UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIFECORE FITNESS, INC., d/b/a ASSAULT FITNESS,	)
Petitioner,	)
vs.	)
WOODWAY USA, INC.,	)
Patent Owner.	)

U.S. Patent No. 11,465,005

IRP2024-00083

CONFERENCE CALL

Tuesday, May 7, 2024

2:02 p.m.

Reported by: Cynthia M. Thomas, RPR, RMR, CRR, CSR-3836

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APPEARANCES (VIA TELEPHONE):

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Judge Amee Shah
Judge Neil T. Powell
Patent Trial and Appeal Board

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- - -

JUDGE PETRAVICK: Good afternoon. This is Judge Petravick. Can you hear me?

MR. TURNER: Yes, I can. Hello, this is Andrew Turner for Petitioner.

Can you hear me?

JUDGE PETRAVICK: Yes, I can hear you.

Is there counsel on the line for Patent Owner?

MR. McKENNA: Yes. Richard McKenna for the Patent Owner, and my Backup Counsel Kadie Jelenchick.

JUDGE PETRAVICK: Is there anybody else on the line for Petitioner?

MR. TURNER: Also for Petitioner I have my colleague here, Reza Esfahani.

JUDGE PETRAVICK: So, as I said, I am Judge Meredith Petravick, and with me on the line is Judge Neil Powell and Judge Amee Shah.

And this is a conference call for IPR2024-00083.

The Board has asked for this conference call so we can get a bit more information on the

issue of whether the petition was filed by a person as required by Section 311.

But what I'd like to do is, I have a series of questions, and I'd like to hear from both parties on each question.

But before I get to this case at hand, I believe you're both counsel for the earlier related cases, the -- what is it? -- the -0836 case, the -0843 case, and the -0849 case.

Is that correct?

MR. TURNER: This is Andrew Turner for Petitioner.

Yes, that is correct.

JUDGE PETRAVICK: And for Patent Owner?

MS. JELENCHICK: This is Kadie Jelenchick for Patent Owner.

That is correct.

JUDGE PETRAVICK: All right. So in each of those cases, the last updated mandatory notices from the Petitioner proposed to update the caption in that case to be LifeCORE Fitness, LLC.

Does Patent Owner have any opposition to updating the caption in those cases where the conversion happened after the petition was filed?

MS. JELENCHICK: This is Kadie Jelenchick

on behalf of the Patent Owner.

The Patent Owner doesn't object for that exact reason. The petitions were filed in the name of LifeCORE Fitness, Inc., the California corporation, which was in existence at the time of the April 11, 12, 13, 2023 filing of the petitions.

JUDGE PETRAVICK: All right. Thank you.

So now that we've got those cases squared away, I'd like to talk about this latest filed case again. It's the IPR2024-00083.

My first question -- and I'd like Petitioner to answer this question first -- is would the misnaming or, you know, having a misnomer in the name of the Petitioner cause us to lose jurisdiction over the case.

Are we dealing with a jurisdictional issue as opposed to a procedural issue?

MR. TURNER: Thank you, your Honors. This is Andrew Turner again for Petitioner.

And, no, we don't think the PTAB would lose jurisdiction here. We think it's more of a procedural issue. It's more, I guess, form over substance. And this kind of gets into, I guess, some corporation law. I don't know if you want me to delve into that.

But, basically, it's our position here that under corporation law, whether this is Delaware law, state law, which was what --

JUDGE PETRAVICK: Well, let me stop you right there, because I'll have questions about that later.

But right now what I'm asking is if, similar to our RPI case law here at the Board -- you know, concentrating on the case law here at the Board -- the Board's jurisprudence and our precedential cases say that even though 312 says that the petition must not be considered unless an RPI is named, under certain circumstances we let RPIs be -- updated for, you know, errors -- correcting errors and stuff after the petition is filed as long as there will be no 315, if the party was named, you know, in the petition when it was filed.

Our precedent or the way that has evolved since the PTAB was formed is that that question is not jurisdictional. You know, it's more of a procedural question. And that allows us to update the RPIs during trial under certain conditions.

