

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

LIFECORE FITNESS, INC. d/b/a  
ASSAULT FITNESS,

Petitioner,

v.

WOODWAY USA, INC.

Patent Owner.

---

IPR2023-00836  
U.S. Patent No. 9,039,580

---

---

**PATENT OWNER'S SURREPLY**

## TABLE OF CONTENTS

I.	Giachetti’s Reply Declaration Should Be Ignored .....	1
II.	Level of Ordinary Skill (“POSA”) .....	2
III.	Claim Construction.....	3
IV.	The Challenged Claims Are Not Unpatentable .....	9
A.	Chickering Does Not Disclose a “Curved Running Surface” .....	9
B.	Chickering Does Not Disclose “the First and Second Bearing Rails Define a Curved Top Profile” .....	11
C.	Socwell Does Not Disclose a “Plurality of Bearings” .....	13
D.	Socwell Does Not Disclose “a Running Belt [...at Least Partially] Supported by the First Bearing Rail and the Second Bearing Rail” .....	13
E.	Socwell Does Not Disclose “Disposing a Running Belt on the Plurality of Bearings” .....	15
F.	There is No Motivation to Combine Magid with Chickering/Socwell .....	15
G.	There Is No Motivation to Substitute Sclater for Magid .....	18
V.	Secondary Considerations Confirm NonObviousness .....	19
A.	Nexus.....	19
B.	Commercial Success.....	21
C.	Industry Praise.....	24
D.	Copying .....	24
E.	Failure of Others and Passage of Time .....	26

The Challenged Claims should be found not unpatentable for the reasons described herein and in the POR.

**I. GIACHETTI'S REPLY DECLARATION SHOULD BE IGNORED**

Significant portions of Giachetti's new declaration are copied nearly *verbatim* from the Reply itself: ¶¶9-11, 13-18, 22, 25-26, 29-31, 35-36, 38-40, 44-45, 48-51, 53-59, 64-65, 67-71. Declarations that merely parrot attorney argument are entitled to no meaningful weight. *Samsung Elecs. Co. v. LED Wafer Sols., LLC*, IPR2021-01491, Paper 11, 12-13 (PTAB Oct. 26, 2022); *Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9, 15 (PTAB Aug. 24, 2022) (precedential). These portions of Giachetti's declaration should be disregarded as should the others that are never cited or relate to arguments the Reply omits. For example, although the Reply cites ¶¶32-33 for the proposition that "[t]he '580 Patent further discloses, 'multiple linear portions may be included in a profile of a non-planar surface,'" these paragraphs only discuss Chickering. Reply, 9-10; EX1036, ¶¶32-33. Similarly, the Reply cites ¶66 for arguments about back-stopping even though ¶66 actually discusses a "high speed freewheeling" functionality not mentioned in the Reply. Reply, 17; EX1036, ¶66. Consideration of these paragraphs and other Giachetti opinions that have no relation to arguments made in Reply improperly permit Petitioner to circumvent its word limit, incorporate arguments by reference, or both. *See Fidelity Nat'l Info.*

*Servs., Inc. v. DataTreasury Corp.*, IPR2014-00489, Paper 9, 9-10 (PTAB Aug. 13, 2014); 37 C.F.R. §42.6(a)(3).

The Board “need not attempt to sort proper from improper portions” of Giachetti’s second declaration. *See Adobe Inc. v. RAH Color Techs. LLC*, IPR2019-00627, Paper 124, 29-30 (PTAB Aug. 31, 2020). The Board should disregard the declaration in its entirety or, at a minimum, give the referenced paragraphs no weight.

## **II. LEVEL OF ORDINARY SKILL (“POSA”)**

While critical of Patent Owner’s proposed POSA, Petitioner fails to offer any support for its POSA. Rather, it relies solely on the *ipse dixit* of Giachetti, who without explanation concludes that an “understanding of exercise biomechanics, or the proportions of people,...is important to understanding the design of curved treadmills.” Reply, 6-7 (citing EX1036, ¶¶17-18). As Blair explained, Giachetti never articulated what he considered in reaching his opinion or even explained what the relevant field of “art” is. EX2018, ¶69. Giachetti’s reply declaration fails to address these deficiencies, instead parroting the same conclusory statements without disclosing any supporting facts or data. EX1036, ¶18. His opinions should therefore be given no weight. 37 C.F.R. §42.65(a); *see also Xerox*, Paper 9 at 15.

Petitioner’s proposed definition must fail as it excludes certain inventors of the ’580 Patent. As established in the POR and by Blair, any definition that requires

a POSA to be a degreed engineer with a “demonstrated understanding of exercise biomechanics, including anthropometry”—as Petitioner and Giachetti’s definition does (Petition, 5; EX1036, ¶18)—would necessarily exclude certain named inventors. POR, 3-4; EX2018, ¶70. Contrary to Petitioner’s statement, (Reply, 7), Blair did indeed “know for a fact that [some of the named inventors] don’t” have an engineering degree. EX1038, 9:24-10:6.

Petitioner’s assertion that excluding certain inventors from its POSA definition is “irrelevant” (Reply, 7) is incorrect. The “starting point [for how a POSA understands the claims] is based on the well-settled understanding that inventors are typically persons skilled in the field of the invention.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (*en banc*). An inventor’s education level is highly relevant to determining the level of ordinary skill, *Daiichi Sankyo Co., Ltd. v. Apotex, Inc.*, 501 F.3d 1254, 1256 (Fed. Cir. 2007), and any POSA definition “should include the inventor,” *Reckitt Benckiser LLC v. Gemak Trust*, IPR2020-00186, Paper 8, 6 (PTAB May 15, 2020) (citing *Daiichi*, 501 F.3d at 1256-57). Petitioner’s proposed definition fails to do so and should be rejected.

