and/or preemptively disposed in relation to the deck, whereby providing a structural support arcuate-shaped movable surface on which the user might exercise.
It kind of implies here it's forced the belt to stay in the round shape.
Q. Would you characterize that description in Socwell as a means for slackening?
A. Rephrase, again, your question.
Q. The methodology that you've described that Socwell explains as to how the running surface maintains its arcuate shape,

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would you characterize that as a means for slackening?

MR. VODOPIA: Objection: form.

A. I don't know.

(Astilean Deposition Exhibit 28, e-mail chain, production No. PLTFESI 001701-1703 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed a document that's been designated 28 to your deposition, and it is an e-mail branded with the production No. PLTFESI 001701 through 1703.

Do you recognize this document?

A. Yes.

Q. If you will flip to the second page branded with 1702 in the bottom right-hand corner. You will see an e-mail that says, that begins, Hi Todd.

A. Yes.

Q. Did you send this e-mail to Mr. Brockway?

A. Yes, I did.

Q. Do you recall when you sent this e-mail to Mr. Brockway?

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A. It says here 10/22/2008.

Q. And you believe you sent it on or around that date?

A. Yeah, I believe.

Q. Near the bottom of that e-mail to Mr. Brockway beginning with the paragraph, "Please let me know." Do you see where I'm referencing?

A. "Let me know what you think"?

Q. "Please let me know if you would like to consider this proposal in principal, and if so, I am ready to meet with you and show you concrete proof of how our apparatus performs compared to the best product in its category on the market."

Did I read that correctly?

A. Correct.

Q. What proposal did you make to Mr. Brockway?

A. This completely different product here. He says apparatus.

Q. What proposal did you make to Mr. Brockway that you are referencing in your October 23rd, 2008 e-mail?

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A. ASTILEAN

A. I'm trying to answer you. Our apparatus. So is a different product. End of conversation. Next.

Q. What --

A. I'm not answering anything more. This is for different product.

MR. VODOPIA: Take it easy, Alex.

THE WITNESS: I mean, I take it easy.

Q. You are not willing to answer my question as to what your proposal was?

A. I answered your question.

Q. Did your proposal relate in any way to the wooden prototype?

A. No. I said different product.

Q. Who did Mr. Brockway work for, if you know?

A. Life Fitness.

Q. You previously provided testimony that you offered, or you were intending to offer a license to your invention as disclosed in the wooden prototype to Life Fitness.

A. Correct.

Q. The proposal in October of 2008 is

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not that licensing proposal?

A. No, that was from different product, and of course I mention we had to come with a new product. I did mention to him. I did spoke with him in October at the show in Club Industry in Chicago about the new product that's coming up, but I didn't disclose to anybody anything. That was the first time I disclosed was to Woodway.

Q. What is the concrete proof that you were referring to in that e-mail to Mr. Brockway in October of 2008?

A. We are talking about some different product, like apparatus.

Q. What apparatus?

A. That's different style like you saw in Discovery and I can't disclose it to you, I'm sorry. It is a trade secret of the Speedfit company. I'm not going to disclose all the details I have about apparatus on Speedfit products.

Q. Was this apparatus depicted on the Discovery Channel video?

A. It wasn't. It was a modified

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A. ASTILEAN

version of the one featured on the Discovery Channel.

(Astilean Deposition Exhibit 29, e-mail correspondence branded with production numbers PLTFESI 002898-2899 with a Romanian version with translator certification marked for identification, as of this date.)

MR. VODOPIA: So this is three pages, this other e-mail as well?

MS. JELENCHICK: Yes.

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 29 which is two documents. The first is e-mail correspondence branded with production numbers PLTFESI 002898 through 2899.

The second portion of deposition Exhibit No. 29 is a certification, as well as a Romanian version of PLTFESI 002898 through 2899.

Do you recognize the Romanian portion of the document?

A. Yes.

Q. What is it?

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A. It is a conversation between me and Dan Bostan.

Q. On Tuesday, June 30th, 2009 you sent an e-mail to Mr. Bostan at 11:52 a.m. Is that correct?

A. Correct.

Q. Mr. Bostan's e-mail address is HW at humanwisdom.ca?

A. Correct.

Q. In that e-mail did you tell Mr. Bostan that no one can get a patent on the curved belt for their treadmill?

A. Can I read it?

Q. Please.

A. Again, you read between lines. You just state from the context what is favor to you.

I said from my point of view no one can get a patent on the curved belt for the treadmill, but this does not mean we can get a patent for this latest treadmill you made. That's the same thing like your question, you asked me a question.

And for, secondly, we are talking

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for completely different version of a treadmill here. It is not about the wooden prototype which I made with Woodway. We are talking about different treadmill.

Q. Why did you tell Mr. Bostan that no one can get a patent on the curved belt for the treadmill?

A. Because I'm -- I state it again. I'm talking about a different type of treadmill, not the one was discussing with Woodway to be built.

Q. Which treadmill were you referring to when you were making this statement to Mr. Bostan?

THE WITNESS: Do I have to answer this question?

MR. VODOPIA: Yes.

A. It's -- I was trying to get curved treadmill with a regular belt, a regular belt, like belt which goes right off of wooden deck.

Cutter, Cutter has a treadmill with belt over a set of rollers. And I said to them that is not going to get patent. And he, I don't know if he listen to me or not, but

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eventually I did get a patent on the slackening rollers.

Q. Mr. Astilean, did you recently execute an assignment transferring certain patent rights to Speedfit?

A. 2015. That is not recent. That's three years.

Q. You didn't execute an assignment in February 20th of this year?

A. If I had to issue another patent, of course I did to transfer that one, too.

(Astilean Deposition Exhibit 30, Assignment, production numbers PLTF 00049661 through 49662 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 30 which is a document branded with production numbers PLTF 00049661 through 49662.

MR. VODOPIA: Did you hand me that?

MS. JELENCHICK: It's in the notebook, tab 123.

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A. ASTILEAN

Q. Do you recognize this document?
A. Yes.
Q. That's your signature on the second page of this assignment, isn't it?
A. It is.
Q. Do you recall signing it?
A. Yes.
Q. Who prepared this document?
A. I don't recall right now, but -- I don't remember.
Q. Why did you execute this assignment?
A. I have to read the whole thing in order to --
Q. Of course. Take your time.
A. Yeah?
Q. Take your time.
A. I don't remember. So many lawyers, where it came from. I did sign it.
Q. Do you know how deposition Exhibit 30 is different from, if at all, deposition Exhibit 3?
MR. VODOPIA: Objection. Are you asking for a legal conclusion, for a legal difference?

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A. I don't know. I was advised to look at it, sign it and I did.
Q. But you don't know why you signed it?
A. Probably to help my company, I signed it.
Q. Do you know why Mr. Bostan didn't sign this assignment?
A. It was already signed by him in 2015. I didn't have one sign in 2015 probably. I don't know.
Q. If you will pull up from the stack, deposition Exhibit 3. You will note on the second page of deposition Exhibit 3 that you did, in fact, sign the June 2015 --
A. I see it.
Q. -- assignment. Correct?
A. I see it. Yes. Yes.
Q. Does that refresh your recollection as to why you executed a second assignment on February 20th of 2018?
A. I can't recall why.
Q. Did you consider asking Mr. Bostan to sign the February 20th, 2018 assignment?

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A. I don't even know what's regards, and what it's all about.
Q. Is it fair to say you didn't ask him to sign it, then?
A. I didn't know if I had to ask him.
Q. Are you going to ask him to sign one?
A. It's probably, there are parts like for him he didn't participate in some of the invention what I did, what we tried to correct now, some of it he didn't participate alone, so why should I ask him to sign something like he never did participate.
Q. Did you receive any compensation in exchange for executing the February 20th, 2018 assignment?
A. From whom?
Q. From Speedfit?
A. No.
Q. Looking at deposition Exhibit 3, did you receive any compensation in exchange for executing the 2015 assignment?
A. Besides food. Every penny I made in this country I put in Speedfit, so I didn't

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receive so far a penny from Speedfit, not even to give Dan his share.
Q. Do you know if Mr. Bostan received any compensation --
A. I don't know.
Q. -- in exchange for him signing the June 2015 assignment?
A. I don't know.
Q. Do you know what, if anything, you are attempting to assign to Speedfit in deposition Exhibit 30?
MR. VODOPIA: Objection. The document speaks for itself. The document speaks for itself.
A. Okay.
Q. You either know or you don't know.
A. I don't know. I said from the beginning, I don't know what it was about and why I sign it.
(Astilean Deposition Exhibit 31, entitled Provisional Application For Patent Cover Sheet marked for identification, as of this date.)

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Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit No. 31 which is entitled Provisional Application For Patent Cover Sheet.

Do you recognize this document?

A. Yes.

Q. What is this document, if you know?

A. It is the Woodway first provisional application ever filed.

Q. Do you know when it was filed?

A. Yes. March 17, 2009.

Q. Do you recall when you first saw a copy --

A. Yes.

Q. -- of deposition Exhibit 31?

A. I recall it very well. Very well. I recall it when I saw it the first time. When I receive my first patent in December of 2012, I saw a name Bayerlein as an applicant on one of my patent, and then I start to realize what kind of person is Mr. Bayerlein.

And I ask my patent lawyer to give me everything they have on Bayerlein, and then this is the first time I saw around December

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2012, I saw the first time this application. After three years.

Q. Your lawyers gave you a copy of this document for the first time?

A. My IP lawyer, yes.

Q. Which lawyer in particular?

A. It's call Al Walker.

Q. Had you seen deposition Exhibit 31 before deposition Exhibit 18 was submitted?

Recall, deposition Exhibit 18 is a copy of your patent application filed on October 29th of 2010?

A. What's the date of my application?

Q. October 29th, 2010.

A. And when I said I seen this in December of 2012 the first time, that didn't answer the question?

When I specifically said the first time when I saw this provision application was 2012, December 6, when the first patent was issued, then I saw the name Bayerlein. I didn't realize Woodway have a file for a patent from Speedfit until 2012 December.

Q. Do you know where Mr. Walker

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obtained a copy of deposition Exhibit 31?

A. No. No. I don't remember.

Q. Is deposition Exhibit No. 31 publicly available, if you know?

MR. VODOPIA: Objection.

THE WITNESS: No, I will answer.

MR. VODOPIA: Calling for a legal conclusion.

A. I will answer. I will answer. I'll answer.

So this is what I have seen in 2012 around December 6, 2012, the circle there, and if it is not the same thing, then I'm wrong, I misstate myself, but I believe this is the only application March 17, 2009, it's exactly that number there which was in that e-mail because I wrote an e-mail about Mr. Bayerlein, a very nasty e-mail to my lawyer.

MS. JELENCHICK: Can I get a copy of this.

THE WITNESS: You want a copy of that?

MS. JELENCHICK: Please.

THE WITNESS: Take it.

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MR. VODOPIA: I will make a couple of copies.

MS. JELENCHICK: Thank you. Why don't we take a quick break.

THE VIDEOGRAPHER: The time is 3:35 p.m., and we're going off the record.

(Recess taken.)

(Astilean Deposition Exhibit 32, two-page e-mail dated sent 4/7/2009 marked for identification, as of this date.)

THE VIDEOGRAPHER: This begins media unit No. 4. The time is 3:44 p.m., and we're back on record.

BY MS. JELENCHICK:

Q. Mr. Astilean, I'm handing you what's been marked as deposition Exhibit No. 32 which is a copy of the document you were sharing with me prior to the break. Page 2 of deposition Exhibit 32 appears to be an annotated patent application assigned to Woodway. Is that correct?

A. Say that again.

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Q. Page 2 of deposition Exhibit 32 --
A. Yes.
Q. -- is a portion of a patent application assigned to Woodway. Correct?
A. Correct.
Q. And there is an annotation on page 2 a circle around "related US application data"?
A. Yes.
Q. And that circle is your marking?
A. Yes.
Q. So page 1 of deposition Exhibit 32 has, appears to be a portion of an e-mail dated April 7th, 2009.
A. Yes. But it is an e-mail. This is attached to an e-mail.
Do you have the e-mail, John? It's not here. So this is attached to an e-mail. It is not complete.
MR. VODOPIA: Alex, all I have is what you just handed me now. What can we do? Where is the rest of it that you would like to see?
THE WITNESS: In the e-mail. It is in the e-mail.

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MR. VODOPIA: This e-mail?
THE WITNESS: No, this is an attachment on the e-mail. This is about an e-mail, and it is not complete.
MR. VODOPIA: But you sent this to me. Right?
THE WITNESS: I did, yes. It is called sneaky Doug, the e-mail.
MR. VODOPIA: Okay.
THE WITNESS: With the e-mail in front of it.
MS. JELENCHICK: Let's go off the record.
THE VIDEOGRAPHER: The time is 3:47 p.m., and we're going off the record.
(Recess taken.)
THE VIDEOGRAPHER: The time is 3:51 p.m., and we're back on the record.
BY MS. JELENCHICK:
Q. Mr. Astilean, I understand that deposition Exhibit 32 is a portion of some e-mail that you shared with your counsel and for that reason I am not accepting a copy of the

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e-mail correspondence between you and your lawyer.
Without telling me any privileged information, are you able to tell me how page 2 of deposition Exhibit 32 relates to page 1 of deposition Exhibit 32?
A. Yes. Because I remember Doug sent me this e-mail on April 7th, a month after he filed the provision, saying to me, Alex, I don't know why you invented this, it is not, I want to know what's happened around this treadmill.
So I receive an e-mail on 4/7/2009 from Doug. It says I'm not trying to be difficult here, but I just want to work out with you but I need to know, you obtain a patent and how we, Woodway, would be protected on that patent. He says in regards to the fact that we do not mention you as the designer, it simply as we do not mention anyone as designer of any of our product in our website. This is not to discredit anyone. It is simply not that important to the customer. And I know that you will like to have your name associated with the design. I will be happy to do that, but I need

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to know what you feel is patentable and what you indeed did design. The curved treadmill is not a new design. It was patented by Precor in 1998.
So he is trying to talk me out of it to not patent which I didn't file a patent in that year based on this e-mail in 2009. Just in 2010. But I wanted to see the e-mail because I find that he just in December of 2012, I connect this e-mail from 4/7/2009 with application, and see that he applied for a provision application on Speedfit patent in March of 17, 2009.
That's the relationship between this e-mail in front page and the second page with the Woodway application.
Q. In April of 2009 were you represented by a lawyer?
A. In and out. I had some lawyers, but not really.
Q. As of April 7th of 2009 had you shared a copy of your 2008 provisional patent application with Mr. Bayerlein?
A. I did send him a front page of something to show him I did file. But I file as

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confidential.

Like, now I find out from you nobody could see his provision, too, because he filed it as a confidential as well. If my lawyer couldn't get a hand of it, that means he filed confidential as well.

Q. What portion, if any, of deposition Exhibit --

A. How they claim here --

Q. -- 16 did you -- I'm sorry, go ahead.

A. How they can claim as the inventors on March 17, 2009, Vance, Nick Oblamski, Doug Bayerlein, when it was a clear fact they received on the silver plate this treadmill from Speedfit. That will be somebody to decide what is going to be that.

Q. What portion, if any, of deposition Exhibit 16 did you share with Mr. Bayerlein as of April 7th, 2009?

A. An e-mail, an e-mail between me and him where I sent a front page of the file document says nothing, somewhere in April of 2009 I sent that, that e-mail to him stating

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that I did file the provision application on the treadmill.

Q. Would you pull up deposition Exhibit 16?

A. 16?

Q. The cover says Exhibit C.

A. Yeah. Yes.

Q. Will you please identify which information, if any, you shared with Mr. Bayerlein?

A. This is from 11/7/2008. Yes.

We have on the record, it is in the e-mails I send it to him, probably this one.

Q. Let me ask something different.

A. Yes.

Q. Or let me ask it in a different way.

A. Yes. Probably this one. I sent this, the front page of the filing. I did send it to him.

Q. So which page are you referring to?

A. I think this one.

Q. Can you annotate it at the top?

A. Um-hmm.

Q. Indicating that this is the portion

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of the document that was shared with Mr. Bayerlein.

Do you recall when you sent that page to Mr. Bayerlein?

A. April.

Q. Some time after March 17th of 2009. Is that correct?

A. Correct. But he asked me on the phone if I did file. He didn't want to put it on the show unless I told him I filed. But actually he put it on the floor because he did file this as well. So he didn't care about my file as much.

Q. Why do you think Mr. Bayerlein has an obligation to share with you that he filed a patent application?

A. Why? He should have filed by himself and go ahead and made money because that's all in the country. You know?

You got the point? It was ironic statement. It was an ironic statement just stated this. It was an ironic statement.

Q. Why do you think Mr. Bayerlein should have told you that he filed a patent

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application when at the same time you were not sharing with him the patent application that you had filed?

A. Why do you think I didn't share with him? Why do you think I didn't share with him after stolen two products and he still continued to stole after he stole this one, and we are in litigation for five years and he still steals from Speedfit, and you try today to tell me about apparatus which I created with Life Fitness, you want to know about it.

So why should I disclose to him my invention and how he cannot even mention my name to the patent office. Hey, I got this treadmill from a crazy Romanian. He post a video on Discovery Channel, YouTube all over was before I file it March 17th. I got this from Mr. Astilean. But, no. He was smooth, very smooth.

Q. Are you familiar with the file histories of any of the Woodway patents?

A. Explain the question, please.

Q. Do you know what the phrase file history means?

A. No.

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Q. Do you know what the phrase prosecution history means?

A. No.

Q. Are you familiar with the documentation that Woodway has exchanged with the United States Patent Office in connection with its patent applications?

A. Yes. I believe if somebody disclose to them the invention before they are supposed to disclose it to the patent office.

Q. Are you aware that Woodway did, in fact, disclose the Discovery Channel video to the patent office in connection with its applications?

MR. VODOPIA: Objection. When?

A. I don't know.

Q. Do you understand that to have been the case, or no?

A. No. I don't know if they disclose or not. Only thing I see here says inventors, Doug Bayerlein, Vance Emons, Nick Oblamski.

If you see my name, please write it there, or just put a line there when you see Alex Astilean. If you didn't see my name there,

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then we move forward. It's clear. Is my name here?

Q. So you don't know one way or the other what information Woodway has shared with the patent office regarding you?

A. Only thing I see, I look at that application and it says Doug Bayerlein, Vance Emons, Nicholas Oblamski, which, in fact, they were not the inventors. They didn't invent anything. They did this to practice something I brought him on the silver plate to them.

MS. JELENCHICK: Mark this one.

(Astilean Deposition Exhibit 33, cover page labeled Exhibit B, attachment entitled Manual Treadmill and Methods of Operating the Same marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit No. 33 which bears the cover sheet Exhibit B. The title of the document is on the second page, Manual Treadmill and Methods of Operating the Same.

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A. 33 now?

Q. 33, yes. I will represent to you this is PCT Application US 2010027543 filed by Woodway.

Do you recognize deposition Exhibit 33?

A. Let me look.

Q. What are you looking at?

A. I'm looking at a diagram.

Q. What diagram?

A. I don't know. I'm just looking. Can I search?

Q. I would prefer you not.

A. No? Okay.

Q. And to the extent that you are consulting information on your computer in response to my questions, I would ask for a copy of that?

A. Of what? I was just going to see on the Internet, on Google.

What's the question about this document?

Q. Do you recognize it? Have you seen it before today?

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A. ASTILEAN

A. No. I don't even know means cross-reference. What means cross-reference?

THE INTERPRETER: May I explain to him what cross-reference means?

MS. JELENCHICK: No. It's not necessary.

Q. I will represent to you that this was attached to the complaint that was filed in this case. That's why it bears Exhibit B as the cover sheet.

Does that refresh your recollection as to whether you have seen it before today?

A. I probably seen it. I don't remember. There is so much here I have to read through all this in order to remember if I read or not. But what's the question?

Q. Have you seen this document before today?

A. I don't know.

Q. You can put it aside.

(Astilean Deposition Exhibit 34, copy of United States Patent Application 13/235,065, titled Manual Treadmill and Methods of

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Operating the Same marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as deposition Exhibit 34 which is a copy of United States Patent Application 13/235,065, titled Manual Treadmill and Methods of Operating the Same.

Have you seen a copy of this document before today?

A. Yes, I did.

Q. When did you first see a copy of this document?

A. When I search on the Internet applications.

Q. Do you have a specific date of when you conducted that search?

A. No.

Q. Was it in the last week?

A. I don't remember. You mean -- no.

Q. Did you see this document in the last year?

A. I'm not sure. I'm not -- I've seen something similar, yes.

Q. But you don't recall when you saw

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it?

A. No.

Q. What were the circumstances surrounding you seeing this document for the first time?

A. I search all the Woodway application. Everything I had public, I look at them.

Q. I will direct you to the first page of deposition Exhibit 34 --

A. Yes.

Q. -- which indicates a publication date of January 12 of 2012.

A. Yes.

Q. Does that refresh your recollection as to when you may have seen this document?

A. I told you the first time I ever notice Woodway ever file anything on the curved treadmill was December of 2012, the first time ever I know this knowledge was December 6, 2012. This is published 1/12/2012. After. Everything I've seen was after December 6, 2012.

MS. JELENCHICK: Mr. Astilean, at this time I have no further questions

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for you in your personal capacity.

I'm happy to take a break and give you an opportunity to have a few minutes to yourself, or to talk to your counsel, but I would like to begin the 30(b)6 deposition of Speedfit LLC when you are prepared to proceed.

A. So you finish today? You ask me all the questions about the inventorship, correction of the inventorship. Yes?

MR. VODOPIA: No, there were two -- sorry. May I?

There were two sets. The first set was just under Rule 30 which we went through and they were you personally.

Now Ms. Jelenchick is going to enter into the 30(b)6 topics that she noticed us for.

THE WITNESS: But that is me representing the company.

MR. VODOPIA: Exactly. She is actually deposing Speedfit.

THE WITNESS: She is no more further question about me personally,

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what did I do, what did I invent, what did I contribute to this invention at all.

MR. VODOPIA: It may come up again.

THE WITNESS: It may come up again, but so far zero.

Okay, fine.

MS. JELENCHICK: Would you like to take a few minutes break?

THE WITNESS: Whatever, I'm fine.

MS. JELENCHICK: Well, we are going to have to change tape and start a new transcript, so why don't we take a couple minutes.

MR. VODOPIA: Okay, great.

(Continued on next page.)

A. ASTILEAN

THE VIDEOGRAPHER: The time is 4:12 p.m., and we're going off the record.

(Time noted: 4:12 p.m.)

_____

ALEX ASTILEAN

Subscribed and sworn to before me this _____ day of _____, 2018.

_____



C E R T I F I C A T E

STATE OF NEW YORK )
: ss.
COUNTY OF NEW YORK )

I, ANNELIESE R. TURSI, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

That the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of July, 2018.

_____

ANNELIESE R. TURSI, RPR



DEPOSITION ERRATA SHEET

US Legal Support Job No. 238882
Case Caption: Speedfit v. Woodway

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

Signed on the_____day of _____,20___

_____

ALEX ASTILEAN



DEPOSITION ERRATA SHEET

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ALEX ASTILEAN

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ALEX ASTILEAN

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July 10, 2018

I N D E X

EXAM BY PAGE
Ms. Jelenchick 5

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
SPEEDFIT LLC,

Plaintiff,

-against-

Case No.
2:17-CV-00768
KAM-AKT

WOODWAY USA, INC.,

Defendant.
----------x

July 10, 2018
4:19 p.m.

Videotaped deposition of SPEEDFIT LLC by ALEX ASTILEAN, taken by Defendant, pursuant to Notice of Rule 30(b)6 Deposition, held at the offices of John F. Vodopia, 191 New York Avenue, Huntington, New York 11743, before Anneliese R. Tursi, a Registered Professional Reporter and Notary Public within and for the State of New York.

A P P E A R A N C E S

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ALSO PRESENT:

JOSE RIVERA, Videographer

SERBAN RUSE, Romanian Interpreter



S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein that filing and sealing be and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, shall be reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be signed and sworn to before any officer authorized to administer an oath with the same force and effect as if signed and sworn to before the Court.





THE VIDEOGRAPHER: This is media unit No. 1 in the 30(b)6 video deposition of Alex Astilean in the matter of Speedfit LLC, plaintiff, versus Woodway USA, Inc., defendant, in the United States District Court, Eastern District of New York, Case No. 2:17-CV-00768-KAM-AKT.

This deposition is being held at the law office of John F. Vodopia, PC, in Huntington, New York, on July 10th, 2018 at approximately 4:19 p.m.

My name is Jose Rivera from the firm of US Legal Support, and I am the legal video specialist.

The court reporter is Liese Tursi, also in association with US Legal Support.

For the record counsel please introduce themselves.

MR. VODOPIA: John Vodopia for Speedfit USA, plaintiff. Sorry. Speedfit LLC, plaintiff.

MS. JELENCHICK: Kadie Jelenchick





of Foley & Lardner LLP on behalf of defendant Woodway USA, Inc.

THE VIDEOGRAPHER: Now would the court reporter please swear in the interpreter and the witness.

S E R B A N R U S E,

called as the interpreter in this action, was sworn by the Notary Public (Anneliese R. Tursi) to accurately and faithfully translate the questions propounded to the witness from English into Romanian, and the answers given by the witness from Romanian into English.

A L E X A S T I L E A N,

residing at 196 Buckskill Road, East Hampton, New York 11957, having been first duly sworn/affirmed by the Notary Public (Anneliese R. Tursi), was examined and testified as follows:

EXAMINATION BY MS. JELENCHICK:

Q. Mr. Astilean, this morning at the start of your first deposition I went over some ground rules as to how to make today run smoothly. Would you like me to review those

again?
A. No. Not at all. I did not expect a couple of times, but I tried to stay in the course.
Q. And just as we did earlier today, per your preference, we will conduct the deposition in English, unless of course you would like to consult the translator. Is that fair?
A. Yes.
Q. And that is your preference, to proceed in English for this deposition?
A. Yes.
Q. Mr. Astilean, you understand that you are here this afternoon to provide deposition testimony on behalf of Speedfit LLC. Is that right?
A. Yes.
Q. Did you prepare for the deposition of Speedfit in any way?
A. The best of my knowledge.
Q. What did you do to prepare for the deposition of Speedfit?
A. I review a lot of documents.



Q. Did you do anything else to prepare?
A. As what? What shall I have done?
Q. That's fine. If you looked at documents, that's fine.
Do you recall specifically which documents you reviewed?
A. Not specifically, no. All documents; just go through it. E-mails, pictures, testimonies, filings.
Q. Were these documents that you identified, or were they materials that the lawyers identified, or a combination of both?
A. A combination.
Q. When did you begin preparing for this deposition?
A. A month ago.
Q. Approximately over the last month, about how much time have you spent preparing for the deposition of Speedfit?
A. Couple of hours, five hours a week.
Q. You've spent 20 hours in preparation for today?
A. Yes.



Q. Did you speak with anyone in preparation for the deposition of Speedfit?
A. My lawyer, John Vodopia.
Q. How many times did you speak with Mr. Vodopia about this deposition?
A. The last ten days we will try to do every day, but we couldn't schedule, so busy.
Q. So how many times did you speak with Mr. Vodopia?
A. About four, five times.
Q. For our five?
A. Um-hmm.
Q. Collectively, how much time did you spend speaking with Mr. Vodopia in preparation for today?
A. Five hours.
Q. Were these conversations in person or over the phone?
A. Over the phone.
No, I met once. No? I met once.
Q. When did you meet Mr. Vodopia in connection with today's deposition?
A. Not in connection with. With some



other matters, but we met and we discuss about the deposition.
Q. And when was that meeting?
A. When was last time we met?
MR. VODOPIA: It was a Friday.
A. Friday.
MR. VODOPIA: Two, three weeks ago.
A. Two, three weeks ago.
Q. You spoke with your counsel between four and five times in preparation for today?
A. Yes.
Q. One such time was an in-person meeting with Mr. Vodopia?
A. Um-hmm.
Q. And collectively --
A. Yes.
Q. -- those conversations and meetings, were they all with Mr. Vodopia?
A. Yes.
Q. And those meetings in total took about five hours?
A. Yes.
Q. Did you take any notes during those

conversations with Mr. Vodopia?
A. Not that I remember.
Q. Did you reach out to Mr. Bostan in connection with your preparation for today?
A. No.
Q. Did you bring any of the documents that you reviewed in preparation for today with you today?
A. I did.
Q. Do you have them here?
A. Yes.
Q. Have you, this morning or earlier this afternoon, did you consult any of those materials in --
A. Not today, no.
Q. So for the testimony that you gave in your personal capacity, you didn't find it necessary to consult any of the materials that you used to prepare for the Speedfit deposition?
A. No.
Q. Were there any documents that you asked Mr. Vodopia to see but were not given?
A. The question again?
Q. Were there any documents that you





wanted to review in preparation for today but you didn't have?
A. No.
Q. I know you testified that you didn't make any notes during your conversations with Mr. Vodopia in preparation for today, but did you make any other notes in preparation for today?
A. No.
Q. You reviewed documents. You spoke with your counsel. Did you do anything else to prepare for the deposition of Speedfit?
A. What I told you, I went to the documents to refresh my memory about everything what happened. It's been ten years. So I think the memory is to miss some of the points, so that's what I did.
Q. You indicated you reviewed some testimony. Do you recall specifically which testimony you reviewed in preparation for today?
A. No.
Q. Did you review your deposition transcripts from the earlier litigation?
A. It's here. Why do I have to read





it? It's here.
Even some of the documents I told you why you bringing up again what I did that's in the first deposition.
MS. JELENCHICK: Let's please mark this as Speedfit Exhibit 1.
(Speedfit Exhibit 1, document entitled Notice of Rule 30(b)(6) Deposition of Speedfit LLC marked for identification, as of this date.)
Q. Mr. Astilean, you have been handed what's been marked as Speedfit Deposition Exhibit 1 which is entitled Notice of Rule 30(b)(6) Deposition of Speedfit LLC.
Before being handed deposition Exhibit 1, had you seen this document before?
A. Probably, yes.
Q. Do you recall when you saw this document for the first time?
A. Not really.
Q. If you will flip to the third page, at the top it states Topics of Testimony?
A. Page 3rd? Is the number 3rd on





the bottom?
Q. No, there is a number of 2 at the bottom. It is the third page of the document?
A. Okay, Topics of Testimony.
Q. And you will see listed on pages 2, 3 and 4 of deposition Exhibit 1, it identifies 33 topics of testimony.
A. Yes.
Q. Before today did you review these topics of testimony?
A. I believe so, yes.
Q. Do you believe you are prepared to provide testimony in connection with these topics?
A. Um-hmm. Yes.
Q. Are there any topics listed where you feel that you are not prepared to provide testimony?
A. Well, if we go through I will let you know if some of them I cannot answer.
Q. But as you sit here today, it is your belief that you are adequately prepared to provide testimony on behalf of Speedfit LLC?
A. Yes.

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A. ASTILEAN

MS. JELENCHICK: Mark this as 2.

(Speedfit Exhibit 2, copy of United States Patent No. 9,114,276 marked for identification, as of this date.)

A. This put down?

Q. That's fine.

Mr. Astilean, you have been handed what's been marked as Speedfit Deposition Exhibit 2 which is a copy of United States Patent No. 9,114,276.

If I refer to deposition Exhibit 2 as the '276 patent, will you --

A. Yes.

Q. -- understand what I mean by that?

A. Um-hmm.

Q. And so if I use the phrase the '276 patent, you understand that to mean that I'm referring to the entirety of deposition Exhibit 2. Correct?

A. Yes, and it is filed as a PCT on March 16 before year expire on the provisional application filed in March 17, 2009. That's how I understood, too.

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A. ASTILEAN

Q. If you will flip to column 32 of the '276 patent.

A. 32?

Q. 32. Column 32.

A. Oh, column 32.

Q. It is also the column where the claims start.

MR. VODOPIA: It is almost at the end, Alex.

A. The claims.

MR. VODOPIA: It is about the third-to-the-last page.

A. Okay.

Q. With respect to claim 1 --

A. 32 is in the last page in mine. Column 32. 32 is right here. Okay.

Q. Does your deposition Exhibit 2 go through column 37?

A. Can you say one more time.

Q. I just want to make sure you have the entirety of the exhibit. What is the last page of deposition Exhibit 2 for you? Okay. So you have a complete copy of the '276 patent.

Looking at column 32.

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A. ASTILEAN

A. Yes.

Q. In particular, claim 1.

A. Yes.

Q. According to Speedfit, what is Mr. Bostan's contribution to the claimed subject matter of claim 1?

A. I'm here to answer question about Speedfit and myself, not Mr. Bostan.

Q. Mr. Astilean, you are here to answer questions about Speedfit.

A. Yes.

Q. There are allegations --

A. Yes.

Q. -- that have been made in this case --

A. Yes.

Q. -- seeking to add --

A. Yes.

Q. -- add both you and Mr. Bostan --

A. Correct.

Q. -- as inventors on this patent.

A. Correct. But you can depose him and you ask him the question about what he feels.

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When you ask me questions about me, what's my contribution, I answer you, but I cannot answer for Mr. Bostan.

Q. I'm not asking you to answer for Mr. Bostan. I'm asking what Speedfit's position is with respect to Mr. Bostan's contribution to the claimed subject matter of claim 1.

MR. VODOPIA: Objection. You are looking for a legal conclusion here.

THE WITNESS: Yes.

MR. VODOPIA: You are looking for a legal --

THE WITNESS: Legal interpretation.

MR. VODOPIA: Are you assuming that Mr. Bostan contributed to this? Is that the presumption we are going on?

THE WITNESS: I don't understand what has to do with the question here with what we are doing here.

MS. JELENCHICK: I actually would like to mark this as Exhibit 6.

(Speedfit Exhibit 6, document entitled Plaintiff's Supplemental

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Responses and Objections to Defendant's First Set of Interrogatories marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as Speedfit Deposition Exhibit 6 which is entitled Plaintiff's Supplemental Responses and Objections to Defendant's First Set of Interrogatories which is dated by your counsel on March 13th, 2018.

Have you seen this document before?

A. Yes.

Q. In fact, you signed the verification --

A. Um-hmm.

Q. -- for these interrogatories on March 13th, 2018. Didn't you?

A. Correct, yes, I did.

Q. Do you believe that the responses to these interrogatories are true and accurate to the best of your recollection?

A. Yes.

Q. If you will flip to page 5 of deposition Exhibit 6.

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A. I am on page 5.

Q. Under the response to request No. 1 it identifies the '276 patent and then states claim 1, "Conceived by Alex Astilean and Dan Bostan," et cetera, et cetera.

So I'm asking you, in connection with the '276 patent what is Speedfit's position as to Mr. Bostan's contribution to the subject matter identified in claim 1?

MR. VODOPIA: If you know.

MS. JELENCHICK: It is his responsibility to know as the designee of Speedfit.

MR. VODOPIA: No, it's --

A. What I understand -- you want me to?

MR. VODOPIA: Go ahead.

A. What I understand is we have to split this lawsuit in two because Mr. Bostan didn't want to join the lawsuit. And the Judge Matsumoto said, no problem, Mr. Bostan doesn't want to join the suit but nothing stops Mr. Astilean to claim his inventorship into the Woodway patents.

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That's why I'm here. To answer about my contribution, not about Dan Bostan and Speedfit. And Dan was never employed at Speedfit. He assigned to Speedfit, but was never employed at Speedfit. So you either ask questions about Speedfit or Alex Astilean. Otherwise, I have no, I don't know how to answer to you.

I'm willing to answer if you ask me what contribution Alex Astilean did on this. No problem. I can tell you for six hours. But if you ask me what Dan Bostan contribute himself on this, then you should ask him.

Q. As the representative of Speedfit can you distinguish between Mr. Bostan's contributions to claim 1 relative to your contributions?

MR. VODOPIA: Objection. That calls for a legal conclusion and he's not a lawyer.

A. We said this, we conceive together, Alex Astilean and Dan Bostan.

What we conceive together, the

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whole concept was conceived together. Specific, I can answer specifics. Everything you want, I'll tell you right now. You never asked me in the first testimony, but I don't mind to say it one more time again here.

Q. Specifically --

A. Yes, specifically.

Q. -- as the representative of Speedfit --

A. Yes.

Q. -- what is Speedfit's position as to Mr. Bostan's contribution to claim 1?

MR. VODOPIA: Asked and answered. He just answered you.

A. I did answer this question.

Q. Can you distinguish Mr. Bostan's contribution --

A. I'm not going to.

MR. VODOPIA: As long as it doesn't require him to make a legal conclusion, he can say whatever he wants, but, Kadie, you can't ask him to make legal conclusions. He is not a patent attorney. This is complicated

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A. ASTILEAN

stuff.

MS. JELENCHICK: Mr. Vodopia, I'm not asking him for a legal conclusion. I'm asking him as a representative of Speedfit.

MR. VODOPIA: What kind of contribution? A contribution is a legal conclusion.

Q. Claim 1.

A. Claim 1.

Q. What from claim 1 includes Mr. Bostan's ideas?

A. Wherein the treadmill is configured to control the speed of the running belt to facilitate the maintenance -- wherein the treadmill is configured to control the speed of the running belt to facilitate the maintenance of the contour of the curved running surface.

As soon as you put curved running surface, it is me and Dan here. It has nothing to do with Woodway. Everything says curve, has wiped out Woodway completely because Woodway did not get the curve. They

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didn't come up with this idea, curve. They trademarked the name, but that's a different story.

Q. You will agree --

A. Does that answer the question?

Q. So the last clause of claim 1 --

A. That I just read one. But I can read the whole thing and I will point out more, but I just read the last one and I just pointed out to you. Curved running surface. Period.

Q. So the curved running surface was Mr. Bostan's idea?

A. And Mr. Astilean, yes.

Q. What specifically within claim 1 are Mr. Bostan's ideas exclusively, if there are any?

A. The curve is, but it is not exclusive, it's not his. It was I worked to -- we worked together on this. I told you in the beginning the way it was developed, it was the circle, and then we came on the concave, and we both agree to make the one, the prototype, with that surface.

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A. ASTILEAN

Q. Are there any other portions of claim 1 that --

A. Synchronizing system coupled. When I draw that on the board at Woodway and I draw the two pulleys there and the two wheels with the teeth and with a chain, was not obviously was coupled?

We argue and I spent $10,000 to go to New York in front of the judge for the word coupled when it was not obviously the pulley and the synchronized pulley it's indirectly coupled?

Was obviously when I draw it, otherwise it is not working, the synchronize is not working if they are not coupled.

We argue for one word coupled which is, means nothing because it is so common sense.

Yes. Synchronized system coupled. I draw it on the board, on Woodway board. The first time when they saw that was when I draw it.

Q. Let's go back to my actual question.

A. Okay.

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A. ASTILEAN

Q. Which ideas are Mr. Bostan's exclusively from claim 1, if there are any?

A. He work, he did come up with the curve. He did say the curve, we should do this curve instead of going that way. And I agree with him.

Q. Are there any other concepts of Mr. Bostan's in claim 1?

A. Let me read it completely.

MR. VODOPIA: Objection. I don't see any concepts in claim 1. I don't see any concepts, I don't see any ideas.

MS. JELENCHICK: Well, I'm not asking you for your opinion. I'm asking Mr. Astilean what his understanding is of Mr. Bostan's ideas and whether they are found in claim 1.

Please continue your answer.

MR. VODOPIA: And he answered you.

A. Yes. The running belt contacting the front and rear pulley and including a curved running surface. Curved running surface that's right there. That's another one.

A. ASTILEAN

Q. Are any of Ms. Bostan's other ideas included in claim 1?

A. No. The rest is mine.

Q. Is Speedfit seeking to correct the inventorship with respect to claim 22 of the '276 patent?

A. 22.

MR. VODOPIA: Is this information in Exhibit 3, the 30(b)6 Exhibit 3, page 8?

MS. JELENCHICK: I don't have an Exhibit 3.

MR. VODOPIA: Here. Use mine.

MS. JELENCHICK: The interrogatories?

MR. VODOPIA: Exhibit 3, yes.

MS. JELENCHICK: That's Exhibit 6.

MR. VODOPIA: Oh, it's Exhibit 6. I thought it was Exhibit 3.

MS. JELENCHICK: There is a conflict in deposition Exhibit 6. In one interrogatory response, claim 22 is not identified, yet it is identified in another. So I would like to understand



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whether Speedfit is pursuing a correction of inventorship claim with respect to claim 22.

MR. VODOPIA: Sorry. Where is the one that -- where is the other one? I'm looking at this. This is 6, yes? And I see what it says. And did you say there was another one that says that --

MS. JELENCHICK: Interrogatory No. 8.

MR. VODOPIA: Interrogatory No. 8.

MS. JELENCHICK: Page 17.

THE INTERPRETER: Excuse me, may I take a couple of minutes break?

MS. JELENCHICK: Sure. Of course.

THE INTERPRETER: Just a couple of minutes.

Q. Do you know the answer, Mr. Astilean?

A. Can you phrase one more time the question.

Q. Is Speedfit pursuing a correction of inventorship claim for claim 22?

A. I don't know specifically exactly



A. ASTILEAN

about that claim 22, but in looking at the, all the claims, they file an application on the product which was not theirs. That's the conclusion.

MR. VODOPIA: Kadie.

MS. JELENCHICK: Yes.

MR. VODOPIA: Interrogatory, the response to interrogatory request No. 8 has an error. I believe it should say 23 and 24, and that's my error.

MS. JELENCHICK: Thank you for that clarification.

Q. Mr. Astilean, if the court determines that neither you nor Mr. Bostan contributed to claim 1 of the '276 patent, is it your understanding that there would be no viable inventorship claims with respect to the remaining patent claims?

MR. VODOPIA: Objection. Calls for a legal conclusion, Kadie.

A. Again, I'm responding, I'm going to respond you in my lay claim, my lay vocabulary. All right?

Q. That's perfectly acceptable. That's



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all I'm looking for.

A. And I'm going to tell you, I mean, you might won case with Chapco, but you are going to be very hard, have a very hard time to convince somebody that my design is different than this design, then the novelty on this is different than me and Dan created and Woodway just took it and claim it as theirs. Simple as that. And I close the statement.

Q. So do you have any position with respect to claims 2 --

A. I just answered to you.

Q. -- through 37?

A. I pointed three points when it says curve surface. Woodway not even dream about curve surface when we are testing in August of 2008 with the curved treadmill with the Woodway belt.

I admit was the Woodway belt, Woodway pulleys, Woodway guide rails, Woodway bearings, but that doesn't mean you make them inventors of the curved treadmill, period.

Q. Well, you understand that the

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invention is not for a curved treadmill because a curved treadmill was in the prior art?

A. No. You are wrong here. You are wrong. You are completely wrong. It is a curved treadmill with, with, and with. It is a curved treadmill, and everything you say by is a curved treadmill. If it is not curved, you don't need a safety device as a one-way bearings. You need just in the curved treadmill. You are never going to put a safety device, a one-way bearing in the flat treadmill. In the curved treadmill you have to put one-way bearings because it is a curved treadmill. You need synchronized mechanism to taut the belt down.

Q. Is it Speedfit's position that Mr. Socwell should be added as an inventor to the '276 patent?

A. Not at all. His invention was completely different, different technology.

Q. How about Mr. Cutter, is it Speedfit's position --

A. Same thing. Different technology.

MS. JELENCHICK: Please go ahead

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and mark this as Exhibit 3.

(Speedfit Exhibit 3, copy of the United States Design Patent No. D736,866 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as Speedfit deposition Exhibit 3 which is a copy of the United States Design Patent No. D736,866.

Do you recognize this document?

A. I do.

Q. And if I refer to deposition Exhibit 3 as the '866 patent, do you understand what I mean?

A. Yes.

MR. VODOPIA: Sorry, this is Exhibit 3, yes?

MS. JELENCHICK: Yes.

MR. VODOPIA: On the 30(b)6 deposition. This is Exhibit 2.

MS. JELENCHICK: Yes.

MR. VODOPIA: And the notice was Exhibit 1. What exhibit number is this?

MS. JELENCHICK: 6.

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MR. VODOPIA: Of the 30(b)6 deposition?

MS. JELENCHICK: Yes. We skipped a couple of numbers.

MR. VODOPIA: Okay. Got it. Sorry for the interruption.

MS. JELENCHICK: That's fine.

Q. Can you flip to the last page of the '866 patent. Will you please indicate what contribution, if any, Mr. Bostan had to this ornamental shape?

A. None.

Q. Excuse me?

A. None.

MS. JELENCHICK: Mark that as 7.

(Speedfit Exhibit 7, copy of the complaint filed in the Eastern District of New York on February 10th, 2017 marked for identification, as of this date.)

Q. Mr. Astilean, you are being handed what's being marked as Speedfit Deposition Exhibit No. 7 which is a copy of the complaint in this case that was filed in the Eastern

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District of New York on February 10th of 2017.

Do you recognize this document?

A. I'm sorry, can I go back?

Q. Sure.

A. Yeah? So Dan Bostan has a contribution on this.

Q. What's his contribution to the '866 patent?

A. It's the treadmill respects -- the treadmill has the same curve. This treadmill has the same curve as the rails from Dan prototype which send it to me, can you measure. It's, you recognize in the treadmill even today, they have the same curve. That's his contribution.

Q. Anything else?

A. That's it. The curve.

Can you rectify on the record? Okay.

Q. Mr. Astilean, earlier today we marked as an exhibit, an e-mail from January 26 of 2009 from Mr. Oblamski back to you indicating that the shape of your curve was unacceptable. Do you recall that document?

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A. You are very, very, very, very very, very well spoke English if you say that my curve were not acceptable, when they took the design. This is the e-mail with the shape.

Q. What exhibit number is that?

No, I'm talking about the e-mail --

A. Let's make a, let's make an exercise of let's consider people around us as part of the jury and ask them if this shape --

MR. VODOPIA: Is this the one you are looking at?

A. -- is not the same with the shape Oblamski used.

Actually, they were mesmerized about the shape I came up with, and they ran with it. And I'm telling you they were going to this shape. They were going straightforward with this shape. Until I tell them no. No. They change the shapes up, they change shapes, it changes.

They were going to exhibit this one in the road show. He was going to order material for this one, until I sent the new

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shape, and you stating like it was not acceptable. It is very rude from your very high speed, very well English person: It was not acceptable. Very nice put it: It was not acceptable. What did they accept from me then?

Q. Mr. Astilean, you understand that the issue of correction of inventorship is not a jury issue. Right?

A. We don't know who it's going to be the fact who is going to make the decision. We really don't know. It is going to be jury maybe. Maybe it is going to be a judge. We don't know yet.

MR. VODOPIA: No, it is going to be the judge.

A. It is going to be a judge? Perfect.

The judge is going to make decision, and he is going to say Mr. Oblamski was not accepting your design.

I mean, you understand to have guts and balls to go forward, but to a point like make me a criminal. Come on. Have a

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decency, Mrs. Jelenchick. Come on. Have some decency. Was not accepted.

Look here what accept Mr. Oblamski. Look here what accept. The first shape, he was working on the first shape, he was working on it to display on the show because he didn't have anything to work on it. Nothing, zero. Until I give him this shape, he was already working, Mr. Oblamski, on the other shape. Look here. It is right here. He put the belt on the other shape, and he tell me he didn't accept my new design.

What is the difference between this image and the patent? What's the difference between this patent and this image? What is the difference?

MR. VODOPIA: What is that document? What's the number on it?

A. 49756.

What is the difference between this shape and the ornamental design? Zero.

And this is in my possession. I sleep under my bed with this, and I will put it in front of the judge, and the cover from

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Woodway. And you tell me the judge is going to say, Mr. Oblamski did not accept your design. Mr. Oblamski did not accept.

No. He ask me for my approval of his modification of my design. You can say that. You can rephrase that.

Well, thanks. Alex, I like you to have this kind of design, but we have to fit the belt, and here it is where I put, I extend your cover design with this little ears here. Are you willing to accept this, or you give me another design?

And of course I accept it because it was my design. And it was my treadmill. It was Speedfit treadmill. Mr. Oblamski did not accept your design.

MR. VODOPIA: Can we enter that document. He is going through those pages. Can we get that in the record.

THE WITNESS: After you come and cross you going to put it in the record.

MR. VODOPIA: But if you are talking about it now, does it make sense --

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THE WITNESS: Yes, let's put it.

MS. JELENCHICK: You can put that particular page as an exhibit.

A. No. The whole thing I want to put. Because this is the whole relationship with Woodway. You look at it. I have the all four copies, and you just stick it in. If you want, of course. If not.

MS. JELENCHICK: No, thank you.

A. But you have it there. See.

MR. VODOPIA: Alex, do you want to take a little break?

THE WITNESS: Not really. Not really.

MR. VODOPIA: Okay.

A. The blue picture there is my design. The red contour is Nick adjusting the cover to fit the belt, and you tell me Nick didn't accept my design. You had the guts to come here and say on the record Nick Oblamski did not accept my design.

MR. VODOPIA: Do you want copies of that?

MS. JELENCHICK: No.

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Q. Are you finished?

A. I'm completely finished.

MS. JELENCHICK: Mark that as Exhibit 8, please.

(Speedfit Exhibit 8, one page picture of blue item with red outline marked for identification, as of this date.)

A. English language. Huh? Oral sex is not sex according to Bill Clinton, except this is not my design. It is Nick design. Perfect.

So to state the question, of course I'm not agreeing with the statement Nick Oblamski did not accept my design.

Nick Oblamski embraced my design. Embraced my design. This blue is Alex Astilean design. The red contour is the modification of Nick Oblamski to fix the belt length. That's it. And you cannot call an inventor somebody tried to reduce to practice somebody else invention.

Q. So, Mr. Astilean, you have been handed deposition Exhibit 8.

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A. Yes.

Q. And that's the document that you were gesturing to in referring to the blue and the red a few moments ago?

A. Yes. Um-hmm.

Q. Thank you.

A. Yes. Sorry.

MS. JELENCHICK: Mark this as 4.

(Speedfit Exhibit 4, copy of United States Design Patent No. D753,776 marked for identification, as of this date.)

Q. Mr. Astilean, you have been handed what's been marked as Speedfit deposition Exhibit 4 which is a copy of United States Design Patent No. D753,776.

If I refer to Speedfit deposition Exhibit 4 as the '776 patent, do you know what I'm referring to?

A. '76 patent, yes.

Q. So if I use the phrase the '776 patent, I'm referring to Speedfit deposition Exhibit 4. Is that fair?

A. It's fair.

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Q. Have you seen deposition Exhibit 4 before?

A. Yes.

Q. If you flip to -- when did you first see this document, if you can recall?

A. No. I had it in -- yes, I've seen it.

Q. So if you could flip to the back page --

A. Yes.

Q. -- of deposition Exhibit 4.

A. Yes.

Q. Can you identify what portion of this ornamental design Mr. Bostan contributed to?

MR. VODOPIA: You know, I have to object because you are asking him to make a legal conclusion as to what Mr. Bostan contributed under the law, and -- I mean, I assume you are asking under the law.

There's my objection. I will shut up here.

Q. My question is, what is Speedfit's

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position as to what Mr. Bostan contributed to this particular ornamental design, if anything?

A. I told you, and I repeat myself again.

Q. Let me ask it a different way.

A. No.

Q. Is Mr. Bostan's contribution to the '776 patent, the same contribution that he made to the '866 patent?

A. Yeah. But I like to continue talking now.

Q. Go ahead.

A. This treadmill has a side cover designed by me, and we both work on the wooden prototype, and after six iteration of prototypes, we came to a curve which applies to Woodway curve -- Woodway belt, but Woodway, even today, doesn't know why the curve is that radius, and they never change it, and when I left Woodway and I went to Chapco, I changed the radius and Woodway didn't know why I changed the radius, and instead of them to be safe, you know what, they did one as a Chapco radius and one as a Dan Bostan wooden

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prototype radius. So now they have two radius, Woodway, and they tried to sell both, but none of them know why one is like that and the other is like that. Why? Because they never developed. They never invented. They never developed this in their house.

So they saw another curve coming from Chapco, and wait a minute, this is different. So now they have a Chapco curve and still they have from initial prototype I did with Dan, the curve. They have two models. And they go with both, and they don't know which one is, which one was going to sell more because they didn't invent it. That's the bottom line. They didn't know where to start. That was my final statement.

Q. Did the wooden prototype have handrails?

A. No, it did not have.

Q. Did the wooden prototype have a ball guard?

A. A ball guard?

THE INTERPRETER: This is a technical term.

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A. ASTILEAN

Q. Mr. Astilean, do you know what the phrase ball guard means?

A. I don't. But I would like to know. That's why I have a translator here and I would like to know this question because it might interfere with the subject matter, so I would like to know. So I want you to tell him in English, explain to him what's the ball guard, and then he will translate to me in Romanian. Please.

MS. JELENCHICK: Is there a Romanian equivalent to the phrase ball guard?

THE INTERPRETER: Yeah, if I giving you a correct interpretation, but that may be a technical term that refers to something that I don't know.

MS. JELENCHICK: That's fine.

THE INTERPRETER: Ball guard. That's a piece of that equipment? Ball guard?

Q. No, I'm just asking, Mr. Astilean, if you know what the phrase ball guard means?

A. And I said no and I would like to

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know.

Q. Maybe another day.

A. Okay.

Q. Does the wooden prototype have no-slick strips?

A. No. You call part of that --

MR. VODOPIA: Objection: relevance.

A. You getting ridiculous.

MR. VODOPIA: Objection: Relevance. This is a design patent.

A. No, but it did have. The one was on Discovery Channel, it did have the slipping pads, you see here -- no, what I'm saying is, it gets to the point where it gets ridiculous.

Yes, had. Yes. The one complete with the side covers had the slipping pads, the one for Discovery Channel.

Q. Did those pads say for the long run?

A. No. Did I say here says, did I say here for long run?

Q. I'm asking you.

A. No, I'm saying, did you see here say for long run?

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We are going like this for 7 hours and like this, and we are going again like this, and I'm telling you, Woodway took this product and they claim it is theirs, and they file a patent for it. That's the bottom line. And then we will see who is going to decide what is it, but if you ask every person if those designs do not look absolutely the same, then I might be sick.

Q. It is Speedfit's position that the no-slip strips were your idea?

A. There were. There were slip strips on it. And you see this picture here? Those bars? Those were identical Doug words on the phone, says, Alex, in the short period of time, we couldn't come up with a better solution for the handrail, so I know you are not going to like it, but this is the best we could have come in a short period of time. So if they couldn't come with a better version of the handrails in three months, how you think they could have designed the whole thing if they wouldn't have had it from somewhere? This is Woodway design. This handle bars is

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in the house Woodway design. That's pure Woodway conception, those handles. That's it. Zero. The rest, they just received.

MS. JELENCHICK: Mark this as Exhibit 5.

(Speedfit Exhibit 5, copy of United States Design Patent No. D753,245 marked for identification, as of this date.)

Q. Ms. Astilean, you have been handed what's been marked as deposition Exhibit 5 which is a copy of United States Design Patent No. D753,245.

Have you seen this document before?

A. Yes.

Q. What were the circumstances of your first viewing of this document?

A. I had to review. I had to look at the patents to see if the similarity which Mike Jones, and it's identical to file the claim. I had to look at them. I had to answer in an e-mail, yes, they are. They are identical.

Q. Did Mr. Bostan have any

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contributions to the ornamental design illustrated in the '245 patent other than the contributions that you identified with respect to the '776 and the '886 patents?

A. All the same, the same contribution here.

Q. What were your contributions to the design illustrated in the '245 patent?

A. The concept, the curve, the side covers was all, this, the blue, designed by me.

Q. Did you design the handrails depicted in '245?

A. Yes, I designed the handrails, yes, but long time ago with Nick, in the Nick office, and he pick up from those designs and adopt it to this treadmill.

Yes, I designed the handrails as well.

Q. Do you have copies of any photographs of those handrails that you were working with Mr. Oblamski on?

A. No, because I work by his computer. I stayed by his computer and I work

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with him. Not on particular treadmill, on the treadmills before we did those handrails, and I work with him on the handrails as well.

Q. When did this work purportedly take place?

A. 2008; '7 '8, when we had the flat. I stayed for three weeks there. I went every day to visit the plant.

Q. During that time when you were visiting the plant, there was no work being done with respect to any curved treadmills, was there?

A. No. But we were working with so many handrails for the flat one that you cannot imagine.

Q. We marked as an exhibit the complaint in this lawsuit. It is Exhibit --

MR. VODOPIA: 7.

Q. 7. In paragraph 8 it identifies that Speedfit is a New York limited liability company formed and existing pursuant to the laws of the State of New York. Isn't Speedfit a company organized under the laws of the State of Delaware?

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A. It is.
Q. So paragraph 8 contains errors?
A. Errors, yes. Not in New York formed. It's in Delaware.
Q. What is Speedfit's physical location, if it has one?
A. East Hampton, New York.
Q. What is the address?
A. 196 Buckskill Road, East Hampton, New York 11937.
Q. How long has the Buckskill Road been the physical location for Speedfit?
A. 2013.
Q. Prior to 2013 was the physical location for Speedfit 79 Newtown Lane?
A. Correct.
Q. Why did Speedfit move locations?
A. I sublet. I sublet the space. It is sublet to a different system, different environment.
Q. Does Speedfit make annual filings with the State of Delaware?
A. My accountant knows that.
Q. Who is your accountant?

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A. It's Stan Tax.
Q. Stan Tax?
A. Stan Tax.
Q. Is that a gentleman's name?
A. It's a company. He is an accounting company.
Q. Where are they located?
A. Queens.
Q. And how long has Stan Tax been handling your taxes for Speedfit?
A. I don't remember exactly.
Q. Does Speedfit file a separate tax return from you, personally?
A. As a corporation?
Q. Yes.
A. You have to ask my accountant.
Q. Do you have copies of Speedfit's tax filings?
A. Probably, yes.
Q. Were those turned over to your lawyers in this case?
A. I don't know. Was I asked about it? I don't know if I was ever asked about it.

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Q. Does Speedfit make corporate filings in any state that you know?
A. New York. I mean -- New York, yeah.
Q. Do you know what type of filings are made in New York?
A. My accountant will know.
Q. Are you the sole member of Speedfit?
A. No. Actually, I have a partner.
Q. Who is your partner?
A. Tom Decea.
Q. What is the ownership split?
A. 95/5.
Q. The 5 percent is to Mr. Decea?
A. Yes.
Q. When did Mr. Decea become your partner?
A. 2014, '13; '14 probably.
Q. Does Mr. Decea have any responsibilities as a member of Speedfit?
A. Yes. As a CFO. Currently, yeah.
Q. Mr. Decea is the CFO of Speedfit?
A. Almost.
Q. For how long has Mr. Decea been the

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CFO?
A. Six months.
Q. Did he have any role as an officer prior to six months ago?
A. Not much, no.
Q. What are Mr. Decea's responsibilities as the CFO of Speedfit?
A. Find investors.
Q. So the investors that we spoke about first thing this morning, those are entities that Mr. Decea identified?
A. Yes.
Q. Does Mr. Decea have any other responsibilities as the CFO?
A. No.
Q. You previously testified that Speedfit has one employee. Who is the employee? You are an employee of Speedfit?
A. Alex Astilean, yes.
Q. What are your employment duties?
A. Day by day working.
Q. How are your duties as an employee of Speedfit any different from your duties as the CEO or president of Speedfit?

A. ASTILEAN

A. I do everything in the house. I order the product. I inventory the product. I ship the product from Korea. I warehouse the product. I sell the product. I ship the product. I do all the legal logistics from the shipping. Everything.

Q. How long have you been characterized as an employee of Speedfit?

A. Since 2015.

Q. What is Speedfit's fiscal year?

A. What's what?

Q. Speedfit's fiscal year. Have you heard of the phrase fiscal year before?

A. No. No.

(Translation.)

A. Any date on January 1st?

Q. Is Speedfit's fiscal year the calendar year?

A. Yes.

Q. Has that always been the case?

A. Um-hmm, yes.

Q. What was Speedfit's total revenue in 2017, if it had any?

A. Minus 200,000.



A. ASTILEAN

Q. Why was it minus 200,000?

A. I took 200,000 from Speedfit to save my foreclosure house.

Q. What was Speedfit's total revenue in 2016, if it had any?

A. That's something I cannot, by head I don't know.

Q. Does Speedfit maintain profit and loss statements?

A. Um-hmm, yes.

Q. Where are those materials maintained?

A. My accountant has them.

Q. Do you know what Speedfit's total expenses were in calendar year 2017?

A. Including lawyers?

Q. Total expenses.

A. I don't have my memory in my head. I don't have.

Should I be prepared for this meeting with those numbers? I should have been prepared?

MR. VODOPIA: I don't know if those specific numbers were identified



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in the notices.

A. I didn't know I had to be prepared with those numbers for today. I mean, it is about Speedfit, but did I have to be prepared with those numbers?

Q. Let me ask it this way.

Were Speedfit's total expenses in excess of a million dollars in 2017?

A. I barely have money for toothpicks, for dental paste, and you ask me for a million dollars.

Again, it is another question like you coming from another planet.

Where you coming with these numbers, a million dollars, when I barely have money to buy toothpaste? Seriously.

Q. So the minus $200,000 that you referenced as the total revenue, was that the net revenue?

A. No. That was -- that was infusion from a Korean company into Speedfit. We asked for this loan in the company, and I took the money to save the house.

Q. So the Korean entity gave you a loan



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for $200,000?

A. Correct.

Q. Do you intend to pay that loan back?

A. I would like to.

Q. Are they charging you interest on that loan?

A. Not yet, but they will.

Q. What is the name of the Korean company?

A. Kaesun.

Q. How do you spell it?

A. K-A-S-U-N.

MR. VODOPIA: There is an E between the A and the S.

A. K-A-E-S-U-N. Sorry.

Q. When did Kaesun provide Speedfit with this loan?

A. 2016.

Q. Did Speedfit provide any collateral for the loan?

A. No.

Q. Why did Kaesun give this loan in 2016?

A. They want to produce this

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treadmill.

Q. Is Speedfit working with To Be One?

A. To Be One is formerly Drax. It was formerly To Be One Drax. Now it is a formerly To Be One company.

Q. You say Trex?

A. Drax, D-R-A-X.

MR. VODOPIA: It was mentioned this morning.

A. It's a To Be One former company.

Q. Does Kaesun have any connection to Drax?

A. No.

Q. Does Speedfit have any relationship with Drago?

A. Spell it.

Q. D-R-A-G-O.

A. Never heard of them.

Q. Does Mr. Decea receive any compensation as a CFO of Speedfit?

A. No.

Q. Does Mr. Decea have any agreement with Speedfit with respect to his duties as a CFO?

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A. No. He just has the operating agreement of the companies. He is in there with 5 percent, in the operating agreement.

Q. Was an amendment made to the operating agreement to account for the addition of Mr. Decea?

A. Yes.

Q. Does your accountant have that paperwork?

A. I don't know exactly.

Q. Do you have copies of that paperwork?

A. Probably.

Q. Currently, what products or services are sold, if any, by Speedfit?

A. The Speedfit ProXL is the model.

Q. What is the ProXL?

A. SpeedBoard. SpeedBoard ProXL. Speedfit SpeedBoard ProXL

Q. And what is that?

A. The curved treadmill with the belt with slats. Slatted belt.

Q. Does the Speedfit ProXL have any means for slackening as you understand that

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phrase?

