

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON ATHLETICA CANADA INC. and LULULEMON USA INC.
Petitioner

v.

NIKE, INC.
Patent Owner

Case IPR2023-00180
Patent 10,232,220

**PRELIMINARY RESPONSE OF PATENT OWNER
NIKE, INC.**

TABLE OF CONTENTS

	Page No.
I. INTRODUCTION	1
II. TECHNICAL BACKGROUND	2
A. The '220 Patent	2
B. Prior Art.....	4
1. Johnson.....	4
2. Sutton	5
3. Plus 3 Network Pages	5
4. Fry	6
III. LEVEL OF ORDINARY SKILL IN THE ART	6
IV. CLAIM CONSTRUCTION	6
V. INSTITUTION SHOULD BE DENIED BECAUSE THE PETITION FAILS TO DEMONSTRATE THE REQUIRED REASONABLE LIKELIHOOD OF SUCCESS.....	7
A. Ground 1: lululemon Fails To Show That Johnson Anticipates the Challenged Claims	9
1. lululemon fails to show that Johnson discloses an apparatus that “record[s] athletic activity performed by a user” [11C]	10
2. lululemon fails to show that Johnson discloses an apparatus that “receive[s] a sharing option selection configured to allow the recorded athletic activity to be shared” [11D]	12
3. lululemon fails to show that Johnson discloses an apparatus that “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users” “in response to receiving the sharing option selection” [11E]	17
B. Ground 2: lululemon Fails To Show That Sutton Anticipates the Challenged Claims	23

1.	lululemon fails to show that Sutton discloses an apparatus that “record[s] athletic activity performed by a user” [11C]	24
2.	lululemon fails to show that Sutton discloses an apparatus that “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users” “in response to receiving the sharing option selection” [11E]	25
C.	Ground 3: lululemon Fails To Show the Challenged Claims Are Obvious Over Sutton.....	28
D.	Ground 4: lululemon Fails To Show That the Challenged Claims are Obvious Over the Combination of Sutton and the Plus 3 Website Pages.....	31
E.	Ground 5: lululemon Fails To Show That Claim 12 Is Obvious Over Sutton and Fry	32
VI.	CONCLUSION.....	32

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adaptics Limited v. Perfect Co.</i> , IPR2018-01596, Paper 20 (PTAB Mar. 6, 2019)	8
<i>Arendi S.A.R.L. v. Apple Inc.</i> , 832 F.3d 1355 (Fed. Cir. 2016)	9
<i>Chamberlain Grp., Inc. v. Techtronic Indus. Co.</i> , 935 F.3d 1341 (Fed. Cir. 2019)	14, 22
<i>Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.</i> , 821 F.3d 1359 (Fed. Cir. 2016)	8
<i>KSR Int’l Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007)	8
<i>Microsoft Corp. v. Biscotti, Inc.</i> , 878 F.3d 1052 (Fed. Cir. 2017)	14, 22
<i>Microsoft Corp. v. FG SRC, LLC</i> , 860 Fed. App’x 708 (Fed. Cir. 2021)	9
<i>Net Money, Inc., v. Verisign, Inc.</i> , 545 F.3d 1359 (Fed. Cir. 2008)	8, 10, 23
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (en banc)	7, 11
<i>Sinjimoru v. Geneze Innovation Inc.</i> , IPR2021-00493, Paper 8 (PTAB July 28, 2021)	8, 15, 17, 21
<i>SMIC, Ams. v. Innovative Foundry Techs., LLC</i> , IPR2020-00837, Paper 13 (PTAB Oct. 9, 2020)	7
<i>U.S. Well Servs., LLC v. Halliburton Energy Servs., Inc.</i> , IPR2022-01163, Paper 9 (PTAB Dec. 20, 2022)	8
<i>Wasica Fin. GmbH v. Cont’l Auto. Sys.</i> , 853 F.3d 1272 (Fed. Cir. 2017)	8, 15, 17, 21

I. INTRODUCTION

Nike, Inc. (“Nike”) is the owner of U.S. Patent No. 10,232,220 (Ex. 1001, “the ’220 patent”). Nike submits this Preliminary Patent Owner’s Response to lululemon Athletica Canada Inc.’s and lululemon USA Inc.’s (“lululemon’s”) Petition, which challenges the patentability of claims 11–14 and 19–20 of the ’220 patent (the “Challenged Claims”). Claim 11 is an independent claim from which all other Challenged Claims depend. Nike requests that the Board deny institution because lululemon fails to establish a reasonable likelihood of prevailing as to any Challenged Claim.

The ’220 patent relates to an apparatus that, among other things, performs two key operations. First, the apparatus records a user’s athletic activity and movements (*e.g.*, with an accelerometer or GPS). Second, the apparatus provides the user with a novel way of sharing workout information associated with the recorded athletic activity. Specifically, the apparatus shares the data to a social networking site in response to the apparatus’ receipt of the user’s sharing option.

lululemon challenges the claims on five grounds. Two of the five grounds are based on anticipation: Ground 1 based on Johnson (Ex. 1004) and Ground 2 based on Sutton (Ex. 1005). Petition at 24, 42. Grounds 3–5 assert obviousness based on Sutton alone or in combination with other references. *Id.* at 57, 67, 72. The Petition does not raise any obviousness grounds based on Johnson.

lululemon fails to show a reasonable likelihood of success for any claim in any of its grounds. Specifically, lululemon’s grounds suffer from two fundamental failures as to claim 11 (the only challenged independent claim), either of which alone is sufficient to deny institution. First, lululemon fails to present evidence showing that either Johnson or Sutton disclose “record[ing] athletic activity” as recited in claim 11. *See* Sections V.A.1 and V.B.1. Instead, lululemon points only to apparatuses in Johnson and Sutton that “store” or “save” pre-recorded data in computer memory. Second, lululemon fails to present evidence showing that either Johnson or Sutton disclose “transmitting” workout information “associated with the recorded athletic activity” in the manner recited in claim 11. *See* Sections V.A.3 and V.B.2. To the extent lululemon shows that Johnson or Sutton share any information, lululemon only shows that they share manually-entered workout information—not information “recorded” by the apparatus. For at least these reasons, lululemon fails to establish a reasonable likelihood that it will prevail as to any Challenged Claim. Nike respectfully requests that the Board decline to institute this proceeding.

