

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

Petitioner,

v.

WOODWAY USA, INC.

Patent Owner.

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

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**PATENT OWNER'S MOTION TO PRESERVE  
THE RECORD PENDING APPEAL**

## **I. STATEMENT OF RELIEF REQUESTED**

Pursuant to the Board’s December 5, 2024 authorization, Woodway USA, Inc. (“Patent Owner”) respectfully submits this Motion to Preserve the Record Pending Appeal. Patent Owner respectfully requests that the entire docket in IPR2023-00836 (“the IPR”), including all confidential versions of papers and exhibits that are currently sealed pursuant to the Board’s Order at Paper 27, be preserved until at least 45 days after conclusion of all appeals concerning the IPR, including preservation of all sealed documents in non-public form, at which time the parties may file a motion to expunge confidential information.

Patent Owner certifies that it previously conferred in good faith with LifeCore Fitness, LLC (“Petitioner”) regarding Patent Owner’s request to preserve the record pending appeal, and Petitioner indicated that it does not oppose the request.

## **II. BASIS FOR RELIEF REQUESTED**

The documents currently under seal include confidential versions of Patent Owner’s Response; Petitioner’s Reply; Exhibits 1037, 1045, 1047, 2020, 2032, 2033, 2034, and 2038; and the parties’ unredacted demonstratives, which incorporate confidential information from other sealed documents.<sup>1</sup> More

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<sup>1</sup> The oral argument transcript is also not available to the public, and the parties have provided redactions to the transcript for public filing.

specifically, the confidential information contained in the documents currently under seal relate to Patent Owner's confidential, sensitive, and proprietary business and financial information, including information relating to Patent Owner's sales, profits, costing, and customers that Patent Owner maintains as trade secrets and to Petitioner's alleged confidential, sensitive, and/or proprietary business and financial information, as described in the Board's Order at Paper 27.

The Board has ordered the aforementioned documents sealed for good cause due to their inclusion of confidential information, and all such documents are now under the stipulated protective order. Paper 27. The Consolidated Patent Trial Practice Guide (Nov. 21, 2019) ("CPTG") provides that "[c]onfidential information that is subject to a protective order ordinarily would become public 45 days . . . after final judgment in a trial." CPTG at 21-22. Any party seeking to maintain the confidentiality of previously sealed information after the 45-day period has expired may file a motion to expunge the information from the record prior to the information becoming public. *Id.*; 37 C.F.R. § 42.56. In this IPR, the deadline for such a request was December 6, 2024.

Where, as here, a party has submitted a request for panel rehearing (Paper 47), the deadline for filing a notice of appeal is 63 days after action on the request, which in this IPR, has not yet occurred. 37 C.F.R. § 90.3. Under the Federal Rules of

Appellate Procedure and the Federal Circuit Rules of Practice, the Board is required to retain the record pending appeal. Specifically, Federal Circuit Rule 17(a) states that “[t]he agency must retain the record and send to this court a certified list or index unless this court, on motion or sua sponte, orders otherwise.” Fed. Cir. R. 17(a). Federal Circuit Rule 17(d) further requires that the parties and their counsel have access to both the sealed and unsealed portions of the record when a petition for review or notice of appeal is filed. Fed. Cir. R. 17(d). Moreover, Federal Circuit Rule 25.1(c)(1) further requires that “any portion of the record that was subject to a protective order in the trial court or agency ***must remain subject to that order on appeal*** or review.” Fed. Cir. R. 25.1(c)(1) (emphasis added).

Patent Owner intends to file a notice of appeal regarding certain aspects of the Final Written Decision. If the record is not preserved in its entirety during the appeal, the Federal Circuit will not be able to fully consider the issues raised by Patent Owner, which would cause prejudice, either from the public disclosure of confidential information of the parties or from expungement of portions of the record. Accordingly, the record should be preserved in its current form pending any such appeal. Indeed, the Board has previously granted motions to preserve the record pending appeal under similar circumstances. *See, e.g., Slayback Pharma LLC v. Eye Therapies, LLC*, IPR2022-00142, Paper 80 at 2-3 (PTAB July 20, 2023); *Boehringer*

*Ingelheim Int'l GmbH v. AbbVie Biotechnology Ltd.*, IPR2016- 00408, Paper 49, at 2 (PTAB Oct. 19, 2017).

Accordingly, to preserve the record for appeal and to preserve the parties' opportunity to expunge confidential information from the record, Patent Owner respectfully requests that the Board preserve the entire record and maintain under seal in non-public form all currently sealed documents until at least 45 days after conclusion of all appeals, as it has in other proceedings. *See, e.g., Google LLC v. Singular Computing LLC*, IPR2021-00179, Paper 65 at 2-3 (PTAB June 23, 2022); *Sanofi-Aventis U.S. LLC v. Immunex Corp.*, IPR2017-01879, Paper 90 at 2 (PTAB Apr. 3, 2019); *Illumina, Inc. v. Trs. of Columbia Univ. in the City of New York*, IPR2018-00797, Paper 68 at 3 (PTAB Oct. 9, 2019); *Arctic Cat, Inc. v. Polaris Indus., Inc.*, IPR2014-01427, Paper 62 at 2-3 (PTAB Mar. 8, 2016) (preserving record and extending due date for motion to expunge until 45 days from filing of mandate from appeal).

### **III. CONCLUSION**

For the foregoing reasons, Patent Owner respectfully requests that the Board preserve the record of this IPR in its entirety, including preserving documents filed under seal in their sealed, non-public form, for at least 45 days following completion of the Request for Rehearing and any appeal to the Federal Circuit Court of Appeals.

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

Motion to Preserve  
Record Pending Appeal

Dated: December 13, 2024

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 Preserve the Record Pending Appeal** was served on December 13, 2024, by email to Petitioner's counsel of record:

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