

legally issued by the U.S. Patent and Trademark Office (“USPTO”) on September 19, 1995, and is entitled “Athletic Shoe with Timing Device.” At all times relevant herein, PLAINTIFF has been and is the named inventor of U.S. Patent No. 5,343,445 (“‘445 Patent,” or “Cherdak ‘445 Patent”), which was duly and legally issued by the USPTO on August 30, 1994 and is entitled “Athletic Shoe with Timing Device.” The Cherdak ‘445 Patent and the Cherdak ‘269 Patent shall be collectively referred to herein as “the Cherdak Patents.”

2. On information and belief, Defendant CURTIS A. VOCK is an individual who resides at 3165 10th Street, Boulder, Colorado, 80304 and is a partner at the law firm of Lathrop & Gage, LLP, located at 4845 Pearl East Circle, Suite 201, Boulder, Colorado, 80301. VOCK regularly and continuously conducts business in this judicial district and has voluntarily appeared in this action.

3. On information and belief, Defendant PHATRAT TECHNOLOGY, LLC is a Colorado Limited Liability Company, located at 4845 Pearl East Circle, Suite 300, Boulder, Colorado, 80301. The Colorado Secretary of State reports an additional address for PHATRAT of 10437 Goosehaven, Lafayette, Colorado, 80026. The Colorado Secretary of State also reports that VOCK is the primary contact for PHATRAT. PHATRAT owns and operates a website that is accessible to citizens of Virginia and has voluntarily appeared in this action.

4. Defendant NIKE, INC. is an Oregon corporation, having its principal place at 1 Bowerman Drive, Beaverton, Oregon, 97005. NIKE manufactures, markets, distributes and sells infringing athletic shoes and related products, accessories, and product lines (including but not limited to, the NIKE+ Sport Kit, the NIKE+ compatible iPhone™ 3GS, 4, and 4S, the NIKE+ compatible iPod™ Touch™, the NIKE+ Sensor, shoe sensors, APPLE iPod® and iPhone® transceivers, and wireless wristband transceivers (“NIKE+ SPORTSBAND”)), through its

network of retailers and its Internet website www.nike.com (“NIKE website”), throughout the United States and in this judicial district. The products described in this paragraph shall be collectively referred to herein as the “NIKE+ products” or “NIKE PLUS products.”

5. Defendant APPLE, INC. is a California corporation with its principal place at 1 Infinite Loop, Cupertino, California, 95014. On information and belief, APPLE is in a business relationship and acts in concert with NIKE to manufacture, market, sell and distribute the NIKE+ products. Defendant APPLE offers and sells NIKE+ products through retail stores and its website www.apple.com (“APPLE website”) to parties throughout the United States and in this judicial district.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1338 and 1400 because the case or controversy arises out of a federal law.

7. This Court has jurisdiction to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202. 28 U.S.C. § 2201 provides this Court with jurisdiction to declare the rights and other legal relations of PLAINTIFF and DEFENDANTS, and 28 U.S.C. § 2202 provides this Court with jurisdiction to grant further relief based on that declaratory judgment after reasonable notice and hearing.

8. This Court has jurisdiction to hear PLAINTIFF’s claim for violation of the Sherman and Clayton Antitrust Acts under §§ 2 and 4 of those Acts (15 U.S.C. Ch. 1 §§ 2, 15) and in accordance with *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965).

9. This Court has personal jurisdiction over all named defendants. Defendants VOCK and PHATRAT have voluntarily submitted to personal jurisdiction in this case. *See* ECF 10, Defendant's Motion to Dismiss Plaintiff's Original Complaint.

NATURE OF THE CASE

10. This is an action for, *inter alia*, Patent Infringement of the Cherdak '445 Patent and the '269 Patent under 35 U.S.C. § 271.

11. This action also seeks a Declaratory Judgment by the Court that U.S. Patent Nos. 5,636,146 and 5,960,380 ("146 Patent" and "380 Patent," respectively), and any and all patents claiming priority, in whole or in part, to the '146 and/or the '380 patents are *invalid* as improperly obtained from the USPTO as a result of inequitable conduct and fraud.

12. This action also includes a claim for Patent Interference between PLAINTIFF and all DEFENDANTS under 35 U.S.C § 291 of the U.S. Patent Act. Under this claim, the Court has the power to adjudicate the validity of the patents in contest.

13. This action also includes a claim for violation of § 2 of the Sherman Antitrust Act, as permitted by § 4 of the Clayton Act in accordance with *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965).

14. NIKE and APPLE, individually and/or in concert, presently and in the past have engaged in the design, importation, distribution, sale, and offering for sale of athletic shoes and related and paired technologies and products including, but not limited to, those which incorporate technologies covered by the Cherdak Patents.

15. At all times relevant herein, DEFENDANTS have engaged in the infringement of, induced the infringement of, and/or committed contributory infringement of the Cherdak Patents throughout the United States and, in particular, in this judicial district.

16. DEFENDANTS, individually and/or in concert, have engaged in and/or continue to engage in inequitable conduct before and fraud on the USPTO in securing, *inter alia*, the issuance of a portfolio of patents including, but not limited to, the '146 Patent and '380 Patent, both to Flentov, *et al.* and/or all "follow-on" U.S. and foreign counterpart patents that base their "priority of invention" date back to November 21, 1994 by express reliance on either the '146 Patent or the '380 Patent, or both.¹

FACTUAL BACKGROUND

17. On or about July 6, 1993, PLAINTIFF filed a patent application entitled "Athletic Shoe with Timing Device," which resulted in the issuance of the '445 Patent on August 30, 1994.

18. On or about August 29, 1994, PLAINTIFF filed a continuation-type application also entitled "Athletic Shoe with Timing Device," which resulted in the issuance of the '269 Patent on September 19, 1995.

19. The Cherdak Patents successfully underwent expert review by the USPTO on two occasions: first, in the early 1990's during initial examination proceedings and later during *ex parte* reexamination proceedings in 2007-2008.

20. Reexamination proceedings resulted in the confirmation of many claims of the Cherdak Patents without amendment.

21. The Cherdak Patents are attached hereto with their re-examination certificates as **Exhibits 1-4**. The Cherdak Patents cover, *inter alia*, shoes and related products like those used, made, imported, and sold by NIKE and APPLE throughout their vast distribution networks.

¹NIKE and APPLE may contend that they too have been victims of fraud by acquiring the Flentov et al. patents in the first place. Notwithstanding, a fraudulently obtained patent, and any other patents relying thereon for priority of invention, must fail as invalid when there has been egregious inequitable conduct.

22. The NIKE+ (pronounced “Nike Plus”) product line has been an extremely successful consumer product offering.

23. On information and belief, APPLE sold more than 80,000,000 iPhones incorporating NIKE+ technology in 2011 alone. In addition, APPLE also sells iPods, NIKE+ Sports Kits, NIKE+ Sportsband, and a host of other products incorporating NIKE+ technologies.

24. As of late October, 2011, NIKE advertised over 70 shoe styles directly configured and sold for infringing purposes for use with NIKE+ technology.²

25. NIKE and APPLE, either individually or jointly, presently, and in the past, imported, marketed, distributed, sold and offered for sale infringing athletic shoes and related and paired products, such as those bearing the “NIKE+” trademark.

26. NIKE and APPLE had full knowledge of the Cherdak Patents prior to introducing, manufacturing, marketing, distributing, offering and selling infringing products, including but not limited to NIKE+ products and those products, which are sold by DEFENDANTS to operate and/or pair with other NIKE+ products, in the marketplace.

27. Despite DEFENDANTS’ actual knowledge of the Cherdak Patents, NIKE and APPLE have engaged in a willful infringement campaign without respecting PLAINTIFF’S valid patent rights.

28. DEFENDANTS continue to seek and procure patents directed to their personal fitness and monitoring technologies and products (like and similar to the NIKE+ products) and, in so doing, continue to reference and rely on the Cherdak Patents to make out alleged enabling disclosures for their own alleged inventions. *See, e.g.*, U.S. Patent No. 8,036,051 to VOCK, et al. issued October 11, 2011 (expressly mentioning in the SUMMARY OF THE INVENTION

² A discussion of NIKE+ technology is included in **Exhibit 5**.

section thereof that U.S. Patent 5,343,445 to Cherdak provides “useful information” to teach those of ordinary skill in the art how to make and use the invention allegedly developed by VOCK, *et al.*).

29. NIKE and APPLE have licensed (or otherwise acquired), either alone or collectively, certain patents originally issued by the USPTO to PHATRAT, VOCK’S alter ego company.

30. All patents based on PHATRAT’s ‘146 and ‘380 patents were filed more than one year after the priority date of the Cherdak ‘445 Patent and ‘269 Patent.

31. On information and belief, PHATRAT either licensed or assigned ownership and/or rights in its invalid patent assets to either or both APPLE and NIKE after PHATRAT filed suit against NIKE and APPLE based on NIKE’s and APPLE’s alleged infringement of PHATRAT’s knowingly invalid patents in the Federal District Court for the District of Colorado.

32. During the proceedings leading to the issuance of the ‘146 and ‘380 Patents, VOCK, a patent attorney representing himself and his co-inventors, made false and misleading material statements about the Cherdak Patents in a fraudulent effort to win allowance for VOCK’s late-to-post patent applications and claims.³ The ‘146 and ‘380 patents are attached hereto at **Exhibits 6-7**, respectively.

33. By materially mischaracterizing the Cherdak Patents and their disclosures, and ignoring the plain and clear language of the specifications and claims of the Cherdak Patents (which form part of the Specification of the Cherdak Patents), in the ‘146 and ‘380 patent applicants, VOCK (and possibly others), defrauded the USPTO and the Patent Examiner.

³ The Cherdak Patents are the primary references on which the USPTO relied in rejecting the application giving rise to both the ‘146 and ‘380 Patents.

34. In addition to materially mischaracterizing and lying about the Cherdak patents, VOCK intentionally concealed prior art teachings within the Cherdak Patents that would have contradicted averments VOCK made in order to intentionally deceive the USPTO into issuing the '146 and '380 Patents. VOCK, acting as co-inventor and attorney of record, concealed the fact that the Cherdak Patents teach the use of the devices mentioned therein that may be applied to structures that are configured to move along a surface (e.g., skating structures – roller skates, ice-skates, skate boards, etc.). VOCK's concealment was material to patentability of the claims of, *inter alia*, the '380 Patent.

35. VOCK intentionally deceived the USPTO and wrongfully won the allowance of, *inter alia*, the '146 and '380 Patents. VOCK's conduct, as will be discussed below rises to the level of affirmative egregious conduct.

36. As shown in **Exhibit 8**, U.S. Patent 8,036,851 to VOCK, *et al.*, issued October 11, 2011 (and now assigned to APPLE), bases its priority of invention date back to VOCK's original root patent – the '146 Patent. The VOCK family of applications and patents spans almost two decades and now represents prior art that relies on an early filing date in 1994 for priority of invention – a priority date long after PLAINTIFF's patents.

37. As shown in **Exhibit 9**, U.S. Patent 7,983,876 to VOCK, *et al.*, issued July 19, 2011 (now assigned to NIKE), bases its priority of invention date back to VOCK's original root patent – the '146 Patent.

38. VOCK's and PHATRAT's inequitable conduct and fraud on the USPTO either was known or reasonably should have been known to NIKE and APPLE during their due diligence of their business dealings with PHATRAT and its owners (including, but not limited to, VOCK). Also, since the '851 and the '876 Patents to VOCK, *et al.* (assigned to APPLE and

NIKE, respectively), incorporate by reference the disclosures of the Cherdak Patents, APPLE and NIKE cannot assert that such patents and others in the VOCK family are unrelated to the Cherdak Patents.

COUNT I – PATENT INFRINGEMENT

THIS COUNT IS ANSWERABLE BY DEFENDANTS NIKE AND APPLE ONLY⁴

39. All preceding and subsequent paragraphs are hereby incorporated by reference as though completely set forth herein.

40. Given the validity and enforceability of the Cherdak Patents as well as their corresponding Reexamination Certificates (**Exhibits 1-4**), PLAINTIFF has the right to seek redress against past, present, and future infringing acts as prohibited under the U.S. Patent Act, 35 U.S.C. § 1, *et seq.*

41. PLAINTIFF possesses the right to pursue claims against NIKE and APPLE (and possibly PHATRAT, see footnote 6, *infra*) for their past, present, and future design, use, manufacture, importation, sale, offer for sale, and distribution of infringing products under 35 U.S.C. § 271(a), (b), and (c). In particular, NIKE and APPLE, either alone or jointly, have acted (and continue to act) in concert to infringe the valid and enforceable claims of the Cherdak Patents.

42. NIKE has infringed, contributed to the infringement of, and/or induced the infringement of the Cherdak Patents in violation of 35 U.S.C. § 271(a), (b), and (c) by their design, use, manufacture, importation, distribution, sale, and offer for sale and inducement to sell athletic shoes and related products currently sold under or with the “TRIAX” trademark

⁴ On information and belief, Defendant PHATRAT has expressed its intention to manufacture and/or market its own line of products allegedly covered by its invalid patents. *See Exhibit 33*. Investigation of PHATRAT’s planned product offering is ongoing and, accordingly, Plaintiff reserves the right to amend his Complaint to have PHATRAT answer this COUNT I after due and proper discovery in this case.

including, but not limited to, products known and marketed as the Triax Elite HRM/SDM, Triax CV-10, Triax V-10, SDM Triax 100, SDM Tailwind and MP3 Run products. The NIKE TRIAX SDM Tailwind single-shoe product is shown in **Exhibit 10**, which also shows the NIKE+ Sportsband Product.

43. NIKE and APPLE have infringed, contributed to the infringement of, and/or induced the infringement of the Cherdak Patents in violation of 35 U.S.C. § 271(a), (b), and (c) by their design, use, manufacture, importation, distribution, sale, and offer for sale and inducement to sell athletic shoes and related products currently sold under or with the “NIKE+” trademark.

44. NIKE and APPLE have infringed, and continue to infringe, the Cherdak Patents in violation of 35 U.S.C. § 271(b) by actively inducing distributors, customers, and/or retailers to infringe. By way of example and not limitation, APPLE states “Thanks to a unique partnership between NIKE and APPLE, your iPod [and iPhone, etc.] becomes your coach.” **Exhibit 11**. NIKE states, *inter alia*, “Combine the Nike + iPod Sport Kit with your Nike+ ready shoes and an iPod Nano® mobile digital device to track your runs while you listen to music. The kit contains a waterproof, durable Nike+ sensor that fits inside your shoe, as well as a receiver that connects to your iPod nano.” **Exhibit 12**.

45. NIKE and APPLE have made and continue to make (and/or have had made on their behalf) infringing athletic shoes and/or related and paired products. They have and continue to market the same throughout the U.S. and, in particular, in this judicial district, for infringing purposes as is illustrated and marketed on the www.nikeplus.com website.

46. Because of the subjectively willful nature of NIKE’s and APPLE’s infringing activities in violation of 35 USC § 271, and given what appears to be continued fraud on the

USPTO to seek allowances for patents DEFENDANTS know are invalid, PLAINTIFF is entitled to enhanced damages of no less than trebled damages as permitted by the U.S. Patent Act, 35 U.S.C. § 1, *et. seq.*, along with attorneys' fees and costs of suit. Such inequitable conduct and frauds on the USPTO give rise to this case being deemed "exceptional," thereby justifying the enhancement and trebling of damages.

47. NIKE and APPLE have and continue to directly and/or indirectly infringe the Cherdak Patents as specified in this COUNT I literally and, in the alternative, under the Doctrine of Equivalents.

COUNT II – INTERFERING PATENTS UNDER 35 USC § 291
DEFENDANTS' PATENTS MUST BE INVALIDATED
THIS COUNT IS ANSWERABLE BY ALL DEFENDANTS

48. All preceding and subsequent paragraphs are hereby incorporated by reference as though completely set forth herein.

49. The Cherdak Patents have priority of invention over every patent in the VOCK family of patents. Many, if not all, of VOCK's patents include claims that: (1) should *not* have been issued by the USPTO in view of the Cherdak Patents; (2) directly overlap with subject matter disclosed and claimed in the Cherdak Patents; and (3) as is shown below in the following four tables, Exemplary Interference Counts (1-3) dictate that the Cherdak Patents should be the only patents covering the technology claimed by many (if not all) patents in the tainted VOCK family. Exemplary Interference Counts 1-3 (EIC Nos. 1-3) have been presented below to particularly set forth exemplary interference between Cherdak's Patents and many, if not all, of VOCK's patents. Accordingly, PLAINTIFF is entitled to relief against all DEFENDANTS under 35 U.S.C. § 291 (Interfering Patents) and, in no event less than, invalidation of the entirety of the VOCK family of patents due, *inter alia*, to fraud on the USPTO.

50. Additionally, marked on NIKE+ products is U.S. Patent No. 6,298,314, apparently assigned to NIKE but used by APPLE by way of their collusive actions with NIKE to rid the athletic and activity monitoring products marketplace of real and legitimate competition. The '314 Patent interferes with the Cherdak Patents as exemplified in the last table below, especially given the construction Claim 13 of the '314 Patent recently received in *Nike v. Adidas*, Case No. 9:06-cv-43 RHC (U.S.D.C. E.D.Tx (Lufkin)). **Exhibit 13**, Markman Order in *Nike v. Adidas*.

51. The Cherdak Patents have priority of invention over the '314 patent relied on by both NIKE and APPLE to embolden their market power and dominance through meritless litigation and false patent marking. For example, NIKE and APPLE mark their NIKE+ products and technologies, *inter alia*, with U.S. Patent No. 6,298,314 to Blackadar, *et al.*. See **Exhibit 14** (NIKE PLUS IPOD User Manual Published by APPLE Copyright 2010).