II. TECHNICAL BACKGROUND

A. The ’220 Patent

The ’220 patent generally concerns athletic performance monitoring and tracking. Ex. 1001, Abstract. The claims recite specific improvements over the

prior art by providing athletes with additional “motivation required to maintain a regular exercise program.” *Id.*, 1:25–26. The Challenged Claims recite an apparatus that (i) “record[s] athletic activity”; (ii) “receive[s] a sharing option”; and (iii) and “in response to receiving the sharing option selection,” “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site.” *Id.*, 68:15–28. The claimed invention facilitates the instant sharing of athletic goals and achievements to virtual networks—helping athletes “feel as if they are working out with other users even though they are physically running by themselves.” *Id.*, 67:7–9. Independent claim 11 is reproduced below with limitations 11A–11E identified:

11. An apparatus comprising:

[11A] a processor; and

[11B] a non-transitory, computer-readable medium storing computer-readable instructions that, when executed, cause the apparatus to:

[11C] ***record athletic activity*** performed by a user;

[11D] ***receive a sharing option*** selection configured to allow the recorded athletic activity to be shared; and

[11E] in response to receiving the sharing option selection, ***transmitting workout information associated with the recorded athletic activity*** to a network page of a social networking site viewable by one or more other users.

Id., 68:15–28 (emphasis added).

B. Prior Art

1. Johnson¹

lululemon contends that Johnson (U.S. Patent Publication No. 2010/0273610, Ex. 1004) discloses “word-for-word much of the ’220 patent’s written description.” Petition at 1. Not so. The ’220 patent discloses much more than the background information that is also provided in Johnson. For example, the ’220 patent specification spans 68 columns as compared to Johnson’s 46 columns. *Compare* Ex. 1001, *with* Ex. 1004. The ’220 patent also contains 83 figures as compared to Johnson’s 45 figures. And Johnson shares no common inventors with the ’220 patent. *Compare* Ex. 1001 at 1, *with* Ex. 1004 at 1. Altogether, the ’220 patent contains more than 20 pages of disclosure that is not present in Johnson, including disclosure related to key limitations of the Challenged Claims. As just one example, Johnson does not include Figures 54A–C or 55A–B of the ’220 patent (or their corresponding description), which depict the sharing of workouts in response to receiving sharing options in the manner recited in the claims. *Compare* Ex. 1001, Figs. 54A–C and 55A–B, with Ex. 1004, Figs. 1–45. As another example, Johnson does not include Figures 35A–

¹ Because the Board may deny institution for the reasons discussed below, Nike does not address whether Johnson constitutes prior art in this preliminary response. Nike reserves the right to challenge the prior art status of Johnson if this *inter partes* review is instituted.

C of the '220 patent (or their corresponding description), which depict an apparatus “record[ing] athletic activity” in the manner recited in the claims.

Ex. 1001, Figs. 35A–C.

2. Sutton

Sutton (U.S. Patent Publication No. 2009/0150178, Ex. 1005) is directed to “[a] method and system for tracking physical metrics in a social commerce system.” Ex. 1005, Abstract. Sutton discloses the creation of a rewards system where a user receives benefits for exercising in a social commerce system. *Id.*, ¶ 23. Physical metrics are converted to a currency that “may be traded in a market provided by the present system and method and in other conventional online and offline markets as well.” *Id.*, ¶ 27. In one example, “[u]ser 101’s cause may be a charitable cause (*e.g.*, Safe Routes to Schools program) toward which user 101 earns points and matching donations from partner 120.” *Id.*, ¶ 29. In another example, the user reward is “carbon offsets obtained as a result of user 101’s activity and exercises (*e.g.*, commute by bicycle).” *Id.*, ¶ 33.

3. Plus 3 Network Pages²

The “Plus 3 Network Pages” is a collection of webpages related to the so-called “Plus 3 Network.” *See* Ex. 1006. The Plus 3 Network is described as a

² Nike reserves the right to challenge the printed publication status of this reference if this *inter partes* review is instituted.

“social network that actively manages, motivates, validates, and rewards our members for participating in fitness activities.” *Id.* at 9. The “Plus 3 Network community” is referenced in Figure 9 of the Sutton reference. *See* Ex. 1005, Fig. 9.

4. Fry

The Fry reference is a one-sentence tweet made by an individual describing a workout. Ex. 1007.

III. LEVEL OF ORDINARY SKILL IN THE ART

For the purposes of this Preliminary Response only, Nike applies lululemon’s proposed level of skill in the art: a person of ordinary skill in the art (“POSITA”) for the technology of the ’220 patent would have had (1) a bachelor’s degree in engineering, computer science, industrial design, biomechanics, or a related field, and (2) at least two years of experience researching, developing, designing, and/or testing fitness or physiological sensors, wearable devices, physiological or biomechanical devices, remotely-controlled systems or interfaces, and/or network-based applications and/or equipment, or the equivalent experience or education. Petition at 22–23. Nike reserves the right to further address lululemon’s proposed level of ordinary skill and/or propose a different level of ordinary skill, if the Board institutes trial.

IV. CLAIM CONSTRUCTION

As a general rule, claim terms are given their “ordinary and customary

meaning.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc). The “ordinary and customary meaning” is “the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.” *Id.* at 1313. A POSITA is deemed to read the claim term “not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Id.*

lululemon concedes that no claim construction is necessary for the purposes of this proceeding. Petition at 22. Nike agrees. All terms and phrases in the ’220 patent have their ordinary and customary meanings, which are readily apparent, and no further construction is required. Nike discusses the ordinary and customary meaning of certain claim terms in the context of lululemon’s unpatentability grounds below.

V. INSTITUTION SHOULD BE DENIED BECAUSE THE PETITION FAILS TO DEMONSTRATE THE REQUIRED REASONABLE LIKELIHOOD OF SUCCESS

lululemon bears the burden on institution of demonstrating a reasonable likelihood that it will prevail in showing the unpatentability of at least one Challenged Claim. *SMIC, Ams. v. Innovative Foundry Techs., LLC*, IPR2020-00837, Paper 13 at 13–14 (PTAB Oct. 9, 2020) (citing 35 U.S.C. §§ 314(a) and 312(a)(3)). To meet its burden, “[i]t is of the utmost importance” that lululemon “identify ‘with particularity’ the ‘evidence that supports the grounds for the

challenge to each claim.” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (citing 35 U.S.C. § 312(a)(3)).

