

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

NIKE, INC.'S PATENT OWNER RESPONSE UNDER 37 C.F.R. § 42.120

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EXHIBITS

Exhibit No.	Description
2001	Declaration of Dr. Robert T. Stone
2002	Deposition Transcript of Dr. Henry H. Houh
2003	Merriam Webster's Online Dictionary Entry For "Record" (excerpt)

PATENT OWNER RESPONSE UNDER 37 C.F.R. § 42.120

Patent Owner Nike, Inc. (“Nike”) submits this Response to the Petition by lululemon Athletica Canada Inc. and lululemon USA Inc. (“lululemon”) seeking *inter partes* review of claims 11–14 and 19–20 (the “Challenged Claims”) of U.S. Patent No. 10,232,220 (Ex. 1001, “the ’220 patent”). Nike respectfully submits that lululemon has not carried its burden of demonstrating by a preponderance of the evidence that the Challenged Claims are unpatentable.

I. INTRODUCTION

The ’220 patent relates to an apparatus that performs two key operations. First, the apparatus measures 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 recorded athletic activity. Specifically, the apparatus presents the user with an option to share workout information to a social networking site, and then shares the information if the user so chooses.

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, 24, 42. Grounds 3–5 assert obviousness based on Sutton alone or in combination with other references. *Id.*, 57, 67, 72. The Petition does not raise any obviousness grounds based on Johnson.

In the Institution Decision (“Decision”), the Board invited the parties to brief the meaning of “record” as recited in [11C]. Decision, 12. As shown herein, a person of ordinary skill in the art would understand that “record” in the context of the ’220 patent means “measure or capture, and then save.” But lululemon fails to present evidence showing that either Johnson or Sutton disclose “record[ing] athletic activity” as recited in the ’220 patent. *See* Section V.A. Instead, lululemon points to apparatuses in Johnson and Sutton that only “store” or “save” data in computer memory—without measuring or capturing that data. This failure undermines all of lululemon’s grounds.

Similarly, the Board invited the parties to address the proper interpretation of “in response to receiving the sharing option selection” as it appears in [11E]. Decision, 20. As shown herein, the proper interpretation is “in response to receiving an individual user command or confirmation to share the recorded athletic activity.” Under the proper construction, lululemon has not shown that Johnson discloses [11E] because lululemon points only to Johnson’s *automatic* sharing of information for all future workouts—not sharing “in response to receiving” a sharing option selection.

Because, lululemon fails to prove that claim 11 is anticipated or rendered obvious, lululemon’s challenges of the dependent claims fail for the same reasons. lululemon’s additional arguments with respect to claims 12, 14, and 19–20 fail for

additional reasons that are also addressed herein. For at least these reasons, lululemon has not met its burden of proving invalidity by a preponderance of the evidence as to any ground for any Challenged Claim. *See* 35 U.S.C. § 316(e). Nike requests that the Board not find any Challenged Claim unpatentable.

II. LEGAL STANDARDS

lululemon has “the burden of proving a proposition of unpatentability by a preponderance of the evidence.” 35 U.S.C. § 316(e); *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1375 (Fed. Cir. 2016). lululemon may not rely on the Board to substitute its own reasoning to remedy the deficiencies in the Petition. *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1367 (Fed. Cir. 2015) (holding that “a challenge can fail even if different evidence and arguments might have led to success”).

A. Anticipation

As to its anticipation grounds, lululemon must prove 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). “[D]ifferences between the prior art reference and a claimed invention, however slight, invoke the question of obviousness, not anticipation.” *Net MoneyIN*, 545 F.3d at 1371. “Ambiguous references do not, as a matter of law, anticipate a claim.” *Wasica*, 853 F.3d at 1284.

B. Obviousness

As to its obviousness grounds, lululemon must prove 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). An obviousness determination must be based on four factual inquiries: (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the art; and (4) objective indicia of nonobviousness. *Id.*, 406 (citing *Graham v. John Deere Co. Kan. City*, 383 U.S. 1, 17–18 (1996)). A party alleging obviousness is “required to place themselves in the minds of those of ordinary skill in the relevant art at the time the invention was made, to determine whether that which is now plainly at hand would have been obvious at such earlier time.” *Millennium Pharms., Inc. v. Sandoz Inc.*, 862 F.3d 1356, 1367 (Fed. Cir. 2017). 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 *Magnum Oil*, 829 F.3d at 1380). 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 also has the burden to show there would have been some motivation to combine the asserted prior art, and that the proposed combinations would render the patented claims obvious. "Obviousness requires more than a mere showing that the prior art includes separate references covering each separate limitation in a claim under examination." *Unigene Labs., Inc. v. Apotex, Inc.*, 655 F.3d 1352, 1360 (Fed. Cir. 2011) (internal citation omitted). lululemon must show a reasonable expectation of success in making a prior art combination. *See Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016).