52. The '314 patent issued on October 2, 2001 and bases priority only back to U.S. Patent No. 6,018,705 which was filed in the U.S. Patent and Trademark Office on October 1, 1997. Despite NIKE's and APPLE's knowledge of the invalidity of U.S. Patent No. 6,298,314 to Blackadar, they continue to falsely mark their products with that patent and NIKE asserted the '314 patent against Adidas America, Inc. ("ADIDAS") in an attempt to embolden NIKE's and APPLE's market dominance in the athletic and activity monitoring products marketplace and to rid that marketplace of competition from ADIDAS and others. In that lawsuit, ADIDAS cited substantial prior art and provided written expert testimony that contradicts the claims asserted by NIKE in *Nike v. Adidas*, Case No. 9:06-cv-43 RHC (U.S.D.C. E.D.Tx (Lufkin)). In the *Adidas* case, both of the Cherdak Patents were cited as anticipating many of the asserted claims and, in particular, Claim 13 of the '314 patent.

53. Further, in *Nike v. Adidas*, the Court issued a Markman Order interpreting many claim terms and, in particular, terms from Claim 13 of the '314 patent that were asserted and alleged to be invalid based on both of the Cherdak Patents. In construing the term “an elapsed time period” in Claim 13 of the '314 patent, the Court held, *inter alia*, that “the elapsed time to be measured could be from the point at which the first step was taken.” See **Exhibit 13** (Markman Order in NIKE v. ADIDAS, ECF-93 at page 22). The Court further held that “The specification [of the '314 patent] describes... measurement of time between the first and last steps...” *Id.* at 23.

54. Based on the Cherdak Patents, the '314 patent should not have issued and, as such, there is interfering subject matter between the Cherdak Patents and the '314 patent.

55. Despite the fact that both NIKE and APPLE now know that their '314 patent has serious and substantial validity issues at least on bases of prior art invalidity (anticipation) in view of the Cherdak Patents, these two parties continue to mark their products with such infirmed patents to scare off potential competitors.

56. PLAINTIFF has been directly harmed by DEFENDANTS' above described efforts to seek and procure illicitly obtained patents based on fraud. Rather than seeking licenses from PLAINTIFF, DEFENDANTS have previously and currently engage in schemes to defraud the USPTO into issuing more patents that DEFENDANTS know are based on patents that are either invalid by fraud on the USPTO or in view of clear teachings in the prior art (the Cherdak Patents).

57. Exemplary Interference Counts may not necessarily conform to typical claim drafting practices as they are intended to describe overlapping subject matter – it is not

uncommon for a proposed count to be broken out during interference practice into multiple counts that ultimately may issue as claims by the USPTO.

TABLE 1 – Exemplary Interference between Cherdak ‘445 and later-filed VOCK ‘851

U.S. Patent 5,343,445 to Cherdak Exemplary Claim 1 Issued Aug. 30, 1994	U.S. Patent 8,036,851 to Vock, et al. Exemplary Claim 9 Issued October 11, 2011 Assigned to Apple, Inc.	EXEMPLARY INTERFERENCE COUNT (EIC No. 1)
<p>1. A method for indicating hang time off the ground and in the air during a jump by a person wearing and athletic shoe, said method comprising the steps:</p> <p>(a) sensing, within said shoe, pressure imparted to said shoe when said shoe leave the ground during said jump;</p> <p>(b) sensing, within said shoe, pressure imparted to said shoe when said shoe returns to the ground at the end of said jump; and</p> <p>(c) activating a hang time indicator on said shoe during the time interval between said shoe leaving and returning to the ground as sensed in steps (a) and (b), respectively, said indicator proving an indication of hang time in a manner perceptible to said person.</p>	<p>9. A method for measuring the movement of a user, comprising: receiving a spectrum of signals varying over time; processing the received spectrum to identify a portion of the spectrum between a first transition from a first comparatively smooth region to a first comparatively erratic region, and a second transition from a second comparatively erratic region to a second comparatively smooth region in the spectrum; determining a duration lapsed between the identified two transitions; and quantifying the movement of the user based on the determined duration.</p>	<p>EIC No. 1: A method for measuring the movement of a user and, in particular a duration of lapsed time between two events occurring during an activity, comprising the steps of: determining a first condition related to said activity occurring over time based on a first signal transition; determining a second condition related to said activity occurring over time based on a second signal transition; determining a duration of lapsed time between said first and second conditions; and quantifying an activity parameter related to the movement of the user based on said lapsed time determined between said first and second conditions.</p>

TABLE 2 – Exemplary Interference between Cherdak ‘445 and later-filed Flentov ‘146

U.S. Patent 5,343,445 to Cherdak Exemplary Claim 19 Issued Aug. 30, 1994	U.S. Patent 5,636,146 to Flentov, et al. Exemplary Claim 1 Issued June 3, 1997	EXEMPLARY INTERFERENCE COUNT (EIC No. 2)
<p>19. An athletic shoe comprising: a sole; a shoe upper mounted on said sole; pressure responsive means on said shoe for providing a signal in response to said shoe leaving the ground when on the foot of an individual, and for removing said signal in response to said shoe returning to the ground; circuit means in said shoe actuatable in response to said signal; and indicator means at said shoe responsive to actuation of said circuit means for providing a perceptible indication related to the time said shoe is off the ground.</p>	<p>1. Apparatus for determining the loft time of a moving vehicle off of a surface, comprising: a loft sensor for sensing a first condition that is indicative of the vehicle leaving the surface, and a second condition indicative of the vehicle returning to the surface, the loft sensor comprising one or more accelerometers for generating a vibrational spectrum of the vehicle, and wherein the first and second conditions correspond to a change in the vibrational spectrum; a microprocessor subsystem for determining a loft time that is based upon the first and second conditions; and display means for displaying the loft time to a user of the apparatus.</p>	<p>EIC No. 2: An apparatus for determining hang time of a moving vehicle such as a skate, a skateboard, or a shoe when in use by a user, comprising: a loft sensor for sensing a first condition that is indicative of the vehicle leaving the surface, and a second condition indicative of the vehicle returning to the surface, the loft sensor comprising one or more accelerometers for generating a vibrational spectrum of the vehicle, and wherein the first and second conditions correspond to a change in the vibrational spectrum; a controller system for determining a loft time that is based on said first and second conditions; and a visual display device for displaying the loft time to the user of the moving vehicle.</p>

TABLE 2 – Exemplary Interference between Cherdak ‘445 and later-filed Flentov ‘380

U.S. Patent 5,343,445 to Cherdak Exemplary Claim 19 Issued Aug. 30, 1994	U.S. Patent 5,960,380 to Flentov, et al. Exemplary Claim 1 Issued September 28, 1999	EXEMPLARY INTERFERENCE COUNT (EIC No. 3)
<p>19. An athletic shoe comprising: a sole; a shoe upper mounted on said sole; pressure responsive means on said shoe for providing a signal in response to said shoe leaving the ground when on the foot of an individual, and for removing said signal in response to said shoe returning to the ground; circuit means in said shoe actuable in response to said signal; and indicator means at said shoe responsive to actuation of said circuit means for providing a perceptible indication related to the time said shoe is off the ground.</p>	<p>1. Apparatus for determining loft time of a moving vehicle off of a surface, the vehicle of the type which is ridden along the surface by a user of the vehicle, comprising: a loft sensor for sensing a first condition that is indicative of the vehicle leaving the surface, and a second condition indicative of the vehicle returning to the surface, the loft sensor being constructed and arranged so as to be substantially non-interfering with motion of the vehicle along the surface, wherein the loft sensor senses a spectrum of information and wherein the first and second conditions correspond to a change in the spectrum of information; a microprocessor subsystem for determining a loft time that is based on the first and second conditions, wherein the microprocessor subsystem comprises means for interpreting the change in the spectrum to determine the loft time; and display means for displaying the loft time to the user.</p>	<p>EIC No. 3: An apparatus for determining hang time of a moving vehicle such as a skate, a skateboard, or a shoe when in use by a user, comprising: a loft sensor for sensing a first condition that is indicative of the vehicle leaving the surface, and a second condition indicative of the vehicle returning to the surface, the loft sensor comprising one or more accelerometers for generating a vibrational spectrum of the vehicle, and wherein the first and second conditions correspond to a change in the vibrational spectrum; a controller system for determining a loft time that is based on said first and second conditions; and a visual display device for displaying the loft time to the user of the moving vehicle.</p>

TABLE 4 – Exemplary Interference between Cherdak ‘445 and later-filed USP 6,298,314

U.S. Patent 5,343,445 to Cherdak Exemplary Claim 19 Issued Aug. 30, 1994	U.S. Patent 6,298,314 Exemplary Claim 13 Issued October 2, 2001	EXEMPLARY INTERFERENCE COUNT (EIC No. 4)
<p>1. A method for indicating hang time off the ground and in the air during a jump by a person wearing and athletic shoe, said method comprising the steps:</p> <p>(a) sensing, within said shoe, pressure imparted to said shoe when said shoe leave the ground during said jump;</p> <p>(b) sensing, within said shoe, pressure imparted to said shoe when said shoe returns to the ground at the end of said jump; and</p> <p>(c) activating a hang time indicator on said shoe during the time interval between said shoe leaving and returning to the ground as sensed in steps (a) and (b), respectively, said indicator proving an indication of hang time in a manner perceptible to said person.</p>	<p>13. A method for monitoring movement of a person in locomotion on foot, comprising steps of:</p> <p>(a) mounting a sensor on the person;</p> <p>(b) using the sensor to generate a signal in response to movement of the person;</p> <p>(c) after the person has begun walking or running, analyzing the signal to identify a characteristic in the signal that indicates the person has initially ceased taking footsteps; and</p> <p>(d) determining an elapsed time period based on a time at which the characteristic appeared in the signal.</p>	<p>EIC No. 4: A method for monitoring movement of a person in locomotion on foot, , comprising steps of:</p> <p>(a) mounting a sensor in a shoe worn by the person;</p> <p>(b) using the sensor to generate a signal in response to movement of the person during a first step taken by the person;</p> <p>(c) after said first step taken by the person, analyzing the signal to identify a characteristic in the signal that indicates the person has begun to stop moving; and</p> <p>(d) determining an elapsed time period based on a time at which the characteristic appeared in the signal.</p>

58. All of the EICs listed in the tables above are fully, properly and adequately supported by the Cherdak Patents disclosures. In fact, the USPTO held during prosecution of the application giving rise to the ‘380 Flentov *et al.* patent that the Cherdak Patents certainly disclosed and taught that a loft sensor is one that may consist of, but not be limited to, (i) an accelerometer that senses a vibrational spectrum; (ii) a microphone assembly that senses a noise spectrum; (iii) a switch that is responsive to a weight of a user of a vehicle, (iv) a voltage-resistance sensor that generates a voltage indicative of the speed of a vehicle; and (v) a plurality of accelerometers connected for evaluating a speed of a vehicle. *See Exhibit 15*, Office Action in USPTO Patent Application ‘758 (forming the basis of USP 5,960,380), at 6. Given that the Cherdak Patents claim combinations including, but not limited to, accelerometers, the entire

VOCK family of patents is invalid based on prior art, in addition to any other ground for invalidation based on inequitable conduct and fraud on the USPTO. The '314 Patent, and in particular claim 13 thereof, is anticipated by the Cherdak Patents and therefore invalid.

59. VOCK and PHATRAT have admitted that the Cherdak Patents have priority of invention over the entire VOCK family of patents mentioned in this Complaint. *See* ECF 10, at 13 (stating “the Cherdak Patents have priority over the PhatRat Patents at issue.”) The patents at issue to date in this case include all patents listed in the table found in COUNT III hereof which table is hereby incorporated by reference.

60. The interfering Flentov, *et al.* and VOCK, *et al.* patents mentioned in this COUNT II are invalid under the requirements for patentability found in § § 102-3 of the U.S. Patent Act. These patents also are invalid as a result of inequitable conduct and fraud by VOCK, and others, during the pendency of the patent applications.⁵

61. As there is interfering subject matter at least between the patents mentioned in this COUNT II and the Cherdak '445 Patent as exemplified by EIC Nos. 1-4 listed in the tables presented above, and as VOCK and PHATRAT have admitted to the fact that the Cherdak Patents have priority of invention over the VOCK family of patents, PLAINTIFF is entitled, as a matter of law and in accordance with 35 U.S.C. § 291, to have the Court adjudicate at least the patents mentioned in this COUNT II, and possibly others as discovery in this case develops, as *invalid* and declare that the Cherdak '445 and '269 Patents are the only valid patents actually covering the technologies and products like and/or similar to the accused devices that are named and specifically identified in COUNT I of this Complaint (Infringement by NIKE and APPLE).

⁵ The facts supporting such allegations of inequitable conduct are found in COUNT III hereof and are incorporated herein by reference.

62. In addition to the aforementioned relief, PLAINTIFF hereby respectfully requests that this Court grant all such other relief including, but not limited to, any declaratory relief as may be appropriate under the circumstances.

63. The proposed EICs included herein are exemplary, and due discovery in this case will likely reveal further interfering subject matter warranting additional claims and/or amendment of this Plaintiff's First Amended Complaint. Accordingly, nothing in this Amended Complaint shall be considered as a bar or waiver preventing PLAINTIFF from asserting any other interfering subject matter.

COUNT III -- DECLARATORY JUDGMENT OF PATENT INVALIDITY

THIS COUNT IS ANSWERABLE BY ALL DEFENDANTS⁶
The Entire VOCK Patent Family is Invalid Due to Inequitable Conduct

64. All preceding and subsequent paragraphs are hereby incorporated by reference as though completely set forth herein.

65. This is an action for Declaratory Judgment of Invalidity of the '146 and '380 Patents and all other U.S. patents that base priority in whole or in part on the '146 and/or the '380 Patents (including, but not limited to, USP 6,499,000 (bases priority on USP 5,636,146), USP 6,885,971 (bases priority on USPs 5,636,146 and 5,960,380), USP 6,963,818 (bases priority on USPs 5,636,146 and 5,960,380), and USP 7,092,846 (bases priority on 5,960,380)) in view of VOCK and PHATRAT's egregious frauds on the USPTO , which rise to the level of inequitable

⁶VOCK is only one of the three (3) named co-inventors of the subject matter claimed in U.S. Patent Nos. 5,636,146 and 5,960,380 and a portfolio of follow-on patents claiming priority back to the filing dates of the '146 and '380 patents (November 21, 2011). PLAINTIFF reserves the right to amend his complaint after due and proper discovery to include, *inter alia*, VOCK's co-inventors Flentov and Darcy. On information and belief, Darcy is a Patent Agent registered to practice before the USPTO and either knew or should have known that VOCK's comments about PLAINTIFF's patents during examination of the '146 and '380 patents were material to the patentability of the inventions claimed in the '146 and '380 patents.

conduct. Such conduct includes false and misleading statements and concealment of known prior art from the USPTO made and effectuated directly by co-inventor VOCK during the initial examination proceedings related to the ‘146 Patent and the ‘380 Patent and the perpetuation of such inequitable conduct and fraud on the patent for almost two decades after the filing of the ‘146 and ‘380 patents.

66. On information and belief, the following U.S. patents are owned by, have been owned by, or have been licensed in or out by DEFENDANTS and must be held invalid and unenforceable due to inequitable conduct by DEFENDANTS on the USPTO relating to the issuance of the patents, in the form of intentional and but-for materially misleading statements, which also rise to the level of affirmative egregious conduct.⁷ The conduct was committed by VOCK, PHATRAT, and possibly others, and in concert by all DEFENDANTS:

1	6499000	System and method for determining loft time, speed, height and distance The invention detects loft time and/or speed during activities of moving and jumping. A loft sensor utilizes a spectrum of information to detect leaving the ground and returning to the ground. A...
2	6496787	Apparatus and method for determining loft time and speed The invention detects loft time and/or speed of a vehicle and/or person during activities of moving and jumping. A loft sensor detects leaving the ground and returning to the ground. A...
3	6266623	Sport monitoring apparatus for determining loft time, speed, power absorbed and other factors such as height The invention detects the loft time and/or speed of a vehicle, such as a sporting vehicle, during activities of moving and jumping. A loft sensor detects when the vehicle leaves the ground and when...

⁷ There may be patent applications (and patents) that are held by one or more Defendants (either solely or collectively) which are currently pending before the U.S. Patent Office and/or have been issued by the USPTO. Due discovery in this case will reveal all such patent applications and patents. PLAINTIFF reserves the right to amend his Complaint to specify all such applications and patents.

