

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIFECORE FITNESS, LLC d/b/a
ASSAULT FITNESS,

Petitioner,

v.

WOODWAY USA, INC.

Patent Owner.

IPR2024-00083
U.S. Patent No. 11,465,005

**PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE PURSUANT TO
37 C.F.R. §42.64(c)**

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I. STATEMENT OF THE PRECISE RELIEF REQUESTED

Pursuant to 37 C.F.R. §42.64(c), Woodway USA, Inc. (“Patent Owner”) moves to exclude certain evidence submitted by Petitioner LifeCORE Fitness, LLC (“Petitioner”) with Petitioner’s Reply (“Reply,” Paper 37) in the above-captioned proceeding and relies on them in the Reply. Specifically, Patent Owner respectfully moves to exclude the following exhibits:

Exhibit	Description	Basis for Exclusion
EX1036	Second Declaration of Robert Giachetti, Ph.D. P.E.	Lack of personal knowledge; testimony not based on sufficient facts or analysis, improper new material that could and should have been included with the Petition in violation of 37 C.F.R. §42.23(b)

Exhibit	Description	Basis for Exclusion
EX1041	Woodway 4Front Owners Manual October 24, 2023 OM_EN_V2 (accessed March 31, 2024) (available at https://www.woodway.com/treadmills/4-front/)	Lack of authentication
EX1042	Woodway Homepage, (accessed March 31, 2024) (available at https://www.woodway.com/)	Lack of authentication
EX1043	Woodway Curve Specification (accessed March 31, 2024) (available at https://www.woodway.com/treadmills/curve/)	Lack of authentication
EX1044	Woodway Manual Treadmills Webpage (accessed March 31, 2024) (available at https://www.woodway.com/manual-treadmills/)	Lack of authentication
EX1046	Woodway Trueform Trainer Webpage dated August 12, 2020 (accessed April 4, 2024) available from Wayback at https://web.archive.org/web/20200812204597/https://www.woodway.com/product/trueform/trainer-powered-by-woodway/)	Lack of authentication

Exhibit	Description	Basis for Exclusion
EX1053	Tru Grit Runner Webpage (accessed on September 4, 2024) (available at https://trugrit-fitness.com/collections/cardio/products/grit-runner-curved-manual-treadmill)	Lack of authentication, hearsay

In accordance with 37 C.F.R. §42.64(b)(1), Patent Owner’s objections were timely filed. *See* Paper 38. Patent Owner’s motion is based on the Federal Rules of Evidence (“FRE”), relevant case law, federal statute, and the Patent Trial and Appeal Board (“PTAB”) Rules.

II. STATEMENT OF REASONS FOR RELIEF REQUESTED

“[A] party may move to exclude evidence, whether as improper under the response-only regulation, under the Trial Practice Guide’s advice, or on other grounds.” *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1081 (Fed. Cir. 2015). Other bases for excluding exhibits exist in the Federal Rules of Evidence. *See* 37 C.F.R. §42.62 (“[T]he Federal Rules of Evidence shall apply to a proceeding.”). Exercising its discretion, the Board may “exclude the ... evidence in their entirety, or alternatively, decline to consider the ... related evidence.” *CBS Interactive Inc. v. Helferich Patent Licensing, LLC*, IPR2013-00033, Paper 79, at 3 (PTAB Aug. 9, 2013). For the reasons outlined below, Exhibits 1036, 1041-1044, 1046, and 1053 are inadmissible and should be excluded.

A. Exhibit 1036 Should Be Excluded Under FRE 401-402, 602, 702-703 and 37 C.F.R. §42.23(b)

Exhibit 1036 was objected to in Patent Owner's Objections to Evidence. Paper 38 at 2-3. Exhibit 1036 is described as the Second Declaration of Robert Giachetti, Ph.D. P.E., and is repeatedly cited throughout Petitioner's Reply.

Exhibit 1036 should be excluded because it includes subject matter that is not permitted pursuant to FRE 602 or 702-703, including without limitation, because the declaration presents as "facts" information that is outside Dr. Giachetti's personal knowledge and/or because Dr. Giachetti's testimony is not based on sufficient facts or data or the product of reliable principles and methods reliably applied in this case. *See, e.g.*, EX1036, ¶¶30, 39, 47, 57, 62-64, 66, and 73. For example, Dr. Giachetti does not provide any underlying source or basis for certain statements, and without providing such underlying facts supporting his opinion, his statements should be excluded. *E.g.*, EX1036 ¶30 (stating "the running surface is not a physical element in the treadmill art, rather it is a spatial and temporal designation for the portion of the running belt that is exposed to the runner's foot where contact between the foot and the belt is expected in a given moment" with no citation to any said prior art); ¶39 (stating that "[t]he word 'shaft' may be described in different ways and may have a similar technical meaning as other words, such as rod, projection, protrusion, roller, etc." without any citation to underlying basis); ¶62 (noting that "a POSA would have understood that this gap between the belt and the runners would not be

present when a user is running on the treadmill due to the weight of the runner” without any citation for support); *see also e.g., TQ Delta, LLC v. Cisco Sys., Inc.*, 942 F.3d 1352, 1362-63 (Fed. Cir. 2019) (reversing Board’s obviousness determination where expert testimony characterizing the prior art was “[u]ntethered to any supporting evidence”).

