

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FITBIT, INC.,
Petitioner,

v.

ALIPHCOM, INC.,
Patent Owner.

Case IPR2016-00714
Patent 8,446,275 B2

Before BRYAN F. MOORE, TREVOR M. JEFFERSON, and
MIRIAM L. QUINN, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. 318(a)

I. INTRODUCTION

Fitbit, Inc. (“Petitioner”) filed a Petition (Paper 1, “Pet.”) to institute an *inter partes* review of claim claims 1–5, 8–10, 13–15, and 18–19 of U.S. Patent No. 8,446,275 B2 (Ex. 1001, “the ’275 patent”) pursuant to 35 U.S.C. §§ 311–319. AliphCom, Inc. (“Patent Owner”) filed a Preliminary Response to the Petition. (Paper 7, “Prelim. Resp.”). On September 15, 2016, we instituted an *inter partes* review of claims 1–5, 8–10, 13–15, and 18–19. Paper 10 (“Dec. on Inst.”).

After institution, Patent Owner filed a Patent Owner Response (Paper 11, “PO Resp.”), and Petitioner filed a Reply (Paper 18, “Reply”). An oral hearing for this case was held on June 13, 2017, and a transcript of the hearing has been entered into the record of the proceeding as Paper 26 (“Tr.”).

We have jurisdiction under 35 U.S.C. § 6. This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a). For the reasons that follow, we determine that Petitioner has shown by a preponderance of the evidence that claims 1–5, 8–10, 13–15, and 18–19 are unpatentable.

A. Related Proceedings

The parties state that the ’275 patent has been asserted in *AliphCom d/b/a Jawbone and Body Media, Inc. v. Fitbit, Inc.*, No 3:15-cv-02579 (N.D. Cal.), and *Certain Activity Tracking Devices, Systems, and Components Thereof*, Inv. No. 337-TA-963 (ITC). Pet. 2; Paper 5, 2. Petitioner also has filed petitions for *inter partes* review challenging claims 1–26 of the U.S. Patent No. 8,529,811 patent and claim 2 of U.S. Patent No. 8,793,522 patent, *Fitbit, Inc. v. AliphCom, Inc.*, Nos. IPR2016-00607 and IPR2016-00658.

B. The '275 Patent

The '275 patent relates to a health and wellness monitoring system and device. Ex. 1001, Abstract. The system claims to be a “general health and wellness management” device and system which receives “user data” from the user that includes “profile” and “preferences” information (*id.* at 20:62–64), tracks the user’s activity using wearable devices having sensors (*id.* at Abstract), and then rewards a user’s activity with “points” determined based on “reference values” that define activity-to-point conversion rates. (*Id.* at 44:6–12). The system can also set a “target score” for a user as a means of increasing user motivation to reach health and wellness goal. *Id.* at 38:58–59.

C. Challenged Claim

Independent claim 1 is reproduced below (Ex. 1001, 30:41–31:7):

1. A method comprising:
 - receiving data representing a profile defining parameters upon which a target score is established based on one or more health-related activities;
 - acquiring data representing one or more subsets of acquired parameters based on one or more sensors disposed in a wearable computing device;
 - determining data representing values for the one or more subsets of the acquired parameters based on reference values for the parameters set forth in the profile;
 - calculating at a first processor a score based on data representing the values, the score representing an attained portion of the one or more health-related activities;
 - causing presentation of a representation of the score relative to the target score; and
 - adjusting a determination upon which to modify the target score,

wherein the target score is indicative of one or more standards against which to compare one or more groups of the values aggregated to form the score.

Ex. 1001, 47:25–44.

D. Instituted Grounds of Unpatentability

We instituted trial on the following grounds. Dec. on Inst. 15.

Reference[s]	Basis	Claims
Hoffman ¹	35 U.S.C. § 102	1–5, 8–9, 13–15, and 19
Hoffman and Gilley ²	35 U.S.C. § 103	10, 18, and 19

II. ANALYSIS

A. Relevant Law

1. Anticipation

To prevail in its challenges to the patentability of claims, the Petitioner must establish facts supporting its challenges by a preponderance of the evidence. 35 U.S.C. § 316(e); 37 C.F.R. § 42.1(d). A claim is anticipated, and, thus, unpatentable, if a single prior art reference discloses each and every element of the claimed invention. *See Schering Corp. v. Geneva Pharms.*, 339 F.3d 1373, 1377 (Fed. Cir. 2003).

¹ U.S. Patent Application Pub. No. 2012/0041767 published Feb. 16, 2012 (“Hoffman”) (Ex. 1003).

² U.S. Patent Application Pub. No. 2008/0076637 published Mar. 27, 2008 (“Gilley”) (Ex. 1004).

2. Obviousness

A claim is unpatentable under 35 U.S.C. § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of skill in the art; and, (4) where in evidence, so-called secondary considerations, including commercial success, long-felt but unsolved needs, failure of others, and unexpected results. *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966) (“the *Graham* factors”).

3. Level of Skill

The level of ordinary skill in the art usually is evidenced by the references themselves. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001); *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995); *In re Oelrich*, 579 F.2d 86, 91 (CCPA 1978). For an obviousness analysis, prior art references must be “considered together with the knowledge of one of ordinary skill in the pertinent art.” *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994) (quoting *In re Samour*, 571 F.2d 559, 562 (CCPA 1978)). Moreover, “it is proper to take into account not only specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom.” *In re Preda*, 401 F.2d 825, 826 (CCPA 1968). That is because an obviousness analysis “need not seek out

precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. at 418; see also *In re Translogic Tech., Inc.*, 504 F.3d at 1259.