4	6516284	Speedometer for a moving sportsman The invention detects loft time and/or speed of a vehicle and/or person during activities of moving and jumping. A loft sensor detects leaving the ground and returning to the ground. A...
5	7457724	Shoes and garments employing one or more of accelerometers, wireless transmitters, processors, altimeters, to determine information such as speed to persons wearing the shoes or garments A shoe is improved by including: at least one accelerometer for generating acceleration signals and a processor configured to process the acceleration signals to determine one or both of speed and...
6	7623987	Shoes and garments employing one or more of accelerometers, wireless transmitters, processors, altimeters, to determine information such as speed to persons wearing the shoes or garments A shoe is improved by including: at least one accelerometer for generating acceleration signals and a processor configured to process the acceleration signals to determine one or both of speed and...
7	7158912	Mobile GPS systems for providing location mapping and/or performance data A location measurement system comprises: a GPS receiver for attachment to a person and for determining earth location of the person; a display for attachment to the person; memory for storing map...
8	7949488	Movement monitoring systems and associated methods Systems and methods are disclosed that monitor movement of a person, or of a vehicle ridden by the person, to determine speed, distance traveled and/or airtime of the person or vehicle....
9	6963818	Mobile speedometer system and associated methods The invention detects loft time and/or speed of a vehicle and/or person during activities of moving and jumping. A loft sensor detects leaving the ground and returning to the ground. A...
10	7072789	Systems for assessing athletic performance Sensors detects loft time, speed, power and/or drop distance of a vehicle and/or person. The sensors couple with multiple persons during athletic activity. Data from the sensors downloads to a...
11	6885971	Methods and systems for assessing athletic performance The invention detects the loft time, speed, power and/or drop distance of a vehicle, such as a sporting vehicle, during activities of moving and jumping. A loft sensor detects when the vehicle...
12	7433805	Pressure sensing systems for sports, and associated methods A system determines athletic performance. A pressure sensor senses change in elevation. A microprocessor processes signals from the pressure sensor to determine speed corresponding to the change in...
13	7813887	Location determining system A location measurement system comprises: a GPS receiver for attachment to a person and for determining earth location of the person; a display for attachment to the person; memory for storing map...
14	7983876	Shoes and garments employing one or more of accelerometers, wireless transmitters, processors altimeters, to determine information such as speed to persons wearing the shoes or garments A shoe is improved by including: at least one accelerometer for generating acceleration signals and a processor configured to process the acceleration signals to determine one or both of speed and...

15	7693668	Impact reporting head gear system and method A system for determining airtime of a moving sportsman includes at least one accelerometer for detecting vibration or acceleration of the sportsman. A processor in communication with the at least...
16	7991565	System and method for non-wirelessly determining free-fall of a moving sportsman A system for determining airtime of a moving sportsman includes at least one accelerometer for detecting vibration or acceleration of the sportsman. A processor in communication with the at least...
17	7860666	Systems and methods for determining drop distance and speed of moving sportsmen involved in board sports A system for determining airtime, speed and/or drop distance of a moving sportsman includes at least one accelerometer for detecting vibration or acceleration of the sportsman and/or a GPS unit. A...
18	7966154	Pressure sensing systems for sports, and associated methods A system determines athletic performance. A pressure sensor senses change in elevation. A microprocessor processes signals from the pressure sensor to determine speed corresponding to the change in...
19	7640135	System and method for determining airtime using free fall A system for determining airtime of a moving sportsman includes at least one accelerometer for detecting vibration or acceleration of the sportsman. A processor in communication with the at least...
20	5960380	Apparatus and methods for determining loft time and speed The invention detects the loft time and/or speed of a vehicle, such as a sporting vehicle, during activities of moving and jumping. A loft sensor detects when the vehicle leaves the ground and when...
21	6539336	Sport monitoring system for determining airtime, speed, power absorbed and other factors such as drop distance The invention detects the loft time, speed, power and/or drop distance of a vehicle, such as a sporting vehicle, during activities of moving and jumping. A loft sensor detects when the vehicle...
22	6498994	Systems and methods for determining energy experienced by a user and associated with activity A method is disclosed for evaluating shoes worn by a person for activity on ground, including the steps of determining forces of acceleration experienced by the person in a direction generally...
23	6959259	System and methods for determining performance data The invention determines performance data during activity of a person. A microprocessor and a sensor, such as a GPS sensor, attach to the person or to a vehicle ridden by the person. The sensor and...
24	7092846	Systems and methods for determining performance data The invention determines performance data during activity of a person. A microprocessor and a sensor, such as a GPS sensor, attach to the person or to a vehicle ridden by the person. The sensor and...
25	6856934	Sport monitoring systems and associated methods Methods and systems are disclosed for determining speed, power and/or impact (sporting characteristics) of persons involved in activity. Wireless signals may be generated indicative of the sporting...
26	7054784	Sport monitoring systems Methods and systems are disclosed for determining speed, power and/or impact (sporting characteristics) of persons involved in activity. Wireless signals may be generated indicative of the sporting...
27	7451056	Activity monitoring systems and methods An activity monitor, comprises housing for attachment to a person; at least one

		accelerometer disposed within the housing; and a processor disposed within the housing, for processing signals from...
28	8036851	Activity monitoring systems and methods An activity monitor, comprises housing for attachment to a person; at least one accelerometer disposed within the housing; and a processor disposed within the housing, for processing signals from...
29	7512515	Activity monitoring systems and methods An activity monitor, comprises housing for attachment to a person; at least one accelerometer disposed within the housing; and a processor disposed within the housing, for processing signals from...
30	7386401	Helmet that reports impact information, and associated methods A system determines impact of a helmet. The helmet includes at least one accelerometer and a processor. The accelerometer detects acceleration of the helmet. The processor is configured to process...
31	7162392	Sport performance systems for measuring athletic performance, and associated methods System determines impact of a helmet, comprising: accelerometer and processor, the accelerometer detecting acceleration of the helmet, the processor configured to process the signals from the...

67. PLAINTIFF has standing to bring this Declaratory Judgment claim against DEFENDANTS. PLAINTIFF, VOCK and PHATRAT are all non-practicing entities, are direct competitors in the patent licensing marketplace for licensees and other transferees of rights under and/or related to their patents, and are both actively involved in the same pursuits to seek out licensees to enjoy rights under U.S. Patents.

68. PLAINTIFF has been and continues to be harmed by DEFENDANTS’ past and ongoing anti-competitive acts, which have brought about non-economic and economic injuries to PLAINTIFF.

69. VOCK and PHATRAT have obtained and enforced their patents by committing fraud on the USPTO and bringing fraudulent actions in the United States District Court for the District of Colorado against entities such as NIKE, APPLE, Polar Elector, Garmin, Ltd., and Timex Group, USA Inc.⁸ Plaintiff seeks to prevent VOCK and PHATRAT from bringing any further

⁸ VOCK’s and PHATRAT’s lawsuits against these aforementioned entities have been suits against PLAINTIFF’s customers (potential licensees) in the patent licensing marketplace. Any similar suits in the future would also be suits against PLAINTIFF’s potential customers.

judicial actions based on fraudulently obtained and invalid patents, especially patents stemming from VOCK's and PHATRAT's '146 Patent and '380 Patent.

70. In *MedImmune, Inc. v. Genentech, Inc.*, the Supreme Court held that an Article III case or controversy exists when "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 549 U.S. 118, 127 (2007). The dispute must be "definite and concrete, touching the legal relations of parties having adverse legal interests," such that the dispute is "real and substantial" and "admi[ts] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* (internal quotation marks and citation omitted).

71. In this case, and in particular in COUNT II hereof, PLAINTIFF has raised a patent interference claim against all DEFENDANTS under 35 U.S.C. § 291 in connection with patents in the VOCK family of patents. An "interfering patents" action under 35 U.S.C. § 291 permits "[t]he owner of an interfering patent [to seek] relief against the owner of another by civil action." A suit under § 291 is used to determine the priority of invention between certain issued patents. *See Genetics Institute, Llc v. Novartis Vaccines And Diagnostics, Inc.*, 655 F.3d 1291 (2011) (citing and quoting *Slip Track Sys., Inc. v. Metal Lite, Inc.*, 159 F.3d 1337, 1341 (Fed. Cir. 1998)).

72. There exists a case and controversy between PLAINTIFF and DEFENDANTS that is "definite and concrete, touching the legal relations of parties having adverse legal interests," such that the dispute is "real and substantial" and "admi[ts] of specific relief through a decree of a conclusive character." Interfering patents as outlined in COUNT II clearly demonstrate adverse

legal interests. Interfering patents clearly touch the legal relations of the parties and, an interfering patents claim is properly plead herein to allow PLAINTIFF to raise all issues of invalidity related to the VOCK patent family and certain patent(s) marked on products sold in commerce by NIKE and APPLE. Such issues of invalidity include, but are not limited to, those issues related to requirements for patentability under the U.S. Patent Act and those going to enforceability of the VOCK family of patents in view of clear inequitable conduct and VOCK's fraud on the USPTO as well as other patent(s) marked on NIKE+ products.

73. The actual case or controversy existing between the PLAINTIFF and DEFENDANTS is real and exacerbated because VOCK, on behalf of himself PHATRAT, NIKE, APPLE and possibly others, concealed critical and vital prior art teachings within the Cherdak Patents that has further allowed VOCK and any entity acting in concert with him to continue to obtain patents from the USPTO based on past frauds perpetuated to the present day by all DEFENDANTS. *See Exhibit 8*, U.S. Patent No. 8,036,851 to Vock et al., issuing on October 11, 2011, basing priority on the '146 and '380 patents and being assigned to APPLE, INC.

74. VOCK continues to conceal material information contained within the Cherdak Patents that goes directly to the heart of the tainted VOCK patent portfolio – movement of an object along a surface. The Cherdak Patents clearly contemplate and expressly disclose and teach that a body may incorporate timing device circuitry in accordance with the Cherdak Patents so as to determine loft time, speed, and other activity metrics such as in skating sports (e.g., ice-skating, skate board sports, roller skating, board skating, etc. – activities in which “hang time” during jumps may be used as a metric for review and processing to derive additional activity-related information). For example, the Cherdak '445 Patent states that “[m]oreover, the

threshold time may change depending on what activity is chosen to provide the benchmark for determining an average threshold time (e.g. walking was the chosen benchmark activity whereas running, skipping, and **skating** could also have been used).” See the ‘445 Patent at col. 6, lines 12-17. Although skating and skate-boarding were certainly contemplated by the Cherdak Patents, VOCK continues to conceal this information from the USPTO so that he can obtain additional invalid patents and prevent the PLAINTIFF and others from actively seeking patent protection in the relevant activity monitoring marketplace and/or from introducing and marketing products for fear of expensive patent litigation.

75. DEFENDANTS’ actions thereby injure PLAINTIFF in his pursuits of valid patents and his own licensing activities in the licensing marketplace in which PLAINTIFF directly competes with DEFENDANTS.

76. The actual case or controversy existing between the PLAINTIFF and direct competitors VOCK and PHATRAT is further exacerbated because VOCK and PHATRAT maliciously restrained trade and created barriers to entry into the activity monitoring marketplace by wrongfully and fraudulently advancing federal claims of patent infringement based on collections of ill-gotten patents obtained as a result of inequitable conduct and egregious acts of fraud on the USPTO. Such bad acts have prevented others, including PLAINTIFF, from entering the activity monitoring marketplace (which relies heavily on licensing of technology and related rights) and have significantly reduced the number of potential licensees for which PLAINTIFF directly competes with VOCK and PHATRAT.

77. VOCK and PHATRAT have acknowledged that they have licensed certain rights to APPLE and NIKE after first asserting patent infringement actions against NIKE and APPLE in the 2005-2006 timeframe. See ECF 10, at 22. Accordingly, on information and belief, VOCK

and/or PHATRAT continue to realize licensing revenue, which constitutes patent licensing-related profits lost by PLAINTIFF, as a direct result of patents fraudulently obtained and enforced. As Plaintiff and Defendants VOCK and PHATRAT are both non-practicing entities (i.e., both neither make or market products in the lucrative athletic and activity monitoring products marketplace), their customers over whom they directly compete are licensees such as companies like NIKE, APPLE, POLAR, FITSENSE, etc. – i.e., VOCK and PHATRAT have and continue to threaten PLAINTIFF’s potential customers.

78. A specific infringement allegation against PLAINTIFF by VOCK and PHATRAT is not necessary for the requisite case-or-controversy requirement to exist between the parties. *See* ECF 10, at 10 (stating “A specific infringement allegation is not necessary for the requisite case-or-controversy to exist” *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 137).⁹

79. VOCK and PHATRAT are non-practicing entities, as is Plaintiff. VOCK and PHATRAT are licensors of their ill-gotten patents for which they materially mischaracterized and concealed the prior art in pursuit of tainted patents. PLAINTIFF is a licensor of his properly obtained Cherdak Patents. As a direct result of VOCK’s misrepresentations to the USPTO, VOCK was able to deceive the patent examiner into believing that VOCK was entitled to patents for his late-to-post patent applications.

80. VOCK is a registered patent attorney (Reg. No. 38,356) and was so registered when he prosecuted the applications for the ‘146 Patent and the ‘380 Patent. VOCK was a named co-inventor, along with fellow inventors Flentov and Darcy. Registered practitioners are held to a very high standard on documents they sign and file in the USPTO, subject to the penalties of

⁹ VOCK and PHATRAT’s Motion to Dismiss, ECF 10, seems to suggest that PLAINTIFF has no standing to sue them for Declaratory Relief despite the existence of a very real dispute that is continuous and ongoing and the fact that PLAINTIFF has every right to raise a claim under Section 291 of the U.S. Patent Act.

perjury under 18 U.S.C. § 1001 and penalties calling for invalidation of any patent resulting, *inter alia*, from deceptively untruthful assertions of fact. See **Exhibit 18**, 37 C.F.R. § 10.18 Effective July 1, 1998.

81. As an attorney and Registered Patent Practitioner, representing himself and his co-inventors, VOCK was held to high standards for truth and veracity when he intentionally sought to mislead the USPTO by averring false statements about the prior art and concealing critical facts in the prior art that negated any chance for VOCK and his co-inventors to obtain valid patents.

82. VOCK's conduct during the initial examination proceedings related to the '146 Patent and the '380 Patent gives rise to a finding of inequitable conduct, which renders an entire patent invalid and unenforceable.

83. VOCK committed inequitable conduct by making materially false statements about the Cherdak Patents in order to overcome numerous prior art rejections based on the Cherdak '445 Patent and the Cherdak '269 Patent and with the requisite specific intent to deceive the USPTO into wrongly issuing the '146 Patent and the '380 Patent.

84. But for VOCK's materially false and misleading averments about the '445 Patent and the '269 Patent, the USPTO would not have issued the '146 Patent or the '380 Patent.

85. But for VOCK's false and misleading statements about the '445 Patent and the '269 Patent, VOCK would not have received allowances on the '146 or '380 Patent due to the fact that the claims possessed limitations obtained by the above-described fraud on the USPTO.

86. Because VOCK's statements are but-for materially false and intentionally misleading, and are expressly stated in the record of the proceedings before the USPTO in connection with the '146 Patent and the '380 Patent, the statements amount to inequitable

conduct thus holding the '146 Patent and the '380 Patent – and all patents that base their priority (in whole or in part) on the same – invalid and unenforceable.

87. Because as a general rule inequitable conduct renders an entire patent or patent family unenforceable, this doctrine must be applied in instances where the patentee's misconduct resulted in the unfair benefit of receiving an unwarranted patent claim.

88. VOCK's misconduct about material facts in the prior art was deliberately, specifically, and expressly designed to deceive the USPTO into wrongly issuing the '146 Patent and the '380 Patent. It is inconsistent with patent law and policy for DEFENDANTS to continue to receive the benefit of their unwarranted patent claims and priority date.

89. VOCK and PHATRAT's conduct further rises to the level of affirmative egregious misconduct because it involves intentionally deceptive statements made during proceedings before the USPTO relating to the '146 Patent and the '380 Patent. This type of affirmative egregious conduct on the USPTO renders the '146 Patent and the '380 Patent – and all patents that base their priority (in whole or in part) on the same – invalid and unenforceable.

90. The statements made by VOCK¹⁰ to the USPTO to fraudulently win allowance for his invalid patent claims constitute affirmative acts of egregious misconduct.

¹⁰VOCK is a Registered Patent Attorney (Registration No. 38356). Under 37 C.F.R. § 1.56, VOCK (and anybody associated with the patents and claims he was pursuing) had an affirmative duty to disclose information material to patentability. 37 C.F.R. § 1.56 (“Duty to disclose information material to patentability: (a) public interest. The public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability. Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section.”) Fraud on the USPTO by a registered patent practitioner is misconduct under 37 C.F.R. § 10.23 (d) (A practitioner who acts with reckless indifference to whether a representation is true or false is chargeable with knowledge of its falsity. Deceitful statements of half-truths or concealment of material facts shall be deemed actual fraud within the meaning of this part.).

91. On November 21, 1994, VOCK, along with his co-inventors (and possibly others) set out to fraudulently obtain patents by filing their primary parent patent application – U.S. Patent Application No. 08/344,485 entitled “Apparatus and Methods for Determining Loft Time and Speed.” (the “‘485 Application”).

92. The ‘485 Application ultimately gave rise to the ‘146 Patent. Currently, the ‘146 Patent forms the basis for a sizeable but tainted patent portfolio that includes a vast array of U.S. and Foreign Patents, Patent Applications and related rights.

93. At the time of VOCK’s filing, PLAINTIFF’s U.S. patent applications had been filed (as early as July 6, 1993), prosecuted, and issued by the USPTO as valid, enforceable patents on August 30, 1994 (USP 5,343,445), and September 19, 1995 (USP 5,452,269).

94. VOCK’s ‘485 patent application was filed on November 21, 1994, two months later, and remains the primary patent on which NIKE AND APPLE continue to rely for purposes of priority to build their set of patents. **Exhibit 8**, U.S. Patent No. 8,036,851 entitled “Activity Monitoring Systems and Methods” to VOCK et al. and issued on October 11, 2011, now assigned to APPLE.

95. During the USPTO Examination Proceedings related to the ‘485 Patent Application giving rise to the ‘146 Patent, VOCK made material misrepresentations about PLAINTIFF’s patents in seeking allowance for the ‘146 Patent.

96. VOCK’s material and false misrepresentations were deliberately made in order to deceive the USPTO into issuing the ‘146 patent.