The Federal Circuit has found that, even for an obviousness challenge based on a single reference in view of the knowledge of a person of ordinary skill in the art, there must have been be a motivation to make a modification of embodiments shown in that reference and a reasonable expectation that such a modification would have been successful; otherwise a skilled artisan would not have arrived at the claimed combination. *In re Stepan Co.*, 868 F.3d 1342, 1345–46 (Fed. Cir. 2017). In other words, when a gap in a single prior art reference requires filling with the knowledge of one of ordinary skill, there must be a further showing that the skilled artisan would have arrived at the claimed invention. *Id.*

III. TECHNICAL BACKGROUND

A. The '220 Patent

The '220 patent generally concerns athletic performance monitoring and tracking. Ex. 1001, Abstract. Prior to the '220 patent, “individuals might not be as motivated to exercise because of the extra effort that may be required in recording and tracking workout results.” *Id.*, 1:29–31. The '220 patent discloses methods and apparatuses that improve motivation to exercise by reducing the effort required to record and track workout results. For example, “a user may record and track athletic activity using a mobile device having multiple types of location determination systems such as a global positioning system (GPS) and an accelerometer or other types of devices (e.g., pedometer) not dependent on remote systems.” *Id.*, 1:55–60. Then, the “data recorded by the mobile device (e.g., GPS data or accelerometer data) may be synchronized with [a] remote network site to alleviate storage requirements of the mobile device.” *Id.*, 2:31–34. The user may also be presented with an option to share the recorded data to a social networking site, where the user may receive motivational feedback from other users. *Id.*, 2:63–3:9, 3:35–50, 46:28–30.

Claim 11 (the only challenged independent claim) recites 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. By facilitating the instant sharing of athletic goals and achievements to social networks—the claimed invention helps 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.

B. Prior Art

1. Johnson

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. But the ’220 patent discloses much more than the background information that is also provided in Johnson. The ’220 patent specification contains

dozens more columns of disclosure and nearly twice as many figures as Johnson. *Compare* Ex. 1001, *with* Ex. 1004. 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 one example, Johnson does not include Figures 35A–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. In another 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.

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 Pages

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 “social network that actively manages, motivates, validates, and rewards our members for participating in fitness activities.” *Id.*, 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.

IV. LEVEL OF ORDINARY SKILL IN THE ART

For the purposes of this Response, Nike does not dispute 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.

V. CLAIM CONSTRUCTION

In its Institution Decision, the Board requested further briefing on the meaning of two claim terms: (a) “record” [11C] and (b) “in response to receiving the sharing option selection” [11E]. Decision, 12, 20. The ordinary and customary meaning of each term should not be “determined in a vacuum” but should instead be “harmonized, to the extent possible, with the intrinsic record, as understood within the technological field of the invention.” *Lexion Med., LLC v. Northgate Techs., Inc.*, 641 F.3d 1352, 1354 (Fed. Cir. 2011). “The construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Phillips*, 415 F.3d at 316.

A. “record”

A POSITA would understand that the ordinary and customary meaning of “record,” as used in claim 11 and when properly viewed in light of the specification, means “measure or capture, and then save.” Ex. 2001, ¶¶ 48–56. The parties thus agree that “record” involves saving in some capacity. But the term “record,” as used in the ’220 patent, requires more: it requires first measuring or capturing the data. Merely saving data is not enough.

As discussed in more detail below, this interpretation of “record” in claim 11

is consistent with (1) other claims in the '220 patent; (2) the specification of the '220 patent; (3) the express purpose of the invention claimed in the '220 patent; and (4) Federal Circuit authority regarding terms that have multiple ordinary meanings.