As to its anticipation grounds, lululemon must show a reasonable likelihood of proving that “the four corners of a single, prior art document describe every element of the claimed invention” in the same specific “arrange[ment] as in the claim.” *See Net Money, Inc., v. Verisign, Inc.*, 545 F.3d 1359, 1371 (Fed. Cir. 2008). The Board regularly denies petitions that “lack particularity or present deficient or conclusory analysis.” *Sinjimoru v. Geneze Innovation Inc.*, IPR2021-00493, Paper 8 at 11 (PTAB July 28, 2021). The requirement for particularity “takes on heightened importance when considered in conjunction with” the “all-or-nothing approach” that applies to decisions on institution. *Adaptics Limited v. Perfect Co.*, IPR2018-01596, Paper 20 at 17 (PTAB Mar. 6, 2019) (informative). “Ambiguous references do not, as a matter of law, anticipate a claim.” *Wasica Fin. GmbH v. Cont’l Auto. Sys.*, 853 F.3d 1272, 1284 (Fed. Cir. 2017).

As to its obviousness grounds, lululemon must show a reasonable likelihood of proving that “the differences between the subject matter sought to be patented 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 skilled artisan. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). lululemon must “articulate specific reasoning, based on evidence of record, to support the legal conclusion of obviousness.” *U.S. Well*

Servs., LLC v. Halliburton Energy Servs., Inc., IPR2022-01163, Paper 9 at 10 (PTAB Dec. 20, 2022) (quoting *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1380 (Fed. Cir. 2016)). lululemon cannot rely on conclusory statements or blanket assertions of common sense to fill gaps and missing limitations from the prior art. *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1362–63 (Fed. Cir. 2016). “It is not the Board’s job to cobble together assertions from different sections of a petition or citations of various exhibits in order to infer every possible permutation of a petitioner’s arguments.” *Microsoft Corp. v. FG SRC, LLC*, 860 Fed. App’x 708, 713 (Fed. Cir. 2021). lululemon’s obviousness arguments “must be made with particularity, not opacity.” *Id.*

As discussed on a ground-by-ground basis below, lululemon has not met its reasonable likelihood burden as to any ground of unpatentability for any Challenged Claim. Nike thus respectfully requests that the Board deny institution.

A. Ground 1: lululemon Fails To Show That Johnson Anticipates the Challenged Claims

lululemon asserts only anticipation based on Johnson. *See* Petition at 24. lululemon, however, fails to show a reasonable likelihood of proving that Johnson anticipates claim 11 (the only challenged independent claim) for at least three reasons. First, as to limitation 11C, lululemon fails to show that Johnson discloses an apparatus that “record[s] athletic activity.” *See* Section V.A.1. lululemon instead relies on Johnson’s disclosure of an apparatus that merely stores pre-

recorded athletic activity. *See* Petition at 26. Second, as to limitation 11D, lululemon fails to show that Johnson discloses an apparatus that “receive[s] a sharing option selection.” *See* Section V.A.2. lululemon instead presents an inconsistent mapping, relying on Johnson’s device 601 as the claimed apparatus, but then pointing to functionality of device 501. *See* Petition at 25, 29–32. Such mixing and matching is improper for an anticipation ground. Third, as to limitation 11E, lululemon fails to show that Johnson discloses an apparatus that transmits workout information in the manner recited in the claim. *See* Section V.A.3. Of the four alleged sharing options that lululemon identifies in Johnson, none discloses transmitting workout information “in response to” receiving the alleged sharing option; and none shows transmitting workout information to a “social networking site.” Ex. 1001 at 68: 25–28.

For at least these reasons, lululemon has not shown a reasonable likelihood of proving that Johnson discloses “every element of the claimed invention” in the same specific “arrange[ment] as in” claim 11. *See Net Money*, 545 F.3d at 1371. lululemon thus fails to show a reasonable likelihood of proving that Johnson anticipates the Challenged Claims.

1. lululemon fails to show that Johnson discloses an apparatus that “record[s] athletic activity performed by a user” [11C]

lululemon fails to show that Johnson discloses an apparatus that “record[s] athletic activity performed by a user.” Ex. 1001 at 68:21. lululemon instead relies

on Johnson’s disclosure of an apparatus that merely saves pre-recorded athletic activity. *See* Petition at 25, 27–28.

The parties agree that the term “record” in claim 11 has its ordinary and customary meaning. *Id.* at 22. Just like a video camera may “record” a video by capturing the activity occurring on the other side of the lens, the apparatus of claim 11 “records” athletic activity by capturing the athletic activity performed by the user. This meaning is reflected in the specification. *See Phillips*, 415 F.3d at 1314. For example, the ’220 patent discloses that the claimed invention may use “both a GPS device and an accelerometer” to “record workout data for both indoor (*e.g.*, stationary) workouts and outdoor workouts.” Ex. 1001 at 1:60–61. This meaning is also reflected in the surrounding claim language. *See Phillips*, 415 F.3d at 1314. Once the user’s athletic activity is recorded [11C], the apparatus “receive[s] a sharing option selection configured to allow the recorded athletic activity to be shared” [11D]; and then “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site” [11E]. Ex. 1001 at 68:15–28. Without first “record[ing]” the user’s athletic activity, the apparatus recited in claim 11 would have no workout information to transmit to a social networking site.

The “apparatus” that lululemon identifies in Johnson—device 601—does not “record” athletic activity. *See* Petition at 25. Device 601 is simply an “athletic

data *display* configuration device.” Ex. 1004, ¶¶ 86–87 (emphasis added). Rather than “record[ing]” athletic activity, Johnson’s device 601 merely receives and displays pre-recorded athletic activity data that it “receives” from a separate “collection” device. *Id.* That separate “collection” device—not device 601—is what “records” the athletic activity data. lululemon tacitly admits this. Petition at 26. lululemon alleges that “[d]evice 601 records user athletic activity *by writing it to memory.*” *Id.* at 28. (emphasis added). But “writing [data] to memory” is different than recording athletic activity. *Id.* If an individual receives a video file over email and saves that video file to a hard drive, the individual has not “record[ed]” the video. That individual has simply saved it. For the same reason, Johnson’s device 601 does not “record” athletic activity merely by “writing [] to memory” pre-recorded athletic data. *See* Petition at 26.

lululemon thus fails to show that Johnson discloses an apparatus that “record[s] athletic activity performed by a user.” Ex. 1001 at 68:21. For this reason alone, lululemon has not shown a reasonable likelihood of success for any claim challenged in Ground 1.