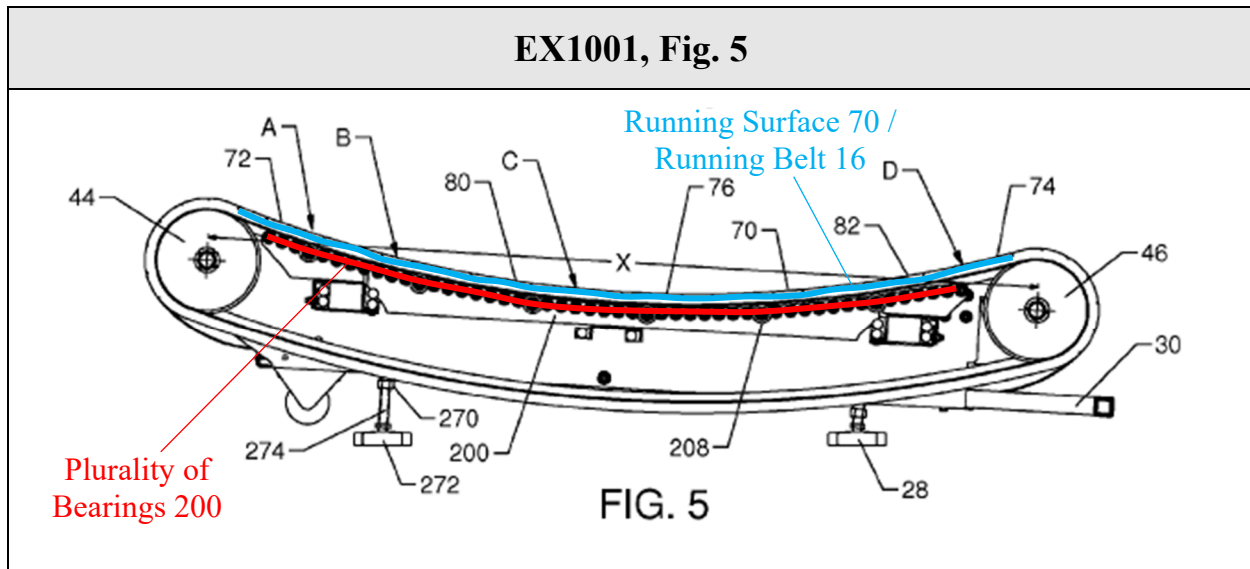
### **III. CLAIM CONSTRUCTION**

Following the district court’s claim construction order, the only terms Petitioner now disputes are “bearings,” “support,” and “disposed on.” The parties agree that the plain and ordinary meaning should apply to each term, although

Petitioner challenges Patent Owner's articulation of those meanings. The Board should adopt Patent Owner's interpretation of these terms and reject Petitioner's overbroad and unclear alternatives.

The plain and ordinary meaning is not determined in a vacuum; rather, it is “the meaning one of ordinary skill in the art would ascribe to a term when read *in the context of the claim, specification, and prosecution history*.” *Apple Inc. v. MPH Techs. Oy*, 28 F.4th 254, 259 (Fed. Cir. 2022) (emphasis added). Here, Patent Owner's understanding of the plain and ordinary meanings of “bearings,” “support,” and “disposed on” is consistent with the intrinsic evidence and should be adopted. In contrast, the Reply fails to address or rebut Patent Owner's plain and ordinary meanings for these terms, instead taking issue with Patent Owner's proper use of the specification to understand such plain and ordinary meaning. Reply, 3.

Patent Owner's position on “bearings,” as set forth in the POR, is simply that “bearings” must be positioned under the running belt and bear *at least some* of the weight of the belt. POR, 18. Figure 5 of the '580 Patent is fully consistent with this understanding. As shown, the plurality of bearings 200 are positioned below and support at least some of the weight of running belt 16—i.e., the weight of the portion of the belt forming running surface 70:



That the bearings are positioned above (but do not bear the weight of) other portions of the belt is irrelevant. Nothing about the plain and ordinary meaning of “bearing” as understood by Patent Owner requires the bearings to be positioned below the *entire* running belt. Rather, particularly when the bearings support only some of the belt’s weight, it is enough that the bearings be positioned below that portion of the running belt they actually support.

Moreover, as is apparent from its Socwell arguments, Petitioner’s understanding of the plain and ordinary meaning of “bearings” is overbroad and inconsistent with the specification. Specifically, Petitioner asserts that Socwell’s rollers 98, which are positioned above the running belt and exert a downward force to hold the running belt in an arcuate shape, constitute all but one of the claimed “plurality of bearings.” Petition, 69-72. But as the POR discussed, the ’580 specification consistently and exclusively describes such structures as “rollers” or

“wheels,” never as “bearings.” POR, 17-18. While the term “bearings” is used throughout the specification, its usage is consistent with Patent Owner’s interpretation, not Petitioner’s. *Id.*

There is a “general presumption that different terms have different meanings,” including for terms used in the specification. *Chi. Bd. Options Exch., Inc. v. Int’l Sec. Exch., LLC*, 677 F.3d 1361, 1369 (Fed. Cir. 2012). Because the specification differentiates between “bearings” positioned *below* and *bearing the weight* of at least part of the running belt and “rollers” or “wheels” positioned *above* and *exerting a downward force* on the running belt, “bearings” should at least be understood *to exclude* “rollers,” “wheels,” or other structures positioned above the running belt and exerting a downward force thereon. This would necessarily exclude Socwell’s rollers 98.