4. Claim Interpretation

In an *inter partes* review, claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b). Under this standard, we interpret claim terms using “the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant’s specification.” *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

We presume that claim terms have their ordinary and customary meaning. See *Trivascular, Inc. v. Samuels*, 812 F.3d 1056, 1062 (Fed. Cir. 2016) (“Under a broadest reasonable interpretation, words of the claim must be given their plain meaning, unless such meaning is inconsistent with the specification and prosecution history.”); *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007) (“The ordinary and customary meaning is the meaning that the term would have to a person of ordinary skill in the art in question.” (internal citation and quotation marks omitted)). A patentee, however, may rebut this presumption by acting as his or her own lexicographer, providing a definition of the term in the specification with “reasonable clarity, deliberateness, and precision.” *In re Paulsen*, 30 F.3d

1475, 1480 (Fed. Cir. 1994). Only those terms that are in controversy need to be construed, and only to the extent necessary to resolve the controversy. *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

B. Claim Interpretation

1. Level of Skill

Petitioner asserts “[a] person of ordinary skill in the art would have had at least two years of relevant college-level coursework in an engineering field with one to two years of post-education relevant work experience.” Pet. 8 (citing Ex. 1002 ¶¶ 16–19). Patent Owner does not offer a proposed level of skill in its Patent Owner Response. Nevertheless, Patent Owner’s Declarant Dr. Darrin J. Young asserts “a person of ordinary skill in the relevant field in June 2011 would have had experience working with electrical and electronic hardware, computer software, wired and wireless network communications, or computing devices.” Ex. 2001 ¶15.

Petitioner argues that the level of skill offered by Dr. Young is “flawed” because it does not include “any experience with health and wellness management.” Reply 5–6. As evidence, Petitioner points to Dr. Young’s alleged inability to answer a question regarding the “difference between ‘health and physical wellness.’” *Id.* at 6. Thus, according to Petitioner, “Dr. Young’s opinions should be given minimal, if any, weight.” *Id.* We find that characterizing one of ordinary skill as having experience in health and wellness does not affect the claim construction, anticipation, or obviousness determinations in this case. Thus, we considered Dr. Young’s answer to that question in the context of his deposition and his assertion that

one of ordinary skill would not need to have experience in health and wellness and we, nevertheless, give full weight to his testimony.

To determine the level of ordinary skill in the art in this case we consider the type of problems encountered in the art, the prior art solutions to those problems, the rapidity with which innovations are made, and the sophistication of the technology. *Custom Accessories Inc. v. Jeffrey-Allan Indus. Inc.*, 807 F.2d 955, 962 (Fed. Cir. 1986).

We agree with level of skill in the art cited by Petitioner. To the extent Patent Owner suggests, through its Declarant, that the pertinent field is limited to the electrical and electronic hardware, computer software, wired and wireless network communications, or computing devices fields *but excluding* health and wellness experience, we disagree. Instead, we agree with Petitioner that the field includes relevant work experience which *may be* in the health and wellness field. *See, e.g.*, Ex. 1001, 1:24–33 (characterizing that field of endeavor as generally relating to electrical and electronic hardware, computer software, wired and wireless network communications, and computing devices and, in particular, to “general health and wellness management techniques and devices for use with a data-capable personal worn or carried device.”).

2. Patent Owner’s Construction of “target score”

Claim 1 recites “receiving data representing a profile defining parameters upon which a target score is established based on one or more health-related activities” and “adjusting a determination upon which to modify the target score, wherein the target score is indicative of one or more

standards against which to compare one or more groups of the values aggregated to form the score.”

Patent Owner asserts “[i]n the context of the claims and specification of the ’275 patent, a POSITA would reasonably understand that a ‘target score’ is a value indicative of a state or conditions of health and physical wellness for a user that the user strives to attain, which . . . excludes the cited subject matter of Hoffman relating to reward goals bought with reward points.” PO Resp. 4.

Patent Owner relies on language in claim 1, recited two paragraphs above, and claim 2, which recites that the “target score” is “indicative of an ability of a user to achieve a targeted level of health and wellness associated with the target score.” PO Resp. 5. Patent Owner also cites various sections of the Specification consistent with its construction. *Id.* at 5–6 (citing generally Ex. 1001, 33:16–45:17 (for how scores are calculated); Ex. 1001, 36:16–21, 37:37–43, 38:24–32, 38–48, 51–55, 39:62–40:3, 40:60–63, 41:29–35, 42:38–42, Fig. 15B; Ex. 2001 ¶¶ 24–31.

3. Petitioner’s Construction of “target score”

Petitioner asserts “all terms should be given their plain and ordinary meaning.” Pet. 9; *see also* Reply 1 (asserting support for the “plain and ordinary meaning” construction in the Board’s Institution Decision). We stated in the Institution Decision that “while it may be true [in Hoffman] that the user ultimately selects the reward . . . the activity point price of the reward, which is the claimed “target score,” is established based on the activity, for example athletics.” Inst. Dec. 9. Petitioner agrees with this and

further states that “a POSITA would have understood a ‘target score,’ under its ordinary meaning, to encompass a ‘goal’ or ‘reward.’” Reply 2.

Petitioner relies on the Specification which explains that “target scores” can provide indicators of “progress or fulfillment of . . . health and wellness goals.” *Id.* (quoting Ex. 1001, 36:19–21). Additionally, the Specification states: “target value or score can be modified dynamically to motivate a user to continue toward a health and wellness goal” (*id.* at 35:29–31); “[modifying the “target score” requires a] baseline profile against which a user’s progress can be measured in modifying behavior when working toward a goal (e.g., overall target score) that is consistent with a healthy lifestyle” (*id.* at 41:21–251); and, “if the user attains or fulfills the goals,” it can correspond to “the target score having a value of 100.” Ex. 1001, 43:61–64.

4. *Construction of “target score” Does not Specifically Exclude Hoffman*

As an initial matter, we do not agree with Patent Owner that this claim term should be construed to specifically exclude the prior art. See PO Resp. 4; Reply 3. Such an exclusion would normally require a clear disavowal of claim scope. See *Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003) (“[W]here the patentee has unequivocally disavowed a certain meaning to obtain his patent, the doctrine of prosecution disclaimer attaches and narrows the ordinary meaning of the claim congruent with the scope of the surrender.”) Patent Owner has not presented sufficient evidence of a clear disavowal in this case.