Furthermore, the Reply improperly introduces new arguments outside of those presented in the Petition, which as argued in Patent Owner’s Sur-reply (Paper 39) should not be accorded any weight. *See* 37 C.F.R. §42.23(b); *Intelligent Bio-Systems, Inc. v. Illumina Cambridge, Ltd.*, 821 F.3d 1359, 1369-70 (Fed. Cir. 2016) (“It is of the utmost importance that petitioners in the IPR proceedings adhere to the requirement that the initial petition identify ‘with particularity’ the ‘evidence that supports the grounds for the challenge to each claim.’ ...Examples of indications that a new issue has been raised in a reply include new evidence necessary to make out a prima facie case for the...unpatentability of an original...claim, **and new evidence that could have been presented in a prior filing.**”) (emphasis added). Here, Exhibit 1036 cites to new evidence to support new arguments that could have been made in the Petition. Accordingly, Exhibit 1036 should be excluded because it contains new information and evidence that should have been included with the Petition and thus does not meet the requirements of Federal Circuit precedent and 37 C.F.R. §42.23(b). *See, e.g.,* EX1036, ¶¶29-32, 47-48, 50-68, 78-79, 83-84, 97-98, 109-112.

For example, Exhibit 1036 presents new evidence of what a person of ordinary skill in the art (“POSA”) would have understood, which is evidence that could have been presented in the Petition. *Id.*, ¶¶53-60. Specifically, Exhibit 1036 discusses how a POSA purportedly would have understood the Tollkien runners 14 in view of the Schonenberger and Abelbeck references, including providing a newly created annotated figure from the Abelbeck reference, which was never mentioned in the Petition at all. *Id.* For reference, the annotated figure, cited for the first time in the Reply and Exhibit 1036, is provided below:

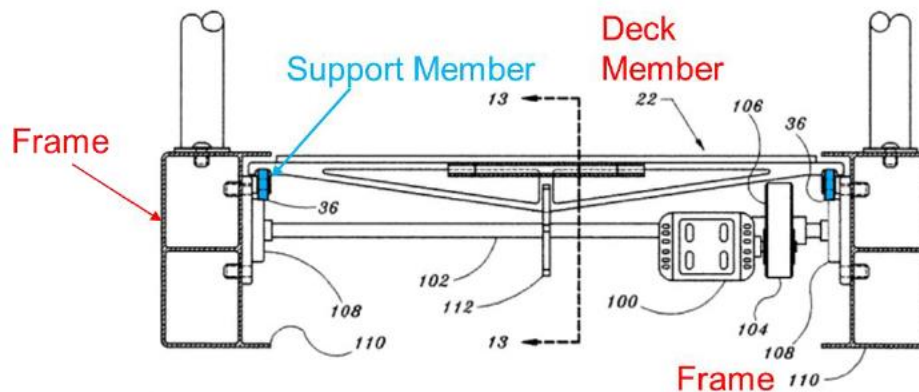


Fig. 12

Abelbeck, Ex. 1015, Fig. 12 (Annotated)

See EX1036, ¶59. Critically, the Abelbeck reference was neither mentioned nor cited at all in the Petition, and the annotated figure and accompanying description in Exhibit 1036 was not provided in Dr. Giachetti’s Opening Declaration (EX1003). Accordingly, Exhibit 1036 presents new evidence that should have and could have

been presented with the Petition. This is improper and should be excluded. 37 C.F.R. §42.23(b); *Intelligent Bio- Systems, Inc.*, 821 F.3d at 1369-70.

As another example, Exhibit 1036 states “POSA would have understood that this gap between the belt and the runners would not be present when a user is running on the treadmill due to the weight of the runner.” EX1036, ¶62. In addition to this statement being inadmissible because there is no supporting citation or factual basis for the statement as stated above, it also improperly presents new evidence that should have been presented in the Petition. There is nothing in the Petition or Dr. Giachetti’s Opening Declaration (EX1003) that even hints at this concept. This newly minted argument is only made for the first time in the Reply. And, the Reply only supports this newly presented argument with Exhibit 1036. To the extent Exhibit 1036 as an expert declaration can be considered evidence, this statement is new and was neither presented in the Petition nor in Dr. Giachetti’s Opening Declaration. Accordingly, Exhibit 1036 presents new evidence that should have been presented with the Petition. This is improper and should be excluded. 37 C.F.R. §42.23(b); *Intelligent Bio- Systems, Inc.*, 821 F.3d at 1369-70.

