

2013-1167  
(Serial No. 10/378,261)

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**United States Court of Appeals  
for the Federal Circuit**

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IN RE RAYMOND GIANNELLI

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*Appeal from the United States Patent and Trademark Office,  
Patent Trial and Appeal Board.*

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**REPLY BRIEF OF APPELLANT**

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JUNE 21, 2013

## CERTIFICATE OF INTEREST

Counsel for Appellant certifies the following:

1. The full name of every party represented by me is Raymond Giannelli
2. The name of the real party in interest represented by me is Cybex International, Inc.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None
4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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Dated: June 21, 2013

/s/ Michael Lawrence Oliverio  
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## STATEMENT OF THE FACTS

### A. The Disclosure Of The '447 Is Itself Persuasive Evidence That It Is *Impossible* To Pull The Handles In A Rowing Motion Along A Substantially Linear Path

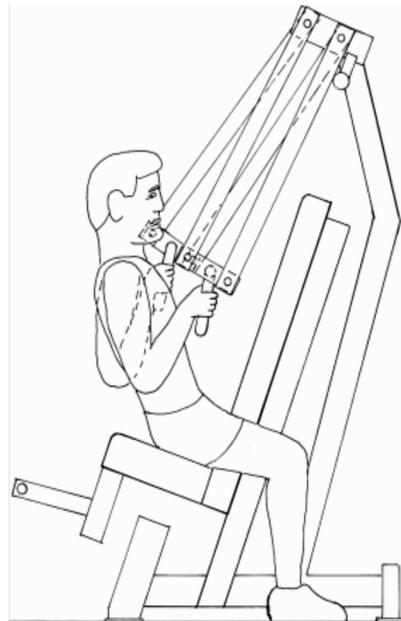
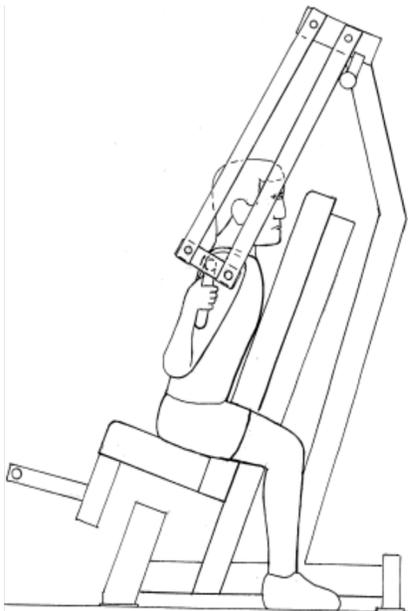
#### The '447 Explicitly Teaches That A User **SITTING DOWN** *Cannot* Perform A Rowing Exercise

If Sitting At Start –

- Chest *Not* Opposed By Back Rest
- User *Not* in a Rowing Position
- Hands Disposed *Behind* Not In Front Of User's Shoulders
- ***Impossible to Pull*** Handles In Starting Position

If User Attempts To Move Handles -

- Whole Body Must Lean Back, *Not Pulling* In a Row Motion
- User's Chest *Not* Pulled Forward *Against* Pad As In Row Motion
- Handles Move Up, *Not* In a Row Motion



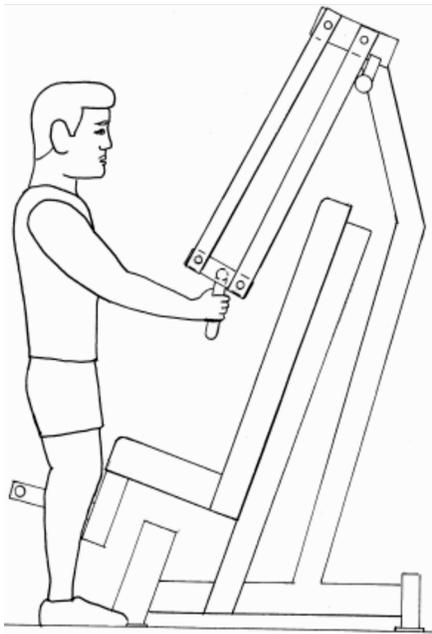
**The '447 Explicitly Teaches That A User STANDING UP  
Cannot Perform A Rowing Exercise**

Standing At Start –

- User's Chest Not Against Pad
- User Not in a Rowing Position
- User Standing Without Front to Rear Support
- **Impossible** To Pull W/O Falling

If User Attempts To Pull Handles -

- User Is Pulled Forward
- By Weight Connected To Handle, Cannot Move Handles
- User Must Hold Onto Handle to Avoid Falling Forward



**B. There Is No Prior Art Exercise Machine That Has Handles That Can Be Pulled In A Rowing Motion Along A Substantially Linear Path**

Apart from its unsupported assertion about the '447, the Patent Office nowhere disputes that there is no other prior exercise machine that has handles that can be pulled *in a rowing motion along a substantially linear path*.