2. lululemon fails to show that Johnson discloses an apparatus that “receive[s] a sharing option selection configured to allow the recorded athletic activity to be shared” [11D]

lululemon fails to meet its reasonable likelihood burden of showing that Johnson discloses an apparatus that “receive[s] a sharing option selection

configured to allow the recorded athletic activity to be shared.” Ex. 1001 at 68:22–23. lululemon identifies “four sharing options” in Johnson that allegedly “allow the recorded athletic activity to be shared”: (1) a “Leaderboard”, (2) a “Brag to Friends” option, (3) a “Share This Run” option, and (4) a “Blog Promotion” option. Petition at 29–32.

There are at least two flaws in lululemon’s position. First, with respect to all four identified options, lululemon presents an inconsistent mapping, relying on Johnson’s device 601 as the claimed apparatus, but then points to functionality of device 501. *See* Section V.A.2.a. Second, with respect to at least two of the alleged “sharing options,” lululemon fails to show that the option is actually a “sharing option” (*i.e.*, one that is “configured to allow the recorded athletic activity to be shared”). *See* Section V.A.2.b. Each of these flaws is discussed in more detail below.

a. For all four alleged “sharing options,” lululemon relies on an inconsistent mapping of the elements in Johnson

Although lululemon identifies Johnson’s device 601 as the “apparatus” that allegedly anticipates claim 11, all of lululemon’s cited evidence for this limitation relates to a different device: Johnson’s device 501. Petition at 25, 29–32. Johnson repeatedly discloses that device 501 and device 601 are two different devices. *E.g.*, Ex. 1004, ¶ 86. As a matter of law, a party asserting an anticipation ground may not rely on “combinations of adjacently disclosed embodiments.”

Chamberlain Grp., Inc. v. Techtronic Indus. Co., 935 F.3d 1341, 1350 (Fed. Cir. 2019); *see also Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1069 (Fed. Cir. 2017) (opining that a party may not mix and match embodiments to establish anticipation). Yet all of lululemon’s cited evidence for this limitation relates to device 501. Petition at 29–32. For example, lululemon asserts that device 501—not device 601—can be configured as a “simple browser” on which all of the “data display configuration[s]” may be performed. Petition at 32. As a result, lululemon has presented no evidence that the allegedly anticipating “apparatus” of Johnson—device 601—“receive[s] a sharing option selection.” Ex. 1001 at 68:22–23. On this basis, lululemon fails to show a reasonable likelihood of proving that Johnson discloses claim limitation 11D. Thus, lululemon has not shown a reasonable likelihood of success for any claim challenged in Ground 1.

b. For at least two of its alleged “sharing options,” lululemon fails to show that the alleged option actually shares the user’s recorded athletic activity

With respect to at least two of the alleged “sharing options” that lululemon identifies in Johnson—the “Brag to Friends” and “Blog Promotion” options—lululemon fails to show that the option actually shares the user’s “recorded athletic activity.” Stated differently, lululemon fails to show that the alleged “sharing options” are “configured to allow the recorded athletic activity to be shared.” Ex. 1001 at 68: 22–23.

As to the alleged “Brag to Friends” option, lululemon simply points to a short snippet of text within Figure 21 of Johnson, as shown below. Petition at 30.

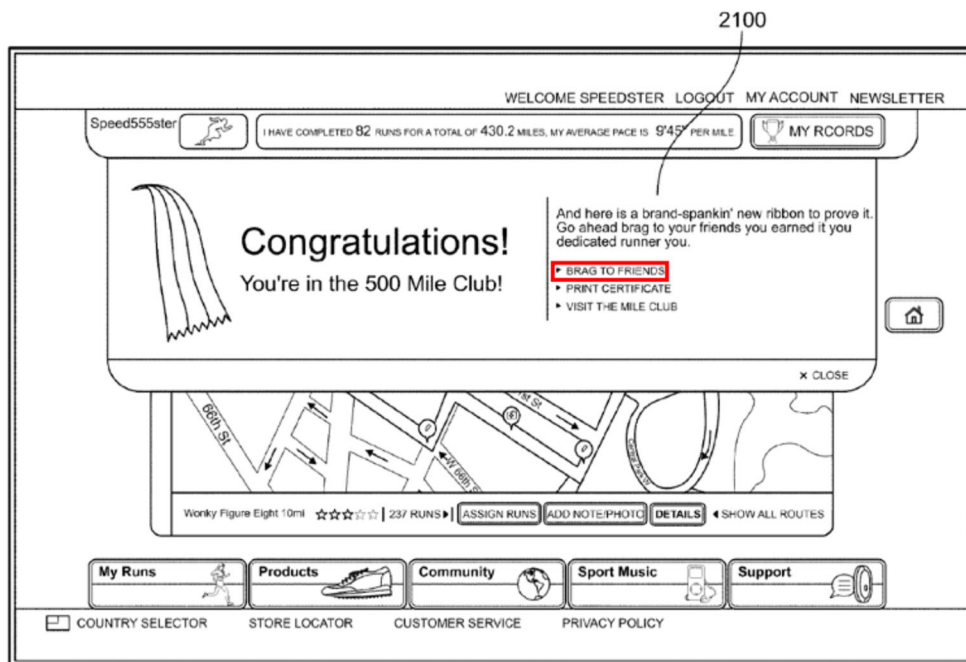
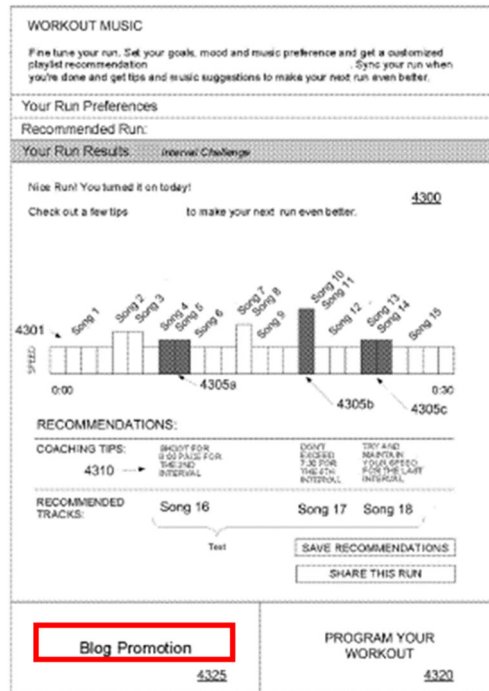