Petitioner’s efforts to conflate the term “bearings” with “one-way bearing assembly” should also be rejected. Like “rollers” and “wheels,” the intrinsic evidence never suggests that “bearings” and “one-way bearing assembly” refer to the same or similar structures. “Bearings” consistently describes a set of structures positioned below and bearing the weight of at least part of the running belt, as discussed *supra*, while “one-way bearing assembly” is expressly defined as “a motion restricting element that is configured to permit rotation of at least one of the front and rear shaft assemblies...(and hence the running belt...) in only one

direction....” EX1001, 27:11-14. Because the specification expressly defines “one-way bearing assembly,” the plain and ordinary meaning of “bearings” is inapplicable to the “one-way bearing assembly” term. Petitioner’s reliance on the specification’s use of the latter term to interpret the former is misplaced.

As for the term “support,” Petitioner’s Reply does not meaningfully address any of Patent Owner’s arguments,<sup>1</sup> instead stating that “[t]he PTAB previously considered and rejected PO construction for ‘support.’” Reply, 3. This argument misunderstands the Board’s findings. The Board explicitly stated that it “need not construe explicitly any of the claim terms proposed by Petitioner,” and it further noted that its findings were based on its understanding that the POPR’s arguments were “not supported by any evidence in the current record and is mere attorney argument.” D.I. 22, 48. However, Patent Owner provided substantial evidence with its POR to support its interpretation of the plain and ordinary meaning of “support,” including expert testimony. *E.g.*, POR, 23 (citing EX2018, ¶127). The Reply does not credibly challenge Patent Owner’s interpretation of such evidence.

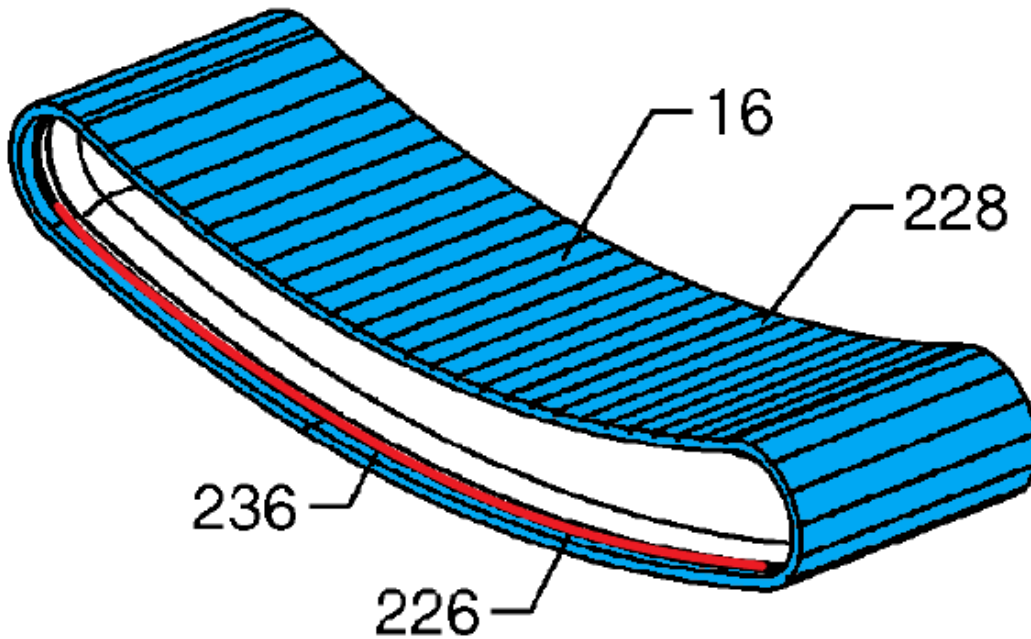
---

<sup>1</sup> While it is unclear whether Petitioner intended the above-referenced arguments to apply equally to the terms “support” and “disposed on,” to the extent it did, those arguments also fail for the reasons discussed above.

As to “disposed on,” Petitioner’s Reply arguments distort the intrinsic evidence. Despite Petitioner’s assertion that “the ’580 Patent uses the phrase ‘disposed on’ to refer to numerous arrangements,” (Reply, 5), the specification actually only uses this phrase once. That usage is unrelated to the relationship between the running belt and the plurality of bearings and is therefore of no consequence to how the claim terms should be understood.