5. *A “target score” is not Separate and Distinct from “reward points”*

Patent Owner also argues that the concept of “target score” is separate and distinct from “reward points.” Specifically, Patent Owner asserts that the calculated points and scores addressed in Figure 8 (Ex. 1001, 33:16–45:17) are entirely unrelated to and distinct from the points and scores shown in Figures 10–11 (Ex. 1001, 27:3–29:8), which they contend describe “reward points.” See PO Resp. 11–12.

Patent Owner asserts that “Petitioner conflates the separate and distinct concepts of ‘scores’ and reward points . . . [such that Petitioner’s implied construction] of ‘target score’ is inconsistent with the term’s use in the claims and the specification of the ’275 patent, and must be rejected.” PO Resp. 9. Specifically, Patent Owner asserts that in “citing to the 41:21–22 and 38:45–46 [portions] of the ’275 patent, Petitioner misleadingly states that the ’275 patent discloses a system that can ‘generate data representing a subset of acquired parameters,’ which represent activities used by the system to award points to a user” and that “[t]he points awarded to the user can then be ‘aggregated to form an overall health and wellness score.’” PO Resp. 9 (internal quotation omitted) (quoting Pet. 5). According to Patent Owner the cited portions of the Specification relate “only to ‘scores’,” not reward points. *Id.* Thus, according to Patent Owner the Specification treats reward points and “target score” as distinct and separate. PO Resp. 11–12.

Patent Owner also asserts,

the ’275 patent specification occasionally generally refers to “point values,” the term in those contexts is properly understood as referring to units of measure rather than to “points” as currency. See Ex. 1001 at 25:60-64, 35:64-67, 44:6-32, 44:47-

57; Ex. 2001 at ¶ 35. In other words, regardless of whether a target score might use points as a unit of measurement, a target score is still a fundamentally different and distinct concept compared to a rewards system as in Hoffman—even if the latter system also uses points as a unit of measurement.

PO Resp. 12 (emphasis added).

Patent Owner also asserts the “description of reward ‘points’ as virtual currency [in the Specification at Ex. 1001, 28:7–11] contrasts with the description of ‘target scores,’ which indicate a user’s state or conditions of health and physical wellness that a user strives to attain.” *Id.* at 11. Nevertheless, Patent Owner has not provided sufficient evidence in the Specification separating reward points from the “health and wellness” aspect of the disclosed system. As Patent Owner admits, points are simply a unit of measurement in the Specification. Indeed, the Specification emphasizes these points are for use as “virtual or actual currency” in “an online wellness marketplace,” as described herein, “e.g., a fitness marketplace” and can be used for prizes such as fitness bands. Ex. 1001, 28:62–65.

We agree with Petitioner that the Specification describes reward points as something that can be used to measure progress toward a desired reward, which can be considered a “target score.” For example, the Specification expressly ties Figure 8 to Figures 10–11, explaining that the latter are depictions of the points and scores calculated in Figure 8. Ex. 1001 at 25:38–26:54.³ The Specification emphasizes “these points may be

³ The Specification describes that for a parameter for which a goal is desired (e.g., nutrition, sleep, activity, etc.), scores are calculated and aggregated as “points” or “reward points,” which are redeemable for rewards. See Ex.

used for obtaining various types of rewards, or as virtual or actual currency, for example, in an online wellness marketplace.” Pet. at 6 (citing Ex. 1001 at 28:62–65, 28:7–23). In sum, Patent Owner has not shown that the Specification indicates that reward points cannot be a “target score.”

6. *The Relatedness of “scores,” “target scores,” and “reward points”*

We agree with Petitioner that the Specification discloses a single point system, which is both a component of the “score” and “target score,” and used as a reward currency. Reply 11–12. For example, the Specification explains how a user can achieve a “target score” for nutritional goals by earning points. Pet. 6 (citing Ex. 1001 at 44:12–21). For a user “goal to consume 45 milligrams of vitamin C per day,” the system may create a profile for that user “that equates 45 milligrams as 20 points (i.e., a target score for this nutrient).” *Id.*; Ex. 1002 ¶ 23. And if the user consumes 22 milligrams of vitamin C, it will achieve “approximately half of the goal,” or “10 points as the value.” Pet. 6. This “[s]core can be calculated at a first processor based on data representing the values,” and represents “an attained portion” of the “goal,” or “target score for this nutrient.” Ex. 1001 at 44:15–24.

1001, 25:55–64. Whether the score is a target score, because the system tracks a desired goal, or an aggregate score, because the system adds up the overall performance, we find that the Specification describes all calculations as corresponding indiscriminately to “points” or “scores.” *Id.* Consequently, because the points (and, therefore, scores) depicted in Figures 10–11 are also rewards, the target score, and the recited score, may also be rewards. Said another way, the Specification and arguments of the parties suggest that the description of both target score and rewards are intertwined.

The point system discussed in the above paragraph can be also used to buy a reward. For example, the Specification states “types of sleep 812, types of meals 814, and miscellaneous activities 816 can correspond to different point values of which one or more scores can be derived to determine aggregate value 830, which can be expressed in terms of points or a score.” Ex. 1001, 25:60–64. The Specification also states “points may be used for obtaining various types of rewards, or as virtual or actual currency, for example, in an online wellness marketplace, as described 10 herein (e.g., a fitness marketplace).” Ex. 1001, 28:7–10. Again, Patent Owner has not cited to sufficient evidence that the points earned to calculate a score are “separate and distinct” from points used to buy rewards.

Patent Owner cites *Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1298 (Fed. Cir. 2015) (emphasis in original) for the proposition that when a specification separately and distinctly describes separate components, a claim term that refers to one component cannot be construed to include both components. *Id.* at 10. Patent Owner also cites *Engel Indus., Inc. v. Lockformer Co.*, 96 F.3d 1398, 1405 (Fed. Cir. 1996) for this proposition. Construing “reward points” to be “target scores” does not conflict with that proposition. As explained in the previous two paragraphs, in the challenged patent, the “reward points” at issue may be used for two purposes, i.e. either to increase a user’s score or to buy goods. Thus, a “target score” is not described separately from a reward point but rather in conjunction with reward points.