97. VOCK’s fraudulent statements to the USPTO are material to the patentability of his claims in the ‘146 Patent and ‘380 Patent. But for such averments, the ‘146 and ‘380 patents would not have been issued by the USPTO in the first place.

98. On November 22, 1995, the USPTO issued an Office Action citing rejections relating to the '146 Patent and '380 Patent. On May 21, 1996, VOCK filed a response to the USPTO on behalf of himself and his co-inventors¹¹ In the response, VOCK intentionally and materially misrepresented the Cherdak '269 patent by stating:

Cherdak, on the other hand, discloses a single embodiment of a "contact dimple," column 5, lines 13-14, for activating timing circuitry relative to an athletic shoe's substantially vertical movement off of the floor. A dimple is, by definition, "an indentation or depression on a surface," *see, e.g., Webster's Ninth College Dictionary*. Such a *dimple* is unsuitable *and* undesirable in accord with the present invention, where a vehicle's movement along the surface is critical to the sport. For example, in snowboarding, a dimple on the underside of the snowboard would cause undesirable speed losses and directional instability.

Office Action Response dated May 21, 1996 at pages 8-9 (**Exhibit 19**).

99. With the matter still unresolved, on September 3, 1996, VOCK sent another signed writing and a RESPONSE to a Final Rejection to the USPTO stating:

More particularly, the amendment to claim 1, which incorporated the language "the left sensor being substantially non-responsive to interfering engagement with the surface," was made in the last response of 6/4/96 **to overcome Cherdak '445**. This argument was rejected by the Examiner. Applicants will continue this argument in a continuing application that will be filed for the rejected claims 1-14, 18-22, 27, 29, 35-37 and 40-42. Therefore, claims 1-14, 18-22, 27, 29, 35-37 and 40-42 are hereby canceled.

Amendment after Final in Accord with 37 C.F.R. §1.116(a) dated September 3, 1996, at 6 (**Exhibit 20**) (emphasis added) (the continuing application mentioned by VOCK ultimately became the '380 patent).

100. In response to VOCK's Rule 1.116 After-Final Rejection Amendment and Response, the USPTO issued U.S. Patent 5,636,146.

101. The statements made by VOCK in papers filed *pro se* with the USPTO on May 21,

¹¹ PLAINTIFF asserts the response was filed in an apparent attempt to overcome prior art rejections in VOCK's '485 Patent Application based on the Cherdak '269 Patent under 35 U.S.C. § 102 (anticipation) and § 103 (obviousness).

1996 and September 3, 1996, such as his avowal to “continue this argument in a continuing application” (e.g. to continue to make materially false misrepresentations about the Cherdak patents), demonstrate VOCK’s clear intent to commit fraud on the USPTO by materially misrepresenting the prior art (the Cherdak ‘445 patent) in order to win allowance for his patents.

102. On December 12, 1996, VOCK (and possibly others) filed a continuation-type patent application in the USPTO bearing Serial No. 08/764,758, entitled “Apparatus and Methods for Determining Loft Time and Speed.”

103. The ‘758 patent application ultimately issued as the ‘380 Patent to Flentov, *et al.* **Exhibit 7**, the ‘380 Patent. In prosecuting the ‘758 application, VOCK made false and materially misleading statements about the Cherdak ‘445 Patent and the Cherdak ‘269 Patent by stating:

This is completely opposite to Cherdak, *which requires a protrusion* from the sneaker in order to operate. Such a protrusion would be completely inconsistent with the invention and its claims. **Specifically, Cherdak only discloses a single embodiment of a "contact dimple," column 5, lines 13-14, for activating timing circuitry relative to a athletic shoe's substantially vertical movement off of the floor.**¹² A dimple is, by definition, "an indentation or depression on a surface," *see, e.g., Webster's Ninth College Dictionary*. A dimple such as Cherdak is unsuitable and undesirable in accord with the present invention, where a vehicle's movement along the surface is critical to the sport. For example, in snowboarding, a dimple on the underside of the snowboard would cause undesirable speed losses and directional instability. Accordingly, Cherdak's recitation of a dimple as an activation switch¹³ is suitable, only to athletic shoes, where a user's movement does not slide or otherwise move in contact with the floor. **Note that the**

¹² In *Cherdak v. Rack Room Shoes*, Case No. 11-cv-169, now pending in this Court, VOCK’s law firm, Lathrop and Gage, has asserted that activation of certain embedded circuitry covered by the claims of the ‘445 patents, for example, only works when in contact with the floor – in direct contravention of VOCK’s earlier averments to the USPTO and his recognition that the triggering devices disclosed in the Cherdak ‘445 patent activate the circuitry in the shoes relative to the shoe’s substantially vertical movement off of the floor. According to VOCK, Cherdak disclosed the activation of circuitry relative to an athletic shoe's substantially vertical movement off of the floor. **Exhibit 21**, at 7.

¹³ VOCK’s assertion that a contact dimple is an activation switch is materially false. The dimple discussed in one preferred embodiment was a formation on the bottom of a sneaker’s sole – not part of the circuit triggering elements that are taught within the Cherdak patents.

amendments state that the loft sensor determines air time in a manner which is substantially non-interfering with motion along the surface. Such a limitation clearly distinguishes over Cherdak.

‘758 Patent Application at Response to Office Action dated February 20, 1998 at page 7 (**Exhibit 21**). In VOCK’s Response to the Office Action, VOCK altered his original assertions to the Patent Examiner and the USPTO: he no longer raised a “discloses a single embodiment of a ‘contact dimple,” argument; rather, he now asserted a “**which requires a protrusion**” from the sneaker in order to operate argument. VOCK’s revised argument was disingenuous and wholly mischaracterized the Cherdak Patents in order to aver that the Cherdak Patents “required” certain structure..

104. VOCK further stated:

As discussed above, Cherdak describes only a sensor that is incorporated with the vehicle - an athletic shoe - as a housing and which extends via a dimple so that direct contact with the floor triggers the switch.

Id. at 9, and that:

As above, independent claim 41 is a method claim which is amended to include the limitation that the steps of sensing are to be non-interfering with the motion of the vehicle along the surface. **As argued above, Cherdak does not have such a sensor; and, as above, Applicants respectfully submit that claim 41 is allowable over the art.** Because claim 42 depends from claim 41, claim 42 is also allowable for the same reasons.

Id.

105. VOCK materially misrepresented and concealed the facts in the Cherdak ‘445 Patent and the ‘269 Patents regarding the contents and enabling disclosures therein. In a direct attempt to make such willful misrepresentations appear official, VOCK cited to the Cherdak ‘269 Patent at Col. 5, by pointing only to one “embodiment” of a particular type of shoe and its sole.

However, VOCK only cited to lines 13-14 at col. 5 of the '269 patent¹⁴.

106. VOCK's deliberately deceptive and inaccurate citation¹⁵ to the Cherdak patent amounts to an egregious affirmative act on his part to materially conceal and mislead the USPTO by mischaracterizing the prior art (the Cherdak Patents) for the intended purpose of obtaining allowance of his '380 Patent.

107. An inspection of VOCK's truncated citations reveals that VOCK made a deliberate decision to withhold and conceal a known material reference (information within the Cherdak '445 Patent).

108. In addition, the disclosure of a contact dimple as part of a shoe's sole in the discussion of a "preferred embodiment" in the Cherdak Patents was but one of many structural and operational arrangements, devices, switches, piezoelectric devices, motion, acceleration and pressure responsive devices disclosed in the specifications of the '445 and '269 Patents.

¹⁴ VOCK's citation to only lines 13-14 at col. 5 of the '269 demonstrates an example of his deliberate concealment of material information and his intent to deceive the USPTO in order win allowance for his own patents. Lines 13-14 at col. 5 of the Cherdak '269 Patent provides only an incomplete sentence fragment, "...GEAR's switch carrier resides is formed with a contact dimple which, when pressed upon contact of the shoe...", and was deliberately taken out of context. Citation to such a sentence fragment is certainly the wrongful, deceitful conduct that 37 C.F.R. § 10.23 (d) seeks to prevent by patent attorneys, specifying the prohibition, *inter alia*, of "half-truths." 37 C.F.R. § 10.23 (d) governs the conduct of patent (attorney) practitioners and states that a "practitioner who acts with reckless indifference to whether a representation is true or false is chargeable with knowledge of its falsity. Deceitful statements of half-truths or concealment of material facts shall be deemed actual fraud within the meaning of this part."

¹⁵ In ECF 10, VOCK and PHATRAT appear to suggest that not fully citing the clear language in the Cherdak Patents by VOCK was permissible. VOCK knew he was concealing critical and material information from the Patent Examiner in order to intentionally deceive him. VOCK also concealed the fact that the Cherdak Patents expressly disclosed and taught the placement of a timing device in a structure that moved along a surface including, but not limited to, a state that is known to move along a surface such as during ice skating, etc. See e.g., 445 at col. 6, lines 12-17. VOCK cannot argue that he was unaware of the facts disclosed in the Cherdak Patents about its applicability to devices that are configured to move along a surface when he so blatantly concealed the same from the USPTO – he incorporated the full disclosures of the Cherdak patents by reference to provide enabling support in his own later-filed patent applications. See e.g., **Exhibit 26** ('846 patent at col. 3, lines 59-64).

109. By way of example, as stated in the '269 Patent and in regard to the many preferred embodiments disclosed therein, PLAINTIFF stated:

While activation switch 4110 is preferably like that of the LA GEAR design other switching systems including contact switches, tape switches, pressure switches, and any other well know switching systems would also work in the present invention.

Cherdak '445 patent at col. 5, **lines 9-14**; same quote found in Cherdak '269 patent at col. 5, lines 18-23; *see also*, '269 patent at col. 2, lines 57-61 (emphasis added) (referencing piezo-electric devices as being known by those skilled in the art and which could be used in the context

of the inventions claimed by the Cherdak ‘445 and ‘269 patents.)¹⁶ The USPTO also held that the Cherdak ‘445 patent *teaches* that a “loft sensor” is one that may consist of, but not be limited to,

(i) an accelerometer that senses a vibrational spectrum; (ii) a microphone assembly that

¹⁶ The USPTO also held that the Cherdak ‘445 patent disclosure was broad enough to include many types of switching and sensor arrangements which pre-dated VOCK’s alleged patentable inventions. The USPTO stated that the Cherdak ‘445 patent broadly disclosed switches in association with sensors which could be used to detect loft time and without interference of a switch with a ground surface. See **Exhibit 16** at page 8 (USP 5,636,146 Patent Prosecution at Office Action Mailed August 14, 1996). Accordingly, while a switch may be configured to produce a relatively narrow signal spectrum indicative of whether a shoe is off the ground and in the air or is on the ground, the USPTO understood that such sensors in association with switches were certainly disclosed in the Cherdak ‘445 patent. *Id.* Furthermore, the express mention of piezo-based devices in the ‘445 patent certainly teaches one of ordinary skill in the art that piezo-based devices, for example, can be used in an apparatus to detect, *inter alia*, loft time. Accordingly, a sensor (e.g., a piezo-based microphone or buzzer, strain-gauge, etc.) in association with other circuit components and devices were clearly understood by the USPTO as being covered and taught by the Cherdak ‘445 patent. *Id.* Consequently, the ‘445 patent certainly contemplates a circuit driving or triggering element that responds to a physical action (pressure or force over area) realized by a shoe and that causes the shoe to move and which causes the triggering element to generate a signal spectrum in response thereto. In the context of the NIKE+ products, Claim 1 of the ‘445 patent, for example, reads directly on the shoe sensor-iPod arrangement device in that the sensor senses pressures (forces over areas) imparted to the shoe when the same is lifted into the air during running (a series of jumps), and that senses pressures imparted to the shoe when the shoe returns to the ground and determines an amount of loft time there-between. The detection of loft time (the time that a shoe structure is off the ground and in the air during a jump), in say, USP 8,036,851 (naming VOCK as a co-inventor), clearly recognizes that the exact structure for determining such loft time is secondary to the function of determining loft time by sensor signal recognition by stating the equivalency among devices that produce signals ranging from relatively wider-spectrum analog signal generation devices (e.g., a microphone) to switches that produce relatively narrower or “discrete” signal spectrums similar to switches: “With reference to FIG. 1, the loft sensor 20 may be constructed by several well known components...Preferably, the sensor is either an accelerometer or a microphone assembly...Alternatively, the sensor 20 may be constructed as a mechanical switch that detects the presence and absence of weight onto the switch.” USP 8,036,851 to VOCK, et al. at col. 11, lines 45-50 (now assigned to APPLE). The ‘851 patent describes the use of a switching component by further stating “In still another embodiment of the invention, the sensor 80 of FIG. 1 can be a switch that rests below the boot of the ski...and that senses pressure caused by the weight of the user within the boot...That is, when the skier is on the ground, the boot squeezes the switch, thereby closing the switch...**The closed switch is detected...as a discrete input.** *Id.* at col. 13, lines 56-end. One of ordinary skill in the art such as PLAINTIFF certainly understands that a discrete input over time is one that certainly represents a spectrum of information (albeit relatively narrower than the signal generated over time by a microphone). Depending on how long a signal from a switch is detected or maintained, it matters not that a spectrum may contain only discrete values – a signal spectrum in this context is a signal representation occurring over time. Defendant VOCK furthered his fraud on the USPTO when he stated “**The microprocessor subsystem 12 will count at known time intervals (clock rates) for the duration of the opened switch, corresponding to the jump, and will record how long the jump lasts.**” A spectrum of signal values corresponding to open switch states at timed intervals will provide an equivalent signal generation arrangement that can be used to detect loft time. VOCK’s patents are invalid due to fraud on the patent office, and they should not have been issued over the Cherdak ‘445 patent based on technical reasons as well. Interestingly, USP 8,036,851 to VOCK *et al.* issued on October 11, 2011, and relies on and incorporates by reference the Cherdak ‘445 patent to provide an enabling disclosure. ‘851 Patent at col. 2, lines 20-25 (the ‘445 patent is the No. 1 patent relied on and incorporated by reference by VOCK and his co-inventors).

senses a noise spectrum; (iii) a switch that is responsive to a weight of a user of a vehicle, (iv) a voltage-resistance sensor that generates a voltage indicative of the speed of a vehicle; and (v) a plurality of accelerometers connected for evaluating a speed of a vehicle. *See Exhibit 22* at Office Action page numbered “6.” (USPTO Office Action in which the USPTO holds that claim 13 of the patent application corresponding to the ‘380 patent to Flentov et al, was unpatentable under 35 U.S.C. § 103, because the Cherdak ‘445 patent disclosed the aforementioned group devices – switches, voltage-resistance sensors, accelerometers, a plurality of accelerometers, and a microphone).

110. Despite the Patent Examiner’s position, VOCK pushed on by continuing to berate the Patent Examiner into falsely believing his sole “dimple” argument.

111. VOCK’s statements about a contact dimple were totally false, misleading, and egregious and were designed to deceive the Patent Examiner and the USPTO. VOCK’s express false and misleading statements are direct evidence of his intent to deceive the USPTO and were, by definition, material to the patentability of claims he was pursuing in the USPTO.

112. VOCK falsely characterized the prior art (the Cherdak patents) by attacking the methods contemplated by the Cherdak patents when he stated:

As above, independent claim 41 is a method claim which is amended to include the limitation that the steps of sensing are to be non-interfering with the motion of the vehicle along the surface. As argued above, Cherdak does not have such a sensor; and, as above, Applicants respectfully submit that claim 41 is allowable over the art. Because claim 42 depends from claim 41, claim 42 is also allowable for the same reasons.

Id. (emphasis supplied). The Cherdak Patents disclosed sensors later disclosed by VOCK and his co-inventors in his late-to-file patent applications giving rise to his ill-gotten ‘146 and ‘380 patents.

113. VOCK's intentionally false and misleading statements to the USPTO were summarized by VOCK, himself, in another Response to an Office Action in the '758 Application after the law had changed and subjected VOCK to penalties of perjury in accordance with 18 U.S.C. s. 1001 as mandated by 37 CFR s. 10.18. In particular, in a Response dated October 8, 1998, Vock again lied and pushed even harder thus manifesting his intent to deceive the USPTO and the Patent Examiner by stating:

We again disagree. Cherdak was discussed fully in the last office action; and Cherdak only discloses a contact dimple for a sneaker.

Exhibit 23 (Response to Office Action (of May 8, 1998) dated October 8, 1998) (emphasis supplied).

114. VOCK's Response dated October 8, 1998, (like all of his other responses) were authored by VOCK, were signed by Vock as both a co-inventor and a patent attorney subject to the rules governing patent practitioners. His averments regarding the prior art and, in particular, the Cherdak patents were wrong, false, misleading, and egregiously submitted to the USPTO so as to intentionally deceive the patent examiner into allowing the '146 Patent and '380 Patent to issue. VOCK's prosecution activities related to his own patent application are tantamount to sworn statements made under federal penalties of perjury in accordance with 18 USC § 1001. See **Exhibit 18**. Thus, the actions rise to the level of affirmative egregious conduct. Further, but for VOCK's actions, neither the '146 Patent nor the '380 would have been issued.

115. VOCK also concealed vital and critical pieces of information at the core of his alleged invention and its alleged ability to determine loft time even when located in a vehicle that moves over or along a surface.

116. The inventions claimed, disclosed and enabled in the '445 and '269 patents may be applied to devices that can move along a surface like a ski would move along a snow surface.

For example, the '445 Patent to Cherdak clearly states that "Moreover, the threshold time may change depending on what activity is chosen to provide the benchmark for determining an average threshold time (e.g. walking was the chosen benchmark activity whereas running, skipping, and **skating** could also have been used)." '445 Patent at col. 6, lines 12-17. Skating (roller skating, ice-skating, speed-skating, skateboarding, etc.) certainly involves the movement of a vehicle (e.g., a skate shoe, an ice-skate, a roller-skate, etc.) along a smooth surface.