A. I understand. Yes, has means for slacking but doesn't have any mechanism. Zero.

Q. The Speedfit ProXL does not have a synchronizing system. Correct?

A. No.

Q. Does the Speedfit ProXL's running belt move in the forward and backward direction?

A. No. Just one direction.

Q. Does the Speedfit ProXL have a safety device?

A. It has.

Q. Does the safety device prevent movement of the belt --

MR. VODOPIA: Objection: relevance.

Kadie, would you stop this line of questioning. We are here about inventorship of Woodway's patents. We're not here about Alex's, about Speedfit's products. Was there a topic that your questions are coming from?

MS. JELENCHICK: Yes, there are

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several topics that this relates to.

MR. VODOPIA: Which ones?

MS. JELENCHICK: For example, the topics relating to reduction to practice.

MR. VODOPIA: Sorry, no, you are asking about Speedfit's invention. The cases about reduction to practice of the Woodway, the inventions set out and claimed in those four patents at issue. You are asking him about a product that has nothing to do with those, the patents at issue in this case.

MS. JELENCHICK: That's fine. Your objection has been noted.

Q. Does the safety device in the Speedfit ProXL prevent the movement of the running belt in both directions?

A. Yes.

Q. How long has Speedfit been selling the ProXL?

MR. VODOPIA: Objection: relevance.

It is not relevant to this

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litigation. Commercialization is not relevant to this litigation. We went through this with Tomlinson. We are not getting commercialization into this deposition. It is not in the case, and it is not in this deposition.

Kadie, please move on.

Q. How long has Speedfit been selling the ProXL?

A. I don't know.

Q. You don't know how long Speedfit has been selling this product?

A. You heard my lawyer, what says. Has nothing to do with this case. This case is about inventorship.

You did not ask me one question about my contribution on this patent that are in the lawsuit. You asked me about Dan Bostan. You told me about Oblamski not accepting my design. But you have a chance here to ask me questions which you are afraid to ask me about my contribution or my design of this product.

So I don't know the answer to that

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question.

Q. Has Speedfit ever been audited?

A. Not that I know.

Q. Is there a specific contact name at Stan Tax that you work with for Speedfit's taxes?

A. Probably, yeah.

Q. Do you know who that individual is, what his or her name is?

A. Yeah.

Q. What's the name?

A. Stan. Called Stan Tax. Stan. Mr. Stan.

Q. Has Speedfit executed any agreements with any other entity?

A. I don't know.

MR. VODOPIA: Objection. Outside the scope of this deposition.

Q. I'll direct you, Mr. Astilean, to topic 30 which is "any facts regarding the organizational relationships between Speedfit and any foreign or domestic person or entity for the period from the alleged conception of the inventions in the patents-in-suit by Mr.

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Astilean and/or Mr. Bostan to the present."

Clearly within the scope of this deposition. Does Speedfit have any executed agreements with any other entities?

A. Number please?

Q. Exhibit 1, topic 30.

MR. VODOPIA: Can you read back the last question, please.

(Record read.)

A. What was the question?

(Record read.)

A. We did.

Q. Which entities does Speedfit have executed agreements with?

A. To Be One Drax, and Kaesun, the two Korean company.

No, actually just Drax.

With Kaesun I don't have a contract. I just have a MOU, memorandum of understanding, but I don't have a contract.

Drax.

Q. When was the memorandum of understanding executed?

A. With Kaesun? 2016.

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Q. With respect to the agreement with To Be One, when was that agreement executed?

A. 2014.

Q. Is the agreement with To Be One still in effect?

A. No.

Q. When was it terminated?

A. Month ago.

Q. Why was it terminated?

A. They used their own name.

Q. What do you mean?

A. So they took the name Speedfit out of the product, and they put Drax name on it.

Q. Are they currently manufacturing that product?

A. They do.

Q. Are they selling it?

A. They sell.

Q. Are they selling it outside the United States?

A. Outside the United States.

Q. Are they selling it within the United States?

A. They can't. They don't sell in

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United States.

Q. And how long have they been selling it under their own name?

A. Six months.

Q. Are they selling what was formerly referred to as the Speedfit ProXL?

A. Correct.

Q. Is the memorandum of understanding still in effect?

A. Yes.

Q. Have copies of those materials been provided to your lawyers in this case?

A. They make them, so probably they have it, a copy.

Q. Who drafted the memorandum of understanding?

A. Tom Decea office.

Q. Who drafted the agreement with To Be One?

A. Tom Decea's office.

Q. Has Speedfit had any communications with third parties regarding this lawsuit?

A. One more time, please.

Q. Has Speedfit had any communications

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with any third parties regarding this lawsuit?

A. Third parties?

THE INTERPRETER: Can I translate into Romanian?

Q. Do you know the phrase third party?

A. Yeah, but I don't understand the meaning here. I understand a third party.

Q. Has Speedfit been talking to anybody about this litigation?

A. As a personal, private, as a litigation, legal team? Who are you referring to?

MR. VODOPIA: Speedfit.

A. Speedfit as an entity, but with who you mean third party? You meant by third party -- give me some examples for me to understand the question.

Q. I mean anybody.

MR. VODOPIA: Anybody other than Speedfit is a third party to Speedfit.

(Translation.)

A. Third party so the lawyers is --

MR. VODOPIA: The question was broad. Anybody. Has Speedfit ever --

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Q. Has Speedfit been having conversations with its lawyers about this litigation? I suspect the answer is yes.

A. Yes, yes.

Q. Has Speedfit been talking to anybody else besides its lawyers about this litigation?

A. No.

Q. In Speedfit's conversations with the five firms that we discussed this morning, has this particular litigation been brought up?

A. Yes. So there was a third party.

Q. What was said about this litigation to your potential investment partners?

MR. VODOPIA: Can we go off the the record for a second?

MS. JELENCHICK: I have a question pending. After this question, yes, we can take a break.

MR. VODOPIA: Okay.

A. So I'm going to speak in a layman terms again.

Your firm did very good job drawing my pocket. I came down to nothing by sustaining this litigation, going on for five

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years. But that was the role. That's the role of the big firms, to draw out the pockets of the little guy with an invention. You did a great job.

But now the company looking at the case and they want to invest in the case and they want to bring a hundred thousand dollars to the table, I have to give $200,000 in one year, or $300,000 in three years, whatever the litigation will take, but they are willing to help this litigation going forward.

Yes. I spoke with these kinds of firms regarding to this litigation.

I hope you understand my answer.

Q. Does Speedfit expect Mr. Bostan to attend the trial in this case?

A. I have no idea. In this case is inventorship, correct inventorship. My name has nothing to do with Dan Bostan.

Are you talking about this case or the other case.

Q. I'm talking about this case.

A. So this case was filed on my behalf on Speedfit. Had nothing to do with

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Dan Bostan.

Q. Does Speedfit expect to call as a witness Mr. Bostan in this case?

A. I don't know yet. At this point I don't know what's going to happen.

MS. JELENCHICK: At this point I have no additional questions. Thank you for your time and your patience.

MR. VODOPIA: I have a few and I'm going to make it very quick. If you all bear with me for just a few minutes. Can we pass right in? Can we start?

THE WITNESS: Yeah.

EXAMINATION BY MR. VODOPIA:

Q. So I'm redirecting and I just want to ask you a question about your testimony. I'm John Vodopia of course. And we were talking about Exhibit -- I had a question that came up with respect to figures 7A and 7B.

MS. JELENCHICK: Just, Mr. Vodopia, those exhibits were marked in the earlier deposition. My understanding is that your direct in this circumstance is in connection with

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the 30(b)6 deposition.

MR. VODOPIA: It is. It is, and it is going to be in connection with the 30(b)6 deposition.

Q. And so I just want to direct your attention to figures 7A and 7B from the earlier deposition to ask my 30(b)6 questions.

MS. JELENCHICK: Except that your redirect is limited to the subject matter as presented in my examination.

MR. VODOPIA: Exactly.

MS. JELENCHICK: Right. I did not ask about these particular exhibits.

MR. VODOPIA: I'm not doing a 30(b)6 redirect. I'm doing the first deposition redirect. I'm doing a first deposition redirect. We didn't get a chance to do it before, so I'm going to do it now.

Does that work, Kadie?

MS. JELENCHICK: I think this is problematic. Had you wished to redirect Mr. Astilean in connection with his personal deposition, it should have

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happened long before now.

So long as it is brief --

MR. VODOPIA: Let me run right into -- I thought we were working together on this so?

MS. JELENCHICK: As long as it is brief, let's go.

MR. VODOPIA: Okay, good.

Q. Alex, when you were talking before, when you were offering testimony regarding Exhibits 7A and 7B, and the means for slackening in the wooden prototype, did you happen to know, were there other ways to keep the running belt synchronized?

A. Many other ways.

MS. JELENCHICK: Objection: form. Outside the scope of the deposition.

Q. And did you explain that to Mr. Bayerlein?

A. I did. I did.

No, but the point is which if I would have -- in the video you don't see the timing belt. Yes?

Q. Yes.

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A. If I wouldn't explain the meaning, you don't see it. In the videos you don't see the mechanism which holds the belt on. You don't see. If they wouldn't get knowledge by me about existing of that, how do they ever going to be able to build it? Never.

Q. Okay. I want to direct your attention to Exhibit 5 from this morning which was your declaration from June 1st, 2015. Exhibit 5.

What I want to know is, was Exhibit 5 directed to patents at issue in this suit?

MS. JELENCHICK: Objection to the form. Outside the scope of the deposition.

A. Say again the question.

Q. Was Exhibit 5 directed to the patents at issue in this suit, or were they directed to the Speedfit patents, the '016 patent and the '619 patent in the 2013 suit?

MS. JELENCHICK: Objection to the form. Outside the scope of the deposition.

A. No, counsel asked me why Mr.

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Bostan did not sign this. And I don't know. I said I don't know why he didn't sign. Because, as I remember, he did not want to join the lawsuit, and this lawsuit I filed on behalf of myself and Speedfit. That's what I understand.

Q. Did you send Woodway the wooden prototype?

MS. JELENCHICK: Objection to the form.

A. I did send the most important part of the wooden prototype, yes.

Q. What did you send?

A. The rails with the bearings with the curve.

Q. When did you send it?

A. Right after the meeting, the next day.

Q. Around the middle of December 2016?

A. Yes.

Q. 2008?

A. Yes. If they have the records of the phone, which they should also the records of the UPS trucking because they had to send



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it before the 30th of December back. They sent the UPS back in 30th of December. So of course the way they pulled the phone records, they can pull also the UPS records.

Q. Why did you send them the bearing rails --

A. Because was important to them to measure the radius.

Q. Did they ask you for it?

A. They did, yes.

Q. Do you know when Oblamski ordered parts for the production model that became, that was released March 17th -- sorry, released at IHRSA March 19th, 2009?

MS. JELENCHICK: Objection: form.

A. In January. They start to order in January 2009.

The point is they order many of them, not one to build the prototype. They already knew how they function, so they ordered many of them, not one or two. They start initially. I said to Nick, as I understand we are supposed to do five prototypes. He said, Alex, we have parts just



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for two, but we order more parts. They come in for 20. So they order some of the parts for many treadmills, and some of them for two units.

MR. VODOPIA: Okay. I would like to enter this document that we referred to and Alex was referring to before as an exhibit. There is one for the exhibit number. I'm not sure what exhibit number you want to put on. I will keep this one.

MS. JELENCHICK: Plaintiff's exhibit.

MR. VODOPIA: Here it is. Sorry. You are typing and I'm handing you something.

And that would be Plaintiff's Exhibit --

MS. JELENCHICK: 1.

(Plaintiff's Exhibit 1, document bearing production numbers 00049735-49766 marked for identification, as of this date.)

MR. VODOPIA: Okay, good.



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Alex, that was a different exhibit, right? We already marked that.

THE WITNESS: But just two pages. I want you to put it in as Exhibit 2.

MR. VODOPIA: But the problem is is that there was some other stuff on it.

THE WITNESS: Yes.

MR. VODOPIA: And we don't have copies of that.

THE WITNESS: You can make four copies.

MR. VODOPIA: Bear with me for one second. I'm going to just make some copies of this.

MS. JELENCHICK: Go off the record.

THE VIDEOGRAPHER: The time is 5:54 p.m., and we're going off the record.

(Recess taken.)

THE VIDEOGRAPHER: The time is 5:56 p.m., and we're back on the record.

MR. VODOPIA: I guess this is

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Plaintiff's Exhibit 2.

(Plaintiff's Exhibit 2, four page document, first page g-mail dated December 6, 2012 marked for identification, as of this date.)

Q. Alex, do you have a copy of Plaintiff's Exhibit 2?

A. I don't. I have just without the -- yes. I have.

Q. You have a copy of this.

Alex, why is this important to you, this document?

MS. JELENCHICK: Objection to the form. Outside the scope of my --

Q. How does it relate to the earlier deposition testimony?

A. It is. In my opinion it is.

Q. So could you tell me.

A. It shows the date when I discover is January 6 -- December 6 of 2012. I didn't know anything before that date.

Q. That shows?

A. That shows exactly when I have the first knowledge aware that Woodway ever filed

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any patents.

Q. That's the significance of that document?

A. That's the significance of that document, yes.

MR. VODOPIA: I would like to enter this as Plaintiff's Exhibit 3.

(Plaintiff's Exhibit 3, e-mail chain bearing production No. Woodway 0037804 marked for identification, as of this date.)

Q. Which also is Woodway 0037804 and Weber's Exhibit 5.

Alex, this is an e-mail from Nick Oblamski dated January 4, 2009. It was in response to your December 30th, 2008 e-mail to Mr. Oblamski.

He states in his e-mail, the last line in his e-mail: Do we use his for the show or do we still push ours through and get our version to the show?

Alex, what did -- do you know what Mr. Oblamski meant when he says: Do we push ours through quick, so do we still push ours

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through quick and get our version to the -- sorry. "Do we use his for the show, or do we still push ours through quick and get our version to the show?"

Do you know what Mr. Oblamski was talking about here?

A. Yes.

MS. JELENCHICK: Objection to the form.

A. He looked at the video and he thought this is a functional unit. It actually was the wooden prototype. It was, just looked nice but was -- and when he said he wants to launch a pulley in the front, the reason I stick for a while with the design of the front, higher front which let's go back to the image. Here is the image of the larger part of the treadmill in front, and the design.

Q. That's from Exhibit 1.

A. Exhibit 1, yes. From Exhibit 1.

Q. And what is the --

A. It's 49747.

Q. Good.

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A. But it is also, it's related in many pictures after that. Is, here is another one in back, after we give him the layout, I was pushing for this shape initially thinking the bigger pull in the front is less friction. So my concern was always less and less, less, less, less friction. But they have to have with the belt, but they didn't have with the belt. He says if we put the bigger pull in the front, we have to shorten the treadmill. So the bigger pulley gets more of the belt. So if we make big pulley so the treadmill will shorten out with the belt they had on stock. So then I give up. When I realize they don't have the right belt for this shape, then I was thinking differently, and I was thinking I don't like anyway the shape, so I go with a different design.

But initially he already start to make this type of treadmill for the show because his drawings for the metal version based on the design was in the Discovery Channel. And then when I send him the new design, then he change it later.

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But initially when I start to do this design was, I wanted to have a bigger pulley in the front for less friction. The bigger the pulleys, the belt goes smoother, less friction. So always I was looking for a less friction on this treadmill.

Q. What do you think he means by push ours through quick and get our version to the show? Again, this is January 4, 2009, two weeks after you met with them.

MS. JELENCHICK: Objection to the form.

Q. Did they have a wooden -- before you met -- were they working on a curved treadmill?

A. No, never.

MS. JELENCHICK: Objection to the form.

A. No.

Q. What do you think they were talking about on January 4th?

MS. JELENCHICK: Objection to the form.

A. They were talking about the one based on our instruction, based on the curve

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what I sent them, based on the handrails what I sent them. They already start to building the metal version of the wooden prototype.

Q. Had they built it yet?

A. Not yet.

MS. JELENCHICK: Objection to the form.

Q. Do you know when they built the first --

A. He was, when he send the e-mail, he said I just finished the frame. We have it on record when he send me the picture the first time. That's the date when the first time they build the first unit.

MS. JELENCHICK: Mr. Astilean, please allow me an opportunity to interpose my objections before you launch your response.

THE WITNESS: Yes.

Q. How did they know it needed a means for slackening?

MS. JELENCHICK: Objection to the form.

A. That is the whole point. Where is

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the evidence? Mrs. Jelenchick ask where is the evidence.

So accumulate all the information and realize, if you don't have, doesn't bring the evidence from discussions, you don't have the evidence. They knew it. It is a means of slacking. The treadmill needs a means of slackening.

Q. Alex, in laymen's terms, would you say you supported Mr. Oblamski in the development of the SpeedBoard 2/Woodway curve --

A. I would say no as a --

MS. JELENCHICK: Objection to the form.

A. No, not supply, or not consult. I instruct him how to do it. And Nick ask for approval on everything he did. He says you approve this? This is the one we have. This is what we got. And even Bayerlein ask, I'll ask Nick to send you an update what's going on.

They were building Speedfit product, not Woodway product, but internally they know exactly which go they are doing. So

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this one, picture this was sent, that was the first time they ever build a treadmill ever, and already has.

Q. What was the date?

A. Wherever is that date, this is the first ever produced by Woodway and has already inside a means --

Q. Means of slackening?

A. Means of slackening, yes.

Q. The synchronizing system.

A. Yes.

Q. Is that what that is, the synchronizing system?

A. Yes. Absolutely, yes.

MS. JELENCHICK: Mr. Vodopia, how much more do you have?

MR. VODOPIA: Not too much. Just a short amount of time. I'm sorry, bear with me. I know it is a long day. I don't mean to be doing this at the end of the day, but I'm limited to this time.

THE WITNESS: I don't have the Exhibit 21 here. You know what is

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Exhibit 21? Yes. Okay.

MR. VODOPIA: Okay, I would like to offer this as Exhibit 5?

THE WITNESS: 4.

MR. VODOPIA: Are you sure? Plaintiff's Exhibit 5.

Plaintiff's Exhibit 4.

(Plaintiff's Exhibit 4, e-mail chain bearing production numbers PLTF00049753-54 marked for identification, as of this date.)

Q. In this document Nick responds to your e-mail of January 21st by saying:

"Please either approve the side cover shape, or get me a new side cover shape you'd like to use."

Was he referring here to the photo in the paragraph above that?

MS. JELENCHICK: Objection to the form.

A. Yes.

Q. And you sent him that photo?

MS. JELENCHICK: Objection to the form.

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A. I sent him the photo. He adjust the photo to fit the belt, and here he is the coming back and says you either approve it or come with a different --

Q. Did you approve this?

A. I did, yes.

Q. So that was your approval?

A. Yes.

Q. Let's see.

A. This is basically what was sent, the blue, came back with a contour.

Q. So wait. Say that again. The photo, was that the photo you sent?

A. This is the photo.

Q. Exhibit what?

A. The blue is the Exhibit 8, Speedfit Exhibit 8.

Q. Okay. Thanks.

Alex, during your earlier testimony you talked about cc'ing people on the announcement for the Discovery Channel.

A. I did.

Q. Did you cc any Woodway people?

A. Everybody.

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A. ASTILEAN

Q. Who at Woodway?

A. Nick, Doug, Eric, even Scott as I remember. The definite Doug, Scott -- I mean Doug, Eric and Nick.

Q. Okay. Next question. Are the Woodway belt slats resilient?

MR. VODOPIA: Objection to the form. Outside the scope.

A. They are.

Q. Alex, I want to turn your direction to Exhibit 23 from the Rule 30 examination. Do you have it there?

A. Yes.

Q. Let me see it. 30?

A. Yes.

Q. Yes. Let me see it.

A. Here. This is the same with our photo.

Q. Okay. Yes.

So Nick says "I know you wish to have something similar to the photo you sent but I'm sending you a file" -- you know what, I'm sorry. That's redundant.

Was there a SpeedBoard 1?

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A. ASTILEAN

A. There was.

MS. JELENCHICK: Objection to the form. Outside the scope.

A. There was.

Q. Was the SpeedBoard 1 the green thing?

A. No. It wasn't. It was the SpeedBoard.

Q. That's the SpeedBoard?

A. Yes. I mean, look here, in the 2007, 2008, look here, at 2008 show all SpeedBoard, Speedfit SpeedBoard, treadmill Speedfit SpeedBoard.

Q. Okay. So that's the SpeedBoard.

A. 1.

Q. Got it?

A. Which was Eco with green at the 2009.

Q. Okay. Let me move on.

Is Mr. Bostan patent savvy?

MS. JELENCHICK: Objection to the form.

A. I don't know. I don't know.

Q. Do you think he understands legally

what means conception?

MS. JELENCHICK: Objection to the form.

A. Yes.

Q. So I would like to direct your attention to the Cutter patent. I think that was Exhibit 26. I would like you to look at page 2 of the Cutter patent, figures 2 and 3.

A. Yes.

Q. Alex, is the running surface 30 in the Cutter patent, can it float up?

MS. JELENCHICK: Objection to the form.

A. If it is tight, yes, it can float up.

Q. It can float off the surface?

A. It can.

Q. And what about the running surface in the Socwell patent?

MS. JELENCHICK: Objection to the form.

A. Also it can float up.

Q. It can float up?

A. Yes.





Q. And then -- you know what, I'm going to leave that question.

Did the US patent -- in terms of your patents --

A. Yes.

Q. Did the US patent examiner that issued your patents see these two patents?

A. Of course.

MS. JELENCHICK: Objection to the form.

Q. Did he find that there were differences between the --

A. They find it, yes.

Q. Good.

A. They are mention in the patents, they are listed both, Socwell and Cutter. And Schonenberg.

Q. In Mr. Bayerlein's April 7th e-mail to you, April 7th, 2009 e-mail --

A. Yes.

Q. -- did Mr. Bayerlein indicate that there was nothing patentable in the SpeedBoard 2/Curve?

MS. JELENCHICK: Objection to the form.





A. April 7, 2009, but one day before or after, the director of sales of Woodway makes the statement in their website saying, this is a unique shape, this is unique treadmill, this is going to change the world, how the people they are going to look at the treadmill. And in their website says it is designed by Alex Astilean. They had on their website for a week about, and then they took it off. And we have a copy. We have a copy in the exhibits.

Q. Okay. Alex, I want to direct your attention Exhibit 34 which was the '065 application.

Do you recall if this patent application issued as a patent, or whether it was abandoned intentionally?

MS. JELENCHICK: Objection to the form.

A. Which one?

Q. The '065 application, Exhibit 34.

A. I believe it was abandoned because they have some claims was identical with mine,





and that's why they abandon it.

Q. Were they identical with the claims of the '016 patent?

A. Yes.

Q. And why do you think they abandoned it?

MS. JELENCHICK: Objection to form.

A. Because the claims were identical, and they were afraid for rejection.

Q. Did this abandoned patent application, the '065 application --

A. Yes.

A. Did this proceed the application that issued as the '276 patent.

MS. JELENCHICK: Objection to form.

A. It came from that.

Q. Yes.

A. Yes.

They were jogging around not to get caught. That's the scoop here.

Q. Okay. I want to ask one last question about the handrails. Before you

pointed out the design --

A. Yes.

Q. -- at IHRSA --

A. Yes, that was the only thing they designed. Nothing else.

Q. Was it the same -- was the treadmill shown at IHRSA the same treadmill shown at FiBO in the April two thousand --

A. No. Was different. They changed it, the design.

Q. Did they change the handle design?

A. They changed.

Q. Why?

A. It was terrible.

Q. How do you know it was terrible?

A. The German people told me: We couldn't put this on the floor in Germany.

Q. Which German people?

A. Woodway.

Q. Why did they say they couldn't put it on the floor?

MS. JELENCHICK: Objection to form.

A. Like, you go to the subway in the





entrance, and that you have the handrails. They had a week. Woodway had three months. They had a week, and they changed them in Germany.

MR. VODOPIA: That's it. No more questions.

MS. JELENCHICK: I just have one follow-up question, Mr. Astilean.

THE WITNESS: Yes.

MS. JELENCHICK: Perhaps two.

CONTINUED EXAMINATION

BY MS. JELENCHICK:

Q. At any point in time was Jamie Corio either your attorney or Speedfit's attorney?

A. He was representing Speedfit. He did make some calls with Doug and tried to settle the case, but they didn't go anywhere. He did try to settle the case, yes.

Q. Mr. Corio was Speedfit's lawyer at some point in time?

A. Some time, yes.

Q. Do you recall which period of time he was Speedfit's lawyer?





A. Between 2009 and two-thousand-and, maybe '12, maybe, but I don't think he got to '12, but '9 for sure.

MS. JELENCHICK: I have no further questions. Thank you.

THE WITNESS: You're welcome.

THE VIDEOGRAPHER: The time is 6:16 p.m., and we're going off the record.

(Time noted: 6:16 p.m.)

_____

ALEX ASTILEAN

Subscribed and sworn to before me this _____ day of _____, 2018.

_____



C E R T I F I C A T E

STATE OF NEW YORK )
: ss.
COUNTY OF NEW YORK )

I, ANNELIESE R. TURSI, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

That the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of July, 2018.



ANNELIESE R. TURSI, RPR

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DEPOSITION ERRATA SHEET

US Legal Support No. 238882

Case Caption: Speedfit v. Woodway

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

Signed on the_____day of

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| Speedfit Exhibit 2, copy of United States Patent No. 9,114,276 | 14 |
| Speedfit Exhibit 6, document entitled Plaintiff's Supplemental Responses and Objections to Defendant's First Set of Interrogatories | 17 |
| Speedfit Exhibit 3, copy of the United States Design Patent No. D736,866 | 31 |
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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

| | |
|---|---|
| SPEEDFIT LLC and AUREL A. ASTILEAN,<br><br>Plaintiffs,<br><br>vs.<br><br>WOODWAY USA, INC.,<br><br>Defendant. | Case No. 2:13-cv-01276 (KAM) (AKT)<br><br>**NOTICE OF WOODWAY USA, INC.'S MOTION TO PRECLUDE THE TESTIMONY OF PLAINTIFFS' TECHNICAL EXPERT JAMES WHELAN** |

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PLEASE TAKE NOTICE that the undersigned attorneys for Defendant Woodway USA, Inc. ("Woodway") will move this Court before the Honorable Kiyo A. Matsumoto, United States District Judge, at the Brooklyn Federal Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, as soon as it may be heard, for (a) an Order granting Woodway's Motion to Preclude the Testimony of Plaintiffs' Technical Expert James Whelan and (b) such other relief as this Court may deem just and proper.

This Motion, made pursuant to Fed. R. Evid. 702 & 703, and Fed. R. Civ. P. 26 & 37, will be based upon the accompanying Memorandum of Law, the Declaration of Matthew W.

Peters and Exhibits, all prior pleadings and proceedings had herein, and such additional oral or documentary evidence as may be received prior to or at a hearing on this Motion.

PLEASE TAKE FURTHER NOTICE that, pursuant to the text-only June 17, 2018 Scheduling Order, any responsive briefing shall be served no later than August 1, 2018. Woodway's reply in support of its Motion to Preclude the Testimony of Plaintiffs' Technical Expert James Whelan shall be served no later than August 8, 2018. A complete set of Woodway's papers will be filed with the Court on August 8, 2018, and two courtesy copies will be provided to chambers.

Dated: July 11, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Matthew W. Peters, an attorney with Foley & Lardner LLP, hereby certify that on July 11, 2018, I caused the foregoing Notice of Woodway USA, Inc.'s Motion to Preclude the Testimony of Plaintiffs' Technical Expert James Whelan to be served by electronic mail upon counsel of record.

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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| SPEEDFIT LLC and AUREL A. ASTILEAN,<br>Plaintiffs,<br>vs.<br>WOODWAY USA, INC.,<br>Defendant. | )<br>)<br>)<br>)<br>) | Case No. 2:13-cv-01276 (KAM) (AKT) |

**WOODWAY USA, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO PRECLUDE THE TESTIMONY OF PLAINTIFFS' TECHNICAL EXPERT JAMES WHELAN**

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35 U.S.C. § 119(e)(1) ..... 11

35 U.S.C. § 256 ..... 2

America Invents Act ..... 25

**Other Authorities**

Fed.R.Civ.P. 26(a)(2)(B) ..... 9

Fed. R. Evid. 702 ..... 8, 9, 10, 25

Fed. R. Civ. P. 37 ..... 10

Plaintiffs Speedfit LLC ("Speedfit") and Aurel A. Astilean (collectively, "Plaintiffs") disclosed James Whelan as their technical expert in this case. For his opening report, Mr. Whelan conducted testing and purported to opine on whether the invention as described in the 2009 Astilean provisional patent application "was sufficient to allow one to make the invention as claimed" in U.S. Patent Nos. 8,308,619 ("the '619 patent") and 8,343,016 ("the '016 patent") (collectively the "Asserted Patents"). Seemingly this opinion was offered to support Plaintiffs' priority claim for the Asserted Patents, which Woodway USA, Inc. ("Woodway") challenges. However, Mr. Whelan's methodology and assessment are irrelevant to the priority determination. Because Mr. Whelan ignored binding Federal Circuit precedent which establishes the test for priority, any information and opinions that Mr. Whelan may provide on this subject will be unhelpful to the jury, particularly because his opinions directly contradict this Court's Claim Construction Order and underlying reasoning regarding "means for slackening."

Relatedly, Mr. Whelan's opinions rebutting Woodway's 35 U.S.C. § 102 challenges, which are grounded in the priority determination, are equally suspect. Mr. Whelan's Rebuttal Report addressing these significant issues was prepared in a single day. (Declaration of Matthew W. Peters ("Peters Decl."), Ex. A, at 121:7-122:7.) Not only did Mr. Whelan spend too little time,[1] but his study was limited to the specific handful of documents selected by Plaintiffs' counsel that do not show the facts in a fair light.

Because Mr. Whelan's opinions regarding priority, anticipation, and co-inventorship fail to meet the requirements for admissible expert opinion, they should be stricken. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

[1] Mr. Whelan testified that he spent a total of 9 hours preparing his opening report, including analysis. (Peters Decl., Ex. A, at 108:16-24.) He purportedly spent a total of 9.5 hours preparing his rebuttal report, including file review and research. (*Id.* at 122:8-13.)

## I. RELEVANT BACKGROUND

### A. The Parties' Claims and Defenses

Plaintiffs filed a complaint against Woodway in this Court on March 11, 2013, for a declaratory judgment that a patent application filed by Woodway, United States Patent Application No. 13/235,065, was invalid, and that it was entitled to damages for breach of contract. (Dkt. No. 1 at ¶¶ 31-59.) Thereafter, Plaintiffs amended the complaint three times and then supplemented it to address a standing issue involving Mr. Astilean's friend and former business partner, Dan Bostan. (Dkt. Nos. 18, 84, 125, & 150.)

Currently before the Court are Plaintiffs' claims alleging breach of oral, unsigned non-disclosure agreements, unjust enrichment, constructive trust, and infringement of the Asserted Patents. (Dkt. No. 150 at ¶¶ 57-81.) Woodway has counterclaimed for a declaratory judgment that these patents are invalid under 35 U.S.C. § 102, and if not invalid, Woodway seeks a determination that Messrs. Astilean and Bostan derived their claimed inventions in the Asserted Patents from at least Woodway engineer, Nick Oblamski.[2] (Dkt. No. 153 at Counterclaim ¶¶ 11-18.) According to Woodway, Mr. Oblamski should be identified as the sole or joint inventor of the '619 and '016 patents pursuant to 35 U.S.C. § 256. (*Id.*)

### B. The Asserted Patents

The Asserted Patents are directed to a curved, manual, motorless treadmill that discloses three specific "means for slackening" the running belt, or in other words, three different methods to keep the running belt in contact with the concave running surface. The '619 patent application was filed on October 29, 2010, and ultimately issued on November 13, 2012, with a single,

[2] At summary judgment or trial, Woodway will demonstrate that the Asserted Patents are invalid because at least the display of Woodway's Curve treadmill at the IHRSA tradeshow in 2009 and subsequent sales predate the effective filing date of the Asserted Patents, rendering them invalid under 35 U.S.C. § 102(a). Additionally, Woodway will demonstrate that Woodway employee, Mr. Oblamski, solely (or jointly) conceived of the inventions claimed in the Asserted Patents, giving rise to a 35 U.S.C. § 102(f) derivation defense and a 35 U.S.C. § 256 certificate of correction.

independent claim. (Dkt. No. 150-2 at cover, col. 4 l. 53-col. 6, l. 9.) Because the '619 patent was filed October 29, 2010, its critical date[3] is October 29, 2009, unless it is entitled to claim priority[4] to an earlier-filed patent application.

The '016 patent application was filed on November 1, 2010, two days after the '619 patent application was filed. (Dkt. No. 150-3 at cover.) The '016 patent is a continuation-in-part of the '619 patent application[5] and ultimately issued on January 1, 2013, with 17 claims. (*Id.* at cover, col. 6, l. 30-col. 8, l. 38.) The '016 patent's filing date is November 1, 2010, which means its critical date is November 1, 2009, unless it is entitled to claim priority to an earlier-filed patent application.

### C. Plaintiffs' Priority Claim to the '265 Provisional Application

In an effort to establish an earlier critical date, Plaintiffs contend that both the '619 and '016 patents are entitled to claim priority to an earlier-filed provisional patent application, U.S. Provisional Patent Application No. 61/280,265 ("the '265 Provisional Application"). The '265 Provisional Application was filed with the United States Patent Office by a patent attorney on November 2, 2009, (Dkt. No. 150-1 at cover), which means it has a critical date of November 2, 2008.

The disclosure of the '265 Provisional Application consists of little more than a single page of written description and a single, grainy photograph of what Plaintiffs refer to as the "Wooden Prototype." The '265 Provisional Application provides in its entirety as follows:

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[3] The "critical date" for determinations based on prior disclosures is one year prior to the filing of the patent application that led to the patent. *See Cummings v. Adidas USA*, 716 F. Supp. 2d 323, 330-31 (S.D.N.Y. 2010). For example, if an offer for sale occurs before the critical date, then the patent is statutorily barred and invalid. *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67 (1998.)

[4] The priority date (or "effective filing date") of a patent is vital because it is the central reference point to which the patent's validity must be tested against the "prior art." Prior art encompasses any matter that "was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention." *In re Enhanced Sec. Research, LLC*, 739 F.3d 1347, 1354 (Fed. Cir. 2014).

[5] A continuation-in-part adds new subject matter to the patent application that is not supported by the parent application. This new matter does not receive the benefit of the filing date(s) for the parent application(s), and this priority is decided on a claim-by-claim basis. *See X2Y Attenuators, LLC v. ITC*, 757 F.3d 1358, 1366 (Fed. Cir. 2014). Here, the application for the '619 patent and the '265 Provisional Application are the "parent applications."

# LEG-POWERED TREADMILL

## BRIEF DESCRIPTION OF SEVERAL VIEWS OF THE DRAWING

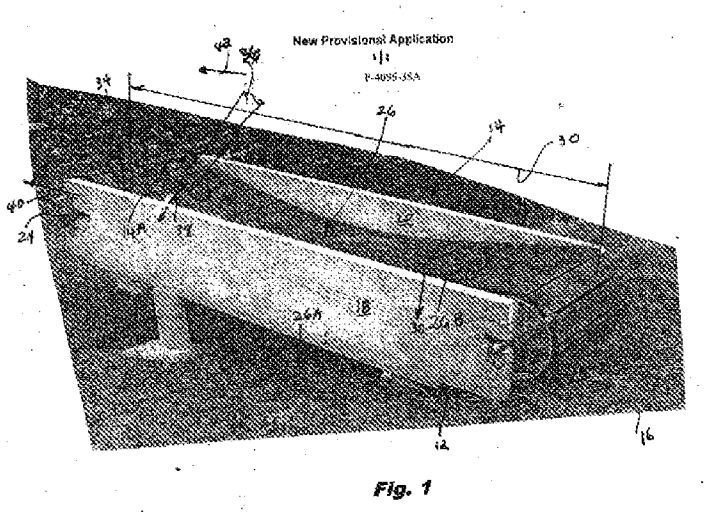
The description of the invention which follows, together with the accompanying drawing should not be construed as limiting the invention to the example shown and described, because those skilled in the art to which this invention appertains will be able to devise other forms thereof.

Fig. 1 is a perspective view of a leg-powered treadmill constructed and having an operating mode according to the present invention.

Illustrated are two leg supports 10 and 12 which lift the treadmill 14 in a clearance position above a support surface 16, said treadmill 10 having space apart sides 18 and 20 which have journalled for rotation end rollers 22 and 24 which support a closed loop treadmill belt 26. Springs (not shown) exert spring urgency in opposite directions holding taut the length of the lower belt portion 26A in a dimension of approximately twenty-three inches denoted by arrow 30 and in the upper belt portion 26B weighing approximately forty pounds, denoted by the arrow 30.

It is to be noted that an essential feature of treadmill 10 is a concave shape subtending an acute angle 34 in the treadmill 10 front end 14A which in practice results in the exerciser 36 running uphill and concomitantly exerting body weight 38 that contributes to driving lengthwise 40 in the direction 42 in which the exerciser runs and achieves the benefits of the exercise.

It is known from common experience that in prior art treadmills, the upper length portion of their closed loops are flat due, it is believed, because of the inability to maintain the concave shape 34 in the length portion 26B. The shortcoming is overcome by the weight 30 which in practice has been found to hold the concave shape 34 during the uphill running of the exerciser.




(Dkt. No. 150-1.)

**D. The Parties' Technical Experts**

On July 27, 2015, Plaintiffs served Woodway with Mr. Whelan's Opening Technical Report. (Whelan Opening Report, Ex. 1.) This report appears to be directed to the validity of the patents-in-suit and Plaintiffs' belief that the disclosure in the '265 Provisional Application "was sufficient to allow one to make the invention as claimed in two issued patents: United States Patent 8,308,619 B1 (Patent 619) and United States Patent 8,343,016 B1 (Patent 016)." (*Id.* at 3.) Mr. Whelan's opinion is based on a test rig that he developed. (*Id.* at 10-21.) More specifically, Mr. Whelan constructed two test models "constructed to be consistent with the description of the provisional patent application," three test models "constructed to be consistent with what was claimed and described in Patent 016 and described in Patent 619," and a "control model" that did not have a "means for keeping the belt taut when the top belt portion was unloaded." (*Id.*) In connection with his testing, Mr. Whelan did not inspect the physical prototype depicted in the photograph in the '265 Provisional Application. (Peters Decl., Ex. A, at 78:17-19.) Nevertheless, Mr. Whelan concluded that his models were "consistent with" this disclosure despite his concessions admitting at deposition that the '265 Provisional Application

lacked many elements claimed in the Asserted Patents. (*See, e.g.*, *id.* at 143:14-144:3, 151:13-154:25, and 161:13-162:8.) Mr. Whelan offered no definition for the relevant person of ordinary skill in the art. (*Id.* at 131:8-11; *see generally* Ex. 1.)

The same day Mr. Whelan's Opening Report was served, as Woodway has the burden of proof regarding invalidity,[6] Woodway served the Expert Report of Kim B. Blair regarding invalidity of the Asserted Patents. (Blair Opening Report, Peters Decl., Ex. B.) Dr. Blair opined on and defined the qualifications required of a relevant person of ordinary skill in the art in this case, which is pertinent to any invalidity analysis. (*Id.* at 7-8.) Dr. Blair also analyzed five prior art patents that are relevant to the art of curved manual treadmills. (*Id.* at 17-26.) In addition, Dr. Blair reviewed Woodway emails, deposition transcripts, and other documentation which established Mr. Oblamski's conception and reduction to practice of the Woodway Curve treadmill, which was displayed and offered for sale at the International Health, Racquet & Sportsclub Association ("IHRSA") in March 2009. (*Id.* at 31-35 and Exhibit B.) The treadmill displayed and subsequently sold at IHRSA is the same in all material respects as certain of the treadmills Plaintiffs accuse of infringement. (*Id.* at 35.)

As part of Dr. Blair's invalidity analysis, he reviewed the disclosures of the '265 Provisional Application and the Asserted Patents and opined regarding Messrs. Astilean's and Bostan's defective priority claim. (*Id.* at 26-37.) Based on the lack of disclosure in the '265 Provisional Application of later-added material in the Asserted Patents, Dr. Blair concluded that the Asserted Patents are not entitled to their priority claim. (*Id.*) Based on this priority determination, the IHRSA disclosure and Woodway's subsequent offers for sale was determined to be an anticipating event, which renders the Asserted Patents invalid. (*Id.*)

[6] A patent challenger, here Woodway, must ultimately demonstrate clear and convincing evidence to prove a patent is invalid. *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 100 (2011).

In addition to Dr. Blair's invalidity analysis in his July 27, 2015 report, Dr. Blair provided a Rebuttal Report to Mr. Whelan's July 27, 2015 report, on August 26, 2015. (Blair Rebuttal Report, Peters Decl., Ex. C.) In this second report, Dr. Blair reiterated his definition of a person of ordinary skill in the art and explained why the mere mention of "springs, not shown" in the '265 Provisional Application does not enable a person of ordinary skill in the art to create the "means for slackening" methods described in the Asserted Patents. (*Id.* at 2-4.) Additionally, Dr. Blair explained the fundamental flaws in Mr. Whelan's testing models, which, among other things, do not reflect the structures disclosed in the '265 Provisional Application and Asserted Patents. (*Id.* at 4-18.) Finally, Dr. Blair refuted Mr. Whelan's conclusions by pointing out evidence Mr. Whelan ignored in his Opening Report regarding Mr. Oblamski's conception and reduction to practice, entitling him to be named as an inventor. (*Id.* at 18-20.)

Plaintiffs also served a rebuttal report for Mr. Whelan on August 26, 2015, purportedly to respond to Dr. Blair's July 27, 2015 opinions. (Whelan Rebuttal Report, Ex. 2.) More specifically, Mr. Whelan opined that the "file material" suggested that Mr. Astilean conceived of the invention (and that Mr. Oblamski did not). (*Id.* at 12-13, 15-16.) Mr. Whelan also retread his priority assessment, and then summarily concluded that the IHRSA disclosure and offer for sale would not anticipate the Asserted Patents. (*Id.* at 11-12, 14-15.) Finally, Mr. Whlean commented on certain claim construction issues. (*Id.* at 13-15.) Significantly, Mr. Whelan did ***not*** offer any opinions on infringement, any prior art, or Plaintiffs' state law claims. (*See id.* at 17.)

Mr. Whelan was deposed on September 28, 2015. (Peters Decl., Ex. A at 1.)

## II. EXPERT TESTIMONY MUST BE RELEVANT, RELIABLE, AND TIMELY

As explained in Woodway's Memorandum in Support of its Motion to Strike Plaintiffs' Damages Expert David Wanetick, which is served contemporaneously with this Memorandum

and Motion, a court may permit an expert to offer opinion testimony only if such testimony (a) will assist the trier of fact, (b) is based upon sufficient facts or data, (c) is the product of reliable principles and methods, and (d) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. "Rule 702 governs the district court's responsibility to ensure that 'any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" *Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005) (quoting *Daubert*, 509 U.S. at 589); *see also CDR-Wantagh, Inc. v. Shell Oil Co.*, No. 07-CV-4497 DRH ETB, 2011 WL 795865, at *8 (E.D.N.Y. Feb. 28, 2011) ("The Second Circuit has articulated three inquiries that a district court must undertake as part of its gatekeeping function under Rule 702: (1) whether the witness is qualified as an expert to testify as to a particular matter," (2) whether the opinion is based upon reliable data and methodology and (3) whether the expert's testimony (as to a particular matter) will assist the trier of fact.") (internal citations and quotations omitted).

Testimony that does not meet the standard set forth in Rule 702 must be excluded. *See Nimely,* 414 F.3d at 396-97 (Courts in this Circuit " have previously stated that 'when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony.'"); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."); *Hill v. City of New York*, No. 03CV1283(ARR)(KAM), 2007 WL 1989261, at *5 (E.D.N.Y. July 5, 2007) (excluding expert testimony "because it is 'speculative and conjectural'") (quoting *Boucher v. United States Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir.1996)); *Great N. Ins. Co. v.*

*Power Cooling, Inc.*, No. 06-CV-874 ERK KAM, 2007 WL 4688411, at *18 (E.D.N.Y. Dec. 18, 2007) ("The glaring lack of reliable methodology and analysis cannot be overlooked and should not be permitted to be packaged as reliable expert opinion and delivered to the trier of fact."); *Byrne v. Liquid Asphalt Sys., Inc.*, 250 F. Supp. 2d 84, 88-89 (E.D.N.Y. 2003) (excluding proposed expert testimony on the grounds of relevance where the testimony did not relate to an element of Plaintiffs' claim); *Detwiler v. Offenbecher*, 728 F. Supp. 103, 139-40 (S.D.N.Y. 1989) (noting that, on summary judgment, a party may not rely on an expert opinion that "that is not based upon specific facts . . . or that makes unsupported assumptions or ignores important facts.").

Rule 702 is not the only requirement Plaintiffs must meet. For a party to use expert testimony at trial, expert opinions must be set forth in written reports as required by Fed. R. Civ. 26(a)(2)(B). Failure to timely disclose expert testimony undermines the very foundation of Rule 26 disclosure requirements. The Advisory Committee Note to Rule 26(a) explains, the expert's report "'is intended to set forth the substance of the direct examination' and 'should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.'" *CDR-Wantagh, Inc. v. Shell Oil Co.*, No. 07-CV-4497 DRH ETB, 2011 WL 795865, at *6 (E.D.N.Y. Feb. 28, 2011) (quoting Fed. R. Civ. P. 26(a) Advisory Committee Note). "The interest served by requiring the disclosure of expert opinions is self evident [sic]. It is to prevent unfair surprise at trial and to permit the opposing party to prepare for the expert's cross-examination. *Sandata Techs., Inc. v. Infocrossing, Inc.*, No. 05 CIV. 09546LMMTHK, 2007 WL 4157163, at *4 (S.D.N.Y. Nov. 16, 2007) (citations omitted) ("'locking' the expert witness into what Fed.R.Civ.P. 26(a)(2)(B) calls 'a complete statement of all opinions to be expressed and the basis and reasons therefor,' the opposing party knows exactly what she is facing.").

The court has discretion under Rule 37 that expert testimony that is not timely disclosed or not disclosed at all cannot be presented at trial.[7] *See In re Omeprazole Patent Litig.,* No. 00CV4467, 2002 WL 287785, at *5 (S.D.N.Y. Feb. 27, 2002) (precluding new opinions in supplemental reports served during the middle of trial); *see also Bristol–Myers Squibb Co. v. Rhone–Poulenc Rorer, Inc.,* 2000 WL 356412, at *2 (S.D.N.Y. Apr.2, 2000) (holding that "direct testimony by any expert witness at trial shall be limited to the contents of the Expert Report"); *Transclean Corp. v. Bridgewood Servs., Inc.,* 77 F. Supp. 2d 1045, 1061-62, 1064 (D. Minn. 1999) (striking a party's eleventh-hour expert report, characterizing it as "trial by ambush"); *Sandata*, 2007 WL 4157163 at *8 ("limiting [the expert] to the opinions expressed in the only report authorized by the Court.").

Plaintiffs have the burden to establish that their expert's testimony meets the criteria set forth in Rule 702 by a preponderance of the evidence. Fed. R. Evid. 702, 2000 Advisory Committee's Notes (citing *Bourjaily v. United States,* 483 U.S. 171 (1987)). This case is well into its fifth year of litigation, and it is too late now to give Plaintiffs a chance to opine on issues which they made a tactical decision to ignore. (*See* Peters Decl., Ex. A, at 114:4-11(stating that Plaintiffs' counsel had directed Mr. Whelan's opening report to be of "small scope.").) Because Plaintiffs are limited to the opinions and theories previously offered by Mr. Whelan, Plaintiffs cannot meet their burden under Rule 702. Mr. Whelan's opinions should be excluded.

## III. RELEVANT LEGAL AUTHORITIES

The invalidity of the Asserted Patents under 35 U.S.C. § 102(a) turns on whether the '265 Provisional Application supports Plaintiffs' priority claim. It does not. Instead, Mr. Whelan's

[7] The Second Circuit considers four factors when deciding whether to preclude untimely or previously undisclosed testimony: (1) the explanation for failure to comply with a discovery order, (2) the importance of the new evidence, (3) the prejudice suffered by the opposing party as a result of having to meet the new evidence, and (4) the possibility of a continuance. *Outley v. City of New York*, 837 F.2d 587, 590–91 (2d Cir.1988).

opinions, with insufficient factual support, defy binding Federal Circuit precedent that establishes how priority is to be determined.

In filing a new patent application, a patentee may claim "priority" to an earlier-filed provisional patent application, but '"only if the disclosure of the earlier application provides support for the claims of the later application, as required by 35 U.S.C. § 112.'" *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1306 (Fed. Cir. 2008) (quoting *In re Chu*, 66 F.3d 292, 297 (Fed. Cir. 1995)); 35 U.S.C. § 119(e)(1). Section 112 requires that the earlier-filed provisional patent application: (i) contain a "written description" of the invention; ***and*** (ii) enable the invention, which means that one reasonably skilled in the art could make or use the invention from disclosures in the patent coupled with information known in the art without undue experimentation. *Callicrate v. Wadsworth Mfg.*, 427 F.3d 1361, 1373 (Fed. Cir. 2005). This priority analysis is conducted on a claim-by-claim basis. *Novozymes A/S v. DuPont Nutrition Biosciences APS*, 723 F.3d 1336, 1345 (Fed. Cir. 2013).

**A. Written Description**

The written description requirement is met where the four corners of the application reasonably convey an understandable invention to those skilled in the art that shows the inventor actually invented the invention claimed. *Ariad Pharmas., Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (*en banc*). Merely establishing that a claimed feature would have been obvious to one of skill in the art reading the priority document does not satisfy the written description requirement. *Id.* at 1352. Indeed, entitlement to a filing date does not extend to subject matter which is not disclosed, even if obvious over what is expressly disclosed. *In re Huston*, 308 F.3d 1267, 1277 (Fed. Cir. 2002). "It is not sufficient for purposes of the written description requirement of § 112 that the disclosure, when combined with knowledge in the art, would lead one to speculate as to modifications that the inventor might have envisioned, but

failed to disclose." *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997); *see also L.A. Biomed. Research Inst. at Harbor-UCLA Med. Ctr. v. Eli Lilly & Co.*, 849 F.3d 1049, 1058 (Fed. Cir. 2017).

Where there are elements in the patent not present in the priority application, for priority to attach, the missing descriptive matter must necessarily be present in the original application's specification such that one skilled in the art would recognize such a disclosure. *Tronzo v. Biomet, Inc.*, 156 F.3d 1154, 1159 (Fed. Cir. 1998) (holding a claim invalid for failure to satisfy the written description requirement when the specification did not disclose all cup shapes literally or "inherently"); *TurboCare Div. of Demag Delaval Turbomachinery Corp. v. Gen. Elec. Co.*, 264 F.3d 1111, 1118-20 (Fed. Cir. 2001) (holding that to comply with the written description requirement the location of the spring must be actually or inherently disclosed; that the location may be obvious from the disclosure is not enough); *see also Martin v. Mayer*, 823 F.2d 500, 505 (Fed. Cir. 1987) (holding the written description requirement is "not a question of whether one skilled in the art might be able to construct the patentee's device from the teachings of the disclosure . . . . Rather, it is a question whether the application necessarily discloses that particular device") (emphasis in original). If each and every element of the claim at issue does not appear in the priority document's disclosure, the claim does not satisfy the written description requirement regardless of whether one of skill in the art could make or use the claimed invention. *See Ariad*, 598 F.3d at 1344 ("[I]f the claimed invention does not appear in the specification . . . the claim . . . fails regardless whether one of skill in the art could make or use the claimed invention").

The prior application need not use the same words to be entitled to priority. *See, e.g., Crown Operations Int'l, Ltd. v. Solutia Inc.*, 289 F.3d 1367, 1376 (Fed. Cir. 2002) ("[T]he

disclosure as originally filed does not have to provide in *haec verba* support for the claimed subject matter at issue."). "Identity of that which is described, however, is necessary: 'What is claimed by the patent application must be the same as what is disclosed in the specification . . . .'" *New Railhead Mfg., L.L.C. v. Vermeer Mfg.*, 298 F.3d 1290, 1296 (Fed. Cir. 2002) (quoting *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002)). "That is, the [earlier] disclosure must show [that the inventor] had invented ***each feature*** that is included as a claim limitation." *New Railhead*, 298 F.3d at 1295 (emphasis added).

Moreover, for the disclosure of a species (*e.g.*, a particular embodiment) in the earlier-filed application to support a later claim for the genus (*e.g.*, a group of structures) in the later patent, which appears to be the position Plaintiffs are taking in this case, the disclosure of a species must "clearly convey to one of skill in the art characteristics common to all species that explain how and why they make the invention operable." *In re Curtis*, 354 F.3d 1347, 1355 (Fed. Cir. 2004). For such an explanation to be clearly conveyed, there must be sufficient description of a representative number of species, by disclosure of relevant, identifying characteristics (*i.e.*, structure), by functional characteristics coupled with a known or disclosed correlation between function and structure, or by a combination sufficient to show the application disclosed the later-claimed genus. *Carnegie Mellon Univ. v. Hoffmann-La Roche Inc.*, 541 F.3d 1115, 1124 (Fed. Cir. 2008). The disclosure of a single species is rarely enough to support a later claim for an entire genus. *Combined Tactical Sys. Inc. v. Defense Tech. Corp. of Am.*, 589 F. Supp. 2d 260, 268 (S.D.N.Y. 2008); *see also LizardTech, Inc. v. Earth Res. Mapping, Inc.*, 424 F.3d 1336, 1346 (Fed. Cir. 2005).

**B. Enablement**

For enablement, patent protection is only granted in return for "an enabling disclosure of an invention, not for vague intimations of general ideas that may or may not be

workable." *Genentech, Inc. v. Novo Nordisk, A/S*, 108 F.3d 1361, 1366 (Fed. Cir. 1997) (in the context of the utility requirement, "[A] patent is not a hunting license. It is not a reward for the search, but compensation for its successful conclusion") (internal quotations omitted). And, a patent specification must enable the ***full scope*** of a claimed invention. *AK Steel Corp. v. Sollac*, 344 F.3d 1234, 1241 (Fed. Cir. 2003) (emphasis added). To constitute an enabling disclosure, "the specification of a patent must teach those skilled in the art how to make and use the full scope of the claimed invention without undue experimentation." *In re Wright*, 999 F.2d 1557, 1561 (Fed.Cir.1993). Illustrative factors that may be considered in determining whether a disclosure requires "undue experimentation" are: (1) the quantity of experimentation necessary, (2) the amount of direction or guidance presented, (3) the presence or absence of working examples, (4) the nature of the invention, (5) the state of the prior art, (6) the relative skill of those in the art, (7) the predictability or unpredictability of the art, and (8) the breadth of the claims. *In re Wands*, 858 F.2d 731, 737 (Fed. Cir. 1988); *see also Tailored Lighting, Inc. v. Osram Sylvania Products, Inc.*, 713 F. Supp. 2d 184, 193-94 (W.D.N.Y. 2010) (finding a patent invalid for lack of enablement where a person of ordinary skill in the art could only engage in trial and error in order to achieve the desired invention). A specification that lacks specificity regarding how a problem is solved, or one that merely restates general principles of the art, is not enabling. *See Harris Corp. v. IXYS Corp.*, 114 F.3d 1149, 1156 (Fed. Cir. 1997). Additionally, where a disclosure contains incoherent or inaccurate figures, it is more likely that a patent is not enabled. *See In re Hoffmann*, 558 Fed. App'x 985, 987 (Fed. Cir. 2014).

## IV. ARGUMENT

### A. Mr. Whelan's Opinions Cannot Establish Priority and Are Premised on a Misapplication of the Facts to the Law

Here, Mr. Whelan's Opening Report fails to offer any coherent opinions pertinent to the priority inquiry, and his Rebuttal Report does not dispute the underlying facts regarding the prior art disclosure and sales of Woodway's Curve treadmill at the 2009 IHRSA tradeshow in San Francisco. Rather, Mr. Whelan exclusively relies on an incorrect assumption that the '265 Provisional Application discloses the same material as the Asserted Patents. This assumption is premised on an unreliable methodology that: (1) fails to establish a definition of a person of ordinary skill in the art, which is required to make a validity determination under Supreme Court precedent; (2) ignores the written description requirement in its entirety; (3) conflates the test for enablement with a proper priority determination under Federal Circuit law; (4) does not separately assess anticipation; and (5) rests on incorrect application of the facts as determined by this Court's Claim Construction Order.

**1. Mr. Whelan repeatedly failed to identify, let alone establish, the relevant person of ordinary skill in the art**

Both infringement and invalidity are determined through the perspective of a person of ordinary skill in the art. *E.g.*, *Sundance Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1361 (Fed. Cir. 2008); *OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1402 (Fed.Cir.1997). Resolution of the level of ordinary skill in the art is required before either inquiry can be determined. *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17 (1966) (regarding an obviousness analysis, "the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; ***and the level of ordinary skill in the pertinent art resolved. Against this background***, the obviousness or nonobviousness of the subject matter is determined") (emphasis added); *In re Jolley*, 308 F.3d 1317, 1321 (Fed. Cir. 2002) (holding priority "must be proven by evidence showing what the inventor has disclosed to others and ***what that disclosure means to one of ordinary skill in the art***") (emphasis added);

*Chiron Corp. v. Genentech, Inc.*, 363 F.3d 1247, 1259 (Fed. Cir. 2004) (upholding jury instructions regarding the written description requirement that provided a challenger "can meet its burden of proving that an earlier application fails to satisfy the written description requirement is to show, by clear and convincing evidence, that the entirety of the specification of an earlier application would clearly indicate ***to persons of ordinary skill in the art*** that the invention described in that application is of a much narrower scope than the invention ultimately claimed in the [later issued] patent") (emphasis added). Exemplary factors that may be considered in determining the level of ordinary skill in the art include: (1) "the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field." *Daiichi Sankyo Co., Ltd. v. Apotex, Inc.*, 501 F. 3d 1254, 1256 (Fed. Cir. 2007) (internal quotations omitted).

Fatal to his opinions, Mr. Whelan fails to identify, let alone discuss, who is the relevant person of ordinary skill in the art in either of his reports. Mr. Whelan failed to provide any opinion regarding the appropriate level of skill in the art from which to view the claims of the Asserted Patents and prior art. In his Opening Report, Mr. Whelan did not define or explain the appropriate level of skill in the art, which was confirmed at his deposition. (*See generally* Ex. 1; Peters Decl., Ex. A, at 130:16-131:11.) Contrast Mr. Whelan's approach with that of Dr. Blair, who defined the relevant person of ordinary skill in the art in his Invalidity Report as follows: "one of ordinary skill in the art of designing manual treadmills would have a bachelor of science degree in mechanical engineering or at least two years of experience in the treadmill industry, including experience and knowledge of the design, construction, testing, and operation of manual treadmills." (Peters Decl., Ex. B, at 7-8.) After considering Dr. Blair's Invalidity Report, Mr.

Whelan still did not discuss or comment on a person of ordinary skill in the art in his Rebuttal Report. (*See generally* Ex. 2; Peters Decl., Ex. A, at 130:16-131:11.)

Mr. Whelan has completely failed to address a fundamental piece of any validity/invalidity (and infringement) analysis. Even when faced with this glaring deficiency at his deposition, Mr. Whelan refused to adopt Dr. Blair's definition of a person of ordinary skill for the purposes of his reports and opinions. (Peters Decl., Ex. A, at 131:4-132:20.) And, he could not even say whether one of the ***named inventors*** of the Asserted Patents is a person of ordinary skill in the art. (*Id.* at 130:16-133:9.) In fact, Mr. Whelan testified that he does not even know who the alleged co-inventor, Dan Bostan, is or any facts about him. (*Id.* at 90:14-15; 133:6-9.)

Under the circumstances, Mr. Whelan's opinions do not provide the trier of fact with any ability to determine the appropriate lens through which to evaluate the evidence regarding invalidity and infringement. It may well be that Mr. Whelan, a licensed patent agent, somehow understands certain claimed aspects of the Asserted Patents that were admittedly never disclosed in the '265 Provisional Application. For the jury, it is immaterial whether Mr. Whelan himself understands the disclosure of the '265 Provisional Application. The litmus test is whether the relevant hypothetical person of ordinary skill in the art shares that understanding. That Mr. Whelan was unwilling to do a basic task to determine the appropriate person of ordinary skill in the art renders all of his opinions regarding invalidity speculative and unhelpful. *See Aristocrat Techs. Austrailia Pty Ltd. v. Int'l Game Tech.*, 709 F.3d 1348, 1361 (Fed. Cir. 2013) (finding a district court properly disregarded an expert's opinion on claim construction where he failed to support his assertions "as understood by a person of ordinary skill in art"). These opinions should be excluded.

### 2. Mr. Whelan ignores the written description requirement

Mr. Whelan does no analysis and fails to provide any discussion or assessment of how the written description requirement is satisfied. *See New Railhead*, 298 F.3d at 1295. In fact, Mr. Whelan's review of the four corners of the '265 Provisional Application illustrates that there is insufficient written description to support a priority claim. Mr. Whelan conceded in his Opening Report that the '265 Provisional Application and the Asserted Patents disclose different "means" for purportedly keeping the lower belt portion taut. (Ex. 1, at 23-24.) During deposition, Mr. Whelan confirmed his position, admitting that the '265 Provisional Application does ***not*** disclose certain claim elements in the Asserted Patents. This, like the failure to identify the relevant person of ordinary skill in the art, is fatal to Mr. Whelan's opinions.

| Claim Limitation | Patent: Claim(s) | Mr. Whelan's Sworn Deposition Testimony | Citation |
|---|---|---|---|
| said parallel **slats attached to each other in a resilient fashion** | '619:1 '016:1-17 | Q. Where, if anywhere, does the 2009 provisional patent application disclose that the parallel slats are attached to each other in a resilient fashion?<br>A. That's structure is not disclosed in the original patent application. | (Peters Decl., Ex. A, 161:13-18.) |
| **timing belt** having respective **timing belt pulleys** attached to said front and rear pulley rollers for said closed loop treadmill belt | '619:1 | Q. Where, if anywhere, in the 2009 provisional patent application is a timing belt disclosed?<br>A. A timing belt structure is not disclosed in the provisional patent application.<br>Q. How about a timing belt pulley. Is that structure disclosed in the 2009 provisional patent application?<br>A. A timing belt – a timing belt pulley structure not disclosed in the provisional patent application. | (Peters Decl., Ex. A, 161:19-162:3.) |
| wherein **timing belt idlers** are used to configure said timing belt geometrically to | '619:1 | Q. What about a timing belt idler, is that structure disclosed in the 2009 provisional patent application?<br>A. That structure is not disclosed in the original patent application. | (Peters Decl., Ex. A, 162:4-8.) |

| Claim Limitation | Patent: Claim(s) | Mr. Whelan's Sworn Deposition Testimony | Citation |
|---|---|---|---|
| fit within constraints of side contours of said treadmill | | | |
| **said timing belt will not permit drooping down of said lower taut portion of said closed loop treadmill belt because all respective motion is synchronous** | '619:1 | Q. Does the Astilean 2009 provisional patent application use the word "synchronous"?<br>A. No, it does not. | (Peters Decl., Ex. A, 154:10-12.) |
| wherein each said slat … conform[s] to a concave row of **upper support peripheral ball bearings** located at each peripheral side of said upper portion of said motor-less, leg-powered curved treadmill | '016:1-17 | Q. Does the 2009 provisional patent application mention ball bearings at all?<br>A. I don't believe so. | (Peters Decl., Ex. A, 154:23-25.) |
| **means for slackening** | '016:1-17 | Q. Where is Figure 2 from the Astilean patents disclosed in the Astilean 2009 provisional?<br>A. Figure 2 is not disclosed in the 2009 provisional. Of course, we're worried about the claim, not worried about what's disclosed in the description.<br>Q. Where is Figure 3 of the Astilean patents disclosed in the 2009 Astilean provisional?<br>A. Figure 3 is not disclosed in the 2009 provisional. However, the main function of keeping | (Peters Decl., Ex. A, 151:13-152:24.) |

| Claim Limitation | Patent: Claim(s) | Mr. Whelan's Sworn Deposition Testimony | Citation |
|---|---|---|---|
| | | Q. Figure 4 of the Astilean patents. Where is this particular figure disclosed in the Astilean 2009 provisional?<br>A. Figure 4 discloses a upper concave belt with the lower belt portion taut, which is disclosed in the provisional patent application. Figure 4 also has rollers which are used to support the lower -- the lower belt portion. That -- the actual rollers themselves, that structure is not disclosed. And of | |

### 3. Mr. Whelan's enablement analysis is based on an unreliable methodology untethered to the requirements for evaluating priority

Mr. Whelan's near-exclusive focus on enablement is a distraction from the key issues in this case and is premised on an incorrect interpretation of the facts and the law. Even if Mr. Whelan is correct regarding enablement, which he is not, his conclusions are insufficient to establish any priority claim to the '265 Provisional Application as discussed above. A claim of priority to an earlier-filed provisional patent application must determine that the "disclosure of the ***earlier application*** provides support for the claims of the later application, as required by 35 U.S.C. § 112.'" *PowerOasis*, 522 F.3d at 1306 (emphasis added). Section 112 requires that the ***earlier-filed provisional patent application***: (i) contain a "written description" of the invention; ***and*** (ii) enable the invention, which means that one reasonably skilled in the art could make or use the invention from disclosures in the patent coupled with information known in the art without undue experimentation. *Callicrate*, 427 F.3d at 1373. Mr. Whelan needed to address ***both*** written description and enablement. He failed to offer any opinions on written description as discussed above. His enablement analysis is equally lacking as it is untethered to Federal Circuit law.

