

FILED

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA**

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CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

Case No. 1:15-CV-72

Erik B. Cherdak
600 Cameron Street
Alexandria, Virginia 22314

Plaintiff,

v.

Starwood Hotels & Resorts Worldwide, Inc.
One StarPoint
Stamford, CT 06902

Defendant.

**COMPLAINT FOR PATENT
INFRINGEMENT**

JURY TRIAL DEMANDED

COMPLAINT FOR PATENT INFRINGEMENT

Comes Now, Plaintiff Erik B. Cherdak (hereinafter “Plaintiff” or “Cherdak”) and in and for his Complaint against the above-named Defendant, states as follows:

SUMMARY OF THE ACTION

This is an action for patent infringement under the U.S. Patent Act – 35 USC 35 USC § 1, *et seq.* Certain in-hotel exercise facility and working tracking service offerings sold and provided to hotel guests by Defendant Starwood Hotels & Resorts Worldwide, Inc.’s and its franchisees as hotel amenities and features are accused of patent infringement of U.S. Patent No. 8,915,823 to McKirdy *et al.* In providing such service offerings, Defendant and its franchisees perform the method steps that are defined and covered by the claims of ‘823 patent. In Defendant’s company-owned and franchised in-hotel fitness facilities (e.g., within WESTIN-WORKOUT® Studios, SHERATON

Fitness Centers, etc.), hotel guests are encouraged to regularly and routinely engage in customized cardio workout regimens using cardio exercise machines that facilitate Defendant's performance of the method steps defined and covered by the claims of the '823 patent. By way of example, and not limitation, Defendant's hotel guests are encouraged to bring their smartphones and tablet devices to in-hotel fitness facilities (e.g., into WESTIN WORKOUT® Fitness Studios) to engage in "high-tech" cardio workouts using state-of-the-art cardio exercise machines including, but not limited to, treadmills, elliptical machines, and stationary bicycles configured to support smartphone connectivity. At present, and based on only publically available information, the method steps defined by Claims 1, 2, 3, 4, 6, 7 and 8 of the '823 patent are literally and directly infringed by the exercise-related service offerings regularly and routinely advertised and sold and provisioned to hotel guests throughout Defendant's vast hotel networks. In accordance with Plaintiff's right to exclude others from using, making and selling service offerings that perform the method steps covered by the claims of the '823 patent, Plaintiff is entitled to redress for past patent infringement and injunctive relief to prevent future infringement and irreparable harm. The '823 patent is a method patent defining and covering steps for managing communications between an exercise machine and a portable storage device like or similar to a smartphone. Infringement occurs within Defendant's company-owned and franchised in-hotel exercise facilities that offer state-of-the-art cardio exercise machines (regardless of manufacturer) that permit connectivity with smartphones, tablets and other similar devices. Infringement of the '823 patent occurs when Defendant provisions a covered service offering within Defendant's

company-owned and franchised in-hotel fitness facilities (and within “in-room” fitness facilities such as those offered under Defendant’s WESTIN® WORKOUT® brand).

THE PARTIES

1. Plaintiff is an individual residing in Gaithersburg, Maryland. Plaintiff maintains his principal place of business relative to enforcement of his patent and other intellectual property rights at 600 Cameron Street, Alexandria, Virginia 22314. At all times relevant herein, Plaintiff has been and is the sole owner of U.S. Patent No. 8,915,823 to McKirdy, *et al* (hereinafter the “patent-in-suit”). Plaintiff is a registered patent attorney and licensor of technology and patents in the exercise machine and corresponding workout tracking marketplaces. Plaintiff is a licensor and/or grantor of rights related to exercise tracking technologies and patents related to body-worn/wearable, in-shoe and accelerometer-based exercise tracking products like those offered by FITBIT, GARMIN INTERNATIONAL, INC., and others in relation to Plaintiff’s U.S. Patent Nos. 5,343,445 and 5,452,269 to Cherdak (Plaintiff is the sole, named inventor thereof). Additionally, certain STARTRAC® branded cardio exercise machines including, but not limited to, treadmills, steppers, stair-climbers and stationary bicycles manufactured under the STARTRAC® brand are marked with Plaintiff’s U.S. Patent No. 8,118,709, and have been so marked since at least July, 2013. See www.startrac.com/patents. Plaintiff also is the owner and licensor of computer software that facilitates intelligent data communications between cardio exercise machines and portable storage devices. Plaintiff has granted license rights to health clubs under his ‘709 and ‘823 patents.