1. The language of claim 1 supports construing “record” in claim 11 to mean “measure or capture, and then save”

The language of claim 1 makes clear that “record” is used synonymously with “measure or capture, and then save.” Ex. 2001, ¶¶ 49–50. This is important because the meaning of “record” in claim 11 is presumed to have the same meaning as “record” in claim 1. *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1366 (Fed. Cir. 2007) (“A presumption exists that the same terms appearing in different portions of the patent claims should be given the same meaning ‘unless it is clear from the specification and prosecution history that the terms have different meanings at different portions of the claims.’”); *Phillips*, 415 F.3d at 1314 (“Because claim terms are normally used consistently throughout the patent, the usage of a term in one claim can often illuminate the meaning of the same term in other claims.”). lululemon has not argued otherwise.

Claim 1 recites a method in which “recorded” “athletic activity data” is received from an “athletic activity monitoring system.” Stone ¶ 50; Ex. 1001 at 67:12–14 (“A method comprising: receiving, from an athletic activity monitoring system, athletic activity data recorded during an athletic activity performed by a first user”). The “athletic information monitoring device” described in

the '220 patent “incorporate[s] a sensor or multiple sensors for *measuring* parameters relating to the person being monitored.” *Id.*, 8:50–53 (emphasis added). By virtue of the athletic monitoring device, “athletic information [is] *obtained* from an individual person.” *Id.* (emphasis added). Figure 2 of the '220 patent “illustrates one example of an athletic information monitoring device 201 that may be employed according to various examples of the invention *to measure athletic information corresponding a user’s athletic activity.*” *Id.*, 11:24–27 (emphasis added). Thus, when claim 1 refers to a monitoring system that “recorded” “athletic activity data,” a POSITA would understand that claim 1 is using “record” to mean “measure or capture, and then save,” i.e., claim 1 must include “measuring parameters” using “a sensor or multiple sensors.” *Id.*, 8:50–53, 67:12–14. Ex. 2001, ¶¶ 49–50. The term “record” in claim 11 should have the same meaning: “measure or capture, and then save.” *PODS*, 484 F.3d at 1366; *Phillips*, 415 F.3d at 1314.

2. The specification of the '220 patent supports construing “record” in claim 11 to mean “measure or capture, and then save”

The proper claim construction is based “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.” *McRO, Inc. v. Bandai Namco Games Am. Inc.*, 959 F.3d 1091, 1097 (Fed. Cir. 2020). *Phillips*, 415 F.3d at 1315 (claims “must be read in view of the specification, of which they are a part.”). The specification of

the '220 patent confirms that “record” is used in claim 11 to mean “measure or capture, and then save.” Ex. 2001, ¶¶ 51–53. Although the word “record” may, in the abstract, have multiple meanings—the specification uses “record” in a way that could only mean “measure or capture and then save.” *Id.*, ¶ 51. The Board should interpret “record” in claim 11 in the same way. *McRO*, 959 F.3d at 1097; *Phillips*, 415 F.3d at 1315.

For example, the specification uses “record,” “recorded,” and “recording” to describe an action performed by an “athletic parameter *measurement* device 207.” Ex. 1001, 11:44–48 (emphasis added); Section V.A.1; Ex. 2001, ¶ 52. The specification discloses that the apparatus uses certain measurement devices—such as GPS devices and accelerometers—to “record” athletic activity data. Ex. 1001, 19:59–61 (“[t]he inclusion of GPS device 713 and accelerometer 715 in a single mobile device 700 allows device 700 to *record* athletic activity data in multiple workout settings.”); 1:60–62 (“By using both a GPS device and an accelerometer, the mobile device may record workout data for both indoor (e.g., stationary) workouts and outdoor workouts.”); 20:10–15 (“For example, if device 700 determines that the individual’s location is not changing, accelerometer 715 or recording data therefrom may be activated and used (again, the device might always be active, but recording data from the device is turned on and off).”) The specification is flush with additional disclosures showing that recording must

include measuring or capturing, in addition to saving. *See, e.g., id.*, 20:31–36, 22:11–13, 26:7–9, 36:26–32, 41:3–6, 41:21–24, 41:56–59, 51:62–65, 57:22–26, 59:6–9. Because the specification repeatedly uses “record” to include the act of measuring or capturing, the term “record” in claim 11 should be interpreted the same way, to mean “measure or capture, and then save.” *See McRO*, 959 F.3d at 1097; *Phillips*, 415 F.3d at 1315.