The only support for Mr. Whelan's enablement conclusion lies in his construction of test models that are purportedly "consistent with the description" in the '265 Provisional Application and Asserted Patents. (Ex. 1 at 10-24.) He does not say how long said "demonstrative testing"

took him or mention undue experimentation. (*Id.*) Mr. Whelan also does not identify the information he restricted himself to in order to show that the Provisional's disclosure was purportedly enabling. (*See id.* at 10-13.) Without additional support, Mr. Whelan, in his Rebuttal Report, states that the elements disclosed in the Asserted Patents "performed similar as the method disclosed" in the '265 Provisional Application. (Ex. 2 at 11-12.) But this analysis is unreliable because it does not address how or why: (1) a person of ordinary skill in the art; (2) would know how to make and use; (3) the full scope of the claimed invention; (4) without undue experimentation. *See In re Wright*, 999 F.2d at 1561. Indeed, Mr. Whelan does not mention ***any factor*** that would guide his analysis in making this determination. *See Tessenderlo Kerley, Inc. v. Or-Cal, Inc.*, No. C 11-04100 WHA, 2012 WL 2054994, at *4 (N.D. Cal. Jun. 5, 2012) (noting enablement requires an assessment from the perspective of a person of ordinary skill in the art and listing the *Wands* factors to analyze enablement). Finally, Mr. Whelan fails to address the complete dearth of disclosure made in the '265 Provisional Application, and the fact that the supporting figure of the Wooden Prototype is a grainy black and white photograph that does not disclose an interior view, where the "means for slackening" was allegedly achieved. *See In re Hoffmann*, 558 Fed. App'x at 987 (affirming rejection of a patent where the figure disclosed was erroneous and would force a person of ordinary skill to make corrections to the figures before experimenting).

The focus when assessing enablement is on what is disclosed in the priority document, not what is taught elsewhere. *See In re Ziegler*, 992 F.2d 1197, 1201 (Fed.Cir.1993) ("The how to use prong of section 112 incorporates as a matter of law the requirement of 35 U.S.C. § 101 that ***the specification disclose as a matter of fact*** a practical utility for the invention.") (emphasis added). In his Opening Report, Mr. Whelan admits to reviewing 275 color photographs, 7 color

drawings, and 49 photocopied drawings and photographs of the leg-powered treadmill that Mr. Astilean purportedly invented, (Ex. 1 at 3), materials that are clearly outside of the '265 Provisional Application. Mr. Whelan also admitted that the specific tension and leaf springs that Mr. Whelan used to create his models were not found in the '265 Provisional Application. (Peters Decl., Ex. A, at 143:14-144:3.) Because Mr. Whelan was intent on addressing the purported advantages of the problem allegedly solved by the invention as opposed to what was actually disclosed in the '265 Provisional Application, he did not even look to the Wooden Prototype itself to see if it in fact had any of the claimed elements. This is surprising since Mr. Whelan admitted that being able to inspect a physical specimen of a curved manual treadmill would have aided his analysis. (*See* Peters Decl., Ex. A, at 77:8-78:25.) Plaintiffs cannot credibly challenge that Mr. Whelan's models were based on knowledge acquired outside of the '265 Provisional Application, which is improper. *See Adang v. Fischoff*, 286 F.3d 1346, 1358 (Fed. Cir. 2002).

Mr. Whelan waves his hands further, claiming that Mr. Astilean possessed evidence of his claimed inventions simply because the Wooden Prototype might have had certain alleged functionality or addressed the same problem. This is not the standard.[8] *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997) ("It is not sufficient for purposes of the written description requirement of § 112 that the disclosure, when combined with knowledge in the art, would lead one to speculate as to modifications that the inventor might have envisioned, but failed to disclose."). The crux of Mr. Whelan's opinions seems to be that because the Asserted Patents "solve the same problem" as addressed in the '265 Provisional Application, there is priority for the Asserted Patents, and therefore, no anticipation. (*See* Ex. 2 at 14-17.)

[8] Mr. Whelan admitted at his deposition that he had not conducted either an invalidity or priority analysis before this case. (Peters Decl., Ex. A, at 73:19-74:7.)

This line of reasoning ignores the express requirement that the earlier application must disclose the same structure, not merely "solve the same problem" in order for priority to be proper. *See Tronzo*, 156 F.3d at 1159 (holding a claim invalid for failure to satisfy the written description requirement when the specification did not disclose all cup shapes literally or "inherently"). Because his analysis ignores the relevant legal standard, his opinions should be excluded as unreliable and unhelpful.[9]

Mr. Whelan's opinions addressing enablement are insufficient and cannot survive scrutiny. Mr. Whelan's opinions in his Opening Report should be struck in their entirety along with the same opinions that he offers again in this Rebuttal Report. (*See* Ex. 2 at 11-12, 14-15.)

**4. Mr. Whelan fails to separately assess anticipation**

Putting aside the misapplication of the priority determination, Mr. Whelan made no other attempt to address whether the Asserted Patents would be anticipated if they are not entitled to claim priority to the '265 Provisional Application. Indeed, in deposition, Mr. Whelan confirmed he is not offering any opinions on this issue. (Peters Decl., Ex. A, at 179:8-16.) It is too late now to allow Mr. Whelan to backfill his reports on a matter that has been part of this case since the beginning.

**5. Mr. Whelan's opinions are unhelpful because they are contrary to the Court's Claim Construction Order**

Mr. Whelan's conclusions regarding the '265 Provisional Application, (Ex. 2 at 11-15), are also based on erroneous assumptions of fact that were already rejected by this Court and can be similarly rejected here. The Court previously declined to adopt Plaintiffs' argument on claim

[9] Mr. Whelan relies heavily on the Manual of Patent Examining Procedure ("MPEP") in rendering his opinions. The MPEP is a guide used by patent examiners to determine patentability, not validity, and is not binding on this Court. *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 323 F.3d 956, 964 (Fed. Cir. 2002); *see also PowerOasis,* 522 F.3d at 1305 (noting that the United States Patent and Trademark Office does not make determinations of proper priority as a matter of course in prosecution). Because Mr. Whelan's opinions ignore the case law interpreting the patent statutes and establishing the requirements under the same, they should be excluded. *See Enzo Biochem*, 323 F.3d at 964.

construction that the '265 Provisional Application and the Wooden Prototype disclose the specific structure that purportedly accomplished the slackening function in the Asserted Patents. (*See* Dkt. No. 189 at 20; *see also* Claim Construction Hearing Tr., Peters Decl., Ex. D, at 15:8-18.) Further, this Court construed the phrase "means for slackening" in the '016 patent to mean the specific "means" disclosed in the Asserted Patents – Figures 2, 3, and 4. (*See* Dkt. No. 189 at 21.)

Mr. Whelan's conclusions regarding the appropriate construction of the phrase "means for slackening" directly and his underlying assumptions regarding what the '265 Provisional Application discloses directly contradict this Court's construction. As shown above, Mr. Whelan later testified that key elements were missing from the '265 Provisional Application, demonstrating the defects in his theory. (*See also* Peters Decl., Ex. D, at 27:9-30:6, 33:6-34:20.) If Mr. Whelan were allowed to assert the rejected premise that the '265 Provisional Application now supports the Asserted Patent's "means,"' the parties are back rearguing claim construction at further hearings. *See Applera Corp. v. MJ Res., Inc.*, 297 F. Supp. 2d 453, 455 (D. Conn. 2004) (regarding revisitation of claim construction, "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again") (internal quotation omitted). Such reargument has already been rejected once on the Plaintiffs' Motion for Reconsideration. (*See* the Court's text-only order of February 21, 2018 denying Plaintiffs' Motion.) The parties and this Court should not have to expend additional resources revisiting these contentions *ad infinitum*.

### B. Mr. Whelan's Opinions Regarding Derivation Are Not Based On Sufficient Facts

Mr. Whelan's opinions regarding 35 U.S.C. § 102(f) and improper inventorship, (Ex. 2 at 13), are not "based upon sufficient facts or data" "reliably applied the principles and methods to

the facts of the case." Fed. R. Evid. 702. Pre-AIA[10] § 102(f) (which applies to the Asserted Patents in this case), provides that a person shall not be entitled to a patent if "he did not himself invent the subject matter sought to be patented." S*ee also In re VerHoef*, 888 F.3d 1362, 1366 (Fed. Cir. 2018) (noting that, with respect to proper inventorship, "[a]n idea is definite and permanent when the inventor has a specific, settled idea, a particular solution to the problem at hand, not just a general goal or research plan") (internal quotation omitted). Not only does this opinion rest on the same faulty priority understanding discussed above, but Mr. Whelan failed to consider all the relevant facts.

Woodway has evidence, including testimony and documentation, that Woodway employee, Mr. Oblamski, is at least a coinventor of the Asserted Patents. (*See* Peters Decl., Ex. B, at 31-35 and Exhibit B.) However, Mr. Whelan, in the limited hours he spent in connection with his Rebuttal Report did not consider the entirety of this evidence before forming his opinion. (Peters Decl., Ex. A, at 122:8-13.) For example, Mr. Whelan did not review any deposition transcripts despite noting that more information would have been beneficial in making his analysis. (*Id.* at 90:16-91:14.) Additionally, the only nonpublic documents Mr. Whelan reviewed were those hand-selected by Plaintiffs' counsel, numbering approximately 10 documents, which do not include all of the documents Dr. Blair considered in reaching his conclusion that Mr. Oblamski was at least a coinventor. (*Compare* Ex. 2 at 3 *with* Peters Decl., Ex. A, at Exhibit B at 3-4.) Furthermore, Mr. Whelan did not interview either named inventor, Mr. Astilean or Mr. Bostan. (Peters Decl., Ex. A, at 89:5-9, 90:14-15.)

Relying on such incomplete information and ignoring the deposition transcripts completely in order to arrive at a convenient conclusion cannot satisfy the standards set by

[10] The America Invents Act ("AIA") was passed in 2011 and made a number of changes to the patent laws. Patents with an effective filing date falling on or after March 16, 2013 are governed by these changes. *See, e.g., Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2137 (2016).

*Daubert*. *See Cates v. Whirlpool Corp.*, No. 15-cv-5980, 2017 WL 1862640, at *15 (N.D. Ill. May 9, 2017) (noting an expert cannot simply ignore evidence contrary to his opinion); *see also Reed Const. Data Inc. v. McGraw-Hill Cos., Inc.*, 49 F. Supp. 3d 385, 400 (S.D.N.Y. 2014) (noting an expert may not ignore data points in order to make a conclusion stronger). Mr. Whelan's analyses and conclusions regarding §102(f) and what the file material does or does not suggest should be excluded. (Ex. 2 at 11-17.)

### C. Mr. Whelan's Opinions Are Not Relevant to Any Other Issues In This Case

Mr. Whelan's opinions from his Opening and Rebuttal Reports are irrelevant and will not assist the jury in determining whether the Asserted Patents are invalid. In addition, Mr. Whelan offers no opinions related to Plaintiffs' affirmative causes of action – patent infringement, breach of contract, unjust enrichment, and constructive trust – which is apparent from even a cursory review of his Reports. (*See* Exs. 1-2.) With respect to patent infringement, Mr. Whelan was unequivocal in his deposition that he is not providing any opinion on this issue. (Peters Decl., Ex. A, at 101:5-102:16.) Similarly, Mr. Whelan offers no opinions regarding the prior art. In fact, Mr. Whelan did not even do any prior art searching or review the references that Dr. Blair offered opinions on in his July 27, 2015 Report.[11] (*Id.* at 60:10-12; 85:25-86:7.) Because Mr. Whelan failed to opine on any of these issues earlier, Plaintiffs should not be allowed to offer expert testimony on these issues now.

## V. CONCLUSION

[11] Dr. Blair identified five prior art patents that may be relevant to the inventions claimed by the Asserted Patents: U.S. Patent Nos. 1,211,765 ("Schmidt"), 3,637,206 ("Chickering"), 3,624,279 ("Cutter"), 5,709,632 ("Socwell"), and 6,053,848 ("Eschenbach"). (Peters Decl., Ex. B, at 17-26.) Mr. Whelan did not review or address any of these prior art patents in his Rebuttal Report. (*See* Ex. 2 at 3.)

For the reasons discussed above, Mr. Whelan's expert reports should be stricken, and Plaintiffs should be precluded from relying on his opinion in any dispositive motion or from offering Mr. Whelan's testimony at trial.[12]

[12] Marked copies demonstrating the portions of the Whelan Opening and Rebuttal Reports that should be stricken are attached as Exhibits 3 and 4, respectively.

Dated: July 11, 2018

Respectfully submitted,

/s/ Kadie M. Jelenchick
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*Counsel for Defendant and Counterclaim-Plaintiff Woodway USA, Inc.*

**CERTIFICATE OF SERVICE**

I, Matthew W. Peters , an attorney with Foley & Lardner LLP, hereby certify that on July 11, 2018, I served an copy of the foregoing document via electronic mail upon all counsel of record.

/s/ Matthew W. Peters
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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| SPEEDFIT LLC and AUREL A. ASTILEAN, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | Case No. 2:13-cv-01276 (KAM) (AKT) |
| vs. | ) | |
| | ) | |
| WOODWAY USA, INC., | ) | |
| | ) | |
| Defendant. | ) | |

**DECLARATION OF MATTHEW W. PETERS**

I, MATTHEW W. PETERS, declare as follows:

1. I am an associate in the law firm Foley & Lardner LLP, counsel for Defendant Woodway USA, Inc. in this action. I submit this Declaration in connection with Woodway USA, Inc.'s Memorandum in Support of its Motion to Preclude the Testimony of Plaintiffs' Technical Expert James Whelan.

2. Attached as Exhibit A is a true and correct copy of an excerpt of the September 28, 2015 deposition transcript of Mr. James D. Whelan, P.E, which has been highlighted.

3. Attached as Exhibit B is a true and correct copy of the July 27, 2015 Expert Report of Dr. Kim B. Blair, Ph.D.

4. Attached as Exhibit C is a true and correct copy of the August 26, 2015 Rebuttal Expert Report of Dr. Kim B. Blair, Ph.D.

5. Attached as Exhibit D is a true and correct copy of an excerpt of the August 15, 2017 Claim Construction Hearing transcript, which has been highlighted.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 11, 2018
Milwaukee, Wisconsin

/s/ Matthew W. Peters
Matthew W. Peters

# EXHIBIT A

UNITED STATE DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| SPEEDFIT, LLC and AUREL ASTILEAN, | § | |
| Plaintiff, | § | |
| v. | § | Case No. |
| | § | 2:13-CV-01276 (KAM) |
| | § | (AKT) |
| WOODWAY USA, INC., | § | |
| Defendant. | § | |

Video Deposition of James D. Whelan

Richmond, Virginia

September 28, 2015

9:29 A.M.

Reported by:
Rosalynn "Roz" DiBartolo
Job No. 40998

Deposition of:
James D. Whelan,

A witness, called for examination by counsel for the defendant, pursuant to notice, at the offices of Beacon Forensic, P.C., 3900 Westerre Parkway, Suite 300, Richmond, Virginia, commencing at 9:42 a.m., before Rosalynn DiBartolo, a Court Reporter and Notary Public (No. 7507810) in and for the Commonwealth of Virginia at Large, when were present on behalf of the respective parties:



APPEARANCES:

ON BEHALF OF THE PLAINTIFF: SPEEDFIT, LLC and AUREL ASTILEAN

Law Office of John Vodopia, PC
191 New York Avenue
Huntington , New York 11743
By: JOHN F. VODOPIA, Esq.
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ON BEHALF OF THE DEFENDANT: WOODWAY USA, INC.

Foley & Lardner, LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
By: KADIE M. JELENCHICK, Esq.
kjelenchick@foley.com

ALSO PRESENT:
Ellen S. Hebert
Videographer



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THE VIDEOGRAPHER: Good morning, this begins the video deposition of James D. Whelan in the matter of SpeedFit, LLC and Aurel A. Astilean verses WOODWAY USA, Inc., in the United States District Court Eastern District of New York.

This deposition is being held at Beacon Forensic, PC, 3900 Westerre Parkway, Suite 300, Richmond, Virginia on Monday, September 28, 2015 at approximately 9:42 a.m.

My name is Ellen S. Hebert from the firm of David Feldman Worldwide. I am the legal video specialist. The court reporter is Rosalynn DiBartolo in association with David Feldman Worldwide.

Will counsel please introduce themselves.

MS. JELENCHICK: Kadie Jelenchick, with Foley & Lardner, LLP on behalf of the defendant, WOODWAY USA, Inc.

MR. VODOPIA: John Vodopia. John F. Vodopia PC, on behalf of the plaintiffs, SpeedFit LLC and Aurel Astilean.

THE VIDEOGRAPHER: Will the court reporter please swear in the witness.

THE COURT REPORTER: Sure.





6

Whereupon --
James D. Whelan,
a witness, called for examination by counsel having been first duly sworn or affirmed by the notary, was examined and testified as follows:
DIRECT EXAMINATION
BY MS. JELENCHICK:

**Q. Good morning, Mr. Whelan. I introduced myself earlier. I represent WOODWAY USA, Inc., in connection with the litigation that brings us here today.**

**As you are likely aware, in this litigation, Mr. Astilean and SpeedFit sued my client, WOODWAY.**

**Do you understand that?**

A. Yes.

**Q. Please state and spell your name.**

A. My name is James Daly Whelan, W-H-E-L-A-N.

**Q. What is your home address?**

A. I don't give out my home address on the record.

I'll give you my office address.

**Q. That's fine.**

A. My office address is 3900 Westerre Parkway, Unit 300, Richmond, Virginia, 23233.

**Q. Do you live in Richmond, Virginia?**

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A. I live in Henrico, which is 3 miles from here; so...

**Q. I'll be asking you a series of questions today while you are under oath. This is the same oath that you will make in court when you're testifying.**

**Do you understand that?**

A. Yes.

**Q. My questions and your answers will recorded by Ms. DiBartolo, the court reporter. You understand that you need to speak up and to answer orally in giving your responses today?**

**Do you understand that?**

A. Yes.

**Q. Ms. DiBartolo will not be able to record a nod or a shake of the head.**

**Will you agree to give verbal responses today?**

A. Yes.

**Q. I may ask a question that I don't state well or if for some other reason, you don't understand what I'm asking. If you don't understand my question or if you have any problems with the question, please tell me and I'll do my best to rephrase, ask a different question or, you know, or maybe even ask a new question in its entirety.**

**I'll assume, if you answer my question, you heard my question and understood my question.**

**Will you agree to that?**

A. Yes.

**Q. Also, when you're responding, please let me finish my question before you jump in with your response. I will similarly try to do the same.**

**We want to make today as easy as possible for Ms. DiBartolo, who can only take down one person speaking at a time.**

**Will agree to do that?**

A. Yes.

**Q. Should you need to take a break for any reason, please let me know. I just ask that you do not break while a question is pending.**

**Is that fair?**

A. Yes.

**Q. Do you understand these instructions?**

A. Yes, I do.

**Q. Is there anything about your health that may impact your testimony in any way today?**

A. No.

**Q. Have you taken any medication that might impact your testament in any way?**

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A. No, I've not.

**Q. Is there any other reason you cannot testify truthfully and fully today?**

A. No, there is not.

**Q. Do you understand that you've been subpoenaed to appear for a deposition today?**

A. Yes, I've seen subpoenas, correct.

(Whereupon, Whelan Exhibit 1 was marked for identification.)

BY MS. JELENCHICK:

**Q. You've just been handed what's been marked as Whelan Deposition Exhibit 1, which is entitled "Notice of Rule 45 Subpoena."**

A. Yes, I have.

**Q. Have you seen this document before?**

A. I believe I would have gotten this document in an e-mail from Jacob.

**Q. Do you recall when that was?**

A. I can look at my e-mails and find a date, if you want.

**Q. Approximately, do you recall when that was?**

A. Within in the last 3 months.

**Q. Was it in the last week?**

A. No, it was not.

**Q. Was it since you prepared your expert**

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was injured during unloading of a -- of piping. And I would have opined on the Federal Motor Carrier Safety Administration Rules and Regulations concerning truck driving procedures.

**Q. Looking at your testimony log, in particular the testimony that you -- the trial testimony that you gave on November 10, 2014.**

A. November 10, 2014.

**Q. Strozewski v Merkhoffer, et al?**

A. You got November -- you said November 10?

**Q. 2014. First page --**

A. Sorry -- sorry. Strozewski, thank you. I saw number 11. I forgot there was kind of back-to-back here. Okay.

**Q. Who engaged you in this matter?**

A. I'm trying to thinking (reads to himself) -- yep, I would have been engaged, if I recall, yeah, it was Momkus McCluskey, defense counsel.

**Q. Do you know how that matter resolved?**

A. It went to trial and -- my client went to trial. I don't know if it one is a defense verdict or a small -- I'm pretty sure my guy -- I know my client was happy with the case.

**Q. How about the next entry on the log: Guerrero v. Rosenthal on May 21, 2014? Who did**

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**you -- who engaged you?**

A. Also, Momkus McCluskey. And it was a trial and it was a defense verdict.

**Q. Okay. On the second page, January 24, 2013 Chubb National Insurance Company v Air Tech Services, who engaged you?**

A. Chubb. And Chubb was -- it was a subrogation case. So we're -- the insurance company is the plaintiff in that case. And that was a defense verdict. So we lost that case.

**Q. The next entry, Terrence Keenan v Kimberly Lea Pen on September 9, 2012, who engaged you in that matter?**

A. The defense, which was -- I guess, Kimberly Lea Pen and that was a defense verdict -- liability case.

**Q. On the third page, halfway down, 8/12/2010 Brandt v Party Express, et al, who engaged you?**

A. The plaintiff.

**Q. How was that resolved?**

A. I'm pretty sure that was a defense verdict.

**Q. So your client lost that case?**

A. Yes.

**Q. On the bottom of this page, May 12, 2009, Teakell v Six Flags Over Texas, who engaged you?**

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A. I was engaged by Thompson Co., I think is the name or Thompson Coburn were the defense attorneys for Chance Rides (phonetic) and it was a -- it was a win.

I know the -- I think the plaintiff was awarded -- they wanted like $33 million and they were awarded like $20,000, some very small number. My understanding was, based on that, then the defense -- they were going to somehow make an offer so the guy wouldn't refile again, to my understanding.

**Q. On the last page, October 26, 2008, Skezas verses Shirley Abram, who engaged you in that matter?**

A. It was defense. And it was a defense verdict.

MS. JELENCHICK: Why don't we take a break to change the tape.

THE VIDEOGRAPHER: This marks the end of Tape 1 in today's videotaped deposition of James Whelan. Going off the record. The time is 11:24 a.m.

(Whereupon, a break was taken off the record.)

THE VIDEOGRAPHER: This marks the beginning of Tape 2 of today's videotaped deposition of James Whelan. Going back on the record. The

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time 11:30 a.m.

BY MS. JELENCHICK:

**Q. Mr. Whelan, over the break did you have occasion to talk about the substance of your testimony with Mr. Vodopia?**

A. Yes. I just asked John, you know, how we're doing and do I -- have I maintained my composure and he was like, yeah, really good.

**Q. Anything else?**

A. No. I -- I said, I think she's -- Kadie is talking about my background quite a bit and we haven't really talked too much about the project. And he was like yep, discussed your background quite a bit. And then we went to the restroom.

**Q. Anything else?**

A. I shared with him that during my previous restroom break it was being cleaned so I couldn't use it. Anything else? That's about it.

**Q. Have you done a patent invalidity analysis before?**

A. No, I have not.

**Q. Have you done a patent validity analysis before?**

A. No, I have not.

**Q. Have you ever evaluated a patent priority**

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**claim before?**
A. I mean, nothing beyond -- beyond this, claiming a priority based on a provisional patent application.
**Q. Aside from this engagement, you've never done a priority evaluation, have you?**
A. No, I have not.
**Q. Do you understand the concept of priority in patents?**
A. Well, yeah. Priorities that are going to be -- you're claiming priority either based on a filing date or priority based to an invention. Like, people claim priority based on a foreign, like, a foreign patent application. And there are requirements if you're going to do that.
**Q. What's your understanding of a priority claim based on?**
A. It's -- let's say if you're going to do a priority claim based on a filing date.
So you're claiming priority to either a -- like, in this particular case, we're talking about the provisional patent application. And the utility had claimed priority to the provisional. And of course, we're talking about whether the -- at this point, in this particular case, whether the inventor

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has the invention or not.
**Q. Did your understanding of a priority claim come from your study for the patent bar exam?**
A. That and what I would have read.
**Q. What do you mean what you would have read?**
A. I get publications on patents. I'll read those. I would have read some -- some documentation in my file which I would have done research on.
But yeah, I mean that's -- that's the skill of where my knowledge would have come from.
**Q. Did plaintiffs' counsel advise you in any way in connection with evaluating a priority claim?**
A. No, they did not.
**Q. Did you ask them to?**
A. No, I did not.
**Q. How many days a week do you run?**
A. Am I a doctor, now or -- I don't run regularly. I run very irregularly.
**Q. You ran this morning, didn't you?**
A. This morning I ran, yeah.
**Q. How far did you run?**
A. I just did -- in the end, it was a little under 3 miles.
**Q. Do you ever run on treadmills?**
A. I have ran on treadmills. I don't like

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running on treadmills. And so I went through a period of when I was living in Chicago, in the winter running on treadmills, and I stopped. And I kind of got into more of calisthenics, that kind of stuff.
**Q. Do you own a treadmill?**
A. No, I do not.
**Q. So if you're running on a treadmill, it's at a health club?**
A. Well --
**Q. Or some other place?**
A. I have not ran a treadmill in probably 8 years, 7 years.
When I used to run on a treadmill, my condo building, my apartment building in Chicago, there was a gym. So I used to run on that treadmill in the winter. Prior to that, when I played football -- I played football at Lehigh University.
So in the winter, we would first run stairs. And if -- if the coach felt like you needed more running, he'd would put you on treadmill, you know, I'm just trying -- we would get up to -- the biggest thing with treadmills was -- you know, like I said, they were just trying to see how fast you could go.
**Q. Have you ever run on any WOODWAY treadmills?**
A. I don't know. I mean, I couldn't tell you

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what brand of treadmill I've run on.
**Q. Have you run on a nonmotorized treadmill?**
A. No, I have not.
**Q. Have you ever seen a nonmotorized treadmill in your life?**
A. No. I've only seen what's on the videos, you know, on YouTube and part of the file material.
**Q. Do you think it would have been important to inspect a physical specimen of the nonmotorized treadmill edition in this case to render your opinion?**
A. I wouldn't say it's important. I would have liked to have inspected one because I would have had more information. And more information is beneficial. But it wasn't necessary.
But it would have been nice, yes.
**Q. Did you ask to do any inspection?**
A. I did.
**Q. Why didn't do an inspection then?**
A. There was no -- I understand there's no real -- it was difficult to locate a treadmill, at least within my geographic region. And so I guess that it wasn't a requirement. So I said well, if I can get some videos, I can get an idea of how it works. I could do that.

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If you go on YouTube, there's some pretty good different reviews of the WOODWAY, SpeedFit, you know, treadmill.

**Q. So you didn't inspect a WOODWAY curved treadmill for the purposes of this litigation, did you?**

A. No. I only saw videos and drawings and prints.

**Q. How about the speed board? Did you inspect a speed board?**

A. No, nothing beyond videos and drawings.

**Q. Did you -- if I use the phrase "wooden prototype," do you know what I mean?**

A. I believe you're referring to the wooden prototype which was photographed in the provisional patent application.

**Q. Did you inspect the wooden prototype for the purposes of your opinion for this case?**

A. No, I just saw the photographs.

**Q. So you didn't inspect any --**

A. And video. Sorry.

**Q. So you didn't inspect any physical specimens of any nonmotorized treadmills in this case -- for this case?**

A. That is correct.

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**Q. What did you do to try and locate a WOODWAY curved treadmill for the purposes of inspection?**

A. I had asked plaintiff counsel if he knew where they were. And I checked my gym. I'm a member of a gym here called ACAC and they didn't have any manual treadmills.

So I did check there but I didn't start searching and, you know, doing a very thorough, thorough search to try and locate one.

**Q. Does your gym offer motorized WOODWAY treadmills?**

A. They may have. I can tell you the treadmills that were there were motorized and I was looking really for the curve. So they had motorized ones but I don't know who makes them.

I don't think they're WOODWAY because I know when this case came along I took a look and saw -- so they weren't WOODWAY. At least, I don't believe they were.

**Q. Does your gym have any nonmotorized treadmills?**

A. No, they don't. I mean not on the floor anyway. I could have asked the guy if they had one out back. But I can tell you they had nothing on the floor.

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**Q. Are you the named inventor on any issued patent?**

A. No, I'm not.

**Q. Are you the named inventor on any patent applications?**

A. No, I'm not.

**Q. Are you familiar with the patents at issue in this litigation?**

A. Yes, I am.

**Q. Have you read them?**

A. Yes, I have.

**Q. When you did you read them?**

A. In my office.

**Q. When?**

A. Oh, you say when? I'm sorry. When did I read them? I would have read them -- I mean, close to the date when I was retained on the case.

So I would have read them around -- around July 21, 2015. So maybe on that day or the day prior and of course, I would have read them again after that.

**Q. Did you read the Astilean patents before you agreed to be retained in this matter?**

A. I would have, yes.

**Q. How much time elapsed from when you were**

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**first contacted about this case to when you agreed to be engaged?**

A. I don't know. I mean it would have been less than -- less than 3 weeks. 'Cause I would have discussed the case with John, and I didn't hear anything for a few weeks and they said hey, we're going to retain you on the case and we want a report, you know. If you look at -- I was retained on the 21st and then a report was issued on the 27th. So it was pretty quick.

**Q. When were you first contacted by plaintiffs' counsel?**

A. It's not documented in my file, but I would guess around July, in the beginning of July, maybe the middle of July as well. I don't know.

(Whereupon, Whelan Exhibit 6; Whelan Exhibit 7; and Whelan Exhibit 8 were marked for identification.)

BY MS. JELENCHICK:

**Q. We're going to mark as Whelan Deposition Exhibit 6, the report that was served on July 27, 2014. And we'll mark as Whelan Deposition Exhibit 7, a copy of the report that was the served on August 26, 2015. And then we'll mark as Exhibit 8 a copy of your fee schedule as we previously discussed.**

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**You can actually set Exhibit 8 aside. But I thought for clarity sake we'll have it on the record.**

**All right. Are Exhibits 6 and 7, to your knowledge, true and accurate copies of the reports that you served in this case?**

A. Yes.

**Q. If you turn to page 3 of Exhibit 6, which is in your July report.**

A. I'm on page 3.

**Q. The first sentence under assignments says (as read): On July 21, 2015 Mr. John Vodopia contacted Beacon Forensic, PC (BFPC) to review file material concerning a leg-powered treadmill.**

**Did I read that correctly?**

A. Yes.

**Q. Is that the first time Mr. Vodopia contacted you in connection with this case?**

A. No. That would have been the official date I was retained, and the agreement was signed. I do know we had a prior conversation to that, but I don't know what date that it was? I don't really start -- I don't create a file until an order agreement has been signed. And so anything prior to that, I wouldn't have documented because I wasn't retained as an expert in this case.

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**Q. Do you have a copy of your engagement letter?**

A. Yes.

**Q. Is that your file?**

A. Yes, it is.

**Q. Can you tell what date it's dated?**

A. It should be July 21, 2015, but I'll check.

**Q. Who signed the engagement letter on behalf of plaintiffs? Was it plaintiffs' counsel? Or was it Mr. Astilean?**

A. It -- well, let me -- let me grab it first. So it's -- it is dated July 21, 2015. It's signed by John Vodopia. And actually, I guess John signed on July 23. I signed on July 24. And the actual date of sign is July 21.

**Q. Do you recall reviewing a protective order in connection with this case?**

A. Yes. I know that Jake would have sent me a protective order. I mean, right around when this was signed, 'cause I indicated I wanted to get some file material and he had said, you know, to do that everything has to be agreed upon by the other party.

And I don't think there's going to be enough time to get that done, you know, prior to the time the report being issued.

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But I have that in my files as well, a protective order, which I have reviewed.

**Q. Okay. Can --**

A. And I -- sorry. I think I reviewed it and I think I also signed it and had it notarized.

**Q. Can you tell what date you signed the protective order? Do you have that in your file that you could look at it and pull it out?**

A. No. I don't have it in my file. Because now that you say that, I don't recall putting it in there.

I'm going to guess it would have been around July 21. I mean it might be -- you know, it might be there. But I know the whole protective order is in there. And of course, I would have signed just like the last page and submitted it. And I think it would been in a sent e-mail. But I don't think I have it in my file.

I apologize about that.

**Q. So you read the Astilean patents shortly after you were contacted by Mr. Vodopia in this case --**

A. I would have --

**Q. -- is that correct?**

A. I would have read them prior to July 21. I

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would have glanced them over. You know, just kind of spent 8 to 10 minutes just looking at the claims, really more to just an idea of what the case was about.

**Q. How many times would you say you've read the Astilean patents?**

A. Greater than -- greater than three times each, each patent and the provisional application.

**Q. More than five times?**

A. Maybe. I can tell you with confidence greater than three.

**Q. More than ten times?**

A. Maybe. I can tell with confidence greater than three.

**Q. What's the magic with three?**

A. I can tell you with confidence I read it more than three. You know, I can give you four. But if we want to start guessing ranges, I can't go -- I really can't go greater than three. I probably could do greater than four, but I can tell you with confidence I read them more than three times.

**Q. Are you familiar with the phrase "prior art"?**

A. Yes.

**Q. Did you review any prior art to the Astilean**

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**patents?**
A. No. I mean, I reviewed material which could be considered prior art. But of course we're relying on the provisional application, so it wouldn't be considered prior art.
Nothing greater, like no printed publication or video greater than one year from the filing date.
**Q. Which specific references do you have in mind?**
A. Everything in my report. So it would have been the videos. I think it's really just -- it's just videos on the invention.
I can't think of anything else.
**Q. Are you aware that manual treadmills were available in prior art before the filing of the Astilean patents?**
A. I am aware they existed, yes.
**Q. Are you aware that manual treadmills were available in the prior art before the filing of the Astilean Provisional Patent Application?**
A. I am aware they existed, yes.
**Q. Are you aware that curved manual treadmills were available in the prior art before the filing of the Astilean patents?**
A. I was not aware, no.

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**Q. Have you reviewed any of WOODWAY's patents?**
A. I have reviewed the WOODWAY Provisional Patent Application concerning the curved, you know, treadmill nothing else per Oblamski.
**Q. So the March 17, 2009, Oblamski Provisional Patent Application appended to your expert report from July?**
A. That would be the one I reviewed, correct.
**Q. When did you review that?**
A. I don't know. It's looking like I would have reviewed that after issuing my -- my first report and prior to issuing my rebuttal.
**Q. Approximately how many times have you read Oblamski 2009 Provisional Patent Application?**
A. More than twice.
**Q. More than five times?**
A. Maybe. But with confidence I can say more than twice.
**Q. Did you review any other WOODWAY patents?**
A. No, I did not.
**Q. Did you review any other WOODWAY patent applications?**
A. No, I did not.
**Q. Were you asked to?**
A. No, I was not.

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**Q. Was it your idea or plaintiffs' counsel's idea to review Mr. Astilean's Provisional Patent Application?**
A. It would been provided to me as part of -- as a rebuttal.
So it would have been the -- well, I think I probably would have asked for it as well. But -- so I could see how it was built. I would have asked for it and if John would have thought it was a good idea, I review it.
**Q. Did you review the WOODWAY PCT application that claims priority to the Oblamski 2009 provisions?**
A. No. I've only reviewed the actual provision. I haven't seen any PCT applications.
**Q. Did you review any WOODWAY patents that claim priority to the Oblamski provisional?**
A. No, I have not. Are there any?
**Q. There are.**
A. There are. Okay.
I never reviewed them.
**Q. In your expert reports that were served in this case, you weren't offering any opinions with respect to any issued WOODWAY patents, are you?**
A. No. The scope of my report was focusing on the Astilean patents and the provisional patent

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application.
And then, in my second report the scope expanded a little bit, but it never got into any patents from --
**Q. Have you ever met Mr. Astilean?**
A. No, I have not.
**Q. Have you ever spoken to Mr. Astilean on the telephone?**
A. No, I have not.
**Q. Would you have liked to speak with him in connection in with the preparation of your expert reports?**
A. I mean he seems like an interesting guy. So that would have been interesting.
But, you know, my opinion is really based on the file material. It's based on the patents. It's based on the provisional application. So I really wouldn't want, you know, his input into this analysis, no.
**Q. So you don't think it's important to speak to one of the named inventors on the patent that are in issue in the litigation for the purposes of your report?**
A. No. Because the report is based on the file material. And the analysis is based on the

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provisional patent application and the issued patents.

Anything different than that, which is shared with Astilean, I mean it's just going to be reported to me. But it's not the basis of my analysis. 'Cause, you know, any case that I have, it's not unusual that I don't talk either with the inventor or with the people involved. It's based on the file material.

**Q. Have you ever talked to any of the inventors in any of your prior litigation consulting work involving patent?**

A. Yes, I have.

**Q. Have you met Mr. Boston?**

A. No. Who is Mr. Boston?

**Q. Did you review any deposition transcripts?**

A. Yes.

**Q. Which ones?**

A. Wait, deposition transcripts. Sorry. Believe I didn't. No, I've never read any deposition transcripts, none.

**Q. Would you have liked to read deposition transcripts for purposes of preparing your opinions in this case?**

A. If there is helpful information. I'm sure

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more information would have been beneficial. But it -- I guess it wasn't required for the amount of work I've done to this point.

**Q. Did you ask to review any deposition transcripts?**

A. Normally, when the case comes in and I talk with a client, I'll say -- you know, I want a copy of the file material in this case. I would ask for transcripts, that's sort of my normal introduction upon talking to the client, to review file material but none were provided.

**Q. So you asked for deposition transcripts in this case and none were provided to you?**

A. I would have asked, yes.

**Q. Do you recall specifically asking?**

A. I don't recall specifically asking. But I can tell you, generally, when a case comes in, it's like, hey, you know, normally we do this. You know, transcripts is one of the things I would said provide to me. Transcripts, complaints, any issued reports, any statements.

**Q. And is it fair to say that the only WOODWAY documents you reviewed are the specific WOODWAY documents identified on page 3 of both of your opening and rebuttal reports?**

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A. I would have also gone on the WOODWAY website, looked at the products. I don't believe I downloaded a specification sheet or anything like that. So whatever WOODWAY had on their website I would have reviewed as well. I didn't print anything out.

**Q. Okay. Who selected the material you were going to review for the purposes of preparing your opinions in this case?**

A. Well, I reviewed everything that was given to me. I don't know who selected them.

**Q. Someone other than you selected the materials for your review?**

A. Yes.

**Q. Do you believe it was plaintiffs' counsel?**

A. I have a strong suspicion it was plaintiff counsel, yes.

**Q. Specifically, which plaintiffs' counsel did you work with in connection with your engagement?**

A. I worked with John Vodopia quite a bit. And also Jacob Lewin. And I know there were two other attorneys. One of them was named Doug. I don't recall the name of the other gentlemen. And I would have had initial conversation with those two gentlemen. But since then, it's just been -- it's

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been Jacob and John.

**Q. Was Mr. Deccea, Tom Deccea, was one of the gentlemen?**

A. Tom, Tom Deccea, that's correct.

**Q. Douglas Robinson, was that --**

A. Yes.

**Q. -- the Doug that you are referring to?**

A. Yes. Douglas Robinson, correct.

**Q. Did you have conversations with anyone other than plaintiffs' counsel in the preparation of your expert reports?**

A. I don't think so. Do the invoices here real quick.

No.

**Q. How many conversations would you say you had with plaintiffs' counsel in the preparation of your opening expert report?**

A. All conversations prior to the issuing of the first report, correct?

**Q. Correct.**

A. All right. I would have had, I think, three conversations in total. And one conversation being the conversation I had prior to being retained. Another conversation on July 21, 2015. And then I would have had a conversation with John on July 27,

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this case or normally -- many times when you're working for a smaller entity such as in this case, I'm being retained by John, but obviously Mr. Astilean is the person who is financing the case. So there will limited funds.

So you always want to make sure you get paid prior to doing the work and, of course, anything which isn't used, it's returned.

**Q. You're concerned with a plaintiffs' financial wherewithal to cover your expenses?**

A. Well, not necessary as concerned with Mr. Astilean, it's for all plaintiff -- all plaintiff work that I do, I always require retainer.

And it's something I would have learned working at SEA. And it's a business practice which is used by a lot of engineers and experts. And I continue to use it with my own firm.

**Q. Has the $5,000 retainer been exhausted?**

A. Yes.

**Q. Who specifically retained you? Was it plaintiffs' counsel or was it Mr. Astilean or SpeedFit?**

A. Specifically -- it's John, Mr. Vodopia, he retained me.

**Q. May I see a copy of the engagement letter?**

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A. Sure. It's two sides, there.

MR. VODOPIA: I can get you a copy of that if you want a copy.

MS. JELENCHICK: We'll get some copies, I think. Why don't we take a break to do that.

THE VIDEOGRAPHER: Going off the record. The time is 12:00 p.m.

(Whereupon, a break was taken off the record.)

(Whereupon, a lunch break was taken off the record.)

THE VIDEOGRAPHER: Going back on the record. The time is 13:23 p.m.

BY MS. JELENCHICK:

**Q. Mr. Whelan, did you have occasion to discuss the substance of your deposition testimony over the lunch hour?**

A. Yes.

**Q. What did you discuss, specifically?**

A. Discussed -- we talked about how to -- to this point the deposition has been a lot of, you know, background information. We really haven't gotten into the project yet, kind of somewhat like the previous discussion. We talked about obviously where we went, where go to lunch. We went to

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Tarrant's for lunch. We then talked about stuff outside of this case. It's about family and Irish background and that kind of stuff.

**Q. But nothing else related to the substance of you deposition testimony?**

A. Nothing else, nothing else in the case that I can think of, no.

(Whereupon, Whelan Exhibit 8-A was marked for identification.)

BY MS. JELENCHICK:

**Q. I'd like to mark as Deposition Whelan Exhibit 8 the document entitled "Project Information Sheet."**

A. It's a two-page document?

**Q. Right. What is Whelan Deposition Exhibit 8?**

A. This is my project information sheet and agreement for work to proceed.

**Q. Is this your engagement letter for this matter?**

A. It will be, yes.

**Q. You signed the engagement letter agreement on July 24th, 2015; is that right?**

A. Yes.

**Q. Under the heading "Scope of Project," it states (as read): Consult as to the reported**

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**infringement of the leg-powered treadmill and subject patent.**

**Did I read that correctly?**

A. That is correct.

**Q. Did you offer any opinions with respect to infringement in either of your expert reports?**

A. No. The scope would have been much more narrowly defined -- you know, after the engagement -- after the project information sheet was signed.

**Q. So you were asked to consult with respect to infringement but you did not provide any opinions with respect to infringement, did you?**

A. That was the initial scope of the project. What I was actually asked to do on the project would have been -- and I'm just going to read from the scope of my first report (as read): Was to determine if the invention as described in the provisional patent application was sufficient to allow one to make the invention as claimed in two issued patents.

And of course, I referenced the Patent '619 and Patent '016.

**Q. Where were you reading from?**

A. On my -- on the first report, which was issued on July 27, 2015, page 3 under Assignment, second paragraph. If you look on your copy, it's

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like the -- you have the first purple highlight, that paragraph.

So that was the eventual scope of the project. And then, with the rebuttal report, the scope was expanded a little bit. I would have touched on, like conception of invention and talking about needs plus functions, talking about priority, talking about one or two rejections. But the actual original scope of infringement of leg-powered treadmill and subject patents, in the end that was never asked.

**Q. So in your expert reports you didn't offer any opinion on whether any of WOODWAY's treadmill products infringed any claim of the Astilean patents, did you?**

A. Correct.

**Q. On the second page of the engagement letter, the last sentence which is in a different font, states (as read): Added on 7/24/2015 per e-mail to client, no work would be done by you (Beacon Forensic) unless you had an advance waiver (sic).**

A. Retainer.

**Q. Excuse me, retainer.**

**Who added that annotation?**

A. I added the annotation at the request of

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John.

**Q. Why did you add it?**

A. John asked me to add the annotation to the work agreement.

**Q. What was the purpose for the annotation?**

A. John asked me to add it. He wanted to make sure I had a retainer before any work was done.

**Q. Was there some concern about your payment in this case? Is that why it was added?**

A. No. I can tell you I would have spoke with them, it was plaintiff case. I would have said we work on -- I work on retainer only. And John asked me to add that onto the agreement for work to proceed.

**Q. What I'd like to mark as Whelan Deposition Exhibit 9 is the collection of your invoices.**

**(Whereupon, Whelan Exhibit 9 was marked for identification.)**

BY MS. JELENCHICK:

**Q. What is the Whelan Deposition Exhibit 9?**

A. These were invoices for this the project.

**Q. And these are all invoices you have sent to plaintiffs' counsel to date; is that correct?**

A. Correct. Yes, it is.

**Q. Let's flip to the second page of Deposition**

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**Exhibit 9.**

A. Okay.

**Q. It indicates that you first began working on this the matter or -- withdrawn.**

**On page 2 of Deposition Exhibit 9, it indicates that you first began tracking time for your work in this case matter on July 24, 2015; is that correct?**

A. That's correct.

**Q. Do you know when opening expert reports were due in this case?**

A. My understanding was the date my report was issued. So that would be July 27, 2015, not a lot of time.

**Q. Do you wish you had more time?**

A. I mean, it worked out well. More time is always preferred. I can tell you they were lucky that I was kind of able to do in that amount of time. So it was possible to get another job in there. I had to work over the weekend to get it done; so...

**Q. Is Whelan Deposition Exhibit 9 a true and accurate reflection of the amount and type of work you did in connection and your expert engagement in this matter?**

A. Well, everything up to the invoice, right.

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I've done additional work since the last invoice, which is preparing for this deposition. And that's about it.

**Q. Is it fair to say that you first began drafting your report on July 27, 2015?**

A. I wouldn't have -- the analysis section of the report would have been done on July 27, 2015. But as I'm -- especially a case like this where, you know, a report is going to be issued 5 days later.

Like once I began reviewing file material, I would have opened a Word document, I would have added that to the report as I'm -- as I'm going along. So this -- the report would have been generated, you know, starting on July 24. But the final analysis section would not have been completed until July 27, 2015.

**Q. When did you first begin typing up your opening expert report which was served on July 27, 2015?**

A. Most likely on July 25, 2015 when I started with the engineering analysis. That's going to be, you know, summarizing the patents, for instance.

**Q. What else does that include?**

A. I can't tell you exactly date by date. But I can tell you, you know, prior to getting the to

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analysis section, I would have listed a -- I would have defined my assignment; I would have written down documents which were reviewed. So as I get a documents, I would have added to my list I'm reviewing such-and-such document.

The report has sections under, you know, provisional patent application and Patent '619 and Patent '016 so whatever I would have noted from those patents would have been written in the report at that time. There's a testing section, so after I would have completed a testing and processed the photographs, I would have written that in the report and it's quite possible during testing, I may have added a few lines on the report of how that was going along.

And if there's anything else, you know, I apologize for not mentioning it.

**Q. Who drafted your opening expert report?**

A. I wrote the report.

**Q. Did anyone help you?**

A. No one helped me.

**Q. Did plaintiffs' counsel suggest any inclusions into the expert report?**

A. No. Plaintiff counsel, really John and I discussed the report. And we're talking about, you

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know, time and constraints and so the scope of the report was limited. So the scope would have been suggested by John which we're going to focus on the provisional application and the patent applications.

**Q. When you say patent applications, you're talking about the --**

A. I'm sorry, patents. I apologize, patents.

**Q. So when you say provisional patents, you're talking about Mr. Astilean's 2009 provisional patent application?**

A. If that's when the date was, yes.

**Q. When you were referring to patents.**

A. Yeah, it's -- I'm sorry, 2009, yeah.

**Q. And when you were referring to patents, you were speaking of the two patents at issue in this litigation, correct?**

A. Correct.

**Q. The '619 and the '016 patents; is that true?**

A. Yeah, that's correct.

**Q. How time did you spend working on your opening expert report?**

A. Well, I can tell you -- I mean, I have here prepare report 3.18 hours on July 27th.

But you can see on July 25th and July 26th I would have spent, you know, 3.4 hours and 6.8 hours.

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I would have also been writing that report at that time.

**Q. So on July 25 and 26, relating to your work associated with the quote/unquote "text fixtures," is that the amount of time you spent in connection with the testing portion of your opening report, which begins on page 10 and --**

A. It's really --

**Q. -- runs through page 21?**

A. It would include that time. It says testing and analysis. So also I would have done some analysis as well. So it could have been -- I mean, I also may have summarized some documents.

It's possible that was included in that chunk of time.

**Q. So collectively, how many hours did you spend working on your opening expert report?**

A. I mean, I can't break it out. But I can add up all the time and I can tell you it was spent doing the entire thing.

The report -- let's see here. Opening expert, I'll give you an estimate. I'm going to say close to 9 hours. Part of that is including the analysis, of course.

**Q. How many drafts of the opening expert report**

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**do you have?**

A. Well, I only this document. So I'm -- I would have gone through, I would have read it. I would have added portions to it.

Normally after, I would write a certain section, or I'd be working on something else, I'd go back to that section and just reread it to make sure it was clear. I then -- there only would have been like one official. It may say draft that came out prior to this and that would have been what I shared with Mr. Stobbe.

**Q. So you saved your work over the top of your previous work?**

A. Yeah, I just, you know, save and save and save, you're adding to it and saving some more.

**Q. Did you save as a different version when you conducted that process?**

A. No. It's just saved as one copy.

**Q. Were there any assumptions that you relied on in the preparation of you opening expert report?**

A. Like I said, it's somewhere in here. I was told that if anything was reported to me, then that would have been the assumption given me to somebody else and I would have relied on. Otherwise if it's not in here, I can't think of any assumption I was

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**Astilean patents?**
A. Correct. I've not written a report with this exact scope before, no.
**Q. Did you have any questions about the scope of your assignment for Mr. Vodopia?**
A. No. It was very clear. The original scope was quite broad and we only had a handful of days to do it. So I said, John, there is no way we can kind of do everything. So John had spent some time and he said, you know what, we'll have you just work on the small scope.
**Q. What instructions, if any, were you given for writing your opening expert report?**
A. None. This is it.
**Q. You weren't given any particular methodologies to implement in doing your analysis for the opening report?**
A. No. I mean this report format, I mean this is a typical Beacon Forensic report. This is also very similar to what I would have written at SEA. So I mean the outlines and everything else. This is a typical format you'll get from my firm, which is only me. I'm working on that.
**Q. Let's turn to you rebuttal report which is dated August 26, 2015. What specifically were you**

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**asked to do in connection with you rebuttal report?**
A. I was asked to look at the report of Dr. Blair. And there was a couple -- you know, say the broader scopes I was asked to touch on or to opine on.
**Q. What were those broader scopes you were asked to opine on?**
A. I'm just going to review the report real quick to refresh my memory.
I was asked to provide an opinion as to the main conclusions in Dr. Blair's report which I would have provided.
**Q. Anything else?**
A. Yes. I believe so. I was asked to talk about what documentation states concerning the conception of invention by Mr. Astilean. And that would have included relying on videos and additional e-mails shared with me between Mr. Astilean and Mr. Oblamski.
**Q. Anything else?**
A. As part of looking at conception, I was asked to also review a purchase order from McMaster-Carr. I was asked to talk about a -- a needs plus function and structure and limiting the claims. I mean everything is in the report. If

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there's anything else, I apologize for not mentioning it. That should cover it.
**Q. Who established scope of the assignment for the rebuttal report?**
A. The scope would have been defined over a conference call.
There's a conference call on the August 25, 2015. I remember Mr. Vodopia was on there, Mr. Lewin was on there. I know either one of the other -- at least one or both of the other two attorneys in Jacob's firm were on there as well. And during the call I have stated, you know, for a rebuttal report of looking at of providing a -- opinions to the main conclusions. And then as well as providing the opinion on the main conclusions, I think John and Jacob had discussed they wanted me to opine on a few other matters, such as conception and talking about the needs plus function and the needs plus claim function having to mention structure.
**Q. All of the opinions that you're offering in rebuttal to Dr. Blair's report are included in your rebuttal report, correct?**
A. Yes. I haven't been asked to go beyond that scope. They might ask me after this. But as of now, I haven't been asked anything else.

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**Q. What instructions, if any, were given for writing your rebuttal report?**
A. It was, like I said, I was going to provide a rebuttal based on his -- his main conclusions. I indicated that I do -- I'll use the MPEP reference manual, the base of those conclusions. That would have come from me. And like I said, John had asked me to opine on conception and also discussing the needs plus function.
**Q. So it was your suggestion to use the MPEP in your rebuttal?**
A. It is my suggestion, yes.
**Q. Why did you suggest using the MPEP?**
A. It's the basis for -- for at least patent law within my scope. I familiar with the MPEP. I'm not an attorney, I'm not familiar law or case law.
**Q. You'll agree with me that the MPEP is used to help guide patent examiners in determining whether particular claims are patentable, correct?**
A. Correct. It is for guiding patent examiners and also patent agents. It's written in the front of the book - define a scope.
**Q. In what circumstances, if any, does a judge in a patent litigation use the MPEP?**
A. I don't know.

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**Q. How about a jury, in what circumstances, if any, would a jury use the MPEP in a patent litigation?**
A. I don't know.
**Q. Did you ask plaintiffs' counsel how the MPEP is used in connection with a patent litigation?**
A. No, I did not.
**Q. Do you think that would have been a prudent thing to do?**
A. No. I mean you guys are the attorneys, you handle the law. I'm the engineer, I handle the science.
**Q. Have you heard the phrase "burden of proof"?**
A. I have had it before, yes.
**Q. What does that mean?**
A. Well, I can tell you from my experience being an engineer and working as an expert witness, but of course this is not the legal definition, so I get it from -- you know, the official definition from somebody else, but my understanding of burden of proof in particular, many times I'm working defense cases, we always say the plaintiff has a burden of proof to prove its case and so I can say from a defense standpoint, you know, when we're doing an analysis, I'll talk with the client and I'll say

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listen, we can do this, but this might prove the plaintiff's case for him. And they'll say, well, you shouldn't do that, it's the plaintiff's burden of proof to prove their case. It's not the job of the defense. So my understanding of it is, it's -- burden of proof means it's the plaintiff's job to prove their case. That is all I know about it.
**Q. What does the MPEP tell us, if anything, about the burden of proof in this particular case?**
A. I'm not sure the MPEP addresses burden of proof.
**Q. How did you decide which sections of the MPEP to cite to in your rebuttal report?**
A. I understood straightforward, you know, I think Dr. Blair had gone through like, you know, different one or two rejections. So if you just go to the MPEP and, you know, one at 2A, one at 2B, one at 2C, it's all laid out.
**Q. Did Dr. Blair cite the MPEP in his opening report?**
A. Dr. Boyer?
**Q. Blair?**
A. Dr. Blair? I don't believe he did cite the MPEP. I mean he cited, you know, stuff from, because he cited one or two rejections. So it would be in

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there. I don't recall -- I don't recall him citing specific pages.
**Q. Are you familiar Title 35 the of the United States Code?**
A. I'm familiar with it, yes. And what is -- what is Title 35 of the United States Code. It's the basis of the law.
**Q. Do you recall whether Dr. Blair cited to Title 35 of the U.S. Code in his opening report?**
A. I don't recall, but he may have.
**Q. Were there any assumptions that you relied on in your rebuttal report?**
A. If there were, it reportedly is written in my rebuttal report and that was an assumption given to me that I relied on.
**Q. Who wrote your rebuttal report?**
A. I wrote my rebuttal report.
**Q. Did anyone else contribute to your rebuttal report?**
A. Nobody else contributed to my rebuttal report.
**Q. Plaintiffs' counsel didn't have any suggestion inclusions to the rebuttal report?**
A. Plaintiff counsel did talk with the scope of the report.

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**Q. And when was that?**
A. The scope of the report was discussed during a conference call.
**Q. So that was that August 25th, 2015 conference call?**
A. Correct. Yeah, August 25th.
**Q. Did you begin working on your rebuttal report before August 25th?**
A. I mean, nothing beyond reviewing Dr. Blair's report. That was about it.
**Q. Do you know when rebuttal reports were due to be exchanged in this case?**
A. I don't recall -- I'm pretty sure they were due pretty close to when I finished my report so I'm going to say they were due -- they were due around August 26, 2015.
**Q. Do you think it would have been prudent to begin working on your rebuttal report more than one day before it was due?**
A. I can tell you it was preferred. More time is better, but there was sufficient time to write the report.
**Q. Why did you wait until August 25th to begin working on your rebuttal report?**
A. I didn't wait until August 25th. Kind of

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the scope of the report was defined by the client on August 25th. So if they called me a week earlier, I probably would have started working a week earlier.

**Q. Do you know why they waited?**

A. I do not know why they waited. I can tell you it was not unusual for clients to do this. But it happens.

**Q. Approximately how much time did you spend in preparing your rebuttal report?**

A. Six and a half hours preparing the report plus three. So about nine and a half hours writing the report. And that would include file review, research, and anything else.

**Q. On the last page of Whalen Deposition Exhibit 9 it indicates that $2,364 is outstanding?**

A. Yes.

**Q. Has that amount been paid?**

A. It has been -- yeah, it has been paid. I received a check.

**Q. When did you receive a check?**

A. I got the check for this yesterday.

**Q. If you will look at your job file, which we'll mark as Deposition -- Whalen Deposition Exhibit 10.**

**(Whereupon, Whelan Exhibit 10 was**

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**marked for identification.)**

A. Okay.

**Q. Can you describe for me what Whelan Deposition Exhibit 10 is?**

A. Yeah. These are just kind of my job notes. So it would have been the -- you know, after I have a phone call, I jot down, mention what it was about. I keep in here my contact info for my clients so I know their phone numbers and that's going to be about it.

**Q. So there's a notion for August 25th, 2015, call with John Jacob. Is that the phone conversation that you had with plaintiffs' counsel that outlined the scope of the assignment for your rebuttal report?**

A. Yes.

**Q. So specifically it mentions 112 paragraph F, means recycling, main point refute PP90 and 91. Cover the claim construction PP94 through 99, 99, 96 and 97. Look at Oblamsky provisional application. Discuss the sync system. Concept was already there as demonstrated. Boyer's report does not support that Oblamsky does not establish that it was Oblamsky and Vinton.**

**Did I read that correctly?**

A. Yes.

**Q. Was that the assignment as provided by**

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**plaintiffs' counsel?**

A. Yeah, these were the notes I took, you know, for expanding the scope or for defining the scope of the rebuttal report. You know, I was -- I stood up because the last time I reached, the cover fell back.

**Q. What's the sync system?**

A. The sync system is referring to the timing belt which is used on the current, I guess, production model for WOODWAY.

**Q. Before this engagement had you heard of the phrase "sync system"?**

A. I mean sync is like -- it's just a generic, generic phrase but I've heard the term "sync system" used before. We used to use it in first year -- wires systems. You have a sync between your input and your output.

**Q. Have you heard of the sync system in the construct of a treadmill before this the engagement?**

A. No. Before this engagement I probably would not have used the term -- have not have heard the term "sync system" within the concept of a treadmill.

**Q. Main point, refute PP90 or 91. What does that mean?**

A. Pages 90 and 91 of the -- of Dr. Boyer's report -- I got to take a look at it.

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Oh, paragraphs, sorry. 90, 91. Sorry. PP refers to the paragraph of the pages.

**Q. So in the other intonation of their August 25th, 2015, when it says PP94 through 99, 99, 96 and 97, you are referring to paragraph numbers?**

A. Yes. Yeah, so this refer to the part about discussing conception.

**Q. And all your opinions with respect to conception are included in your rebuttal report; is that right?**

A. Yes.

**Q. You can set that aside. So I'd like to mark as -- actually you provided before the lunch break the introduction of an article from Indiana's International and Comparative Law Review entitled "The Doctrine of Equivalence in Patent Litigation: An Analysis of the Epilady Controversy."**

**Who directed you towards this article?**

A. Nobody did. It was research on the Internet.

**Q. Okay. Do you know what the date of this article is?**

A. Is it written on the article? We can look through the rest of it and see if there's a date on there.

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A. No. It's a product liability case.
**Q. How much time have you billed for your engagement in this matter, approximately?**
A. It's documented on the invoices. I can add them up or -- I'll say about 30 hours.
**Q. What have your expenses been in this case?**
A. Expenses?
**Q. Thus far.**
A. I'm sorry?
**Q. Thus far?**
A. I'll approximate them here. Maybe about $3300.
**Q. And you bill your expenses at cost, correct?**
A. Yeah, they're billed at cost. I just estimated, you know.
**Q. Are you familiar with the phrase "a person of ordinary skill in the art"?**
A. Yes.
**Q. What does that mean?**
A. It's a hypothetical person who would be skilled in whatever the art of question is. So there's not actually a strict definition. It's literally, it's a hypothetical person who has knowledge in the field we're talking about.
**Q. Will you agree with me that patent claims**

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**are interpreted from the viewpoint of the person of ordinary skill in the art?**
A. Yes, I will agree with that.
**Q. Will you agree with me that the validity or invalidity of patents are considered from the viewpoint of a person or ordinary skill in the art?**
A. I don't know. I'll take your word on it.
**Q. In your expert reports you didn't provide a definition of who you consider a person of ordinary -- ordinary skill in the art, did you?**
A. No, I did not.
**Q. What do you consider the art to be in this case?**
A. The art is going to be a mechanical system consisting of rollers, belts and pulleys.
**Q. Dr. Blair opined that the art in question relates to designing manual treadmills. Do you agree?**
A. In part of the scope, yes, but I think it's a bigger question of belts and pulleys, bearings, rollers. It's a mechanical system. Dr. -- Dr. Blair also defined a, I think, a person of ordinary skill in the art was someone who had two years of design experience or a bachelor's degree in mechanical engineering. I like that definition. It's okay.