FIG. 21

Ex. 1004, Fig. 21 (annotated). Neither lululemon nor Johnson provide any additional information as to the significance of these words. For example, lululemon has not shown that the “Brag to Friends” text provides the user with an option to share recorded athletic activity as opposed to simply providing the user with general encouragement to call their friends and brag to them. Petition at 29–30; Ex. 1004, ¶ 159, Fig. 21. lululemon’s reliance on an ambiguous disclosure—with only a superficial corresponding explanation and analysis—is insufficient to establish anticipation. *See Sinjimoru*, IPR2021-00493, Paper 8 at 11; *Wasica Fin. GmbH*, 853 F.3d at 1284.

As to the “Blog Promotion” option, lululemon again points to a small snippet of text that says “Blog Promotion” within box 4325 of Figure 43 of Johnson. Petition at 30–31.



Ex. 1004, Fig. 43 (annotated). But Johnson provides only one sentence of disclosure related to box 4325 in Figure 43, stating that: “[t]he user may further be provided options 4320 and 4325 to program a workout (*e.g.*, a new workout) or to *post comments or a report about the completed workout*, respectively.” Ex. 1004, ¶ 183 (emphasis added). Aside from quoting that sentence, neither lululemon nor Johnson provide any additional information as to the significance of these words. See Petition at 29–31. For example, lululemon has not shown that the “Blog Promotion” text refers to an option for “sharing” recorded athletic activity with others, or whether it merely refers to a privately kept blog of a user’s private

tracking of the user’s progress. Here too, lululemon’s reliance on an ambiguous disclosure—with only a superficial corresponding explanation and analysis—is insufficient to establish anticipation. *See Sinjimoru*, IPR2021-00493, Paper 8 at 11; *Wasica Fin. GmbH*, 853 F.3d at 1284.

For both of these reasons, lululemon fails to show that Johnson discloses an apparatus that “receive[s] a sharing option selection configured to allow the recorded athletic activity to be shared.” Ex. 1001 at 68:22–23. On this basis, lululemon fails to show a reasonable likelihood of success for any claim challenged in Ground 1.

3. lululemon fails to show that Johnson discloses an apparatus that “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users” “in response to receiving the sharing option selection” [11E]

lululemon fails to show that Johnson discloses an apparatus that “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users” “in response to receiving the sharing option selection.” Ex. 1001 at 68:25–28. Like with claim limitation 11D, lululemon contends that “device 601 performs this [11E] limitation in response to all four sharing options”: (1) a “Leaderboard”, (2) a “Brag to Friends” option, (3) a “Share This Run” option, and (4) a “Blog Promotion” option. Petition at 32–38. But there are at least two flaws in lululemon’s position.

First, lululemon fails to show that any of the four options discloses transmitting workout information “in response to” receiving the sharing option selection. *See* Section V.A.3.a. Second, lululemon fails to show that any of the four options discloses transmitting workout information to “a social networking site viewable by one or more other users.” *See* Section V.A.3.b. Each of these flaws is discussed below in turn.

- a. lululemon fails to show that any of the four alleged “options” disclose transmitting workout information “in response to” receiving the sharing option selection*

lululemon fails to show that any of the four alleged “options” in Johnson discloses transmitting workout information associated with the user’s recorded athletic activity “in response to” receiving the sharing option selection. Claim 11 recites an apparatus that transmits workout information “in response to receiving” the user’s selection of a “sharing option.” Ex. 1001 at 68:25–28. None of the four options identified by lululemon meets this limitation.

As to the “Leaderboard” option, lululemon argues that users can share their data to the Leaderboard if they “agree in advance to have their data shared with others.” Petition at 33 (citing Ex. 1004, ¶ 135). But lululemon does not show that this disclosure actually proves that Johnson’s “Leaderboard” option transmits workout information “in response to *receiving*” a sharing option selection. *Contra* Ex. 1001 at 68:25–28. Instead, once the user agrees in advance to have their data

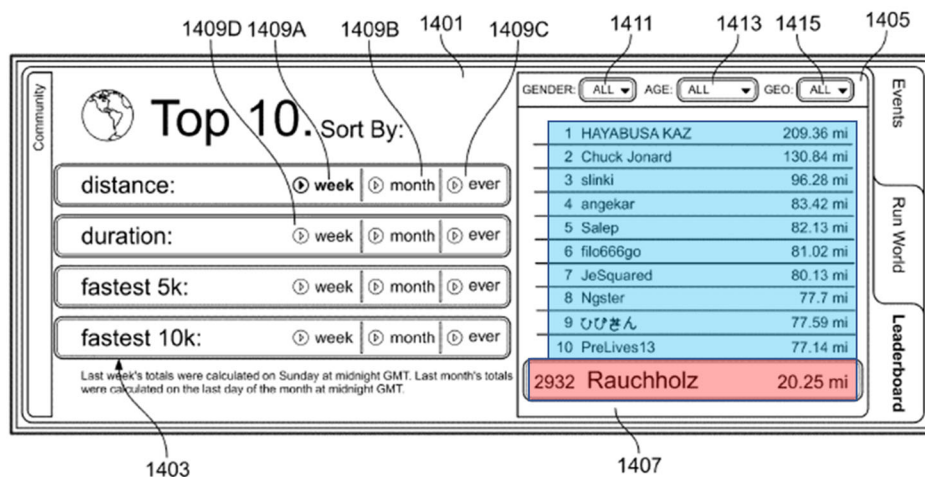
shared with others, device 601 will automatically share information for all future workouts once the user has completed each workout. That type of automatic sharing is not “in response to *receiving*” a sharing option selection as recited in claim 11. *See id.* Accordingly, lululemon fails to establish that this leaderboard option discloses this limitation.