2. Defendant Starwood Hotels & Resorts Worldwide, Inc. (“STARWOOD”) is a publically traded corporation (NYSE: HOT) organized under the laws of the State of

Maryland, that has its principal place of business at One Star Point, Stamford, Connecticut, 06902. Within hotels owned, operated and franchised under the brands owned by STARWOOD, fitness centers and related service offerings (including those service offerings described herein and that are accused of patent infringement) operate and are offered, respectively, as in-hotel fitness clubs for the benefit of hotel guests. Within such in-hotel fitness clubs owned and operated within Defendant's vast network of STARWOOD and its multi-branded hotels, Defendant and its franchisees provision service offerings that facilitate intelligent data communications between cardio exercise machines and portable content devices like smartphones – service offerings that infringe the methods defined in the claims of Plaintiff's U.S. Patent No. 8,915,823 as asserted in this Complaint. On many levels, Defendant is a sizeable health-club operator and multi-brand, multi-unit manager in the very lucrative hospitality marketplace.

JURISDICTION AND VENUE

3. This is an action for Patent Infringement of U.S. Patent No. 8,915,823 assigned to Plaintiff under the Laws of the United States of America and, in particular, under Title 35 of the United States Code (Patents – 35 USC § 1, *et seq.*). Accordingly, jurisdiction and venue are properly based in accordance with Sections 1338(a), 1391(b) and (c), and/or 1400(b) of Title 28 of the United States Code.

4. Defendant operates company-owned hotels and oversees the establishment and brand management of numerous franchised hotels throughout the United States and abroad, and, in particular, in this judicial district of Virginia. Based on Defendant's 2013 Annual Report (SEC Form 10K), Defendant owns, operates, manages, controls, and oversees operations of approximately 1175 hotels and guest-centric properties throughout

the United States under at least nine (9) famous brands including, but not limited to, Sheraton® Hotels, Westin® Hotels, W® Hotels, The Luxury Collection® Hotels, St. Regis® Hotels, Le MERIDIEN® Hotels, ALOFT® Hotels, ELEMENT® Hotels, and Four Points® Hotels. At all times relevant herein, Defendant has engaged in the infringement of and/or induced the infringement of and/or committed contributory infringement of the patent-in-suit patent throughout the United States, including, but not limited to, such significant acts in the Commonwealth of Virginia.

FACTS

5. U.S. Patent No. 8,915,823 to McKirdy *et al* officially issued from the U.S. Patent and Trademark Office (USPTO) on December 23, 2014. The '823 Patent has been and assigned in total to Plaintiff. A copy of the '823 patent is attached hereto at **Exhibit 1**.

6. As an operator and franchisor of hotel properties, Defendant regularly requires both company-owned and franchised facilities to provide in-hotel fitness facilities in which hotel guests and exercisers may engage in cardio workout regimens using cardio exercise machines such as cardio treadmills, cardio elliptical machines, cardio stair climbers and recumbent and stationary bicycles. Defendant has intentionally set out to make it in-hotel (and, in some cases "in-room") fitness facilities within hotels in the STARWOOD system a distinguishing hotel amenity and feature to encourage hotel guests to purchase coveted room-nights in the highly competitive hotel and hospitality marketplace. For example, and not by way of limitation, in STARWOOD's WESTIN® hotels that incorporate a WESTIN WORKOUT® fitness facility/studio, cardio exercise machines now allow exercisers to link their smartphones to such cardio exercise machines to facilitate customized workout regimens, to facilitate exercise tracking, and to