7. *Petitioner's Declarant Performs a Proper Analysis*

Patent Owner also asserts that Petitioner's Declarant Dr. Mark A. Musen's positions should be "given little, if any, weight" as lacking underlying facts because he does not construe "target score" and because he allegedly does not acknowledge Patent Owner's asserted distinction between "target score" and reward points. PO Resp. 13. We disagree. Experts may be relied on to discuss claim terms even if they are given a plain meaning construction. *Cf. IGT v. Bally Gaming Int'l, Inc.*, 659 F.3d 1109, 1119 (Fed. Cir. 2011) (finding a claim not to be indefinite relying in part on an expert's testimony regarding plain meaning). Additionally, although Dr. Musen does not discuss Patent Owner's alleged distinction between "target score" and "reward points," he supports his opinions with facts, i.e. citations to the challenged patent. *See generally*, Ex. 1002.

8. *A "target score" is not Limited to Physical Activity*

Patent Owner's proposed construction includes the phrase "health and physical wellness." Petitioner asserts this is an apparent attempt to exclude from the scope of the claims scores that are related to non-athletic activity. Reply 6. To the extent that Patent Owner suggests that non-athletic activities are excluded from the claims, we disagree. Claim 1 states only that the "target score" is "indicative of . . . standards against which to compare . . . groups of the values aggregated to form the score," and "based on" data representing "health-related activities." Further, dependent claims 6 and 7 require the claimed "target score" to encompass participation in location-related events and tracking of social-related activities. *Id.* at 47:63–48:2. We find that social-related activities, at a minimum, can be non-

athletic. Accordingly, the plain language of the claim, together with the surrounding words, and in context of other recited limitations preclude us from limiting “target score” to physical activity.

9. Construction of “target score”

For the reasons above, we construe “target score” to have its plain meaning as evidenced by the explicit language of the claim, i.e. that it is “indicative of . . . standards against which to compare . . . groups of the values aggregated to form the score,” and it is “based on” data representing “health-related activities.” We do not accept Patent Owner’s assertion that “reward points” are separate and distinct from a “target score,” thus “target score” may include a score that can be achieved through the accumulation of reward points.

10. Other Terms

We need not construe any other terms to resolve a controversy between the parties or a distinction with the prior art. *Vivid Techs., Inc. v. Am. Science & Eng’g, Inc.*, 200 F.3d 795, 803, (Fed. Cir. 1999) (“[O]nly those terms need be construed that are in controversy, and only to the extent necessary to resolve the controversy.”). For purposes of this Decision, we determine that no other terms require explicit construction.

C. Anticipation Based on Hoffman (Ex. 1003)

1. Overview of Hoffman

Hoffman teaches an activity monitoring system that can, among other things, “encourage individuals to participate in athletic activities and improve their fitness levels.” Ex. 1003 ¶ 4. In particular, the system

motivates users to perform activities by rewarding them with “activity points” when they perform certain athletic and nonathletic activities. *Id.* ¶ 5. Accumulated activity points can then be “spent” on rewards such as products, services, discounts, and status upgrades. *Id.*

The system includes a “platform that maintains user account information.” Ex. 1003 ¶ 69. This allows users to “register with [the system] to track and monitor their athletic performance and other types of activity.” *Id.* The system collects and stores information likely to “produce insights into various aspects of the user” such as their interests in sports, personal styles, and strengths, their preferences for events or event locations, shopping and/or browsing interests, their social network memberships, and event participation and workout data. *Id.* ¶ 73. This allows the system to “customize content based [] user interests” and to “personalize the user’s experience” with the system. *Id.*

Based on the user’s interests in their profile, the system can suggest rewards that may be “purchased” with a certain number of activity points. *See* Ex. 1003 ¶¶ 5, 114, 122–23. These rewards can include “VIP treatment” at stores or events, product and/or service discounts, and “video game related items.” *Id.* ¶ 122. Hoffman teaches modifying the “cost” of these rewards based on the user’s interests, for example discounting the price for items relating to those interests. *See id.*

The system also displays the user’s accumulated activity points relative to their reward in order to “visually represent [the] progress a user has made toward earning a number of activity points needed to purchase [a] corresponding reward.” Ex. 1003 ¶¶ 87, 114, 123, 130, Figs. 14–16. This

allows the user to compare their progress towards their reward over multiple types of athletic and non-athletic activities. *See id.* ¶¶ 91, 123.

2. Overview

Petitioner contends that claims 1–5, 8–9, 13–15, and 19 are anticipated by Hoffman. Pet. 10. To support its contentions, Petitioner provides detailed explanations as to how the prior art meets each claim limitation. *Id.* at 10–43. Petitioner also relies upon a Declaration of Dr. Musen, who has been retained as a Declarant by Petitioner for the instant proceeding. Ex. 1002.

3. Claim 1 – Petitioner’s Contentions

Hoffman discloses “receiving data representing a profile defining parameters upon which a target score is established based on one or more health-related activities,” as recited in claim 1. Pet. 10–14; Ex. 1003 ¶¶ 5, 69, 73, 77, 78, 109, 114, 118; Ex. 1002 ¶ 40. For example, Petitioner contends that Hoffman’s reward goal is a “target score” defined in terms of a number of activity points. *Id.* at 14 (citing Ex. 1003 at ¶¶ 114, 123, Figs. 14–16). We agree and adopt this contention. These points represent and are based on athletic or exercise activities (i.e., health-related activities) such as those measured by the sensors in the system’s wearable athletic-monitoring device. *Id.* (citing Ex. 1003 ¶¶ 80, 91). Hoffman discloses that a user’s interests defined in their profile comprise a parameter based on health-related activities such as the user’s exercise history. *Id.* (citing Ex. 1003 at ¶¶ 115 (“A user’s interests [i.e., a parameter in the user’s profile] may be determined based on a history of user activity including types of workouts [i.e., health-related activities].”), 73 (“interests” are part of “a user’s

profile”)). Also, Hoffman discloses establishing such an activity-point goal for a reward (i.e., a target score) upon parameters defined in a user’s profile, such as a user’s interests: “The rewards 1425 displayed in portion 1405 may be selected in a variety of ways including based on a user’s interests.” *Id.* (citing *Ex. 1003 ¶ 115*).