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**Q. Do you agree with Dr. Blair's definition of a person of ordinary skill in the art?**
A. I think it's -- I think it's acceptable but the person of ordinary skill in the art is a theoretical person.
**Q. Would you adopt that definition of a person or ordinary skill in the art for the purposes of this case?**
A. I'll say I'll accept it. But I won't say I'll adopt it.
**Q. What is the difference between accepting and adopting?**
A. Accepting is I'm going to argue it but adopting would be, well, maybe if I sit down and I think about it, I will come up with a broader definition.
**Q. But you didn't offer a definition of a person of ordinary skill in the art in you expert reports, did you?**
A. No, I did not.
**Q. Do you consider yourself a person of ordinary skill in the art?**
A. In this case, yes.
**Q. Do you consider Dr. Blair a person of ordinary skill in the art for this case?**

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A. In this case, yes.
**Q. Do you consider Mr. Astilean a person of ordinary skill in the art in this case?**
A. No. I don't know his background well enough to answer that question. I don't know.
**Q. How about Mr. Boston, do you consider him a person of ordinary skill in the art in this case?**
A. I literally know nothing about Mr. Boston so I don't know.
**Q. Earlier in this deposition you referenced the phrase "means plus function"?**
A. Yes.
**Q. What does that?**
A. That relates to a claim you can write in a patent or you can state the -- you can claim sort of the -- I'll get the actual wording in the report here.
**Q. I'm sorry, what are you looking for?**
A. I'm pulling out the wording out of my report because I pull out looking for the MPEP.
**Q. If you'd like, you can actually use the one that's stapled that we marked as exhibit just so papers don't get lost. Trying to keep things organized.**
A. A means plus function is a claim in which

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torsional spring, you can have a tension spring.
**Q. Is a spring always a leaf spring?**
A. No. A spring wouldn't always be a leaf spring, no.
**Q. And the spring wouldn't always be a torsion spring, would it to fist thing many on to sees aspirins?**
A. No. I mean a spring is a way to store mechanical energy so it can be a lot of things. It can be twisted, it can be bent, it can be compressed, it can be stretched, it can be a pin. I mean I can -- I can -- I can flex this right now and we can call it a spring.
**Q. Okay. I'm more interested in the Astilean 2009 provisional patent application where, if anywhere, is a leaf spring disclosed?**
A. They don't disclose leaf spring. They disclose spring.
**Q. Where in the Astilean 2009 provisional patent application is there a disclosure of a torsion spring or springs?**
A. It's the same answer. They don't disclose a torsion spring, they disclose a spring. And what it says is springs within parentheses not shown exert spring urgency n opposite directions holding taut the

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length of the lower belt portion 26A and a dimension of approximately 23 inches denoted by arrow 30 and the upper belt portion 26B weighing approximately 40 pounds denoted by the arrow 30.
**Q. Where is that reference to springs tied to the identified function for the means for slackening limitation in the provisional patent application?**
A. Well, the provisional patent application, I mean, doesn't have a means plus function. There's no claims in that provisional patent application. Is that what you're --
**Q. Where does it tell us in the Astilean 2009 provisional patent application how the springs are supposed to be used?**
A. All it states is that the springs exert spring urgency in opposite directions holding taut the length of the lower belt portion. That's -- that's what it's telling us. So it's telling us that it's providing a, I think it's a way of holding the -- taut the lower length of the belt portion. That's -- that's the only description they have given us here. But it is quite obvious that you can easily do that by what you see in the photograph and in the model.
**Q. But you agree with me that no springs aren't**

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**listed in the photograph, are they?**
A. I agree with you and they even say they're not shown.
**Q. Will you agree with me that the function for means plus function claim limitation in the '016 patent application requires more than just holding taut the length of the lower belt portion?**
A. Correct. It is a means for slacking the upper concave portion while simultaneously keeping the lower portion of the belt taut, preventing the said lower portion from drooping down during rotation and exertion of walking or running force upon said upper concave portion of said closed loop treadmill. So as well keeping the lower portion taut, you have to keep the upper portion concave. And of course by keeping the lower portion taut you will keep the upper portion concave.
**Q. That specific that you just outlined is not included in the 2009 Astilean provisional patent application, is it?**
A. No, the provisional patent application states that you have to have a concave upper portion belt -- upper belt portion. I mean just for example it says it is to be noted that an essential feature of a treadmill is a concave shape subtending an acute

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angle and treadmill front end which compresses the results in the exercise of running uphill and concomitantly exerting body weight that contributes to driving lengthwise in the direction which the exerciser runs and achieves the benefits of the exerciser.
So the concave portion is mentioned there. And like he mentioned other areas as well. Let me take a look here.
**Q. Is it mentioned anywhere else?**
A. It's also mentioned in the last paragraph. Maintain the concave shape in the length portion. The shortcoming is overcome by the weight which in practice has been hold -- has been found to hold the concave shape during the uphill running -- running of the exerciser. And you also see it in the figure as well. In Figure 1 you can see the concave shape.
**Q. Okay. Where in the 2009 Astilean provisional patent application does it talk about the simultaneousness of slackening the upper concave portion while at the same time preventing the lower portion from drooping down?**
A. Well, we've already mentioned -- I've already mentioned where they mention taut and they mention concave. It is going to be simultaneous. As

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because the bottom of the belt is remaining taut, the bottom of the belt is going to be slacking because the slackening of gravity is going to be concave.

**Q. On page 11 of your rebuttal report you state in the last paragraph --**

A. Hold on one second. Let me just -- I need to see it in here. On page 11? Okay.

**Q. Of your rebuttal report.**

A. Yes.

**Q. You state the provisional patent application disclosed that the weight of the belt in combination with springs was one way of solving the problem of maintaining the upper belt in a slacken state.**

A. Yes. I wrote that.

**Q. Do you agree with that?**

A. (Reading to himself.) Yes.

**Q. Isn't that the only way that is identified in provisional patent application?**

A. That is the only way disclosed in the provisional patent application, correct.

**Q. Where, if anywhere, in Figure 1 is --**

A. Of?

**Q. Of the provisional patent application.**

A. Okay.

**Q. -- is a means for slackening illustrated?**

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A. It is not shown. If it was there, it would have had to have been -- at least all of it is not shown. It's described in the description, in the specification, but within the figure itself it's not seen. The means for slackening would have had to been underneath the belt to keep the lower belt portion taut.

**Q. Let's look at the figures from the Astilean patent. Figure 2 --**

A. Okay.

**Q. -- from the Astilean patents.**

A. I see Figure 2.

**Q. Where is Figure 2 from the Astilean patents disclosed in the Astilean 2009 provisional?**

A. Figure 2 is not disclosed in the 2009 provisional. Of course, we're worried about the claim, not worried about what's disclosed in the description.

**Q. Look at Figure 3 of the Astilean patents.**

A. I see Figure 3.

**Q. Where is Figure 3 of the Astilean patents disclosed in the 2009 Astilean provisional?**

A. Figure 3 is not disclosed in the 2009 provisional. However, the main function of keeping the upper belt portion slack and the lower belt portion taut as claimed as a means plus function is disclosed.

**Q. But this figure isn't disclosed?**

A. That figure is not disclosed, correct.

**Q. Are there any words describing this figure disclosed in the provisional?**

A. Words describing including keeping the upper belt portion concave and the lower belt portion -- upper belt portion concave in a slacken state and the lower belt portion taut is shown in this figure but any additional structure is not shown or not seen in the provisional patent application.

**Q. Are there any words that describe Figure 2 in the 2009 Astilean provisional?**

A. For that exact structure, no.

**Q. Figure 4 of the Astilean patents. Where is this particular figure disclosed in the Astilean 2009 provisional?**

A. Figure 4 discloses a upper concave belt with the lower belt portion taut, which is disclosed in the provisional patent application. Figure 4 also has rollers which are used to support the lower -- the lower belt portion. That -- the actual rollers themselves, that structure is not disclosed. And of course, all these structures are doing the same

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thing.

**Q. I can direct you to column 4 of the '619 patent.**

A. '619, column 4.

**Q. Starting at line 16 through lines 24 -- through line 24?**

A. Line 16, starting with the method of Figure 2?

**Q. Yes.**

A. And finishing off line 24 ending with drooping down?

**Q. Yes.**

A. Yes.

**Q. Is this is the corresponding description of what is depicted in Figure 2 of the Astilean patents?**

A. Yes.

**Q. Starting at line 25 through line 35 of column 4 of the '619 patent, will you agree with me that this is the corresponding description for Figure 3 of the Astilean patents?**

A. Yes.

**Q. Will you agree with me that the phrase "timing belt" does not appear in the 2009 provisional patent application?**

A. Yes.

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**Q. Will you agree with me that timing belt idlers, that phrase doesn't appear in the 2009 Astilean provisional patent application?**
A. Yes.
**Q. Does the 2009 Astilean provisional patent application say anything about a high coefficient of friction?**
A. No, it does not mention high coefficient friction.
**Q. Does the Astilean 2009 provisional patent application use the word "synchronous"?**
A. No, it does not.
**Q. In column 4, lines 36 through 42 of the '619 patent, will you agree with me that this is the corresponding description to what's depicted in Figure 4 of the Astilean patents?**
A. Yes.
**Q. Where, if anywhere, does the 2009 Astilean provisional patent application refer to one or more linear arrays of bearings?**
A. The provisional does not mention that structure.
**Q. Does the 2009 provisional patent application mention ball bearings at all?**
A. I don't believe so.

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**Q. What about ball bearing casters, does the 2009 provisional patent application mention that?**
A. I don't believe so. It does not mention that structure.
**Q. If you'll flip to the '016 patent, in particular, Figure 6. Where in the 2009 provisional patent application is Figure 6 of the '016 patent depicted?**
A. Well, Figure 6 some feature such as a concave shape. It is going to have front rollers or pulleys and rear rollers or pulleys so that structure is -- would have been cited in the provisional patent application, but Figure 6 does contain much more detail and the addi- -- also contains components for a treadmill frame which also will be listed. But it has some additional features which would not be documented in provisional patent application.
**Q. Does the 2009 provisional patent application say anything about the resiliency and strength of the treadmill slats?**
A. No, it does not.
**Q. Figures 7 and 8 of the '016 patent disclose what is referred to as a V-belt. Do you know what a V-belt is?**
A. I know what a V-belt is. It's going to be a

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belt that has V shape to it. And on Figure 7 and 8, if it -- I mean was it listed in the -- is it like 115 then? I don't see it, that's why I'm asking. I see rollers and pulleys that could accept a V-belt but I don't see a V-belt in the diagram.
**Q. Figure 7 shows the two V-belts 114 and an inner and end view near front end pulleys 94.**
A. Let's see. 114.
**Q. 114?**
A. Yeah. Those look more like pulleys. Let me -- Figure 7 shows two V-belts 117 and an inner and rear view and front L pulleys. It says V-belts but it looks like they're pointing at the rollers. Figure 114 -- all right, I guess it is just the way they drew it. 114 -- two V-belts.
**Q. Will you agree with me that Figure 7 and Figure 8 identify that they contain a V-belt?**
A. They do identify they have a V-belt, yeah.
**Q. And Figures 7 and 8 identify that they have V-belt pulleys?**
A. Yes, they do.
**Q. Where in the 2009 Astilean provisional patent application is there a disclosure of the V-belt?**
A. That structure is not disclosed in the

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provisional patent application. Those structures are not disclosed.
**Q. So are you saying that in addition to the V-belt not being disclosed, the V-belt pulley is also not disclosed in the provisional patent application?**
A. Correct.
**Q. If you can look at claim 1 of the '619 patent.**
A. Okay.
**Q. And I'd like you --**
A. I apologize. You have '619, I have '160 (sic). I'm going to start using -- because there's two printouts here, I'm going to pull my report up.
**Q. Do you have a printout of Figure 1 from the provisional patent application?**
A. I do. First thing is you want Figure 1 of the '016?
**Q. No, I want --**
A. You wanted claim 1 of the --
**Q. I want claim 1 of the '619 and I want --**
A. Figure 1.
**Q. I want Figure 1 along with the one and a half page description in the provisional patent pulled up.**
MR. VODOPIA: It's in your report, it's

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right there.
A. Yeah, I know but I grabbed this one. It's all in here as well. Great. All right.
**Q. Claim 1 of the '619 patent calls for a motorless leg-powered treadmill comprising a treadmill frame. Do you agree with that?**
A. Yes.
**Q. Will you identify and annotate within the 2009 provisional patent application what constitutes the treadmill frame?**
MR. JELENCHICK: We're going to make this as a new exhibit.
THE WITNESS: This has got John's notes on it. You want to give me a clean one there?
MR. VODOPIA: Oh, yeah. Right. Yeah. So it's in your report, no?
THE WITNESS: Yeah. No, I'll just grab my report. Do you know where my -- okay, here we go. This is leg-powered treadmill. This is the July 27th. I'll grab this one.
So the treadmill frame would consist of -- we're only using a little annotation just TF, treadmill frame, okay.
BY MS. JELENCHICK:
**Q. Why don't you write out treadmill frame?**

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A. Write out treadmill frame, all right. Well, it says, it will start with the legs -- and I put TF, it's treadmill frame. So it will include the legs, looks like below the legs they have some kind of foot structure. It will include that. It's going to include the side of the treadmill. So you're going to have both sides be part of the treadmill frame. Looks like there's a wooden structure underneath the sides, that will be part of the treadmill frame. Looks like there's some sort of -- look like it's going to be a horizontal structure you can see in front of the feet. That will be part of the treadmill frame. What else? That will be the treadmill frame.
**Q. Is the treadmill frame disclosed anywhere else in the provisional patent application?**
A. Yes.
**Q. Where?**
A. In the --
**Q. Why don't you circle it and annotate it?**
A. In the description.
**Q. Why don't you circle the relevant portion of the description and annotate it? What did you circle?**
A. I'm just -- I saw one part but I'm going to

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go through the whole thing.
So illustrator to leg supports, said treadmill to having space support sides. That is it for the treadmill frame.
**Q. If you can identify and annotate in the 2009 provisional patent application where the front pulley end rollers are disclosed.**
A. Front and rear pulley end rollers?
**Q. Well, specifically the front pulley end rollers.**
A. The front pulley end roller, okay. So in the provisional it just states rotation end rollers. And so they kind of combine them. But there's a front pulley would be part of rotation end rollers and also in the diagram, diagram in the figure you can see a front pulley and the figures I've noted there as well, FP.
**Q. Is that denoted by a particular number?**
A. 2 -- 22 and 24. So 24 would be the front pulley. 22 would be the rear pulley.
Are you going to ask me about the rear pulley end rollers? I can start that.
**Q. No.**
A. No? All right.
**Q. Where in the 2009 provisional patent**

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**application does it disclose a plurality of parallel slats laying to -- perpendicular to an axis of rotation? If it discloses that at all.**
A. The only disclosure of plurality of parallel slats orientated perpendicular to an axis of rotation of said valves can be seen in the figure, where you can see they have a belt consisting of parallel slats, perpendicular to rotation.
**Q. But those words aren't used. The words from the '619 claim language are not used in the 2009 provisional patent application?**
A. Correct, those words are not used.
**Q. Where, if anywhere, does the 2009 provisional patent application disclose that the parallel slats are attached to each other in a resilient fashion?**
A. That's structure is not disclosed in the original patent application.
**Q. Where, if anywhere, in the 2009 provisional patent application is a timing belt disclosed?**
A. A timing belt structure is not disclosed in the provisional patent application.
**Q. How about a timing belt pulley. Is that structure disclosed in the 2009 provisional patent application?**

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A. A timing belt -- a timing belt pulley structure not disclosed in the provisional patent application.

**Q. What about a timing belt idler, is that structure disclosed in the 2009 provisional patent application?**

A. That structure is not disclosed in the original patent application.

**Q. Where, if anywhere, in the 2009 provisional patent application does it disclose that movement of the belts is synchronized?**

A. Movement of the belts by definition has to be synchronous, because if it's a belt, it's an object. Once one portion of it moves, the other portion of it also has to move but that wording is not in here.

**Q. Let's look at claim 1 of the '016 patent.**

MS. JELENCHICK: Wait, before you flip the page, I think I'd like to mark as an independent exhibit the portion of the provisional patent application that he annotated. So I think we're up to 11. So let's mark as Whalen Deposition Exhibit 11 the description of the 2009 provisional and the subsequent figure.

(Whereupon, Whelan Exhibit 11 was

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marked for identification.)

THE VIDEOGRAPHER: Going off the record. The time is 15:12 p.m.

(Whereupon, a short break was taken off the record.)

THE VIDEOGRAPHER: Going back on the record. The time is 15:25 p.m.

BY MS. JELENCHICK:

**Q. To your knowledge, when submitting a provisional patent application, is there a page limitation?**

A. I don't recall if there's page limitations.

**Q. Do you know if there's a word count limit for a provisional patent application?**

A. I don't believe there's a word count limit, no.

**Q. How about a limitation on figures? Is there a limitation on the number of figures you can include in a provisional patent application?**

A. No, there's not a right number -- oh, yes -- well, actually, there might be, but I think it's -- I'm not familiar of a limit.

**Q. During the break, Mr. Whelan, did you have an occasion to discuss the substance of your testimony with Mr. Vodopia?**

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A. No. Anything I do with John is he wanted to get something printed so I brought him to the front.

**Q. On page 24 of your opening report, the last paragraph.**

A. Yes.

**Q. The methods of keeping the lower belt portion taut and the upper belt portion concave as claimed in patents '619 and '016 were mechanical and performed similar as to the method disclosed in the provisional patent application, which disclosed means from maintaining the upper portion of the running belt in a slackened state.**

**Did I read that correctly?**

A. Yes.

**Q. What is the method disclosed in the provisional patent application?**

A. The provisional patent application discloses a -- using springs as not shown, keeping the lower belt portion taut. Within my report, I would have showed two different structures to do that. One was using a tension spring, the other one was using a leaf spring. And there could be others.

**Q. What other methods disclosed in the '619 patent?**

A. The '619 patent. Both patents disclosed

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similar structures. They had different claims. The '619 would have claimed a structure consisting of the timing belt that we discussed earlier today.

**Q. Anything else?**

A. I can read the claim to you. So '619, a means for slackening an upper concave portion of said closing belt while simultaneously keeping the lower portion of said closing belt taut preventing said lower portion from drooping down during rotation and exertion of walking or miming force upon said upper concave portion of said closed loop treadmill belt. Said means for slackening the upper portion while simultaneously keeping the lower portion taut preventing said lower portion from drooping down during rotation and exertion of walking or running force upon said upper concave portion of said closed loop treadmill belt, comprising a timing belt, having respective timing belt pulleys attached to said front and rear pulley rollers for said closed loop treadmill belt wherein timing belt idlers are used to configure said timing belt geometrically to fit within constraints of side contours of said treadmill, wherein if said closing treadmill belt is prevented from slipping relative to said end rollers by high friction coefficient, one can figure that

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MR. VODOPIA: Well, if she wants you to offer a legal opinion, you're not a lawyer.
THE WITNESS: I'll say I don't know. I don't make legal opinions but --
BY MS. JELENCHICK:
**Q. I'm not asking for your legal opinion. I'm asking if you're offering an opinion.**
A. For date of invention?
**Q. On the date of invention for the claims 1 of the '619 patent if the '619 patent is not mailed to the priority date of the provisional?**
A. No. I'm not.
**Q. Will you agree with me that October 29th, 2010 is the filing date for the '619 patent application?**
A. If that's what's -- if that's what's written on the patent. I can grab it if you want me to. Which patent?
**Q. The '619.**
A. That's '016. That's what I'm looking for. The '619 filing date is October the 29th, 2010.
**Q. What is the filing date for the '016 patent application?**
A. The '016 filing date is November 1, 2010.
**Q. Are you offering any opinion on the date of**

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**invention for any claims of the '016 patent if the '016 patent can't claim priority to the 2009 provisional?**
MR. VODOPIA: Objection, form.
THE WITNESS: As you know, I'm not offering any opinions about date of invention.
BY MS. JELENCHICK:
**Q. The '619 patent is not entitled to the priority date of the 2009 provisional patent application. Is claim 1 of the '619 patent invalid?**
A. I'm not offering any opinions on that.
**Q. How about with respect to the '016 patent, that's not entitled to the priority date of the provisional patent application, are any other claims of the '016 patent invalid?**
A. I'm not offering any opinion on that.
**Q. What did you do to prepare for your deposition today?**
A. Would have reviewed my file.
**Q. Did you do anything else?**
A. I met with Mr. Vodopia last night for dinner.
**Q. Anything else?**
A. I met with him for breakfast this morning.
**Q. Anything else in preparation for today?**

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A. Not that I can think of.
**Q. When did you begin your preparations for the deposition?**
A. Probably on maybe Friday.
**Q. Approximately how much time have you spent preparing?**
A. Maybe just three hours, four hours if you the put time I spent with Mr. Vodopia for dinner and for breakfast, about four hours.
**Q. How long was your dinner with Mr. Vodopia?**
A. It was more than an hour. I don't think it went two hours.
**Q. What did you the discuss?**
A. Just a little bit about the case. You know, John had asked about my prior experience testifying and I explained that and my prior experience with different cases. I explained that. We discussed the, you know, this case, just saying, you know, what, you know, if you review the file, he asked if we reviewed my file. We asked and I said you have questions that you think she's going to ask me and he's like no, you know. Kadie is straight shooter. She'll ask some straight questions. And a lot of our conversation then was just talking about our cultural backgrounds. He has some Irish background, I have

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Irish background. My wife went up to New York to -- she went to this the festival in Little Italy, which I guess he knows about from some of his background so. I think both of us were -- kind of enjoyed just, you know, talking about life and family and that kind of stuff, and engineering. Discussed about his background in engineering and my background in engineering.
**Q. How long was your breakfast this morning with about Mr. Vodopia?**
A. I'm going to say half an hour.
**Q. What did you talk about this morning?**
A. This morning we discussed -- I apologized, I had been late because I had been running, you know. Early on the case -- we didn't discuss anything on the case. Just I think he asked me if I had any questions and I'm like, no, I don't have any questions. He made a reference and I had mentioned I had been running. He said you would -- probably also had been running. And then he saw you and said, there's Kadie. And that was -- that was kind of about it. He asked about the office, you know, how close it is, I'm like, you know, right down the road.
**Q. Did you take any notes during your breakfast meeting this morning?**

# EXHIBIT C

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| SPEEDFIT LLC and AUREL A. ASTILEAN, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | Case No. 2:13-cv-01276 (KAM) (AKT) |
| vs. | ) | |
| | ) | |
| WOODWAY USA, INC., | ) | |
| | ) | |
| Defendant. | ) | |

# REBUTTAL EXPERT REPORT OF KIM B. BLAIR, Ph.D.

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I, Kim B. Blair, Ph.D., hereby make the following disclosure pursuant to Fed. R. Civ. P. 26(a)(2).

1. I am the same Kim Blair who submitted an expert report in this matter on July 27, 2015, and I hereby incorporate that report by reference.

2. Since July 27, 2015, I have neither authored nor co-authored any additional publications beyond those detailed in my curriculum vitae, which was attached to my initial expert report.

3. Since July 27, 2015, I have not provided any testimony as an expert at trial or by deposition beyond those matters detailed in Paragraph 19 of my initial report.

4. The compensation for my time spent in working on issues in this case continues to be $450 per hour. I continue to be compensated for my expenses in connection with this matter. Just as with my initial report, my compensation is not dependent on or related in any manner to the outcome of the current litigation. I have no financial interest whatsoever in the outcome of this litigation.

5. For this report, I have been asked by Woodway USA, Inc. ("Woodway") to review and analyze the July 27, 2015 Leg-Powered Treadmill Report prepared by James D. Whelan, P.E. and to respond and comment on this Report and Mr. Whelan's opinions and conclusions contained therein.

6. Within this report, just as in my initial report, I may refer to U.S. Patent Nos. 8,308,619 and 8,343,016 as "the '619 patent" and "the '016 patent," respectively, or collectively, "the Astilean patents." I will also refer to the 2009 provisional patent application to which the Astilean patents purport to claim priority, U.S. Provisional Patent Application No. 61/280,265, as "the '265 Provisional Application."

7. In my study of Mr. Whelan's report and in forming my opinions disclosed herein that respond to the same, I have relied on my own experience and education as well as information learned through examining the Astilean patents, the prosecution history for the Astilean patents, including the '265 Provisional Application, the materials specifically cited in this report and my initial report, as well as the materials identified on page 3 of Mr. Whelan's Report.

## I. PERSON OF ORDINARY SKILL IN THE ART

8. Mr. Whelan identifies his assignment to include "determin[ing] if the invention as described in the ['265 P]rovisional ... [A]pplication was sufficient to allow **one** to make the invention as claimed" in the Astilean patents (emphasis added). Mr. Whelan's reference to "one" presumably is referring to "one of ordinary skill in the art." However, in his report, Mr. Whelan fails to identify who he considers a person of ordinary skill in the art.

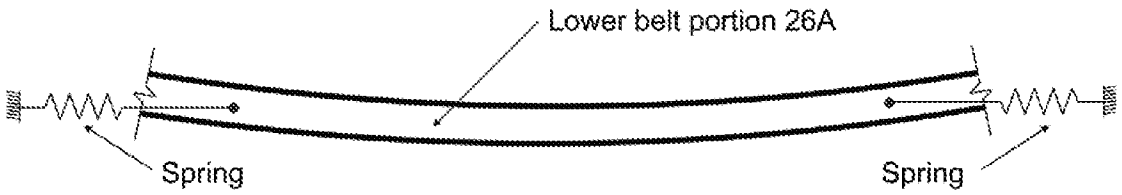
9. For the purposes of my rebuttal report, I adopt the definition of a person of ordinary skill in the art as described in my initial report at Paragraphs 24-25, which in my opinion, is a person with a bachelor of science degree in mechanical engineering or at least two years of experience in the treadmill industry, including experience and knowledge of the design, construction, testing, and operation of manual treadmills.

10. To the extent that Mr. Whelan disagrees with my definition of a person of ordinary skill in the art, I reserve the right to modify, expand, revise, supplement, or otherwise amend this report.

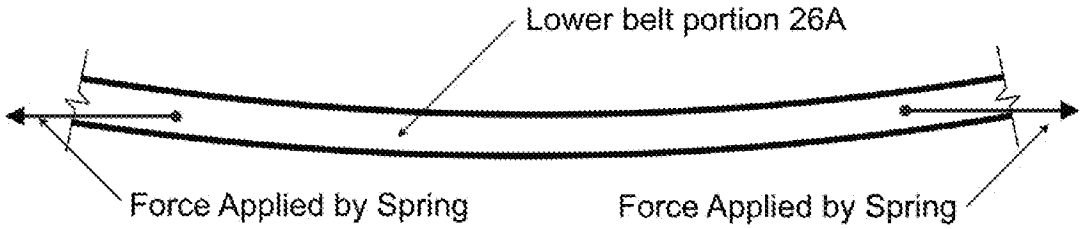
## II. THE '265 PROVISIONAL APPLICATION'S DISCLOSURE OF "SPRINGS" IS INSUFFICIENT TO ENABLE A PERSON OF ORDINARY SKILL IN THE ART TO CREATE A TAUT LOWER BELT PORTION

11. The '265 Provisional Application provides "[s]prings (not shown) exert spring urgency in opposite directions holding taut the length of the lower belt portion 26A ... ." One

skilled in the art would understand that this requires that these springs be applied such that the springs apply tension in the lower belt portion.[1] This is illustrated schematically in the following figure, where one spring is applied at each end of the lower belt portion.




12. As shown in the following figure, it is seen that these springs exert a "spring urgency" in opposite directions. The applications of springs in this manner will result in a tension being present in the lower belt portion, thus "holding taut the lower belt portion."




13. In my opinion, the key concept in the foregoing language of the '265 Provisional Application is that the springs need to be applied in order to apply a tension to the belt.

14. One skilled in the art will also realize that applying the springs as shown above creates a problem in that the "lower belt portion" does not remain under the treadmill, but rather travels around the treadmill as the user walks or runs on the treadmill.

15. As a result, there is a fundamental challenge for which a solution is not apparent or disclosed in the '265 Provisional Application. The "lower belt portion" is not a fixed portion of the belt, but rather describes a region through which the belt travels over time. Any springs

[1] In my opinion, a person of ordinary skill in the art would understand "taut" in this context to comport with plain and ordinary meaning. Said another way, "taut" is something that is very tight from being pulled or stretched; not loose or slack.

that apply a force to create tension in the lower belt will be creating tension in that same section of the belt in a different location at a different point in time.

16. It is my opinion that merely including the phrase "[s]prings (not shown) exert a spring urgency in opposite directions holding taut the length of the lower belt portion 26A" in the '265 Provisional Application does not lead one of skill in the art to any workable solution.

## III. MR. WHELAN'S DEMONSTRATIVE TESTING IS FLAWED AND IRRELEVANT

17. As an initial matter, the majority of Mr. Whelan's Report, including the testing he conducted and described at pages 10-21, is irrelevant to the issues in this case. More specifically, one of the central issues in this case is whether to a person of ordinary skill in the art the claims of the Astilean patents are adequately supported by the disclosure in the '265 Provisional Application. Whether Mr. Whelan can construct a "model" in July 2015 to illustrate the claimed subject of the Astilean patents has no bearing on this issue

18. Moreover, as further detailed below, Mr. Whelan's testing is flawed. Mr. Whelan has constructed a number of "models" that he asserts represent the various embodiments described in the '265 Provisional Application and in the Astilean patents. In the following discussion, I have reviewed each of the models and provide my opinions as to whether the models accurately represent what is described in the relevant document. In addition, I provide my opinion on Mr. Whelan's observations.

### A. Model 1: Figures 4-6

19. Mr. Whelan asserts that Model 1 shown in Figures 4, 5, and 6 of his Report represents one embodiment of the alleged invention described in the '265 Provisional Application. When a person of ordinary skill in the art considers the content of the '265 Provisional Application, he or she cannot consider any material, additional description, or

disclosure contained in the Astilean patents when developing models of the alleged inventions described in the '265 Provisional Application.

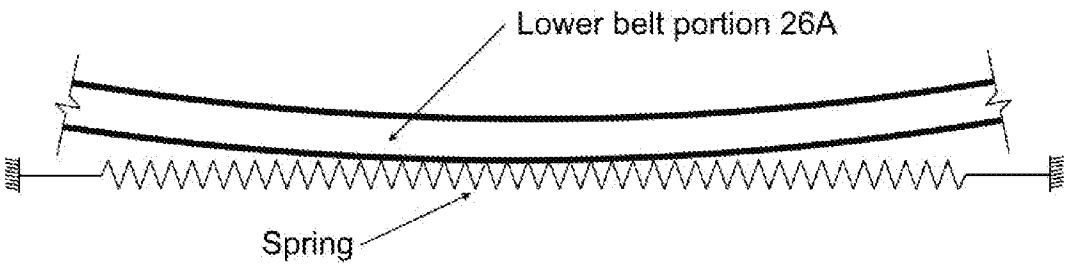
20. Model 1 includes the following features described in the '265 Provisional Application:

- "[T]wo leg supports 10 and 12 which lift the treadmill 14 in a clearance position above a support surface 16, said treadmill 10 having space apart sides 18 and 20 which have journalled for rotation end rollers 22 and 24 which support a closed loop treadmill belt 26."
- "[A] concave shape subtending an acute angle 34 in the treadmill 10 front end 14A."
- Mr. Whelan's Report does not clearly state the purpose of the weight applied in Figure 5. However his experiment of adding and removing the weight indicates that he likely intended that the weight was to represent feature 38, the weight applied to the treadmill by the exerciser. ("[T]he exerciser 36 running uphill and concomitantly exerting body weight 38 that contributes to driving lengthwise 40 in the direction 42 in which the exerciser runs.")

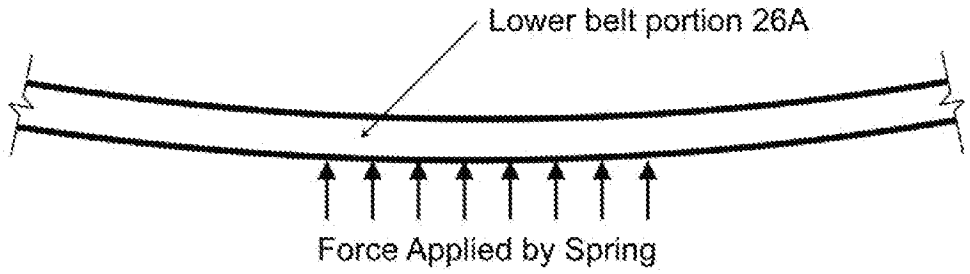
21. Model 1 does not include the following features described in the '265 Provisional Application:

- "Springs (not shown) exert a spring urgency in opposite directions holding taut the length of the lower belt portion 26A."

22. The spring in Model 1 in Figures 4-6 does not connect to the treadmill's belt directly, and thus cannot hold the belt taut as shown in the following illustration.




23. As the spring is applied in Model 1, the force applied on the treadmill belt is perpendicular to the belt and has no effect on the how taut the belt is. This effect of the spring on the belt is no different than laying a section of belt on the floor as shown in the following figure. While the spring helps to prevent the lower portion of the belt from sagging, it does not hold the belt taut.




24. Mr. Whelan's observation of his testing of Model 1 is repeated here.

> The following was observed during testing: as the weight and belt traveled, the top portion of the belt retained the concave shape and the bottom portion of the belt was taut, not slacked (Figure 5). When the weight was removed from the belt, the top belt portion retained its concave shape and the bottom portion remained taut, not slacked (Figure 6).

25. I do not find his observation surprising as I am assuming that the moving of the treadmill belt was quite slow, and that the weight applied was set on the treadmill belt, as

opposed to dropped dynamically on the treadmill belt as would be applied by a runner.[2] If the treadmill belt is moving at running speeds, the mass and inertia of the belt will contribute to the response of the belt in ways that have not been studied by Mr. Whelan. Thus, Mr. Whelan's model and his testing is not sufficient to draw any conclusion as to how the system will perform as a treadmill.

**B. Model 2: Figures 7-9**

26. Mr. Whelan asserts that Model 2 shown in Figures 7, 8, and 9 represents one embodiment of the invention described in the '265 Provisional Application.

27. Model 2 includes the following features described in the '265 Provisional Application:

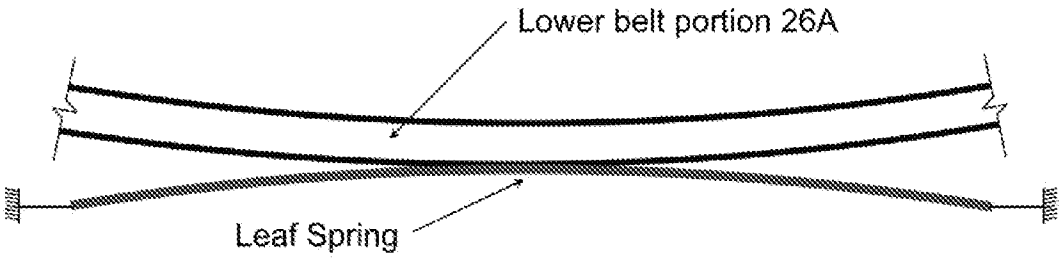
- "[T]wo leg supports 10 and 12 which lift the treadmill 14 in a clearance position above a support surface 16, said treadmill 10 having space apart sides 18 and 20 which have journalled for rotation end rollers 22 and 24 which support a closed loop treadmill belt 26."
- "[A] concave shape subtending an acute angle 34 in the treadmill 10 front end 14A."
- Mr. Whelan's Report does not clearly state the purpose of the weight applied in Figure 8. However his experiment of adding and removing the weight indicates that he intended that the weight to represent feature 38, the weight applied to the treadmill by the exerciser. ("[T]he exerciser 36 running uphill and concomitantly exerting body weight 38 that contributes to driving lengthwise 40 in the direction 42 in which the exerciser runs.")

[2] http://www.barefootrunning.fas.harvard.edu/4BiomechanicsofFootStrike.html.

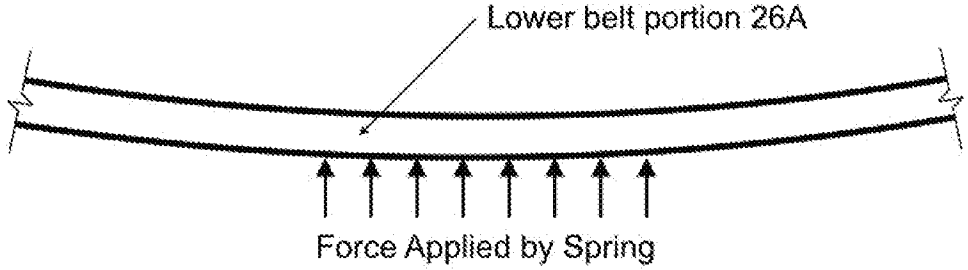
28. Model 2 does not include the following features described in the '265 Provisional Application:

- "Springs (not shown) exert a spring urgency in opposite directions holding taut the length of the lower belt portion 26A."

29. The spring in Model 2 does not connect to the treadmill belt directly, and thus cannot hold the belt taut as shown in the following illustration.




30. As the leaf spring is applied in the model, the force applied on the treadmill belt is perpendicular to the treadmill belt and has no effect on the how taut the treadmill belt is. This effect of the spring on the treadmill belt is no different than laying a section of belt on the floor as shown in the following figure. While the spring helps to prevent the lower portion of the treadmill belt from sagging, it does not hold the belt taut.



31. Mr. Whelan's observation of his testing of Model 2 is repeated here.

> The following was observed during testing: as the weight and belt traveled, the top portion of the belt retained the concave shape and the bottom portion of the belt was taut, not slacked (Figure 8). When the weight was removed from the belt, the top belt portion retained its concave shape and the bottom portion remained taut, not slacked (Figure 9).

32. Again, I do not find his observation surprising as I am assuming that the moving of the treadmill belt was quite slow, and that the weight applied was set on the treadmill belt, as opposed to dropped dynamically on the treadmill belt as would be applied by a runner.[3] If the treadmill belt is moving at running speeds, the mass and inertia of the belt will contribute to the response of the belt in ways that have not been studied by Mr. Whelan. Thus, Mr. Whelan's model and his testing is not sufficient to draw any conclusion as to how the system will perform as a treadmill.

**C. Model 3: Figures 10-12**

33. Mr. Whelan asserts that Model 3 shown in Figures 10, 11, and 12 represents the alleged inventions claimed in the Astilean patents. Model 3 appears to be specifically directed at claim 1 of the '619 patent.

34. Model 3 includes the following features described in claim 1 of the '619 patent:

- "a treadmill frame";
- "a set of respective front and rear pulley end rollers for rotation, said front and rear pulleys supporting a closed loop treadmill belt";

[3] http://www.barefootrunning.fas.harvard.edu/4BiomechanicsofFootStrike.html.

- "said closed loop treadmill belt being of such a length as compared to the distance between the end rollers to permit it to assume a required concave upper contour"; and
- "a means for slackening an upper concave portion of said closed loop treadmill belt while simultaneously keeping a lower portion of said closed loop treadmill belt taut, preventing said lower portion from drooping down during rotation and exertion of walking or miming force upon said upper concave portion of said closed loop treadmill belt, said means for slackening the upper portion while simultaneously keeping the lower portion taut, preventing said lower portion from drooping down during rotation and exertion of walking or running force upon said upper concave portion of said closed loop treadmill belt comprises a timing belt having respective timing belt pulleys attached to said front and rear pulley rollers for said closed loop treadmill belt, wherein timing belt idlers are used to configure said timing belt geometrically to fit within constraints of side contours of said treadmill, wherein if said closed loop treadmill belt is prevented from slipping relative to said end rollers by a high friction coefficient, once configured, said timing belt will not permit drooping down of said lower taut portion of said closed loop treadmill belt because all respective motion is synchronous."

35. The '265 Provisional Application fails to disclose "a means for slackening an upper concave portion of said closed loop treadmill belt while simultaneously keeping a lower portion of said closed loop treadmill belt taut, preventing said lower portion from drooping down during rotation and exertion of walking or miming force upon said upper concave portion of said closed loop treadmill belt, said means for slackening the upper portion while simultaneously

keeping the lower portion taut, preventing said lower portion from drooping down during rotation and exertion of walking or running force upon said upper concave portion of said closed loop treadmill belt comprises a timing belt having respective timing belt pulleys attached to said front and rear pulley rollers for said closed loop treadmill belt, wherein timing belt idlers are used to configure said timing belt geometrically to fit within constraints of side contours of said treadmill, wherein if said closed loop treadmill belt is prevented from slipping relative to said end rollers by a high friction coefficient, once configured, said timing belt will not permit drooping down of said lower taut portion of said closed loop treadmill belt because all respective motion is synchronous" as claimed in claim 1 of the '619 patent. Mr. Whelan does not offer an opinion to the contrary.

36. Model 3 does not include the following features described in claim 1 of the '619 patent (or shown in any slats depicted in the '265 Provisional Application in Figure 1):

- "said closed loop treadmill belt comprising a plurality of parallel slats oriented perpendicular to an axis of rotation of said belt, said parallel slats attached to each other in a resilient fashion."

37. I disagree with Mr. Whelan that omitting this feature will not have an effect on his analysis. The additional mass and spacing of the treadmill slats may have a sufficient impact on the dynamic response of the treadmill belt under running conditions.

38. Mr. Whelan's observation of his testing of Model 3 is repeated here.

> The following was observed during testing: as the weight and belt traveled, the top portion of the belt retained the concave shape and the bottom portion of the belt was taut, not slacked (Figure 11). When the weight was removed from the belt, the top belt portion retained its concave shape and the bottom portion remained taut, not slacked (Figure 12).

39. I do not find his observation surprising as I am assuming that the moving of the treadmill belt was quite slow, and that the weight applied was set on the treadmill belt, as opposed to dropped dynamically on the treadmill belt as would be applied by a runner.[4] If the treadmill belt is moving at running speeds, the mass and inertia of the belt will contribute to the response of the belt in ways that have not been studied by Mr. Whelan.

40. As noted above, the treadmill belt does not include the plurality of parallel slats. These slats will add mass and localized stiffness to the treadmill belt which will have a substantial effect on the dynamics of the belt when in use. Thus, Mr. Whelan's model and his testing is not sufficient to draw any conclusion as to how the system will perform as a treadmill.

**D. Model 4: Figures 13-15**

41. Mr. Whelan asserts that Model 4 shown in Figures 13, 14, and 15 represents the alleged inventions described in the Astilean patents. However, this model appears to be directed to claim 1 of the '016 patent, which is a means plus function claim, as detailed in my initial expert report.

42. Model 4 includes the following features described in claim 1 of the '016 patent:

- "a treadmill frame";
- "a set of respective front and rear pulley end rollers for rotation, said front and rear pulleys supporting a closed loop treadmill belt";
- "said closed loop treadmill belt being of such a length as compared to the distance between the end rollers to permit it to assume a required concave upper contour"; and
- "a means for slackening an upper concave portion while simultaneously keeping a lower portion of the belt taut, preventing said lower portion from drooping down

[4] http://www.barefootrunning.fas.harvard.edu/4BiomechanicsofFootStrike.html.

during rotation and exertion of walking or running force upon said upper concave portion of said closed loop treadmill belt."

43. The '265 Provisional Application fails to disclose "a means for slackening an upper concave portion while simultaneously keeping a lower portion of the belt taut, preventing said lower portion from drooping down during rotation and exertion of walking or running force upon said upper concave portion of said closed loop treadmill belt" as claimed in claim 1 of the '016 patent. Mr. Whelan does not offer an opinion to the contrary.

44. While the "means for slackening" included in Model 4 is not claimed in the Astilean patents, it is described in the Astilean patents as follows:

> The method of FIG. 2 shows a flat support belt loop **50** engaged with two side pulleys **54** and a third pulley **56** which is attached to treadmill **10** frame. Two springs **52** pulling in opposite directions hold belt **50** taut with a flat top configuration in contact with bottom treadmill belt portion **26**A. Since pulleys **54** and **52** are low friction, and there is no relative movement between belt **50** and belt **26**, belt **50** imposes very little drag on belt **26** while supporting lower belt portion **26**A vertically preventing it from drooping down. ('016 patent, col. 4, l. 61-col. 5, l. 2; '619 patent, col. 4, ll. 16-24)

45. Model 4 does not include the following features described in claim 1 of the '016 patent (or shown in any slats depicted in the '265 Provision Application in Figure 1):

- "said closed loop treadmill belt comprising a plurality of parallel slats oriented perpendicular to an axis of rotation of said belt, said parallel slats attached to each other in a resilient fashion" and
- "wherein each said slat is made of a material with sufficient resiliency and strength and weight to lie on and conform to a concave row of upper support peripheral ball bearings located at each peripheral side of said upper portion of said motor-less, leg-powered curved treadmill."

46. I disagree with Mr. Whelan that omitting these features will not have an effect on his analysis as the additional mass and spacing of the treadmill slats may have a sufficient impact on the dynamic response of the treadmill belt under running conditions.

47. Mr. Whelan's observation of his testing of Model 4 is repeated here.

> The following was observed during testing: as the weight and belt traveled, the top portion of the belt retained the concave shape and the bottom portion of the belt was taut, not slacked (Figure 14). When the weight was removed from the belt, the top belt portion retained its concave shape and the bottom portion remained taut, not slacked (Figure 15). Also, slippage was observed between the two belts, but the treadmill closed loop belt remained taut.

48. I do not find his observation surprising as I am assuming that the moving of the treadmill belt was quite slow, and that the weight applied was set on the treadmill belt, as opposed to dropped dynamically on the treadmill belt as would be applied by a runner.[5] If the treadmill belt is moving at running speeds, the mass and inertia of the belt will contribute to the response of the belt in ways that have not been studied by Mr. Whelan.

49. As noted above, the treadmill belt does not include the plurality of parallel slats. These slats will add mass and localized stiffness to the treadmill belt which will have a substantial effect on the dynamics of the belt when in use. Thus, Mr. Whelan's model and his testing is not sufficient to draw any conclusion as to how the system will perform as a treadmill.

**E. Model 5: Figures 16-18**

50. Mr. Whelan asserts that Model 5 shown in Figures 16, 17, and 18 represents the alleged inventions described in the Astilean patents. However, this model appears to be specifically directed at claims 1 and 12 of the '016 patent.

51. Model 5 includes the following features described in claim 1 of the '016 patent:

- "a treadmill frame";

[5] http://www.barefootrunning.fas.harvard.edu/4BiomechanicsofFootStrike.html.

- "a set of respective front and rear pulley end rollers for rotation, said front and rear pulleys supporting a closed loop treadmill belt";
- "said closed loop treadmill belt being of such a length as compared to the distance between the end rollers to permit it to assume a required concave upper contour"; and
- "a means for slackening an upper concave portion while simultaneously keeping a lower portion of the belt taut, preventing said lower portion from drooping down during rotation and exertion of walking or running force upon said upper concave portion of said closed loop treadmill belt."

52. Model 5 does not include the following features described in claim 1 of the '016 patent (or shown in any slats depicted in the '265 Provisional Application in Figure 1):

- "said closed loop treadmill belt comprising a plurality of parallel slats oriented perpendicular to an axis of rotation of said belt, said parallel slats attached to each other in a resilient fashion" and
- "wherein each said slat is made of a material with sufficient resiliency and strength and weight to lie on and conform to a concave row of upper support peripheral ball bearings located at each peripheral side of said upper portion of said motor-less, leg-powered curved treadmill."

53. I disagree with Mr. Whelan that omitting these features will not have an effect on his analysis because the additional mass and spacing of the treadmill slats may have a sufficient impact on the dynamic response of the treadmill belt under running conditions.

54. Model 5 also includes the following additional features described in dependent claim 12 of the '016 patent:

- "a pair of linear arrays of bearings extending along and located at opposite peripheral edges of said treadmill frame, each said array of peripheral edge bearings physically supporting said lower portion of said closed loop treadmill belt in a taut non-drooping configuration."

55. While Mr. Whelan only includes two sets of bearings in his linear array – as opposed to the five sets shown in Figure 4 of the '016 patent – I agree that his model represents the intent of claim 12.

56. Mr. Whelan's observation of his testing of Model 5 is repeated here.

> The following was observed during testing: as the weight and belt traveled, the top portion of the belt retained the concave shape and the bottom portion of the belt was taut, not slacked (Figure 17). When the weight was removed from the belt, the top belt portion retained its concave shape and the bottom portion remained taut, not slacked (Figure 18).

57. I do not find his observation surprising as I am assuming that the moving of the treadmill belt was quite slow, and that the weight applied was set on the treadmill belt, as opposed to dropped dynamically on the treadmill belt as would be applied by a runner.[6] If the treadmill belt is moving at running speeds, the mass and inertia of the belt will contribute to the response of the belt in ways that have not been studied by Mr. Whelan.

58. As noted above, the treadmill belt does not include the plurality of parallel slats. These slats will add mass and localized stiffness to the treadmill belt which will have a substantial effect on the dynamics of the belt when in use. Thus, Mr. Whelan's model and his testing is not sufficient to draw any conclusion as to how the system will perform as a treadmill.

[6] http://www.barefootrunning.fas.harvard.edu/4BiomechanicsofFootStrike.html

**F. Model 6: Figures 19-20**

59. Mr. Whelan asserts that Model 6 shown in Figures 19 and 20 represents the "control model" of the alleged inventions described in the Astilean patents.

60. Model 6 includes the following features described in claim 1 of the '619 patent:

- "a treadmill frame";
- "a set of respective front and rear pulley end rollers for rotation, said front and rear pulleys supporting a closed loop treadmill belt"; and
- "said closed loop treadmill belt being of such a length as compared to the distance between the end rollers to permit it to assume a required concave upper contour."

61. Model 6 includes the following features described in claim 1 of the '016 patent:

- "a treadmill frame";
- "a set of respective front and rear pulley end rollers for rotation, said front and rear pulleys supporting a closed loop treadmill belt"; and
- "said closed loop treadmill belt being of such a length as compared to the distance between the end rollers to permit it to assume a required concave upper contour."

62. Model 6 does not include any "means for slackening."

63. Mr. Whelan's observation of his testing of Model 6 is repeated here.

> The following was observed during testing: as the weight and belt traveled, the top portion of the belt retained the concave shape and the bottom portion of the belt was taut, not slacked (Figure 19). When the weight was removed from the belt, the top belt portion lost its concave shape and the bottom portion became slacked (Figure 20).

64. I do not find this result surprising as the mass of the lower section of the belt will cause the belt to sag until such time as the tension is nearly uniform throughout the length of the belt.

## IV. MR. WHELAN'S "CONCLUSIONS" ARE NOT SUPPORTED

65. Conclusion 2 from Mr. Whalen's report reads as follows.

> One advantage of the leg-powered treadmill in both the provisional patent application and Patents 619 and 016 is that the closed loop belt upper contour remains concave and the lower belt portion remains taut while an exerciser loads the closed loop belt cyclically by walking or running.

66. In my opinion, the models presented and the testing completed by Mr. Whelan do not support this conclusion. As described above, the treadmill belt in Mr. Whelan's models moves quite slowly, and the weight applied was set on the treadmill belt, as opposed to dropped dynamically on the treadmill belt as would be applied by a runner.[7] If the belt is moving at running speeds, the mass and inertia of the belt will contribute to the response of the belt in ways that have not been studied by Mr. Whelan. Thus, Mr. Whelan's model and his testing is not sufficient to draw any conclusion as to how the system will perform as a treadmill.

67. Conclusion 4 from Mr. Whalen's report reads as follows.

> The methods of keeping the lower belt portion taut and the upper belt portion concave as claimed in Patents 619 and 016 were mechanical and performed similar as to the method disclosed in the provisional patent application, which disclosed means for maintaining the upper portion of the running belt in a slackened state.

I disagree with this conclusion. While a certain method(s) to keep the lower belt portion taut and the upper belt portion concave may have been disclosed in the '265 Provisional Application (and the Astilean patents), as explained in my initial expert report, there is no support present in the '265 Provisional Application for any

- "**timing belt** having respective **timing belt pulleys** attached to said front and rear pulley rollers for said closed loop treadmill belt";
- "wherein **timing belt idlers** are used to configure said timing belt

[7] http://www.barefootrunning.fas.harvard.edu/4BiomechanicsofFootStrike.html.

geometrically to fit within constraints of side contours of said treadmill"; and

- **said timing belt will not permit drooping down of said lower taut portion of said closed loop treadmill belt because all respective motion is synchronous**";

as claimed in the '619 patent.

68. Similarly, the '265 Provisional Application fails to disclose any corresponding structure for the claimed "**means for slackening**," in the '016 patent, which as Plaintiffs claim, is a "synchronizing system for the running belt that keeps the upper portion from floating up (Figs. 2-4)."[8]

## V. MR. WHELAN FAILS TO CITE TO ANY RELEVANT EVIDENCE TO SUBSTANTIATE MR. ASTILEAN'S ALLEGED CONCEPTION OF AND/OR REDUCTION TO PRACTICE

69. Mr. Whelan indicated that he reviewed, among other things, "275 digital colored photographs of the leg-powered treadmill," "7 colored drawings of the leg-powered treadmill," and "49 colored photocopied drawings and photographs of the leg-powered treadmill and additional images."

70. It is my understanding that Plaintiffs' counsel has produced these materials to counsel for Woodway (WhelanESI000001-283), who has shared the same with me.

71. I have reviewed WhelanESI000001-283 and based on my study of these materials, none of the photographs, drawings, or renderings evidence that Mr. Astilean allegedly conceived of and/or reduced to practice any of the following before the filing of the '619 patent:

- "a **timing belt** having respective **timing belt pulleys** attached to said front and rear pulley rollers for said closed loop treadmill belt";
- "wherein **timing belt idlers** are used to configure said timing belt geometrically to fit within constraints of side contours of said treadmill"; and

[8] Second Supplemental Answer to Woodway USA, Inc.'s First Set of Interrogatories to Plaintiffs, Speedfit LLC and Aurel A. Astilean, Supplemental Answer to Interrogatory No. 1.

- **said timing belt will not permit drooping down of said lower taut portion of said closed loop treadmill belt because all respective motion is synchronous**"

(emphasis added). Similarly, the photographs, drawings, and/or renderings fail to evidence any corresponding structure for the claimed "**means for slackening**," in the '016 patent, which as Plaintiffs claim, is a "synchronizing system for the running belt that keeps the upper portion from floating up (Figs. 2-4)."[9]

## VI. RESERVATIONS

72. My investigation and review in this matter is ongoing. Additional information may become available which could further support or modify the conclusions that I have reached to date.

73. Further, I reserve the right to consider and comment on any additional expert statements and testimony of Plaintiffs' expert(s) in this matter.

74. Any changes or necessary amplification of my opinions and conclusions will be addressed in supplemental reports or testimony, which I reserve the right to provide.

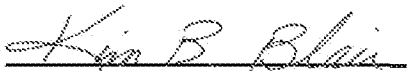
75. I also reserve the right to develop and rely on demonstrative exhibits to explain and supplement my testimony at trial to the extent that such demonstratives would assist the Court and/or the jury.

[9] Second Supplemental Answer to Woodway USA, Inc.'s First Set of Interrogatories to Plaintiffs, Speedfit LLC and Aurel A. Astilean, Supplemental Answer to Interrogatory No. 1.

## VII. SIGNATURE

I hereby certify under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Date: August 26, 2015



Kim B. Blair, Ph.D.

# EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| SPEEDFIT LLC AND AUREL A. ASTILEAN,<br><br>Plaintiffs,<br><br>-against-<br><br>WOODWAY USA, INC. AND DOUGLAS G. BAYERLEIN,<br><br>Defendants. | 13-CV-1276(KAM)<br><br>United States Courthouse<br>Brooklyn, New York<br><br>Tuesday, August 15, 2017<br>12:00 p.m. |

TRANSCRIPT OF CIVIL CAUSE FOR EVIDENTIARY HEARING
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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BY: MATTHEW W. PETERS, ESQ.

Court Reporter: Angela Grant, RPR, CRR
Official Court Reporter

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.



(In open court at 12:05 p.m.)

COURTROOM DEPUTY: All rise.

This is a civil claim construction hearing, 13-CV-1276, Speedfit LLC et al. versus Woodway USA, Inc. et al.

Will plaintiff's attorney state your appearance, please.

MR. VODOPIA: John Vodopia, 191 New York Avenue, Huntington, New York for plaintiffs Speedfit and Aurel A. Astilean.

COURTROOM DEPUTY: Counsel for defendants.

MS. JELENCHICK: Good afternoon, Your Honor.

Kadie Jelenchick of Foley & Lardner, LLC. Here with me today is my colleague, Matthew Peters.

THE COURT: All right. Good afternoon.

Mr. Vodopia, did you want to proceed first?

MR. VODOPIA: Yes.

THE COURT: All right. I'm happy to hear from you.

MR. VODOPIA: Judge, I'm not sure exactly how to proceed. Let me propose to read a short statement, an introduction, and then we have -- plaintiffs have a tutorial that we'd like to play.

THE COURT: All right.

Was this something that you submitted in your

guesswork involved when you go outside what's expressly disclosed and try to -- and try to get an understanding of what the federal circuit of the Supreme Court understands to be equivalent under 112 six paragraph, 112(f).

THE COURT: But you have a burden here, don't you? You're the plaintiffs' counsel. You're asking me to construe your client's claims.

MR. VODOPIA: I'm asking you to construe my client's claims to read on anything found in the '265 Provisional Application, right? The springs in the written description, the fact that it's a photograph, the figure in the 265 provisional application, it's Figure 1, it's a photograph of the wooden prototype that's played in the video which is Exhibit E.

THE COURT: That doesn't show you what's going on inside. It doesn't show you what the means are for maintaining the means for -- it doesn't show you the means for slackening. I mean just hypothetically suppose, and, again, I'm just speaking hypothetically because I don't know the science and the technology of what it is you're grasping for. But suppose there's a way to do this with magnets that would pull the top down to make it slack and would repel the bottom to make it flat or taut, would that fall within your means for slackening or any other means that maybe aren't indicated at all in your client's prosecution

2, 3 and 4 of the patent were discussed in relation to the 265 application. I think that is ground that you covered in your direct, sir, so far. But we haven't heard the exact question. She's just laying the groundwork for discussing Mr. Whelan's prior testimony at his deposition, I believe.

So, respectfully, you're overruled.

You can proceed.

MS. JELENCHICK: Thank you.

Q Do you recall during your deposition stating that the 265 provisional patent application disclosed the weight of the belt in combination with springs as being the only way to solve the problem of maintaining the upper belt in a slackened state?

A To be honest, I'm going to have to defer to what's -- what was written in my deposition transcript. I mean, as I sit here today two years later, I can't independently recall. I haven't even read my transcript, you know, in I think two years so I'm sorry.

MS. JELENCHICK: Your Honor, may I approach the witness?

THE COURT: Yes.

Could you, for the record, just tell us what page you're referring him to.

MS. JELENCHICK: Of course.

THE COURT: All right. This is a transcript dated

September 28, 2015 of Mr. James Whelan.

Q Mr. Whelan, I'll direct you to page 150 of your transcript. In particular, line 10. Are you on --

A Yes, I'm just reading it. Or do you want to read it and then I'll?

Q Are you at the right page?

A I'm at the right page. I'm at line 10.

Q Terrific. So at line 10, my question to you, you state the provisional patent application disclosed that the weight of the belt in combination with springs was one way of solving the problem of maintaining the upper belt in a slackened state.

How did you respond?

A I said, yes, I wrote that.

Q I then asked did you agree with that statement?

A I said read -- has it reading to himself in parenthesis and then I said yes.

Q I then asked you isn't that the only way that is identified in provisional patent application?

What's your response?

A I answered, yes, that is the only way disclosed in a provisional patent application, correct.

Q Turning to page 151 of your transcript, line 13. During your deposition I asked you where is Figure 2 from the Astilean patents disclosed in the Astilean 2009

provisional?

How did you respond during deposition?

A My answer was Figure 2 is not disclosed in the 2009 provisional. Of course, we're worried about the claim, not worried about what was disclosed in the description.

Q But during your deposition, which closely followed your submission of your expert report in this case, you agreed with me that Figure 2 was not disclosed in the 2009 provisional, correct?

A That is correct.

Q During your deposition I also asked you where in Figure 3 -- where Figure 3 of the Astilean patents is disclosed in the 2009 Astilean provisional patent application. How did you respond?

A I replied saying Figure 3 is not disclosed in the 2009 provisional. However, the main function of keeping the upper belt portion slack and the lower belt portion taut as claims as a means plus function is disclosed.

Q You will agree with me that there was no structure resembling Figure 3 of the Astilean patents included in the 2009 provisional, was there?

A There was structure in the sense of an upper belt being slackened, but when it comes to the drawings which we have already discussed, the figures we've already discussed, those specific structures are not there, that is correct.

Q You're familiar with the 2009 provisional patent application?
A Yes.
Q And you understand it's a little over one page of text and one figure?
A Yes.
Q In either the one page of text or the figure, is there any discussion for a person of ordinary skill in the art to read on how to accomplish the orientation of components detailed in Figure 3 of the Astilean patents?
A For any structure at all, of course. I mean, they talk about the two sides, about the rollers. So that is discussed, yes.
Q Can you tell me where in the 2009 provisional application there's a disclosure relating to Figure 3 of the Astilean patents?
A Can you give me a copy of Figure 3 so I can, you know, fairly answer the question.
THE COURT: I'll get it for you, sir. I have it. It's of the '016 patent.
THE WITNESS: It's the same for both.
And if I could also get a copy of the provisional so I can go through and identify them.
Can I get a copy of the provisional as well?
MR. VODOPIA: Yes, I'm bringing it.

patent.
A I don't -- tab -- I don't see A or B or.
Q Yours may actually have the tab name '016 patent.
A So just look for 0 -- yeah. So I do see U.S. patent number '016.
Q I'll direct you to column 5 of the '016 patent. In particular, line 3 where it states the method shown in Figure 3 shows the use of a timing belt 67 in achieving a similar result. Here and roller 60 and 64 are attached to timing belt pulleys 62 and 66 respectively. Timing belt idlers 68 are simply used to configure timing belt geometrically to fit within the constraints of the side contours of treadmill 10.