And so my question is sort of going on to, like, is 35 U.S.C. 311, the portion that requires

the petition to be filed by a person other than the Patent Owner, is that a procedural question or is that a question that, if it's not fulfilled, we don't have jurisdiction?

MR. TURNER: It's Petitioner's position that that's a procedural question. And in cases similar to the 312 argument, they held it was a procedural issue as it related to RPIs.

JUDGE PETRAVICK: All right. Patent Owner, same question for you.

And if you could say your name before you speak.

MS. JELENCHICK: Sure, of course. This is Kadie Jelenchick on behalf of Patent Owner.

I'm sure the Board is not surprised to learn that we have a different view that 35 U.S.C. 311 is a jurisdictional requirement. And there was no person as of the time that the petition was filed because there was no corporate entity under the name LifeCORE Fitness, Inc., in California or --

JUDGE PETRAVICK: Yeah, I understand your position as to the facts about the corporation. But could you tell me why you think 35 U.S.C. 311 is jurisdictional. Why would a case that doesn't

comply with that rob the Board of jurisdiction? What language in 311 do you think causes that to happen?

MS. JELENCHICK: Sure.

"... a person who is not the owner of a patent may file with the Office a petition to institute an inter partes review of the patent."

JUDGE PETRAVICK: Right.

MS. JELENCHICK: Whatever LifeCORE was calling itself at the time, the quote/unquote person, as contemplated by 35 U.S.C. 311, would have been the Delaware LLC. It was not the nonexistent, now defunct, California corporation.

We're aware of no legal authority, rule, or case law that stands for the proposition, within Delaware, that an entity that previously existed and no longer exists, whether by conversion or otherwise, has the ability to file a lawsuit or has standing as a quote/unquote person, as that term is understood in a parlance of corporate law, to raise a legal issue.

And here the legal issue is whether they have the ability to file a petition to institute an inter partes review.

JUDGE PETRAVICK: Yeah, that argument goes to the procedure and whether the -- I believe the procedure and whether the Petitioner has followed the procedure.

But my question is more as to jurisdictional issues as opposed to a procedural -- to procedural issues at that point. You know, similarly section 312 says the petition will not be considered unless, you know, all RPIs are, you know, named. And yet that's not a jurisdictional issue. That is more of a procedural issue that the Board is allowed to update.

MS. JELENCHICK: Understood. However, 311 identifies the parameters of who may bring a petition. And unless you satisfy that requirement, there's no jurisdiction to even trigger the Board's jurisdiction.

So, you know, I get your point that --

JUDGE PETRAVICK: I'm just gonna push you a little bit further.

Wouldn't that argument apply to all procedures -- all procedural rules then, you know, under 312? It wouldn't -- we would have no jurisdiction. And we already know from case law that that's not the correct argument. For example,

in Wi-Fi One.

MS. JELENCHICK: I get your point. There is, of course, a procedural component to what's going on here.

And I think -- if we put this in context, I think what's clear is that LifeCORE Fitness messed up, and they should have filed in the name of the Delaware LLC. And now they want to cast it as simply a -- you know, I heard Petitioner counsel refer to it as, you know, "form over substance."

That's not the case. You need to be a person to file a petition. There was no person. There was no operative person as of the timing of when the petition was filed, which happened to be the last day of the statutory period.

JUDGE PETRAVICK: All right. Thank you.

So that kind of leads into my next question.

Petitioner, why was the California case -- corporation named in the petition instead of the Delaware petition -- instead of the Delaware corporation? Excuse me.

MR. TURNER: Thank you, your Honors. Again, this is Andrew Turner for Petitioner.

And we listed the California corporation

in the petition because we were not aware of the conversion at the time. So we were -- we didn't handle the conversion for LifeCORE, so we actually -- we didn't learn about it until much later. Actually, I didn't see it until the Patent Owner Preliminary Response. But it came out during the litigation a few months ago.

So we were not aware of it until -- I think the earliest we saw it in the litigation, it came out during a deposition in December of a Roger Bates. So that's when my co-counsels were aware of it from deposition.

So we were -- you know, as a team, Petitioner was aware of it, I guess, in late December. Petitioner's counsel, that is.