117. VOCK intentionally concealed the quoted language found in the '445 Patent because he knew (as a registered patent attorney) that such quoted language would have obliterated his arguments and alleged entitlement to a patent for an invention first conceived by Cherdak.

118. On June 1, 1999, the Patent Examiner issued a Notice of Allowability in the '380 patent file then-pending before the USPTO.

119. The Patent Examiner and the USPTO indicated their direct reliance on VOCK's fraudulent and inequitable averments in the USPTO's REASONS FOR ALLOWANCE by stating:

"Claims 1-12, 18-22, 29, 35 and 36 are allowable over the prior art because the prior art does not disclose or suggest ***the combination of the following features***: a loft sensor for sensing a first condition that is indicative of a vehicle, the vehicle of the type which is ridden along a surface by a user of the vehicle, leaving the surface, and a second condition indicative of the vehicle returning to the surface, **the loft sensor being constructed and arranged so as to be substantially non-interfering with motion of the vehicle along the surface**, wherein the loft sensor senses a spectrum of information and wherein the first and second conditions correspond to a change in the spectrum of information; and a microprocessor subsystem for determining a loft time that is based on the first and second conditions, wherein the microprocessor subsystem comprises means for interpreting the change in the spectrum to determine the loft time."

Exhibit 25 at page 2 (emphasis supplied) (USPTO Notice of Allowability Mailed June 1, 1999).

120. As noted *supra*, the Federal Regulations governing VOCK's false and misleading statements to the USPTO about the Cherdak patents and VOCK's intentional concealment of

prior art teachings (from the Cherdak patents), were subject to penalties outlined in 37 CFR s. 10.18 (Effective 7/1/1998) which include, but are not limited to, those penalties codified in 18 USC s. 1001. *See Exhibit 18* (37 CFR § 10.18 (Effective 7/1/1998)).

121. VOCK's false and misleading sworn testimony were repeatedly made by a well-versed patent practitioner who was well-trained to read and understand patent documents including, and certainly not limited to, prior art patents like the Cherdak Patents.

122. VOCK's comments were intentionally designed to mislead and deceive the USPTO into issuing patents for VOCK's unpatentable devices as part of a deliberately planned and carefully executed scheme to defraud the USPTO and, ultimately, the Federal District Court in Colorado.

123. Vock's affirmative egregious misconduct in intentionally deceiving the USPTO during the pendency of the '146 Patent and the '380 Patent is further demonstrated by the fact that he intentionally withheld vital, dispositive information contained within the Cherdak patents (i.e., that the Cherdak patents actually disclosed information understandable by those skilled in the art that goes directly to devices that travel over a surface when placed into their normal operation).

124. Taken together or alone, repeated false and misleading statements and/or blatant concealment of negating prior art content expressly certainly are more than mere oversights or simple failures to mention prior art. VOCK's lies and his concealment were desperate measures to withhold critical prior information from documents he was specially trained to read and understand and for which he had an express obligation to bring to the attention of the patent examiners in charge of the examination proceedings related to his ill-gotten '146 and '380 patents.

125. VOCK's awareness and concealment of the teachings of Cherdak Patents is further evidenced by his express inclusion by reference to the Cherdak Patents in patents that followed in the entirely-invalid VOCK family of patents. For example, in U.S. Patent 7,092,846 which bases priority on the '380 patent, VOCK and his co-inventor gang wrote the following text in the Summary of the Invention section of their patent application:

The following U.S. patents provide useful background for the invention and are herein incorporated by reference: **U.S. Pat. No. 5,343,445**; U.S. Pat. No. 4,371,945; U.S. Pat. No. 4,757,714; U.S. Pat. No. 4,089,057; U.S. Pat. No. 4,722,222; **U.S. Pat. No. 5,452,269**; U.S. Pat. No. 3,978,725; and U.S. Pat. No. 5,295,085.

Exhibit 26 ('846 patent at col. 3, lines 59-64). Interestingly, the '846 patent was asserted by Defendant PhatRat against APPLE in the Federal District Court for the District of Colorado.

126. BUT FOR VOCK's repeated false and misleading statements, the USPTO would not have issued the '146 and '380 patents.

127. In addition to the Court having Declaratory Judgment Jurisdiction in this case stemming from VOCK's inequitable conduct and fraud on the patent office, a case and controversy exists between PLAINTIFF and all of the DEFENDANTS on the basis that there are interfering patents *vis-à-vis* the Cherdak Patents and, under 35 USC § 291, Plaintiff is entitled to declarations of invalidity of any such interfering patents.

128. Accordingly, Plaintiff is entitled to a judgment declaring that the '146 Patent and the '380 Patent, and all patents relying on same for priority of invention, are invalid as a result of the inequitable conduct by DEFENDANTS.

COUNT IV – ANTITRUST
Under the Sherman (§ 2) and Clayton (§ 4) Antitrust Acts
A Walker Process Claim

A. Antitrust Standing for a Walker Process Claim

129. Plaintiff hereby incorporates by reference all other paragraphs contained in this Complaint.

130. Section 2 of the Sherman Act deems that any person who commits anticompetitive and monopolistic behavior shall be guilty of a felony; Section 4 of the Clayton Act allows parties injured by violations of the Act to sue for treble damages. The two Acts, combined with the Supreme Court’s holding *Walker Process v. Food Mach. & Chemical Corp.*, 382 U.S. 172, 174 (1965), shall be collectively referred to herein as the “US Antitrust Laws.”

131. The Supreme Court has stated that a patent holder who obtains a patent fraudulently “cannot enjoy the limited exception to the prohibitions of § 2 of the Sherman Act, but must answer . . . in treble damages to those injured by any monopolistic action taken under the fraudulent patent claim.” *Walker Process v. Food Mach. & Chemical Corp.*, 382 U.S. 172, 174 (1965).

132. Such “monopolistic action” includes actions that cause injury to, *inter alia*, competitors and customers in relation to products contemplated and/or covered by a patent procured by fraud. *See, e.g., In re DDAVP Direct Purchaser Antitrust Litigation*, 585 F.3d 677 (2nd Cir. 2009).

133. A plaintiff suing for violations of § 4 of the Clayton Act has antitrust standing when the following factors weigh in favor of standing:

A. The causal connection between the antitrust violation and the harm to the plaintiff, and whether the plaintiff’s harm was intended;

B. The nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market;

C. The directness of the injury, including whether determining damages would be too speculative;

D. The danger of duplicative recovery, and whether it would be too complex to apportion the damages; and

E. The existence of a class of better-situated plaintiffs or more directly affected victims.

See Assoc. Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 540-45 (1982).

134. Generally, standing to bring a *Walker Process* claim has been held to the same level of scrutiny as standing to bring Declaratory Judgment Proceedings when it comes to patent-related cases. *See, e.g., Unitherm Food Systems, Inc. v. Swift Eckrich, Inc.*, 375 F. 3d 1341 (Fed. Cir. 2004).

135. The Supreme Court has clearly held that there need not be a threat of patent infringement (directed to a Declaratory Judgment plaintiff or to his customers) in order to find proper standing. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 127 S.Ct. 764 (2007).

136. In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), the Court previously held that “[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” (emphasis added).

137. Plaintiff has standing to raise both his *Walker Process* claim and his Declaratory Judgment claim against all Defendants because:

(1) there is a substantial controversy between the parties as to who first to invented the subject matter at issue (although Defendants VOCK and PHATRAT have recognized that PLAINTIFF has priority of invention and is the “Senior Party”)

(2) The patents discussed in COUNT II are each owned by parties having adverse legal interests (PLAINTIFF has sued the DEFENDANTS; VOCK and PHATRAT have sued NIKE and APPLE, and NIKE and APPLE have sued other parties based on the patents at issue.)

(3) There is sufficient immediacy and reality given, *inter alia*, the fact that the Cherdak Patents are slated to expire within two years.

Such factors warrant the issuance of a declaratory judgment, support standing in a *Walker Process* context, and bolster the statutory standing mandated by 35 U.S.C. § 291.

138. PLAINTIFF and DEFENDANTS are all involved in the athletic footwear technology industry.

139. VOCK and PHATRAT participate in the athletic footwear technology industry through licensing their fraudulently obtained patents, which pertain to footwear.

140. NIKE participates in the athletic footwear technology industry through its manufacturing, production, distribution, and sale of billions of dollars of shoes each year.

141. APPLE participates in the athletic footwear technology industry through its agreement with NIKE to produce athletic footwear technology, including but not limited to the NIKE+ products.

142. CHERDAK participates in the athletic footwear technology industry through his ownership of multiple footwear patents and his attempts to license or sell those patents to manufacturers and producers in the footwear industry.

143. As described *supra*, VOCK and PHATRAT have fraudulently obtained a patent for footwear products by lying to the USPTO regarding Plaintiff's prior art, which rendered their patent obvious and not novel.

144. VOCK and PHATRAT have violated the US Antitrust Laws, as construed by *Walker Process*, by attempting to enforce those fraudulently obtained patents against competitors in the footwear industry, particularly NIKE.

145. NIKE and APPLE, licensees of the fraudulently obtained VOCK patents described *supra*, have attempted to enforce the fraudulent monopoly of this patent by suing competitors in the footwear industry, including but not limited to ADIDAS.

146. The actions taken by each Defendant, in an attempt to enforce a fraudulently obtained monopoly, are predatory and exclusionary conduct and demonstrate an attempt to monopolize the footwear industry, especially with regards to embedded sensing systems contained in athletic footwear.

147. Given the size of NIKE and APPLE, and their dominance of the technology and footwear markets, their predatory and exclusionary conduct is anticompetitive and poses a dangerous probability of achieving monopoly power over the athletic footwear technology industry—especially with respect to the sector producing and selling sensing systems embedded in athletic footwear.

148. Defendants, through their anticompetitive and fraudulent behaviors and through their ability to monopolize the defined market, have violated the US Antitrust Laws. *See e.g. Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993).

149. Defendants' anticompetitive behaviors have, further, proximately and directly caused injury to the Plaintiff, who has been unable to license his patent to Defendants'

competitors in the athletic footwear technology industry, who fear costly enforcement actions based on the fraudulently obtained patents and other anticompetitive behaviors aimed at monopolizing the industry.

150. Plaintiff has lost profits and revenues as a result of his inability to license his patent.

151. Plaintiff's standing to raise a Sherman Act § 2 claim and a Clayton Act § 4 claim against Defendants lies in the fact that Plaintiff is a proper and efficient private enforcer of such a claim. The core of operative facts surrounding Defendants VOCK and PHATRAT commencing an egregious scheme to defraud the USPTO by procuring invalid patents and enforcing them in Federal Court, only to transfer rights to those invalid patents to NIKE and APPLE. Through that conduct Defendants VOCK and PHATRAT passed on a "baton of fraud" to Defendants NIKE and APPLE, who continue to perpetuate the fraud to the detriment of competitors and, ultimately, consumers who are forced to pay higher prices for goods and services because of the exploitation of market power resulting from vast portfolios of ill-gotten patents.¹⁷

152. Plaintiff accordingly has standing to bring his *Walker Process* claim against Defendants VOCK and PHATRAT. Plaintiff and Defendants VOCK and PHATRAT are non-practicing entities, are direct competitors in the athletic footwear technology marketplace,

¹⁷ Any reasonable patent attorney conducting a proper due diligence of the VOCK patents would have immediately seen the direct evidence of the fraud carried out by VOCK and his co-inventors when they blatantly deceived the USPTO and when they purposefully concealed the fact that the Cherdak patents mention skating (an activity involving jumps while wearing shoes specifically designed to move along a surface). While NIKE and APPLE may assert that they are innocent of the frauds committed on the USPTO, both continue to rely on and profit from the fraud that permitted VOCK and PHATRAT to obtain their ill-gotten '146 and '269 patents.

especially with regards to patent licensing in which they directly and actively compete for licensees and other transferees of rights under and/or related to their patents.

153. Plaintiff has been and continues to be harmed, both economically/financially and otherwise, by Defendants past and ongoing anti-competitive acts. Defendants VOCK and PHATRAT have fraudulently obtained and enforced their patents.

154. NIKE and APPLE have and continue to benefit greatly from the acquisition of rights related to the VOCK family of patents.

155. APPLE continues to seek issuance for patents that rely on either the '146 or the '380 patent or both for priority of invention – effectively allowing NIKE and APPLE to get behind years of prior art to win allowances for their recently filed patent applications. *See e.g.*, **Exhibit 8** (U.S. Patent 8,036,851 issued October 11, 2011).

156. APPLE remains in the athletic footwear technology industry (like Plaintiff), as evidenced by its long-standing relationship with Defendant VOCK. *See Exhibit 27* (U.S. Patent 7,911,339 entitled “Shoe wear-out sensor, body-bar sensing system, unitless activity assessment and associated methods”).

157. NIKE also continues to procure patents tainted by the fraudulently obtained patents. *See e.g.*, **Exhibit 28** (U.S. Patent No. 7,949,488 entitled “Movement monitoring systems and associated methods” and issued on May 24, 2011).

158. By its very nature, a fraudulently obtained patent allows patentees like APPLE and NIKE (both being beneficial owners of rights under the tainted and invalid VOCK portfolio) to exclude competitors from the marketplace, to the detriment of Plaintiff and other similarly situated competitors and to charge higher prices for their products to the detriment of Plaintiff

and other innocent consumers of Defendants' products who are similarly situated and who may not even know they are victims of monopolistic activities.

159. As addressed in greater detail below, Defendants APPLE and NIKE exploit their "partnership" in connection with their otherwise unrelated product lines (athletic shoes and apparel by NIKE and technology products by APPLE) to obtain monopolistic profits, and unreasonable prices and monopolistic margins that prevent competitors from entering the marketplace.

160. Every iPhone and iPod sold in recent years, for example, comes pre-loaded with the NIKE+ "app" and technology that calls out to phone users to "*WALK AROUND TO ACTIVATE YOUR SENSOR*" effectively commanding consumers to buy additional add-on products to enable the NIKE+ features of monopolistically priced iPhones, iPods, shoes, and other products.

161. Against this backdrop, NIKE (and APPLE) have asserted other patents they knew or should have known were invalid in view of the Cherdak patents against, *inter alia*, ADIDAS in an effort to further dominate the athletic and activity monitoring products marketplace.

162. NIKE+ is a huge part of APPLE's and Nike's businesses. The NIKE+ "app" on the iPhone remains one of the "apps" used to distinguish iPhones and related products from all the other mobile phones and shoes being sold.

163. Both APPLE and NIKE have bolstered and continue to bolster their market power and monopolistic dominance by obtaining patents from the USPTO based on known frauds committed on USPTO for years. They have also tried to assert a patent (the '314 patent) they knew was invalid based on the Cherdak Patents. In fact, competitors have been effectively removed from the electronics, footwear, technology, and activity monitoring marketplaces

because they know APPLE and NIKE continue to develop huge patent portfolios that relate back to the VOCK family of patents and/or other patents NIKE and APPLE knew or should have known were invalid.

164. To competitors, APPLE's and NIKE's continued joint procurement of patents in the tainted VOCK family of patents is demonstrative of APPLE's and NIKE's intent and collusion to dominate and monopolistically control the athletic footwear technology and related marketplaces, and APPLE and NIKE have collaborated to rid those marketplaces of real, meaningful competition to date.

165. As a result consumers are forced to pay higher prices because competition has been stifled – if a consumer wants NIKE+ functionality he or she has only one product from which to choose because meaningful competition has been eradicated through broad enhancement of NIKE's and APPLE's ill-gotten patent portfolios.

166. NIKE markets and sells its NIKE+ shoes on the basis that the NIKE+ sensor can only work with NIKE+ shoes -- all the while NIKE and APPLE know that the sensor works with any manufacturer's shoes by simply attaching the sensor to the shoes such as by attachment to a shoe's laces. Notwithstanding such realities, NIKE and APPLE insist that consumers must purchase NIKE+ shoes to properly work with NIKE+ technologies. That is how NIKE fully benefits from monopolistically priced footwear.

167. APPLE's and NIKE's false marketing practices unduly burden consumers and falsely leads consumers to believe that if they desire NIKE+ functionality, they must buy NIKE+ sensors from either NIKE or APPLE, NIKE+ shoes made by NIKE, and mp3 music players only from APPLE.

168. Not a single patent owned by NIKE or APPLE as marked on NIKE+ products reads on a system employing a special shoe structure that can be said to be part of the NIKE+ product mix. See **Exhibit 14** at page 1 (NIKE PLUS USER GUIDE).

169. To assert that NIKE+ technology works only with NIKE+ shoes and that a consumer must purchase NIKE+ shoes for use with NIKE+ technologies is false, misleading and a direct attempt at having their patents read beyond their scope onto “special” NIKE+ shoes. NIKE and APPLE are engaged in a scheme to have their patents somehow read beyond their actual scope and, in particular, onto shoes that NIKE and APPLE allege are necessary for NIKE+ products to work.

170. Plaintiff’s patents pre-date every patent Defendants rely upon to build their vast patent portfolios—under which they seek to tie sales of unpatented articles (shoes, for example) to allegedly patented NIKE+ technologies (e.g., sensor modules, etc.)

171. NIKE and APPLE are improperly attempting to extend the scope of any patents into the field of “special shoes” for which NIKE and APPLE have no such corresponding rights. Such misleading advertising, over-extension of patent claim scope, and abuse of consumers and competitors is exactly the conduct that the Antitrust laws were designed to protect against.