If belt 26 is prevented from slipping relative to end roller 60 and 64 by high friction coefficient or by the use of integral timing belt on the inside of belt 26 and rollers are timing belt engagement group once configured as shown, timing belt 67 will not permit drooping down of section 26A since all motion is now synchronous.

Did I read that correctly?
A Yes.
Q And in your opinion, would a person of ordinary skill in the art understand that description of Figure 3 to be reflected in the figure Figure 3 included in the patent? So put another way, does Figure 3 of the patent accurately

depict the description in column 5?
A Yes.
Q Will you agree with me that the phrase "timing belt" does not appear in the 2009 provisional patent application?
A Yes.
Q Will you also agree with me that the timing belt idlers that are referenced in column 5 of the '016 patent don't appear in the 2009 provisional application?
A Yes.
Q Does the 2009 provisional patent application say anything about the application of a coefficient friction in connection with any structure to hold the belt taut?
A I'm just going to review it real quick. I don't recall. No.
Q So you'll agree with me that the 2009 provisional application doesn't reference a coefficient of friction?
A That is correct.
Q Does the 2009 provisional patent application mention in any way synchronizing motion of the belts?
A No, because there's only one belt.
Q In response to some questions by Mr. Vodopia you testified that there are circumstances where a spring would be considered equivalent.

Do you recall that testimony?

A Yeah. I think I testified that there's many ways,

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| SPEEDFIT LLC and AUREL A. ASTILEAN,<br>Plaintiffs,<br>vs.<br>WOODWAY USA, INC.,<br>Defendant. | )<br>)<br>)<br>)<br>) | Case No. 2:13-cv-01276 (KAM) (AKT) |

**WOODWAY USA, INC.'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO PRECLUDE THE TESTIMONY OF PLAINTIFFS' TECHNICAL EXPERT JAMES WHELAN**

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Woodway USA, Inc. ("Woodway") respectfully submits its Reply in Support of its Motion to Preclude the Testimony of Plaintiffs' Technical Expert James Whelan ("*Daubert* Motion").

## I. PLAINTIFFS' RESPONSE MISSTATES THE FACTS AND THE LAW

### A. The U.S. Patent and Trademark Office Did Not Determine Priority

Plaintiffs are incorrect – the U.S. Patent and Trademark Office ("the Patent Office") did not make any priority[1] determination for the Astilean patents-in-suit. (Pls. Br. at 3-5.) Plaintiffs do not point to any evidence that the Patent Office made any priority finding, likely because they cannot. (*See id.* at 4.) There is no documentation or evidence of a priority determination in the prosecution file history. The prosecution histories neither contain interview notes nor examiner rejections/responses that even suggest priority was as issue under consideration, let alone something that was decided. In addition, Plaintiffs can offer no competent witness testimony on issue – Plaintiffs' patent counsel, Al Walker, is deceased and Mr. Astilean was not involved in the prosecution of the patents-in-suit. (*See* Supplemental Declaration of Matthew W. Peters, Ex. E, March 24, 2015 Astilean Deposition Tr., at 245:24-247:8.) Plaintiffs offer no authority for their position that the mere fact that Plaintiffs included certain information in an Information Disclosure Statement submitted to the Patent Office[2] says anything about priority.[3] In fact,

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[1] As explained in Woodway's opening Memorandum at 3-4, the priority date (or "effective filing date") of a patent is vital because it is the central reference point to which the patent's validity must be tested against the "prior art." In filing a new patent application, a patentee may claim "priority" to an earlier-filed provisional patent application, but "'only if the disclosure of the earlier application provides support for the claims of the later application, as required by 35 U.S.C. § 112.'" *PowerOasis*, 522 F.3d at 1306 (quoting *In re Chu*, 66 F.3d 292, 297 (Fed. Cir. 1995)); 35 U.S.C. § 119(e)(1).

[2] An "IDS" or "Information Disclosure Statement" is "a document filed with the United States Patent and Trademark Office during the pendency of a patent application to furnish the patent examiner with patents, publications, or other information that the patent applicant believes the examiner should consider." *See Mead Johnson & Co. v. Barr Labs., Inc.*, 38 F. Supp. 2d 289, 295 n.1 (S.D.N.Y. 1999).

[3] Even if the Patent Office considered the various items that Plaintiffs point to, (Pls. Br. at 3-4), there is no evidence that the inner workings of the treadmill were visible. As previously noted by the Court, the patents are directed toward interior mechanisms that interact with the running belt, and Plaintiffs' Wooden Prototype referenced in the

patent examiners may give deference to materials submitted in an Information Disclosure Statement, despite that such materials may reinforce an incorrect claim of priority. *See Arrow Int'l v. Spire Biomed., Inc.*, 635 F. Supp. 2d 46, 62 (D. Mass. 2009).

The Patent Office does not make determinations of priority as a matter of course in prosecution. *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1305 (Fed. Cir. 2008); *see also* M.P.E.P. at § 201.08. Indeed, Plaintiffs admit that the Patent Office only considers the merits of an applicant's claim of priority under limited circumstances, none of which occurred in the context of the Patents-in-Suit. (Pls. Br. at 4 n.2.)

**B. It Is Plaintiffs' Burden to Establish Priority**

It is Plaintiffs' burden to demonstrate that the '619 and '016 patents are entitled to the filing date of the '265 Provisional Application. *See PowerOasis*, 522 F.3d at 1305-06. Plaintiffs admit, as they must, that Woodway's public disclosure and offer for sale of what is now known as the Woodway CURVE treadmill at IHRSA is invalidating prior art unless the Astilean patents are entitled to priority based on the '265 Provisional Application. (Pls. Br. at 4 ("the release and offer for sale of the Speedboard (Curve) at IHRSA San Francisco in March 2009 . . . would have prevented allowance unless the Examiner relied on the Speedfit '265 Provisional application for priority").) Rather than attempt to carry their burden, Plaintiffs try to shift it onto the Patent Office, (Pls. Br. at 3-6), which expressly disclaims such a charge. *See* M.P.E.P. at § 201.08 ("The Office does not need to make a determination as to whether the requirement of 35 U.S.C. [§] 120 that the earlier nonprovisional application discloses the invention of the second application in the manner provided by 35 U.S.C. [§] 112(a) is met unless the filing date of the

'265 Provisional Application does not disclose any particular interior mechanisms when viewed from the outside. (Ex. G, Claim Construction Hearing Tr., at 15:5-16:2.) The synchronizing system was invented by Woodway, subject of a separate Woodway patent application, and thereafter publicly disclosed and offered for sale at the International Health Racquet & Sportsclub Association ("IHRSA") convention in San Francisco in March 2009.

earlier nonprovisional application is relied upon in a proceeding before the Office."). There was no proceeding in the Patent Office that triggered any priority determination.

Plaintiffs' reliance on *i4i* is misplaced. While it is Woodway's ultimate burden to prove invalidity defenses by clear and convincing evidence, Plaintiffs must bring forth evidence to rebut admitted facts that make a *prima facie* case of invalidity. The Supreme Court held in *i4i* that defendant's ultimate burden does not decrease to preponderance of the evidence based on whether a prior art reference was considered by the examiner. *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 99-100 (2011). However, where factual matters are not in dispute, as here and in *PowerOasis*, Plaintiffs cannot merely hide behind the burden of proof to avoid the legal conclusion demonstrated by admitted facts. *See id.* at 114 ("Where the ultimate question of patent validity turns on the correct answer to legal questions—what these subsidiary legal standards mean or how they apply to the facts as given—today's strict standard of proof has no application.") (J. Breyer, concurring); *see also PowerOasis*, 522 F.3d at 1305 ("Once it has established a *prima facie* case of invalidity and its burden is met, the party relying on validity is then obligated to come forward with evidence to the contrary.") (internal quotations omitted).

### C. Plaintiffs' Priority Claim to the '265 Provisional Application Requires Support from the Written Description of the Provisional, Not Just an Enabling Disclosure

As explained in Woodway's opening Memorandum, a priority determination turns on the analysis of 35 U.S.C. §112. (Memo. at 10-11.) Section 112 requires that the ***earlier-filed provisional patent application***: (i) contain a "written description" of the invention; ***and*** (ii) enable the invention, which means that one reasonably skilled in the art could make or use the invention from disclosures in the patent coupled with information known in the art without undue experimentation. *Callicrate v. Wadsworth Mfg., Inc.*, 427 F.3d 1361, 1373 (Fed. Cir. 2005). These are separate requirements that cannot collapse into a single inquiry. *Ariad*

*Pharmas., Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1344 (Fed. Cir. 2010) (*en banc*); *see also Permutit Co. v. Graver Corp.*, 284 U.S. 52, 58 (1931) (affirming finding of invalidity based on lack of written description with no mention of enablement). Plaintiffs do not credibly dispute that this is the relevant test. (*See, e.g.*, Pls. Br. at 14-15 and 16-19.)

Plaintiffs admit that Mr. Whelan does not address the written description requirement, which is fatal to their position. (Pls. Br. at 14-15 ("Mr. Whelan's investigation, reports and testimony did not opine as to whether the '265 provisional application included each and every element of the invention as claimed").) Resorting to Mr. Whelan's understanding of the '265 Provisional Application, premised on his specific experiences and background as a patent agent or engineer, cannot backfill the deficiencies.

The written description of a patent is not satisfied by merely identifying a problem and highlighting a single potential solution. In that scenario, any subsequent patents that address the same problem with a different solution are not entitled to claim priority. *See Univ. of Rochester v. G.D. Searle & Co., Inc.*, 358 F.3d 916, 927 (Fed. Cir. 2004) (finding the written description inadequate where the specification described what can be done, but failed to disclose which specific compounds may achieve the desired result); *see also Ariad*, 598 F.3d at 1345 ("Every patent must describe an invention. It is part of the *quid pro quo* of a patent; one describes an invention, and, if the law's other requirements are met, one obtains a patent . . . ."). A proper analysis of the written description is constrained to the four corners of the patent, which Mr. Whelan did not do. *See Phigenix, Inc. v. Genentech Inc.*, 238 F. Supp. 3d 1177, 1177-88 (N.D. Cal. 2017) (finding an expert declaration failed to create a triable issue of fact regarding whether an invention was adequately supported in an earlier-filed provisional application).

The plain language of the '265 Provisional Application cannot satisfy the written description requirement. Mr. Whelan does not dispute that specific "means for slackening" claim limitations in the Astilean patents are missing from the '265 Provisional Application. (Peters Decl., Ex. A, at 151:13-154:25, 161:13-162:8.) Mr. Astilean admits that the '265 Provisional Application fails to disclose Figures 2-4 and an "slackening mechanism." (Ex. E, at 170:5-15, 177:6-179:22.) "It was just in the ['619] patent application." (*Id.* at 170:14-15.) Purported co-inventor, Dan Bostan, similarly testified that the "secondary belt" in the wooden prototype was not a synchronizing system or timing belt as claimed in the patents-in-suit. (June 5, 2015 Bostan Tr., Ex. F, at 90:10-92:16.) This is aligned with the Court's Claim Construction Order, which which held that "means for slackening" must be construed as limited to the structures specifically disclosed in the specification of the '016 Patent – Figures 2, 3, and 4. (Dkt. No. 189 at 20-21; *see also* Claim Construction Hearing Tr., Peters Decl., Ex. D, at 15:8-18.) Plaintiffs and Mr. Whelan contradict the Court's ruling. It is irrelevant what may have been disclosed in the videos or other offerings to the Patent Office that Mr. Whelan considered.

Moreover, there is no "similarity" test for determining adequacy of the written description, which is the sole basis for Mr. Whelan's opinions. (*See, e.g.*, Woodway Op. Br., Ex. 1, at 24; *New Railhead Mfg., L.L.C. v. Vermeer Mfg.*, 298 F.3d 1290, 1296 (Fed. Cir. 2002) ("***Identity*** of that which is described, however, is necessary: 'What is claimed by the patent application must be the same as what is disclosed in the specification . . . .'") (emphasis added) (quoting *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002)).) Plaintiffs offer no authority to the contrary. While compliance with the written description requirement is a question of fact, *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1556 (Fed. Cir. 1991), Mr. Whelan's statement that the patents disclose similar, albeit admittedly different,

structures would allow Plaintiffs to claim new structures by "describing something that is not the invention" in the '265 Provisional Application. *See Amgen, Inc. v. Sanofi, LLC*, 872 F.3d 1367, 1378-79 (Fed. Cir. 2017). Plaintiffs concede that, at most, Mr. Whelan's testimony is only relevant to discuss enablement. (See Pls. Br. at 15.) Mr. Whelan ignores the written description requirement of a priority determination in its entirety. Merely having opinions directed to one part of the test – enablement – does not advance any priority determination. Without a discussion of the written description requirement, Mr. Whelan's opinions are unhelpful because they cannot, as a matter of law, carry Plaintiffs' burden to establish an earlier priority date. And in permitting only enablement opinions, the jury is left with the impression that the written description requirement can be ignored. *Cf. Byrne v. Liquid Asphalt Sys., Inc.*, 250 F. Supp. 2d 84, 88-89 (E.D.N.Y. 2003) (excluding proposed expert testimony on the grounds of relevance where the testimony did not relate to an element of Plaintiffs' claim).

Plaintiffs concede that, at most, Mr. Whelan's testimony is only relevant to discuss enablement. (*See* Pls. Br. at 15.) However, while enablement is part of the priority determination, it should not be offered in a vacuum. Doing so would confuse the trier of fact by suggesting that the written description requirement can be ignored or is less important than enablement. Enablement and written description must both be established in order to properly claim priority, and Mr. Whelan provides no discussion regarding written description requirement. *See Ariad*, 598 F.3d at 1344; s*ee also New Railhead*, 298 F.3d at 1295. Because Plaintiffs offer no other evidence that will allow them to satisfy the written description requirement, Mr. Whelan's testimony should not be allowed to be an end-run-around a complete priority analysis.

## II. MR. WHELAN'S TESTIMONY WILL NOT ASSIST THE TRIER OF FACT

### A. Mr. Whelan Fails to Identify the Relevant Person of Ordinary Skill in the Art

A person of ordinary skill in the art and his/her perspective is the touchstone for infringement and invalidity inquiries. *E.g.*, *Sundance Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1361 (Fed. Cir. 2008). Resolution of the level of ordinary skill in the art is required before either inquiry can be determined. *In re Jolley*, 308 F.3d 1317, 1321 (Fed. Cir. 2002) (holding priority "must be proven by evidence showing what the inventor has disclosed to others and ***what that disclosure means to one of ordinary skill in the art***") (emphasis added). Plaintiffs do not address Mr. Whelan's failure to identify and assess the relevant person of ordinary skill in the art, focusing instead on whether Whelan himself qualifies as a person of ordinary skill in the art. (Pls. Br. at 12-14.) But, whether an expert is of ordinary, or even extraordinary, skill in the art is a red herring; the expert still must explain the case through the lens of the person of ordinary skill in order for the testimony to be helpful to the jury. *See Aristocrat Techs. Australia Pty Ltd. v. Int'l Game Tech.*, 709 F.3d 1348, 1361 (Fed. Cir. 2013) (regarding claim construction, finding an expert must explain "why a person of ordinary skill would understand a term in a particular manner"). Plaintiffs fail to explain how Mr. Whelan could have accomplished this task without defining the relevant person of ordinary skill. Whether Mr. Whelan agreed with Dr. Blair's assessment of a person of ordinary skill in the art during deposition, this is beside the point. Mr. Whelan's opinions were not offered with this definition in mind. Based on this fact alone, Mr. Whelan's opinions should be excluded in their entirety.

**B. Mr. Whelan's Opinions Regarding Derivation Ignore Critical Information**

Plaintiffs posit that Mr. Whelan completed a thorough analysis, (Pls. Br. at 2-3 and 20-21), but this is contradicted by the facts. In their Opposition, Plaintiffs largely ignore the information Woodway identified that Mr. Whelan failed to consider. (Woodway Op. Br. at 24-26.) Mr. Whelan's analysis was limited to 9 hours for his opening report and 9.5 hours for his rebuttal report (inclusive of research and actual writing of the reports). (Peters Decl., Ex. A, at 108:16-24, 122:8-13.) Mr. Whelan did not review any deposition transcripts, despite noting that more information would have been beneficial in making his analysis, (*id.* at 90:16-91:14), and he did not interview either named inventor, (*id.* at 89:5-9, 90:14-15). Mr. Whelan admitted that having the deposition transcripts would have been helpful. This is certainly true as Mr. Oblamski's transcript contains important information regarding Woodway's inventorship of the synchronizing system. *Detwiler v. Offenbecher*, 728 F. Supp. 103, 139-40 (S.D.N.Y. 1989) (noting that, on summary judgment, a party may not rely on an expert opinion that "that is not based upon specific facts . . . or that makes unsupported assumptions or ignores important facts.") And Plaintiffs ignore that the only nonpublic documents Mr. Whelan reviewed were approximately 10 documents, hand-selected by Plaintiffs' counsel. *See San Diego Comic Convention v. Dan Farr Prods.*, No., 2017 WL 4227000, at *7 (S.D. Cal. Sept. 22, 2017) ("The Court is unable to ignore the fact that the foundation of [expert's] conclusions was generated from a narrow field of documents, most of which were provided to him by Defendants. Thus, his opinions are not based on "sufficient facts or data . . . ."""). It is not apparent from the materials considered sections of Mr. Whelan's reports that he reviewed the file histories for the patents. Moreover, Mr. Whelan admitted that he did not inspect the wooden prototype to determine its inner workings, and further admitted such an inspection would have been helpful to his analysis. (Peters Decl., Ex. A, at 77:8-78:25) Plaintiffs should not be permitted to allow the jury to hear

opinions that are not sufficiently grounded in the facts or otherwise based on insufficient data in order to support a desired conclusion.

### C. Plaintiffs Fail to Identify Any Other Issue in this Case Where Mr. Whelan's Testimony Would be Relevant

Plaintiffs admit that the Court must determine whether Mr. Whelan's testimony "will assist the trier of fact in understanding the evidence or determining an issue of fact." (Pls. Br. at 10.) Yet, Plaintiffs themselves are confused as to the specific relevance of Mr. Whelan's contemplated testimony as they affirm Woodway's position that Mr. Whelan did not offer an opinion on: (1) priority, (Pls. Br. at 1-2); (2) anticipation, (Pls. Br. at 18-19); (3) inventorship, (Pls. Br. at 1-2); or (4) written description, (Pls. Br. at 11 n.5). Plaintiffs cannot identify the relevance of the testimony to any specific issue in this case – patent infringement, breach of contract, unjust enrichment, and constructive trust – which likely means that the jury will similarly be left guessing.

### D. Mr. Whelan's Credentials Are Irrelevant Where His Opinions Are Inconsistent with the Facts and the Law

The Second Circuit has articulated three inquiries that a district court must undertake as part of its gatekeeping function under Rule 702: "(1) whether the witness is qualified as an expert to testify as to a particular matter," (2) whether the opinion is based upon reliable data and methodology and (3) whether the expert's testimony (as to a particular matter) will assist the trier of fact." *CDR-Wantagh, Inc. v. Shell Oil Co.*, No. 07-CV-4497 DRH ETB, 2011 WL 795865, at *8 (E.D.N.Y. Feb. 28, 2011). Plaintiffs seem to largely focus on the first prong of the inquiry while ignoring Woodway's challenges to the other two prongs. For the purposes of the *Daubert* Motion, Woodway did not contest that Mr. Whelan was qualified to render opinions, instead focusing on the more fundamental problems with the opinions as offered. While Woodway reserves the right to question his qualifications in further proceedings, that should not be

necessary since his opinions should be stricken because Plaintiffs have not demonstrated how the opinions are reliable or will be helpful to the trier of fact in light of the elements of their case.

## III. CONCLUSION

For the reasons discussed above, and in Woodway's opening Memorandum, Mr. Whelan's expert reports should be stricken, and Plaintiffs should be precluded from relying on his opinions in any dispositive motion and from offering Mr. Whelan's testimony at trial.

Dated: August 8, 2018

Respectfully submitted,

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*Counsel for Defendant and Counterclaim-Plaintiff Woodway USA, Inc.*

**CERTIFICATE OF SERVICE**

I, Matthew W. Peters, an attorney with Foley & Lardner LLP, hereby certify that on August 8, 2018, I caused to be filed the foregoing document with the Clerk of Court using the CM/ECF System which will send notification of such filing via electronic mail to all counsel of record. In accordance with Chambers Practice, two courtesy copies of the foregoing will be sent via Federal Express.

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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| SPEEDFIT LLC and AUREL A. ASTILEAN, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | Case No. 2:13-cv-01276 (KAM) (AKT) |
| vs. | ) | |
| | ) | |
| WOODWAY USA, INC., | ) | |
| | ) | |
| Defendant. | ) | |

**SUPPLEMENTAL DECLARATION OF MATTHEW W. PETERS**

I, MATTHEW W. PETERS, declare as follows:

1. I am an associate in the law firm Foley & Lardner LLP, counsel for Defendant Woodway USA, Inc. in this action. I submit this Supplemental Declaration in connection with Woodway USA, Inc.'s Memorandum in Support of its Motion to Preclude the Testimony of Plaintiffs' Technical Expert James Whelan.

2. Attached as Exhibit E is a true and correct copy of excerpts of the deposition transcript of the March 24, 2015 Deposition of Aurel Astilean, which has been highlighted.

3. Attached as Exhibit F is a true and correct copy of excerpts of the deposition transcript of the June 5, 2015 Deposition of Dan Bostan, which has been highlighted.

4. Attached as Exhibit G is a true and correct copy of excerpts of the August 15, 2017 Claim Construction Hearing Transcript, which has been highlighted.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 8, 2018
Milwaukee, Wisconsin

/s/ Matthew W. Peters
Matthew W. Peters

# EXHIBIT F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

----------X
SPEEDFIT LLC and AUREL A. ASTILEAN,

Civil Action No.
Plaintiffs. 2:13-cv-01276 (KAM(AKT)
v.
WOODWAY USA, INC.,
Defendants.
----------X
Volume I June 5 , 2015
New York, New York

VIDEOTAPED DEPOSITION OF

DAN BOSTAN



Videotaped deposition of DAN BOSTAN, taken at the offices of Fisher & Decea, 84 Business Park Drive, Suite 200, New York, New York, on Friday, June 5, 2015, at 9:38 a.m., before Anthony Armstrong, a Realtime Systems Administrator, Certified Realtime Reporter, Certified Court Reporter and Notary Public of the State of New York.



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Also present:
Aurel Astilean
Lilia Rusu, Romanian Interpreter
Eric Lenz, videographer



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09:38:25 THE VIDEOGRAPHER: Good morning. This is the video operator speaking Eric Lenz of Sound Deposition Services located in Long Beach, California.

Today is Friday, June 5th, 2015. Time is approximately 9:38 in the morning. We're at the offices of Fishman & Decea, 84 Business Park Drive, Armonk, New York, in the matter of Speedfit versus Woodway. This is in the US District Court for the Eastern District of New York, Case Number 2:13-CV 01276.

Will counsel introduce themselves for the record.

MS. JELENCHICK: Kadie Jelenchick of Foley & Lardner LLP on behalf of defendant Woodway USA Inc.

On the phone is Jeff Costakos, also of Foley & Lardner.

MR. VODOPIA: Douglas Robinson, Fishman & Decea, 84 Business Park Drive, Armonk, New York on behalf of plaintiffs.

MR. LEWIN: Jacob Lewin of Fishman & Decea representing the plaintiffs.

MR. VODOPIA: John Vodopia, John F. Vodopia P.C., 191 New York Avenue, Huntington, New York, on behalf of plaintiffs.

MR. ASTILEAN: Alex Astilean, Speedfit, 196 Knoxville Road, East Hampton, New York 11937.

THE VIDEOGRAPHER: And will our court reporter Anthony Armstrong swear both the witness and the interpreter, please.

LILIA RUSU, Romanian Interpreter, having first been duly sworn, interpreted from English to Romania and from Romania to English as follows:

DAN BOSTAN, a witness, having first been duly sworn, testified as follows:

THE VIDEOGRAPHER: Please begin.

DIRECT EXAMINATION

BY MS. JELENCHICK:

Q. Good morning, Mr. Bostan. I know we met a few moments ago. I would just like to introduce myself to you on the record.

As I just mentioned, I represent Woodway US Inc. in connection with the litigation that brings us here today. In this litigation, Woodway has been sued by Mr. Astilean and Woodway USA Inc. Do you understand that?

A. Yes.

Q. You previously met Ms. Rusu who is our interpreter today. And since I do not speak or understand Romanian, but for the time being per your request, we're going to proceed with this deposition in English, is that acceptable?

A. Yes.

Q. And to the extent you would like the assistance of the translator either because you don't understand the question that I'm asking or a particular word that I use or phrase or if you need assistance with your answer, please by all means we should use the interpreter.

A. Thank you.

Q. Will you agree to do that?

A. Yes.

Q. Please state and spell your name as well as provide your home address.

A. Dan, D-A-N, Bostan, B-O-S-T-A-N, 147 Allancroft, A-L-L-A-N-C-R-O-F-T, Quebec, Beaconsfield, H9W2P6, Canada.

Q. I will be asking you a series of questions today while you're under oath. This is the same oath you must make in court before testifying.

Do you understand that?

A. Yes.

Q. My questions and your answers will be recorded today by Mr. Armstrong our court reporter.

You understand that you need to speak up and provide oral responses to my questions?

A. Yes.

Q. Will you agree to do that?

A. Yes.

Q. Mr. Armstrong can't take down a shake of your head or other gestures indicating a response. So will you agree to give verbal responses to my questions?

A. Yes, I do.

Q. I may ask a question that I don't state very well or for some reason you don't understand what I'm asking.

If you have some problem with the question, will you please agree to tell me?

A. Sure.

Q. And I'll do my best to rephrase, ask a different question or maybe even a better question, but I can't do that unless you tell me you have some problem with the question.

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12:07:35 Q. You had a working model six in
12:07:37 August of 2008; is that correct?
12:07:38 A. Yes.
12:07:43 Q. I'm handing you what's been marked
12:07:46 Bostan Deposition Exhibit 8 and 9.
12:08:10 And Bostan Deposition Exhibit 8 was
12:08:12 previously marked during Mr. Hoerig's deposition.
12:08:15 And it is an e-mail from Alexspeedfit@aol.com to
12:08:20 ma@myronamer.com on October 6th, 2008.
12:08:26 If you flip to the second page of the
12:08:28 exhibit, second, third, fourth, fifth pages.
12:08:36 A. Yes.
12:08:36 Q. Are these photographs of model six?
12:08:38 A. Yes.
12:08:39 Q. How do you know?
12:08:41 A. This is my garden, this is my
12:08:43 backyard, and this is the model six that I built.
12:08:52 Q. In this Deposition Exhibit 8, is
12:08:55 there a photograph of the secondary belt
12:09:00 structure that we have been discussing?
12:09:04 A. It's definitely installed underneath,
12:09:08 because as you can see the belt was curved.
12:09:11 Otherwise, it wouldn't have been.
12:09:14 The third picture shows the underneath
12:09:18 belt.

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12:09:20 Q. And the third picture is document
12:09:22 brand with production number PLTFES1001694; Is
12:09:28 that right?
12:09:29 A. Correct.
12:09:36 Q. Do you recall when these photographs
12:09:37 were taken?
12:09:38 A. I know when -- I'm not sure about the
12:09:41 exact date. They were beginning of August when
12:09:45 Alex came to our house.
12:09:55 Q. If you look at Bostan Exhibit 9,
12:10:00 which was previously marked as Oblanski
12:10:03 Deposition Exhibit 3, do you recognize these two
12:10:14 photographs?
12:10:14 A. Yes.
12:10:15 Q. What are they? What's the first
12:10:18 photograph?
12:10:18 A. It's the wooden structure of the
12:10:20 model six that I built, and the -- the sustaining
12:10:24 belt, the secondary belt underneath -- underneath
12:10:28 the main running belt.
12:10:34 Q. What about the second photograph,
12:10:35 what is that?
12:10:39 A. That is the same thing.
12:10:47 Q. Do you know where these photographs
12:10:47 were taken?

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12:10:48 A. Where? No idea.
12:10:50 Q. Have you seen them before?
12:10:51 A. No.
12:11:09 Q. Would you refer to the photograph
12:11:12 1694 in Exhibit 8, would you ever refer to that
12:11:19 belt structure as a timing belt?
12:11:22 A. Which picture, this one?
12:11:24 Q. Yes. 1694.
12:11:27 A. No, this is not a timing belt.
12:11:33 Q. 1694 is not a timing belt?
12:11:36 A. No.
12:11:37 Q. How about in Bostan Exhibit 9?
12:11:39 A. No.
12:11:41 Q. Is the -- does the photograph -- do
12:11:43 either of the photographs depict a timing belt?
12:11:46 A. No.
12:11:47 MR. LEWIN: Objection to the form.
12:11:48 A. No.
12:11:49 BY MS. JELENCHICK:
12:11:50 Q. Why not?
12:11:51 A. This is a sustaining belt for the
12:11:54 bottom part of the running belt. The timing belt
12:12:00 is something that works on the front and the rear
12:12:05 pulleys to hold them in place. So that is
12:12:10 another option of keeping the curve -- the belt

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12:12:13 on the curved surface.
12:12:20 Q. So the secondary belt illustrated in
12:12:24 Bostan Deposition Exhibit 9, it's different than
12:12:27 a timing belt?
12:12:29 MR. LEWIN: Objection.
12:12:30 A. It's not the timing belt.
12:12:31 BY MS. JELENCHICK:
12:12:31 Q. Could it ever be referred to as a
12:12:33 timing belt?
12:12:34 A. Never.
12:12:43 Q. Do you know if Mr. Astilean ever
12:12:46 refers to the secondary belt as a timing belt?
12:12:48 A. No, no.
12:12:51 Q. No, you don't know or no he doesn't?
12:12:53 A. No, he did not. As a matter of fact,
12:12:55 he didn't like this idea.
12:12:57 Q. Why not?
12:12:57 A. Because you notice on one of the
12:13:00 pictures, see, you see the first document, No. 8,
12:13:07 the last picture?
12:13:11 Q. 1690?
12:13:13 A. 1690, exactly. You notice here a
12:13:18 mark in the middle of the treadmill? That is
12:13:22 what he was unhappy about. He said this system
12:13:26 will leave marks on the -- marks and will worn

# EXHIBIT G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| SPEEDFIT LLC AND AUREL A. ASTILEAN,<br><br>Plaintiffs,<br><br>-against-<br><br>WOODWAY USA, INC. AND DOUGLAS G. BAYERLEIN,<br><br>Defendants. | 13-CV-1276(KAM)<br><br>United States Courthouse<br>Brooklyn, New York<br><br>Tuesday, August 15, 2017<br>12:00 p.m. |

TRANSCRIPT OF CIVIL CAUSE FOR EVIDENTIARY HEARING
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiffs: JOHN F. VODOPIA, ESQ.
Attorney for the Plaintiffs
191 New York Avenue
Huntington, NY 11743
BY: JOHN F. VODOPIA, ESQ.

For the Defendants: FOLEY & LARDNER, LLP
Attorneys for the Defendants
777 East Wisconsin Avenue
Milwaukee, WI 53202
BY: KADIE M. JELENCHICK, ESQ.
BY: MATTHEW W. PETERS, ESQ.

Court Reporter: Angela Grant, RPR, CRR
Official Court Reporter

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

(In open court at 12:05 p.m.)

COURTROOM DEPUTY: All rise.

This is a civil claim construction hearing, 13-CV-1276, Speedfit LLC et al. versus Woodway USA, Inc. et al.

Will plaintiff's attorney state your appearance, please.

MR. VODOPIA: John Vodopia, 191 New York Avenue, Huntington, New York for plaintiffs Speedfit and Aurel A. Astilean.

COURTROOM DEPUTY: Counsel for defendants.

MS. JELENCHICK: Good afternoon, Your Honor.

Kadie Jelenchick of Foley & Lardner, LLC. Here with me today is my colleague, Matthew Peters.

THE COURT: All right. Good afternoon.

Mr. Vodopia, did you want to proceed first?

MR. VODOPIA: Yes.

THE COURT: All right. I'm happy to hear from you.

MR. VODOPIA: Judge, I'm not sure exactly how to proceed. Let me propose to read a short statement, an introduction, and then we have -- plaintiffs have a tutorial that we'd like to play.

THE COURT: All right.

Was this something that you submitted in your

guesswork involved when you go outside what's expressly disclosed and try to -- and try to get an understanding of what the federal circuit of the Supreme Court understands to be equivalent under 112 six paragraph, 112(f).

THE COURT: But you have a burden here, don't you? You're the plaintiffs' counsel. You're asking me to construe your client's claims.

MR. VODOPIA: I'm asking you to construe my client's claims to read on anything found in the '265 Provisional Application, right? The springs in the written description, the fact that it's a photograph, the figure in the 265 provisional application, it's Figure 1, it's a photograph of the wooden prototype that's played in the video which is Exhibit E.

THE COURT: That doesn't show you what's going on inside. It doesn't show you what the means are for maintaining the means for -- it doesn't show you the means for slackening. I mean just hypothetically suppose, and, again, I'm just speaking hypothetically because I don't know the science and the technology of what it is you're grasping for. But suppose there's a way to do this with magnets that would pull the top down to make it slack and would repel the bottom to make it flat or taut, would that fall within your means for slackening or any other means that maybe aren't indicated at all in your client's prosecution

history as long as it had the effect of creating a slack, concaved top and a taut horizontal bottom?

MR. VODOPIA: I wouldn't say that anything that -- I wouldn't say that anything that performs that function, that solves that problem, that was solved by the disclosure in the '265 Provisional Application. I'm not sure if I would say that any structure outside of the record that does it also falls within the scope of the claims. It's a little bit --

THE COURT: So what are you saying?

MR. VODOPIA: I'm saying that it's -- I think it's on a case-by-case basis it has to be determined. I think that equivalence is pretty mushy, but nevertheless that's what the law says and so the claims must be construed as anything in the intrinsic record and their equivalence under the law.

And, again, I agree, I would agree with you, Judge, if you would say it's a bit mushy. I don't know how to really make that call. I believe that -- I believe a lot could get through in equivalence.

THE COURT: All right. Do you want to be heard, ma'am?

MS. JELENCHICK: Yes, please. If I can direct the Court to the Bennett Marine case versus Lenco Marine. And in that federal circuit case I think, and it's line of

# EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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SPEEDFIT LLC,

17-cv-00768 (KAM/AKT)

Plaintiffs,

PLAINTIFF'S SUPPLEMENTAL RESPONSES and OBJECTIONS TO DEFENDANT'S FIRST SET OF INTERROGATORIES

- against -

WOODWAY USA, Inc.,

Defendant.

----------x

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff Speedfit, by and through its attorneys, John F. Vodopia P.C., hereby presents its responses and objections to defendant, Woodway USA Inc.'s ("Defendant"), First Set of Interrogatories ("Requests"), as follows:

**GENERAL OBJECTIONS**

1. Plaintiff objects to the Requests, including each and every Definition and Instruction, to the extent they purport to impose duties on Plaintiff that exceed the scope of permissible discovery under the Federal Rules of Civil Procedure, the Local Rules for the Eastern District of New York, the Local Patent Rules for the Eastern District of New York, and/or applicable law.

2. Plaintiff objects to the Requests to the extent that they seek information protected from disclosure by the attorney-client privilege, a right of confidentiality, a right of privacy, and/or any other privilege, doctrine, or immunity, including, but not limited to, the attorney work product doctrine and the common interest privilege. Any disclosure of privileged

material is inadvertent and shall not be considered a waiver of the applicable privilege, protection, or immunity.

3. Plaintiff objects to the Requests to the extent that: (a) the information sought is unreasonable, cumulative or duplicative, or are obtainable from another source that is more convenient, less burdensome or less expensive; (b) Defendant has obtained the documents or information sought in any other proceedings or pursuant to any other means; and/or (c) the burden or expense of responding to any of the Requests outweighs its likely benefit.

4. Plaintiff objects to the Requests to the extent that they seek publicly available information that is equally accessible to Defendant.

5. Plaintiff objects to the Requests to the extent that they seek production of information not within Plaintiff's possession, custody, or control.

6. Plaintiff objects to the Requests to the extent they are vague, ambiguous, and/or fail to describe the information sought with reasonable particularity. Subject to and without waiving this objection, and to the extent Plaintiff can ascertain the nature of the information requested, Plaintiff will make reasonable efforts to respond to the Requests. In the event Defendant subsequently asserts an interpretation of any request that differs from that of Plaintiff, Plaintiff reserves the right to alter, amend, or modify their objections, responses, and production.

7. Plaintiff objects to the Request to the extent that they seek documents and information over an unreasonable, irrelevant, or unspecified time frame.

8. Plaintiff objects to the Requests to the extent that they seek documents or information constituting or containing trade secrets, confidential, and/or proprietary business information.

9. Plaintiff objects to the Requests to the extent that they are overly broad,

unduly burdensome, oppressive and seek information that is irrelevant to the claims and defenses presented in this matter (under 35 USC §256). Subject to these objections, Plaintiff will use reasonable diligence to locate information within Plaintiff's possession, custody, or control based on an examination of those files reasonably expected to yield responsive information.

10. Plaintiff objects to the Requests to the extent that they require Plaintiff to assume any disputed facts or to reach any legal conclusions in interpreting the meaning of the Requests and/or responding to the Requests. Any information produced by Plaintiff in response to any such Requests are without prejudice to this objection, and Plaintiff does not, by responding to any Request, adopt or agree with any such disputed facts or legal conclusions.

11. Plaintiff's responses are made without waiver, and with preservation, of all objections as to competency, relevancy, materiality, privilege and admissibility of the responses and the subject matter thereof as evidence for any purposes in any further proceeding in this action (including a trial of this action) and for any other action or proceeding. Plaintiff's responses to these Requests in no way constitutes and should not be construed as an admission of the relevance or admissibility of any information, or the truth or accuracy of any information. No response or objection made herein, or lack thereof, shall be deemed an admission by Plaintiff as to the existence or nonexistence of information.

12. Plaintiff's failure to object to a Request on a particular ground shall not be construed as a waiver of its right to object on that or any other additional ground.

13. Plaintiff makes these Responses and Objections after a reasonably diligent

search of its files and continue to pursue its investigation and analysis of the facts and law relating to this case and provide the information in its responses as of the date hereof. Therefore, the responses set forth herein are given based on information presently available to Plaintiff and it reserves the right to revise, supplement, or update its responses at any time both during discovery and at trial. Plaintiff specifically reserves the right to rely upon additional information at trial not produced in response to these Requests.

14. Each of the foregoing General Objections is incorporated into each specific response below. Plaintiff makes the responses below without waiving the foregoing General Objections or any specific objections stated in the responses below.

**SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES**

**REQUEST NO. 1:**

Separately for each claim of the Patents-in-Suit, describe in detail the conception, reduction to practice (actual or constructive), and all activities constituting diligence from conception to reduction to practice, including without limitation, an identification and description of: (i) when, where, and by whom each claim of the claimed invention/design was conceived; (ii) the specific contribution by each alleged inventor; (iii) the first written description of each claimed invention/design (including when and where it was made and by whom); (iv) when, where, by whom, and under what circumstances each claimed invention/design was first reduced to practice; (v) the first public disclosure of each claimed invention/design, including when, where, by whom, and to whom; and (vi) all evidence and witnesses corroborating the above, including a specific identification of the relevant

documents by production number.

**RESPONSE TO REQUEST NO. 1:**

**US Patent No. 9,114,276**

Claim 1:

(i)conceived by Alex Astilean and Dan Bostan during late March and early April 2008, on Long Island, whereinafter after Bostan created several prototypes, including a wooden prototype in Late July or August 2008, captured in operation in a video with Astilean's family in Bostan's yard in Montreal. Concurrently, in Montreal, Astilean conceived of variation of means for slackening embodying a synchronizing mechanism,
(ii) Mr. Astilean and Mr. Bostan together invented the manually operated treadmill comprising: a treadmill frame having a front end and a rear end opposite the front end; a front shaft rotatably coupled to the treadmill frame at the front end; a front pulley coupled to the front shaft; a rear shaft rotatably coupled to the treadmill frame at the rear end; a rear pulley coupled to the rear shaft; a running belt contacting the front and rear pulleys and including a curved running surface upon which a user of the treadmill may run, wherein the running belt is disposed about the front and rear shafts such that a first force generated by a user causes rotation of the front shaft and the rear shaft and also causes the running surface of the running belt to move from the front shaft toward the rear shaft, a means for slackening; and wherein the treadmill is configured to control the speed of the running belt to facilitate the maintenance of the contour of the curved running surface; Astilean, in Montreal in late July or August 2008 conceived of variation on the means for slackening, embodied therein as a

synchronizing system coupled to both the front and rear shafts and comprising a synchronizing belt coupled between the front and rear shafts, wherein tension in the synchronizing belt provides a second force which acts to resist differential rotation of the front and rear shafts;

(iii) the first written description of the treadmill, as understood by Astilean, is found in US Application No. 61/193,239, filed November 7, 2008 and as claimed is found in US Application no. 61/161,027, filed March 17, 2009 ("the Oblamski provisional application"); (iv) the invention as conceived in March/April 2008, was first reduced to practice in late July or early Aug 2008 in Montreal, Canada; while the treadmill with the variation on the means for slackening, as claimed, as understood by Astilean, was conceived by Astilean in late July or early August 2008, where same was not reduced to practice, as specifically claimed, until January or February 2009, (v) the invention as conceived in March/April 2008, and first reduced to practice in late July or early Aug 2008 in Montreal, Canada, the treadmill was filmed in Dec 2008 and the first public disclosure was on the Discovery Channel, Wreckreation Nation, sometime in January 2009 and the treadmill with the variation on the means for slackening, as claimed, was conceived by Astilean in late July or early August 2008, same was first publicly disclosed as the Speedfit Speedboard at the IHRSA tradeshow in San Francisco on March 19, 2009; and (vi) the evidence corroborating the above is found in the discovery documents served Plaintiff on February 5, February 15 and February 20, 2018, which includes the deposition testimony and exhibits thereof, of Alex Astilean (March 24, 25, 2015), of Dan Bostan (June 2015), of Douglas Bayerlein (April 24, 2015), of Nick Oblamski (April 1, 2015), Scott Hoerig and Michael Frank (March 31, 2015), Weber (4/23/2015(, Kim

Blair (September 9, 2015 and James Whelan (9/28/2015), conducted by the parties in the related case Speedfit, LLC v. Woodway USA Inc. 2:13-cv-1276, where the relevant witnesses are Aurel A. Astilean, Dan Bostan, Douglas Bayerlein, Vance Emons, Nicholas Oblamski, Scott Hoerig, Matthew Zank, Robert Zimpel, Joel Richards, Kim Blair, James Whelan, Michael Frank, Eric Weber.

Claim 2: Same as response for claim 1.

Claim 3: No claim of inventorship made to claim 3 subject matter, but for the subject matter of claims 1 and 2 from which it depends.

Claim 4: No claim of inventorship made to claim 4 subject matter, but for the subject matter of claim 1 from which it depends.

Claim 5: No claim of inventorship made to claim 5 subject matter, but for the subject matter of claim 1 from which it depends.

Claim 6: No claim of inventorship made to claim 6 subject matter, but for the subject matter of claim 1 from which it depends.

Claim 7: Same as response for claim 1.

Claim 8: No claim of inventorship made to claim 8 subject matter, but for the subject matter of claim 1 from which it depends.

Claim 9: No claim of inventorship made to claim 9 subject matter, but for the subject matter of claim 1 from which it depends.

Claim 10: No claim of inventorship made to claim 10 subject matter, but for the subject matter of claim 1 from which it depends.

Claim 11: No claim of inventorship made to claim 11 subject matter, but for

the subject matter of claim 1 from which it depends.

Claim 12: Same as response for claim 1.

Claim 13: Same as response for claim 1.

Claim 14: No claim of inventorship made to claim 14 subject matter, but for the subject matter of claim 12 from which it depends.

Claim 15: No claim of inventorship made to claim 15 subject matter, but for the subject matter of claim 12 from which it depends.

Claim 16: Same as response for claim 1.

Claim 17: No claim of inventorship made to claim 17 subject matter, but for the subject matter of claim 16 from which it depends.

Claim 18: Same as response for claim 1.

Claim 19: Same as response for claim 1.

Claim 20: Same as response for claim 1.

Claim 21: Same as response for claim 1.

Claim 22: No claim of inventorship made to claim 22 subject matter, but for the subject matter of claim 21 from which it depends.

Claim 23: Same as response for claim 1.

Claim 24: Same as response for claim 1.

Claim 25: Same as response for claim 1.

Claim 26: Same as response for claim 1.

Claim 27: Same as response for claim 1.

Claim 28: Same as response for claim 1.

Claim 29: No claim of inventorship made to claim 29 subject matter, but for the subject matter of claim 16 from which it depends.

Claim 30: No claim of inventorship made to claim 30 subject matter, but for the subject matter of claim 16 from which it depends.

Claim 31: Same as response for claim 1.

Claim 32: Same as response for claim 1.

Claim 33: Same as response for claim 1.

Claim 34: Same as response for claim 1.

**US Patent No. D736866:**

(i) the ornamental design as claimed was conceived by Alex Astilean in December 2008 in Astilean's home in East Hampton, Long Island

(ii) Mr. Astilean provided the ornamental design of the base or body of the treadmill as shown in the figures;

(iii) a figure embodying an ornamental design, as understood by Astilean to be a written description, was provided by Astilean to Oblamski between December 2008 and march 2009; the treadmill as claimed also was shown on the discovery channel in January 2009, if the first written description means "written description" in a patent sense, same may be said to embody the Oblamski provisional application (US Application no. 61/161,027), filed March 17, 2009 and/or PCT/US2010/026731, which shows Astilean's ornamental design as claimed;

(iv) the invention was first reduced to practice by Astilean between December 2008 and March 2009 in Astilean's home on Long Island;

(v) the first public disclosure was on the Discovery Channel, Wreckreation Nation, sometime in January 2009; and

(vi) the evidence corroborating the above is found in the discovery documents, served Plaintiff on February 5, February 15 and February 20, 2018, which includes the deposition testimony and exhibits thereof, of Alex Astilean (March 24, 25, 2015), of Dan Bostan (June 2015), of Douglas Bayerlein (April 24, 2015), of Nick Oblamski (April 1, 2015), Scott Hoerig and Michael Frank (March 31, 2015), Weber (4/23/2015(, Kim Blair (September 9, 2015 and James Whelan (9/28/2015), conducted by between the parties in the related case Speedfit, LLC v. Woodway USA Inc. 2:13-cv-1276, where the relevant witnesses are at least Aurel A. Astilean, Dan Bostan, Douglas Bayerlein, Vance Emons, Nicholas Oblamski, Robert Zimpel, Kim Blair and James Whelan.

**US Patent No. D753245:** same as for US Patent No. D736866. **US Patent No. D753776:** same as for US Patent No. D736866.

**REQUEST NO. 2:**

Identify any entity or person including, but not limited to, any holding company, parent, subsidiary, affiliate, shareholder, or third party that has any financial interest, direct or indirect, in the outcome of the current litigation or in any of the patents-in-suit.

**RESPONSE TO REQUEST NO. 2:**

Speedfit LLC.

**REQUEST NO. 3:**

Identify and describe in detail each and every instance in which Speedfit or Mr.

Astilean has licensed, attempted to license, offered to license, suggested a license under, discussed a license under, entered a covenant not to sue, entered a technology transfer agreement, or settled a lawsuit that relates to the subject matter of any of the Patents-in-Suit, including, but not limited to, the persons, places, dates, and material terms associated with each instance.

**RESPONSE TO REQUEST NO. 3:**

Plaintiff has not attempted to license any of the patents in suit.

**REQUEST NO. 4:**

Describe in detail the pre-suit investigation Plaintiff or a third party on Plaintiff's behalf undertook to form the basis of Plaintiff's allegation that Woodway, with deceptive intent, incorrectly identified the inventors of the Patents-in-Suit to the Patent Office, including: (i) the dates of all activities related to the pre-suit investigation; (ii) the persons that participated or were involved in the pre-suit investigation; (iii) a description of any activities undertaken during the course of the pre-suit investigation; and (iv) all documents relating to the pre-suit investigation.

**RESPONSE TO REQUEST NO. 4:**

While a pre-suit investigation was undertaken on behalf of Plaintiff by John F. Vodopia, PC, the details of that suit are privileged attorney work product.

**REQUEST NO. 5:**

Identify with particularity and provide a copy of each proposed contract between Plaintiff and Woodway concerning the subject matter of the Patents-In-Suit.

**RESPONSE TO REQUEST NO. 5:**

None.

**REQUEST NO. 6:**

Describe in detail any technical information provided to Nicholas Oblamski, Doug Bayerlein, or any other Woodway personnel by Mr. Astilean concerning the subject matter of the Patents-In-Suit and identify all documents by production number showing the same.

**RESPONSE TO REQUEST NO. 6:**

The technical information that was provided to Oblamski, Bayerlein and other Woodway personnel is the evidence corroborating the above is found in the discovery documents, served Plaintiff on February 5, February 15 and February 20, 2018, which includes the deposition testimony and exhibits thereof, of Alex Astilean (March 24, 25, 2015), of Dan Bostan (June 2015), of Douglas Bayerlein (April 24, 2015), of Nick Oblamski (April 1, 2015), Scott Hoerig and Michael Frank (March 31, 2015), Weber (4/23/2015(, Kim Blair (September 9, 2015 and James Whelan (9/28/2015), conducted by between the parties in the related case Speedfit, LLC v. Woodway USA Inc. 2:13-cv-1276, where the relevant witnesses are at least Aurel A. Astilean, Dan Bostan, Douglas Bayerlein, Vance Emons, Nicholas Oblamski, Robert Zimpel, Kim Blair and James Whelan; depositions have yet to be taken of any of the witnesses.

Production number's of the documents served February 5, February 15 and February 20, 2018, that are responsive to this request are [sp006797 – 6938 90083952)]; [PLTF00049696-49759]; [PLTF00049589]; [PLTF00049627]; [PLTF00049633]; [speedfittemp (jpg, no number)]; [PLTF00049631]; [PlTF00049634]; [Speedfit7 (no number; jpeg)]; [PLTF00049632]; [speedfit6 (jpg, no number)]; [speedfit5

(jpg, no number)]; [PLTF00049630]; [speedfit3 (jpg, no number)]; [PLTF000497629]; [speedfit2 (jpg, no number)]; [PLTF00049628]; [PLTF00049627]; [PLTF00049635-49660]; [PLTF00049626]; [PLTF00049588]; [PLTF00049625]; [PLTF00049641; screenshot jpeg]; [PLTF00049641; pdf]; [PLTF00049587]; [PLTF000496624]; [PLTF00049586]; [PLTF00049623]; [PLTF00049585]; [PLTF00049622]; [PLTF00049584]; [PLTF00049621]; [PLTF00049583]; [PLTF00049620]; [PLTF00049658]; [PLTF00049496]; [PLTF00049581]; [PLTF00049618]; [PLTF000580; picture or video 088]; [PLTF00049687; picture or video 088 (1)]; [PLTF00049579]; [PLTF00049616]; [PLTF00049578]; [PLTF00049615]; [PLTF00049577]; [PLTF00049614]; [PLTF00049570]; [PLTF00049613]; [PLTF00049575]; [PLTF00049612]; [PLTF00049574]; [PLTF00049611]; [PLTF00049573]; [PLTF00049610]; [PLTF00049572]; [PLTF00049609]; [PLTF00049571]; [PLTF00049608]; [PLTF00049570]; [PLTF00049607]; [PLTF00049606]; [PLTF00049609]; [PLTF00049568]; [PLTF00049605]; [PLTF00049607]; [PLTF00049604]; [PLTF00049566]; [PLTF00049603]; [PLTF00049565]; [PLTF00049602]; [PLTF00049564]; [PLTF00049601]; [PLTF00049563]; [PLTF00049600]; [PLTF00049562]; [PLTF00049599]; [PLTF00049561]; [PLTF00049598]; PLTF00049560]; [PLTF00049597*]; [[PLTF00049618]; PLTF00049559]; [PLTF00049596]; PLTF00049595]; [PLTF00049594]; [PLTF00049556]; [PLTF00049593]; [PLTF00049555]; [PLTF00049592]; [PLTF00049554]; [PLTF00049591]; [PLTF00049553]; [PLTF00049590]; [PLTF00049552]; [PLTF00049546]; [PLTF00049551]; [PLTF00049545]; [PLTF00049550]; [PLTF00049544]; [PLTF00049549]; [PLTF00049543]; [PLTF00049548]; [PLTF00049542]; [PLTF00049547]; [PLTF00049541]; [PLTF00049661-49662]; [PLTF00049663-49694].

Please note that the non-Bates-numbered jpeg documents are duplicates. That is,

[speedfittemp (jpg, no number)] is a duplicate of [PLTF00049633]; [Speedfit7 (no number; jpeg)] is a duplicate of [PlTF00049634]; [speedfit6 (jpg, no number)] is a duplicate of [PLTF00049632]; [speedfit5 (jpg, no number)] is a duplicate of [PLT00049631]; [speedfit3 (jpg, no number)] is a duplicate of [PLTF00049630]; and [speedfit2 (jpg, no number)] is a duplicate of [PLTF000497629].

**REQUEST NO. 7:**

Describe in detail any instructions or directions provided to Nicholas Oblamski, Doug Bayerlein, or any other Woodway personnel by Mr. Astilean concerning the subject matter of the Patents-In-Suit and identify all documents by production number showing the same.

**RESPONSE TO REQUEST NO. 7:**

The description set forth in response to Request 2, as well as the production documents identified therein, are responsive to Request 7.

**REQUEST NO. 8:**

Describe with particularity your factual basis for asserting Messrs. Astilean and Bostan contributed to the conception of the Patents-In-Suit, identifying which claims of which Patents-in-Suit you contend Messrs. Astilean and Bostan are sole or joint inventors.

**RESPONSE TO REQUEST NO. 8:**

The factual basis for the assertion that Astilean and Bostan conceived of the invention is found in discovery documents, served Plaintiff on February 5, February 15 and February 20, 2018, which includes the deposition testimony and exhibits thereof, of Alex Astilean (March 24, 25, 2015), of Dan Bostan (June 2015), of Douglas Bayerlein (April 24, 2015), of Nick Oblamski (April 1, 2015), Scott Hoerig and Michael Frank (March 31, 2015), Weber

(4/23/2015), Kim Blair (September 9, 2015) and James Whelan (9/28/2015), conducted by between the parties in the related case Speedfit, LLC v. Woodway USA Inc. 2:13-cv-1276, where the relevant witnesses are at least Aurel A. Astilean, Dan Bostan, Douglas Bayerlein, Vance Emons, Nicholas Oblamski, Robert Zimpel, Kim Blair and James Whelan.

The facts evidence that Astilean and Bostan met in March/April 2008, conceived of the non-motorized treadmill with curved running surface, at Astilean's home in East Hampton, NY, whereinafter after Bostan created several prototypes, including a wooden prototype in Late July or August 2008, captured in operation in a video with Astilean's family in Bostan's yard in Montreal. Concurrently, in Montreal, Astilean conceived of variation of means for slackening embodying a synchronizing mechanism, in August 2008, brought the invention, to Woodway in early December 2008, and taught Woodway how it works, how it must function and what it must look like, between December 2008 and March 2009.

Woodway and Nicholas Oblamski, at Astilean's direction, based on a wooden prototype constructed by Bostan at his home in 2008 and finished by Alex Astilean at his home in Long Island NY constructed a production model of the non-motorized treadmill with curved running surface.

The subject matter invented by Astilean and Bostan was first disclosed to Woodway by Astilean on or about December 10, 2008, when Astilean played a video of him, his wife and one of his children walking and running on the wooden prototype ("wooden prototype"). The video was recorded sometime in August 2008, in Bostan's home in Canada. During the video disclosure to Woodway on December 20, 2008, Astilean also explained to Douglas

Bayerlein, Woodway's president and CEO, the need that a non-motorized treadmill with curved running surface has for a "means for slackening" the upper running surface of the treadmill running belt, to prevent the upper portion of same from floating up and losing the curved shape during use, which is crucial to the design and operation. The means for slackening is the solution to the problem of the curved running surface comprising the upper part of the belt floating up off its bearing surface and losing its curved shape due to the lower part of the running belt sagging due to its weight.

After reviewing Speedfit's Wooden Prototype on or about December 10, 2008, Woodway (i.e., Mr. Bayerlein) agreed to build a production version of the wooden prototype that it would market and sell as the Speedfit Speedboard. Bayerlein directed Mr. Oblamski to build the production version of the wooden prototype. Between approximately, December 12, 2008 through February 24, 2008, Oblamski worked under Astilean's direction to realize a production model of the Speedfit design, as evidenced by numerous email exchanges. Astilean provided Oblamski with access to videos of the operation of the wooden prototype and the operation of a slightly modified version of the wooden prototype, broadcast by the Discovery Channel in January 2009.

Astilean sent Oblamski the side rails of the Wooden Prototype so that Oblamski could measure and duplicate the curvature of the Wooden Prototype in the production model, which was proven to work. Astilean spoke on the phone to Oblamski during this period of construction numerous times, and Oblamski verified that the production model of the Wooden Prototype was operational finally in late February or early March 2009. The production model was shown and offered for sale by Woodway under Speedfit's brand name

SPEEDBOARD, on or about March 19, 2009 at the IHRSA tradeshow in San Francisco. The production model is referred to as the Speedboard 2, the Woodway Curve or the Woodway Product, one of several motor-less treadmill products with curved running surface that Woodway sells, and which derive from Astilean's and Bostan's inventive know-how.

Astilean and/or Boston conceived of the invention as claimed in the '276 patents claims 1, 2, 7, 12, 13, 16, 18-21, 22-28 and 31-34, in late March/early April 2008 and in late July or August 2008; Astilean conceived of the invention as claimed in the 3 design patents, on Long Island in December 2008 or January 2009.

**REQUEST NO. 9:**

Describe with particularity your factual and legal basis for asserting Woodway acted with intent to deceive the patent Office concerning the prosecution of any of the patents in suit.

**RESPONSE TO REQUEST NO. 9:**

The factual basis for Woodway's intent to deceive is that Woodway had the side rails of Speedfit's inventive treadmill (i.e., the wooden prototype) in their hands just before they filed on March 17, 2009 and Oblamski had the drawings of the ornamental design supplied to him by Astilean in December 2008 or January 2009, and never disclosed this relevant and material information, among other things, to the USPTO in any of the applications or patents in suit.

**REQUEST NO. 10:**

Describe with particularity your factual basis for asserting Woodway acted with intent to deceive the Patent Office concerning the prosecution of any of the Patents-In-Suit.

**RESPONSE TO REQUEST NO. 10:**

Defendant filed the Oblamski provisional application (ex 1 to the Complaint herein, dkt 1.1), and filed a PCT application based thereon, without informing Astilean or Speedfit; Perhaps more importantly, at filing of the Oblamski provisional application, the PCT application, and the applications found in Exhibits 2 (dkt 1-2) and 3 (dkt 1-3) of the Complaint herein, Defendant failed to inform the USPTO and WIPO that the inventive subject matter to which Speedfit and Astilean seek to be identified as true inventors to (i.e., a leg-powered treadmill with a curved running surface and inter alia means for slackening to prevent belt float), was disclosed to Defendant by Astilean in December 2008, that an embodiment thereof were first reduced to practice as a wooden prototype, and its operational means for slackening disclosed to Defendant, including that a video showing operation of the wooden prototype was displayed for Bayerlein and other Defendant personnel in Milwaukee in early December 2018, that Woodway and Oblamski used the side rails sent to them by Astilean as a guide for the construction of the Speedboard 2, and interacted with Astilean from December 2008 through March 17, 2017, and that Defendant knew and observed a video of Astilean's modified version of the wooden prototype on the Discovery channel on January 14, 2009, his disclosure to Oblamski of the ornamental design in January 2009, and that Defendant's failure to disclose Astilean's material and relevant disclosure to the USPTO, in the aggregate, raises a rebuttable presumption of deceptive intent.

**REQUEST NO. 11:**

Identify the dates and the circumstances surrounding Mr. Astilean's and Speedfit's first knowledge of any of the Patents-in-Suit and any of the Patents-in-Suit's priority patent applications.

**RESPONSE TO REQUEST NO. 11:**

Astilean became aware of each of the '276 patent sometime after the patent issued on August 25, 2015; became aware of the 'D866 sometime after the patent issued on August 8, 2015; became aware of the 'D245 patent sometime after the patent issued on April 5, 2016; and became aware of the 'D776 patent sometime after the patent issued on April 12, 2016.

Dated: March 13, 2018

As to Objections:

JOHN F. VODOPIA, P.C.

By: /john f vodopia/
John F. Vodopia, Esq.
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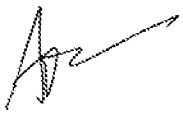
VERIFICATION

I, Aurel A. Astilean, am authorized to make this verification for and on behalf of Speedfit, LLC. I declare that I have read Speedfit's January 17, 2018, Responses and Objections to Defendant Woodway's First Set of Interrogatories and Speedfit's March 13, 2018 Supplemental Responses and Objections to Defendant Woodway's First Set of Interrogatories, and know the contents thereof of these responses; that said responses were prepared with the assistance and advice of counsel upon which I have relied; that the responses, subject to inadvertent or undiscovered errors, are based on and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of preparation of these responses; that consequently I reserve the right to make any changes in these responses if it appears at any time that omission or errors have been made therein or that more accurate information is available; that subject to the limitations set forth herein, the same responses are true to the best of my knowledge and belief.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 13th day of March 2018

Plaintiff, SPEEDFIT, LLC



By: _____

Aurel A. Astilean, Manager

**CERTIFICATE OF SERVICE**

I, John F. Vodopia, an attorney with John F. Vodopia, PC, hereby certify that on March 13, 2018, I electronically served the foregoing document on Defendant's counsel Kadie M. Jelenchick (kjelenchick@foley.com) and Matthew W. Peters (mpeters@foley.com).

/john f vodopia/

JOHN F. VODOPIA, P.C.
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# Leg-Powered Treadmill

**Prepared for:**
John F. Vodopia, P.C.
Mr. John Vodopia
191 New York Avenue
Huntington, NY 11743

| | |
|---|---|
| Case Name: | Speedfit LLC vs. Woodway USA |
| Beacon Project No.: | 10034 |
| Report Date: | June 12, 2018 |
| Prepared by: | James D. Whelan, P.E. |

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## ASSIGNMENT

Mr. John Vodopia contacted Beacon Forensic, P.C. (BFPC) to review file material concerning a leg-powered treadmill. The plaintiff, Mr. Aurel Astilean, invented and then collaborated with defendants, Woodway USA and Mr. Douglas Bayerlein, its President and CEO, to develop a leg-powered treadmill for production. The defendants subsequently filed and were issued patents, including United Patent 9,114,276 B2 (Patent '276), and design patents D753,245 S, D753,776 S, and D736,866 S; without disclosing the collaboration with Mr. Astilean to the United States Patent & Trademark Office (USPTO) or listing him as an inventor.

The scope of the assignment was to complete the following: determine if utility patent '276 claimed the concept and invention of Mr. Astilean and Mr. Bostan; construe the term "coupled"; and investigate United States patent 5,709,632 ('632) by Mr. Socwell.