3. The purpose of the invention supports construing “record” in claim 11 to mean “measure or capture and then save”

The term “record” in claim 11 should be construed in accordance with the ’220 patent’s express purpose: to measure athletic activity and thereby motivate the user. Ex. 1001, 1:29–35. An interpretation of “record” to simply mean saving or storing data would be incorrect because it conflicts with the invention’s purpose. Ex. 2001, ¶¶ 54–56. The Federal Circuit has repeatedly explained that “a patent’s express purpose of the invention informs the proper construction of claim terms.” *Sequoia Tech., LLC v. Dell, Inc.*, 66 F.4th 1317, 1326 (Fed. Cir. 2023); *see also In re Power Integrations, Inc.*, 884 F.3d 1370, 1376–77 (Fed. Cir. 2018) (“because the patent at issue ‘strives to eliminate unnecessary components and create a more compact circuit,’ the Board’s construction that would include a ‘bulky’ component was ‘unduly broad’ and ‘inconsistent’ with the patent’s ‘focus’”).

In distinguishing the prior art, the ’220 patent criticizes earlier systems that required manual entry of pre-recorded athletic activity. Ex. 2001, ¶ 55. For

example, the specification discloses that “individuals might not be as motivated to exercise because of the extra effort that may be required in recording and tracking workout results,” including the need to “manually enter workout information such as a number of miles run, a route run, an average heart rate and the like, into a database in order to track his or her progress.” Ex. 1001, 1:29–35. In view of this disclosure, a POSITA would understand that the invention requires more than simply saving manually entered workout information—it also requires measuring or capturing athletic activity with an athletic information monitoring device. Ex. 2001, ¶ 55. As a result, the Board should construe “record” in claim 11 to mean “measure or capture, and then save.” *Sequoia*, 66 F.4th at 1326.

4. When a term has multiple ordinary meanings, the meaning most consistent with the specification should control

In the Institution Decision, the Board observed that “Merriam Webster’s online dictionary lists various definitions of the transitive verb of ‘record.’” Decision at 12. Some of the ordinary definitions provided in Merriam Webster’s online dictionary relate to the act of saving—such as “to set down in writing” and “to cause (sound, visual images, data, etc.) to be registered on something (such as a disc or magnetic tape) in reproducible form.” Decision at 12 (citing Ex. 2003, 1). But another definition Merriam Webster’s online dictionary includes the act of measuring or capturing: it defines “record” as “to register permanently by mechanical means.” Ex. 2003, 1. The dictionary gives two examples of this

definition, both of which involve measuring or capturing: (i) “earthquake shocks recorded by a seismograph” and (ii) “the thermometer recorded 90°.” *Id.*

When presented with several dictionary definitions, the Federal Circuit requires that the claim term be construed in accordance with the patent. For example, in *McRO*, the Federal Circuit observed that extrinsic evidence presented two meanings of the term “vector”: (i) a “geometric” meaning of “a vector with direction and magnitude in three-dimensional space” and (ii) a broader meaning “in mathematics and other fields” as “an ordered list of numbers.” 959 F.3d at 1099. But the Court rejected the broader, mathematical meaning in view of the intrinsic record:

What matters is the meaning most appropriate in the context of the particular patent. Here, it is clear, based on the intrinsic evidence, that the term “vector” has the narrower geometric meaning in this patent.

Id. The Federal Circuit has taken the same approach in many other cases. *E.g.*, *Choon’s Design, LLC v. Idea Village Prods. Corp.*, 776 F. App’x 691, 696 (Fed. Cir. 2019) (“And though dictionary definitions of ‘supported’ may suggest a broader meaning, such extrinsic evidence does not outweigh the intrinsic record. Though Choon’s argues otherwise, the specification, not dictionaries or colloquial use, dictates a term’s ‘plain and ordinary meaning.’”). Here too, the Board should construe “record” in claim 11 to have the ordinary meaning that is consistent with the specification, i.e., “measure or capture and then save.” *See McRO*, 959 F.3d at

1099.

5. Dr. Houh failed to determine the ordinary and customary meaning of “record”

lululemon relies on Dr. Houh’s declaration (Ex. 1003) to support its grounds of anticipation and/or obviousness. But the Board should afford no weight to those opinions because Dr. Houh conducted his analysis with a misunderstanding about the meaning of “record.” In fact, Dr. Houh never had any understanding about the ordinary meaning of the word “record.”