JUDGE PETRAVICK: Uh-huh. So it was an error --

MR. TURNER: Yes.

JUDGE PETRAVICK: -- in the naming.

The entity is the same. The people that hired you to do the IPR are the Delaware -- is the Delaware corporation. You didn't realize the name had changed.

MR. TURNER: Correct. We're working with the same -- you know, the same management team at

LifeCORE when they changed from being incorporated in California to a Delaware LLC. We're interacting with the same team. And we're also handling -- our firm is handling the litigation for them, also.

JUDGE PETRAVICK: Okay. And what happened in the related district court case with the naming of the entity?

MR. TURNER: Again, Andrew Turner for Petitioner.

The name has not changed in the district court litigation. And we will look into that, whether it needs to change. But based on -- basically, based on corporation law, it's our understanding that the ...

THE COURT REPORTER: I'm sorry, Counsel, there was interference on the line and I couldn't hear you. The last I heard was:

(Record read as follows:

"But based on -- basically, based on corporation law, it's our understanding that the ...")

MR. TURNER: So based on corporation law, you know, before we talk about conversion, which is -- we cited that in some of our briefing, the Delaware conversion provision, you know, the entity

continues to exist after a conversion, and it does not constitute a dissolution.

And then, also, there's also provision in the Delaware statute that has to do with a wind-up provision. So, basically, you know, this is a common occurrence where, you know, companies might change their status during litigation. And there's -- in Delaware corporation law, there's a wind-up provision which -- let me see. I can pull it up here.

So, you know, as we mentioned in our briefing, it's our position that the conversion does not constitute a dissolution, and it's a continuation of the existence. So, basically, whether there's a conversion, LifeCORE is still the same entity and continues to exist as the LLC.

And, also, even if LifeCORE was dissolved -- right? -- even if it was dissolved, there's a wind-up provision in corporation law. And in Delaware, this is Section 278. So this is -- even if a company is dissolved, they have a period of three years to continue -- that they can continue to pursue and defend in lawsuits, including civil, criminal, and/or administrative proceedings.

So it's our position that LifeCORE still

exists. And even if they -- you know, through this conversion, they were dissolved, they would be covered by a wind-up provision and they could still pursue this litigation under the prior name.

But this is something we will look at as far as if we need to update the name in the, you know, California litigation. But we have not done so yet.

JUDGE PETRAVICK: Thank you.

Patent Owner, sort of a similar question.

Patent Owner is not confused by what -- you know, like if there was an error in the naming of the entity, Patent Owner is not confused or is confused by which entity filed the petition or that the -- you are aware that the California corporation converted into the Delaware corporation; that there is still an entity regardless of what name is on the petition.

MS. JELENCHICK: This is Kadie Jelenchick on behalf of the Patent Owner.

Yes, today, Patent Owner is well aware that Petitioner would like to be LifeCORE Fitness LLC.

At the time that the petition was filed, we had every reason to believe that LifeCORE

Fitness Inc. was the Petitioner. That was based on their identification of the real party-in-interest in their October 24th, 2023, petition. That was also based on LifeCORE Fitness Inc.'s responses to Patent Owner's interrogatories in the parallel litigation, where specifically Patent Owner sought the identification of any entity or persons, including but not limited to any holding company, parent, subsidiary, affiliate, shareholder, or third party that had any financial interest, direct or indirect, in the outcome of this litigation.

The response to that interrogatory, which was provided in August of 2022, stated that the responding party is a California corporation. It has no parent, subsidiary, or affiliate.

That interrogatory was not supplemented until February the 29th, 2024, where there was an identification of this Delaware conversion.

There was rumblings of a Delaware conversion during Mr. Bates' December 2023 deposition, which was news to Patent Owner. And December of 2023 was well after the one-year bar date for when Petitioner had the ability to file that petition challenging the '005 patent.

And I heard from Petitioner's counsel that

they just weren't aware of this conversion, but that's just not credible. In response to deposition questioning in the parallel litigation, witnesses refused to answer questions about this conversion on the advice of counsel.