172. NIKE’s and APPLE’s assertions and misleading statements are overt attempts to tie unpatented articles (shoes with cavities adapted to receive sensor modules) to their allegedly patented NIKE+ products to increase sales, raise prices, defeat and eradicate competition, and otherwise monopolize the athletic footwear technology industry. Such tyings are *per se* antitrust violations.

173. APPLE’s and NIKE’s clear collusion and their *per se* antitrust violations are apparent in their advertising and press releases, stating, “The Nike+iPod Sport Kit requires a

Nike+ shoe and an iPod nano with a Mac® with a USB 2.0 port and Mac OS® X version 10.3.9 or later and iTunes 6.0.5; or a Windows PC with a USB 2.0 port and Windows 2000, XP Home or Professional (SP2) and iTunes 6.0.5,” *See, e.g., Exhibit 29* at pages 1-2 (APPLE Press Release Dated 5/23/06) (emphasis supplied).

174. In addition to standing to raise his *Walker Process* claim against Defendants based on the existence of standing to raise his Declaratory Judgment claim against Defendants, Plaintiff has additional antitrust injuries that provide further bases for standing to raise his claims under the Sherman (§ 2) and Clayton (§ 4) Antitrust Acts. In particular, because Defendants have been able to obtain and embolden large portfolios of invalid patents procured by fraud, and are knowingly and vexatiously enforcing patents they know are invalid, Defendants have effectively prevented competitors from entering the athletic footwear technology industry. Any reasonable company or other entity examining the vast portfolios of patents allegedly covering activity monitoring technologies and products would be wrongfully deterred from entering into that marketplace on account of fear of being sued by NIKE, APPLE, VOCK and/or PHATRAT.

175. By continuously obtaining more patents that are invalid as a result of their reliance on patents knowingly procured by fraud, Defendants have deliberately set out to maintain and enhance their dominant market positions.

176. Defendants NIKE and APPLE have taken the “fraud baton” passed to them by VOCK and PHATRAT and have continued to perpetuate the frauds on the Patent Office that were commenced years earlier by VOCK. Such conduct has prevented others from effectively entering and competing in the lucrative marketplace for athletic and activity monitoring products and from obtaining the benefits of validly issued patents because Defendants improperly rely on priority dates dating back almost 20 years.

177. Defendants NIKE and APPLE have brought suit against others based on at least one invalid patent and APPLE continues to mark that patent on its products knowing full-well that such a patent is invalid. As a result of such NIKE's and APPLE's anti-competitive conduct, Plaintiff has been unable to establish a licensing pool in a space where there are many potential licensees under his patents.

178. Conversely, in the lighted shoe products space, in which Plaintiff has been successful with regard to licensure of the Cherdak patents, there are no monopolies, no illegal tying arrangements, and no illegal combinations or "unique partnerships" among industry participants.

179. Defendants have illicitly created monopolies, enhanced market power, bolstered their ill-gotten monopoly positions, and obtained greater market shares and higher profits while competitors are pushed out of the marketplace and consumers pay more for their improperly tied products.

B. Walker Process

180. DEFENDANTS have secured a large number of U.S. and foreign patents which they have used to embolden their market power and to deter others from entering the personal fitness and activity monitoring marketplace. All of these patents claim, in one way or another, the benefit of priority of invention (the effective filing date) to two patents knowingly procured by egregious fraud on the patent office. These two parent or "seed" patents, U.S. Patent Nos. 5,636,146 and 5,960,380 (**Exhibits 6 and 7**) are a parent patent and an immediate, next-inline continuation patent, respectively, in what is now a vast portfolio of ill-gotten patents obtained by the egregious frauds Defendant VOCK (and possibly others) committed on the U.S. Patent and Trademark Office in the mid-1990s.

181. In the mid-1990s, well after the issuance of one of the Cherdak Patents, VOCK, a patent attorney licensed to practice law in Massachusetts, Colorado and New York, a partner at Lathrop & Gage, named co-inventor, and principal at Defendant PHATRAT, along with his co-inventors, engaged in a scheme to defraud the patent office and engaged in egregious inequitable conduct to win allowance for patents that should never have issued.

182. VOCK and PHATRAT perpetuated frauds on the USPTO by egregiously, intentionally and materially misrepresenting and/or concealing prior art references (namely, the Cherdak '445 and '269 patents) and teachings therein. Such prior art references completely negated patentability for the claims in the applications giving rise to the '146 and '380 patents.

183. To the present day, and for almost 20 years, Defendants have enjoyed the fruits of their frauds, concealment of information material to patentability, and collusive activities to effectively rid the market of real, meaningful competitors and competition.

184. While NIKE and APPLE were once Defendants in VOCK's expanded scheme to enforce knowingly invalid patents against them, NIKE and APPLE have since aligned themselves with VOCK and PHATRAT by basing priority of invention of their own patents on the earliest VOCK patents, which NIKE and APPLE knew, or reasonably should have known, were invalid as part of any reasonable due diligence study.

185. Defendants NIKE and APPLE now enjoy the ill-gotten rewards associated with the marketing of one of the most successful consumer product launches in history, all the while preserving for themselves the demonstrated ability to keep competitors at bay.

186. NIKE and APPLE have introduced, marketed, and sold numerous products in the NIKE+IPOD product line, including shoes, electronic devices, clothing, iPods, iPhones, and a

whole array of products that piggy-back on the “NIKE+IPOD” (pronounced NIKE “PLUS” IPOD) product line.

187. After the ‘146 and ‘380 patents were fraudulently and inequitably obtained from the U.S. Patent Office, Defendants reaped millions of dollars in product-related revenue, patent royalty income and monies known only to those who are able to benefit from the wild marketing success of the NIKE+IPOD family of products.

188. Defendants continue to profit as a result of their frauds before the USPTO, restraining free trade and commerce in the process. These actions are illegal under the Sherman and Clayton Acts. The Supreme Court has long recognized a cause of action for fraud on the patent office that results in a patent or patents that are used in a way to stifle free and open competition. *See Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174 (1965) (“the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present.”).

189. A *Walker Process* claim is proper (as in the instant case) (1) where the Defendants have procured patent(s) by fraud on the patent office; and (2) the other elements necessary to a § 2 case are present.

190. A Sherman § 2 claim, in general, requires a claimant to establish monopolization or an attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act. *Id.* at 177.

i. Patents Procured by Fraud on the Patent Office

191. On November 21, 1994, VOCK, along with his co-inventors (and possibly others) set out to deliberately and fraudulently obtain patents by filing their primary parent patent

application – U.S. Patent Application No. 08/344,485 entitled “Apparatus and Methods for Determining Loft Time and Speed” (the “‘485 Application”).

192. The ‘485 Application ultimately gave rise to the ‘146 patent. Currently, the ‘146 Patent forms the basis for a sizeable but tainted patent portfolio that includes a vast array of U.S. and Foreign Patents, Patent Applications and related rights.

193. Unfortunately for Defendants, Plaintiff arrived at the USPTO first – long before VOCK and his co-conspirators filed their first application giving rise to the vast array of U.S. and foreign patents stemming from VOCK’s first ‘146 patent.

194. In fact, by the time VOCK, et al. arrived at the USPTO, Plaintiff Cherdak’s U.S. Patents had been filed (as early as July 6, 1993), prosecuted, and issued by the USPTO as valid, enforceable patents on August 30, 1994 (USP 5,343,445), and September 19, 1995 (USP 5,452,269).

195. VOCK’s ‘485 patent application was filed on November 21, 1994, and remains the primary patent on which NIKE (and APPLE) still rely upon for purposes of priority of invention to continue to build their set of tainted patents by Fraud on the Patent Office. **Exhibit 8** (U.S. Patent No. 8,036,851 entitled “Activity Monitoring Systems and Methods” to VOCK *et al.* issued on October 11, 2011).

196. During the Examination Proceedings related to the ‘485 Patent Application giving rise to the ‘146 patent, VOCK made material misrepresentations about Plaintiff’s patents in seeking allowance for the ‘146 patent and concealed certain prior art teachings contained in the Cherdak patents in a deliberate scheme to win allowance for the ‘146 patent.

197. VOCK’s material and false misrepresentations and acts of concealment were deliberately made to deceive the USPTO into issuing the ‘146 patent. VOCK’s false

misrepresentations concerned claimed features held by the USPTO to be points of novelty in combination, and were made to deliberately steer the USPTO from uncovering critical information that would have negated patentability.

198. VOCK's direct involvement in the frauds is clear – he is a named co-inventor, a patent attorney, and he signed the very papers (under penalties of perjury in accordance with 18 USC § 1001) that were submitted to the USPTO to further his frauds.

199. VOCK's fraudulent statements to the USPTO are material to the patentability of his claims in the '146 and '380 patents. But for VOCK's fraudulent statements, the '146 and '380 patents would not have been issued.

200. VOCK's fraudulent statements go the heart of claimed features in VOCK's claims and were relied upon by the patent office in its decision to allow those claims.

201. VOCK deliberately deceived the USPTO by making false and misleading statements about the prior art concealed express teachings in the prior art so that the USPTO would issue his bogus patents.

202. By brow-beating the USPTO in the first patent applications, VOCK was able to “get rid” of the Cherdak Patents to clear the way for VOCK to read-out claims limitations that would negate the commercial meaningfulness of his claims.

203. In essence, while VOCK lied to the USPTO he was also lying-in-wait for the right time to obtain additional patents that he could assert against Plaintiff's potential licensees.

204. On May 21, 1996, in attempting to overcome prior art rejections in VOCK's '485 Patent Application based on the Cherdak '269 patent under 35 U.S.C. § 102 (anticipation) and § 103 (obviousness), VOCK signed and submitted a “RESPONSE” on behalf of himself and his co-inventors to an Office Action containing such rejections as mailed by the USPTO on

November 22, 1995. At all relevant times, VOCK was a practicing attorney, a registered patent attorney before the USPTO, and a co-inventor – he knew what he was doing and he knew how to cite to prior art before the USPTO. In that RESPONSE, VOCK intentionally and materially misrepresented the Cherdak '269 patent to the USPTO by stating:

Cherdak, on the other hand, discloses a single embodiment of a "contact dimple," column 5, lines 13-14, for activating timing circuitry relative to an athletic shoe's substantially vertical movement off of the floor. A dimple is, by definition, "an indentation or depression on a surface," *see, e.g., Webster's Ninth College Dictionary*. Such a *dimple* is unsuitable *and* undesirable in accord with the present invention, where a vehicle's movement along the surface is critical to the sport. For example, in snowboarding, a dimple on the underside of the snowboard would cause undesirable speed losses and directional instability.

Office Action Response dated May 21, 1996 at pages 8-9 (**Exhibit 19**).

205. Despite the USPTO's initial reluctance to accept VOCK's fraudulent statements, VOCK pushed on and would not take "no" for an answer. On September 3, 1996, VOCK again wrote to the USPTO (again signing a RESPONSE to a Final Rejection under pains and penalties of perjury) and stated:

More particularly, the amendment to claim 1, which incorporated the language "the loft sensor being substantially non-responsive to interfering engagement with the surface," was made in the last response of 6/4/96 **to overcome Cherdak '445**. This argument was rejected by the Examiner. Applicants will continue this argument in a continuing application that will be filed for the rejected claims 1-14, 18-22, 27, 29, 35-37 and 40-42. Therefore, claims 1-14, 18-22, 27, 29, 35-37 and 40-42 are hereby canceled.

Amendment after Final in Accord with 37 C.F.R. §1.116(a) dated September 3, 1996 at page 6 (**Exhibit 20**) (emphasis added) (the continuing application mentioned by VOCK ultimately became the '380 patent).

206. In response to VOCK's Rule 1.116 After-Final Rejection Amendment and Response, the USPTO issued U.S. Patent 5,636,146.

207. The statements made by VOCK in the papers he filed *pro se* in the USPTO on May

21, 1996 and September 3, 1996, such as his avowal to “continue” materially false misrepresentations of the prior art (the Cherdak patents), demonstrate VOCK’s clear intent to commit fraud on the USPTO by materially misrepresenting the prior art (the Cherdak ‘445 patent) to win allowance for his patents.

208. On December 12, 1996, VOCK, *et al.* filed a Continuation-type patent application in the USPTO bearing Serial No. 08/764,758, entitled “Apparatus and Methods for Determining Loft Time and Speed.”

209. The ‘758 patent application ultimately issued as the ‘380 Patent to Flentov, *et al.* **Exhibit 7** (‘380 Patent). In prosecuting the ‘758 application, VOCK continued his false and materially misleading statements about the Cherdak ‘445 and Cherdak ‘269 Patents by stating:

This is completely opposite to Cherdak, *which requires a protrusion* from the sneaker in order to operate. Such a protrusion would be completely inconsistent with the invention and its claims. **Specifically, Cherdak only discloses a single embodiment of a "contact dimple," column 5, lines 13-14, for activating timing circuitry relative to a athletic shoe's substantially vertical movement off of the floor.**¹⁸ A dimple is, by definition, "an indentation or depression on a surface," *see, e.g., Webster's Ninth College Dictionary*. A dimple such as Cherdak is unsuitable and undesirable in accord with the present invention, where a vehicle's movement along the surface is critical to the sport. For example, in snowboarding, a dimple on the underside of the snowboard would cause undesirable speed losses and directional instability. Accordingly, Cherdak's recitation of a dimple as an activation switch¹⁹ is suitable, only to athletic shoes, where a user's movement does not slide or otherwise move in contact with the floor. **Note that the amendments state that the loft sensor determines air time in a manner which is substantially non-interfering with motion along the surface. Such a limitation**

¹⁸ In *Cherdak v. Rack Room Shoes*, Case No. 11-cv-169, now pending in this Court, VOCK’s law firm, Lathrop and Gage, has asserted that activation of certain embedded circuitry covered by the claims of the ‘445 patents, for example, only works when in contact with the floor – in direct contravention of VOCK’s earlier averments to the USPTO and his recognition that the triggering devices disclosed in the Cherdak ‘445 patent activate the circuitry in the shoes relative to the shoe’s substantially vertical movement off of the floor. According to VOCK, Cherdak disclosed the activation of circuitry relative to an athletic shoe's substantially vertical movement off of the floor. **Exhibit 21** at 7.

¹⁹ VOCK’s assertion that a contact dimple is an activation switch is materially false. The dimple discussed in one preferred embodiment was a formation on the bottom of a sneaker’s sole – not part of the circuit triggering elements that are taught within the Cherdak patents.

clearly distinguishes over Cherdak.

‘758 Patent Application at Response to Office Action dated February 20, 1998 at page 7 (**Exhibit 21**) (emphasis in original text).

210. In VOCK’s Response to the Office Action, VOCK turned up the heat on the Patent Examiner and the USPTO by going from his initial argument that the Cherdak Patents “discloses a single embodiment of a ‘contact dimple,’” to his even more deceptive argument that the Cherdak Patents “**requires a protrusion**” from the sneaker in order to operate.

211. VOCK deliberately and materially misrepresented the Cherdak Patents by stating that the Cherdak Patents “required” certain structures. This is shocking, false, misleading, and egregious misconduct done to get his patent issued regardless of the prior art.

212. VOCK further fraudulently stated:

As discussed above, Cherdak describes only a sensor that is incorporated with the vehicle - an athletic shoe - as a housing and which extends via a dimple so that direct contact with the floor triggers the switch.

Id. at 9. and that:

As above, independent claim 41 is a method claim which is amended to include the limitation that the steps of sensing are to be non-interfering with the motion of the vehicle along the surface. **As argued above, Cherdak does not have such a sensor; and, as above, Applicants respectfully submit that claim 41 is allowable over the art.** Because claim 42 depends from claim 41, claim 42 is also allowable for the same reasons.

Id.

213. VOCK materially misrepresented (and concealed) the facts in the Cherdak ‘445 and ‘269 patents regarding the contents and enabling disclosures therein. In an attempt to make his misrepresentations appear legitimate, he cited to the Cherdak ‘269 Patent at Col. 5, but neglected to inform the USPTO that he was pointing only to one “embodiment” of a particular type of shoe

and its sole.²⁰

214. VOCK's truncated and deliberately deceptive citation to the Cherdak patent was a clear affirmative act to materially conceal and mislead the USPTO by mischaracterizing the prior art (the Cherdak patents) for the intended purpose of obtaining allowance of his '380 patent.

215. An inspection of VOCK's truncated citations reveals that VOCK made a deliberate decision to withhold and conceal a known material reference (information within the Cherdak '445 patent). Contrary to VOCK's statements to the USPTO, the disclosure of a contact dimple as part of a shoe's sole in the discussion of a "preferred embodiment" in the Cherdak Patents was but one of many structural and operational arrangements, devices, switches, piezoelectric devices, motion, acceleration and pressure responsive devices disclosed in the specifications of the '445 and '269 patents.

216. By way of example, as stated in the '269 patent and in regard to the many preferred embodiments disclosed therein, Mr. Cherdak clearly stated:

While activation switch 4110 is preferably like that of the LA GEAR design other switching systems including contact switches, tape switches, pressure switches, and any other well know switching systems would also work in the present invention.