During his deposition, Dr. Houh was repeatedly asked to articulate the plain and ordinary meaning of the term “record.” *See, e.g.*, Ex. 2002, 31:3-32:15, 162:16-163:7. Dr. Houh was unable to do so. *Id.* Instead, Dr. Houh merely testified that the meaning of “record” would “include some of the examples” in the specification. *Id.*, 18:9-16 (“**Q.** And what is the plain and ordinary meaning of ‘record’? **A.** Well, I mean, I -- I think the plain and ordinary meaning would include the things that I’ve discussed in reference to the various references, and it would include some of the examples that are given in the specification.”); *id.*, 31:3–32:15, 162:16–163:7. Dr. Houh testified that it was unnecessary for him to understand the meaning of “record” because—according to Dr. Houh—the prior art included “examples” that matched the “examples” in the ’220 specification:

I don’t need to consider whether “record” is -- is measuring, “record” is collecting, or “record” is recording, or “record” is only measuring, “record” is only

collecting, because the examples that a person of ordinary skill would have understood to be within the claim scope of “record athletic activity performed by a user,” are recognized by a person of ordinary skill in the art through some of these examples given. And I found similar or identical -- parallel or identical disclosures in the prior art.

Ex. 2002, 164:5-8. That is, Dr. Houh found examples in the specification in which he believed record meant saving. He then found disclosures in the prior art that teach saving. He relied on those to conclude that the prior art teaches recording. That is incorrect because Dr. Houh never considered whether any of the prior art teaches measuring or capturing. Dr. Houh admitted that “record” has “at least” two dictionary definitions—but he admitted that he never considered a definition other than “save.” Ex. 2002, 33:8–20.

When lululemon’s expert assessed the “record” limitation of claim 11, he admittedly failed to consider the meaning of “record” as used in claim 1. Ex. 2002, 180:18-22 (“And so the analysis that I did was with respect to the actual language in Claim 11 and not the -- not the different claim tense for the word ‘record’ and --and other words that are slightly different as well in Claim 1.”).¹ As noted above,

¹ Dr. Houh’s analysis also failed to appreciate the entirety of claim 11. He testified that the word “recorded” is not in the challenged claims. Ex. 2002, 185:10-11; see also id. 180:11-181:3. But claim 11 recites the word “recorded” twice, as does challenged claim 12. Ex. 1001, 68:15-32

the meaning of “record” in claim 11 is presumed to have the same meaning as “record” in claim 1. *PODS*, 484 F.3d at 1366. Based on this alone, Dr. Houh’s consideration of the ordinary and customary meaning of “record” is insufficient and should not be given weight.