As to the three remaining options cited by lululemon—“Brag to Friends,” “Share this Run,” and “Blog Promotion”—lululemon fails to provide with particularity any evidence or argument that the alleged transmission of workout information occurs “in response to receiving” a sharing option selection. Petition at 32–38. Lululemon provides no argument whatsoever for the “Brag to Friends” and “Share this Run” options. *Id.* at 32–38 (providing argument sections for only the “Leaderboard” and “Blog Post” options). And lululemon’s only argument for Johnson’s “Blog Post” option relates to whether the “Blog Promotion” text in Figure 43 or the “blog 2900” of Figure 29 identifies “a social networking site viewable by one or more other users.” *Id.* at 37–38. Lululemon provides no evidence or argument that the “Blog Promotion” text in Figure 43 or the “blog 2900” of Figure 29 disclose transmitting workout information “in response to receiving” a sharing option selection. *See id.*; Ex. 1001 at 68:25–28.

- b. *lululemon fails to show that any of the four alleged “options” disclose transmitting workout information to “a social networking site viewable by one or more other users”*

lululemon fails to show that any of the four alleged “options” in Johnson discloses transmitting workout information associated with the user’s recorded athletic activity to “a social networking site viewable by one or more other users.” Ex. 1001 at 68:25–28.

As to the “Leaderboard” option, lululemon cites to Figure 14a of Johnson, which appears to show ten users on a leaderboard in blue, followed by user “Rauchholz.” Petition at 33–36. Johnson discloses that the text “Rauchholz” refers to the user whose athletic activity data is stored by device 601. Ex. 1004, ¶ 134.



Ex. 1004, Fig. 14A (annotated). But lululemon never argues—let alone sufficiently shows—that the workout information associated with user Rauchholz is shared on “a social networking site viewable by one or more other users.” See

Petition at 33–36 lululemon argues that user Rauchholz can “view[] the recorded data of ten athletes.” Petition at 35. But lululemon presents no evidence showing that user Rauchholz has shared his workout information with other users, or that anyone other than user Rauchholz can view the leaderboard depicted in Figure 14a of Johnson. *See id.* at 33–36. In other words, lululemon focuses on what user Rauchholz can view, not what user Rauchholz has shared. lululemon’s reliance on an ambiguous disclosure—with only a superficial corresponding explanation and analysis—is insufficient to establish anticipation. *See Sinjimoru*, IPR2021-00493, Paper 8 at 11; *Wasica Fin. GmbH*, 853 F.3d at 1284.

As to the “Brag to Friends” and “Share this Run” options, lululemon fails to provide any evidence or argument as to limitation 11E. *See* Petition at 32–38 (providing argument sections for only the “Leaderboard” and “Blog Post” options). Thus, lululemon fails to show that either of these options transmits workout to “a social networking site viewable by one or more other users.” *Id.*

As to the “Blog Post” option, lululemon points again to the “Blog Promotion” text in Figure 43 of Johnson as evidence that Johnson teaches sharing to a blog. Petition at 36–38. Lululemon then also cites Figure 29 of Johnson, which depicts “blog 2900.” *Id.* at 37; *see also* Ex. 1004, ¶ 167. lululemon appears to argue that “blog 2900” in Figure 29 is the same “blog” referenced in Figure 43, and thus Figures 29 and 43 collectively show that Johnson’s device 601 transmits

workout information associated with the recorded athletic activity to a social networking site. Petition at 36–38. But lululemon provides no evidence that blog 2900 is the same blog referenced in Figure 43. *See id.* lululemon’s attempt to combine different disclosed embodiments is improper. *See Chamberlain Grp., Inc. v. Techtronic Indus. Co.*, 935 F.3d 1341, 1350 (Fed. Cir. 2019); *Microsoft Corp.*, 878 F.3d at 1069. Also, Johnson expressly states that blog 2900 is *not* a social networking page, but rather is something a user *may include* in a social networking page: “a user, athlete, or runner may *include* a blog 2900 in their web page or social networking page.” Ex. 1004, ¶ 167 (emphasis added). Thus, Johnson expressly discloses that blog 2900 is separate and different from a “social networking page.” *See id.* Thus, even if a user could share its workout information to blog 2900, lululemon has not shown that this would constitute sharing workout information to “a social networking site viewable by one or more other users.” *See id.*; *contra* Ex. 1001 at 68:25–28.

Ultimately, lululemon fails to show that Johnson discloses an apparatus that “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users” “in response to receiving the sharing option selection.” Ex. 1001 at 68:25–28. On this basis, lululemon fails to show a reasonable likelihood of success for any claim challenged in Ground 1.

For at least the reasons discussed above, lululemon fails to show a reasonable likelihood of proving that Johnson anticipates claim 11. lululemon’s challenges of dependent claims 12–13 and 19 on this ground fail for the same reasons.

B. Ground 2: lululemon Fails To Show That Sutton Anticipates the Challenged Claims

In Ground 2, lululemon asserts anticipation based on Sutton. *See* Petition at 24. But lululemon fails to show a reasonable likelihood of proving that Sutton anticipates claim 11 by teaching “every element of the claimed invention” in the same specific “arrange[ment] as in the claim” for at least two reasons. *See Net Money*, 545 F.3d at 1371. First, similar to the deficiency in Ground 1 for limitation 11C, lululemon fails to show that Sutton discloses an apparatus that “record[s] athletic activity.” *See* Section V.B.1. lululemon instead relies on Sutton’s disclosure of an apparatus that merely stores pre-recorded athletic activity. *See* Petition at 46. Second, as to limitation 11E, lululemon fails to show that Sutton discloses an apparatus that transmits workout information “associated with the recorded athletic activity” in response to receiving a sharing option. *See* Section V.B.2. Instead, lululemon identifies an alleged “sharing option” for manually entered workout information—not workout information associated with “recorded athletic activity.” *See* Petition at 47. lululemon thus fails to show a reasonable likelihood of proving that Sutton anticipates claim 11.

1. lululemon fails to show that Sutton discloses an apparatus that “record[s] athletic activity performed by a user” [11C]

lululemon fails to show that Sutton discloses an apparatus that “record[s] athletic activity performed by a user.” Ex. 1001 at 68:21. lululemon instead relies on Sutton’s disclosure of an apparatus that merely saves pre-recorded athletic activity.