Moreover, the specification’s single usage of “disposed on” is consistent with Patent Owner’s articulation of the phrase’s plain and ordinary meaning. Petitioner overlooks the fact that, when endless belts 226 are “disposed on opposite sides of the running belt 16,” part of the running belt is positioned below the endless belts and at least partially bears their weight. This is apparent in the following annotated excerpt of Figure 6, which shows the *lower portion* of the running belt (blue) positioned below and supporting the endless belts (red):

EX1001, Fig. 6



#### IV. THE CHALLENGED CLAIMS ARE NOT UNPATENTABLE

##### A. Chickering Does Not Disclose a “Curved Running Surface”

Contrary to Petitioner’s statement and its creative use of quotes, the experts do not agree that Chickering discloses a “curved running surface.” Reply, 7. Petitioner relies on blatant mischaracterizations of Patent Owner arguments and Blair’s testimony. The fact that “the *running belt* would be bending in a very, very small curve” as Blair testified (EX1038, 24:23-25 (emphasis added)) does not mean that that the *running surface* (a distinct element) is curved. To take Petitioner’s arguments at face value would be to interpret “running surface” as synonymous with “running belt,” which cannot be correct. These terms presumptively have different

meanings, *Chi. Bd.*, 677 F.3d at 1369, and interpreting “running surface” as the surface the user is actually intended to make contact with when running is the only reasonable interpretation.

Petitioner does not meaningfully rebut the express teachings in Chickering indicating that a runner's foot would ***not*** contact the curved portion of the running belt when using the Chickering device. *See* POR, 11-13 (discussing EX1013, 2:50-58). Although Giachetti baldly states that “[a] POSA would have understood this disclosure in Chickering [sic] teaches that a user could contact the curved area of the running surface,” (EX1036, ¶26), he provides no support for this statement beyond his own say-so. Such *ipse dixit* from an expert is inappropriate and properly disregarded. *TQ Delta, LLC v. Cisco Sys.*, 942 F.3d 1352, 1362-63 (Fed. Cir. 2019). The Reply itself similarly does not offer any support, instead simply parroting Giachetti's unsupported statement *verbatim*. Reply, 9 (citing EX1036, ¶¶23-25).

Moreover, Petitioner's cursory arguments regarding the supposed curvature in a single-belt Chickering device find no support in the disclosures Petitioner cites. Specifically, the Reply focuses on disclosures in Chickering regarding design considerations that result from using a heavier belt and suggests these would “require a more gradual curvature” in the running belt. Reply, 8-9. Reviewing the cited language, however, demonstrates that these disclosures speak only of the potential desire for larger end rollers 29a and 29b—structures located at the ***far front and rear***

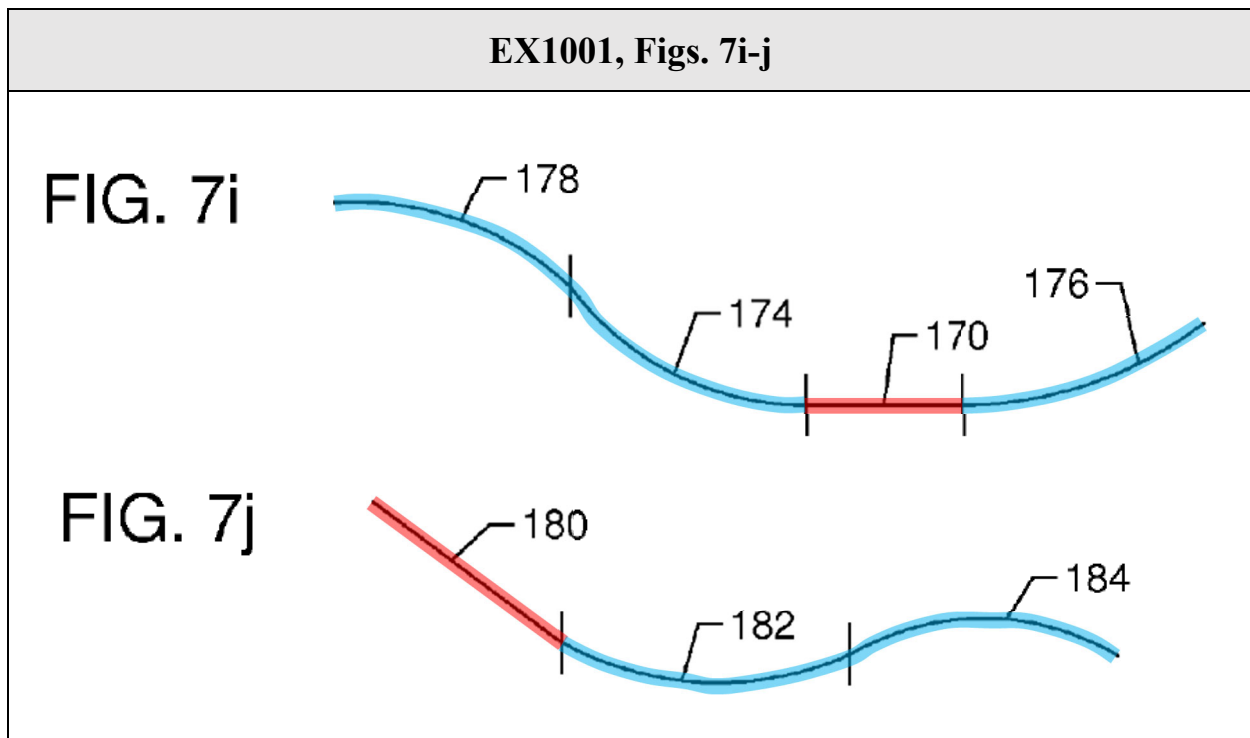
*ends* of the treadmill, respectively—to provide a larger turning radius for the belt. EX1013, 3:11-18. They provide no insight whatsoever into how (if at all) a heavier belt would affect the shape of the running belt elsewhere, and certainly do not indicate that the user's feet would be expected to contact the running belt at a location with any amount of curvature.