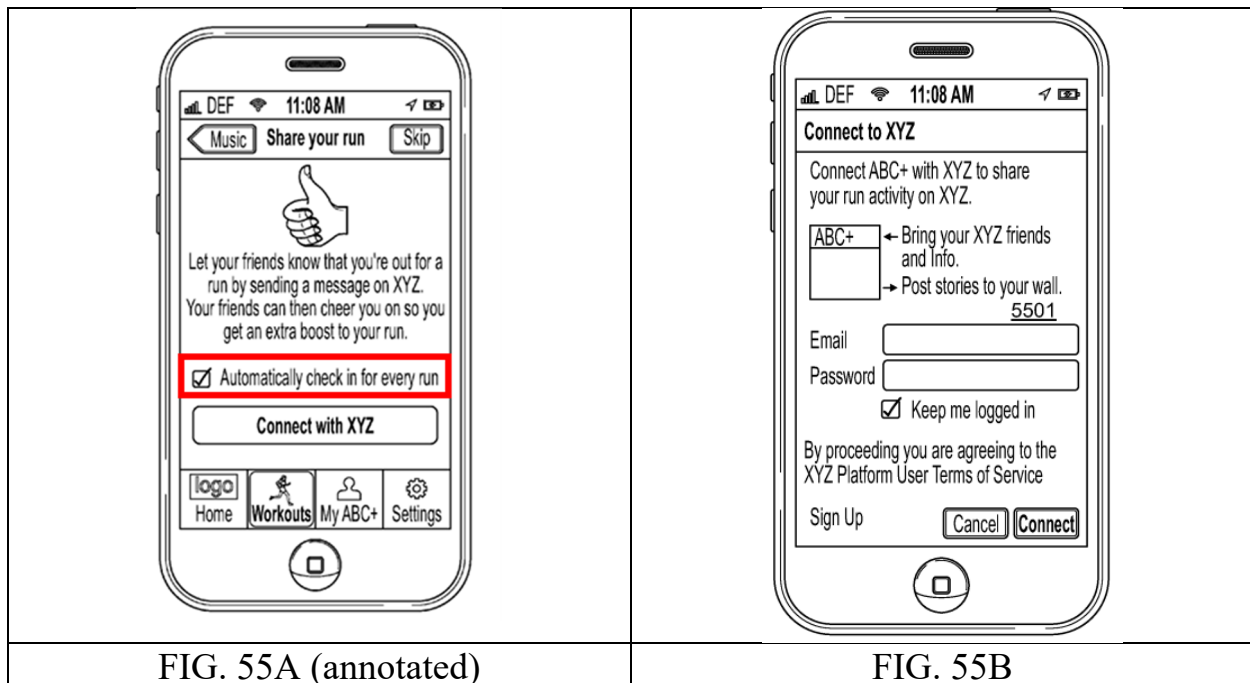
Because Dr. Houh did not understand the meaning of “record” when he reviewed the prior art, the Court should not afford any weight to his opinion that the prior art teaches “recording athletic activity.” *Toro Co. v. Deere & Co.*, 355 F.3d 1313, 1319 (Fed. Cir. 2004) (“The lack of claim construction leaves unclear the precise scope of limitation (c), and as a result, it is impossible to know exactly what the ’516 patent must disclose if it is to anticipate inherently limitation (c).”)); *Cochlear Bone Anchored Sols. AB v. Oticon Med. AB*, 958 F.3d 1348, 1359 (Fed. Cir. 2020) (“Where a claim contains a requirement that must be met by any device or process within its scope, and the meaning of that requirement is entirely unknown, the claim cannot be compared to the prior art for purposes of an invalidity analysis, and so that analysis cannot be conducted.”).

B. “in response to receiving the sharing option selection”

A POSITA would understand that the ordinary and customary meaning of “in response to receiving the sharing option selection,” as used in claim 11 and when properly viewed in light of the specification, means “in response to receiving an individual user command or confirmation to share the recorded athletic activity.”

Ex. 2001, ¶¶ 57–61; Ex. 1001, 68:21.

The specification never uses the phrase “in response to receiving the sharing option selection”—but the specification does use the term “in response to receiving” once. *Id.*, 46:21–23 Ex. 2001, ¶ 58. And it uses that term in the same context as the term is used in claim 11, i.e., when discussing sharing workout information to a social networking site. *Id.* The disclosure appears in the description of Figures 55A and 55B, which “illustrate[] example interfaces for sharing workout/run information according to one or more aspects described herein.” *Id.*, 7:9–11. Interface 5501 (illustrated in Fig. 55B) allows the user to log into the social networking site. *Id.*, 46:21–23; Ex. 2001, ¶ 58.



Ex. 1001 at Figs. 55A–55B.

The passage discloses two distinct types of sharing: one “automatic”; one “in response to receiving a user command or confirmation.” Ex. 2001, ¶ 59; Ex. 1001, 46:26–30. First, in the “automatic” scenario, the specification discloses that, when a “user is logged in, the system may *automatically* share new run information through the information outlet.” Ex. 1001, 46:26–27 (emphasis added). The annotated checkbox in FIG. 55A above displays this “automatic” sharing feature. Ex. 2001, ¶ 59. Second, the passage discloses a type of sharing in which information will “only be shared *in response to receiving* a user command or confirmation.” *Id.*, 46:28–30 (emphasis added). lululemon’s expert Dr. Houh confirmed that these are different “arrangement[s].” Ex. 2002, 190:21-191:8.