## SUMMARY OF ARGUMENT

The burden is on the Patent Office to cite evidence, not posit conclusions, that it is possible to pull the arms of the '447 prior art chest press in a rowing motion along a substantially linear path. *In Re Lueders*, 111 F.3d 1569 (Fed. Cir. 1997).

By any measure of what is clearly erroneous, the Patent Office's factual assertion that the '447 can be used to pull the handles in a rowing motion along a substantially linear path is clearly erroneous. *In Re Lueders*, 111 F.3d 1569 (Fed. Cir. 1997).

## ARGUMENT

### **A. The Patent Office Is Asking This Court To Blindly Accept The Patent Office's Assertions As Indisputable Fact Without Any Explanation As To Where Those *Facts* Come From**

Nowhere in the Solicitor's brief is there any citation to any *evidence* that appears in the '447 disclosure itself. The only statements about the prior art by the Solicitor are *conclusions*, not facts, that the '447 is an old machine that can be used in the same way as claimed in Appellant's application.

This is just not good enough. The Solicitor is required to cite to *evidence* that appears in the '447 disclosure itself that suggests that it can be used as the Patent Office contends. As this Court said in *In Re Lueders*, 111 F.2d at 1574:

“At oral argument, we repeatedly asked the Solicitor what evidence there was, if any, that formed the basis for the Board's finding that a person of skill in the art would know to use a flexible liquid crystal display over a pressure sensitive-keyboard. Each time, the Solicitor answered that there was no such express mention of evidence in the Board's opinion, but argued that because we should review the decision of the Board, not its opinion, we can disregard the lack of express mention of evidentiary support in the opinion as harmless error and find implicit evidence through inductive reasoning. We are unable, however, to find any such implicit support.”

**B. The *Lueders* Case Is Factually Analogous To This Case, Not *Schreiber***

*Lueders, supra* is factually analogous to this case. In *Lueders* the Solicitor was contending as it does here, that the prior art device cited by the examiner could be used in a manner that was contrary to the actual teaching of the prior art. As stated at 111 F.3d at 1573-1574::

“According to the Board, this is a very broad teaching of inputs and outputs that would be combined by one of ordinary skill in the art to form the *Lueders* invention. .... From these findings, the Board reached the ultimate conclusion that the *Lueders* invention was **obvious** over *Hawkins*, which, it said, discloses **all elements** of the *Lueders* invention -- a liquid crystal output over a pressure sensitive input, in view of the general level of skill in the art.

\*\*\*\*\*

First, *Lueders* argues that *Hawkins* does not teach the use of a visual output at all. .... Because there is nothing in this record to teach the use of a visual output, we agree with *Lueders* that **the Board clearly erred in concluding that *Hawkins* teaches the use of a visual output.**

Second, *Lueders* argues that *Hawkins* does not teach the dynamic interactive connection between the keyboard and display of the invention. The PTO Solicitor argues that the suggestion in *Hawkins* to use a liquid crystal display anticipates this element because it was

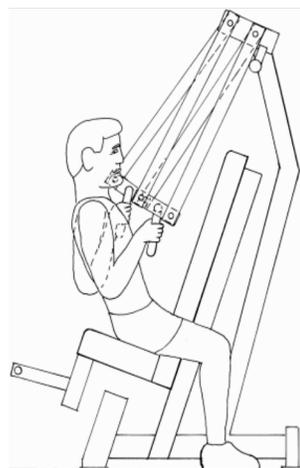
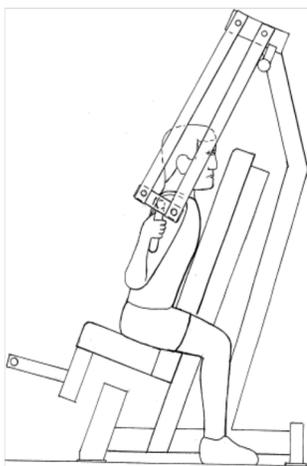
well known in the art that such displays are programmable. .... Lueders argues that Hawkins **teaches away** from Lueders .... As before, **we find no evidence offered by the Board or the PTO Solicitor** to refute this factual assertion by Lueders. As a result, we are persuaded by Lueders that the Board clearly erred on this point.

Third, Lueders disputes the Board's finding that one of skill in the art would know to use a pressure sensitive keyboard with a liquid crystal display. .... It appears from the Board's reasoning that it misinterpreted the above phrase from column 4, lines 43-46 of Hawkins concerning "other display/input means". .... **absent any contrary evidence cited by the Board** in its opinion, we reverse the Board on this point..