Hoffman discloses “acquiring data representing one or more subsets of acquired parameters based on one or more sensors disposed in a wearable computing device,” as recited in claim 1. *Pet. 15–16; Ex. 1003 ¶¶ 38, 49, 62, 63, 70, 93, 109, 116, Figs. 7 A–B; Ex. 1002 ¶ 40.* For example, Hoffman’s sensors acquire data representing parameters such as calories burned, miles run, steps taken, heart-rate, amount of time exercised, and the speed and/or distance traveled by the user. *Pet. 15 (citing Ex. 1003 ¶¶ 38, 96, 82).*

Hoffman discloses “determining data representing values for the one or more subsets of the acquired parameters based on reference values for the parameters set forth in the profile,” as recited in claim 1. *Pet. 16–17; Ex. 1003 ¶¶ 39, 42, 69, 77, 78, 80, 92, 111, 130–131; Ex. 1002 ¶ 40.* For example, the “electrical signals output by the sensors” of Hoffman indicate athletic parameters—these parameters are converted into a representation of measured athletic activity. *Id.* at 16 (citing *Ex. 1003 ¶¶ 39, 42*). Then, Hoffman converts the activity metric(s) for the subset of athletic parameters (i.e., acquired parameters) into activity points (i.e., data representing values) using conversion rates (i.e., reference values). *Id.* at 17 (citing *Ex. 1003 ¶ 7*).

Hoffman discloses “calculating at a first processor a score based on data representing the values, the score representing an attained portion of the one or more health-related activities,” as recited in claim 1. Pet. 17–18; Ex. 1003 ¶¶ 64, 82, 87–89, 91, 109–11, 114, 131, Fig. 14–16; Ex. 1002 ¶ 40. For example, Hoffman discloses an exercise watch with a processor that determines values for various measured athletic activities. *Id.* at 17 (citing ¶ 0091 (“[W]atch 10 (FIGS. 7A and 7B) may be configured to measure athletic performance information [i.e., acquiring data . . . representing parameters] for a variety of athletic activity types and to determine an amount of activity points [i.e., data representing values] earned through those activity types”). Hoffman discloses an “activity monitoring server” in communication with the exercise watch that calculates a score based on activity-point values determined for athletic parameters. *Id.* at 18 (citing Ex. 1003 ¶¶ 109–11 (“[T]he system may add the determined number of activity points [i.e., data representing values] to a total number of activity points [i.e., the score] available to the user.”), 0114, Fig. 12).

Hoffman discloses “causing presentation of a representation of the score relative to the target score,” as recited in claim 1. Pet. 18–19; Ex. 1003 ¶¶ 87, 114, 123, 130, Figs. 14–16; Ex. 1002 ¶ 40. For example, Hoffman’s system causes a user interface to present “a total number of activity points accumulated” and to “further display a goal 1411 and a number of points 1413 needed to achieve goal 1411.” Pet. 18–19 (citing Ex. 1003 at ¶¶ 114, 130 (“[A]n athletic activity monitoring device . . . may include a display that visually reflects a state of the user’s progress relative to a challenge, goal or objective.”), Fig. 14).

Hoffman discloses “adjusting a determination upon which to modify the target score, wherein the target score is indicative of one or more standards against which to compare one or more groups of the values aggregated to form the score” as recited in claim 1. Pet. 20–22; Ex. 1003 ¶¶ 79, 91, 105, 122, 123, Figs. 15, 16; Ex. 1002 ¶ 40. For example, Hoffman teaches that “a conversion rate or algorithm may be determined based on a user’s athleticism score such as a SPARQ rating” (Ex. 1003 at ¶ 79), the athleticism score being determined from data collected by the system, (Ex. 1003 ¶ 0079 (“[D]ata used in deriving the SPARQ rating may be evaluated in determining a number of points to award or deduct from a user.”), 0105). Pet. 20.

4. Claim 1 - Patent Owner Response

Patent Owner asserts that Petitioner has not shown that Hoffman discloses a “target score,” as recited in claim 1. PO Resp. 13–24. Petitioner asserts: that “[t]he number of activity points necessary to ‘purchase’ a reward is established and presented to the user as a ‘goal’ (i.e., a target score).” Pet. 13–14 (citing Ex. 1003 ¶¶ 114, 123). Patent Owner argues that Petitioner’s reliance on reward items as the “target score” is misplaced. PO Resp. 13–24.

Patent Owner argues that “the price of a reward item is not set ‘based on one or more health-related activities’,” as required by claim 1. PO Resp. 18. We disagree. The Petition states that the activity points (which include athletic activity) in Hoffman are converted to a form of currency that can be used to buy reward items. Pet. 13 (citing Ex. 1003 ¶¶ 5, 77). Thus, athletics (a health related activity) is used to establish the price of the reward item in

activity points. Additionally, the reward item can be selected as a goal based on a user's interest in athletics. Pet. 13–14 (citing Ex. 1003 ¶¶ 114, 123). Additionally, the activity point price of the reward, which is the claimed “target score,” is established based on the activity, for example athletics. Thus, we are not persuaded by Patent Owner's argument.

Patent Owner asserts that “Hoffman's activity points do not represent a user's health or wellness since “activity points are earned through non-athletic activity such as shopping,” such as “award[ing] activity points for each dollar spent shopping at sponsoring companies.” PO Resp. 14–15 (citing Ex. 1003 ¶¶ 6, 26, 77, 81). We disagree. As explained above in Section II.B.8., the dependent claims specifically include non-athletic activity within the scope of the claims. Under our claim construction, the claims do not require the point earned toward a “target score” be converted directly from athletic activity, rather the points need to be “based on” data representing “health-related activities.” Additionally, Patent Owner admits that points in Hoffman “can be earned via athletic activity.” PO Resp. 14. This is sufficient to meet the claim even if the points sometimes are earned from non-athletic activity. Prior art that sometimes explicitly⁴ meets the claim elements is sufficient to show unpatentability. Just as a device or process that sometimes infringes nonetheless infringes (*Bell Commc'n Research, Inc. v. Vitalink Commc'n Corp.*, 55 F.3d 615, 622–23 (Fed. Cir.