Claim 11 recites only this second type of sharing. Ex. 2001, ¶ 60. Claim 11 recites “transmitting workout information associated with the recorded athletic activity to a network page of a social networking site” “*in response to receiving* the sharing option selection.” Ex. 1001, 68:24–28. Because the specification draws a clear distinction between “automatic” sharing and sharing “in response to receiving the sharing option selection,” a POSITA would understand the term “in response to receiving the sharing option selection” in claim 11 to exclude “automatic” sharing. Ex. 2001, ¶ 60. The term “in response to receiving the sharing option selection” in claim 11 should thus be construed to exclude automatic sharing. *See McRO*, 959 F.3d at 1099 (“What matters is the meaning most appropriate in the context of the

particular patent. Here, it is clear, based on the intrinsic evidence, that the term “vector” has the narrower geometric meaning in this patent.”). Any construction of “in response to receiving the sharing option selection” that captures the automatic sharing option would be contrary to specification and thus improper. *Wi-Fi One, LLC v. Broadcom Corp.*, 887 F.3d 1329, 1346 (Fed. Cir. 2018). The Board should construe “in response to receiving the sharing option selection” in claim 11 to have the ordinary meaning that is consistent with the specification, i.e., “in response to receiving an individual user command or confirmation to share the recorded athletic activity.” *See McRO*, 959 F.3d at 1099.

VI. LULULEMON FAILS TO CARRY ITS BURDEN OF PROVING THAT THE CHALLENGED CLAIMS ARE UNPATENTABLE BY A PREPONDERANCE OF THE EVIDENCE

lululemon has not met its burden for any Challenged Claim on any ground of unpatentability as discussed in detail below. Accordingly, the Board should find that lululemon has not proven by a preponderance of the evidence that any Challenged Claim is unpatentable.

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

lululemon asserts that Johnson anticipates the Challenged Claims. *See* Petition, 24. But, for at least two reasons, lululemon fails to prove anticipation by a preponderance of the evidence. First, as to limitation [11C], lululemon fails to show that Johnson discloses an apparatus that “record[s] athletic activity” under the proper

interpretation of the term “record.” *See* Section V.A. lululemon instead relies on Johnson’s disclosure of an apparatus that merely stores pre-recorded athletic activity. *See* Petition, 26. Second, 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.B. Of the four purported sharing options that lululemon identifies in Johnson, none (i) discloses transmitting workout information “in response to” receiving the alleged sharing option under the ordinary and customary meaning identified above (*see* Section V.B.), and (ii) none discloses transmitting workout information to a “social networking site.” Ex. 1001 at 68: 25–28. lululemon thus fails to prove by a preponderance of the evidence that Johnson discloses “every element of the claimed invention” and anticipates the Challenged Claims. *See Net Money*, 545 F.3d at 1371.

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, 68:21; *see also* Section V.A. lululemon instead relies on Johnson’s disclosure of an apparatus that merely saves pre-recorded athletic activity. *See* Petition, 25, 27–28.

The “apparatus” that lululemon identifies in Johnson—device 601—does not “record” (i.e., measure or capture, and then save) athletic activity. *See* Petition, 25; Ex. 2001, ¶ 64. 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.* As explained above, this is not “recording” under the proper construction—measure or capture, and then save. *See* Section V.A. Dr. Houh alleges that the separate “monitoring” device disclosed in Johnson—not device 601—is what “records” the athletic activity data. Ex. 1003, ¶ 55. lululemon admits that device 601 does not measure or capture, and then save athletic activity. Petition, 26. lululemon explains that “[d]evice 601 records user athletic activity *by writing it to memory.*” *Id.*, 28 (emphasis added). But “writing [data] to memory” does not include capturing or measuring the athletic activity itself, only saving it. *Id.*; *see* Section V.A.; Ex. 2001, ¶ 64.

lululemon thus fails to show that Johnson discloses an apparatus that “record[s] athletic activity performed by a user.” Ex. 1001, 68:21. On this basis, lululemon fails to prove by a preponderance of the evidence that any Challenged Claim based in Ground 1 is unpatentable.

2. 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, 68:25–28. 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, 32–38. But lululemon’s position is flawed. It fails to show that any of the four options discloses transmitting workout information “in response to” receiving the sharing option selection under the proper construction. *See* Section V.B.