Specifically, Ms. Bates, who is the current CEO -- a member, as we understand it, of some portion of the currently existing Delaware LLC -- testified expressly that on the advice of counsel -- why LifeCORE Fitness Inc. ...

THE COURT REPORTER: I'm sorry, but I -- I didn't -- I'm sorry. I apologize, Ms. Jelenchick.

Ms. Jelenchick, I apologize, but there's so much feedback on the line that it's so hard for me to hear. Whoever isn't speaking, could they maybe mute while they're not speaking, because there's so much feedback.

Am I the only one hearing it?

JUDGE PETRAVICK: I believe you're the only one hearing the feedback. Your connection seems to be a little shaky.

THE COURT REPORTER: My phone connection?

JUDGE SHAH: This is Judge Shah. I'm hearing the feedback, as well.

MR. TURNER: This is Andrew Turner.

I hear the feedback, as well.

JUDGE PETRAVICK: Oh. Well, then maybe it's me who has the feedback.

Is that better?

THE COURT REPORTER: It seems to be.

JUDGE PETRAVICK: Hello?

JUDGE SHAH: Yes.

THE COURT REPORTER: Yes.

JUDGE PETRAVICK: Okay.

THE COURT REPORTER: Yes, that's better.

JUDGE PETRAVICK: My apologies.

THE COURT REPORTER: Let me just state where I left off.

(Record read as follows:

"Specifically, Ms. Bates, who is the current CEO -- a member, as we understand it, of some portion of the currently existing Delaware LLC -- testified expressly that on the advice of counsel -- why LifeCORE Fitness Inc. ...")

That's where I left off.

MS. JELENCHICK: ... why LifeCORE Fitness Inc., a California corporation, incorporated into the Delaware LLC. Ms. Bates would not answer

questions about that conversion based on said advice of counsel.

And it's just not credible that there was no investigation by Petitioner as to who was the proper quote/unquote person to bring the Petition in the first instance.

This is not an instance where we're talking about a couple of days. We're talking about six months elapsed between the time that LifeCORE Fitness Inc. converted into the Delaware LLC, and six months later they filed a petition for IPR challenging the '005 patent on the very last day.

As we understand it, there was a transaction afoot. LifeCORE Fitness Inc. was contemplating some type of sale of all or a portion of its assets. And it's our supposition that the conversion into the Delaware LLC was for the purposes of some perceived benefit for that transaction. We've now seen that that transaction has come to fruition in some updated mandatory disclosures that Petitioner filed in this petition.

However, it appears that what Petitioner was trying to do is have all of the benefits of a Delaware conversion and none of the limitations that are clear regardless of whether there is the ability

within Delaware corporate law to seek relief vis-a-vis any wind-up provisions of the company.

LifeCORE Fitness Inc., the California corporation, how it is treated as a legacy organization in the context of the district court litigation has no bearing on whether this particular board has the ability to decide whether they were a proper person for the purposes of filing this petition in the first place.

We agree with Petitioner's counsel that liability will pass to the Delaware LLC for the purposes of our infringement allegation, but that says nothing about whether a nonexistent California corporation has the capacity to sue when it is no longer in existence.

And I think that the practical implications of what Petitioner is trying to propose here is that at any time, seemingly within a three-year period, LifeCORE Fitness Inc., the California corporation, could file a petition challenging an IPR -- bringing an IPR petition for any patent because it was in existence three years ago. There's no legal authority to that. They haven't cited to any --

JUDGE PETRAVICK: We've gotten away from

the question a little bit. Don't worry, there will be more questions and more chances to talk. But let's just move on to the next question.

So, Patent Owner, what I took from that is that you're not confused that the Delaware corporation was previously the California corporation.

MS. JELENCHICK: In this moment, no, there's no confusion.

JUDGE PETRAVICK: Yeah, there's no confusion. Okay.

My next question is: Patent Owner, if we viewed this as just an error in the naming of the Petitioner, and allowed them to update or correct the naming, what prejudice would you suffer from that other than, of course, that the IPR has a chance to continue or, you know, not be terminated based on this issue?