allow guests to enjoy an overall feeling of “wellness” by staying at a WESTIN® hotel in which they can engage in invigorating cardio workouts. In fact, many, if not all, WESTIN WORKOUT® fitness facilities have incorporated cardio treadmills, elliptical machines and different types of stationary bicycles that facilitate wired and wireless communications with Apple® and Android™ based smartphones as hotel amenities to enhance workout regimens for hotel guests and customers. Travelers and, most importantly, the coveted “repeat hotel customer” look for fitness facility uniformity when making their selection where to lodge. In fact, just like a hotel guest who will accept only the robes or particular soaps and bath salts offered in one particular hotel, other repeat hotel customers look for particular types of gym and exercise equipment so that lodging experiences are consistent and universal. In fact, many hotel guests and exercisers will not stay in a particular hotel unless a particular hotel offers consistent workout amenities that include exercise and workout tracking, the ability to create customized workouts that may be uploaded from a person’s smartphone to a cardio exercise machine, and, in some instances, a particular brand of exercise machines. WESTIN® branded hotels have made wellness and exercise critical selling features of a “WESTIN” experience by investing millions of dollars into high-tech exercise facilities (WESTIN WORKOUT® Fitness Studios) to entice hotel guests to select and purchase room-nights at WESTIN® branded hotels. As Defendant and its SHERATON business unit advertises, “Travel and fitness go hand-in-hand...You enjoy your travels more when you are maintaining your health and fitness routines.” See Exhibit A attached to **EXHIBIT 3** of this Complaint.

7. As a hotel and health-club chain owner, operator and franchisor, Defendant widely advertises and promotes “high-tech” exercise and workout amenities as service offerings within the hotels that form Defendant’s hospitality system. As infringing service offerings, Defendant regularly claims that hotel guests can use their smartphones such as by coupling and connecting the same to cardio exercise machines within in-hotel fitness facilities. Take for example, the Westin® Hotel at Times Square in New York City. There, Defendant approves, advertises, and provisions a high-tech WESTIN WORKOUT® Fitness Studio and related service offerings that are sold to hotel guests on a regular and routine basis as follows:



THE WESTIN NEW YORK AT TIMES SQUARE
WESTINWORKOUT® FITNESS STUDIO

*Our all-new, complimentary WestinWORKOUT® Fitness Studio provides the ultimate recharge, ready whenever you need it. Located on the eighth floor, this state-of-the-art facility offers the latest in Life Fitness equipment. While you’re exercising, **you can personalize your interactive workout**, connect and manage your playlists, watch videos, surf the web, and even power your Apple or Android product.*

See **Exhibit 2** (emphasis supplied). Defendant’s advertising entices potential hotel guests to purchase coveted room-nights and related infringing service offerings by advertising

that hotel guests can and do in fact use their smartphones in combination, for example, with cardio exercise equipment *inter alia* to “personalize their interactive workout[s].”

8. Defendant’s use of LIFE FITNESS cardio exercise equipment (as exemplified above), for example, does in fact support the provisioning of infringing service offerings and the performance of methods advertised by Defendant and its franchisees that can and do regularly take place within STARWOOD’s hotels as operated nationwide and under at least nine (9) different brands. For example, and not by way of limitation, Defendant’s owned and operated cardio exercise treadmills and cardio elliptical machines are capable of communicating with smartphones as advertised by Defendant through its STARWOOD, WESTIN, SHERATON, etc. websites. By way of further example, and not limitation, LIFE FITNESS developed a set of products, technologies and open APIs (open source-code application program interfaces) that facilitate functional workout operations carried out by Defendant completely within Defendant’s branded hotels that are covered by claims of the ‘823 patent-in-suit. The cardio treadmills shown in the image contained within paragraph 7, *supra*, incorporate electronics and the aforementioned open-source technologies that facilitate operation of “Apps” that are free and available for both Apple and Android smartphones, namely, the LFCONNECT App (and a host of other LF-OPEN Apps) that operates as a smartphone application program and front-end interface to allow users to access the LFCONNECT website to download customized workout programs to correspondingly equipped cardio exercise machines (e.g., certain LIFE FITNESS cardio exercise machines).¹ The cardio exercise machines

¹ The LFCONNECT App is one of many Apps that permit smartphones to connect with cardio exercise machines within Defendant’s in-hotel fitness facilities. For example, very popular Apps such as RUNTASTIC , UP by Jawbone, and MY FITNESS PAL to name a few allow exercisers to connect their smartphones to equipped cardio exercise machines while using Defendant’s in-hotel fitness facilities and infringing service offerings.

shown in the picture included within paragraph 7, *supra*, for example, like the thousands of cardio exercise machines that are operating within in-hotel fitness facilities within Defendant's company-owned and franchised hotels, are used by Defendant and its franchisees to perform the steps of establishing a connection (wired or wireless) between a smartphone or other similar device, communicating personalized workout and machine metrics over that connection, generating workout data based on sensor data (e.g., from a body sensor, a machine sensor, or some other sensory device), and communicating that workout data to at least one of either the smartphone and a back end system (e.g., a website, etc. like or similar to www.lfconnect.com).²