Finally, to the extent portions of Exhibit 1036 cite an exhibit objected to herein (see, e.g., EX1036, ¶111 (citing to EX1053)), Exhibit 1036 should be excluded for the same reasons the cited exhibit should be excluded, as stated herein.

B. Exhibits 1041-1044, 1046 Should Be Excluded Under FRE 901

Exhibits 1041-1044 and 1046 were objected to in Patent Owner's Objections to Evidence. Paper 38. Exhibit 1041 is described as Woodway 4Front Owners Manual October 24, 2023 OM_EN_V2 (accessed March 31, 2024) (available at <https://www.woodway.com/treadmills/4-front/>). Exhibit 1042 is described as Woodway Homepage, (accessed March 31, 2024) (available at <https://www.woodway.com/>). Exhibit 1043 is described as Woodway Curve Specification (accessed March 31, 2024) (available at <https://www.woodway.com/treadmills/curve/>). Exhibit 1044 is described as Woodway Manual Treadmills Webpage (accessed March 31, 2024) (available at <https://www.woodway.com/manual-treadmills/>). Exhibit 1046 is described as Woodway Trueform Trainer Webpage dated August 12, 2020 (accessed April 4, 2024) available from Wayback at <https://web.archive.org/web/20200812204597/https://www.woodway.com/product/trueform/trainer-powered-by-woodway/>).

Exhibits 1041-1044 and 1046 should be excluded as lacking authentication under FRE 901, which requires "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Petitioner has not presented any such evidence. For example, Petitioner fails to offer sufficient evidence that these exhibits were publicly accessible in their presented form as of

the alleged dates, or that these exhibits are what Petitioner claims them to be. Petitioner does not provide any evidence from the examples provided in FRE 901(b) to authenticate the webpage exhibits, nor are the webpage exhibits self-authenticating under any of the categories provided in FRE 902. Accordingly, these exhibits lack proper authentication and should be excluded.

Nor is there any apparent risk of prejudice to Petitioner to exclude these exhibits. Indeed, the exhibits do not appear to be cited in the Reply, or Dr. Giachetti's Second Declaration (EX1036) and the Petitioner does not otherwise seem to rely on these exhibits for any substantive argument or position. *See generally* Reply, Paper 37; EX1036. Petitioner's apparent lack of reliance on these documents compounds with Petitioner's failure to provide sufficient evidence of authentication and will not be impacted by these exhibits being excluded. Accordingly, Exhibits 1041-1044 and 1046 should be excluded.

C. Exhibit 1053 Should Be Excluded Under FRE 801-802 and 901

Exhibit 1053 was objected to in Patent Owner's Objections to Evidence. Paper 38. Exhibit 1053 is described as Tru Grit Runner Webpage (accessed on September 4, 2024) (available at <https://trugrit-fitness.com/collections/cardio/products/grit-runner-curved-manual-treadmill>).

Exhibit 1053 should be excluded as lacking authentication under FRE 901 for the same reasons discussed above with respect to Exhibits 1041-1044 and 1046. As

with those exhibits, Petitioner fails to offer sufficient evidence that Exhibit 1053 was publicly accessible in its presented form as of the alleged date, or that this exhibit is what Petitioner claims it to be. Petitioner does not provide any evidence from the examples provided in FRE 901(b) to authenticate the webpage exhibit, nor is the webpage exhibit self-authenticating under any of the categories provided in FRE 902. However, unlike those other exhibits, Exhibit 1053 is not a webpage belonging to Patent Owner, but a third-party, and is inadmissible hearsay.

Exhibit 1053, an unauthenticated third-party webpage, should additionally be excluded as containing hearsay under FRE 801 and FRE 802. Petitioner attempts to rely on Exhibit 1053 to prove the truth of any matter asserted therein. For example, the Reply states that “there are many other curved manual treadmills in the market...at least some of which clearly do not infringe the ’005 Patent” citing to Dr. Giachetti’s Second Declaration (EX1036 at ¶¶109-112). Looking then to Exhibit 1036, Dr. Giachetti cites to Exhibit 1053 in ¶110-112, stating “I have reviewed some of these competing curved treadmills and noted treadmills that don’t include a one-way device to substantially prevent or resist movement of the belt in any one direction versus the other...[o]ne such example is the Tru Grit Runner Curved Manual Treadmill,” providing a screen capture and citing to Exhibit 1053. EX1036, ¶¶110-111. Petitioner seeks to use the third-party webpage for the truth of the matter asserted, namely that the Tru Grit Runner product is available in the market and

allegedly does not infringe the '005 Patent, in violation of FRE 801 and 802. Exhibit 1053 fails to meet the requirements of any hearsay exception or exemption under FRE 803-807. Accordingly, it is impermissible hearsay, and should be excluded.

Dated: January 28, 2025

Respectfully submitted,

/R.J. McKenna/

Richard J. McKenna

Registration No. 35,610

Counsel for Patent Owner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. §42.64(C)** was served on January 28, 2025, by email to Petitioner's counsel of record:

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