In response to this request, BFPC completed the following:

- Reviewed file material:
  - Provisional Patent Application No. 61/280,265;
  - United States Patent 9,114,276 B2;
  - United States Patent 8,308,619 B1;
  - United States Patent 8,343,016 B1;
  - United States Patent 8,864,627 B2;
  - United States Patent D753,245 S;
  - United States Patent D753,776 S;
  - United States Patent D736,866 S;
  - United States Patent 5,709,623;
  - International Application PCT/US2010/026731;
  - International Application PCT/US2010/027543
  - Continuing Patent Application Transmittal Letter for Application 13/235,065;
  - Tree from Oblamski provisional application;
  - Emails between Mr. Astilean and Mr. Nick Oblamski, a senior engineer with Woodway;
  - Letter from Mr. Richard McKenna dated January 21, 2011
  - Strategic Evaluation Agreement not completed
  - Document titled "Woodway Debuts SpeedBoard at IHRSA Show"
  - 275 digital colored photographs of the leg-powered treadmill
  - 7 colored drawings of the leg-powered treadmill
  - 49 colored photocopied drawings and photographs of the leg-powered treadmill and additional images
  - Second Amended Complaint dated February 17, 2015
  - Video of the leg-powered treadmill on the Discovery Channel (PLTFESI012011)
  - Videos of the leg-powered treadmill from December 2008 (PLTFESI013758-59)
  - Drawing of the SpeedBoard color design;
  - A screenshot of the Speedfit's portfolio;
  - Plaintiff's Supplemental Responses And Objections To Defendant's First Set Of Interrogatories;
  - Plaintiff's Writing Concerning Need For Consruction Of Claims Terms
  - Speedfit LLC's Opening Claim Construction Brief;

  - Declaration of Aurel A. Astilean;
  - Declaration of Nicholas Oblamski;
  - Declaration of Kadie Jelenchick;
  - Woodway USA, Inc.'s List Of Claim Terms To Be Construed And Proposed Constructions;
  - Woodway Patent List; and
  - Woodway USA, Inc.'S Opening Claim Construction Brief.
- BFPC researched pertinent sections of the Manual Of Patent Examining Procedure.
- BFPC completed an analysis to determine if Mr. Astilean and Mr. Bostan were the inventors of the leg powered treadmill claimed in utility patent '276 and design patents 'D245, 'D776 and 'D866.
- BFPC completed a review of the definition for the term coupled.
- BFPC completed a review of the '632 patent by Mr Socwell to determine if it was the same as the invention by Mr. Astilean and Mr. Bostan.

# TIMELINE

## Conception and Reduction to Practice

Mr. Astilean and Mr. Bostan met in March or April of 2008 and conceived of the non-motorized treadmill with the curved running surface at Mr. Astilean's home in East Hampton, New York. Afterwards, Mr. Bostan created several prototypes, including a wooden prototype in Late July or August of 2008.

The original porotype , captured in operation in a video discussed later in this report, comprised of the following elements: a treadmill frame having a front end and a rear end opposite the front end; a front shaft rotatably coupled to the treadmill frame at the front end; a front pulley coupled to the front shaft; a rear shaft rotatably coupled to the treadmill frame at the rear end; a rear pulley coupled to the rear shaft; a running belt contacting the front and rear pulleys and including a curved running surface upon which a user of the treadmill may run, wherein the running belt is disposed about the front and rear shafts such that a first force generated by a user causes rotation of the front shaft and the rear shaft and also causes the running surface of the running belt to move from the front shaft toward the rear shaft, a means for slackening; and wherein the treadmill is configured to control the speed of the running belt to facilitate the maintenance of the contour of the curved running surface.

During August of 2008 Mr. Astilean conceived of variations on the means for slackening, embodied therein as a synchronizing system coupled to both the front and rear shafts and comprising a synchronizing belt coupled between the front and rear shafts, wherein tension in the synchronizing belt provides a second force which acts to resist differential rotation of the front and rear shafts; Mr. Astilean constructed a wooden prototype of the improved invention.

## Video from Mr. Astilean captured in August, 2008

Mr. Astilean created two videos of the wooden prototype leg-powered treadmill in operation. The videos were created in August of 2008 for testing purposes at the home of co-inventor Mr. Bostan in Montreal, Canada. In one video, the treadmill was concealed and there were multiple operators walking and jogging on what was the leg-powered treadmill. In the second video, the leg-powered treadmill was visible and was operated by people of various ages, heights and weights at speeds between walking and running. The leg-powered treadmill was in full view. Two stills from the video were included in this report. In one still, a child was seen running on the treadmill (**Figure 1**). In another still, an adult was seen walking on the treadmill (**Figure 2**).

The videos were shown to Mr. Bayerlein and Mr. Scott Weber at the Woodway offices in Milwaukee, Wisconsin in December, 2008. Mr. Bayerlien stated in his deposition on April 24, 2015 that Mr. Astilean had explained a means for slackening to Mr. Bayerlien after showing the subject video.



Figure 1: Video created in August of 2008, a child was seen running on the wooden prototype leg-powered treadmill.



Figure 2: Video created in August of 2008, an adult was seen walking on the wooden prototype leg-powered treadmill.

## Email from Mr. Astilean dated October 6, 2008

On October 6, 2008, Mr. Astilean sent an email to Mr. Myron Amer, a patent attorney, which contained five photographs of a wooden prototype of the leg-powered treadmill. The photographs were captured in Montreal, Canada around August of 2008, in the backyard of Mr. Don Bostan, the co-inventor of the leg-powered treadmill. Two of the photographs were oblique views of the wooden prototype treadmill (**Figures 3 and 4**). One of the photographs contained a view of the bottom of the treadmill (**Figure 5**). The bottom of the treadmill had a belt and pulley system, used to keep the top portion of the belt slackened while the bottom portion was taught.

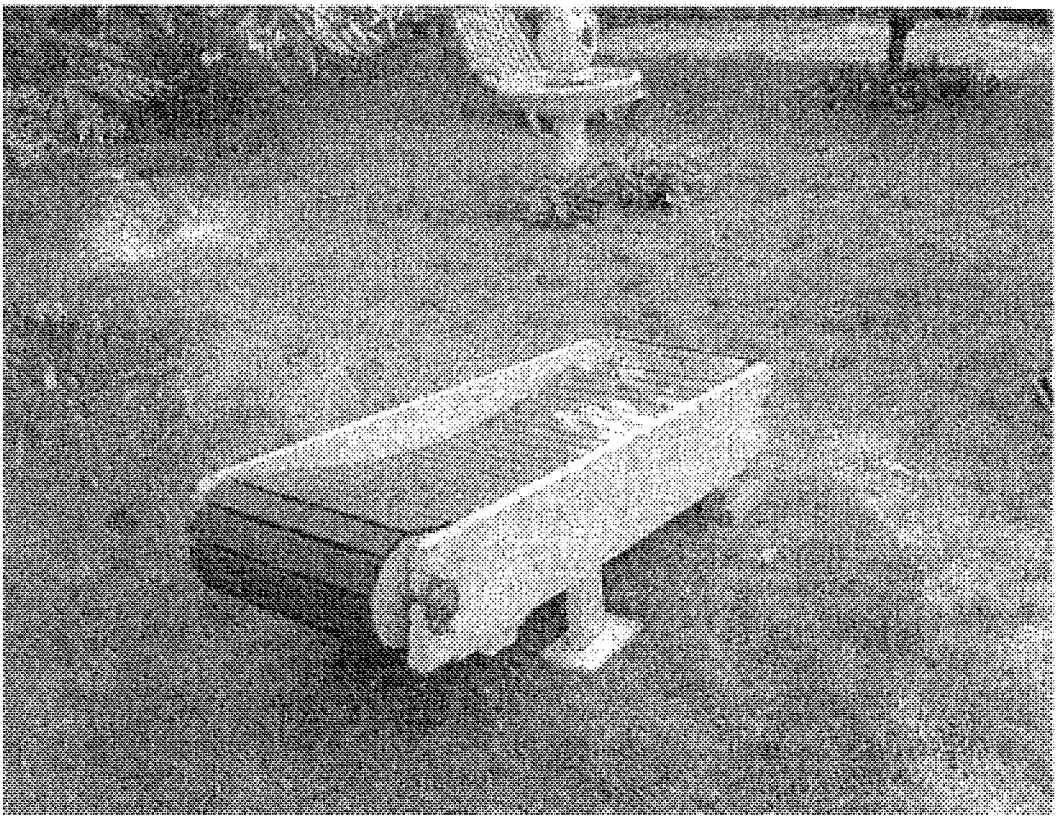


**Figure 3: An oblique view of a wooden prototype of the treadmill.**

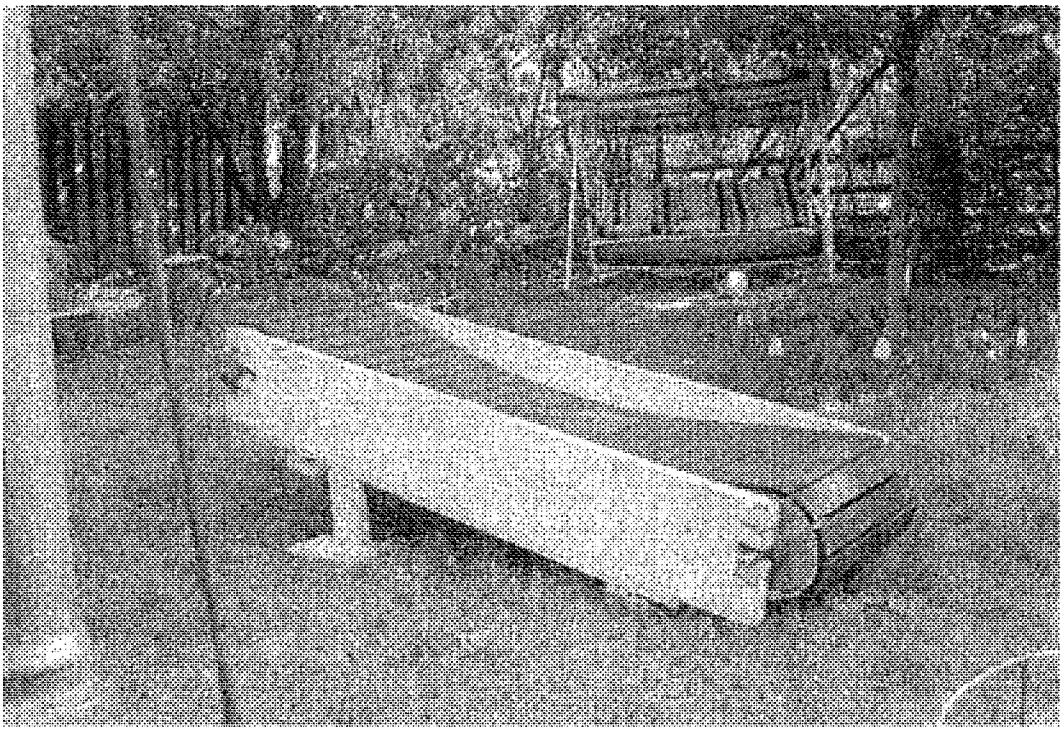


Figure 4: An oblique view of a wooden prototype of the treadmill.

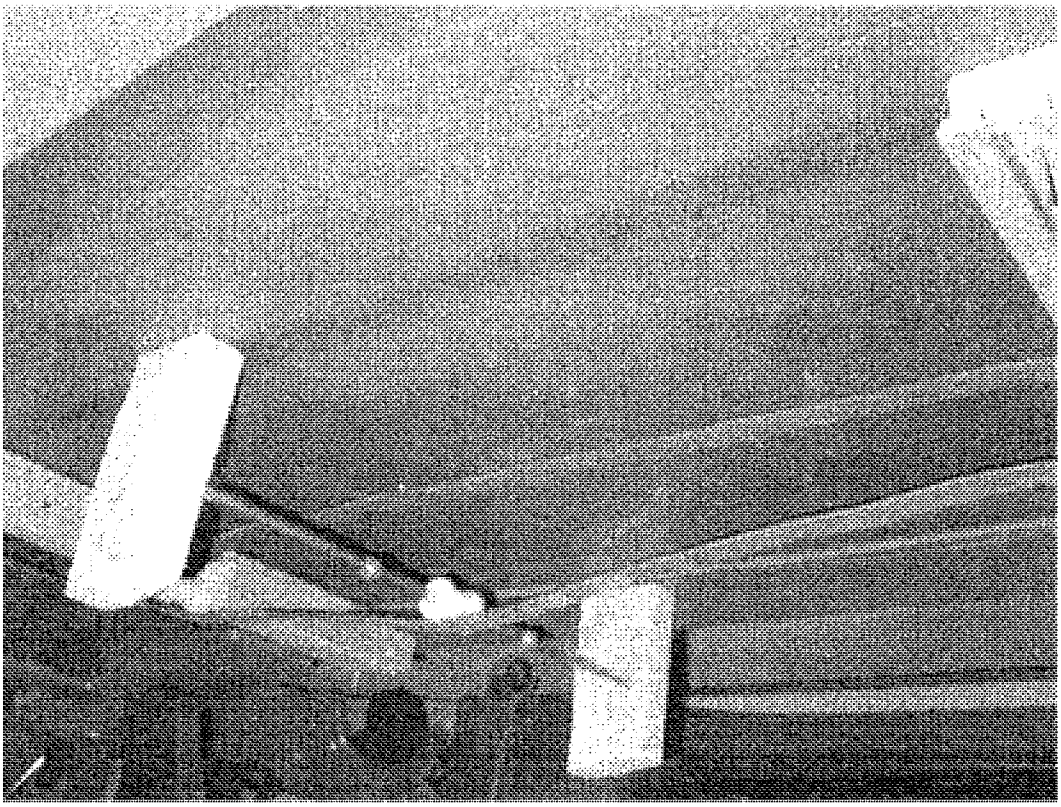


Figure 5: A bottom view of the wooden prototype of the treadmill. A belt and pulley was in place to keep the top portion of the belt slackened while the bottom portion was taught.

## Deposition Transcript of Mr. Astilean

When discussing Figure 5 in Mr. Astilean's deposition, starting on page 166 he described the wooden prototype belt and the concept of the synchronizing system for the front and rear pulleys which was explained to Mr. Bayerlein in December of 2008 when they met at the Woodway office. He specifically stated:

> "A. So let me explain. When we did a prototype, we had to keep the belt taut down on the belts. The only way we could have done it was with the belt under. Do you want to call it whatever you want. Was the belt under stretched. It wasn't stretched by the springs. We put in an application in the springs, but we just stretch it. Physically we stretched the belt tight enough in order to keep the belt up.
>
> When I went to Mr. Bayerlein's office and I showed the video, he didn't even know the belt was running over the bearings. He said, but Alex, I don't think my belt is going to last. Says what are you talking about.
>
> Under the belt is the rails with bearings that will hold the belt. And he asked me, so okay, but how you keep it down there. I said it's a belt under. It hold it. A timing belt or whatever you call that belt, it holds the belt. And he says, but it's going to do marks on the treadmill. I said no problem.
>
> We are going to do it, and I explained to him on the board the effects of the bicycle. When he turn around the bicycle, if you synchronize both front and back wheels by the chain (**Figures 6 and 7**), always the chain stays down -- down, down all the time. I explained that things. And that was it."

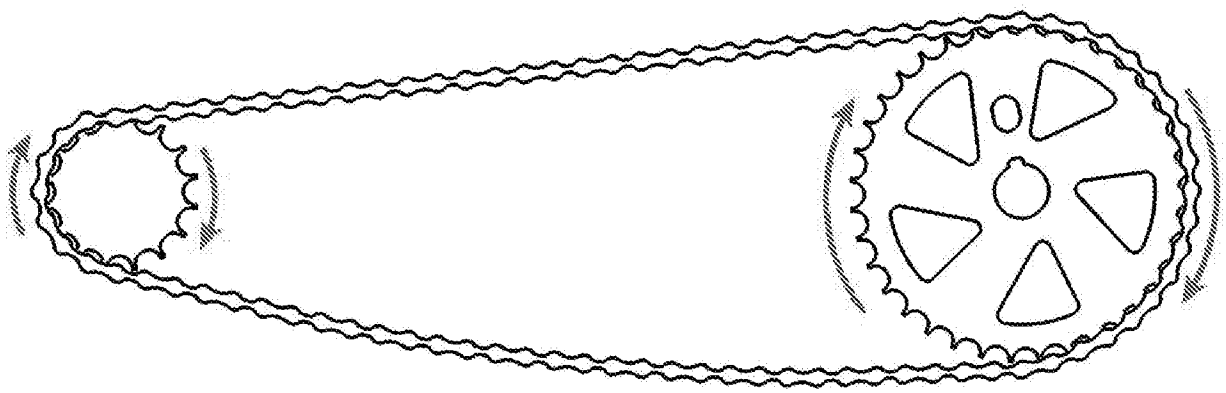


Figure 6: The bike chain orientated as normal, the slackened chain hangs down.

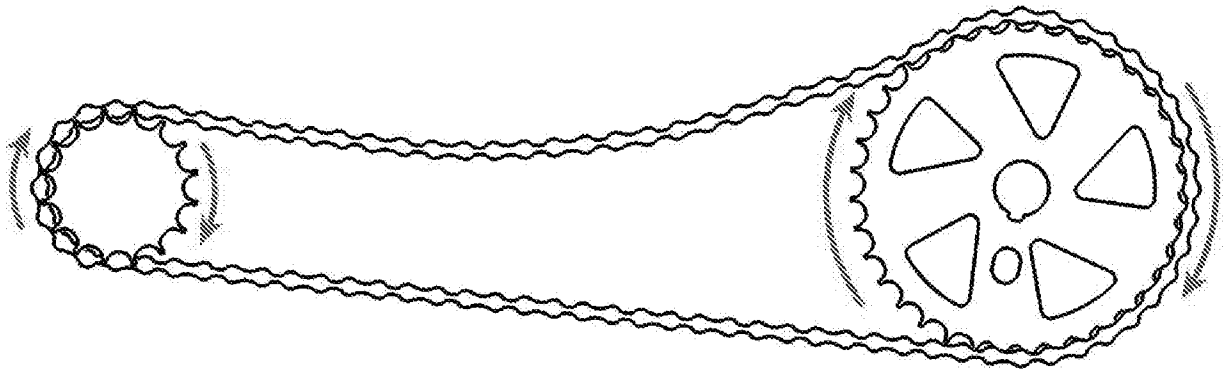


Figure 7: The bike chain flipped, as when one would "turn around the bicycle", the slackened chain hangs down.

## Video from Wreckreation Nation Released February 24, 2009

Mr. Astilean participated in a television show which contained a segment showing his various inventions, including the leg-powered treadmill. The leg-powered treadmill (**Figure 8**) was seen being operated by Mr. Astilean and a child. They were both walking and running on the treadmill. The leg-powered treadmill in the videos was configured by Mr. Astilean from the wooden prototype depicted in the videos shown to Mr. Bayerlein and Mr. Weber in December 2008.

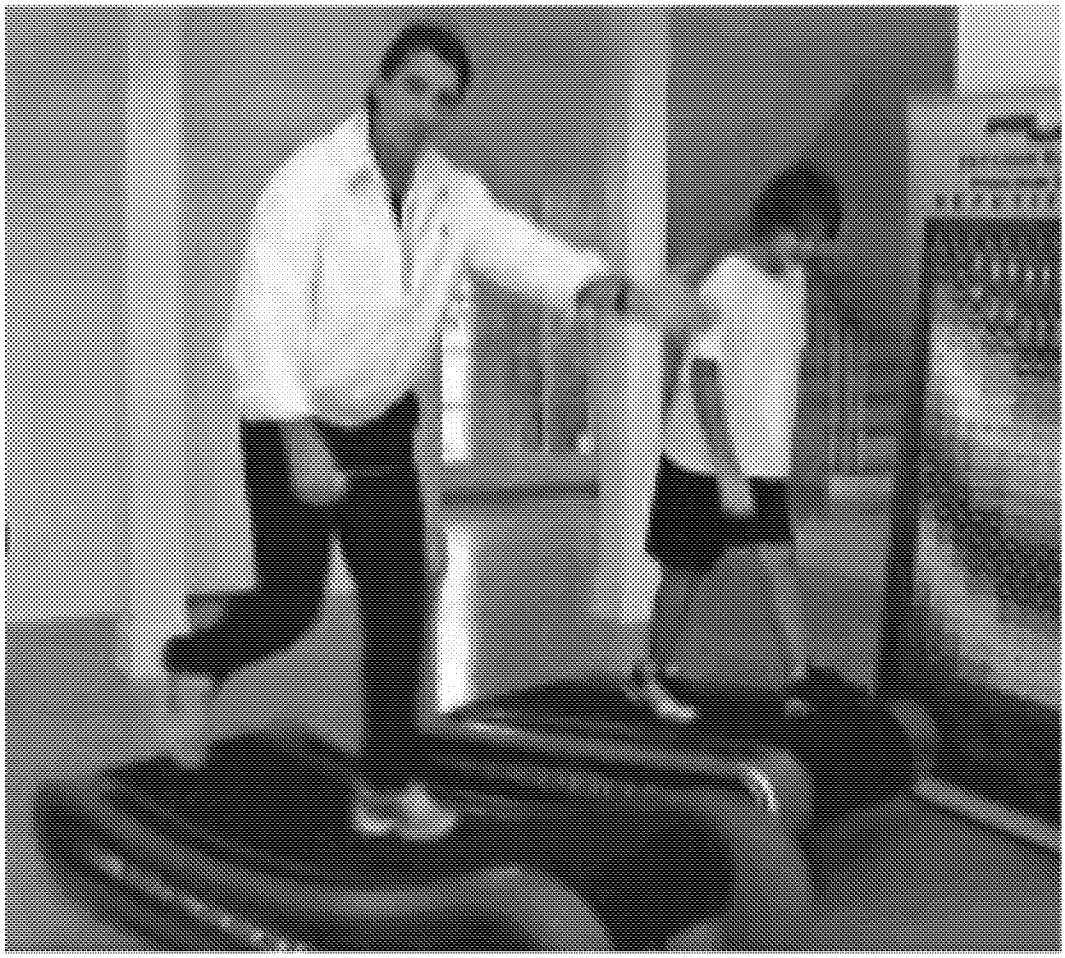


**Figure 8: Video from Wreckreation Nation dated February 24, 2009, an adult and child were using the leg-powered treadmill.**

## Provisional Application No. 61/161,027, filed on March 17, 2009.

On March 17, 2009, Woodway filed a provisional application for a leg powered treadmill under application number 61/161,027 ('027). Mr. Astilean was not aware that Woodway had filed a provisional application on the invention. Mr. Astilean was not listed as an inventor.

The following was noted from the Provisional Patent Application:

| | |
|---|---|
| Application Number: | 61/161,027 |
| Filing Date: | March 17, 2009 |
| Inventor: | Mr. Nicholas Oblamski |

The written description included the following:

[0002] Some embodiments of the invention provide an energy-efficient and self-regulating curved treadmill. The curved treadmill can use a main pulley system and a secondary pulley system on either end to control a main belt and a synchronous belt for a safe and comfortable curved running surface. Some embodiments of the curved treadmill do not require external power and the speed of the curved treadmill can be controlled by where a runner positions himself along the main belt.

[0008] FIG. 1 (**Figure 9**) illustrates a curved treadmill 10 according to one embodiment of the invention. The curved treadmill 10 can be a self-regulating, energy-efficient, and low-impact treadmill. The curved treadmill 10 can include a base 12, a main belt 14, a synchronous belt 16, a main pulley system 18, and a secondary pulley system 20

[0010] The curved treadmill 10 can also include front and rear shafts 26 and 28, respectively, on either end. Bearing rails 30 between the shafts 26, 28 can support the main belt 14. The main belt 14 can be wrapped around the base 12 and be in contact with the main pulley system 18 at either end of the base 12, as shown in FIG. 2. The synchronous belt 16 can also wrap around the base 12 along one or both sides of the main belt 14, and be in contact with the secondary pulley system 20 at either end of the base 12. The synchronous belt 16 can be controlled by the secondary pulley system 20 and the main belt 14 can be controlled by both the main pulley system 18 and the secondary pulley system 20. The secondary pulley system 20 can be coupled to the main pulley system 18 at one or both ends.

[0011] In some embodiments, as shown in FIGS. 1 and 2, the pulley systems 18, 20 can be coupled to the front and rear shafts 26, 28 and the main belt 14 and the synchronous belt 16 can be in contact with the main pulley system 18 and the secondary pulley system 20, respectively, only at each end of the base 12. Thus, as shown in FIG. 3, there can be minimal components in contact with the main belt 14 or the synchronous belt 16 near the center 22 of the base 12. In such embodiments, the weight of the main belt 14 and the synchronization of the pulley systems 18, 20, can allow the main belt 14 to follow a top curve of the curved treadmill 10 rather than "float" straight across the top of the curved treadmill 10.

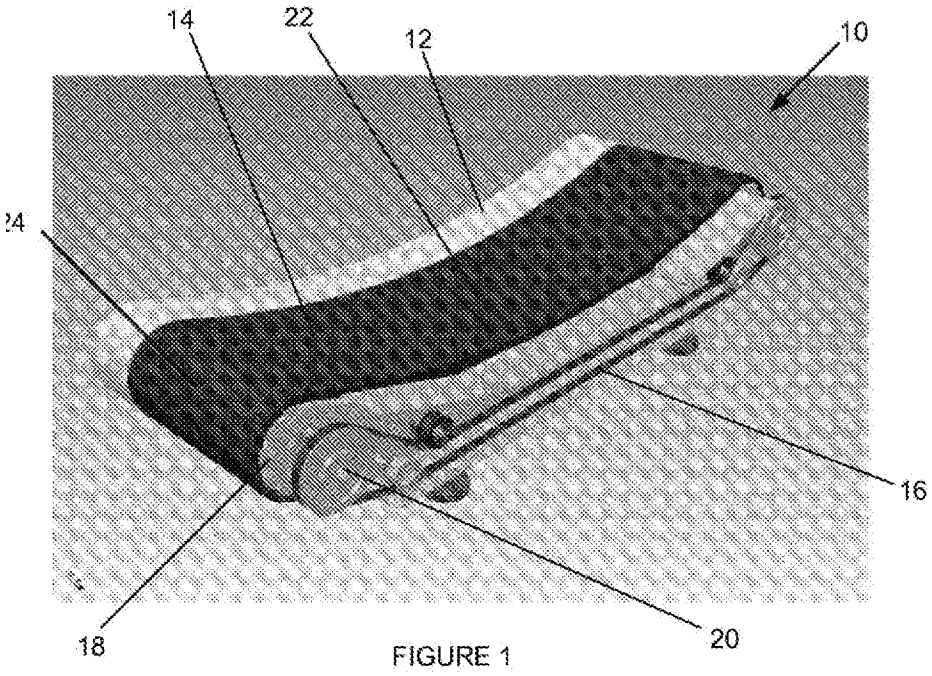



FIGURE 1

**Figure 9: A drawing from the Provisional Patent Application '027.**

## PROVISIONAL PATENT APPLICATION BY MR. ASTILEAN

The following was noted from the Provisional Patent Application:

| | |
|---|---|
| Application Number: | 61/280,265 |
| Filing Date: | 11/07/2008 |
| Applicant: | Mr. Astilean, East Hampton, New York |

The written description contained the following:

> The description of the invention which follows, together with the accompanying drawing should not be construed as limiting the invention to the example shown and described, because those skilled in the art to which this invention appertains will be able to devise other forms thereof.
>
> Fig. 1 (**Figure 10**) is a perspective view of a leg-powered treadmill constructed and having an operating mode according to the present invention.
>
> Illustrated are two leg supports 10 and 12 which lift the treadmill 14 in a clearance position above a support surface 16, said treadmill 10 having space apart sides 18 and 20 which have journalled for rotation end rollers 22 and 24 which support a closed loop treadmill belt 26. Springs (not shown) exert spring urgency in opposite directions holding taut the length of the lower belt portion 26A in a dimension of approximately twenty-three inches denoted by arrow 30 and in the upper belt portion 26B weighing approximately forty pounds, denoted by the arrow 30.
>
> It is to be noted that an essential feature of treadmill 10 is a concave shape subtending an acute angle 34 in the treadmill 10 front end 14A which in practice results in the exerciser 36 running

uphill and concomitantly exerting body weight 38 that contributes to driving lengthwise 40 in the direction 42 in which the exerciser runs and achieves the benefits of the exercise.

It is known from common experience that in prior art treadmills, the upper length portion of their closed loops are flat due, it is believed, because of the inability to maintain the concave shape 34 in the length portion 26B. This shortcoming is overcome by the weight 30 which in practice has been found to hold the concave shape 34 during the uphill running of the exerciser 36.

The provisional patent application referenced a drawing seen in **Figure 10**.

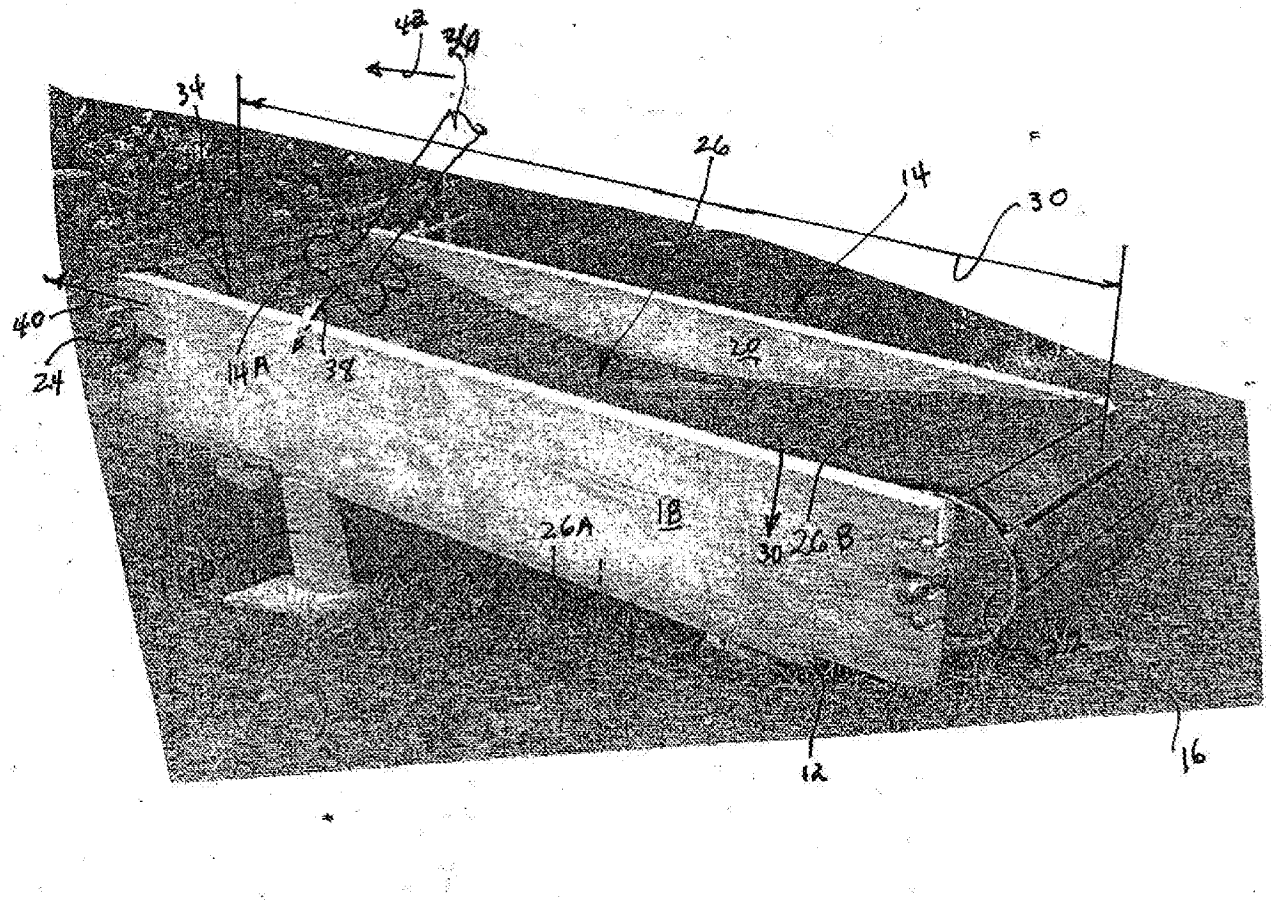



**Figure 10: Provisional Patent Application Figure 1.**

## PATENT US 9,114,276 B2 BY WOODWAY

The following was noted from the Patent '276:

| | |
|---|---|
| Patent No.: | US 9,114,276 B2 |
| Application No.: | 14/076,912 |
| Filing Date: | 11/11/2013 |
| Patent Date: | 8/25/2015 |
| Inventors: | **Douglas G. Bayerlein**, Oconomowoc, WI (US); Vance E. Emons, Hartland, WI (US); **Nicholas A. Oblamski**, Waukesha, WI (US); **Scott D. Hoerig**, Brookfield, WI (US); **Matthew J. Zank**, Milwaukee, WI (US); **Robert L. Zimpel**, Menomonee Falls, WI (US); **Joel W. Richards**, Wauwatosa, WI (US) |
| Related US Application Data: | Continuation of application No. 13/235,065, filed on September 16, 2011, which is a continuation-in-part of application No. PCT/US2010/027543, filed on March 16, 2010.<br><br>Provisional application No. 61/161,027, filed on March 17, 2009. |

The patent contained 34 claims, 1, 12, 16, 21, 24 and 25 are the independent claims. Claim 1 stated the following:

1. A manually operated treadmill comprising:

   a treadmill frame having a front end and a rear end opposite the front end;

   a front shaft rotatably coupled to the treadmill frame at the front end;

   a front pulley coupled to the front shaft;

   a rear shaft rotatably coupled to the treadmill frame at the rear end;

   a rear pulley coupled to the rear shaft;

   a running belt contacting the front and rear pulleys and including a curved running surface upon which a user of the treadmill may run, wherein the running belt is disposed about the front and rear shafts such that a first force generated by a user causes rotation of the front shaft and the rear shaft and also causes the running surface of the running belt to move from the front shaft toward the rear shaft;

   a synchronizing system coupled to both the front and rear shafts, the synchronizing system comprising a synchronizing belt coupled between the front and rear shafts, wherein tension in the synchronizing belt provides a second force which acts to resist differential rotation of the front and rear shafts; and

   wherein the treadmill is configured to control the speed of the running belt to facilitate the maintenance of the contour of the curved running surface.

The description of Patent 276 provided drawings showing an exemplary embodiment of a manual treadmill, seen in **Figure 11**, and the synchronizing system seen in **Figure 12**.

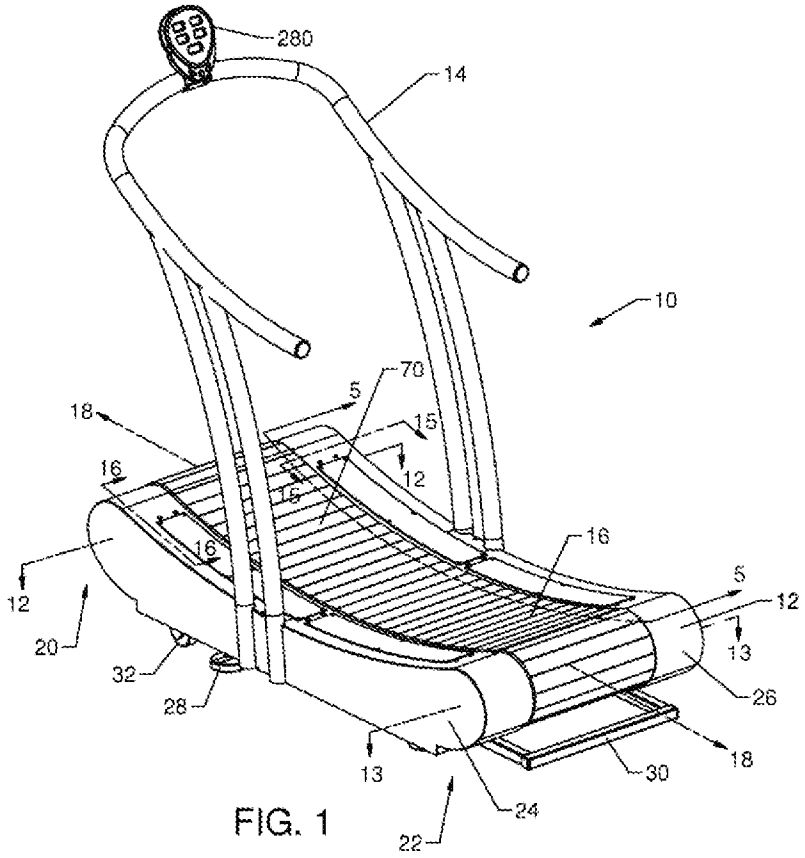



**Figure 11: An exemplary embodiment of a manual treadmill having a non-planar running surface.**

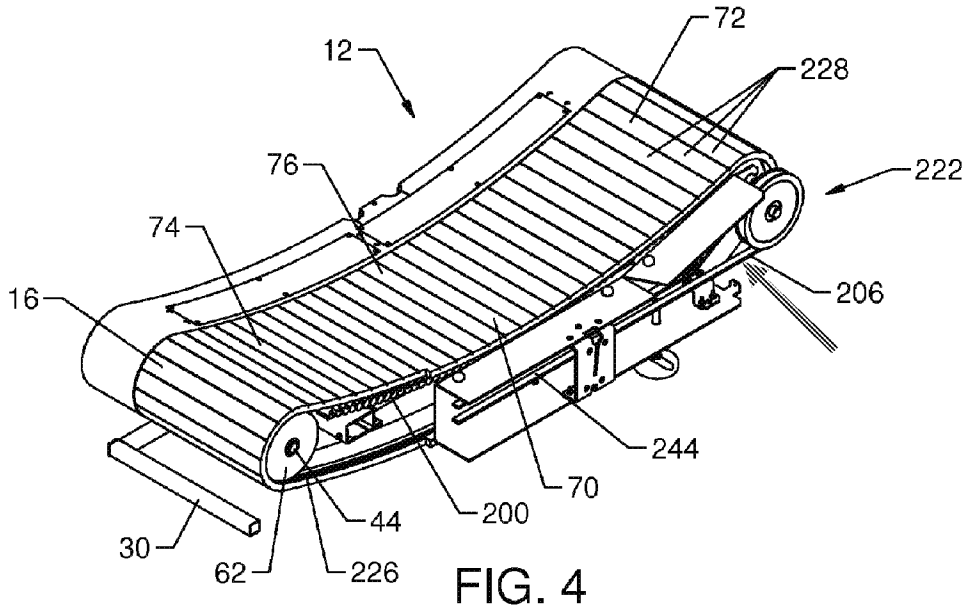



FIG. 4

**Figure 12: A perspective view of the side of the manual treadmill, with a portion of the rear of the treadmill cut-away to show a portion of the arrangement of the elements, including the synchronizing system identified by a red arrow.**

The description of Patent 276 provided a definition of the term "coupled" seen on

> "For the purpose of this disclosure, the term "coupled" means the joining of two members directly or indirectly to one another. Such joining may be stationary or moveable in nature. Such joining may be achieved with the two members or the two members and any additional intermediate members being integrally formed as a single unitary body with one another or with the two members or the two members and any additional intermediate members being attached to one another. Such joining may be permanent in nature or may be removable or releasable in nature".

## AUREL ASTILEAN DECLARATION

On **March 19, 2018**, Mr. Astilean signed a declaration that stated the following:

> I, AUREL A. ASTILEAN, declare as follows:
>
> 1. I am the principle of Plaintiff, Speedfit USA ("Speedfit"), in this action, and I present this Declaration in support of Speedfit's Opening Claim Construction Brief.
>
> 2. At issue, is the construction of the claims of four (4) patents in suit Plaintiff, allegedly owned by Defendant Woodway USA Inc. ("Woodway"): U.S. Patent No. 9,114,276 (the " '276 patent"), U.S. Design Patent No. D736,866 (the "D866 patent"), U.S. Design Patent No. D753,245 (the "D245 patent") and U.S. Design Patent No. D753,776 (the "D776 patent").
>
> 3. The "Introduction" and "Relevant Background," set forth at pages 1-5 of Woodway's Brief, and in Oblamski's declaration, attached to Woodways Brief as Exhibit 1, indicate that Oblamski invented "improvements and concepts for a curved treadmill" and that "Mr. Astilean did not contribute in any way to my invention of these concepts."

4. I am not sure what Nick means at par. 7 of his declaration that I did not contribute in any way to his invention of these concepts. How does one invent "concepts?"

5. I invented a non-motorized treadmill with a curved running surface and a secondary system for preventing the running belt from rising up between the front and rear pulleys, i.e., a secondary system for preventing "belt float."

6. When me and Dan Bostan conceived of the invention in April 2008, we didn't know it needed a secondary system for preventing belt float—we just had an idea of a non-motorized treadmill that didn't need to be adjusted for different uses because of the curved running surface. The inventive treadmill never worked until we added, in the 6th prototype (which is referred the "wooden prototype"), a secondary belt system that supported the lower portion of the running belt weight and tensions to prevent the running belt from floating.

7. While the wooden prototype had a secondary belt system underneath the running belt, and physically contacted therewith, I realized that any type of secondary belt system contacting or otherwise connecting to the running belt that added tensioning would keep the front and rear pulleys in a state in which the belt would not float up between them.

8. In November 2008, I filed a provisional patent application that disclosed the inventive treadmill, including the problem of belt float and solutions thereto. The only figure is a photograph of the wooden prototype, but there are other photographs of same including of its secondary belt system for relieving belt float, that were provided to Oblamski with the wooden prototype in December 2008; the evidence shows that Oblamski had this in his hands.

9. I met with Woodway in early December 2008, around Dec 8 -10, if I remember the date correctly. Doug Bayerlein and Eric Weber were at the meeting.

10. I showed them the video first with the white door obstructed the treadmill, he already screwed me with the flat and I was not going to disclose to him, but I did, I was also anxious to build it for production.

11. Bayerlein's first reaction was "Alex I don't think the belt will hold up" because he thought that I put the belt with nothing under with 2 pulleys front and back and let the belt sag and run on it.

12. I explained that it is a rail with bearings under and also another belt under the treadmill that holds the lower portion as much as the top portion; Bayerlein said " we need that rail with bearings to measure the radius of the curve and if we are going to build it we can't use another belt under because will wear out the rubber on the slats on the main belt "and I said 'no problem', we'll connect both pulleys front and back with a bicycle chain and will create a slack on the top portion of the belt and as long as both pulleys have the exact same rotation the slack on top will never disappear and I draw that on the white board in the conference room

13. I explained to Bayerlein and Weber that when you put the bike upside down and start to spin the pedal the top portion of the chain slacks down for him to envision the slacking mechanism; I said " everyone in the world had the bike upside down and spin the pedal, the bike creates the slaking mechanism on the chain all the time but when you put the bike upside down the slack is created exactly like the treadmill me and Dan invented.

14. Bayerlein is a mechanical engineer who has been building treadmills for a long time. He understood immediately the information and its significance.

15. Bayerlein said a bicycle chain would be too noisy and that he would have his engineer Oblamski come up with an alternative to the bicycle chain ( a timing belt )—Bayerlein told Oblamski to build the Speedboard 2 and Oblamski wrote up a parts list and ordered parts after the meeting, including for the synchronizing mechanism without ever building ONE unit- ZERO prototypes and they already order parts for the synchronizing mechanism.

16. Within days of the December 8 or 10 meeting in Milwaukee, I sent part of the wooden prototype so Oblamski could use to build the Speedboard 2, that is, I sent the bearing rails the next day I got home because they had to send it back before DEC 30 2008 when I had the discovery people in my house shooting the second video. Oblamski asked me in detail about the curvature in an email, and why the front curve was slightly different that the back curve; I explained it to (sp) him using the wooden prototype as a model. He was also very concerned about the bearings in the wooden prototype, as is plain from his written questions to me.

17. Bayerlein and Oblamski knew all along about the Discovery Channel shooting of the prototype and, it was important for Oblamski to measure the radius of the curve of the wooden prototype's bearing rails in order to produce the exact model as a production model (Speedboard 2, release March 17 or 19, 2009).

18. Oblamski didn't have much time for experimentation because it was 3 months before the show so disassembled the wooden prototype in East Hampton and sent the rails with bearings for Nick to measure the curve.

19. Oblamski asked me in emails a lot of small details such as why is one side of the rails the front) different than the other side (the back or rear). He didn't know because it was mine and Bostan's invention, not his or anyone else at Woodway.

20. Oblamski and I discussed the secondary belt system for preventing belt float, how it worked on the wooden prototype and how it should work on the Speedboard 2 many times by telephone.

21. Oblamski and Bayerlein stabbed me in the back when they filed the Oblamski patent application a few weeks later, and said it was their invention and not mine of Bostan's.

22. All of the inventors swore under oath that they invented the treadmill with the tensioning mechanism to prevent belt float and that my invention was theirs and that it was never known or used by me in the USA.

## MANUAL OF PATENT EXAMINING PROCEDURE (MPEP)

The MPEP is a manual published to provide U.S. Patent and Trademark Office (USPTO) patent examiners, applicants, attorneys, agents, and representatives of applicants with a reference work on the practices and procedures relative to the prosecution of patent applications before the USPTO. It contains instructions and material in the nature of information and interpretation in the normal examination of a patent application.

According to the MPEP section 2137 titled, "Pre-AIA 35 U.S.C. 102(f)":

> A person shall be entitled to a patent unless -(f) he did not himself invent the subject matter sought to be patented.

According to the MPEP section 2111.01 titled, "Plain Meaning"

> An applicant is entitled to be their own lexicographer and may rebut the presumption that claim terms are to be given their ordinary and customary meaning by clearly setting forth a definition of the term that is different from its ordinary and customary meaning(s) in the specification at the time of filing. See In re Paulsen, 30 F.3d 1475, 1480, 31 USPQ2d 1671, 1674 (Fed. Cir. 1994) (holding that an inventor may define specific terms used to describe invention, but must do so "with reasonable clarity, deliberateness, and precision" and, if done, must "'set out his uncommon definition in some manner within the patent disclosure' so as to give one of ordinary skill in the art notice of the change" in meaning) (quoting Intellicall, Inc. v. Phonometrics, Inc., 952 F.2d 1384, 1387-88, 21 USPQ2d 1383, 1386 (Fed. Cir. 1992)).

## PATENT US 5,709,632 BY SOCWELL

The following was noted from the patent '632:

| | |
|---|---|
| Patent No.: | US 5,709,632 |
| Application No.: | 721,724 |
| Filing Date: | September 27, 1996 |
| Patent Date: | January 20, 1998 |
| Inventors: | **Jeff Socwell**, Logan, Utah |

The patent contained 19 claims, 2 of the claims are independent claims. Claim 1 stated the following:

The specification described a curved deck treadmill, as seen in **Figure 13**. The treadmill had a belt that was riding on top of a deck to give the belt a curved shape, seen in **Figure 14.** It was also observed that there was not a secondary belt, synchronizing system or other device to provide a means for slackening as observed in the subject invention.

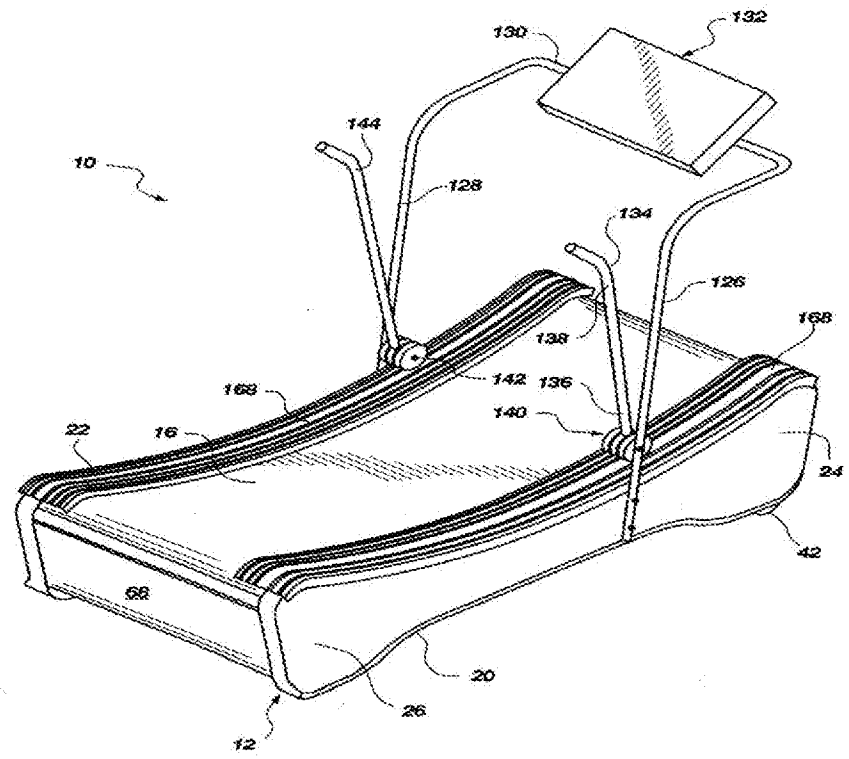



Fig. 1

Figure 13: The curved deck treadmill by Mr.Socwell.

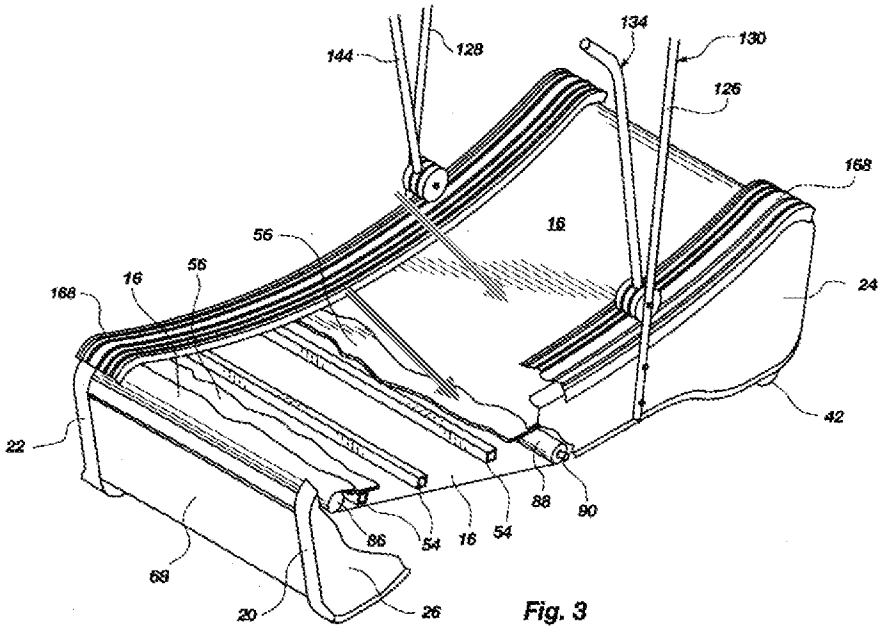



Fig. 3

Figure 14: A cutaway view of the Socwell treadmill showing a deck, highlighted by a red arrow, and a running belt, identified by a blue arrow.

## DISCUSSION

According to the MPEP, an applicant is entitled to be their own lexicographer and may rebut the presumption that claim terms are to be given their ordinary and customary meaning by clearly setting forth a definition of the term that is different from its ordinary and customary meaning(s) in the specification at the time of filing. The '276 patent in the specification stated that couple "means the joining of two members directly or indirectly to one another". **For the purpose of this analysis, coupled was read as joining of two members directly or indirectly; or directly or indirectly joined, linked or connected.**

A series of photographs taken of the wooden prototype prior to the filing date of patent '276 demonstrate that Mr. Astilean and Mr. Bostan are the inventors of the leg-powered treadmill. The photographs illustrate that the wooden prototype contained all the elements observed in Claim 1 of the '276 patent.

Mr. Astilean and Mr. Bostan together invented the manually operated treadmill comprising:

a treadmill frame having a front end and a rear end opposite the front end (**Figure 15**);

a front shaft rotatably coupled to the treadmill frame at the front end (**Figure 16**);

a front pulley coupled to the front shaft (**Figure 17**);

a rear shaft rotatably coupled to the treadmill frame at the rear end (**Figure 18**);

a rear pulley coupled to the rear shaft (**Figure 19**);

a running belt contacting the front and rear pulleys and including a curved running surface upon which a user of the treadmill may run (**Figure 20**),

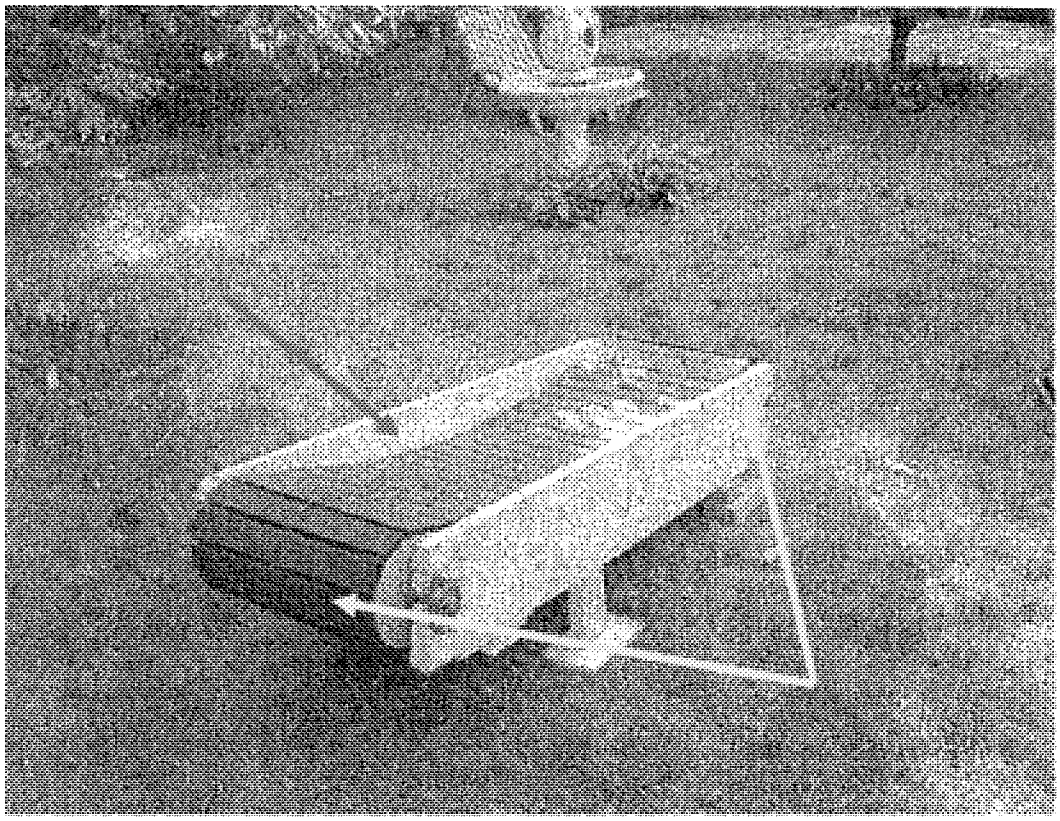


Figure 15: A treadmill frame, identified by a red arrow, having a front end and a rear end opposite the front end, identified by yellow arrows.

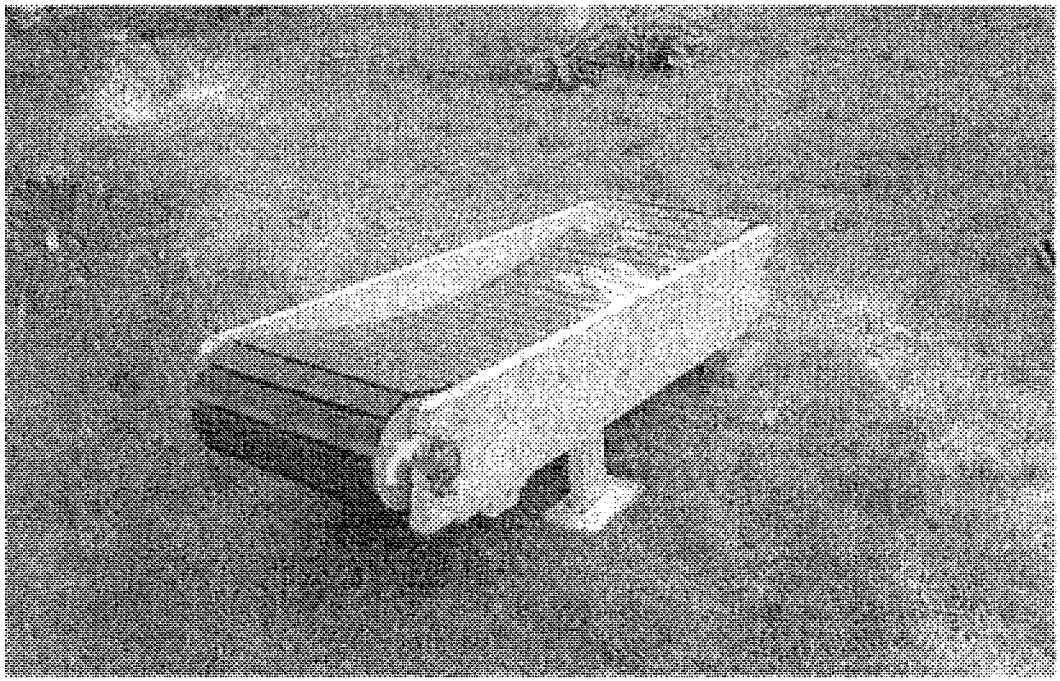


Figure 16: A front shaft, represented by a broken red line because only the end of the shaft is visible in this photograph, rotatably coupled, identified by a yellow arrow, to the treadmill frame at the front end.

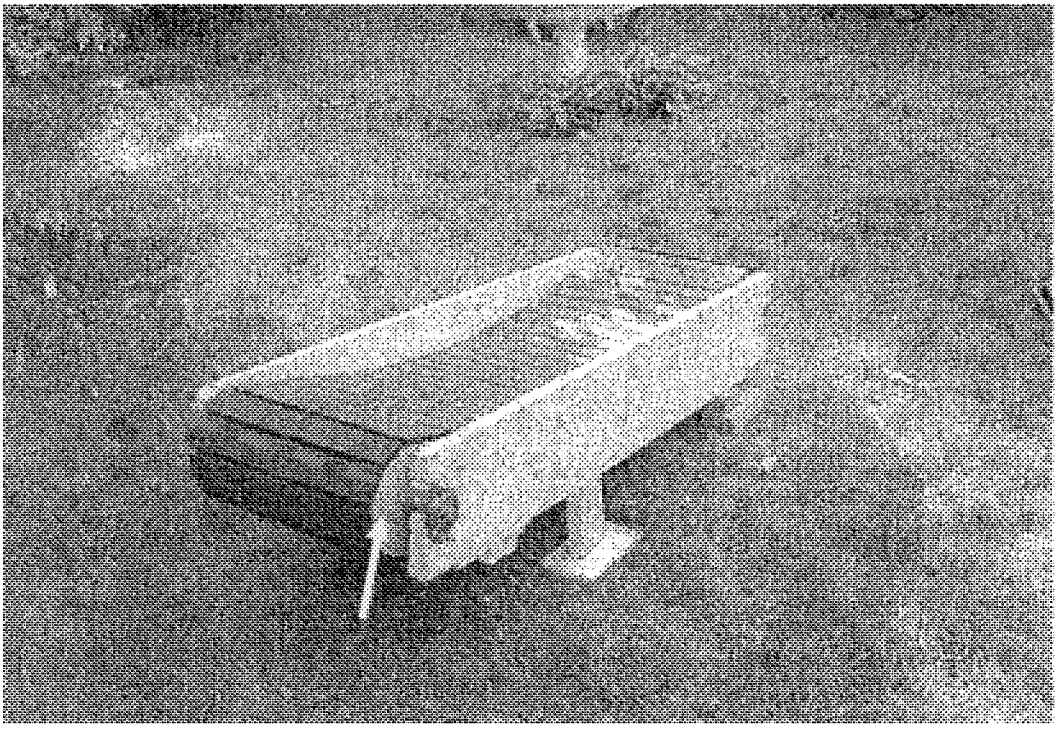


Figure 17: A front pulley, identified by a yellow arrow, coupled to the front shaft, represented by a broken red line because only the end of the shaft is visible in this photograph.

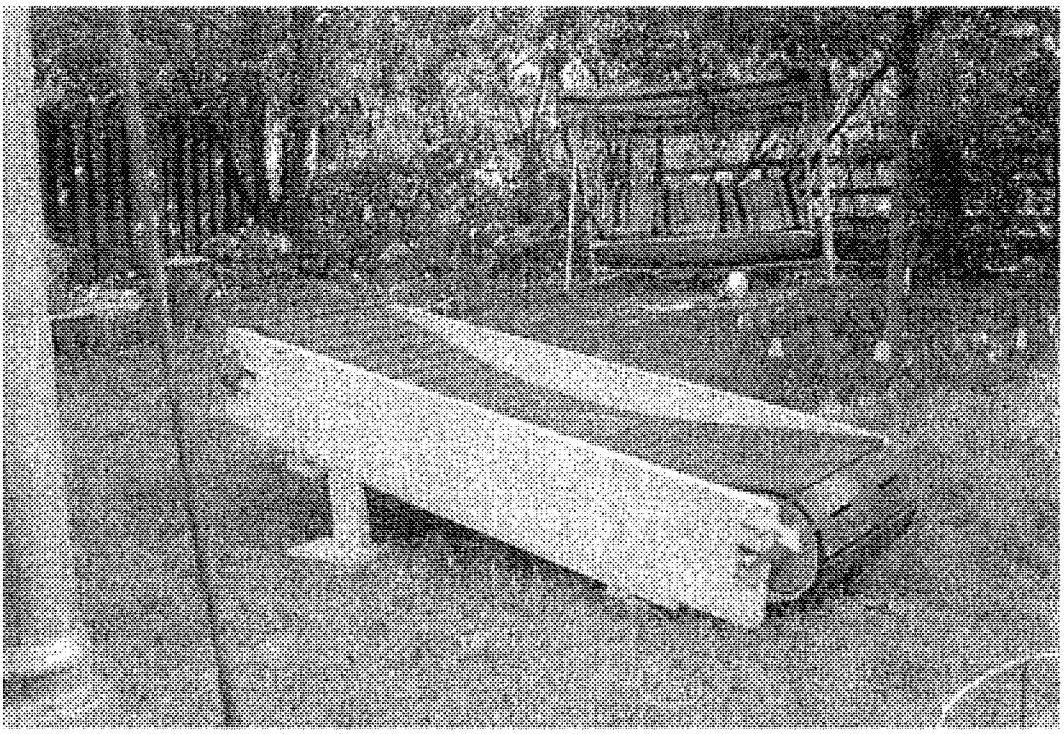


Figure 18: A rear shaft, represented by a broken red line because only the end of the shaft is visible in this photograph, rotatably coupled, represented by a yellow arrow, to the treadmill frame at the rear end.