9. As an owner and operator of hotels under many different brands, Defendant is directly carrying out method steps that permit hotel guests to enjoy the amenities provided by in-hotel high-tech fitness facilities. As a franchisor with tight control over its franchisees of Defendant's many branded hotels, and especially tight control over advertising and branding operations by such franchised hotel-units, Defendant encourages, entices induces and mandates that others to stay "true" to STARWOOD's branding policies when they own and operate high-tech fitness facilities – facilities in which hotel guests can and actually do engage in customized workouts to directly realize the benefits of exercise tracking that is achieved by employing cardio exercise machines that support connectivity to devices like smartphones. In all cases, Defendant acts as the central operator of reservations, overseer of hotel features, and advertiser and brand

² As noted in the Summary of the Action beginning on page 1 of this Complaint, this case is not tied to any particular brand of cardio exercise equipment. Instead, this case is one for patent infringement related to the '823 method-type patent and, in particular, one covering the Defendant's in-hotel fitness facility service offerings that perform all of the method steps defined by the claims of the '823 patent. Accordingly, use of LIFE FITNESS equipment is merely exemplary and should not be read as limiting the scope of the claims of the '823 patent-in-suit or the cause of action expressed herein. Discovery in this case will reveal the domain of all branded products found within Defendant's company-owned and franchised in-hotel fitness facilities that are used by Defendant in performing the method steps defined by the claims of the '823 patent-in-suit.

manager of hotel amenities for use by hotel customers who can and do engage in technology-based workouts, take advantage of branded consistency in terms of in-hotel workout amenities and operations (and in some cases, in-hotel *room* workout facilities – e.g., WESTIN’s *in-room* cardio machine installations), and who enjoy the benefits of automated workout customization and workout performance tracking from one hotel to the next.

10. Defendant regularly and routinely performs method steps within fitness facilities within Defendant’s company-owned and franchised hotels that are claimed in the method steps defined by the claims of the ‘823 patent-in-suit.

COUNT I – PATENT INFRINGEMENT

Paragraphs 1 through 10 are hereby incorporated by reference as if recited verbatim herein.

11. Given the validity and enforceability of the ‘823 patent-in-suit against present and future infringing conduct prohibited under the U.S. Patent Act (35 USC § 1, *et seq.*), Plaintiff, *inter alia*, possesses the right to pursue a cause of action against Defendant for its own direct conduct to offer for sale, to sell, and to use and provision certain exercise fitness facility services to exercisers that are covered by the claims of the ‘823 patent-in-suit and in direct violation of 35 USC § 271(a) (direct infringement). Defendant continues to offer to sell, to sell, and to use and to provision certain services within company owned exercise facilities that are covered by the method-type claims of the ‘823 patent-in-suit in direct violation of 35 USC § 271(a). **Exhibit 3** contains infringement charts that demonstrate exemplary instances of direct patent infringement of at least Claims 1, 2, 3, 4, 6, 7, & 8 as such direct patent infringement was informed by publically

available information at the time of commencement of the instant lawsuit. **Exhibit 3** and the infringement charts found therein are incorporated herein by reference as if recited herein and therefore form an express part of this pleading that must be answered by Defendant. *See* Fed. R. Civ. P. Rule 10(c). Discovery likely will reveal additional materials that will further inform the infringement inquiry now before this Honorable Court. Discovery in this case likely will reveal additional instances of patent infringement such as may be related to additional service offerings and claims of the patents-in-suit. The fitness facility services offered by Defendant and its franchisees perform all of the method steps defined in the asserted claims in the same location within each hotel, and in the United States.