⁴ While claims are not inherently anticipated where the prior art process occasionally yields the claimed element (*In re Crish*, 393 F.3d 1253, 1259 (Fed. Cir. 2004) (citing *Glaxo Inc. v. Novopharm Ltd.*, 52 F.3d 1043, 1047 (Fed. Cir. 1995))), Petitioner's contention is not based on inherency.

1995)), a description of a device that in some embodiments anticipates nonetheless anticipates. *See Lewmar Marine, Inc. v. Barient, Inc.*, 827 F.2d 744, 747 (Fed. Cir. 1987) (that which would literally infringe if later anticipates if earlier).

Patent Owner also asserts that “[b]oth Hoffman’s activity points and the ’275 patent’s reward points are virtual currencies” which are “separate and distinct” from “target score.” *Id.* (citing Ex. 1001 at 28:7–10; Ex. 2001 ¶ 50). Patent Owner reasons that “[s]cores and target scores are not virtual currencies, and cannot be bought, transferred, sold, or sold as the currency in Hoffman.” *Id.* (citing generally Ex. 1001). Nevertheless, as explained above in Section II.B.5., in connection with claim construction, according the Specification, reward points may be also be accumulated as points toward reaching a desired reward or a “target score.”

Patent Owner argues that Petitioner improperly combines the embodiment of website display (Ex. 1003, Fig. 14) and a watch display (Ex. 1003, Fig. 7A). Specifically, Patent Owner asserts “[t]he complex interface of Fig. 14, which is intended for a website, is plainly incompatible with the simple LCD interface of output device assembly 22 of Figs. 7A and 7B.” PO Resp. 25 (citing *Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1371 (Fed. Cir. 2008)). The argument is unpersuasive. Patent Owner’s argument is mere attorney argument, which is unsupported by factual evidence. Mere attorney arguments and conclusory statements that are unsupported by factual evidence have little probative value. *In re Geisler*, 116 F.3d 1465, 1470 (Fed.Cir.1997); *see also In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir.1984).

We do acknowledge, as Patent Owner urges, that a reference advanced as anticipating “must clearly and unequivocally disclose the claimed [invention] or direct those skilled in the art to the [invention] without any need for picking, choosing, and combining various disclosures not directly related to each other by the teachings of the cited reference.” *Net MoneyIN*, 545 F.3d at 1371 (quoting *In re Arkley*, 455 F.2d 586, 587 (CCPA 1972)). Nonetheless, the inquiry is “not constrained to proceed example-by-example when reviewing an allegedly anticipating prior art reference. Rather, the [reviewer] must, while looking at the reference as a whole, conclude whether or not that reference discloses all elements of the claimed invention arranged as in the claim.” *Net MoneyIN*, 545 F.3d at 1369 n.5 (emphasis added).

Petitioner asserts that the website and watch work together as part of the Hoffman system rather than as incompatible embodiments. Reply 21–23. Petitioner relies on the watch display and website display to meet the limitation to “causing presentation of a representation of the score relative to the target score.” Pet. 18–19. Petitioner asserts “representation of the user’s activity-point score relative to a reward goal (i.e., the target score) can be presented in numerous ways.” *Id.* at 19. We find that it is appropriate in the context of this invention to rely on the two ways (watch and website) of displaying information to meet the claim limitation at issue. We agree with Petitioner that the website and the watch together form the Hoffman system, and the display capability of the system is evidenced through the display in both devices: a computer displaying a website and the watch’s screen.

Claim 1 recites “adjusting a determination upon which to modify the target score.” Petitioner relies on Hoffman’s SPARQ rating to meet this limitation. Pet. 20. Patent Owner asserts “Petitioner attempts to combine disclosures relating to a SPARQ rating with a rewards goal when the two features have nothing to do with one another.” PO Resp. 26. Specifically, Patent Owner argues “The SPARQ rating is a type of athleticism score (which neither Petitioner nor Hoffman defines) that can be used to determine the rate at which a user earns virtual currency, whereas a rewards goal is the amount of virtual currency needed to purchase a reward.” *Id.* (citing Ex. 1003 ¶ 79; Ex. 1001, 10:1–67, 22:1–67). Patent Owner’s argument is premised on its contention that reward points are incompatible with “target score.” As explained above in Section II.B.5., we disagree. Thus, Petitioner has made a proper showing of anticipation. As SPARQ rating adjusts the rate at which a user earns reward points, it would also adjust the rate at which reward points accumulate towards a “target score.” Ex. 1003 ¶ 79.

For the reasons above, based on the full record developed during trial, we adopt Petitioner’s argument and evidence and we are persuaded that Petitioner has established by a preponderance of the evidence that claim 1 is anticipated by Hoffman.

5. Claims 2–5, 8–9, 13–15, and 19

Claim 1 is similar in scope to independent claim 19 and Petitioner has argued claim 19 with reference to its argument regarding claim 1. We have considered any differences in scope and Petitioner’s particular contentions in analyzing claim 19. Pet. 30–43. Also, as to the ground based on Hoffman alone, the Patent Owner argues these claims collectively, choosing claim 1

as representative. *See, e.g.*, PO Resp. 13–14. Accordingly, the previous discussion with respect to claim 1 equally applies to claim 19. We adopt Petitioner’s contention regarding claim 19. We are persuaded that Petitioner has shown by a preponderance of the evidence that claim 19 is anticipated by Hoffman.

We have reviewed the briefs and the supporting evidence concerning the additional limitations recited in dependent claims 2–5, 8–9, 13–15 as anticipated by Hoffman. *See* Pet. 22–30. Based on the full record developed during trial, we adopt Petitioner’s argument and evidence that Hoffman discloses the limitations of claims 2–5, 8–9, 13–15. Patent Owner does not challenge Petitioner’s evidence or arguments regarding the additional limitations recited in these dependent claims. PO Resp. 24, 27. We are persuaded that Petitioner has shown that the proffered prior art discloses those limitations.