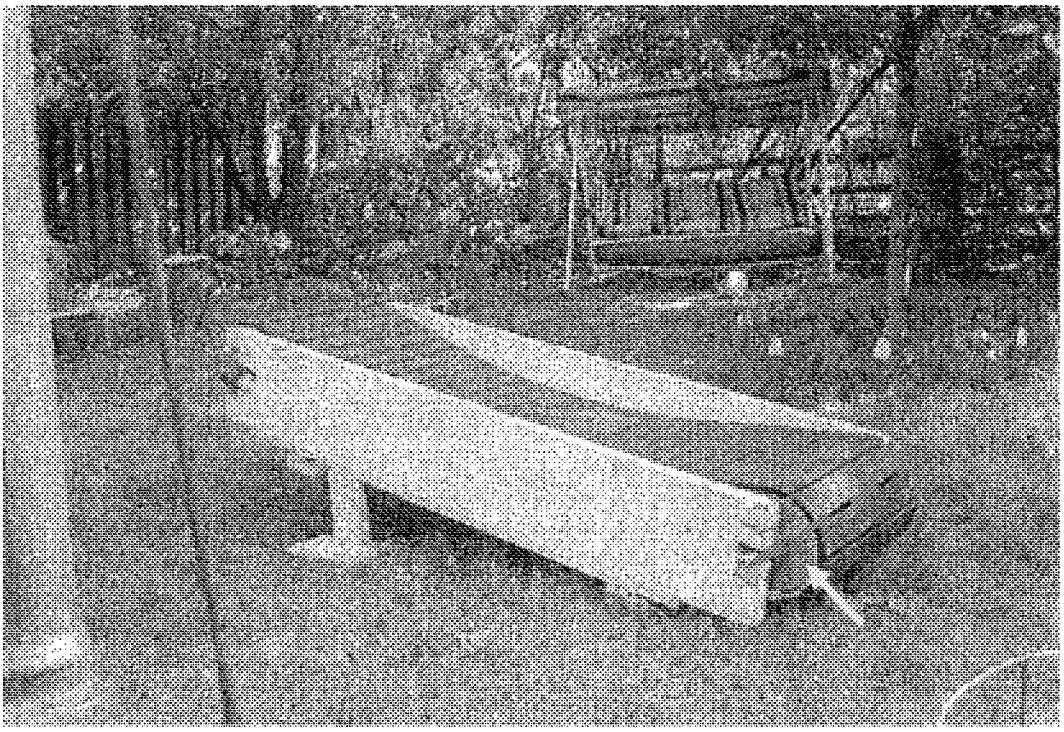


Figure 19: A rear pulley, identified by a yellow arrow, coupled to the rear shaft, represented by a broken red line because only the end of the shaft is visible in this photograph.

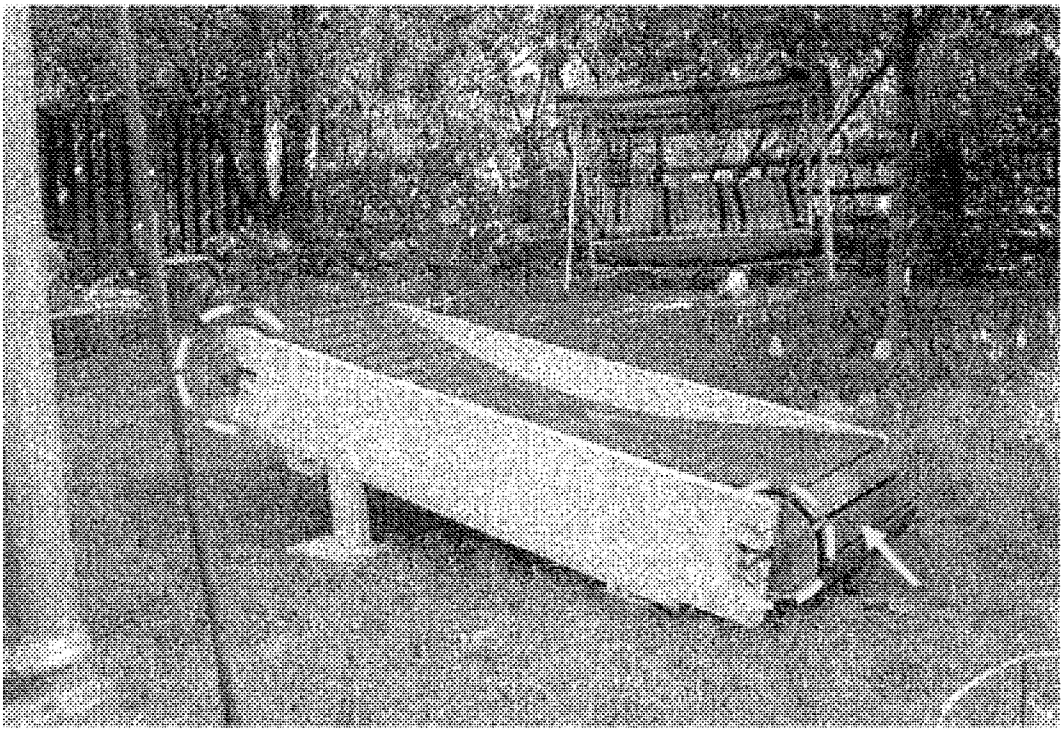


Figure 20: A running belt, identified by a yellow arrow, contacting the front and rear pulleys, identified by yellow circles, and including a curved running surface, identified by a red broken line, upon which a user of the treadmill may run.

wherein the running belt is disposed about the front and rear shafts such that a first force generated by a user causes rotation of the front shaft and the rear shaft and also causes the running surface of the running belt to move from the front shaft toward the rear shaft (**Figure 21**);

The wooden prototype used a belt and pulley to keep the top portion of the belt slackened while the bottom portion was a taught belt, which kept the front and rear pulleys in sync. Mr. Astilean further used an example of a bicycle chain to explain the conception of the idea to Mr. Bayerlin. The claimed synchronizing system is just one form or species of the Speedfit means for slackening, and thereby keeping the front and rear pulleys in sync, that was invented by Mr. Astilean and/or Mr. Bostan in 2008.

a synchronizing system coupled to both the front and rear shafts, the synchronizing system comprising a synchronizing belt coupled between the front and rear shafts, wherein tension in the synchronizing belt provides a second force which acts to resist differential rotation of the front and rear shafts (Figure 7);

and wherein the treadmill is configured to control the speed of the running belt to facilitate the maintenance of the contour of the curved running surface (**Figure 22**);



**Figure 21: Wherein the running belt is disposed about the front and rear shafts such that a first force generated by a user, identified by a red arrow, causes rotation of the front shaft and the rear shaft, identified by yellow arrows, and also causes the running surface of the running belt to move from the front shaft toward the rear shaft, a means for slackening, where the slackening is identified by a broken red line.**



**Figure 22: Wherein the treadmill is configured to control the speed of the running belt to facilitate the maintenance of the contour of the curved running surface, shown as a broken red line.**

The MPEP stated that definition for inventorship can be simply stated: "The threshold question in determining inventorship is who conceived the invention. Unless a person contributes to the conception of the invention, he is not an inventor. ... Insofar as defining an inventor is concerned, reduction to practice, per se, is irrelevant [except for simultaneous conception and reduction to practice, Fiers v. Revel, 984 F.2d 1164, 1168, 25 USPQ2d 1601, 1604-05 (Fed. Cir. 1993)]. One must contribute to the conception to be an inventor." In re Hardee, 223 USPQ 1122, 1123 (Comm'r Pat. 1984)." A person must contribute to the conception of the invention to be considered an inventor.

Based on a review of the file material, the leg-powered treadmill was conceived by Mr. Alex Astilean and Mr. Dan Bostan during late March and early April 2008 on Long Island, wherein after Mr. Bostan created several prototypes, including a wooden prototype in late July or August of 2008, and captured in operation in a video with Mr. Astilean's family in Mr. Bostan's yard in Montreal. Concurrently, in Montreal, Mr. Astilean conceived of variation of means for slackening embodying a synchronizing mechanism, which keeps the front and rear pulleys in sync. **Mr. Alex Astilean and Mr. Dan Bostan conceived and taught Woodway all the elements of claim 1 in the '276 patent. Mr. Alex Astilean and Mr. Dan Bostan are the inventors of the manual treadmill claimed in the '276 patent.**

As such, the patent claims of the '276 patent are anticipated by the invention disclosed by Astilean to Bayerlein and Weber on December 12, 2008. The patent claims of the '276 patent also are anticipated by the wooden prototype, and anticipate the metal production model (i.e., Speedboard 2) described in the Oblamski provisional application.

The invention described in patent '632 by Mr. Socwell did not have a means for slackening and used a deck to ensure the belt held its shape. Mr. Socwell did not include a secondary belt system to prevent belt float, ie, that is coupled to the front and rear shafts to maintain their synchronous operation to prevent belt float, as claimed. Mr. Socwell does not suggest any problem with belt float. **The invention by Mr. Astilean and Mr. Boston is novel and distinct and not the same as the treadmill claimed in the '632 patent by Mr. Socwell.**

## CONCLUSIONS

Based on BFPC's investigation and analysis, the following has been determined:

1. Coupled was read as joining of two members directly or indirectly; or directly or indirectly joined, linked or connected.

2. Mr. Alex Astilean and Mr. Dan Bostan conceived and taught Woodway all the elements of claim 1 in the '276 patent.

3. Mr. Alex Astilean and Mr. Dan Bostan are the inventors of the manual treadmill claimed in the '276 patent, including the synchronizing system to prevent belt float.

4. The invention by Mr. Astilean and Mr. Boston is novel and distinct and not the same as the treadmill claimed in the '632 patent by Mr. Socwell.

5. The file material shows that Mr. Oblamski and his co-inventors, did not invent the leg powered as claimed in the '276 patent.

## SIGNATURES

This report contains opinions and conclusions that are based on the information available at this time. The conclusions are made with a reasonable degree of professional certainty and based on reliable principles in combination with my knowledge, skill, education, training and experience. Should additional information become available, the right to add to this report is reserved should it become necessary.

Beacon Forensic, P.C. appreciates this opportunity to provide consulting services in this matter. Please contact us should any questions arise concerning this report, or if we may be of further assistance.

Respectfully submitted,

James Daly Whelan

James D. Whelan, P.E.
Principal Engineer
State of New York
License No. 093646

Reviewed by:

D. Sn

David Stobbe, Ph.D.
Consulting Mechanical Engineer

# EXHIBIT 2

# Leg-Powered Treadmill

**Prepared for:**

| | |
|---|---|
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| Mr. Thomas Decea | Mr. John Vodopia |
| 84 Business Park Drive, #200 | 133c New York Avenue |
| Armonk, NY 10504 | Huntington, NY 11743 |

| | |
|---|---|
| Case Name: | Speedfit LLC and Aurel Astilean, v. Woodway USA |
| Beacon Project No.: | 10034 |
| Report Date: | August 26, 2015 |
| Prepared by: | James D. Whelan, P.E. |

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## ASSIGNMENT

On July 27, 2015, Beacon Forensic, P.C. (BFPC) issued a report concerning a leg-powered treadmill and its patents. The plaintiff, Mr. Aurel Astilean, invented a leg-powered treadmill and filed a provisional patent application and subsequently secured two issued patents. It was reported that the defendant, Woodway USA (Woodway) and Mr. Douglas Bayerlein its President and CEO, stated that the leg-powered treadmill as disclosed in the provisional patent application does not enable one to make the invention as claimed in the issued patents.

Additional file material was reviewed, including a report issued by Kim Blair, Ph.D., titled "Expert Report of Kim B Blair, Ph.D.". After a review of the additional file material, a report was requested to address issues raised in the report of Dr. Blair.

In response to this request, BFPC completed additional work including the following:

- Reviewed file material:
  - Expert Report of Kim B Blair, Ph.D.
  - Provisional Patent Application No. 61/161,027
  - Letter from Mr. John Vodopia to Woodway's Counsel, dated May 22, 2015
  - Email from Mr .Astilean dated October 6, 2008 (PLTFESI001689,90,92-94)
  - Emails from Mr. Nick Oblamski, a Senior Project Engineer with Woodway, to Mr. Astilean dated January 26, 2009 (PLTFESI001821) and February 28, 2009 (PLTFESI002205)
  - Email from Mr. Oblamski to Mr. Doug Bayerlein, a representative of Woodway, dated January 12, 2009 (WOODWAY0032022-24)
  - Email from Mr. Oblamski to Messrs. Eric Weber, Scott Hoerig, Mr. Vance Emons and Bayerlin, representatives of Woodway, dated December 17, 2008 (WOODWAY0032138-39)
  - Email from Mr. Oblamski to Mr. Mark LaFond, representatives of Weimer Bearing, dated February 3, 2009 (WOODWAY0046280-82)
  - Email from Mr. Oblamski to Mr. Todd Mooig, representatives of Brecoflex, dated January 12, 2009 (WOODWAY0051725)
  - Purchase order 2009227 from McMaster-Carr (WOODWAY0051631)
  - Video of the leg-powered treadmill on the Discovery Channel (PLTFESI012011)
  - Videos of the leg-powered treadmill from December 2008 (PLTFESI013758-59)
- BFPC researched pertinent sections of the Manual Of Patent Examining Procedure

## EMAIL FROM MR. ASTILEAN DATED OCTOBER 6, 2008

On October 6, 2008, Mr. Astilean sent an email which contained five photographs of a wooden prototype of the leg-powered treadmill. The photographs were reportedly captured in Montreal, Canada around August 2008, in the backyard of Mr. Don Bostan, reportedly the co-inventor of the leg-powered treadmill. Two of the photographs were oblique views of the wooden prototype treadmill (**Figures 1 and 2**). One of the photographs contained a view of the bottom of the treadmill (**Figure 3**). The bottom of the treadmill had a belt and pulley system, used to keep the top portion of the belt slackened while the bottom portion was taught.

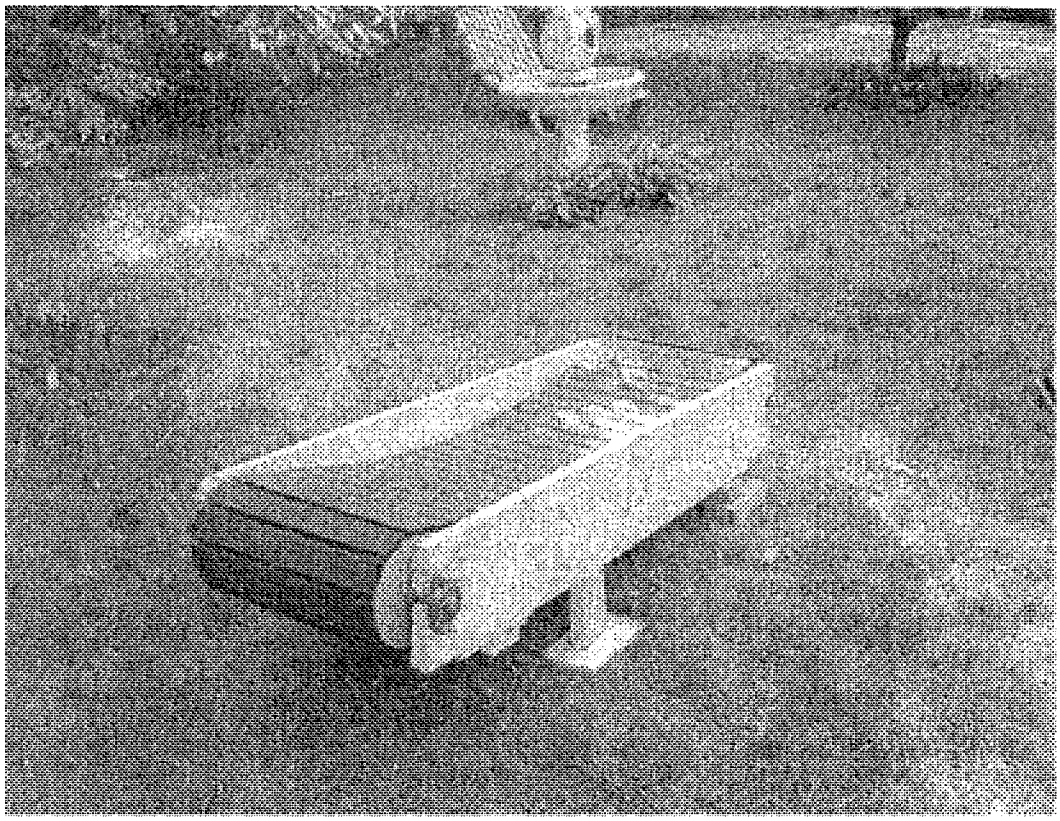


**Figure 1: An oblique view of a wooden prototype of the treadmill.**

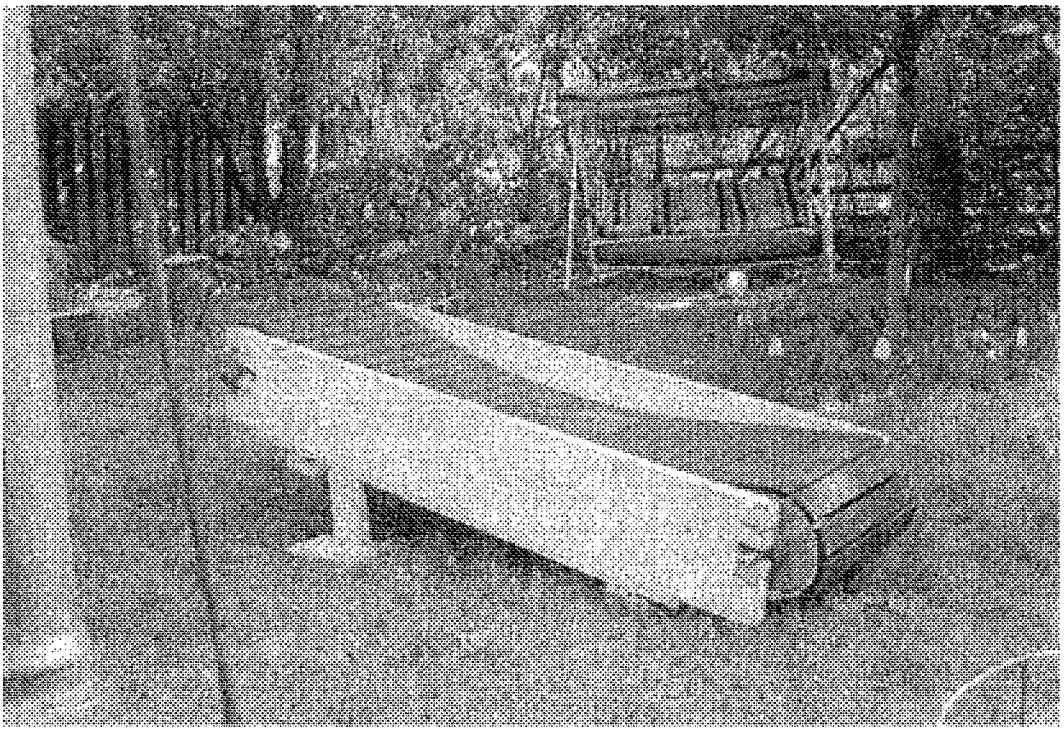


Figure 2: An oblique view of a wooden prototype of the treadmill.

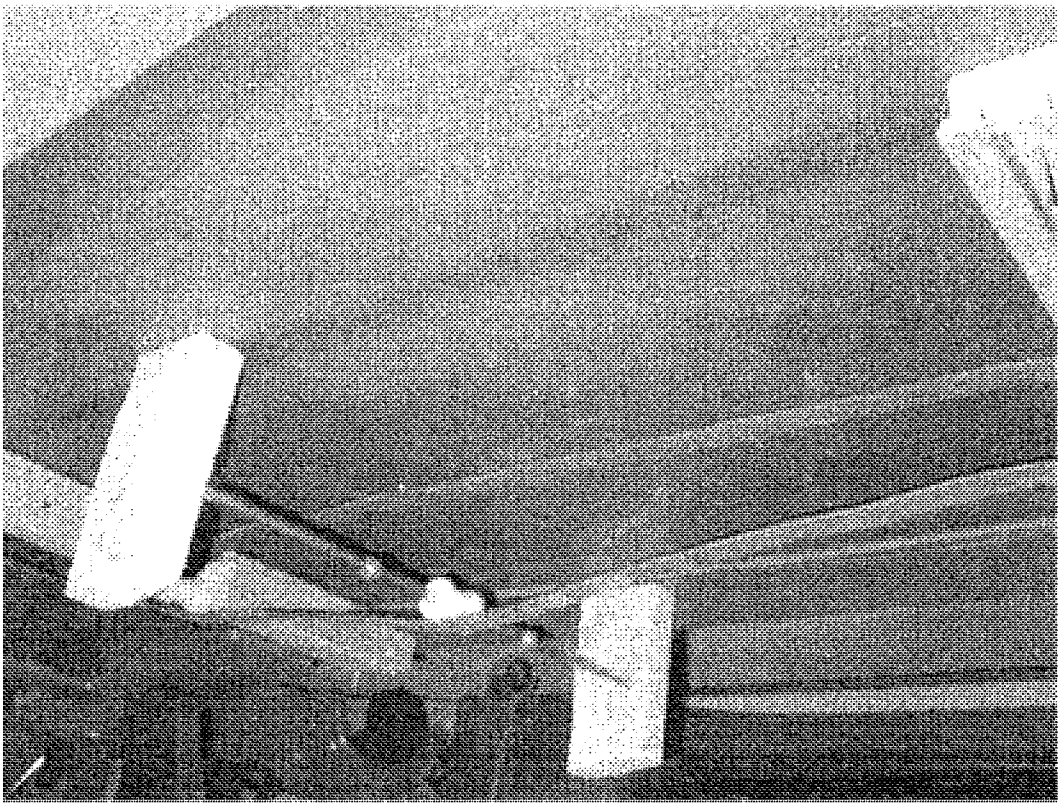


Figure 3: A bottom view of the wooden prototype of the treadmill. A belt and pulley was in place to keep the top portion of the belt slackened while the bottom portion was taught.

## VIDEO FROM MR. ASTILEAN CAPTURED IN AUGUST, 2008

Mr. Astilean created two videos of the wooden prototype leg-powered treadmill in operation. The videos were reportedly created in August of 2008 for testing purposes at the home of reported co-inventor Mr. Bostan in Montreal, Canada. In one video, the treadmill was concealed and there were multiple operators walking and jogging on what presumably was the leg-powered treadmill. In the second video, the leg-powered treadmill was visible and was operated by people of various ages, heights and weights at speeds between walking and running. The leg-powered treadmill was in full view. Two stills from the video were included in this report. In one still, a child was seen running on the treadmill (**Figure 4**). In another still, an adult was seen walking on the treadmill (**Figure 5**).

Reportedly, the videos were shown to Mr. Bayerlein and Mr. Scott Weber at the Woodway offices in Milwaukee, Wisconsin in December, 2008. It was also reported that Mr. Bayerlien stated in his deposition on April 24, 2015 that Mr. Astilean had explained a means for slackening to Mr. Bayerlien after showing the subject video.



**Figure 4: Video reportedly created in August of 2008, a child was seen running on the wooden prototype leg-powered treadmill.**



Figure 5: Video reportedly created in August of 2008, an adult was seen walking on the wooden prototype leg-powered treadmill.

## VIDEO FROM WRECKREATION NATION RELEASED FEBRUARY 24, 2009

Mr. Astilean participated in a television show which contained a segment showing his various inventions, including the leg-powered treadmill. The leg-powered treadmill (**Figure 6**) was seen being operated by Mr. Astilean and a child. They were both walking and running on the treadmill. The leg-powered treadmill in the videos was configured by Mr. Astilean from the wooden prototype depicted in the videos shown to Mr. Bayerlein and Mr. Weber in December 2008.

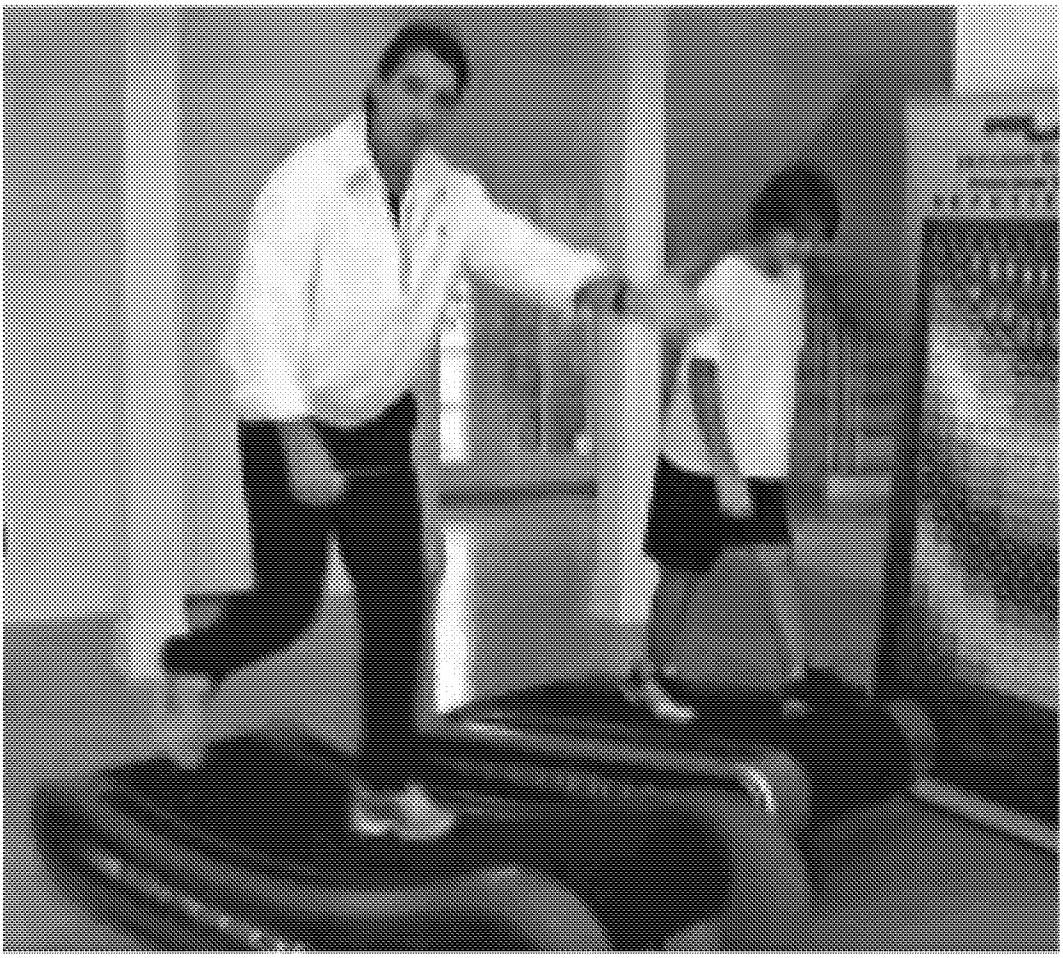


**Figure 6: Video from Wreckreation Nation dated February 24, 2009, an adult and child were using the leg-powered treadmill.**

## PROVISIONAL PATENT APPLICATION NO. 61/161,027

The following was noted from the Provisional Patent Application:

| | |
|---|---|
| Application Number: | 61/161,027 |
| Filing Date: | March 17, 2009 |
| Inventor: | Mr. Nicholas Oblamski |

The written description included the following:

[0002] Some embodiments of the invention provide an energy-efficient and self-regulating curved treadmill. The curved treadmill can use a main pulley system and a secondary pulley system on either end

to control a main belt and a synchronous belt for a safe and comfortable curved running surface. Some embodiments of the curved treadmill do not require external power and the speed of the curved treadmill can be controlled by where a runner positions himself along the main belt.

[0008] FIG. 1 (**Figure 7**) illustrates a curved treadmill 10 according to one embodiment of the invention. The curved treadmill 10 can be a self-regulating, energy-efficient, and low-impact treadmill. The curved treadmill 10 can include a base 12, a main belt 14, a synchronous belt 16, a main pulley system 18, and a secondary pulley system 20

[0010] The curved treadmill 10 can also include front and rear shafts 26 and 28, respectively, on either end. Bearing rails 30 between the shafts 26, 28 can support the main belt 14. The main belt 14 can be wrapped around the base 12 and be in contact with the main pulley system 18 at either end of the base 12, as shown in FIG. 2. The synchronous belt 16 can also wrap around the base 12 along one or both sides of the main belt 14, and be in contact with the secondary pulley system 20 at either end of the base 12. The synchronous belt 16 can be controlled by the secondary pulley system 20 and the main belt 14 can be controlled by both the main pulley system 18 and the secondary pulley system 20. The secondary pulley system 20 can be coupled to the main pulley system 18 at one or both ends.

[0011] In some embodiments, as shown in FIGS. 1 and 2, the pulley systems 18, 20 can be coupled to the front and rear shafts 26, 28 and the main belt 14 and the synchronous belt 16 can be in contact with the main pulley system 18 and the secondary pulley system 20, respectively, only at each end of the base 12. Thus, as shown in FIG. 3, there can be minimal components in contact with the main belt 14 or the synchronous belt 16 near the center 22 of the base 12. In such embodiments, the weight of the main belt 14 and the synchronization of the pulley systems 18, 20, can allow the main belt 14 to follow a top curve of the curved treadmill 10 rather than "float" straight across the top of the curved treadmill 10.

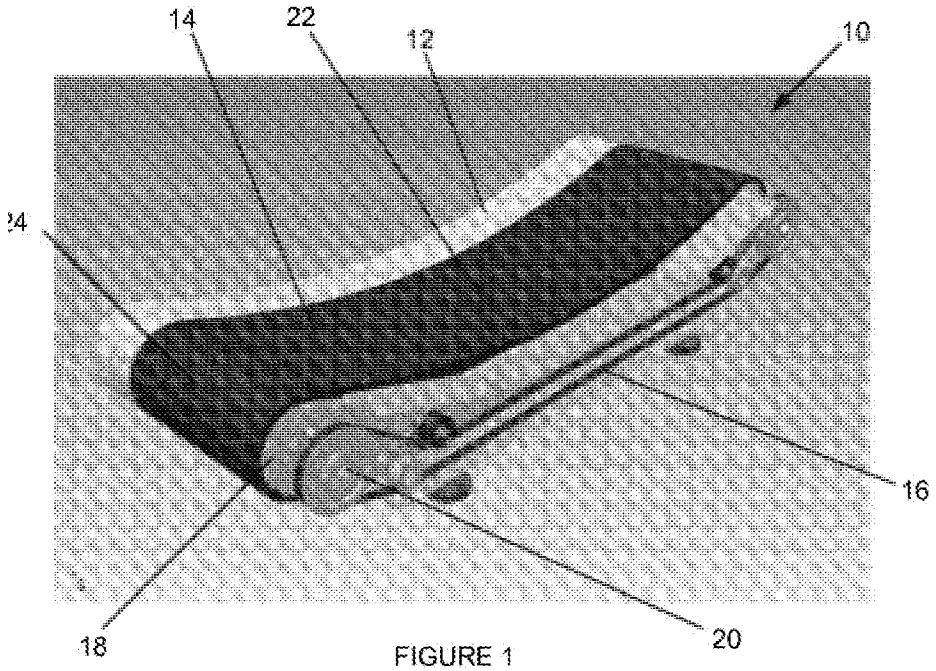



FIGURE 1

**Figure 7: A drawing from the Provisional Patent Application 027.**

## MANUAL OF PATENT EXAMINING PROCEDURE (MPEP)

The MPEP is a manual published to provide U.S. Patent and Trademark Office (USPTO) patent examiners, applicants, attorneys, agents, and representatives of applicants with a reference work on the practices and procedures relative to the prosecution of patent applications before the USPTO. It contains instructions and material in the nature of information and interpretation in the normal examination of a patent application.

According to MPEP section 2132 titled, "Pre-AIA 35 U.S.C. 102(a)":

> A person shall be entitled to a patent unless –(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

According to the MPEP section 2133 titled, "Pre-AIA 35 U.S.C. 102(b)":

> A person shall be entitled to a patent unless -(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

According to the MPEP section 2137 titled, "Pre-AIA 35 U.S.C. 102(f)":

> A person shall be entitled to a patent unless -(f) he did not himself invent the subject matter sought to be patented.

According to MPEP section 2181 titled, "Identifying and Interpreting a 35 U.S.C. 112(f) or Pre-AIA 35 U.S.C. 112, Sixth Paragraph Limitation":

> This section sets forth guidelines for the examination of 35 U.S.C. 112(f) or pre-AIA 35 U.S.C. 112, sixth paragraph, "means or step plus function" limitations in a claim. These guidelines are based on the Office's current understanding of the law and are believed to be fully consistent with binding precedent of the Supreme Court, the Federal Circuit and the Federal Circuit's predecessor courts. These guidelines do not constitute substantive rulemaking and hence do not have the force and effect of law.
>
> The Court of Appeals for the Federal Circuit, in its en banc decision In reDonaldson Co., 16 F.3d 1189, 1194, 29 USPQ2d 1845, 1850 (Fed. Cir. 1994), held that a "means-or-step-plus-function" limitation should be interpreted as follows:
>
> Per our holding, the "broadest reasonable interpretation" that an examiner may give means-plus-function language is that statutorily mandated in paragraph six. **Accordingly, the PTO may not disregard the structure disclosed in the specification corresponding to such language when rendering a patentability determination.**
>
> Therefore, the broadest reasonable interpretation of a claim limitation that invokes 35 U.S.C. 112(f) or pre-AIA 35 U.S.C. 112, sixth paragraph, is the structure, material or act described in the specification as performing the entire claimed function and equivalents to the disclosed structure, material or act.

The above paragraphs references 35 U.S.C. 112 (f), which is repeated below:

> An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

## DISCUSSION

BFPC reviewed the report of Dr. Blair. Dr. Blair had multiple conclusions, starting on page 1 paragraph 2 of his report, including the following:

> a) It is my opinion that the 2009 provisional patent application to which the Astilean patents purport to claim priority, U.S. Provisional Patent Application No. 61/280,265 ("the '265 Provisional Application"), does not adequately support the November 2, 2009 priority date for the claims of the Astilean patents. At a minimum, the '265 Provisional Application fails to teach, suggest, or disclose any alleged invention of the following elements from claim 1 of the '619 patent:
>
> > "a timing belt having respective timing belt pulleys attached to said front and rear pulley rollers for said closed loop treadmill belt";
> > "wherein timing belt idlers are used to configure said timing belt geometrically to fit within constraints of side contours of said treadmill"; and
> > said timing belt will not permit drooping down of said lower taut portion of said closed loop treadmill belt because all respective motion is synchronous"
>
> (emphasis added). Accordingly, these elements can only be given the filing date of the '619 patent, which is October 29, 2010 (i.e., the effective filing date of the '619 patent). Regarding the '016 patent, the '265 Provisional Application and the '619 patent fail to teach, suggest, or disclose the corresponding structure for the claimed "means for slackening," which as Plaintiffs claim, is a "synchronizing system for the running belt that keeps the upper portion from floating up (Figs. 2-4)."1 This concept is first disclosed in the specification for the '619 patent (and also appears in the '016 patent), not the '265 Provisional Application. More specifically and relevant for this Report, the '265 Provisional Application fails to teach, suggest, or disclose the inclusion of a synchronizing system, including a timing belt, in a manual, curved treadmill as depicted in Figure 3 of the Astilean patents. Thus, the earliest filing date afforded to this subject matter is the '619 filing date, which is October 29, 2010.

The Astilean provisional patent application disclosed and Patents 619 and 016 claimed a motor-less leg-powered treadmill with means for slackening the upper belt portion of the treadmill belt in order to keep the upper belt position from floating up, by different methods for keeping the lower belt portion taut. All the documents disclosed or claimed a taut lower belt or maintained the upper belt portion in a slackened state. The provisional patent application disclosed that the weight of the belt in combination with springs was one way of solving the problem of maintaining the upper belt in a slackened state. Patents 619 and 016 claimed a treadmill with means for slackening, as outlined in the BFPC report issued on July 27, 2015.

The various means of keeping the lower belt portion taut and the upper belt portion concave, including the synchronizing system, as disclosed or claimed in Patents 619 and 016 were mechanical and performed similar as to the method disclosed in the provisional patent application, which disclosed means for maintaining the upper portion of the running belt in a slackened state. **The Astilean provisional patent application does support the subject claims in both Patents 619 and 016.** The filing date of the Astilean provisional patent was November 2, 2009.

b) The Astilean patents are invalid as anticipated under 35 U.S.C. § 102(a) in light of Woodway's U.S. Provisional Patent Application No. 61/161,027 ("Woodway '027 Application") which was filed on March 17, 2009, and discloses each and every claim limitation incorporating a "synchronous belt" and "synchronous belt system," into a manual curved treadmill.

According to the MPEP, a 102(a) rejection is appropriate when "the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent." The Woodway provisional patent application was not published and was not a patent. Mr. Astilean had a video documenting that a working prototype of the leg-powered treadmill existed prior to the filing of the Woodway provisional patent application. **The Woodway provisional patent application would not anticipate the Astilean patents.**

c) The Astilean patents are invalid as anticipated under 35 U.S.C. § 102(b) in light of the public disclosure and introduction of what is now known as the CURVE treadmill, which incorporated the synchronous belt and synchronous belt system, which includes a timing belt, timing belt pulleys, and timing belt idlers during the International Health, Racquet & Sportsclub Association ("IHRSA") tradeshow on March 17, 2009, which is more than one year before the filing dates of the '619 and '016 patents.

d) The Astilean patents are invalid as anticipated under 35 U.S.C. § 102(b) in light of Woodway's successful manufacture and documented sale of what is now known as the CURVE treadmill beginning at IHRSA and continuing up to and through October 29 and November 1, 2009, which is more than one year before the filing dates of the '619 and '016 patents.

According to the MPEP, a 102(b) rejection is appropriate when "the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States." The Astilean patents references the Astilean provisional patent application, which was filed on November 2, 2009. The filing date of the Astilean provisional patent application was less than one year after the IHRSA tradeshow. **The IHRSA tradeshow would not anticipate the Astilean patents.** The leg-powered treadmill was on sale on October 29, 2009, less than one year from the Astilean provisional patent application. **The sale of the Curve treadmill would not anticipate the Astilean patents.**

e) The Astilean patents are invalid under 35 U.S.C. § 102(f) as Woodway engineer, Mr. Nicholas Oblamski, is an inventor of certain of the subject matter of the Astilean patents. There is corroborated clear and convincing evidence that Mr. Oblamski conceived of and reduced to practice a synchronous belt and synchronous belt system, which includes a timing belt, without any contribution by either Mr. Aurel (Alex) Astilean or Mr. Dan Bostan. For at least this reason, Mr. Oblamski should be named as an

> inventor on the Astilean patents, and these patents should be corrected pursuant to 35 U.S.C. § 256.

According to the MPEP, a 102 (f) rejection is appropriate when "he did not himself invent the subject matter sought to be patented." The MPEP also stated that definition for inventorship can be simply stated: "The threshold question in determining inventorship is who conceived the invention. Unless a person contributes to the conception of the invention, he is not an inventor. ... Insofar as defining an inventor is concerned, reduction to practice, per se, is irrelevant [except for simultaneous conception and reduction to practice, Fiers v. Revel, 984 F.2d 1164, 1168, 25 USPQ2d 1601, 1604-05 (Fed. Cir. 1993)]. One must contribute to the conception to be an inventor." In re Hardee, 223 USPQ 1122, 1123 (Comm'r Pat. 1984)."

The file material documented that Mr. Astilean conceived the invention and created a working prototype of the treadmill by August, 2008. The working prototype was using an alternative method for keeping the lower belt portion taut and the upper belt portion concave. The file material documented that Mr. Oblamski and Mr. Astilean collaborated in building the production leg-powered treadmill, as early as the beginning of 2009. At this time Mr. Astilean already had disclosed to Woodway in December 2008 the need for a means for slackening, as embodied in the wooden prototype. The file material documented that Mr. Oblamski worked with suppliers starting around December 2008 and early 2009. This was to realize a metal production version of the wooden prototype including making changes to the means for slackening in the wooden prototype so same means could be modified to work in the metal production model, Speedboard 2. The production model, Speedboard 2, utilized the synchronous belt system to keep the lower belt portion taut and the upper belt portion concave. **The file material does not suggest that Mr. Oblamski conceived or was developing a leg-powered treadmill with a lower belt portion taut and the upper belt portion concave prior to working with Mr. Astilean.** The file material suggests that Mr. Oblamski was neither the inventor or co-inventor of the leg-powered treadmill. **The Astilean patents are not invalid under 102(f).**

Dr. Blair stated the following concerning claim construction:

> C. "Means For Slackening"
>
> 48. In the May 22, 2015 letter, Plaintiffs construe "means for slackening" as follows: "Means for slackening is construed to mean structure that operates to ensure that the concave shape of the closed loop belt 26 of treadmill 14 is maintained during actual use, and its equivalents."
>
> 49. I disagree with this proposed construction. As noted by Plaintiffs, and agreed to in Woodway's July 12, 2015 responsive e-mail, in the context of the '016 patent, "means for slackening" is a means plus function claim. In this type of claim language, an element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof. As noted by Woodway, the function and corresponding structure are not provided in Plaintiffs' proposed construction. I agree with Woodway's proposed construction, which is repeated here:

> Function: slacken an upper concave portion of the running belt while simultaneously keeping a lower portion of the running belt taut, preventing said lower portion from drooping down during rotation and exertion of walking or running force upon said upper concave portion of said closed loop running belt;
>
> and
>
> Corresponding structures: support belt as described and disclosed in Figure 2, col. 2, ll. 24-28, col. 4, l. 61 – col. 5, l. 2; timing belt as described and disclosed in Figure 3, col. 2, ll. 29-33, col. 5, ll. 3-13; linear array of ball bearings as described and disclosed in Figure 4, col. 2, ll. 34-37, col. 5, ll. 14-20.

According to the MPEP, "an element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof." **It would not be appropriate to limit the claims to the "corresponding structures" as stated by Dr.Blair. The claims should be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.**

Dr. Blair stated the following concerning the support in the Astilean provisional patent

> 90. As there is absolutely no mention of the timing belt or synchronous belt concepts (or their related components) in the '265 Provisional Application, nor were any figures similar to Figure 3 shown in the '619 or '016 patents included in the '265 Provisional Application, then the method of using a timing belt or synchronous belt system to keep the treadmill belt in contact with the concave surface is not communicated to a person of ordinary skill in the art. Thus, the priority date for the claimed invention of the timing belt and synchronous belt system is that of the '619 patent application. Indeed, Mr. Astilean agrees in that he stated during his deposition that the timing belt and synchronous belt system concepts were not disclosed in the '265 Provisional Application.17
>
> 91. In summary, the only concepts (under contention) in the '619 and '016 patents not described in the prior art are the use of a timing belt or synchronous belt system as a method to keep the treadmill belt in contact with the concave running surface. The earliest priority date these concepts are entitled to is the filing date of the '619 patent application, which is October 29, 2010. There is no support for the method of using a timing belt or synchronous belt system to keep the treadmill belt in contact with the concave running surface on a manual treadmill in the '265 Provisional Application. Said another way, there is no support for Figure 3 in the '265 Provisional Application.

As already stated, the Astilean provisional patent application disclosed and Patents 619 and 016 claimed a motor-less leg-powered treadmill with means for slackening the upper belt portion of the treadmill belt in order to keep the upper belt portion from floating up, by keeping the lower belt portion taut. The documents disclosed or claimed a taut lower belt or maintained the upper belt portion in a slackened state for maintaining the upper belt portion in a slackened, and, therefore, concave shape. The provisional patent application disclosed the weight of the treadmill belt in combination with springs. Patents 619 and 016 claimed multiple methods outlined in the BFPC report issued on July 27, 2015.

The methods of keeping the lower belt portion taut and the upper belt portion concave, comprising means for slackening as disclosed or claimed in Patents 619 and 016 were mechanical and performed similar as to the method disclosed in the provisional patent application, which disclosed means for maintaining the upper portion of the running belt in a slackened state. The Astilean provisional patent application does support the subject claims in both Patents; they all solve the same problem.

Dr. Blair stated the following concerning the invention conception:

> 94. As illustrated by the documents produced in this case as well as the deposition testimony that I have reviewed, in December of 2008, Woodway launched the development of a manual treadmill with a concave running surface, with a plan to have a commercially viable production model prototype ready to demonstrate at the IHRSA show in San Francisco, California, in March of 2009.24 As I understand it, a key challenge during this development effort was identifying a commercially viable method to keep the treadmill belt in contact with the concave running surface.
>
> 95. Woodway personnel, including at least Nick Oblamski, conceived of the idea of using a belt to synchronize the front and rear shafts in order to allow the treadmill belt to follow the concave running surface and shared the beginnings of this concept with Mr. Bayerlein and Mr. Vance Emons in an e-mail message on December 17, 2008,25 with a subsequent update on the concept on January 12, 2009.26 Mr. Oblamski's subsequent efforts in developing the timing belt system is captured in a number of e-mail exchanges with component suppliers and purchase orders for components during the development period including but not limited to McMaster-Carr, BRECOflex CO. LLC, and Weimer Products. A purchase order dated February 14, 2009, for the synchronizing belt and associated parts corresponds to Mr. Oblamski's e-mail discussion with Weimer Products.
>
> 96. During the development of the treadmill for the IHRSA show, Mr. Oblamski communicated with Mr. Astilean about his progress. On January 26, 2009, Mr. Oblamski sent an e-mail to Mr. Astilean with details of the treadmill design. Mr. Oblamski did not mention a synchronizing system or timing belt in the e-mail text, and these features are not present in the design files attached to the e-mail.
>
> 97. After constructing a prototype from the components procured earlier in the month, Mr. Oblamski updated Mr. Astilean on his progress in a February 25, 2009 e-mail and attached a photograph of the treadmill with a timing belt.32 In a subsequent e-mail three days later, Mr. Oblamski states that he has found a solution to keeping the belt in the desired position.
>
> 98. Having successfully reduced to practice the concept of using a timing belt to keep the treadmill belt in contact with a curved running surface, on March 17, 2009, Woodway filed its '027 Application, which disclosed the notion of incorporating a "synchronous belt" and "synchronous belt system," into a manual curved treadmill. In particular, it disclosed a timing belt, upper bearing rails, and T-slats of rubber-coated aluminum. Mr. Oblamski is named as the inventor on the Woodway '027 Application.
>
> 99. From my review of the relevant materials in this matter and my discussions with Mr. Oblamski, Woodway personnel, including at least Mr. Oblamski, conceived of and

> reduced to practice the method of using a synchronous belt and synchronous belt system, which includes a timing belt to keep the treadmill belt in contact with a concave running surface. There is no evidence of any contribution by either Mr. Astilean or Mr. Bostan in this development. In fact, Woodway personnel have noted that Mr. Astilean was not involved in the development of the timing belt system.35 Nick Oblamski of Woodway independently conceived of the idea of a synchronous belt system and other improvements to a curved manual treadmill as described in the Woodway '027 Application.

As already stated, the file material documented that Mr. Astilean and reportedly Mr. Bostan conceived the invention and created a working prototype of the leg-powered treadmill by August, 2008. The working wooden prototype was using an alternative method for keeping the lower belt portion taut and the upper belt portion concave. The file material documented that Mr. Oblamski and Mr. Astilean collaborated in building the production leg-powered treadmill. The collaboration, per the provided emails, started as early as December, 2008. The file material documented that Mr. Oblamski worked with suppliers starting around December 2008 and early 2009. The production model, Speedboard 2, utilized the synchronous belt system to keep the lower belt portion taut and the upper belt portion concave as taught to Mr .Oblamski by Mr. Astilean. **The file material does not suggest that Mr. Oblamski conceived or was developing a leg-powered treadmill with a lower belt portion taut and the upper belt portion concave prior to working with Mr.Astilean. The file material suggests that Mr. Astilean conceived of a leg-powered treadmill with a lower belt portion taut and the upper belt portion concave.**

## CONCLUSIONS

Based on BFPC's investigation and analysis, the following has been determined:

1. The Astilean provisional patent application does support the subject claims in both Patents 619 and 016.

2. The Woodway provisional patent application would not anticipate the Astilean patents.

3. The IHRSA tradeshow would not anticipate the Astilean patents.

4. The sale of the Curve treadmill would not anticipate the Astilean patents.

5. The file material does not suggest that Mr. Oblamski conceived or was developing a leg-powered treadmill with a lower belt portion taut and the upper belt portion concave prior to working with Mr.Astilean.

6. The Astilean patents are not invalid under 102(f).

7. It would not be appropriate to limit the claims to the "corresponding structures" as stated by Dr.Blair. The claims should be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

8. The file material does not suggest that Mr. Oblamski conceived or was developing a leg-powered treadmill with a lower belt portion taut and the upper belt portion concave prior to working with Mr.Astilean.

9. The file material suggests that Mr. Astilean conceived of a leg-powered treadmill with a lower belt portion taut and the upper belt portion concave prior to working with Woodway or Mr. Oblamski.

## SIGNATURES

This report contains opinions and conclusions that are based on the information available at this time. The conclusions are made with a reasonable degree of professional certainty and based on reliable principles in combination with my knowledge, skill, education, training and experience. Should additional information become available, the right to add to this report is reserved should it become necessary.

Beacon Forensic, P.C. appreciates this opportunity to provide consulting services in this matter. Please contact us should any questions arise concerning this report, or if we may be of further assistance.

Respectfully submitted,

James D. Whelan, P.E.
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Reviewed by:

David Stobbe, MSME
Consulting Mechanical Engineer

# Leg-Powered Treadmill

**Prepared for:**

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|---|---|
| Case Name: | Speedfit LLC, verses, Woodway USA |
| Beacon Project No.: | 10034 |
| Report Date: | September 28, 2018 |
| Prepared by: | James D. Whelan, P.E. |

BEACON FORENSIC
3900 Westerre Parkway, Suite 300
Richmond, VA 23233

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## ASSIGNMENT

Beacon Forensic, P.C. (BFPC) previously issued a report on June 12, 2018. The scope of the report was to complete the following: determine if utility patent '276 and design patents 'D245, 'D776 and 'D866 claimed the concept and invention of Mr. Astilean; review the defendant's definition of the term "coupled"; and determine if the invention as claimed in United States patent US 5,709,632 ('632) by Mr. Socwell is the same as the invention by Mr. Astilean.

After issuing the June 12, 2018 report, BFPC was asked to elaborate on the analysis and findings concerning the ornamental design claimed in design patents 'D245, 'D776 and 'D866 and the concept and invention of Mr. Astilean. BFPC's analysis and findings are disclosed in this supplemental report.

In response to this request, BFPC completed a number of activities documented in the June 12, 2018 report including: BFPC reviewed file material; BFPC researched pertinent sections of the Manual Of Patent Examining Procedure (MPEP); and BFPC completed an analysis to determine if Mr. Astilean was the inventors of the leg powered treadmill claimed in design patents 'D245, 'D776 and 'D866.

# TIMELINE

## Emails between Mr. Astilean and Woodway prior to March 17, 2009

Mr. Astilean brought the invention to Woodway in Milwaukee, Wisconsin around December 10, 2008, and taught Woodway how the invention worked, how it must function and what it must look like. There were follow-up emails and phone calls between Mr. Astilean and Woodway between December of 2008 and March of 2009.

BFPC reviewed multiple emails between Mr. Astilean and representatives of Woodway. Some of the events documented in the emails are narrated below:

On **January 21, 2009,** Mr. Astilean sent an email to Mr. Bayerlin, Mr. Oblamski, and Mr. Eric Weber where he indicated that the new speed board design works when it is orientated flat. He specifically wrote the following:

> "Doug, I spoke with Nick the other day and I told them that the new Speed Board works even flat, so here is the new design, Nick can you put it on CAD to see how it will look, the only problem you need to resolve is the belt rolling under, in order to be a slick machine, I will send you pictures to show you how I did it."

Mr. Oblamski replied on **January 26, 2009**. He wrote that the shape of treadmill is limited by the belt sizes and stresses. Mr. Oblamski further asked Mr. Astilean to approve the ornamental design. He specifically stated, "Please either approve the side cover shape or get me a new side cover shape you'd like to use. I need this to determine the frame size and everything to get it on order so we can make it for the show"!

The **January 21, 2009** email from Mr. Astilean included the drawing seen in **Figure 1.** The **January 26, 2009** email from Mr. Oblamski included the following drawings seen in **Figure 2.** It was observed in both drawings that the top running surface of the treadmill had a concave shape.

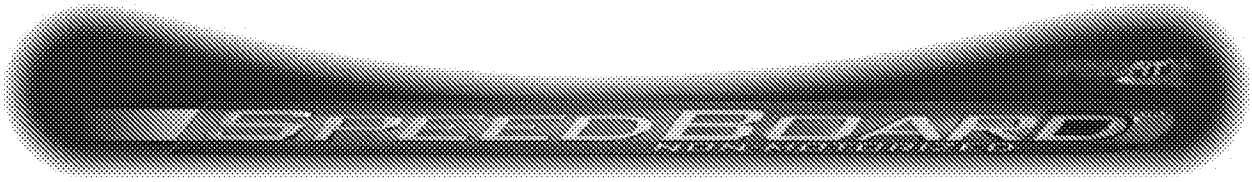


**Figure 1: The drawing that was sent from Mr. Astilean to Mr. Oblamski.**

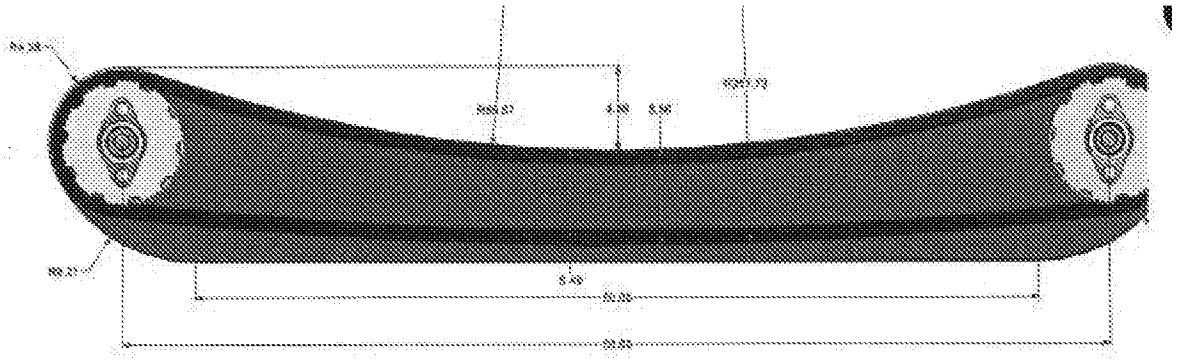


**Figure 2: The CAD (Computer-Aided Design) drawing by Mr. Oblamski of Woodway based on the design by Mr. Astilean.**

## PATENT US D753,245 S BY WOODWAY

The following was noted from the United States Patent D753,245 S (D245):

| | |
|---|---|
| Patent No.: | US D753,245 S |
| Application No.: | 29/534,417 |
| Filing Date: | July 28, 2015 |
| Patent Date: | April 5, 2016 |
| Inventors: | **Nicholas A. Obiamski**, Waukesha, WI (US); **Robert L. Zimpel**, Menomonee Falls, WI (US) |
| Assignee: | Woodway USA, Inc. |
| Related US Application Data: | Division of application number 29/506,302 filed on October 14, 2014, now patent number design 738,866, which is a continuation of application number 13/257,038 filed as application number PCT/US2010/026731 on March 9, 2010, now patent number 8,864,627. |

The patent contained 1 claim and 1 drawing. Claim 1 stated the following:

> We claim the ornamental design for a treadmill, as shown and described.

The drawing is seen in **Figure 3**.

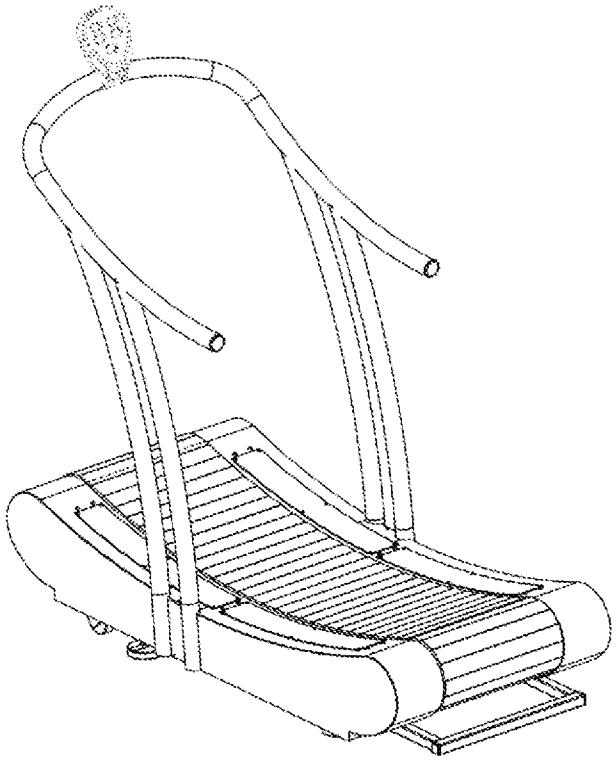


**Figure 3: The ornamental designed as claimed in patent D245.**

## PATENT US D753,776 S BY WOODWAY

The following was noted from the United States Patent D753,776 S (D776):

| | |
|---|---|
| Patent No.: | US D753,776 S |
| Application No.: | 29/534,421 |
| Filing Date: | July 28, 2015 |
| Patent Date: | April 12, 2016 |
| Inventors: | **Nicholas A. Oblamski**, Waukesha, WI (US); **Robert L. Zimpel**, Menomonee Falls, WI (US) |
| Assignee: | Woodway USA, Inc. |
| Related US Application Data: | Division of application number 29/506,302 filed on October 14, 2014, now patent number design 738,866, which is a continuation of application number 13/257,038 filed as application number PCT/US2010/026731 on March 9, 2010, now patent number 8,864,627. |

The patent contained 1 claim and 1 drawing. Claim 1 stated the following:

> We claim the ornamental design for a treadmill, as shown and described.

The drawing is seen in **Figure 4**.

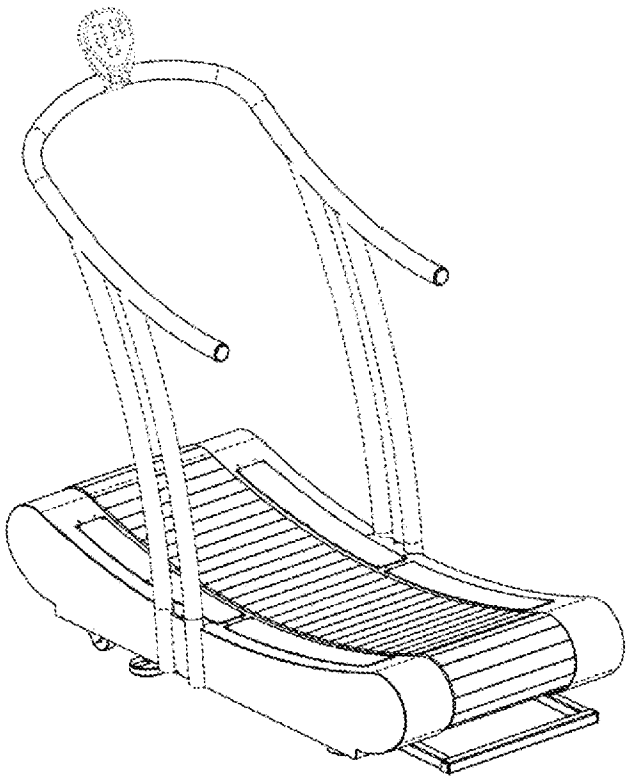


**Figure 4: The ornamental designed as claimed in patent D776.**

## PATENT US D736,866 S BY WOODWAY

The following was noted from the United States Patent D753,866 S (D866):

| | |
|---|---|
| Patent No.: | US D736,866 S |
| Application No.: | 29/506,302 |
| Filing Date: | October 14, 2014 |
| Patent Date: | August 18, 2015 |
| Inventors: | **Nicholas A. Oblamski**, Waukesha, WI (US); **Robert L. Zimpel**, Menomonee Falls, WI (US) |
| Assignee: | Woodway USA, Inc. |
| Related US Application Data: | Continuation of application number 13/257,038 filed as application number PCT/US2010/026731 on March 9, 2010, now patent number 8,864,627. |

The patent contained 1 claim and 1 drawing. Claim 1 stated the following:

> We claim the ornamental design for a treadmill, as shown and described.

The drawing is seen in **Figure 5**.

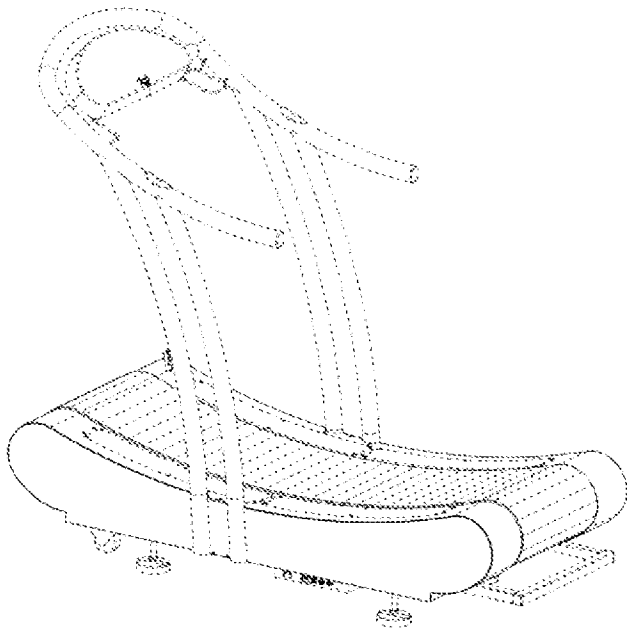


**Figure 5: The ornamental designed as claimed in patent D866.**

## DISCUSSION

In a design patent, the subject matter which is claimed is the design of the treadmill, but not the treadmill itself. According to the MPEP, "the design for an article consists of the visual characteristics embodied in or applied to an article. Since a design is manifested in appearance, the subject matter of a design patent application may relate to the configuration or shape of an article, to the surface ornamentation applied to an article, or to the combination of configuration and surface ornamentation. Design is inseparable from the article to which it is applied and cannot exist alone merely as a scheme of surface ornamentation. It must be a definite, preconceived thing, capable of reproduction and not merely the chance result of a method."

The drawings in the subject design patents consists of solid and broken lines. The broken line showing is for illustrative purposes only and forms no part of the claimed design.

The design patent 'D245 claims the ornamental design of a manual treadmill with a concave shape; styled vertical supports for a handrail; and a styled handrail. The design patent 'D776 claims the ornamental design of a manual treadmill with a concave shape; and a styled handrail. The design patent 'D866 claims the ornamental design of the sides of a manual treadmill with a concave shape.

The file material documented that Mr. Astilean collaborated with Woodway on the ornamental design of the treadmill between January 21 and 26, 2009. The design by Mr. Astilean consisted of a treadmill with a concave top. **Mr. Astilean conceived an ornamental design which consisted of a treadmill that had a concave top. Mr. Astilean conceived the ornamental design claimed in design patent 'D866. Mr. Astilean conceived part of the ornamental designs, specifically the treadmill with a concave shape, claimed in design patents 'D245 and 'D776.**

## CONCLUSIONS

Based on BFPC's investigation and analysis, the following has been determined:

1. Mr. Astilean conceived an ornamental design which consisted of a treadmill that had a concave top.
2. Mr. Astilean conceived the ornamental design claimed in design patent 'D866.
3. Mr. Astilean conceived part of the ornamental designs, specifically the treadmill with a concave shape, claimed in design patents 'D245 and 'D776.