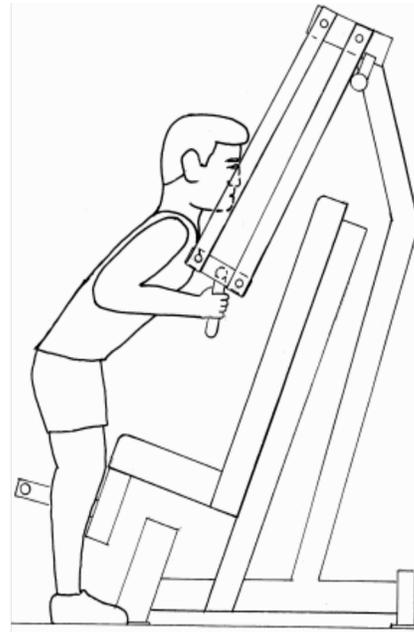
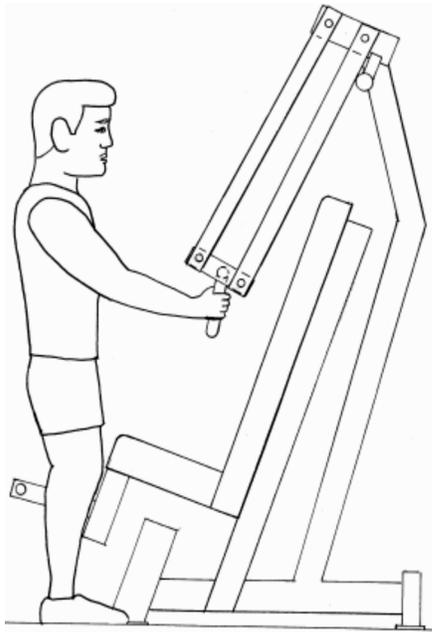
**C. The Patent Office Does Not Dispute That The '447 Teaches That It Cannot Be Used As The Patent Office Contends**

The Solicitor's brief nowhere disputes and does not offer any explanation based on any *interpretation* of the '447 that the following is not true and accurate:

**SITTING, Cannot Pull '447 Handles  
In A Rowing Motion Along A Substantially Linear Path**



**STANDING, *Cannot Pull* '447 Handles  
In A Rowing Motion Along A Substantially Linear Path**



**D. *Schreiber* Is Not Analogous To This Case**

The Patent Office places paramount reliance on *In Re Schreiber*, 128 F.3d 1473 (Fed. Cir. 1997) without any consideration of the relevant facts. In *Schreiber* the thing being claimed was a *simple conical funnel*, the only distinction in structure over the prior art being the *size* of the small aperture at the dispensing end of the funnel. The prior art cited against this simple claimed device was another *simple conical funnel*. There was *no dispute* that the prior art funnel could perform and was intended to perform the exact same function, namely dispensing of popcorn through the small aperture. The only dispute was whether the *size* of the funnel aperture was “such as to by itself jam up the popped popcorn ... and permit the dispensing of only a few kernels at a shake ... “

## Schreiber Claimed Funnel



## Prior Art Funnel



Clearly, the size of an aperture of a simple conical funnel is not *this* case.

In this case, the Patent Office is asserting that a highly complex prior art machine, the '447 which is comprised of a multiplicity of component parts arranged in a highly peculiar assembly, can be used in a ***backwards, unintended and contrary*** way to meet the limitations of a patent claim that calls for a completely contrary function, use and structure.

### **E. The Patent Office Waives Its Argument That The '447 Can *Inherently*, Be Used To Pull In A Rowing Motion Along A Substantially Linear Path**

In its Brief, the Patent Office no longer asserts that the '447 can inherently be used to pull the handles in a rowing motion.

**F. Dependent Claims 14 and 22, The Patent Office Admits These Claims Are Patentable And Waives Its Argument That The ‘447 Back Rest Can Function As A Chest Pad**

In its Brief, The Patent Office nowhere contends that the ‘447 back rest can be used as a chest pad. Dependent claims 14 and 22 specifically call for a chest pad:

14. The exercise machine according to claim 1, further comprising a user support structure including: a seat mounted to the frame; *and a chest pad mounted to the frame above and in front of the seat.*

22. The row exercise machine according to claim 15, further comprising a user support structure including: a seat mounted to the frame; *and a chest pad mounted to the frame above and in front of the seat.*

Given the Patent Office’s lack of response to the fact that the ‘447 back rest is not a structure analogous to a chest pad, the Patent Office admits that at least these claims are patentable.

## **CONCLUSION**

For the reasons stated, it is respectfully submitted that the Patent Office's Decision is erroneous and should be reversed.

Dated: June 21, 2013

Respectfully submitted,

/s/ Lawrence Oliverio

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**United States Court of Appeals  
for the Federal Circuit**  
IN RE RAYMOND GIANNELLI, No. 2013-1167  
**CERTIFICATE OF SERVICE**

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by NOVAK, DRUCE, CONNOLLY, BOVE & QUIGG LLP, Attorneys for Appellant to print this document. I am an employee of Counsel Press.

On **June 21, 2013**, Counsel for Appellant has authorized me to electronically file the foregoing **Reply Brief of Appellant** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to any of the following counsel registered as CM/ECF users:

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Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court, via Federal Express, within the time provided in the Court's rules.

June 21, 2013

/s/Robyn Cocho  
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
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REQUIREMENTS**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

  x   The brief contains  1,495  words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), or

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Dated: June 21, 2013

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