**B. Chickering Does Not Disclose “the First and Second Bearing Rails Define a Curved Top Profile”**

Petitioner's Reply arguments regarding Claim 25's “first and second bearing rails define a curved top profile” limitation relies on the specification's supposed description that a curved top profile may be defined in part by one or more linear portions. Reply, 9-10. These arguments are deficient.

Petitioner points to the portions of the specification that discuss Figures 7b-7j, all of which relate to the shape of the *running surface*, not a top profile defined *by the bearing rails*. EX1001, 3:58-60, 9:26-29. Nothing in these sections discusses the shape of the bearing rails. Moreover, even if the cited portions were broadly interpreted to encompass the shape of a top profile defined by the bearing rails, nothing therein suggests that a bearing rail may define a curved top profile where, as in Chickering, *all* portions of the bearing rail are linear. The specification makes clear that, even if a profile has a linear portion, the full profile is only nonlinear if it has one or more curved portions. For example, Figure 7i depicts a single linear portion 170, which is combined with *multiple curved portions* to define a nonlinear

running surface. EX1001, 10:17-35. Similarly, for Figure 7j, the inclusion of “a linear portion 180 provided at the front of the running surface which *transitions into a concave curve* 182 which then *transitions into a convex curve* 184” results in running surface that is, on the whole, curved. *Id.*, 10:36-38 (emphasis added). Figures 7i and 7j are shown below, with curved portions highlighted in blue and linear portions in red:



As depicted and described in the specification, a profile must be defined by at least one curved portion to be curved. While including one or more linear portions will not transform an otherwise nonlinear profile into a linear profile, no intrinsic evidence suggests that a curved running surface can be defined entirely by linear

portions. Even Figures 7i-j, which incorporate linear portions, only define a curved running surface because they also include curved portions, unlike Chickering.

**C. Socwell Does Not Disclose a “Plurality of Bearings”**

Petitioner improperly interprets “bearings” to include structures that do not comply with the characteristics required by the ’580 Patent. As the POR explains, all but one of the structures Petitioner identifies as the claimed “plurality of bearings” are analogous to structures the ’580 Patent expressly distinguishes from bearings. POR, 17-20. Petitioner does not meaningfully address this argument in Reply beyond arguing (incorrectly) that the plain and ordinary meaning of “bearings” includes structures like rollers 98. Reply, 10. Because the rollers 98 cannot constitute bearings under the plain and ordinary meaning of that term, Socwell has (at most) only one bearing and cannot disclose a “plurality of bearings.”

**D. Socwell Does Not Disclose “a Running Belt [...at Least Partially] Supported by the First Bearing Rail and the Second Bearing Rail”**

As the POR explained, the Petition failed even to allege that the bearing rails, rather than the frame or other components, support the running belt. POR, 20-22. Now, Petitioner purports to rebut this argument, but the only evidence it cites is post-Petition Giachetti testimony. Reply, 12-13 (citing EX2022 & EX1036). This is improper. “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.’” *Intelligent*

*Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (quoting 35 U.S.C. §312(a)(3)). “[T]he expedited nature of IPRs bring[s]...an obligation for petitioners to make their case in their petition to institute,” an obligation that carries with it “strict...requirements of which petitioners are aware when they seek to institute an IPR.” *Id.*; *see also* 37 C.F.R. §42.104(b)(4).

Although Petitioner belatedly offers convoluted and nonsensical<sup>2</sup> arguments that Socwell's cover members 168 indirectly “support” the running belt, (Reply, 12-13), these assertions are completely absent from the Petition, as is the purported evidence (i.e., Giachetti's unsupported testimony) Petitioner cites. There is no reason Petitioner could not have included this information in the Petition and/or asked Giachetti to address this issue in his first declaration. It did not, so the new Reply arguments must be disregarded. *Henny Penny Corp. v. Frymaster LLC*, 938 F.3d 1324, 1331 (Fed. Cir. 2019).

---

<sup>2</sup> Under Petitioner's new argument, virtually *any* part of a treadmill could be said to “support” the running belt as long as a potentially infinite number of intermediate components “transmit[] the force from the frame through” that part to the running belt. *See* Reply 12-13. This cannot be the plain and ordinary meaning of “support” as it would render the term “meaninglessly empty.” *Ethicon Endo-Surgery, Inc. v. United States Surgical Corp.*, 93 F.3d 1572, 1578 (Fed. Cir. 1996).

**E. Socwell Does Not Disclose “Disposing a Running Belt on the Plurality of Bearings”**

Socwell fails to disclose a “plurality of bearings” because its rollers 98 do not meet the plain and ordinary meaning of “bearings.” *See* §IV(C), *supra*. Accordingly, Socwell also cannot disclose “disposing a running belt on the plurality of bearings.”

Even if Socwell's rollers 98 somehow did constitute “bearings,” Socwell still fails to disclose “disposing a running belt on” said bearings as explained in the POR. POR, 11-14. Petitioner's attempted rebuttal relies entirely on its faulty argument that Patent Owner misinterpreted the plain and ordinary meaning of the term “disposed on.” Reply, 13. As discussed above, the intrinsic evidence Petitioner identifies supports *Patent Owner's* interpretation.