12. Defendant regularly and routinely performs all the operations and methodic steps within fitness facilities within Defendant's company-owned and franchised hotels that are claimed in the method steps defined by the claims of the '823 patent-in-suit. Accordingly, Defendant has infringed and continues to infringe '823 patent-in-suit both directly and indirectly and based on a literal reading of the asserted claims as specified in the Infringement Charts found in Exhibit 3 – which infringement charts form part of this Complaint and are hereby incorporated herein by reference. *See* Fed. R. Civ. P. Rule 10(c). Defendant has so acted to infringe the '823 patent-in-suit without authority from the Plaintiff and with no rights of any kind under the '823 patent-in-suit. Plaintiff reserves the right to assert patent infringement under the Doctrine of Equivalents should the Court rule away from the literal language of the claims of the '823 patent-in-suit that in fact literally read on the accused operations and methodic steps that are carried out within in-hotel fitness facilities located within Defendant's company-owned and

franchised hotels, and that are marketed, advertised as and known by Defendant to be amenities and vital services of Defendant's branded hotels.

13. As a marketer and advertiser of fitness club facilities and services known by Defendant to be contemplated by Plaintiff's claim of patent infringement as set forth in this Complaint, Defendant is liable for indirect patent infringement and, in particular, under appropriate legal standards related to application of 35 USC § 271(b) (wrongful inducement to infringe a patent), and 35 USC § 271(c) (wrongful contribution to the acts that constitute patent infringement). Any continued conduct to induce others to infringe and to contribute to the infringement of the '823 patent-in-suit such as by inducing others to operate and to use in-hotel fitness facilities and by contributing to such infringement in accordance with applicable legal standards is wrongful induced and contributory patent infringement in violation of the U.S. Patent Act.

14. Defendant's direct and indirect patent infringement in violation of the U.S. Patent Act will continue without this Court's intervention to remedy such patent infringement.

15. Because of Defendant's infringing conduct in the marketplace, Plaintiff and the '823 patent-in-suit will continue to be injured. Accordingly, the U.S. Patent Act mandates that Plaintiff be granted remedies including, but not limited to, equitable relief to stop prospective infringement, and damages for such patent infringement in an amount of no less than a reasonable royalty.

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PRAYER FOR RELIEF

Plaintiff prays for judgment and relief as follows:

A. For a judgment that Plaintiff's '823 patent-in-suit is infringed by Defendant (including, but not limited to, its subsidiaries, predecessors-in-interest and business units however and wherever formed, etc.) in that Defendant has acted and continues to act in unauthorized ways to bring to market and encourage the infringing provision of certain fitness facility services within Defendant's company-owned and franchised fitness facilities;

B. That a permanent injunction be issued against continued infringement of the patent-in-suit by Defendant and its parents, subsidiaries, officers, directors, employees, affiliates, representatives and agents, and all those acting in concert with or through Defendant, directly or indirectly, including, but not limited to, distributors, customers, and other retailers;

C. That an accounting be ordered and had for damages caused to Plaintiff by Defendant's acts in violation of the U.S. Patent Act (35 USC § 1, *et seq.*) together with pre-judgment and post-judgment interest;

D. That damages be assessed and awarded to Plaintiff in an amount based on no less than a reasonable royalty in relation the infringing fitness facility services as specified herein;

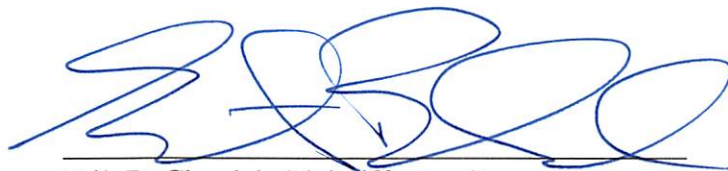
E. That any damages awarded in accordance with any prayer for relief be enhanced and, in particular, trebled in accordance with the U.S. Patent Act for Defendant's acts which are found to be willful; and

F. Such other and further relief as this Court shall deem just and proper.

DEMAND FOR TRIAL BY JURY

The Plaintiff hereby demands a TRIAL BY JURY on all issues so triable.

Respectfully submitted,



Erik B. Cherdak, Plaintiff *Pro Se*
600 Cameron Street
Alexandria, Virginia 22314, Ph.(202) 330-1994
email: ebcherdak@gmail.com

January 7, 2015

Exhibits:

1. A copy of U.S. Patent No. 8,915,823 to McKirdy *et al.*
2. A printout of a website located at:
http://www.starwoodhotels.com/westin/property/features/attraction_detail.html?propertyID=1380&attractionId=1001016885&language=en_US printed on January 6, 2014
3. A set of Infringement Charts for Claims 1, 2, 3, 4, 6, 7 & 8 w/additional exhibits A-D.