MS. JELENCHICK: Well, I mean, the prejudice is clear insofar as it -- to the extent the Board allowed them to correct the name and require updating of the real parties-in-interest, which, to date, is still incorrect and deficient and fails to -- as it stands, Petitioner has failed to identify all real parties-in-interest.

The Patent Owner is left with significant uncertainty as to how the potential estoppel provisions may apply or don't apply.

Patent Owner is also prejudiced insofar as the parallel district court proceeding is proceeding as it relates to fact and expert discovery, but summary judgment and trial dates are held in abeyance based on the earlier-filed IPRs.

And now the Patent Owner, to the extent there is a correction and the Board decides to institute, will continue to have to delay to seek recourse for its infringement allegation.

Petitioner waited until the final day of the statutory period to file an IPR petition on a fourth related patent where the three previous petitions that were filed were eight months earlier and based on the overlapping prior art. And they didn't follow the procedural rules when they did it.

So simply failing to comply with the rules and feigning ignorance until Patent Owner points it out in proceedings -- Patent Owner has suffered prejudice not only from the litigation perspective, not only from the integrity of the proceedings, but also the additional legal fees in having to deal with the wrangling and the backfilling of

Petitioner's deficiencies in a petition that could have been filed correctly in the first instance had they taken the time and done the necessary due diligence to do so.

JUDGE PETRAVICK: Okay. Petitioner, same question. Do you think Patent Owner has suffered any prejudice from, you know, the naming -- the misnaming of the entity in the petition?

MR. TURNER: Your Honors, there's no prejudice here. The '005 patent has only been asserted against one entity, and that's Petitioner.

So there's no potential unnamed RPIs that would be estopped here. So there's no prejudice with respect to that.

And as far as the litigation fees, Petitioner moved to stay the related litigation as soon as the first three IPRs were instituted, but the district court denied that motion.

JUDGE PETRAVICK: All right. And I take it that Patent Owner opposed the stay in the district court litigation?

MR. TURNER: Yes.

MS. JELENCHICK: This is Kadie Jelenchick on behalf of the Patent Owner.

That is correct.

JUDGE PETRAVICK: Okay. Thank you.

From what Patent Owner has said already, I believe Patent Owner believes that Petitioner acted in bad faith and that there was gamesmanship going in by the fact that the entity -- the name of the entity wasn't corrected earlier.

Would that be a correct summary of what you argued?

MS. JELENCHICK: This is Kadie Jelenchick on behalf of Patent Owner.

Yes. I believe, in large part, that's true.

JUDGE PETRAVICK: All right. Does Petitioner have any response to that?

MR. TURNER: Thank you, your Honors. This is Andrew Turner for Petitioner.

As far as the bad faith from the litigation, I think, you know, LifeCORE has used multiple law firms. So they used another firm, which was discussed in some of the same depositions, for some of the agreement work. So he did not handle the conversion, and he was not aware.

As far as -- I think there was also some -- Patent Owner argued about the timeliness. And if that was the question here, timeliness --

sorry, excuse me.

There's nothing to gain for us by, you know, withholding this name change. I mean, Petitioner has filed updated mandatory notices as we were aware of them. And this was just an error. And once we learned about it, we updated our mandatory notice.

JUDGE PETRAVICK: Thank you.

The last question from me -- my last question is: When I look at the cases that are, you know, cited in the brief and things, I just want to make sure, does either party know of any case where the Petitioner's name has been corrected after the filing of a petition at the PTAB.

Petitioner?

MR. TURNER: Your Honors, again, Andrew Turner for Petitioner.

I'm not aware of a case where the name of the Petitioner was corrected. I mean, we cited -- in our briefing, we cited the proponent -- proponent case, which is a designated decision, where the RPI was updated later. But as far as the name of the Petitioner, we didn't find a case on that.

JUDGE PETRAVICK: Patent Owner?

MS. JELENCHICK: This is Kadie Jelenchick

on behalf of the Patent Owner.

No, not on facts similar to this where there was a California corporation that converted to a Delaware entity and filed an IPR.

JUDGE PETRAVICK: All right. So I'm aware of some cases where a conversion or merger happened after the petition was filed, but not before the petition was filed.