6. Summary

We have reviewed the proposed ground of anticipation by Hoffman against claims 1–5, 8–9, 13–15, and 19, and we are persuaded that Petitioner has shown by a preponderance of the evidence that claims 1–5, 8–9, 13–15, and 19 are anticipated by Hoffman.

D. Obviousness Based on Hoffman (Ex. 1003) and Gilley (Ex. 1004)

1. Overview of Gilley

Gilley establishes a user profile that defines a variety of health and activity parameters (Ex. 1004 ¶¶ 15, 45, 84), monitors and analyzes activity data from sensors disposed in a wearable computing device (*id.* ¶¶ 14, 71, 82, 89, 90), sets health and activity targets for a user (*id.* ¶¶ 17, 49, 75, 96,

105), tracks and provides feedback regarding a user's progress towards those targets (*id.* ¶¶ 16, 99, 169), and includes a reward system through which an attained amount of activity can be exchanged for a reward (*id.* ¶¶ 73, 182).

Gilley's system is designed to "maintain the user's motivation" to engage in exercise and to "assist or motivate the user" to meet activity goals. *Id.* ¶¶ 67, 75, 140. For example, Gilley's system can "assign an activity level to the user's profile, e.g., beginner, intermediate, or advanced" in order to "suggest fitness activities in step 104 that are more suited to . . . the capabilities of the user" (*id.* ¶¶ 49–50) and later update a user's level based on collected activity data. *See id.* ¶ 72.

To assist users in meeting fitness goals, Gilley also teaches that its system determines the difference between a user's progress and their target and recommends that a user engage in a health-related activity that the system predicts will compensate for a user's projected shortfall by, for example, "increas[ing] the level or intensity of future workout(s)." *Id.* ¶ 76. Where "the collected data (e.g., sensor data) indicates that the user will not reach a target" the system also can "reduce the target performance metric to a level that is more attainable" and "adjust the user's fitness goals to be less ambitious to maintain the user's motivational level." *Id.* ¶¶ 75, 140.

2. Analysis

Petitioner contends that Hoffman and Gilley teach the limitations of claims 10, 18, and 19. Pet. 43. To support its contentions, Petitioner provides detailed explanations as to how the prior art meets each claim limitation. *Id.* at 43–54. Petitioner also relies upon a Declaration of Dr. Musen. Ex. 1002.

The combination of Hoffman and Gilley teach determining a magnitude of a difference between the score and the target score; predicting a subset of the acquired parameters to reduce the difference between the score and the target score; and generating data representing a recommendation to present to a user to engage in a health-related activity as recited in claim 10. Pet. 45–49; Ex. 1003 ¶ 114, 123; Ex. 1004 ¶ 17, 39, 60, 70, 75, 76, 78, 102; Ex. 1002 ¶ 51. For example, Gilley “intelligently recommend[s] lifestyle choices and activities based on [the] information and data collected about the user.” Ex. 1004 ¶ 39. Gilley “dynamically adapt[s] the user’s activities based on the data collected.” *Id.* at ¶ 76, Fig. 1. Gilley also teaches that if the collected activity data indicates the user will not reach a target performance metric, the system can “increase the intensity or duration of the current fitness activity or a future fitness activity” (*id.* at ¶ 76), or otherwise “suggest activities” based on data previously collected, *id.* at ¶ 0078, in order to compensate for the projected shortfall. *Id.* ¶¶ 76, 102, 60.

The combination of Hoffman and Gilley teach determining a subset of scores; changing a classification associated with a user based on the subset of scores, wherein changing the classification including leveling up to a first classification or leveling down to a second classification as recited in claim 18. Pet. 49–52; Ex. 1003 ¶ 121; Ex. 1004 ¶ 39, 49, 72; Ex. 1002 at ¶ 52. For example, Gilley teaches the “assigning [of] user category levels (e.g., activity levels)” based on the user’s profile data. *See* Ex. 1004 at ¶¶ 12, 39, 49. These levels, which the Gilley system first assigns based on information collected during an initial “interview” with the user, can be “e.g., beginner,

intermediate, or advanced.” *Id.* at ¶ 49, Fig. 1 (item 102). As the user engages in exercise and activities, the system “can change the category level assigned to a user in step 102 based on the collected data” so as to move the user up or down between classifications. *Id.* ¶ 72.

Petitioner relies on its contentions regarding Hoffman for the majority of the limitations of claim 19. Additionally, the combination of Hoffman and Gilley teach a general health and wellness module configured to facilitate modification of a value of an acquired parameter associated with a state of a user to change the “target score” as recited in claim 19. Pet. 52–54; 1004 ¶ 72, 75, 140; Ex. 1002 at ¶ 53. For example, Gilley teaches that a change of a user’s long-term fitness goal (i.e., the target score) “to be less ambitious” facilitates modification of a value of an acquired parameter by encouraging a user to engage in further activity represented by such a parameter by “maintain[ing] the user’s motivational level.” Ex. 1004 ¶ 140.

Finally, Petitioner provides a reasonable rationale to combine Hoffman and Gilley. Pet. 47–49, 51–52, 54. For example, Petitioner asserts adjusting a user’s target score to reflect more appropriate goals in order to maintain a user’s motivation to exercise as taught by Gilley would have furthered the Hoffman system’s goal of “motivat[ing] and encourag[ing] athletic activity among users.” Ex. 1002 ¶¶ 51, 53; Ex. 1003 ¶ 0077. We agree that adjustment to the accumulation of award points as taught by Gilley would allow flexibility in attaining Hoffman’s target score which would serve Hoffman’s goal of motivating athletic activity. Based on the full record developed during trial, we adopt Petitioner’s argument and evidence that the combination of Hoffman and Gilley discloses the

limitations of claims 10 and 18.