Cherdak '445 patent at col. 5, lines 9-14; same quote found in Cherdak '269 patent at col. 5, lines 18-23; *see also*, '269 patent at col. 2, lines 57-61 (emphasis supplied) (clearly referencing piezo-

²⁰ Patent Attorney VOCK's citation only to lines 13-14 at col. 5 of the '269 demonstrates an example of his deliberate concealment of material information and his intent to deceive the USPTO to win allowance for his own patents. Lines 13-14 at col. 5 of the Cherdak '269 patent provides only an incomplete sentence fragment "...*GEAR's switch carrier resides is formed with a contact dimple which, when pressed upon contact of the shoe...*" deliberately taken out of context. Citation to such a sentence fragment is certainly the wrongful, deceitful conduct that 37 C.F.R. § 10.23 (d) seeks to prevent by patent attorneys by specifying the prohibition, *inter alia*, of "half-truths." 37 C.F.R. § 10.23 (d) governs the conduct of patent (attorney) practitioners and states that a "practitioner who acts with reckless indifference to whether a representation is true or false is chargeable with knowledge of its falsity. Deceitful statements of half-truths or concealment of material facts shall be deemed actual fraud within the meaning of this part."

electric devices as being known by those skilled in the art and which could be used in the context of the inventions claimed by the Cherdak '445 and '269 patents.)²¹ The USPTO also held that the Cherdak '445 patent teaches that a “loft sensor” is one that may consist of, but need not be

²¹ The USPTO also held that the Cherdak '445 patent disclosure was broad enough to include many types of switching and sensor arrangements which pre-dated VOCK's alleged patentable inventions. The USPTO stated that the Cherdak '445 patent broadly disclosed switches in association with sensors which could be used to detect loft time and without interference of a switch with a ground surface. See **Exhibit 16** at page 8 (USP 5,636,146 Patent Prosecution at Office Action Mailed August 14, 1996). Accordingly, while a switch may be configured to produce a relatively narrow signal spectrum indicative of whether a shoe is off the ground and in the air or is on the ground, the USPTO understood that such sensors in association with switches were certainly disclosed in the Cherdak '445 patent. *Id.* Furthermore, the express mention of piezo-based devices in the '445 patent certainly teaches one of ordinary skill in the art that piezo-based devices, for example, can be used in an apparatus to detect, *inter alia*, loft time. Accordingly, a sensor (e.g., a piezo-based microphone or buzzer, strain-gauge, etc.) in association with other circuit components and devices were clearly understood by the USPTO as being covered and taught by the Cherdak '445 patent. *Id.* Consequently, the '445 patent certainly contemplates a circuit driving or triggering element that responds to a physical action (pressure or force over area) realized by a shoe and that causes the shoe to move and which causes the triggering element to generate a signal spectrum in response thereto. In the context of the NIKE+ products, Claim 1 of the '445 patent, for example, reads directly on the shoe sensor-iPod arrangement device in that the sensor senses pressures (forces over areas) imparted to the shoe when the same is lifted into the air during running (a series of jumps), and that senses pressures imparted to the shoe when the shoe returns to the ground and determines an amount of loft time there-between. The detection of loft time (the time that a shoe structure is off the ground and in the air during a jump) in, say, USP 8,036,851 (naming VOCK as a co-inventor), clearly recognizes that the exact structure for determining such loft time is secondary to the function of determining loft time by sensor signal recognition by stating the equivalency among devices that produce signals ranging from relatively wider-spectrum analog signal generation devices (e.g., a microphone) to switches that produce relatively narrower or “discrete” signal spectrums similar to switches: “With reference to FIG. 1, the loft sensor 20 may be constructed by several well known components...Preferably, the sensor is either an accelerometer or a microphone assembly...Alternatively, the sensor 20 may be constructed as a mechanical switch that detects the presence and absence of weight onto the switch.” USP 8,036,851 to VOCK, et al. at col. 11, lines 45-50 (now assigned to Defendant APPLE). The '851 patent describes the use of a switching component by further stating “In still another embodiment of the invention, the sensor 80 of FIG. 1 can be a switch that rests below the boot of the ski...and that senses pressure caused by the weight of the user within the boot...That is, when the skier is on the ground, the boot squeezes the switch, thereby closing the switch...**The closed switch is detected...as a discrete input.** *Id.* at col. 13, lines 56-end. One of ordinary skill in the art would certainly understand that a discrete input over time is one that certainly represents a spectrum of information (albeit relatively narrower than the signal generated over time by a microphone). Depending on how long a signal from a switch is detected or maintained, it matters not that a spectrum may contain only discrete values – a signal spectrum in this context is a signal representation occurring over time. Defendant VOCK furthered his fraud on the USPTO when he stated “**The microprocessor subsystem 12 will count at known time intervals (clock rates) for the duration of the opened switch, corresponding to the jump, and will record how long the jump lasts.**” A spectrum of signal values corresponding to open switch states at timed intervals will provide an equivalent signal generation arrangement that can be used to detect loft time. Defendant VOCK's patents are invalid due to fraud on the patent office, and they should not have been issued over the Cherdak '445 patent based on technical reasons as well. Interestingly, USP 8,036,851 to VOCK *et al.* issued on October 11, 2011, and relies on and incorporates by reference the Cherdak '445 patent to provide an enabling disclosure. '851 Patent at col. 2, lines 20-25 (the '445 patent is the No. 1 patent relied on and incorporated by reference by VOCK and his co-inventors).

limited to, (i) an accelerometer that senses a vibrational spectrum; (ii) a microphone assembly that senses a noise spectrum; (iii) a switch that is responsive to a weight of a user of a vehicle, (iv) a voltage-resistance sensor that generates a voltage indicative of the speed of a vehicle; and (v) a plurality of accelerometers connected for evaluating a speed of a vehicle. *See Exhibit 22* at Office Action page numbered “6.” (USPTO Office Action in which the USPTO holds that claim 13 of the patent application corresponding to the ‘380 patent to Flentov et al, was unpatentable under 35 U.S.C. § 103, because the Cherdak ‘445 patent the aforementioned group devices – switches, voltage-resistance sensors, accelerometers, a plurality of accelerometers, and a microphone).

217. Despite the Patent Examiner’s position, VOCK pushed on by continuing to berate the Patent Examiner into falsely believing his sole “dimple” argument. VOCK’s false, misleading and egregious statements about a contact dimple were designed to deceive the Patent Examiner. VOCK’s express false and misleading statements are direct evidence of his intent to deceive the USPTO and were, by definition, material to the patentability of claims he was hotly pursuing in the USPTO.

218. VOCK pushed even harder and continued to brow-beat the patent examiner by further falsely characterizing the prior art (the Cherdak patents) by attacking the methods contemplated by the Cherdak patents when he stated:

As above, independent claim 41 is a method claim which is amended to include the limitation that the steps of sensing are to be non-interfering with the motion of the vehicle along the surface. As argued above, Cherdak does not have such a sensor; and, as above, Applicants respectfully submit that claim 41 is allowable over the art. Because claim 42 depends from claim 41, claim 42 is also allowable for the same reasons.

Id. (emphasis supplied). The Cherdak patents certainly disclosed sensors – a fact later disclosed by VOCK and his co-inventors in his late-to-file patent applications giving rise to his ill-gotten

'146 and '380 patents.

219. On June 1, 1999, the Patent Examiner issued a Notice of Allowability in the '380 patent file then-pending before the USPTO.

220. The Patent Examiner and the USPTO indicated their direct reliance on VOCK's fraudulent and inequitable averments in the USPTO's REASONS FOR ALLOWANCE by stating:

"Claims 1-12, 18-22, 29, 35 and 36 are allowable over the prior art because the prior art does not disclose or suggest *the combination of the following features*: a loft sensor for sensing a first condition that is indicative of a vehicle, the vehicle of the type which is ridden along a surface by a user of the vehicle, leaving the surface, and a second condition indicative of the vehicle returning to the surface, **the loft sensor being constructed and arranged so as to be substantially non-interfering with motion of the vehicle along the surface**, wherein the loft sensor senses a spectrum of information and wherein the first and second conditions correspond to a change in the spectrum of information; and a microprocessor subsystem for determining a loft time that is based on the first and second conditions, wherein the microprocessor subsystem comprises means for interpreting the change in the spectrum to determine the loft time."

Exhibit 25 at page 2 (emphasis supplied) (USPTO Notice of Allowability Mailed June 1, 1999).

221. BUT FOR VOCK's false and misleading statements to the USPTO and his endless pressuring of the Patent Examiner, the USPTO would not have wrongly found allowable subject matter in VOCK's then-pending patent applications giving rise to the '146 and '380 patents and, more particularly, in the "combinations" claimed therein.

222. BUT FOR VOCK asserting such false and misleading comments such as "Cherdak only discloses a single embodiment of a 'contact dimple', column 5, lines 13-14, for activating timing circuitry relative to a athletic shoe's substantially vertical movement off of the floor," the USPTO would not have allowed the '380 patent to issue in the first place.

223. VOCK knew that his statements were false and material to patentability of his patent claims as directly evidenced by the claims issuing in the '380 patent. For example, claims

of the '380 contain the very features VOCK argued as distinguishing his alleged invention over the Cherdak patents.

224. VOCK made deliberate and material misrepresentations about the Cherdak patents to secure his own patents. *See e.g.*, '380 Patent at Claim 1 defining VOCK's combination as one that includes a loft sensor like Plaintiff's, which is "constructed and arranged so as to be substantially non-interfering with motion of the vehicle along the surface." **Exhibit 8** at Claim 1.

225. In fact, Plaintiff's loft sensor doesn't interfere with a vehicle's movement along any surface, as it was described as being embedded within a shoe. See '445 Patent (**Exhibit 1**) at Claim 22, for example (**Exhibit 1** at Claim 22). Any mention of a contact dimple was part of a shoe's sole member, not in any way forming part of a circuit element used to trigger apparatus operation.

226. VOCK knowingly made material misrepresentations to the USPTO. In so doing, VOCK improperly frustrated the very competition which patents are intended to promote and protect.

227. In *Cherdak v. Rack Room Shoes, Inc.* (Case No. 11-cv-169), currently pending in this Court, Lathrop & Gage (VOCK's law firm) demonstrated the frauds committed by VOCK, beginning with the prosecution of the '146 patent.

228. In a Summary Judgment Motion filed by Defendant Rack Room and signed by a Lathrop & Gage attorney, (which was denied by the Court *sua sponte* without any responsive briefing being required by Plaintiff Cherdak in that case), Lathrop & Gage attorneys stated that "[a]lthough the '445 patent states that the activation switch is preferably like that of the LA GEAR design, it [the '445 patent] also notes that other well-known switching systems, such as

contact switches and tape switches could be used as well.” *See* Case No. 11-cv-169, ECF 87 at page 18.

229. VOCK’s colleagues at Lathrop & Gage who drafted that Motion were able to read the Cherdak ‘445 patent and easily confirm that it does not “only disclose a contact dimple” as VOCK earlier misled the USPTO into falsely believing.

230. BUT FOR VOCK’s intentional, materially false and misleading statements during the USPTO prosecutions of the ‘146 and ‘380 patents, he would not have received allowances for his patents and he would not have been able to keep an array of patent applications pending in the USPTO to the present day merely to rid the marketplace of genuine and meaningful competition.

231. VOCK’s egregious conduct could not be clearer than in the claims of the ‘380 patent, which recite the very features VOCK argued for when he intentionally and materially committed fraud on the patent office.

232. VOCK’s truncation of quoted language found in the enabling disclosures of the Cherdak ‘445 and ‘269 Patents, coupled with the materially false and misleading statements he directly and repeatedly made to the USPTO to win allowance for his ‘146 and ‘380 patents so as to make them the roots of a tainted patent portfolio, is clear fraud on the patent office. This is the exact type of inequitable conduct that must render invalid the entire patent portfolio Defendants have enjoyed through unwarranted and unjustified enforcement of invalid patents.

233. PHATRAT (at VOCK’s direction and control) prosecuted a number of Federal lawsuits against, *inter alia*, NIKE, APPLE, POLAR, FITSENSE, GARMIN and TIMEX Corp. based on invalid, unenforceable, and ill-gotten patents.

234. VOCK’s intentionally false and misleading statements to the USPTO were

summarized by VOCK in yet another Response to an Office Action in the '758 Application after the law had changed and subjected VOCK to penalties of perjury in accordance with 18 U.S.C. § 1001 as mandated by 37 CFR s. 10.18.

235. In particular, in a Response dated October 8, 1998, Vock again lied and pushed on with his intent to deceive the USPTO and the Patent Examiner by stating:

We again disagree. Cherdak was discussed fully in the last office action; and Cherdak only discloses a contact dimple for a sneaker.

Exhibit 23 (Response to Office Action (of May 8, 1998) dated October 8, 1998) (emphasis supplied).

236. VOCK's Response dated October 8, 1998, like all of his other responses, were authored by VOCK himself, and were signed by VOCK as both a co-inventor and a *pro se* patent attorney subject to the rules governing patent practitioners. His statements regarding the prior art and, in particular, the Cherdak patents, were wrong, false, misleading, and submitted to the USPTO with the clear intention of deceiving the patent examiner into allowing the '146 and '380 patents to issue in the first place.

237. BUT FOR flaunting his valuable USPTO Registration Number, he would not have been able to brow-beat the patent examiner as he did. VOCK's prosecution activities related to his own patent application are tantamount to sworn statements made under federal penalties of perjury in accordance with 18 USC § 1001. See **Exhibit 24**.

238. VOCK also concealed vital and critical pieces of information going to the very heart of his alleged invention and its alleged ability to determine loft time even when located in a vehicle that moves over a surface.

239. In fact, both of the Cherdak patents clearly and expressly disclose the fact that the inventions claimed, disclosed and enabled therein may be applied to devices that can move along

a surface like a ski would move along a snow surface. For example, the '445 Patent to Cherdak clearly states that "Moreover, the threshold time may change depending on what activity is chosen to provide the benchmark for determining an average threshold time (e.g. walking was the chosen benchmark activity whereas running, skipping, and **skating** could also have been used)." '445 Patent at col. 6, lines 12-17. Skating (roller skating, ice-skating, skateboarding, etc.) certainly involves the movement along the surface like a ski would move along a snow surface. The inclusion of the word "skating" in the Cherdak Patents eviscerates VOCK's fraudulent statement that a dimple is required by the Cherdak patents.

240. As noted *supra*, the Federal Regulations governing VOCK's false and misleading statements to the USPTO about the Cherdak patents and VOCK's intentional concealment of prior art teachings (from the Cherdak patents), were subject to penalties outlined in 37 CFR § 10.18 (Effective 7/1/1998) which include, but are not limited to, those penalties codified in 18 USC § 1001. See **Exhibit 18** (37 CFR § 10.18 (Effective 7/1/1998)).

241. VOCK's false and misleading comments were repeatedly made by a well-versed and experienced patent practitioner who was well trained to read and understand patent documents including, and certainly not limited to, prior art patents like the Cherdak Patents.

242. VOCK's egregious and deliberate misrepresentations to the USPTO during the pendency of the '146 and '380 patents is further exacerbated by the fact that he intentionally withheld vital information contained within the Cherdak patents (i.e., that the Cherdak patents actually disclosed information understandable by those skilled in the art that goes directly to devices that travel over a surface when placed into their normal operation).

243. VOCK knew that he was bound to rules for truthfulness as governing patent practitioners when he signed blatantly false and misleading papers he himself filed on his own

behalf in the USPTO. The papers VOCK filed held him to the same standards for truth and conduct that govern any affiant or declarant seeking to urge action from any governmental body. Taken together or alone, repeated false and misleading statements and/or blatant concealment of negating prior art content expressly found in the prior art are certainly more than mere oversights or simple failures to mention prior art. VOCK's fraudulent statements to the USPTO and his concealment of prior art were desperate measures to withhold critical prior information from the patent examiners in charge of the examination proceedings related to his ill-gotten '146 and '380 patents.

244. VOCK's awareness and concealment of the teachings of Cherdak Patents is further evidenced by his express inclusion by reference to the Cherdak Patents in patents that followed in the entirely-invalid VOCK/PHATRAT-family of patents. For example, in U.S. Patent 7,092,846 which bases priority on the '380 patent, VOCK and his "co-inventors" wrote the following text in the Summary of the Invention section of their patent application:

The following U.S. patents provide useful background for the invention and are herein incorporated by reference: **U.S. Pat. No. 5,343,445**; U.S. Pat. No. 4,371,945; U.S. Pat. No. 4,757,714; U.S. Pat. No. 4,089,057; U.S. Pat. No. 4,722,222; **U.S. Pat. No. 5,452,269**; U.S. Pat. No. 3,978,725; and U.S. Pat. No. 5,295,085.

Exhibit 26 ('846 patent at col. 3, lines 59-64).

245. VOCK's repeated false and misleading statements to the USPTO were directed to key aspects of the patentable combination allowed to issue in a U.S. Patent. While BUT FOR such statements, the USPTO would not have issued the '146 and '380 patents in the first instance, VOCK's repetitive bullying on such points warrants his falsehoods being classified as egregious acts demonstrating materiality under all applicable standards. In addition to the materiality of VOCK's egregious and repetitive lies to the USPTO, such statements were made in the context of a clear and unmistakable plan to deceive the USPTO into issuing the '146 and

'380 patents as further evidenced by clear concealment of critical teachings in the prior art that VOCK knew would have negated patentability of his claimed combinations.

246. VOCK's patents continue to stifle competition in violation of the Sherman and Clayton antitrust acts.

ii. Defendant's Enforcement and Holding Out of Invalid Patents

247. Defendants' continuing frauds on the patent office cannot be overlooked in view of the express enforcement activities engaged in by Defendants to date.

248. Since at least as early as mid-2005, PHATRAT (by one name or another) sued several market leaders including APPLE, NIKE, TIMEX, FITSENSE, POLAR ELECTRO, INC., POLAR ELECTRO OY, GARMIN and TIMEX Corporation for patent infringement based on alleged infringement by such parties of patents which in one way or another all rely on either U.S. Patent 5,636,146 and/or 5,960,380, the original parent patents on which the entirety of DEFENDANTS' ill-gotten patent portfolio rests.