As discussed in Section V.A.1, there is no dispute that the term “record” in claim 11 has its ordinary and customary meaning. Petition at 22. And just like a video camera may “record” a video by capturing the activity occurring on the other side of the lens, the apparatus of claim 11 “records” athletic activity by capturing the athletic activity performed by the user. Ex. 1001 at 1:60–61, 68:16–28.

The “apparatus” that lululemon identifies in Sutton is different. lululemon identifies Sutton’s “activity and biometric tracking system 110” as the “apparatus” that allegedly anticipates claim 11. Petition at 42. But Sutton’s system 110 does not “record” athletic activity. Sutton’s system 110 comprises only a database (115) and a server (111). Ex. 1005, ¶ 28. Sutton’s system 110 merely “store[s]” pre-recorded athletic activity data in database 115. *Id.* lululemon expressly admits this. Petition at 46. lululemon alleges that “[s]ystem 110 records athletic activity by *writing user exercise and activity data to memory* in database 115.” *Id.* (emphasis added). But lululemon has not established that “writing [data] to memory” discloses recording athletic activity as recited in limitation 11C. If an

individual receives a video file over email and then saves that video file to a hard drive, the individual has not “record[ed]” a video. That individual has simply saved it. For the same reason, Sutton’s system 110 does not “record” athletic activity merely by “writing [data] to memory.” *See id.*

lululemon thus fails to show that Sutton discloses an apparatus that “record[s] athletic activity performed by a user.” Ex. 1001 at 68:21. For this reason, lululemon has not shown a reasonable likelihood of success for any claim challenged in Ground 1.

2. lululemon fails to show that Sutton discloses an apparatus that “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users” “in response to receiving the sharing option selection” [11E]

lululemon fails to show that Sutton discloses an apparatus that “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users” “in response to receiving the sharing option selection.” Ex. 1001 at 68:25–28. Lululemon relies on Figure 3 and Figure 9 of Sutton, but those embodiments describe “enter[ing]” workout information “by hand”—not workout information related to “recorded” athletic activity. Petition at 48–52. As a result, lululemon fails show that Sutton transmits workout information associated with “recorded athletic activity.” Ex. 1001 at 1:26-27.

Specifically, lululemon points to Figure 9 of Sutton as the “sharing option” recited in claim 11. Petition at 47. Figure 9 depicts a data entry form that bears the title “Enter Activity by Hand.” Exhibit 1005, Fig. 9. The form shown in Figure 9 allows the user to manually enter certain details about a previously performed athletic activity, such as the “Sport,” “Description,” “Course Rating,” “Total Time,” and “Total Distance.” *Id.*, Fig. 9. Figure 9 also depicts a “Privacy” option that allows the user to elect “Public” or “Private.” *Id.* Next to the “Public” button, Figure 9 includes a parenthetical that states “visible to the Plus 3 Network community.” *Id.*

900

Enter Activity By Hand [X]

Activity Name Morning Run	Start Date / Time: 11/20/2008 09:30 AM ▼
Sport Running ▼	Total Time (hours: minutes: seconds) 00 ▼ 35 ▼ 00 ▼
Description A five mile run from the house into the park and around the school yard.	Total Distance 5 miles ▼
	Course Rating ★★☆☆
	Privacy ☒ Public (visible to the Plus 3 Network community) ☐ Private (only visible to me)
Save activity	Back to my activities

Id., Fig. 9. Lululemon relies exclusively on the “Public” button of Figure 9 to argue that Sutton discloses publicizing a user’s workout information on a social network site in response to a sharing option selection. Petition at 47–52.

But Figure 9 relates only to manually entered athletic activity data—not “recorded athletic activity.” Ex. 1005, Fig. 9. Lululemon admits this fact. Petition at 47 (“Sutton’s users can manually enter activity data via an exemplary data entry form.”). As a result, even if Figure 9 does disclose a “sharing option,” that option is only presented to the user in conjunction with manual entry of a previously performed athletic activity. *See id.* Lululemon never argues—let alone sufficiently shows—that Figure 9 discloses an apparatus that transmits workout information “associated with the recorded athletic activity” to a network page of a social networking site viewable by one or more other users. *See* Petition at 47–52; Ex. 1001 at 1:26-27.

Lululemon thus fails to show that Sutton discloses an apparatus that “transmit[s] workout information associated with the recorded athletic activity to a network page of a social networking site viewable by one or more other users” “in response to receiving the sharing option selection.” Ex. 1001 at 68:25–28. On this basis, Lululemon fails to show a reasonable likelihood of success for any claim challenged in Ground 2.

For at least the reasons discussed above, lululemon fails to show a reasonable likelihood of proving that Sutton anticipates claim 11. lululemon's challenges of dependent claims 12 and 19–20 on this ground fail for the same reasons.

C. Ground 3: lululemon Fails To Show the Challenged Claims Are Obvious Over Sutton

lululemon fails to show a reasonable likelihood of proving that Sutton renders claim 11 obvious at least because lululemon fails to show that Sutton teaches or suggests transmitting “recorded athletic activity” in response to receiving a sharing option selection. Ex. 1001 at 1:26-27.

With respect to claim limitation 11E, lululemon's obviousness argument for Sutton is similar to what lululemon argued for anticipation by Sutton. Petition at 47–52, 61–65. Here too, lululemon points to the “Public” option in Figure 9 as its “sharing option.” Petition at 61–65.

In this ground, lululemon further argues that “it would have been obvious” to configure the apparatus “to receive Figure 9's sharing option selection in the automatic device transfer pathway before the user started their workout.” Petition at 63 (citing Ex. 1005, Fig. 3). lululemon alleges (largely by cross-referencing its arguments for limitation 11D) that this so-called “automatic device transfer pathway” is depicted in Figure 3 of Sutton, which allegedly shows data transfer between a user's device and system 110. *Id.* at 63, 65. Within Figure 3,

lululemon points to box 312, which is titled “Automatic Transfer.” *Id.* at 62–63.