So it seems like we might be in some new territory here on this issue, and might be best for a Director Review issue.

MS. JELENCHICK: Judge Petravick, this is Kadie Jelenchick on behalf of the Patent Owner.

If I can just respond to one thing that Mr. Turner said at the end relating to the fact that they had nothing to gain by the error in the name.

JUDGE PETRAVICK: Uh-huh.

MS. JELENCHICK: The issue is had they filed their petition for IPR sooner, i.e., not waited until the last day of the statutory period, and otherwise tried to tether that forced filing to have consistent timing with the three previously filed IPRs, this issue likely would have came to light far sooner. But, instead, they waited until the end, obscured the facts, and failed to

investigate, notwithstanding signing as an officer of the Patent Office, that it was in compliance with the requirements to bring a petition, that the proper real parties-in-interest were identified. And it was only by happenstance that we learned about it in deposition.

Fast-forward five months later, and here we are facing what should have been a trial date in October, which is now on hold pending resolution of the three earlier-filed IPRs and possibly a further extension of that stay and adjournment of summary judgment and a trial date to accommodate the eight-month delay in bringing that fourth IPR petition.

And so while I appreciate that Petitioner may feel like they had nothing to gain, but they had every obligation to exercise their appropriate due diligence to file with the proper name in the first place. And it shouldn't be the Patent Owner that suffers the penalty because of their carelessness, lack of diligence or, at worst, gamesmanship.

JUDGE PETRAVICK: All right. Thank you.

Petitioner, would you like to respond to that?

MR. TURNER: Again, Andrew Turner for

Petitioner.

Regarding timing, the IPR petition here for the '005 patent was filed within the one-year time limit.

And one thing, you know, I'd like to mention here is, you know, we tried to optimize our IPR petitions and just file one challenging each patent. And there were a number of claim instruction issues in the related litigation.

So that is one thing that -- we did have a Markman hearing in district court. And, you know, some of the delay in filing this fourth IPR petition is waiting for this Markman order which, unfortunately, that -- I don't think that issued until after we ended up filing.

But in our petitions, we sometimes had alternate grounds just to address all the different claim construction positions that were being furthered in the litigation. So that's one of the reasons why we delayed filing this fourth IPR petition.

JUDGE PETRAVICK: All right. Just to be clear, Petitioner, when your client converted, you had conversations with the client after that fact, did they indicate that there was a conversion?

MR. TURNER: No, they did not.

JUDGE PETRAVICK: All right. I'm going to take a minute to pause and poll my colleagues as to whether they have any other questions.

(Brief interruption in the proceedings.)

JUDGE PETRAVICK: All right. They do not.

I think that's all the information that we were seeking from you today. Thank you so much for coming and providing us that information.

Petitioner, as the statutory deadline for entering a decision is coming up, if possible, could you file this transcript as soon as you can into the case?

MR. TURNER: Yes, we will.

JUDGE PETRAVICK: That would be great.

Are there any other issues the parties wish to deal with today?

MR. TURNER: No.

MS. JELENCHICK: Nothing from the Patent Owner.

JUDGE PETRAVICK: All right. Well, thank you again for joining us. We are adjourned.

(Proceeding adjourned at 2:41 p.m.)

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CERTIFICATE

STATE OF MICHIGAN)
) ss
COUNTY OF OTTAWA)

I, CYNTHIA M. THOMAS, Certified Shorthand Reporter and Notary Public, do hereby certify that the foregoing proceeding was taken before me via telephone.

I FURTHER CERTIFY that the proceeding was taken in shorthand and thereafter transcribed by means of computer-aided transcription by me and under my direction and supervision, and that it is a true and accurate transcript of my original shorthand notes.

I FURTHER CERTIFY that I am not a relative or employee or attorney of any of the parties, or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of May, 2024, at Grand Rapids, Michigan.

Cynthia M. Thomas

CYNTHIA M. THOMAS
Certified Shorthand Reporter No. 3836
Notary Public, Ottawa County, Michigan
My Commission Expires: 11-09-28

Y