**F. There is No Motivation to Combine Magid with Chickering/Socwell**

Petitioner's arguments regarding the alleged motivation to combine these references remain deficient. Whether Chickering, Socwell, and Magid fall within the broad field of “exercise equipment” is not enough. Reply, 13-14. Simply being in the same field of endeavor cannot establish motivation to combine. *See Johns Manville Corp. v. Knauf Insulation, Inc.*, IPR2018-00827, Paper 9, 10 (PTAB Oct. 16, 2018) (informative) (“Demonstrating that a reference is analogous art or relevant to the field of endeavor of the challenged patent is not sufficient to establish that one of ordinary skill would have had reason to combine its teachings with other prior art

in the manner set forth in the claim....Mere compatibility of the references is likewise not sufficient.”).

Perhaps recognizing this fatal flaw, Petitioner attempts to backfill by relying on third-party treadmill safety standards. These arguments must fail. No ground in the Petition includes these so-called standards as a primary or secondary reference, and Petitioner never asserts that any ground would be supplemented by a POSA's general knowledge of the art. *See generally* Petition. Even if it had, as Blair explained, none of the safety standards Petitioner identifies actually call for a one-way bearing or other mechanical means for restricting the movement of the belt in a given direction. EX2018, ¶170. Without more, Petitioner cannot rely on such third-party standards that fail to even address the relevant elements to provide the missing motivation to combine other references.

Finally, Petitioner continues to downplay the significance of prior art teachings that discourage its proposed combinations. The POR describes in detail the teachings in Magid that would have discouraged a POSA from attempting to combine it with Socwell or Chickering. POR, 28-34. Petitioner's attempted rebuttal does not contest that Magid contains such teachings, but instead asks the Board to disregard these teachings as “not relevant to the proposed combinations.” Reply, 15-16. This is improper. Under controlling law, the Board may not disregard a teaching that would discourage the asserted combination simply because the party

challenging patentability does not rely on it. *See, e.g., Arctic Cat Inc. v. Bombardier Rec. Prods.*, 876 F.3d 1350, 1360 (Fed. Cir. 2017) (“[T]he prior art could contain one reference suggesting a combination and others critiquing or otherwise discouraging the same. Even a single reference can include both types of statements, and...it is error to fail to consider the entirety of the art.”). Thus, the Board must consider Magid for all it teaches, including those teachings that would discourage any curved, single-belt treadmill.

The sole case Petitioner cites does not stand for any contrary proposition—or even for the proposition Petitioner states. *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994) does not support disregarding Magid’s dual-belt or planar surface disclosures as “not relevant to the proposed combinations, i.e., the solution in question,” (Reply, 16). Rather, *Gurley* expressly states that “a reference that teaches away is a significant factor to be considered in determining unobviousness” only to conclude that the reference at issue did not arise to a teaching away at all because it “teaches that [the relevant element] is usable and has been used for [the applicant’s] purpose.” 27 F.3d at 553.

Magid contains no teachings whatsoever to support the use of its bearing assembly or safety device with a curved running surface. *See generally* EX1012. Rather, as explained in the POR, many teachings in Magid would actively discourage a POSA from attempting to combine the features of Magid with a

treadmill having a curved or multi-planar running surface. POR, 28-34. This is especially true for Petitioner's (over-qualified) POSA as a greater understanding of "anthropometry" would make him more likely to appreciate that Magid's features are adapted for its narrow use as a therapeutic walker. Petitioner cannot overcome these teachings by simply asking the Board to disregard them. Doing so is improper, and the Board should find Petitioner has failed to establish motivation to combine.

**G. There Is No Motivation to Substitute Sclater for Magid**

Petitioner's arguments regarding the alleged motivation to substitute Sclater for Magid similarly fail. Despite Petitioner's contrary assertions, its stated motivations plainly rely on hindsight bias and must be rejected.

While spending much of its Reply argument discussing how a POSA would understand the Emerson catalog and purportedly rely on its disclosures to substitute a sprag-type clutch for Magid's ratchet-type clutch, (Reply, 18), the Petition actually relied on Sclater as a secondary reference, not Emerson. *See generally* Petition. But, Sclater is just as much of a problem. Sclater describes a number of devices a POSA would recognize as more similar to—and thus more easily substituted for—Magid's toothed ratchet-type one-way bearing. POR, 34-45. Petitioner has never explained why a POSA would consider a completely different sprag-type one-way bearing assembly when Sclater itself discloses more structurally similar and easily substituted devices like toothless ratchets that would also solve the purported

“problems” Petitioner and Giachetti identify. The only explanation is that Petitioner relied on hindsight bias specifically to select Sclater’s—and now Emerson’s—sprag-type clutch in order to cobble together a device that it contends meets the elements of the Challenged Claims. This is improper and wrong.

**V. SECONDARY CONSIDERATIONS CONFIRM NONOBVIOUSNESS**

**A. Nexus**

Patent Owner clearly demonstrated nexus between certain of the Challenged Claims and Woodway’s products. Petitioner’s arguments to the contrary—which rely on caselaw that actually contradicts the proposition Petitioner argues—must fail.

As Petitioner admits, there is a rebuttable presumption of nexus if the product at issue “is the invention disclosed and claimed.” Reply, 19 (quoting *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373 (Fed. Cir. 2019)). This presumption was established through Blair’s testimony and claim charts demonstrating that each element of at least Challenged Claims 1-12, 14, 15, 18, and 25 is present in Patent Owner’s products. EX2018, ¶¶189-191 (citing EX2025). Petitioner fails to rebut this evidence. Instead, Petitioner misapprehends prior decisions of the Board to assert that the presumption of nexus should not apply in the first place. Petitioner’s citation to *Lectrosonics, Inc., v. Zaxcom, Inc.*, IPR2018-01129, Paper 33, 33 (PTAB Jan. 24, 2020) (precedential) is particularly misleading.