By focusing on an “automatic” data transfer, lululemon is apparently attempting to overcome the failures identified above in Section V.B.2, *i.e.*, that Figure 9 of Sutton merely shows a “sharing option” for manually entered data—not “recorded athletic activity.” But lululemon fails in this attempt for two reasons.

First, Sutton’s Figure 3 merely depicts methods of transferring “user-provided data”; it says nothing about the transfer of “recorded athletic activity.” *See* Ex. 1005, Fig. 3, ¶ 60. Sutton discloses that Figure 3 “illustrates a block diagram for exemplary data transfer methods.” *Id.* According to lululemon, Figure 3 depicts a “manual device transfer” path and an “automatic device transfer” path for communication of workout data. Petition at 61. But both paths begin at box 301, which is labeled “Enter Activity Data.” Ex. 1005, Fig. 3. Sutton explains that the “activity data” entered in box 301 is “user-provided data.” Ex. 1005, ¶ 60. As a result, regardless of which “device transfer” path is used, the same problem remains: Sutton merely discloses a “sharing option” for manually entered data—not “recorded athletic activity” as recited in claim 11. Ex. 1001 at 68:21–28. Put another way, regardless of whether the “user-provided data” is uploaded manually or automatically, Sutton does not teach a sharing option for “recorded athletic activity.” *See* Ex. 1005, ¶ 60.

Second, even assuming that Sutton’s “automatic device transfer” related to

the transfer of “recorded athletic activity” (which it does not), lululemon offers no support for its claim that a skilled artisan would have been motivated to modify Sutton with the disjointed sequence of steps that lululemon proposes. Petition at 63. With respect to this “automatic device transfer” pathway, lululemon alleges that a skilled artisan would have been motivated to present Figure 9 to a user on two separate occasions for each workout: once before their workout solely to receive the “sharing option,” and then again after their workout to manually enter other information related to that workout. Petition at 63. lululemon contends:

A POSITA therefore would have required a user to fill out Figure 9’s form before starting their workout, except that the POSITA would omit the ‘Start Data/Time,’ ‘Total Time,’ ‘Total Distance,’ and ‘Course Rating’ fields from the form because the user would not yet have performed the activity.

Id. This proposed sequence of events is nonsensical and unsupported by Sutton. In fact, lululemon provides no citations to Sutton whatsoever in support of this proposition. lululemon instead relies exclusively on one paragraph of conclusory expert testimony that is nearly verbatim to the Petition. Petition at 63 (citing Ex. 1003, ¶ 94).

For the reasons discussed above, lululemon fails to show a reasonable likelihood of proving that Sutton renders claim 11 obvious. lululemon’s challenges of dependent claims 12 and 19–20 on this ground fail for the same reasons.

D. Ground 4: lululemon Fails To Show That the Challenged Claims are Obvious Over the Combination of Sutton and the Plus 3 Website Pages

lululemon fails to show a reasonable likelihood of proving that the combination of Sutton and the Plus 3 Website Pages renders the Challenged Claims obvious.

In Ground 4, lululemon challenges claims 11–14 and 19–20 as obvious over the combination of Sutton and the Plus 3 Website Pages. Petition at 67. As to claim 11, lululemon relies on the Plus 3 Website Pages for limitations 11D and 11E. Petition at 69–70. Specifically, lululemon relies on two disclosures in the Plus 3 Website Pages. First, lululemon relies on the Plus 3 Network Privacy Policy to show that the Plus 3 Network website allows a user’s activity to be viewed publicly: “If the Activity is set to Public it can be viewed, with your name attached, by all Users.” Petition at 69, 70 (citing Ex. 1006 at 12). Second, lululemon relies on the Plus 3 Website Pages to show that the Plus 3 Network is a “social network.” *Id.* at 70 (citing Ex. 1006 at 9, 12).

Neither of these disclosures cure the fatal flaw in lululemon’s obviousness assertions based on Sutton alone (Ground 3): that Figure 3 and Figure 9 of Sutton relate only to manually entered athletic activity data—not “recorded athletic activity.” Ex. 1005, Fig. 9. As a result, for the same reasons set forth in Section V.C, lululemon fails to show a reasonable likelihood of proving that the

combination of Sutton and the Plus 3 Website Pages renders claim 11 obvious. lululemon's challenges of dependent claims 12–14 and 19–20 on this ground fail for the same reasons.

E. Ground 5: lululemon Fails To Show That Claim 12 Is Obvious Over Sutton and Fry

In Ground 5, lululemon challenges the unpatentability of only dependent claim 12. Petition at 72. lululemon fails to show a reasonable likelihood of proving that the combination of Sutton and Fry renders claim 12 obvious.

Claim 12 depends from claim 11 and recites that “the apparatus is further caused to tag a summary of one or more metrics from the recorded athletic activity with identifiers of one or more other users.” Ex. 1001 at 68:29–32. lululemon relies on Fry only for this additional limitation. Petition at 72–76. lululemon does not assert that Fry teaches any of the claim elements of claim 11. *See id.* As a result, for the same reasons that lululemon failed to show a reasonable likelihood of proving that claim 11 is obvious in view of Sutton, *see* Section V.C, lululemon likewise fails to show a reasonable likelihood of proving that the combination of Sutton and Fry render claim 12 obvious.

VI. CONCLUSION

For the foregoing reasons, lululemon fails to meet its burden of showing a reasonable likelihood of prevailing as to at least one of the Challenged Claims. The Board should deny institution.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this preliminary response complies with the type-volume limitations of 37 C.F.R. § 42.24(a)(1)(i). This preliminary response (including figure labels and annotations) contains 7093 words as calculated by the “Word Count” feature of Microsoft Office 365 Word application, the word processing program used to create it, and manual counting of the annotations in the figures.

The undersigned further certifies that this preliminary response complies with the typeface requirements of 37 C.F.R. § 42.6(a)(2)(ii) and typestyle requirements of 37 C.F.R. § 42.6(a)(2)(iii). This preliminary response has been prepared in a proportionally spaced typeface using Microsoft Office 365 Word application in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR §§42.6(e)(4)(i) *et seq.* and 42.105(b), the undersigned
Certifies that on February 17, 2023, a true and entire copy of this **PRELIMINARY
RESPONSE OF PATENT OWNER NIKE, INC TO IPR2023-00180**, was served
via e-mail to lululemon by serving the correspondence address of record, indicated
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