As to claim 19, the Petition states that Gilley teaches reducing the user's long-term goals to more attainable levels if collected data indicates that users are falling short of their fitness goals. Pet. at 53 (citing Ex. 1004 ¶ 75). The Petition then argues that one of ordinary skill "would have been motivated to combine the Hoffman and Gilley systems based on teachings in both references" and that this modification involves "[u]sing the target score adjustments taught by Gilley in the Hoffman system." Pet. at 54 (citation omitted). Based on the full record developed during trial, we adopt Petitioner's argument and evidence that the combination of Hoffman and Gilley discloses the limitations of claim 19.

Patent Owner faults Petitioner for not analyzing the Graham factors. PO Resp. 28–29; *Graham*, 383 U.S. at 17–18. Nevertheless, failure to enumerate and to analyze the Graham factors specifically is not fatal if the proper factual determinations are made and considered them in rendering a conclusion of obviousness. See *Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 990, 6 USPQ2d 1601, 1607 (Fed.Cir.1988). Petitioner does discuss the Graham factors. As noted above, Petitioner proposes a level of skill in the art. Petitioner then addresses the differences between the claims and the prior art with an eye to the appropriate level of skill. Pet. 52–55; see *Litton Indus. Prod., Inc. v. Solid State Sys.*, 755 F.2d 158, 163–64, 225 USPQ 34, 38 (Fed.Cir.1985) ("A specific finding on the level of skill in the art is not, however, required where the prior art itself reflects an appropriate level and a need for testimony is not shown.") (citing *Chore-Time Equip.*,

Inc. v. Cumberland Corp., 713 F.2d 774, 779 n. 2, 218 USPQ 673, 676 n. 2 (Fed.Cir.1983)).

Patent Owner asserts that “in addressing the scope and content of the prior art, Petitioner improperly takes statements in Gilley “wholly out of context and giv[es] them meanings they would not have had to one skilled in the art.” PO Resp. 29–30. Patent Owner is apparently referring to Petitioner’s equating rewards with a target score. *See id.* As explained above in Section II.B.5., we do not accept Patent Owner’s characterizations of these as being unrelated to each other. Thus, Petitioner explains sufficiently the scope and content of the prior art as to Hoffman and Gilley. Pet. 10–12, 43–45.

Petitioner discusses the similarities and differences between these references and the claimed invention. Pet. 45–54. Specifically, Petitioner explains what features of Gilley it relies on and what features of Hoffman it relies on and how they are to be combined. *Id.*

Patent Owner argues that “Petitioner offers no evidence that Gilley makes up for [the] deficiency” regarding “target score” in Hoffman and thus “claims 10 and 18 are unpatentable for the same reasons” as claim 1 and that “Petitioner’s obviousness ground for claim 19 [also] fails because it contains the same deficiencies as discussed above for its anticipation ground.” PO Resp. 27–28. We have determined that Petitioner has shown claim 1 is anticipated by a preponderance of the evidence so these arguments are not persuasive.

Patent Owner asserts, without citation to Gilley, that Gilley’s “rewards systems and fitness goals[] are distinct and separate components in

Gilley.” PO Resp. 30. Patent Owner also asserts that the fact that Hoffman and Gilly are both compatible with Apple products is of “no moment” because Gilley relates to “performance metrics” (target scores) and Hoffman relates to rewards. PO Resp. 31. We disagree. As noted above in Section II.B.5. and II.C.4., in the context of Hoffman, reward points can be earned toward a goal that can be considered a “target score.” Patent Owner argues that Petitioner combines Hoffman’s reward points with Gilley’s “fitness goals” which, according to Patent Owner, are incompatible. *Id.* 29–30. Again, as explained above, these concepts are not incompatible.

Patent Owner also argues:

Gilley discloses raw, un-converted goals for a user’s fitness, such as a “user’s weight loss goal,” “calorie burning goal,” and a “target number of walks.” See Ex. 1004 at ¶¶ 76, 142, 170. In contrast, Hoffman uses a variety of conversion formulas to change both athletic and non-athletic activities into standard activity points that are unspecific to a user’s physical and that do not represent a user’s fitness goals. See Ex. 1003 at ¶ 77; *supra* Section IV.A. A POSITA would understand that Hoffman’s rewards goals are unrelated to a user’s fitness, so it would make no sense to combine the disclosures of Gilley with those of Hoffman.

PO Resp. 30. We disagree. In an obviousness combination, “[a] person of ordinary skill is also a person of ordinary creativity, not an automaton.”

KSR, 550 U.S. at 421. And *KSR* explains that the ordinary artisan recognizes “that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *Id.* at 420.

We disagree that rewards based on physical activity are “unrelated” to

fitness goals. *See* Pet. 49. We find that combining fitness goals with a conversion formula that takes into account physical activity would have been obvious for the reasons already stated.

For the reasons above, based on the full record developed during trial, we adopt Petitioner's argument and evidence and find Petitioner has shown by a preponderance of the evidence that claim 19 would have been obvious over Hoffman and Gilley. For claims 10 and 18, each of which depends directly from independent claim 1, based on the full record developed during trial, we adopt Petitioner's argument and evidence and we find that Petitioner has adequately shown the combination of Hoffman and Gilley teach each of the additional limitations of claims 10 and 18 such that they would have been obvious over the combination.

3. Summary

We have reviewed the proposed ground of obviousness over the combination of Hoffman and Gilley against claims 10, 18, and 19, and we are persuaded that Petitioner has shown by a preponderance of the evidence that claims 10, 18, and 19 would have been obvious in view of Hoffman and Gilley.

III. CONCLUSION

Petitioner has demonstrated by a preponderance of the evidence the unpatentability of the following claims over the following grounds:

- a) claims 1–5, 8–9, 13–15, and 19 as anticipated over Hoffman; and
- b) claims 10, 18 and 19 would have been obvious over Hoffman and Gilley.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that claims 1–5, 8–10, 13–15, 18, and 19 of the '275 patent have been shown to be unpatentable.

This is a final decision. Parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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Patent 8,446,275 B2

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