249. PHATRAT sued Defendant APPLE in the U.S. District Court for the District of Colorado (Case No. 1:06-cv-02122-REB-MJW) alleging patent infringement of PHATRAT's patents (by way of assignment) including, but not limited to, Patent Nos. 6,499,000 (bases priority on USP 5,636,146), 6,885,971 (bases priority on USPs 5,636,146 and 5,960,380), 6,963,818 (bases priority on USPs 5,636,146 and 5,960,380), and 7,092,846 (bases priority on USP 5,960,380).

250. All such lawsuits were ultimately dismissed, by agreement of the parties, with prejudice, and, on information and belief, resulted in licenses or other rights agreements, or assignments of rights such as those from PHATRAT to NIKE and/or APPLE.

251. Lathrop & Gage was responsible, at least in substantial part, for representing PHATRAT and for prosecuting the aforementioned patents which were the subject of litigation in the PHATRAT v. APPLE case²².

252. One of Defendant VOCK's co-inventors, Dr. Shawn E. Burke, is a named co-inventor in U.S. Patent No. 7,092,846 as asserted by PHATRAT against APPLE in the *PhatRat v. Apple* case – a case in which the accused devices alleged of infringement were none-other than NIKE + IPOD products. Dr. Burke has been hired by Lathrop & Gage, LLP, VOCK's law firm, as an “expert” in the *Cherdak v. Rack Room Shoes, Inc.* case now pending in this Court. Clearly, Dr. Burke has a significant interest in protecting the alleged validity of the very patents in which he is a named co-inventor and which have been asserted against APPLE in connection with NIKE+ products.

253. The very close relationships between VOCK, Burke, Lathrop & Gage, and PHATRAT²³ (co-inventors, consulting experts, counsel to the same parties, etc.), demonstrate that VOCK knew of the fraud on the patent office that he committed over his own signatures on several occasions, and the continued fraud on the U.S. District Court for the District of Colorado court when PHATRAT filed suit, *inter alia*, against NIKE, APPLE, TIMEX, GARMIN, FITSENSE and POLAR based on alleged infringement of knowingly invalid patents.

²² Its also interesting to note that while PHATRAT apparently had retained other counsel to handle certain litigation related tasks, Lathrop & Gage was still very involved and even fronted the money to commence the *PhatRat v. Apple* case in the first place. **Exhibit 17** (Filings Fees Receipt issued by the United States District Court for the District of Colorado evidencing filing fees paid by Lathrop & Gage Check No. 1035 in case no. 06-cv-012122).

²³ On information and belief, Defendant VOCK, the Boulder Office of Lathrop & Gage, and the offices of Defendant PHATRAT are all located in the same building at 4845 Pearl East Circle Boulder, CO 80301. Defendant VOCK is a named forming member of Defendant PHATRAT Technologies, LLC. **Exhibit 24** (Colorado Business Records Articles of Organization for Defendant PhatRat Technologies, LLC).

254. The frauds on the USPTO not only render the '146 and '380 patents invalid *ipso facto*, any patent “in the technology family” and relying on such invalid patents is tainted by the frauds to obtain the root patents in the first place.

255. VOCK's materially false and misleading statements to the USPTO during pendency of the '146 and '380 were relied upon by the USPTO.

256. VOCK, PHATRAT, APPLE and NIKE used these fraudulent and ill-gotten patents to rid the marketplace of meaningful competition.

257. VOCK and PHATRAT have significantly benefited from the frauds they perpetrated on the USPTO to obtain invalid patents. They have used their ill-gotten patent portfolio to extract considerable fees and/or licenses from entities including, but not limited to, NIKE, APPLE, TIMEX, POLAR, GARMIN, FITSENSE in direct contravention of Section 2 of the Sherman Antitrust Act and Section 4 of the Clayton Act.

C. Defendant's Attempted and Actual Monopolization Through Use of Fraudulently Obtained Patents, Patent Enforcement, and other Bad Acts

i. The Relevant Market

258. NIKE + IPOD products and related technologies and products (including, but not limited to, footwear) have been some of the most successful consumer products ever marketed and sold throughout the world. All parties to this action are competitors in the footwear space.

259. Plaintiff is a licensor of footwear related patents (his own) to many companies who use, make and sell footwear products. VOCK and PHATRAT have sued NIKE and APPLE in connection with footwear products (namely, NIKE+ products). APPLE sells footwear related products and continues to work with VOCK to secure patents directly related to footwear.

260. The success of such product offerings has created a relevant marketplace and a modern phenomenon known as NIKEPLUS.COM, where runners, athletes, and the public in

general can learn about new products, buy shoes, clothing, and technologies under the NIKE+ trademark, share information about the activities in which they use their NIKE+ products to virtually compete against each other and share stories about their successes and challenges.

261. As a result of extensive marketing by NIKE and APPLE, the NIKE+ family of products have become market leaders worldwide.

262. Defendants have collectively permitted only a limited amount of competition from other marketers who do not possess the sheer numbers of users, products, website facilities, features, technologies and collections of U.S. and foreign patents. It has become impossible to effectively compete in the market space created, maintained, and enjoyed almost exclusively by VOCK, PHATRAT and, more recently, NIKE and APPLE.

263. In fact, no other marketers can compete with the ill-gotten, but vast, patent portfolio that was initially pursued by VOCK and PHATRAT and, then later, by NIKE and APPLE. And, because NIKE and APPLE have sued others (e.g., ADIDAS) based on this illicitly procured family of patents, competitors are wary to enter the relevant market for athletic and activity monitoring and related products.

264. At the time that VOCK and PHATRAT pursued patent infringement litigation, against, *inter alia*, NIKE, APPLE, POLAR, FITSENSE, GARMIN and TIMEX Corp., PHATRAT was the assignee of record of many U.S. and foreign related and intended patent applications/patents.

265. In the *PhatRat v. Nike* case alone, PhatRat asserted four (4) patents – all directed to personal activity monitoring technologies in connection with use in footwear and which all rely on VOCK's false and material statements to obtain allowances in connection with the '146 and '380 patents in the first place.

266. VOCK saw Plaintiff Cherdak's patents as huge obstacles in the pursuit of his unfair and anticompetitive trade practices. Instead of attempting to purchase rights from Cherdak, VOCK chose instead to materially misrepresent the metes and bounds of the Cherdak Patents to the USPTO and to the American People.

**ii. Monopoly Power and Defendant's Acts in Furtherance Thereof
Monopolization and Attempted Monopolization**

267. Defendants' use of numerous invalid patents to extract revenue from parties in the market (and exclude others from that market) is clear evidence of predatory practices in the market.

268. To utilize the high costs of litigation to extract royalties based on knowingly invalid patents obtained by fraud is illegal and is clear patent misuse.

269. By acquiring tens of patents directed to personal activity monitoring technologies by deliberately misrepresenting the prior art (the Cherdak patents) to build a vast, yet invalid, patent portfolio of U.S. and Foreign Patent Rights and then to knowingly assert broad patent claims against others in Federal Court in the United States is, by definition, exclusionary.

270. As a result of VOCK's and PHATRAT'S improper, illegal and predatory acts and anticompetitive practices, competitors, including Plaintiff, have not been able to enjoy the benefits of the U.S. Patent systems' *quid pro quo*. In the case of Plaintiff, he has and continues to be injured by VOCK'S and PHATRAT'S predatory practices in the field of patent licensing in which VOCK and PHATRAT directly compete.

271. Defendants NIKE and APPLE (as a result of their obtaining assignments and/or licenses from PHATRAT and/or VOCK) now enjoy an invalid patent portfolio that, absent Court intervention, will continue to expand and create barriers to entry to new marketers who could otherwise introduce new and innovative products.

272. VOCK, PHATRAT, NIKE and APPLE, based on VOCK and PHATRAT's fraudulent behavior, have now created a marketplace that is virtually impenetrable so that others cannot enter the same and effectively compete.

273. Defendants have violated Section 2 of the Sherman Antitrust Act by improperly and illegally monopolizing interstate commerce and, in particular, the personal fitness and monitoring marketplace.

274. Section 4 of the Clayton Act permits Plaintiff to bring this Count and to seek all applicable damages and remedies including, but not limited to, threefold the damages incurred by Plaintiff to date (lost licensing revenue, lost profits, damage to business position, etc.), the cost of suit and attorney's fees.

iii. Per Se Illegal Tying by NIKE and APPLE – A Clear Violation of Sherman § 2

275. NIKE and APPLE have created a marketplace they enjoy free from any real and meaningful competition. Their combined and individual monopolies in their respective marketplaces have allowed them to further dominate the athletic and activity monitoring products and footwear spaces for their own individual and joint gain.

276. In addition to their acts of monopolization and attempts to monopolize the athletic and activity monitoring products and footwear spaces including, *inter alia*, the procurement, use, enforcement, and false marking of patents, NIKE and APPLE are engaged in *per se* illegal tying of articles namely shoes, apparel, iPods, iPhones, etc. to the NIKE+ product line.

277. If a consumer wants to purchase and use NIKE+ technology for his or her own use, he or she is faced with a command that they must also purchase NIKE+ shoes and APPLE "i" products. Such tying involves a scheme in which NIKE and APPLE openly instruct their

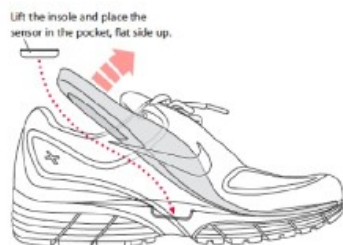
retailers and others to “push” NIKE and APPLE products on false assertions that NIKE+ products only work with NIKE+ shoes.

278. For example, APPLE openly asserts the following on its website in connection with its illegal concerted action with NIKE:

What do I need to get started using the Nike + iPod system?

You need:

- An iPod nano, iPod touch (2nd generation) and later, or iPhone 3GS and later
- The Nike + iPod Sport Kit if using an iPod nano or the Nike + iPod Sensor if using an iPod touch or iPhone
- Nike+ ready shoes
- iTunes 8 or later



See **Exhibit 30** (APPLE information re NIKE+).

279. NIKE states the following on its website:

Frequently Asked Questions

Will my Nike+ sensor work with other shoe brands? Can I tie my sensor into my laces?

The Nike+ sensor has been designed and tested specifically to work with Nike+ shoes. Only Nike+ shoes feature a specifically engineered, built-in pocket under the insole for the Nike+ sensor, designed for both maximum accuracy and comfort.

The sensor is most accurate when placed within the built-in pocket of Nike+ footwear. After more than two years of testing, we know that for best accuracy, the sensor needs to be flat, stable, and secure. By placing the sensor anywhere other than the pocket in Nike+ footwear, accuracy, reliability, and wireless performance could be affected and lead to inconsistent or unreliable performance.

See **Exhibit 31** (Nike FAQ).

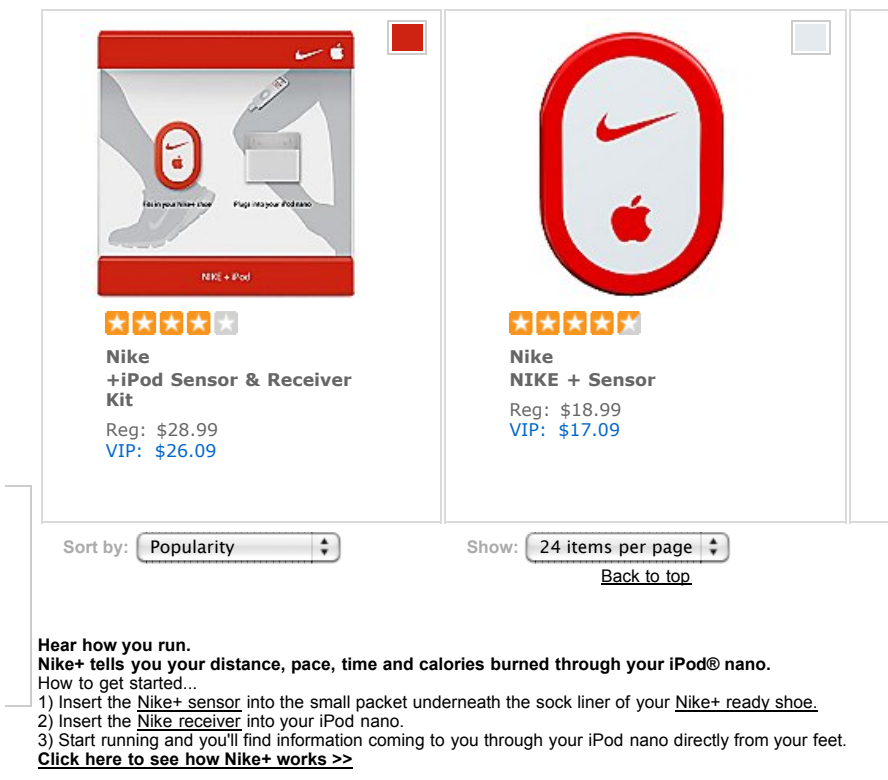
280. Both NIKE and APPLE know that the NIKE+ sensor works just as well if it is tied to the laces of a pair of any shoes such as those sold by ADIDAS, BROOKS, SAUCONY, REEBOK, etc. NIKE's avoidance in directly answering its own stated FAQ, is demonstrative of the fraud that NIKE and APPLE are perpetuating on American consumers.

281. Such fraud is part of NIKE's and APPLE's illicit tying of NIKE+ sensors and technologies to products not protected by patents and not special in any real and meaningful way in connection with their use in combination with NIKE+ sensors.

282. NIKE and APPLE, alone and in concert, are concealing the fact that the NIKE+ sensor can certainly be used with other shoes made by others by tying them to the laces.

283. NIKE and APPLE utilize low prices for NIKE+ sensors to gauge consumers on mp3 players and other "i" devices and athletic shoes, all in a carefully crafted marketing plan that boils down to pure and simple *per se* illegal tying.

284. NIKE and APPLE's illegal tying is evident by retailers who are forced to become part of the illegal scheme to defraud consumers in the name of greater profits. For example, the well-known retailer, ROAD RUNNER SPORTS, asserts on its website the following false and misleading statements:



See **Exhibit 32** (ROADRUNNER SPORTS). Despite these statements to the contrary, NIKE+ Ready Shoes are not required to use NIKE+ technologies.

285. In addition to clear facts supporting Plaintiff’s *Walker Process* claim and in the included antitrust offense and injury based on a totality of the circumstances as viewed based on a rule of reason analysis, DEFENDANTS are involved in a *per se* illegal product tying scheme in the name of greater profits. Such tying involves the selling of add-on products (shoes, mp3 players, etc.) which are marketed as required to operate with NIKE+ technologies and sensors.

286. Such tying has lead to higher prices to consumers and significant barriers to entry for competitors in regard to the lucrative athletic and activity monitoring products and footwear marketplace.

287. Plaintiff is entitled to redress for his lost profits from potential licensees, his costs of suit, treble damages, attorneys fees and all other relief that is due and proper under the circumstances as deemed just by the Court.

288. Plaintiff also is entitled to a public declaration of the illegality of Defendants' *per se* illegal arrangements and to an injunction ordering Defendants to publicly state that their NIKE+ products work with shoes manufactured by others and preventing Defendants from further engaging in *per se* illegal conduct involving false and misleading marketing.

GENERAL PRAYER FOR RELIEF

WHEREFORE, in addition to any other relief specifically mentioned and prayed for herein, Plaintiff Cherdak prays for judgment and relief against Defendants as follows:

- A. For a judgment that the Cherdak '445 and '269 patents are infringed by Defendants NIKE and APPLE (including, but not limited to, their subsidiaries, predecessors-in-interest and business units however and wherever formed, etc.) each standing alone and, jointly and severally, as they have and continue to act independently and in concert to bring to market and encourage the infringing use of products within the NIKE+ product family and the NIKE TRIAX products mentioned herein;
- B. That permanent injunctions be issued against continued infringement of the Cherdak '445 and '269 patents by Defendants NIKE and APPLE and their parents, subsidiaries, officers, directors, employees, affiliates, representatives and agents, and all those acting in concert with or through Defendants, directly or indirectly, including, but not limited to, distributors, customers, and other retailers;

- C. That an accounting be had for damages caused to Plaintiff Cherdak by Defendants NIKE's and APPLE'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 any damages awarded in accordance with any prayer for relief be enhanced and, in particular, trebled in accordance with the U.S. Patent Act (35 USC § 1, et seq.) for Defendants NIKE's and APPLE's acts which are found to be willful acts of patent infringement;
- E. That Defendants be required to pay treble damages, costs of suit, attorneys' fees and all other due relief required in accordance with Section 4 of the Clayton Antitrust Act (15 U.S.C. Ch. 1, § 15);
- F. That the Court declare the '146 and '380 Patents to Flentov, et al., and all patents relying thereon for priority of invention in whole and/or in part INVALID and UNENFORCEABLE due to INEQUITABLE CONDUCT and FRAUD ON THE USPTO regardless of ownership of such patents;
- G. That in accordance with 35 U.S.C. § 291 (Interfering Patents), the Court declare that the '146, '380 and '851 Patents as discussed in COUNT II hereof are invalid as interfering with the Cherdak Patents and as being invalid in accordance with the requirements for patentability set for in the U.S. Patent Act.
- H. That the Court award reasonable attorneys fees and costs incurred by Plaintiff in bringing and prosecuting this case.
- I. Such other and further relief as this Court shall deem just and proper.

Respectfully submitted,

/s/ Daniel S. Ward

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February 2012, I electronically filed the foregoing with the Court of the Court using the CM/ECF system, which will then send, as appropriate, a notification of such filing to the following:

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