## SIGNATURES

This report contains opinions and conclusions that are based on the information available at this time. The conclusions are made with a reasonable degree of professional certainty and based on reliable principles in combination with my knowledge, skill, education, training and experience. Should additional information become available, the right to add to this report is reserved should it become necessary.

Beacon Forensic, P.C. appreciates this opportunity to provide consulting services in this matter. Please contact us should any questions arise concerning this report, or if we may be of further assistance.

Respectfully submitted,

James Daly Whelan

James D. Whelan, P.E.
Principal Engineer
State of New York
License No. 093646

Reviewed by:

D. S

David Stobbe, Ph.D.
Consulting Mechanical Engineer

*IN THE UNITED STATES PATENT AND TRADEMARK OFFICE*

| | |
|---|---|
| First Inventor Name: | Douglas G. Bayerlein |
| Title: | MANUAL TREADMILL AND METHODS OF OPERATING THE SAME |
| Application No.: | 15/958,339 |
| Filing Date: | 4/20/2018 |
| Examiner: | Deichl, Jennifer M. |
| Art Unit: | 3784 |
| Confirmation No.: | 4765 |

**INFORMATION DISCLOSURE STATEMENT UNDER 37 CFR §1.56**

Mail Stop Amendment
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Commissioner:

Applicant submits herewith documents for the Examiner's consideration in accordance with 37 CFR §§1.56, 1.97 and 1.98.

Applicants respectfully request that each listed document be considered by the Examiner and be made of record in the present application and that an initialed copy of Form PTO/SB/08 be returned in accordance with MPEP §609.

Applicant requests that, in accordance with 37 CFR §1.98(d), the Examiner review all applications relied on for an earlier effective filing date under 35 U.S.C. 120, including application no. PCT/US10/27543, filed 3/16/2010; application no. 13/235,065, filed 9/16/2011; application no. 14/076912, filed 11/11/2013; application no. 14/832,708, filed 8/21/2015, for

copies of references of record therein that are not being provided here; although Applicant would be pleased to provide copies of any such documents at the Examiner's request.

The submission of any document herewith is not an admission that such document constitutes prior art against the claims of the present application or that such document is considered material to patentability as defined in 37 CFR §1.56(b). Applicant does not waive any rights to take any action which would be appropriate to antedate or otherwise remove as a competent reference any document submitted herewith.

## TIMING OF THE DISCLOSURE

The listed documents are being submitted in compliance with 37 CFR §1.97(c), before the mailing date of any of a final action under 37 CFR §1.113, a notice of allowance under 37 CFR §1.311, or an action that otherwise closes prosecution in the application.

## FEE

Fees in the amount of $120.00 to cover the fee associated with an information disclosure statement are being paid by credit card via EFS-Web.

The Commissioner is hereby authorized to charge any additional fees which may be required for this application to Deposit Account Number 19-0741.

Respectfully submitted,

Date /10-18-2018/ By /Alexander J. Neuworth/

FOLEY & LARDNER LLP
Customer Number: 26371
Telephone: (414) 319-7029
Facsimile: (414) 297-4900

Attorneys for Applicant

Richard J. McKenna
Registration No. 35,610

Alexander J. Neuworth
Registration No. 72,021

| Substitute for form 1449/PTO | | | | Complete if Known | |
|---|---|---|---|---|---|
| **INFORMATION DISCLOSURE STATEMENT BY APPLICANT** | | | | **Application Number** | 15/958,339 |
| | | | | **Filing Date** | 4/20/2018 |
| Date Submitted: October 18, 2018 | | | | **First Named Inventor** | Douglas G. Bayerlein |
| | | | | Art Unit | 3784 |
| *(use as many sheets as necessary)* | | | | Examiner Name | Deichl, Jennifer M. |
| Sheet | 1 | of | 3 | Attorney Docket Number | 097208-0226 |

| NON PATENT LITERATURE DOCUMENTS | | | |
|---|---|---|---|
| Examiner Initials* | Cite No.[1] | Include name of the author (in CAPITAL LETTERS), title of the article (when appropriate), title of the item (book, magazine, journal, serial, symposium, catalog, etc.) date, page(s), volume-issue number(s), publisher, city and/or country where published. | T[6] |
| | D1 | Minute Entry and Order for Markman Hearing, dated June 13, 2018, 2 pps. | |
| | D2 | Order Denying Motion for Reconsideration (Doc. No. 248), dated June 20, 2018, 12 pps. | |
| | D3 | Supplemental Expert Report of Kim B. Blair, PhD., Case 3:15-CV-01665-JCH, Document 184-8, filed 3/16/2018, 19 pps., marked on its face as Exhibit AA. | |
| | D4 | Second Supplemental Expert Report of Kim B. Blair, PhD., Case 3:15-CV-01665-JCH, Document 254-3, 41 pps., marked on its face as Exhibit 3. | |
| | D5 | Expert Report of Kim B. Blair, Ph.D., Case 3:15-CV-01665-JCH, Document 254-7, filed 6/8, 2018, 135 pps., marked on its face as Exhibit 7. | |
| | D6 | Rebuttal Expert Report of Kim B. Blair, Ph.D., Case 3:15-CV-01665-JCH, Document 254-15, 184 pps., marked on its face as Exhibit 15. | |
| | D7 | Woodway USA, Inc.'s opposition to plaintiffs' motion for partial reconsideration, Case 3:15-CV-01665-JCH, Document 250, filed 5/14/2018, 19 pps. | |
| | D8 | Defendant Woodway USA, Inc.'s responses and objections to plaintiffs' first set of interrogatories, Case 3:15-CV-01665-JCH, Document 254-22, 17 pps., marked on its face as Exhibit 22. | |
| | D9 | Woodway USA, Inc.'s motion for summary judgment of infringement of U.S. Patent No. 9,039,580, Case 3:15-CV-01665-JCH, Document 255, filed 6/8/2018, 3 pps. | |
| | D10 | Woodway USA, Inc.'s Memorandum of Law in support of its motion for summary judgment of infringement of U.S. Patent No. 9,039,580, Case 3:15-CV-01665-JCH, Document 256, 38 pps. | |
| | D11 | Woodway USA, Inc.'s local rule 56(a)1 statement of undisputed material facts in support of its motion summary judgment of infringement of U.S. Patent No. 9,039,580, Case 3:15-CV-01665-JCH, Document 257, 8 pps. | |
| | D12 | Woodway USA, Inc.'s memorandum of law in opposition to plaintiffs' motion for summary judgment of non-infringement and invalidity of Claim 25 of U.S. Patent No. 9,039,580, Case 3:15-CV-01665-JCH, Document 266, filed 6/29/2018, 42 pps. | |
| | D13 | Woodway USA, Inc.'s local rule 56(a)2 statement of facts in opposition to plaintiffs' motion for summary judgment, Case 3:15-CV-01665-JCH, Document 267, filed 6/29/2018, 34 pps. | |
| | D14 | Woodway USA, Inc.'s Amended Supplemental Counterclaims, Case 3:15-CV-01665-JCH, Document 309, filed 9/14/2018, 28 pps. | |
| | D15 | Plaintiffs' motion for partial reconsideration, Case 3:15-CV-01665-JCH, Document 248, filed 5/7/2018, 3 pps. | |
| | D16 | Plaintiffs' memorandum of law in support of their motion for partial reconsideration, Case 3:15-CV-01665-JCH, Document 249, filed 5/8/2018, 9 pps. | |

| Examiner Signature | | Date Considered | |
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|---|---|---|---|---|---|
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| | | | | **Filing Date** | 4/20/2018 |
| Date Submitted: October 18, 2018 | | | | **First Named Inventor** | Douglas G. Bayerlein |
| | | | | Art Unit | 3784 |
| *(use as many sheets as necessary)* | | | | Examiner Name | Deichl, Jennifer M. |
| Sheet | 2 | of | 3 | Attorney Docket Number | 097208-0226 |

**NON PATENT LITERATURE DOCUMENTS**

| Examiner Initials* | Cite No.[1] | Include name of the author (in CAPITAL LETTERS), title of the article (when appropriate), title of the item (book, magazine, journal, serial, symposium, catalog, etc.) date, page(s), volume-issue number(s), publisher, city and/or country where published. | T[6] |
|---|---|---|---|
| | D17 | Plaintiffs' Reply in Support of motion for partial reconsideration, Case 3:15-CV-01665-JCH, Document 251, filed 5/29, 2018, 4 pps. | |
| | D18 | Plaintiffs' motion for summary judgment of non-infringement and invalidity on Claim 25 of U.S. Patent No. 9,039,580, Case 3:15-CV-01665-JCH, Document 252, 2 pps. | |
| | D19 | Plaintiff's memorandum in support of motion for summary judgment of non-infringement and invalidity on Claim 25 of U.S. Patent No. 9,039,580, Case 3:15-CV-01665-JCH, Document 253, filed 6/8/2018, 45 pps. | |
| | D20 | Plaintiffs' Local Rule 56(a)1 statement of undisputed material facts, Case 3:15-CV-01665-JCH, Document 254, filed 6/8/2018, 14 pps. | |
| | D21 | Plaintiffs' Opposition to Woodway USA, Inc.'s motion for summary judgment of infringement on Claim 25 of U.S. Patent No. 9,039,580, Case 3:15-CV-01665-JCH, Document 264, filed 6/29/2018, 35 pps. | |
| | D22 | Plaintiffs' Local Rule 56(a)2 statement of facts in opposition to summary judgment, Case 3:15-CV-01665-JCH, Document 265, filed 6/29/2018, 17 pps. | |
| | D23 | Chapco, Inc. and Samsara Fitness LLC's notice pursuant to 34 U.S.C. §282, Case 3:15-CV-01665-JCH, Document 310, filed 9/14/2018, 4 pps. | |
| | D24 | Plaintiffs' preliminary non-infringement contentions, Case 3:15-cv-01165-JCH, Document 96-3, filed May 2, 2017, 56 pps. | |
| | D25 | Plaintiffs' supplemental non-infringement contentions, Case 3:15-CV-01665-JCH, Document 98-8, filed May 2, 2017, 60 pps. | |
| | D26 | Plaintiffs' preliminary invalidity contentions, Case 3:15-CV-01665-JCH, Document 254-16, filed 6/8/2018, 205 pps., marked on its face as Exhibit 16. | |
| | D27 | Declaration of Robert Giachetti, Case 3:15-CV-01665-JCH, Document 88-2, filed May 1, 2017, 20 pps., marked on its face as Exhibit 1. | |
| | D28 | Opening expert report of Dr. Robert Giachetti re: invalidity of United States Patent No. 8,986,169 and United States Patent No. 9,039,580, Case 3:15-CV-01665-JCH, Document 216-1, filed 4/5/2018, 67 pps., marked on its face as Exhibit 1. | |
| | D29 | Expert report of Dr. Robert Giachetti, Case 3:15-CV-01665-JCH, Document 216-2, filed 4/5/2018, 31 pps., marked on its face as Exhibit 2. | |
| | D30 | Supplemental rebuttal expert report of Dr. Robert Giachetti responsive to supplemental expert report of Dr. Kim Blair dated March 15, 2018, dated May 14, 2018, 12 pps. | |
| | D31 | Supplemental rebuttal expert report of Dr. Robert Giachetti responsive to second supplemental expert report of Dr. Kim Blair dated April 13, 2018, Case 3:15-CV-01665-JCH, Document 254-4, filed 6/8/2018, 18 pps., marked on its face as Exhibit 4. | |
| | D32 | Woodway USA, Inc.'s first supplemental responses and objections to plaintiff's first set of interrogatories (Nos. 1-7), Case 2:17-cv-00768-KAM-AKT, Document 38-1, filed 3/14/2018, 18 pps., marked on its face as Exhibit A. | |
| | D33 | Transcript of videotaped deposition of Alex Astilean taken July 10, 2018 for Case 2:17-cv-00768-KAM-AKT, 75 pps. | |

| Examiner Signature | | Date Considered | |
|---|---|---|---|

| Substitute for form 1449/PTO | | | | Complete if Known | |
|---|---|---|---|---|---|
| **INFORMATION DISCLOSURE STATEMENT BY APPLICANT** | | | | **Application Number** | 15/958,339 |
| | | | | **Filing Date** | 4/20/2018 |
| Date Submitted: October 18, 2018 | | | | **First Named Inventor** | Douglas G. Bayerlein |
| | | | | Art Unit | 3784 |
| *(use as many sheets as necessary)* | | | | Examiner Name | Deichl, Jennifer M. |
| Sheet | 3 | of | 3 | Attorney Docket Number | 097208-0226 |

| NON PATENT LITERATURE DOCUMENTS | | | |
|---|---|---|---|
| Examiner Initials* | Cite No.[1] | Include name of the author (in CAPITAL LETTERS), title of the article (when appropriate), title of the item (book, magazine, journal, serial, symposium, catalog, etc.) date, page(s), volume-issue number(s), publisher, city and/or country where published. | T[6] |
| | D34 | Transcript of videotaped deposition of Speedfit LLC by Alex Astilean taken July 10, 2018 for Case 2:17-cv-00768-KAM-AKT, 38 pps. | |
| | D35 | Notice of Woodway USA, Inc.'s motion to preclude the testimony of plaintiffs' technical expert James Whelan, Case 2:13-cv-01276-KAM-AKT, Document 211, filed 8/8/2018, 3 pps. | |
| | D36 | Woodway USA, Inc.'s memorandum in support of its motion to preclude the testimony of plaintiffs' technical expert James Whelan, Case 2:13-cv-01276-KAM-AKT, Document 212, filed 8/8/2018, 37 pps. | |
| | D37 | Declaration of Matthew W. Peters, Case 2:13-cv-01276-KAM-AKT, Document 213, filed 8/8/2018, 2 pps. | |
| | D38 | Video deposition transcript of James D. Whelan taken on September 28, 2015, Case 2:13-cv-01276-KAM-AKT, Document 213-1, filed 8/8/2018, 23 pps., marked on its face as Exhibit A. | |
| | D39 | Rebuttal expert report of Kim B. Blair, Ph.D., Case 2:13-cv-01276-KAM-AKT, Document 213-3, filed 8/8/2018, 24 pps., marked on its face as Exhibit C. | |
| | D40 | Transcript of civil cause for evidentiary hearing before the Honorable Kiyo A. Matsumoto, United States District Judge, Case 2:13-cv-01276-KAM-AKT, Document 213-4, filed 8/8/2018, 10 pps., marked on its face as Exhibit D. | |
| | D41 | Woodway USA, Inc.'s reply memorandum in further support of its motion to preclude the testimony of Plaintiffs' technical expert James Whelan, Case 2:13-cv-01276-KAM-AKT, Document 226, filed 8/8/2018, 16 pps. | |
| | D42 | Supplemental declaration of Matthew W. Peters, Case 2:13-cv-01276-KAM-AKT, Document 227, filed 8/8/2018, 1 pg. | |
| | D43 | Transcript of videotaped deposition of Dan Bostan, Case 2:13-cv-01276-KAM-AKT, Document 227-2, filed 8/8/2018, 4 pps., marked on its face as Exhibit F. | |
| | D44 | Transcript of civil cause for evidentiary hearing before the Honorable Kiyo A. Matsumoto, United States District Judge, Case 2:13-cv-01276-KAM-AKT, Document 227-3, filed 8/8/2018, 5 pps., marked on its face as Exhibit G. | |
| | D45 | Plaintiff's supplemental responses and objections to defendant's first set of interrogatories, Case 2:17-cv-00768-KAM-AKT, Document 38-3, filed 3/14/2018, 22 pps., marked on its face as Exhibit C. | |
| | D46 | Expert report of James D. Whelan, P.E., report dated June 12, 2018, 30 pps. | |
| | D47 | Expert report of James D. Whelan, P.E., report dated July 27, 2015, Case 2:13,cv-01276-KAM-AKT, Document 212-1, filed 8/8/2018, 62 pps., marked on its face as Exhibit 1. | |
| | D48 | Expert report of James D. Whelan, P.E., report dated August 26, 2015, Case 2:13-cv-01276-KAM-AKT, Document 212-2, filed 8/8/2018, 19 pps., marked on its face as Exhibit 2. | |
| | D49 | Expert report of James D. Whelan, P.E., report dated September 28, 2018, 10 pps. | |

| Examiner Signature | | Date Considered | |
|---|---|---|---|

# EXHIBIT 16

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| CHAPCO, INC. and SAMSARA FITNESS, LLC | : | CIVIL ACTION NO. |
| | : | 3:15-cv-01665 (JCH) |
| Plaintiffs, | : | |
| | : | |
| v. | : | |
| | : | |
| WOODWAY USA, Inc. | : | |
| | : | |
| Defendant. | : | MAY 27, 2016 |

**PLAINTIFFS' PRELIMINARY INVALIDITY CONTENTIONS**

Pursuant to the Court's Scheduling Order, Plaintiffs Chapco, Inc. and Samsara Fitness, LLC (collectively, "Plaintiffs") make the following Initial Invalidity Contentions, which are responsive to the Initial Infringement Contentions served by Defendant Woodway USA, Inc. ("Woodway").

To date, Woodway has asserted claims 11, 12, 13, 14, 15 and 16 of U.S. Patent No. 8,590,169 ("the '169 Patent") and claims 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22 and 25 of U.S. Patent No. 9,039,580 (the '580 Patent"). Plaintiffs claim that each asserted claim is invalid under at least 35 U.S.C. §§ 102, 103, and/or 112 invalid.

This disclosure is based on information that Plaintiffs have been able to obtain to date and on the infringement contentions Woodway served. Plaintiffs expressly reserve the right to supplement or amend their contentions if Woodway amends or alters its infringement contentions or its position on claim construction in any way. Further, by applying Woodway's apparent constructions, in whole or in part, Plaintiffs do not concede in any way that Woodway's constructions are correct, and instead expressly reserves the right to oppose those constructions at the appropriate time.

**I. Identification of Prior Art for U.S. Patent No. 8,590,169**

Plaintiffs contend that the the following prior art renders one or more asserted claims of the '169 patent invalid:

A. U.S. Patent No. 5,709,632 ("Socwell"), **Exhibit A;**

B. U.S. Patent No. 5,709,632 in combination with U.S. Patent Application 2006/0287165 ("Pasqualin"), **Exhibit B;**

C. U.S. Patent No. 3,642,279 ("Cutter") in combination with U.S. Patent No. 5,411,455 ("Haber"), **Exhibit C**; and

D. U.S. Patent No. 4,334,676 ("Schönenberger") in combination with U.S. Patent No. 5,411,455 ("Haber"), **Exhibit D**.

**II. Identification of Prior Art for U.S. Patent No. 9,039,580**

A. U.S. Patent No. 5,709,632 ("Socwell"), **Exhibit E;**

B. U.S. Patent No. 5,709,632 ("Socwell") in combination with U.S. Patent No. 5,411,455 ("Haber"), **Exhibit F**;

C. U.S. Patent No. 5,709,632 ("Socwell") in combination with U.S. Patent No. 5,538,489 ("Magid"), **Exhibit G**;

D. U.S. Patent No. 5,538,489 ("Magid") in combination with U.S. Patent No. 3,642,279 ("Cutter"), **Exhibit H;**

E. U.S. Patent No. 5,538,489 ("Magid") in combination with U.S. Patent No. 4,334,676 ("Schönenberger"), **Exhibit I.**

Plaintiffs further contend that the anticipatory references in combination with the knowledge and skill of one of ordinary skill in the art at the time of the alleged invention and/or other prior art disclosing the allegedly missing limitations would have rendered each of the patents-in-suit obvious.

The differences, if any, between the relevant prior art reference and the patents-in-suit would have been within the knowledge and common sense of one of ordinary skill in the art, and modification, if any, needed to achieve the claimed invention would have a routine design choice with a reasonable expectation of success. *KSR Int'l Co. v. Teleflex, Inc. et al.*, 550 U.S. 398, 401 (2007).

The motivation to combine the teachings of the identified prior art reference is found in the references themselves and/or: (1) the nature of the problem being solved; (2) the express, implied and inherent teachings of the prior art; (3) the knowledge of one of ordinary skill in the art; and/or (4) the predictable results obtained in combining the different elements of the prior art references.

To the extent any item or combination of prior art cited herein is deemed not to disclose, explicitly or inherently, any limitation of an asserted claim, Plaintiffs reserve the right to argue that any difference between that reference and the corresponding patent claim would have been obvious to one of ordinary skill in the art.

Plaintiffs' preliminary claim charts are attached hereto as Exhibits A-I. In the claim charts, Plaintiffs have cited representative portions of identified references, even where a reference may contain additional support for a particular claim element. Persons of ordinary skill in the art at the time of the filing of the patents-in-suit knew to read references as a whole, and in the context of other publications and literature and the general knowledge in the field. Plaintiffs may rely on all such information, including uncited portions of the prior art references listed herein, and on other publications and expert testimony, to provide context and as aids to understanding and interpreting the listed references, or to establish that a person of ordinary skill in the art would have been motivated to modify or combine any of the cited references so as to render the claims obvious. Additionally, citations to a particular figure in a prior art reference encompass all text relating to the figure, and citations to text encompass all figures relating to that text.

Plaintiffs reserve the right to rely on admissions concerning the scope of the prior art relevant to the patents-in-suit found inter alia in: (i) the patent prosecution and reexamination histories of the patents-in-suit and related patents and/or patent applications; (ii) any deposition testimony in this or other actions of the named inventors on the patents-in-suit; and/or (iii) any evidence submitted by Woodway in connection with this or any other litigation.

CHAPCO, INC. and SAMSARA FITNESS, LLC
By Their Attorneys,

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Dated: May 27, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of May, 2016, the within *Plaintiffs' Preliminary Invalidity Contentions* was served electronically to:

James T. Shearin, Esq.
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/s/ Christine K. Bush

# Exhibit A

**EXHIBIT A**

**U.S. Patent No. 5,709,632 Invalidates Asserted Claims 11, 12 and 13 of U.S. Patent No. 8,590,169**

Claims 11, 12, and 13 of U.S. Patent No. 8,590,169 ("the '169 patent") are invalid as anticipated and/or obvious in view of U.S. Patent No. 5,709,632 ("the '632 patent") to Socwell. The '632 Patent was filed on September 27, 1996 and issued on January 20, 1998. The '632 patent is available as prior art against the '169 patent under at least 35 U.S.C. § 102.

These Invalidity Contentions, in part, utilize Woodway's interpretations of the '169 patent claims, to the extent those interpretations can be discerned from Woodway's Preliminary Infringement Contentions in this case. Plaintiffs disagree with Woodway's application and interpretation of the claims, and these Invalidity Contentions are not, and should not be construed as, an endorsement or acceptance of any of Woodway's contentions or interpretations of the '169 patent claims nor as an admission with respect to any claim or claim limitation. Plaintiffs expressly reserve the right to propose alternative constructions to those advocated by Woodway and to contest Woodway's proffered claim interpretations

| **Claims of the 8,590,169 Patent** | **'632 patent (Socwell)** |
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| 11. A manually operated treadmill comprising: | This is a preamble, not entitled to any weight. Nevertheless, the '632 patent discloses a manually operated treadmill. *See, e.g.*, '632 patent, Col. 1, lns. 64-66; claim 1 as compared with dependent claim 3; Col. 11, lns. 26-28 ("In an alternate embodiment, the curved deck treadmill 10 or the present invention may be implemented without a driving means engageably disposed to a roller in order to facilitate the forced rotation of the belt 16"). |
| a frame supported on a substantially horizontal surface; | The Socwell patent discloses a frame supported on a substantially horizontal surface.<br><br>*See, e.g.*, '632 patent, Col. 4, lns. 61-64 ("the curved deck treadmill comprises a support frame 12"); Fig. 1.<br><br>The use of the apparatus on a substantially horizontal surface is described at, *e.g.*, Col. 9, lns. 15-23 ("the force absorbing member 40 may also include a means for stabilizing the curved deck treadmill 10 at an elevated position so as to provide a means for inclining the front end 24 |



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| | of the support frame 12"); Col. 13, lns. 5-10 ("the curved deck treadmill of the present invention comprises a first end and a second end disposed substantially parallel in dimensional relationship and including a deck having an intermediate portion disposed therebetween comprising a substantially arcuate longitudinal configuration which is disposed lower in dimensional relation to the first and second ends"); and Fig. 2. |
| a front shaft assembly supported by the frame and comprising:<br><br>a front shaft; and at least one front running belt pulley supported by the from shaft; | The Socwell patent discloses a front shaft assembly supported by the frame and comprising: a front shaft; and at least one front running belt pulley supported by the front shaft.<br><br>*See, e.g.*, '632 patent, Col. 5, lns. 4-10 ("Further, a roller assembly 14 is provided preferably comprising a first and second roller 78, 86. The first roller 78 may be rotatably disposed contiguous the first end 58 of the deck 56 between the first side 20 and the second opposing side 22 of the support frame 12"); Col. 5, lns. 11-16 ("In preferred operation, a belt 16 is rotatably mounted in relation to the roller assembly 14 and operatively disposed in relation to the deck 56, thereby providing a structurally supported arcuate shaped, moveable surface on which a user may exercise"); Col. 6, lns. 1-10 (a first journal housing 28 may be formed substantially adjacent the first end 24 of the first side 20 of the support frame 12. Preferably, the first journal housing 28 is formed having an opening readily adapted to receive at least one journaling end (not shown) of the first roller 78. Similarly, a second journal housing 34 may be formed substantially adjacent the second end 26 of the first side 20 of the support frame 12 and include an opening readily adapted to receive at least one journaling end (not shown) of the second roller 86); Col. 11, lns. 7-14 ("In one presently preferred embodiment of the present invention, a driving means 84 is operably connected to at least one roller to enable the rotation of the belt 16. The driving means 84 preferably comprises a conventional electric motor for rotating the belt 16. In preferred arrangement, a pulley 80 is disposably mounted to the first roller 78 at the first end 24 of the support frame 12"); Figs. 1-4; claims 5, 6. |

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| a rear shaft assembly supported by the frame a spaced distance from the front shaft and comprising:<br><br>a rear shaft; and at least one rear running belt pulley supported by the rear shaft; | The Socwell patent discloses a rear shaft assembly supported by the frame and comprising: a rear shaft; and at least one front running belt pulley supported by the rear shaft.<br><br>*See, e.g.*, '632 patent, Col. 5, lns. 4-10 ("Further, a roller assembly 14 is provided preferably comprising a first and second roller 78, 86. The first roller 78 may be rotatably disposed contiguous the first end 58 of the deck 56 between the first side 20 and the second opposing side 22 of the support frame 12"); Col. 5, lns. 11-16 ("In preferred operation, a belt 16 is rotatably mounted in relation to the roller assembly 14 and operatively disposed in relation to the deck 56, thereby providing a structurally supported arcuate shaped, moveable surface on which a user may exercise"); Col. 6, lns. 1-10 (a first journal housing 28 may be formed substantially adjacent the first end 24 of the first side 20 of the support frame 12. Preferably, the first journal housing 28 is formed having an opening readily adapted to receive at least one journaling end (not shown) of the first roller 78. Similarly, a second journal housing 34 may be formed substantially adjacent the second end 26 of the first side 20 of the support frame 12 and include an opening readily adapted to receive at least one journaling end (not shown) of the second roller 86); Col. 11, lns. 7-14 ("In one presently preferred embodiment of the present invention, a driving means 84 is operably connected to at least one roller to enable the rotation of the belt 16. The driving means 84 preferably comprises a conventional electric motor for rotating the belt 16. In preferred arrangement, a pulley 80 is disposably mounted to the first roller 78 at the first end 24 of the support frame 12"); Figs. 1-4, claim 7. |
| a running belt supported at least in part by the front shaft assembly and the rear shaft assembly. | The Socwell patent discloses a running belt supported at least in part by the front shaft assembly and the rear shaft assembly.<br><br>*See, e.g.*, '632 patent, Col. 4, lns. 5-17 ("Further, a roller assembly is provided preferably comprising a first and second roller. The first roller may be rotatably disposed contiguous the first end of the deck between the first side and the second side of the support frame. Correspondingly similar in construction and design, a second roller is preferably disposed contiguous the second end of the deck between the first and second sides of the support frame. In operation, an endless belt may be rotatably |

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| | mounted in relation to the roller assembly and operatively disposed in relation to the deck, whereby providing a structurally supported arcuate shaped, moveable surface on which a user may exercise"); claim 14 ("flexible, endless belt rotatably engaging said first and second rollers and being further disposed in structural relation to said deck, whereby said belt in cooperation with the first and second rollers and the deck provides a substantially arcuate, selectively moveable surface"). |
| the running belt including a front belt portion adjacent the front shaft assembly, a rear belt portion adjacent the rear shaft assembly, and a central belt portion intermediate the front belt portion and the rear belt portion, | The Socwell patent discloses the running belt including a front belt portion adjacent the front shaft assembly, a rear belt portion adjacent the rear shaft assembly, and a central belt portion intermediate the front belt portion and the rear belt portion.<br><br>*See, e.g.*, '632 patent Col. 4, lns. 5-17 ("Further, a roller assembly is provided preferably comprising a first and second roller. The first roller may be rotatably disposed contiguous the first end of the deck between the first side and the second side of the support frame. Correspondingly similar in construction and design, a second roller is preferably disposed contiguous the second end of the deck between the first and second sides of the support frame. In operation, an endless belt may be rotatably mounted in relation to the roller assembly and operatively disposed in relation to the deck, whereby providing a structurally supported arcuate shaped, moveable surface on which a user may exercise"); Col. 7, lns. 16-21 ("In accordance with one preferred arrangement, the belt 16 is rotatably disposed in relation to the first roller 78, the second roller 86, and the third roller 88, whereby each roller 78, 86, 88 is preferably disposed in structural relation to the support frame 12 at their respectively preferred positions, as disclosed above."); Col. 13, lns. 5-10 ("the curved deck treadmill of the present invention comprises a first end and a second end disposed substantially parallel in dimensional relationship and including a deck having an intermediate portion disposed therebetween comprising a substantially arcuate longitudinal configuration which is disposed lower in dimensional relation to the first and second ends"); Figs. 1, 3. |
| the front belt portion and the rear belt portion being positioned vertically higher than a lowest point found in the central belt portion to form a curved running surface upon which a user of the | The Socwell patent discloses the front belt portion and the rear belt portion being positioned vertically higher than a lowest point found in the central belt portion to form a curved running surface upon which a user of |



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| treadmill may walk or run, | the treadmill may walk or run.<br><br>*See, e.g.*, '632 patent, Col. 3, lns. 39-50 ("It is a still further object of the present invention to provide a curved deck treadmill which substantially prevents a user from falling off the back end of the treadmill and whereby serving to keep the user centered on the upper surface of the treadmill without encumbering the natural body motion of the user exercising thereon. In addition, it is an object of the present invention to provide a curved deck treadmill which is capable of providing meaningful walking, jogging, or running comfort in relation to the physiology of a user, thereby facilitating an upper surface which supportably provides for a longer stride with more flexibility"); Col. 13, lns. 5-10 ("the curved deck treadmill of the present invention comprises a first end and a second end disposed substantially parallel in dimensional relationship and including a deck having an intermediate portion disposed therebetween comprising a substantially arcuate longitudinal configuration which is disposed lower in dimensional relation to the first and second ends"). |
| wherein gravitational force acting upon weight of the user's body on the running belt relative to the lowest point of the running belt causes rotation of the running belt, front shaft, and the rear shaft without the aid of a motor; | The Socwell patent discloses an apparatus wherein gravitational force acting upon weight of the user's body on the running belt relative to the lowest point of the running belt causes rotation of the running belt, front shaft, and the rear shaft without the aid of a motor.<br><br>*See, e.g.*, '632 patent, Col. 11, lns. 26-28 ("In an alternate embodiment, the curved deck treadmill 10 or the present invention may be implemented without a driving means engageably disposed to a roller in order to facilitate the forced rotation of the belt 16"). |
| a safety device cooperating with the rear shaft to permit rotation of the rear shaft in only one direction; and | The Socwell patent discloses a safety device cooperating with the rear shaft to permit rotation of the rear shaft in only one direction.<br><br>*See, e.g.*, '632 patent, Col. 11, lns. 25-34; Col. 12, ln. 67- Col. 13, ln. 4 ("In addition, the present invention substantially prevents a user from falling off the back of the treadmill and whereby serves to keep the user centered on the upper surface of the rotating belt without encumbering the natural body motion of the user exercising thereon.") |



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| at least one bearing rail having a plurality of bearings rotatably coupled to the at least one bearing rail and forming a top profile, | The Socwell patent discloses at least one bearing rail having a plurality of bearings rotatably coupled to the at least one bearing rail and forming a top profile.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."). |
| the top profile defined by a front profile portion adjacent the front shaft assembly, a rear profile portion adjacent the rear shaft assembly, and a central profile portion intermediate the front profile portion and the rear profile portion, | The Socwell patent discloses the top profile defined by a front profile portion adjacent the front shaft assembly, a rear profile portion adjacent the rear shaft assembly, and a central profile portion intermediate the front profile portion and the rear profile portion.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper |

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| | surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"). |
| the central profile portion having a concave curve, and the front profile portion and the rear profile portion being continuations of the concave curve; | The Socwell patent discloses the central profile portion having a concave curve, and the front profile portion and the rear profile portion being continuations of the concave curve.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Fig2. 2, 4. |
| wherein the running surface of the running belt is supported by the top profile of the at least one bearing rail such that the running surface substantially corresponds to the shape of the top profile of the at least one bearing rail. | The Socwell patent discloses an apparatus wherein the running surface of the running belt is supported by the top profile of the at least one bearing rail such that the running surface substantially corresponds to the shape of the top profile of the at least one bearing rail.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently |

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| | retain the belt 16 in operable disposition to the deck 56"); Fig. 2, 4. |
| **12.** The manually operated treadmill of claim 11, the at least one bearing rail extending along the frame and longitudinally aligned with one of the at least one front running belt pulley and one of the at least one rear running belt pulley. | The Socwell patent discloses the manually operated treadmill of claim 11, the at least one bearing rail extending along the frame and longitudinally aligned with one of the at least one front running belt pulley and one of the at least one rear running belt pulley.<br><br>*See, e.g.*, '632 patent, Col. 5, lns. 4-10 ("Further, a roller assembly 14 is provided preferably comprising a first and second roller 78, 86. The first roller 78 may be rotatably disposed contiguous the first end 58 of the deck 56 between the first side 20 and the second opposing side 22 of the support frame 12"); Col. 5, lns. 11-16 ("In preferred operation, a belt 16 is rotatably mounted in relation to the roller assembly 14 and operatively disposed in relation to the deck 56, thereby providing a structurally supported arcuate shaped, moveable surface on which a user may exercise"); Col. 6, lns. 1-10 (a first journal housing 28 may be formed substantially adjacent the first end 24 of the first side 20 of the support frame 12. Preferably, the first journal housing 28 is formed having an opening readily adapted to receive at least one journaling end (not shown) of the first roller 78. Similarly, a second journal housing 34 may be formed substantially adjacent the second end 26 of the first side 20 of the support frame 12 and include an opening readily adapted to receive at least one journaling end (not shown) of the second roller 86); Col. 11, lns. 7-14 ("In one presently preferred embodiment of the present invention, a driving means 84 is operably connected to at least one roller to enable the rotation of the belt 16. The driving means 84 preferably comprises a conventional electric motor for rotating the belt 16. In preferred arrangement, a pulley 80 is disposably mounted to the first roller 78 at the first end 24 of the support frame 12"); Figs. 1-4, claim 7. |
| **13.** The manually operated treadmill of claim 12, wherein the running belt comprises a plurality of laterally extending slats. | The Socwell patent discloses the manually operated treadmill of claim 12, wherein the running belt comprises a plurality of laterally extending slats.<br><br>*See, e.g.*, '632 patent, Col. 7, lns. 4-14 ("the belt 16 operably disposed in relation to the rollers 78, 86, 88 may be formed comprising an endless construction which preferably consists of a sufficiently sturdy material. For example, the belt 16 may be formed of an endless sheet of a flexible |

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| | canvas or a rubber-impregnated material. The belt 16 may alternatively be formed of a thin, flat band of steel or a sufficiently tenacious polymeric or composite material. As will be readily appreciated by those skilled in the art, the belt 16 can, of course, be formed of a wide variety of suitable materials which are consistent with the spirit and scope of the present invention."). |

# Exhibit E

# EXHIBIT E

**U.S. Patent No. 5,709,632 Invalidates Asserted Claims 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, and 25 of U.S. Patent No. 9,039,580**

Claims 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, and 25 of U.S. Patent No. 9,039,580 ("the '580 patent") are invalid as anticipated and/or obvious in view of U.S. Patent No. 5,709,632 ("the '632 patent") to Socwell. The '632 Patent was filed on September 27, 1996 and issued on January 20, 1998. The '632 patent is available as prior art against the '580 patent under at least 35 U.S.C. § 102.

These Invalidity Contentions, in part, utilize Woodway's interpretations of the '580 patent claims, to the extent those interpretations can be discerned from Woodway's Preliminary Infringement Contentions in this case. Plaintiffs disagree with Woodway's application and interpretation of the claims, and these Invalidity Contentions are not, and should not be construed as, an endorsement or acceptance of any of Woodway's contentions or interpretations of the '580 patent claims nor as an admission with respect to any claim or claim limitation. Plaintiffs expressly reserve the right to propose alternative constructions to those advocated by Woodway and to contest Woodway's proffered claim interpretations.

| Claims of the 9,039,580 Patent | '632 patent (Socwell) |
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| 1. A manually powered treadmill comprising: | This is a preamble, not entitled to any weight. Nevertheless, the '632 patent discloses a manually operated treadmill. *See, e.g.*, '632 patent, Col. 1, lns. 64-66; claim 1 as compared with dependent claim 3; Col. 11, lns. 26-28 ("In an alternate embodiment, the curved deck treadmill 10 or the present invention may be implemented without a driving means engageably disposed to a roller in order to facilitate the forced rotation of the belt 16"). |
| a frame having a front end and a rear end positioned opposite the front end; | The Socwell patent discloses a frame having a front end and a rear end positioned opposite the front end.<br><br>*See, e.g.*, '632 patent, Col. 4, lns. 61-64 ("As shown, the curved deck treadmill 10 comprises a support frame 12 having a first side 20 and a second opposing side 22 and having a deck 56 supportably disposed therebetween. In preferred construction, the deck 56 comprises a first end 58, a second end 60, and an intermediate portion 62 disposed therebetween."); Col. 13, lns. 5-10 ("the curved deck treadmill of the present invention comprises a first end and a second end disposed |



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| | substantially parallel in dimensional relationship and including a deck having an intermediate portion disposed therebetween comprising a substantially arcuate longitudinal configuration which is disposed lower in dimensional relation to the first and second ends"); Figs. 1, 2. |
| a front shaft rotatably coupled to the frame at the front end; | The Socwell patent discloses a front shaft rotatably coupled to the frame at the front end.<br><br>*See, e.g.*, '632 patent, Col. 5, lns. 4-7 ("Further, a roller assembly 14 is provided preferably comprising a first and second roller 78, 86. The first roller 78 may be rotatably disposed contiguous the first end 58 of the deck 56 between the first side 20 and the second opposing side 22 of the support frame 12."); claim 1 ("a roller assembly rotatably disposed in operable relation to said support frame"). |
| a rear shaft rotatably coupled to the frame at the rear end; | The Socwell patent discloses a rear shaft rotatably coupled to the frame at the rear end.<br><br>*See, e.g.*, '632 patent, Col. 5, lns. 8-12 ("Correspondingly similar in construction and design, a second roller 86 is preferably disposed contiguous the second end 60 of the deck 56 between the first and second sides 20, 22 of the support frame 12"). |
| a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame; | The Socwell patent discloses a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable |

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| | disposition to the deck 56"); Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."). |
| a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame; | The Socwell patent discloses a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred |



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| | operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."). |
| a running belt supported by the first bearing rail and the second bearing rail and disposed about the front shaft and the rear shaft, wherein the running belt follows a curved running surface; and | The Socwell patent discloses a running belt supported by the first bearing rail and the second bearing rail and disposed about the front shaft and the rear shaft, wherein the running belt follows a curved running surface.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Figs. 2, 4. |
| a safety device coupled to at least one of the front shaft and the rear shaft, wherein the safety device is structured to substantially prevent rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction. | The Socwell patent discloses a safety device coupled to at least one of the front shaft and the rear shaft, wherein the safety device is structured to substantially prevent rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction.<br><br>*See, e.g.*, '632 patent, Col. 11, lns. 25-34; Col. 12, ln. 67- Col. 13, ln. 4 ("In addition, the present invention substantially prevents a user from falling off the back of the treadmill and whereby serves to keep the user centered on the upper surface of the rotating belt without encumbering the natural body motion of the user exercising |



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| | thereon.") |
| 2. The manually powered treadmill of claim 1, wherein the frame includes at least one cross-member, a left side member, and a right side member; and wherein the at least one cross-member extends between the left side member and the right side member. | The Socwell patent discloses the manually powered treadmill of claim 1, wherein the frame includes at least one cross-member, a left side member, and a right side member; and wherein the at least one cross-member extends between the left side member and the right side member.<br><br>*See, e.g.*, '632 patent, Col. 8, lns. 1-9 ("As shown in FIG. 4, the first side 20 of the support frame 12 may comprise one or more rib seats 30 disposed adjacent the deck slot 32. The rib seats 30 are preferably formed having an internal surface area sufficient for seating at least one end of a support rib 54 disposed therein. As best illustrated in FIG. 3, one or more support ribs 54 extend substantially transverse dimensionally between the first and second sides 20, 22 of the support frame 12. In preferred construction, the support ribs 54 provide a means for structurally supporting the deck 56."). |
| 3. The manually powered treadmill of claim 2,<br><br>wherein each one of the first and second bearing rails are coupled to at least one of the at least one cross-member. | The Socwell patent discloses the manually powered treadmill of claim 2, wherein each one of the first and second bearing rails are coupled to at least one of the at least one cross-member.<br><br>*See, e.g.*, '632 patent, Col. 10, lns. 55-63 ("Referring now to FIG. 5, the belt securing assembly 94 and the corresponding cover member 68 may be attached to the support frame 12 by a conventional fastening means. For example, in one presently preferred embodiment of the present invention, a bolt 118 may be disposed through an aperture 112 formed in the cover member 168 and at least one aperture 114 formed in a respective side 20, 22 of the support frame 12. Alternatively, the bolt 118 may be disposed through an aperture 116 formed in a support rib 54 which may further serve to secure the support rib 54 to the support frame 12."). |

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| 4. The manually powered treadmill of claim 1,<br><br>wherein each one of the first and second bearing rails are attached longitudinally to the frame between the front shaft and the rear shaft. | The Socwell patent discloses the manually powered treadmill of claim 1, wherein each one of the first and second bearing rails are attached longitudinally to the frame between the front shaft and the rear shaft.<br><br>*See, e.g.*, '632 patent, Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."). |
| 5. The manually powered treadmill of claim 1,<br><br>wherein each one of the first bearing rail and the second bearing rail define in part a top profile corresponding to the curved running surface. | The Socwell patent discloses the manually powered treadmill of claim 1, wherein each one of the first bearing rail and the second bearing rail define in part a top profile corresponding to the curved running surface.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable |

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| | disposition to the deck 56"); Fig2. 2, 4. |
| **6.** The manually powered treadmill of claim 1,<br>wherein the safety device includes a one-way bearing. | The Socwell patent discloses the manually powered treadmill of claim 1, wherein the safety device includes a one-way bearing.<br><br>*See, e.g.*, '632 patent, Col. 11, lns. 25-34; Col. 12, ln. 67- Col. 13, ln. 4 ("In addition, the present invention substantially prevents a user from falling off the back of the treadmill and whereby serves to keep the user centered on the upper surface of the rotating belt without encumbering the natural body motion of the user exercising thereon."). |
| **10.** The manually powered treadmill of claim 1,<br>further comprising a handrail attached to the frame and structured to provide a support structure for the user of the manually powered treadmill. | The Socwell patent discloses the manually powered treadmill of claim 1, further comprising a handrail attached to the frame and structured to provide a support structure for the user of the manually powered treadmill.<br><br>*See, e.g.*, '632 patent, Col. 12, lns. 15-26 ("The handles 134, 144 may be constructed of any suitable rigid material. For example, the handles 134, 144 may be formed of a metal or metal alloy, wood, fiberglass, graphite, ceramic, plastic or any other suitable composite material. Additionally, the handles 134, 144 may include a gripping member (not shown) preferably disposed substantially adjacent the distal ends of the handles 134, 144 to enable a user to more easily grip the handle. In particular, a rubber grip may be disposed in relation to the distal end 138 of the handle 134, 144 and positioned so that a user may grasp the gripping member of the handle 134, 144 when exercising."). |
| **11.** A manually powered treadmill, comprising: | This is a preamble, not entitled to any weight. Nevertheless, the '632 patent discloses a manually operated treadmill. *See, e.g.*, '632 patent, Col. 1, lns. 64-66; claim 1 as compared with dependent claim 3; Col. 11, lns. 26-28 ("In an alternate embodiment, the curved deck treadmill 10 or the present invention may be implemented without a driving means engageably disposed to a roller in order to facilitate the forced rotation of the belt 16"). |



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| a frame having a front end and a rear end positioned opposite the front end; | The Socwell patent discloses a frame having a front end and a rear end positioned opposite the front end.<br><br>*See, e.g.*, '632 patent, Col. 4, lns. 61-64 ("As shown, the curved deck treadmill 10 comprises a support frame 12 having a first side 20 and a second opposing side 22 and having a deck 56 supportably disposed therebetween. In preferred construction, the deck 56 comprises a first end 58, a second end 60, and an intermediate portion 62 disposed thereberween."); Col. 13, lns. 5-10 ("the curved deck treadmill of the present invention comprises a first end and a second end disposed substantially parallel in dimensional relationship and including a deck having an intermediate portion disposed therebetween comprising a substantially arcuate longitudinal configuration which is disposed lower in dimensional relation to the first and second ends"); Figs. 1, 2. |
| a front shaft attached to the frame adjacent the front end; | The Socwell patent discloses a front shaft attached to the frame adjacent the front end.<br><br>*See, e.g.*, '632 patent, Col. 5, lns. 4-7 ("Further, a roller assembly 14 is provided preferably comprising a first and second roller 78, 86. The first roller 78 may be rotatably disposed contiguous the first end 58 of the deck 56 between the first side 20 and the second opposing side 22 of the support frame 12."); claim 14 ("a first roller rotatably disposed in relation to said first side and said second side of said support frame, said first roller disposed contiguous said first end of said support frame."). |
| a rear shaft attached to the frame adjacent the rear end; | The Socwell patent discloses a rear shaft attached to the frame adjacent the rear end.<br><br>*See, e.g.*, '632 patent, Col. 5, lns. 8-12 (Correspondingly similar in construction and design, a second roller 86 is preferably disposed contiguous the second end 60 of the deck 56 between the first and second sides 20, 22 of the support frame 12"). |



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| a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame; | The Socwell patent discloses a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."). |
| a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame; | The Socwell patent discloses a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper |

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| | surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."). |
| a running belt at least partially disposed about the front shaft and the rear shaft and at least partially supported by the first bearing rail and the second bearing rail, | The Socwell patent discloses a running belt at least partially disposed about the front shaft and the rear shaft and at least partially supported by the first bearing rail and the second bearing rail.<br><br>*See, e.g.*, '632 patent, Col. 7, ln2. 16-24 ("In accordance with one preferred arrangement, the belt 16 is rotatably disposed in relation to the first roller 78, the second roller 86, and the third roller 88, whereby each roller 78, 86, 88 is preferably disposed in structural relation to the support frame 12 at their respectively preferred positions, as disclosed above. The tension of the belt 16 may be readily tightened or loosened in relation to the disposition of the first and second rollers 78, 86 engageably disposed in the respective elongated slot of the journal housings 28, 34."); Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for |

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| | retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."); Figs. 1, 2. |
| wherein the running belt includes a front belt portion proximate the front end, a rear belt portion proximate the rear end, and a central belt portion intermediate the front and rear belt | The Socwell patent discloses an apparatus wherein the running belt includes a front belt portion proximate the front end, a rear belt portion proximate the rear end, and a central belt portion intermediate the front and rear belt.<br><br>*See, e.g.*, '632 patent Col. 4, lns. 5-17 ("Further, a roller assembly is provided preferably comprising a first and second roller. The first roller may be rotatably disposed contiguous the first end of the deck between the first side and the second side of the support frame. Correspondingly similar in construction and design, a second roller is preferably disposed contiguous the second end of the deck between the first and second sides of the support frame. In operation, an endless belt may be rotatably mounted in relation to the roller |



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| | assembly and operatively disposed in relation to the deck, whereby providing a structurally supported arcuate shaped, moveable surface on which a user may exercise"); Col. 7, lns. 16-21 ("In accordance with one preferred arrangement, the belt 16 is rotatably disposed in relation to the first roller 78, the second roller 86, and the third roller 88, whereby each roller 78, 86, 88 is preferably disposed in structural relation to the support frame 12 at their respectively preferred positions, as disclosed above."); Col. 13, lns. 5-10 ("the curved deck treadmill of the present invention comprises a first end and a second end disposed substantially parallel in dimensional relationship and including a deck having an intermediate portion disposed therebetween comprising a substantially arcuate longitudinal configuration which is disposed lower in dimensional relation to the first and second ends"); Figs. 1, 3. |
| wherein the central belt portion is positioned vertically closer to a ground surface supporting the frame than the front and rear belt portions such that the running belt follows a curved running surface; | The Socwell patent discloses an apparatus wherein the central belt portion is positioned vertically closer to a ground surface supporting the frame than the front and rear belt portions such that the running belt follows a curved running surface.<br><br>*See e.g.*, '632 patent, Col. 3, lns. 39-50 ("It is a still further object of the present invention to provide a curved deck treadmill which substantially prevents a user from falling off the back end of the treadmill and whereby serving to keep the user centered on the upper surface of the treadmill without encumbering the natural body motion of the user exercising thereon. In addition, it is an object of the present invention to provide a curved deck treadmill which is capable of providing meaningful walking, jogging, or running comfort in relation to the physiology of a user, thereby facilitating an upper surface which supportably provides for a longer stride with more flexibility"); Col. 13, lns. 5-10 ("the curved deck treadmill of the present invention comprises a first end and a second end disposed substantially parallel in dimensional relationship and including a deck having an intermediate portion disposed therebetween comprising a substantially arcuate longitudinal configuration which is disposed lower in dimensional relation to the first and second ends"). |

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| and a safety device for substantially preventing rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction. | The Socwell patent discloses a safety device for substantially preventing rotation of at least one of the front shaft and the rear shaft in a first rotational direction while permitting rotation of the at least one of the front shaft and the rear shaft in a second rotational direction opposite the first rotational direction.<br><br>*See, e.g.*, '632 patent, Col. 11, lns. 25-34; Col. 12, ln. 67- Col. 13, ln. 4 ("In addition, the present invention substantially prevents a user from falling off the back of the treadmill and whereby serves to keep the user centered on the upper surface of the rotating belt without encumbering the natural body motion of the user exercising thereon.") |
| **12.** The manually powered treadmill of claim 11,<br><br>wherein the safety device includes a one-way bearing. | The Socwell patent discloses the manually powered treadmill of claim 11, wherein the safety device includes a one-way bearing.<br><br>*See, e.g.*, '632 patent, Col. 11, lns. 25-34; Col. 12, ln. 67- Col. 13, ln. 4 ("In addition, the present invention substantially prevents a user from falling off the back of the treadmill and whereby serves to keep the user centered on the upper surface of the rotating belt without encumbering the natural body motion of the user exercising thereon.") |
| **13.** The manually powered treadmill of claim 11,<br><br>further comprising a pair of wheels mounted to the frame, wherein the pair of wheels are mounted so that the pair of wheels are not in contact with the ground surface when the manually powered treadmill is in an operating position. | The Socwell patent discloses the manually powered treadmill of claim 11, further comprising a pair of wheels mounted to the frame, wherein the pair of wheels are mounted so that the pair of wheels are not in contact with the ground surface when the manually powered treadmill is in an operating position.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 5-8 ("The foot roller assembly 38 preferably includes one or more wheels 42 rotatably connected thereto in such a manner so as to provide a means for readily moving the curved deck treadmill 10.") |

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| **14.** The manually powered treadmill of claim 11,<br><br>further comprising support feet coupled to the frame, wherein the support feet are vertically adjustable to adjust an incline of the manually powered treadmill relative to the ground surface. | The Socwell patent discloses the manually powered treadmill of claim 11, further comprising support feet coupled to the frame, wherein the support feet are vertically adjustable to adjust an incline of the manually powered treadmill relative to the ground surface.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 16-18 ("The force absorbing member 40 may also include a means for stabilizing the curved deck treadmill 10 at an elevated position so as to provide a means for inclining the front end 24 of the support frame 12 for increasing user workout."). |
| **18.** The manually powered treadmill of claim 11,<br><br>wherein each of the first and second bearing rails are attached longitudinally to the frame between the front shaft and the rear shaft. | The Socwell patent discloses discloses the manually powered treadmill of claim 11, wherein each of the first and second bearing rails are attached longitudinally to the frame between the front shaft and the rear shaft.<br><br>*See, e.g.*, '632 patent, Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."). |
| **19.** A manually powered treadmill, comprising: | This is a preamble, not entitled to any weight. Nevertheless, the '632 patent discloses a manually operated treadmill. *See, e.g.*, '632 patent, Col. 1, lns. 64-66; claim 1 as compared with dependent claim 3; Col. 11, lns. 26-28 ("In an alternate embodiment, the curved deck treadmill 10 or the present invention may be implemented without a driving means engageably disposed to a roller in order to facilitate the |



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| | forced rotation of the belt 16."). |
| a frame having a front end and a rear end; | The Socwell patent discloses a frame having a front end and a rear end.<br><br>*See, e.g.*, '632 patent, Col. 4, lns. 61-64 ("As shown, the curved deck treadmill 10 comprises a support frame 12 having a first side 20 and a second opposing side 22 and having a deck 56 supportably disposed therebetween. In preferred construction, the deck 56 comprises a first end 58, a second end 60, and an intermediate portion 62 disposed therebetween."); Col. 13, lns. 5-10 ("the curved deck treadmill of the present invention comprises a first end and a second end disposed substantially parallel in dimensional relationship and including a deck having an intermediate portion disposed therebetween comprising a substantially arcuate longitudinal configuration which is disposed lower in dimensional relation to the first and second ends"); Figs. 1, 2. |
| a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame; | The Socwell patent discloses a first bearing rail having a plurality of bearings, the first bearing rail attached to a left side of the frame.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 |

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| | may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."). |
| a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame; | The Socwell patent discloses a second bearing rail having a plurality of bearings, the second bearing rail attached to a right side of the frame.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Col. 9, ln. 57- Col. 10, ln. 4 ("In one presently preferred embodiment of the present invention, the belt securing assembly 94 comprises a roller 98 having an axle 100 which rotatably engages a mounting bracket 96. The mounting bracket 96 is preferably disposed in relation to the roller 98 such that the roller 98 may engage the belt 16, thereby substantially retaining a side portion of the belt 16 substantially flush with the deck 56. In preferred operation, as the belt 16 rotates in relation to the roller assembly 14, the rollers 98 of the belt securing assembly 94 preferably rotate in relation thereto. It will be apparent that other belt securing mechanisms may be constructed in accordance with the inventive principles set forth herein. Correspondingly, those skilled in the art |



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| | may recognize other possible modifications and/or adaptations which are consistent with the spirit and scope of the present invention."). |
| a handrail attached to the frame and structured to provide a support structure for a user of the manually powered treadmill; | The Socwell patent discloses a handrail attached to the frame and structured to provide a support structure for a user of the manually powered treadmill.<br><br>*See, e.g.*, '632 patent, Col. 12, lns. 15-26 ("The handles 134, 144 may be constructed of any suitable rigid material. For example, the handles 134, 144 may be formed of a metal or metal alloy, wood, fiberglass, graphite, ceramic, plastic or any other suitable composite material. Additionally, the handles 134, 144 may include a gripping member (not shown) preferably disposed substantially adjacent the distal ends of the handles 134, 144 to enable a user to more easily grip the handle. In particular, a rubber grip may be disposed in relation to the distal end 138 of the handle 134, 144 and positioned so that a user may grasp the gripping member of the handle 134, 144 when exercising."). |
| a pair of wheels mounted to the frame, wherein the pair of wheels are mounted so that the pair of wheels are not in contact with a ground surface when the manually powered treadmill is in an operating position; | The Socwell patent discloses a pair of wheels mounted to the frame, wherein the pair of wheels are mounted so that the pair of wheels are not in contact with a ground surface when the manually powered treadmill is in an operating position.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 5-8 ("The foot roller assembly 38 preferably includes one or more wheels 42 rotatably connected thereto in such a manner so as to provide a means for readily moving the curved deck treadmill 10.") |
| at least two support feet coupled to the frame, wherein the support feet are vertically adjustable to adjust an incline of the manually powered treadmill relative to the ground surface; | The Socwell patent discloses at least two support feet coupled to the frame, wherein the support feet are vertically adjustable to adjust an incline of the manually powered treadmill relative to the ground surface.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 16-18 ("The force absorbing member 40 may also include a means for stabilizing the curved deck treadmill 10 at an elevated position so as to provide a means for inclining the front end 24 of the support frame 12 for increasing user |

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| | workout."). |
| a running belt supported by the first and second bearing rails, wherein the running belt follows a curved running surface | The Socwell patent discloses a running belt supported by the first and second bearing rails, wherein the running belt follows a curved running surface.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible nature of the belt 16 to the arcuate configuration of the intermediate portion 62 of the deck 56. In design, one or more belt securing assemblies 94 may be disposed in spaced-apart relation along the upper surface 66 of the intermediate portion 62 of the deck 56, as shown in FIG. 2, to sufficiently retain the belt 16 in operable disposition to the deck 56"); Figs. 2, 4. |
| and a safety device coupled to the frame and operatively coupled to the running belt, wherein the safety device is structured to substantially prevent movement of the running belt in a first direction and permit movement of the running belt in a second direction opposite the first direction. | The Socwell patent discloses a safety device coupled to the frame and operatively coupled to the running belt, wherein the safety device is structured to substantially prevent movement of the running belt in a first direction and permit movement of the running belt in a second direction opposite the first direction.<br><br>*See, e.g.*, '632 patent, Col. 11, lns. 25-34; Col. 12, ln. 67- Col. 13, ln. 4 ("In addition, the present invention substantially prevents a user from falling off the back of the treadmill and whereby serves to keep the user centered on the upper surface of the rotating belt without encumbering the natural body motion of the user exercising thereon.") |
| **20.** The manually powered treadmill of claim 19,<br><br>further comprising a sensor configured to acquire data indicative of a speed of the running belt. | The Socwell patent discloses the manually powered treadmill of claim 19, further comprising a sensor configured to acquire data indicative of a speed of the running belt.<br><br>*See, e.g.* '632 patent, Co. 11, lns. 54-64 ("In one presently preferred embodiment of the present invention, a console 132 is preferably mounted in relation to the cross-bar 130. Supportably disposed by the |



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| | cross-bar 130, the console 132 may be mounted substantially above the support frame 12, the deck 56, and the belt 16 such that a user may view the information displayed on the console 132. The console 132 preferably comprises a processor, a display, and may include input keys for entering user programmable options. Similarly, the console 132 may provide a variety of feedback data, such as elapsed time, speed, distance, pulse rate, and/or other functions and features, as desired."). |
| **21.** The manually powered treadmill of claim 19,<br><br>wherein the frame includes at least one cross-member, a left side member, and a right side member; and wherein the at least one cross-member extends between the left side member and the right side member. | The Socwell patent discloses the manually powered treadmill of claim 19, wherein the frame includes at least one cross-member, a left side member, and a right side member; and wherein the at least one cross-member extends between the left side member and the right side member.<br><br>*See, e.g.*, '632 patent, Col. 8, lns. 1-9 ("As shown in FIG. 4, the first side 20 of the support frame 12 may comprise one or more rib seats 30 disposed adjacent the deck slot 32. The rib seats 30 are preferably formed having an internal surface area sufficient for seating at least one end of a support rib 54 disposed therein. As best illustrated in FIG. 3, one or more support ribs 54 extend substantially transverse dimensionally between the first and second sides 20, 22 of the support frame 12. In preferred construction, the support ribs 54 provide a means for structurally supporting the deck 56.") |
| **22.** The manually powered treadmill of claim 21,<br><br>wherein each one of the first and second bearing rails are coupled to at least one of the at least one cross-member. | The Socwell patent discloses the manually powered treadmill of claim 21, wherein each one of the first and second bearing rails are coupled to at least one of the at least one cross-member.<br><br>*See, e.g.*, '632 patent, Col. 10, lns. 55-63 ("Referring now to FIG. 5, the belt securing assembly 94 and the corresponding cover member 68 may be attached to the support frame 12 by a conventional fastening means. For example, in one presently preferred embodiment of the present invention, a bolt 118 may be disposed through an aperture 112 formed in the cover member 168 and at least one aperture 114 formed in a respective side 20, 22 of the support frame 12. Alternatively, the bolt 118 may be disposed through an aperture 116 formed in a support rib 54 which may further serve to secure the |

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| | support rib 54 to the support frame 12.") |
| 25. A method, comprising:<br>providing a manually powered treadmill, | The Socwell patent discloses a method comprising providing a manually operated treadmill.<br><br>*See, e.g.*, '632 patent, Col. 1, lns. 64-66; claim 1 as compared with dependent claim 3; Col. 11, lns. 26-28 ("In an alternate embodiment, the curved deck treadmill 10 or the present invention may be implemented without a driving means engageably disposed to a roller in order to facilitate the forced rotation of the belt 16") |
| the manually powered treadmill having a frame with a front end and rear end; | The Socwell patent discloses the manually powered treadmill having a frame with a front end and rear end.<br><br>*See, e.g.*, '632 patent, Col. 4, lns. 61-64 ("As shown, the curved deck treadmill 10 comprises a support frame 12 having a first side 20 and a second opposing side 22 and having a deck 56 supportably disposed therebetween. In preferred construction, the deck 56 comprises a first end 58, a second end 60, and an intermediate portion 62 disposed therebetween."); Col. 13, lns. 5-10 ("the curved deck treadmill of the present invention comprises a first end and a second end disposed substantially parallel in dimensional relationship and including a deck having an intermediate portion disposed therebetween comprising a substantially arcuate longitudinal configuration which is disposed lower in dimensional relation to the first and second ends"); Figs. 1, 2. |
| providing a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile; | The Socwell patent discloses providing a first bearing rail and a second bearing rail, the first and second bearing rails each comprising a plurality of bearings and extending longitudinally on the frame, wherein the first and second bearing rails define a curved top profile.<br><br>*See, e.g.*, '632 patent, Col. 9, lns. 44-56 ("Referring now to FIG. 5, the curved deck treadmill 10 may include one or more belt securing assemblies 94 which provide a means for retaining the endless belt 16 in a curvilinear configuration being substantially flush with the upper surface 66 of the deck 56. Preferably, the belt securing assemblies 94 provide a means for substantially conforming the inherent flexible |