Specifically, unlike here, as *Lectrosonics* explains, the patent owner did “**not** provide an analysis demonstrating that its products are coextensive...with the challenged claims;” i.e., it failed to establish a presumption of nexus at all. *Id.*, 33. Although the Board discussed ways a patent owner may still rely on secondary considerations, these apply only where “a presumption of nexus is **inappropriate**.” *Id.* (citing *Fox Factory*, 944 F.3d at 1375) (emphasis added). Although Petitioner faults Patent Owner for failing to meet these alternative ways of showing nexus, (Reply, 19)—alternatives are simply inapplicable where, as here, Patent Owner has offered an unrebutted analysis demonstrating that the products and the Challenged Claims are coextensive.

Further, Petitioner's application of *Lectrosonics* is wrong. Petitioner asserts that, “[s]ince all claim elements were in the prior art, there is no nexus,” (Reply, 19), but as *Lectrosonics* explains, “there is **no requirement** that ‘objective evidence must be tied exclusively to claim elements that are not disclosed in a particular prior art reference in order for that evidence to carry substantial weight.’....A patent owner may show, for example, ‘that it is the claimed combination as a whole that serves as a nexus for the objective evidence....’”<sup>3</sup> *Lectrosonics*, Paper 33, 33 (quoting *WBIP*,

---

<sup>3</sup> To the extent Petitioner contends Patent Owner identified a “safety device” as the sole inventive feature, it is mistaken. Not only did Patent Owner's nexus analysis

*LLC v. Kohler Co.*, 829 F.3d 1317, 1331 (Fed. Cir. 2016)). Thus, not only does Petitioner's authority have no relevance when Patent Owner has established that a *prima facie* presumption of nexus applies, that authority contradicts Petitioner's supposed takeaway.

## **B. Commercial Success**

Petitioner's arguments regarding the lack of nexus between the undeniable commercial success of Patent Owner's products and the claimed inventions are misplaced. Patent Owner never argued the commercial success of its products resulted from the inclusion of a safety device; indeed, the commercial success section of the POR never even mentions the safety device. POR, 57-60.

The POR focuses on the products as a whole, which Patent Owner has already established are coextensive with the claimed inventions. *Id.*, 46-60. As the Federal Circuit has held, "[w]hen a patentee can demonstrate commercial success, usually shown by significant sales in a relevant market, and that the successful product is the invention disclosed and claimed in the patent, ***it is presumed that the commercial success is due to the patented invention.***" *Chemours Co. FC, LLC v. Daikin Indus.*, 4 F.4th 1370, 1378 (Fed. Cir. 2021) (citing *J.T. Eaton & Co. v. Atl. Paste & Glue*

---

focus on the Curve treadmills as a whole, but one of the analyzed claims—Claim 25—does not even recite a "safety device." EX1001, Claim 25; EX2025, 36-41.

*Co.*, 106 F.3d 1563, 1571 (Fed. Cir. 1997) & *WBIP*, 829 F.3d at 1329) (emphasis added). Petitioner fails to rebut this presumption.

To the extent Petitioner argues there can be no finding of commercial success without market share evidence, this is also incorrect. It is error to conclude that “gross sales figures, absent market share data, ‘are inadequate to establish commercial success,’” and the Federal Circuit has reversed Board decisions that do so. *Chemours*, 4 F.4th at 1378. The Board should reject Petitioner’s invitation to make the same error here, particularly when Petitioner arbitrarily concludes, without any substantiation, that the relevant market includes flat motorless treadmills.<sup>4</sup>

Likewise, Petitioner’s assertion that commercial success cannot be established because some Curve products include unclaimed features is misplaced. The Federal Circuit has explained that “the commercial success of the embodiment with additional unclaimed features is to be considered when evaluating the obviousness of the claim, provided that embodiment’s success has a sufficient nexus to the claimed and novel features of the invention.” *ArcelorMittal France v. AK Steel Corp.*, 700 F.3d 1314, 1325 (Fed. Cir. 2012). Moreover, courts “never held that the existence of one or more unclaimed features, standing alone, means nexus may not

---

<sup>4</sup> Flat, motorless treadmills have different design considerations than curved, manual treadmills, which render a “safety device” unnecessary. EX1038, 81:11-83:5.

be presumed.” *Teva Pharms. Int’l GmbH v. Eli Lilly & Co.*, 8 F.4th 1349, 1361 (Fed. Cir. 2021) (quoting *Fox Factory*, 944 F.3d at 1374).

Here, despite bearing the burden to rebut the presumption of nexus between the claimed inventions and Patent Owner’s commercially successful treadmills, Petitioner offers nothing but a list of purported unclaimed features and bare speculation that they contributed to the Curve treadmills’ commercial success. Reply, 25-26. This cannot overcome the presumption of commercial success. *WBIP*, 829 F.3d at 1329 (“[A] patent challenger cannot successfully rebut the presumption with argument alone—it must present evidence.”); *Polaris Indus. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1072 (Fed. Cir. 2018) (same). Indeed, as confirmed by Mr. Weber, who has been Woodway’s Director of Sales and Marketing since at least the introduction of the first Curve treadmill in 2009, the unclaimed features Petitioner identifies are not found in all Curve treadmills, with very few Curve treadmills being equipped with the sophisticated software Petitioner references, for example. EX1037, 27:8-30:8. Even though this leads to a significant price-range for the Curve treadmills (*id.*), the entire Curve line has experienced commercial success, regardless of whether additional features are present, further demonstrating that commercial success is not tied to unclaimed features.

Additionally, while Petitioner complains about the lack of Samsara sales data and suggests that unreported Samsara sales somehow indicate a lack of commercial

success, such sales actually demonstrate the opposite. As the POR explained, the Samsara treadmill was found to infringe the '580 Patent, and Samsara subsequently took a license to Patent Owner's patents, including the '580 Patent. POR, 62-63. Increased sales of the cheaper Samsara treadmill, which presumably has fewer of the high-end features Petitioner identifies, only serves as further evidence that the claimed inventions, not unclaimed features, drive the commercial success of the embodying products.

### **C. Industry Praise**

Petitioner's arguments regarding industry praise also depend on the false premise that Patent Owner relied on a "safety device" for secondary considerations. As discussed, however, Patent Owner established nexus for and relied on the claimed combination as a whole, not on any individual feature. Thus, the mere fact that the evidence of industry praise does not reference a safety device is irrelevant.

### **D. Copying**

Petitioner's Reply also misrepresents Patent Owner's copying evidence. Patent Owner has not relied only on the superficial appearance of competitors' products to show copying; certain of these products have been adjudged to infringe Patent Owner's patents, which include features Petitioner now argues are obvious. For example, Samsara's treadmill is not only visually substantially similar to the Curve Legacy but was *also subject to a judgment of infringement in federal court*.

POR, 62-63. As explained in the POR, one of the patents asserted in that case was the '580 Patent. *Id.* Despite Petitioner's speculation that certain features might be missing from Samsara's copycat treadmill (Reply, 31), all claims in the '580 Patent require such features. EX1001, Claims 1-25. Combined evidence of access and substantial similarity (both in terms of appearance *and* claimed features) establishes copying.

Likewise, Petitioner's blatant copying of the user manual *for a specific Woodway product* is relevant to whether the product in the copycat manual was itself a copy of the Woodway product, which unlike Petitioner, does have substantiation for caloric burn. EX1037, 54:20-55:4. Rather than attempt to rebut such evidence—indeed, Petitioner does not deny that portions of EX2071 were copied from a specific Woodway manual—Petitioner attempts to distract the Board through baseless accusations of document “doctor[ing]” and alleged protective order violations. Reply, 32-33. Such accusations are false and contradicted by the evidence.

Specifically, Petitioner's arguments misrepresent the testimony of its co-CEO, Traci Bates, regarding EX2071 (deposition exhibit 39). During her deposition, Bates was asked outright if she considered any of the information in the relevant exhibit “to be confidential in any way.” EX1045, 80:7-10. She testified that she did not. *Id.* Even after changing her testimony (following cross-examination by Petitioner's counsel) to assert that she would “have to think [EX2071 is] a draft”

rather than a final manual, Bates never recanted her earlier testimony that the exhibit was not confidential. *Id.*, 216:21-217:2. Petitioner's efforts to disparage Patent Owner and its counsel through mischaracterization of this testimony should not be allowed to distract from strong, unrebutted evidence of copying.

#### **E. Failure of Others and Passage of Time**

The mere fact that Patent Owner's only competitors in the curved, manual treadmill market were copycats who only emerged years later after Patent Owner introduced the Curve products in 2009 is clear evidence that others had failed to develop the product themselves. As the Federal Circuit has recognized, when competitors "tried and failed to develop the claimed invention *and copied it instead*," it evidences failure of others. *Dow Chem. Co. v. Am. Cyanamid Co.*, 816 F.2d 617, 622 (Fed. Cir. 1987) (emphasis added). As Patent Owner explained, this is precisely what happened here. *See* POR, 65-66 (noting that, "until others in the industry started to copy Patent Owner's CURVE products, Patent Owner was the only provider of curved, manual treadmills in the market"). Petitioner's bald assertions that there was no failure of others ignored this evidence and must fail.

With respect to passage of time, Petitioner relies only on the supposed lack of long-felt need or failure of others to support disregarding the significant gaps between the cited prior art and the date of invention. Reply, 34. Because Patent Owner demonstrated failure of others, Petitioner's arguments again must fail.

IPR2023-00836  
U.S. Patent No. 9,039,580

Patent Owner's Surreply

Dated: June 5, 2024

Respectfully submitted,

/R.J. McKenna/

Richard J. McKenna

Registration No. 35,610

Counsel for Patent Owner

**CERTIFICATE OF COMPLIANCE**

This Patent Owner Surreply complies with the type-volume limitations required by 27 C.F.R. §42.24. The word count in this paper totals 5,577 words. Patent Owner has relied upon the word count feature of Microsoft Word.

Dated: June 5, 2024

/R.J. McKenna/  
Richard J. McKenna  
Registration No. 35,610  
Counsel for Patent Owner

IPR2023-00836  
U.S. Patent No. 9,039,580

Patent Owner's Surreply

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **Patent Owner's Surreply** was served on June 5, 2024, by email to Petitioner's counsel of record:

jhalan@brookskushman.com

aturner@brookskushman.com

rcantor@brookskushman.com

kkonz@brookskushman.com

LCF0112IPR@brookskushman.com

Dated: June 5, 2024

/R.J. McKenna/  
Richard J. McKenna  
Registration No. 35,610  
Counsel for Patent Owner