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

lululemon fails to show that any of the four purported “sharing option[s]” 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, 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, 33 (citing Ex. 1004, ¶ 135). As explained above, “in response to receiving the sharing option selection” as recited in claim 11 should be interpreted

as transmission “in response to receiving an individual user command or confirmation to share the recorded athletic activity.” *See* Section V.B. But lululemon does not show that Johnson’s “Leaderboard” option discloses any sort of individual user command or confirmation. Petition, 33–36; Ex. 2001, ¶ 68. Instead, once the user agrees in advance to have their data shared with others, Johnson’s device 601 will automatically share information for all future workouts once the user has completed each workout. Ex. 2001, ¶ 68. That type of automatic sharing is not “in response to *receiving*” a sharing option selection under the proper interpretation of [11E]. Petition, 33–36; Ex. 2001, ¶ 68. Accordingly, lululemon fails to establish that the Leaderboard option discloses this limitation.

As to the three remaining options identified 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, 32–38. lululemon provides no argument whatsoever for the “Brag to Friends” and “Share this Run” options. *Id.*, 32–38 (providing argument sections for only the “Leaderboard” and “Blog Post” options); Ex. 2001, ¶¶ 69–70. 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.” Petition, 37–38; Ex. 2001, ¶¶ 69–70.

lululemon provides no evidence or argument that the “Blog Promotion” text in Figure 43 or the “blog 2900” of Figure 29 discloses transmitting workout information “in response to receiving” a sharing option selection under the proper interpretation of the ordinary and customary meaning. *See id.*; Ex. 1001, 68:25–28.

b. lululemon fails to show that Johnson discloses transmitting workout information to “a social networking site viewable by one or more other users”

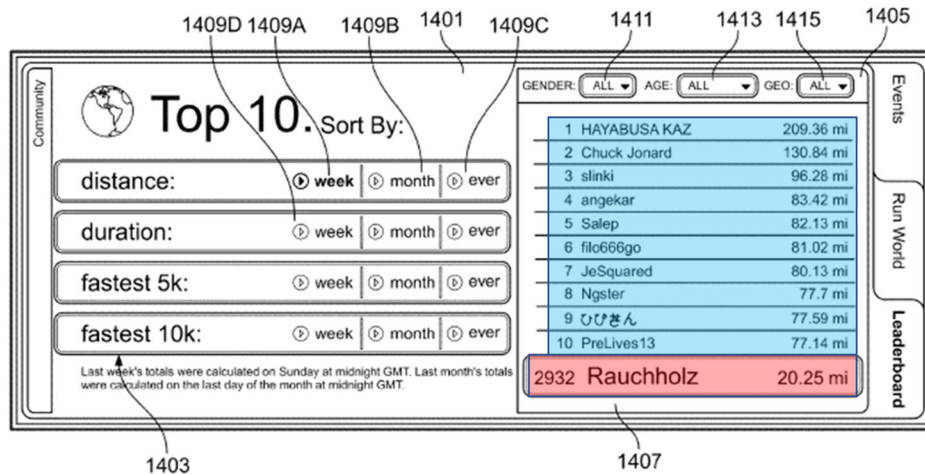
lululemon fails to show that any of the four embodiments in Johnson disclose transmitting workout information associated with the user’s recorded athletic activity to “a social networking site viewable by one or more other users.” Ex. 1001, 68:25–28.

As to the “Brag to Friends” and “Share this Run” options, lululemon fails to provide any evidence or argument concerning limitation [11E]. *See* Petition at 32–38 (providing argument sections only for the “Leaderboard” and “Blog Post” options) ; Ex. 2001, ¶ 72. Thus, lululemon fails to show that either of these options transmits workout information to “a social networking site viewable by one or more other users.” *Id.*

With respect to the “Blog Post” option, lululemon fails to show that 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, 68:25–28; Ex. 2001, ¶ 73. lululemon points again to Johnson’s “Blog

Promotion” text in Figure 43 as purported evidence that Johnson teaches sharing to a blog. Petition, 36–38. lululemon also cites Figure 29 of Johnson, which depicts “blog 2900.” *Id.*, 37; *see also* Ex. 1004, ¶ 167. lululemon appears to be arguing 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, 36–38; Ex. 2001, ¶ 73. But lululemon provides no evidence that blog 2900 is the same blog referenced in Figure 43. *See id.*; Ex. 2001, ¶ 73. lululemon’s attempt to combine different disclosed embodiments to show anticipation is improper as a matter of law. *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.*; Ex. 2001, ¶ 73. 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.*

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, 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, 33–36; Ex. 2001, ¶ 74. lululemon argues that user Rauchholz can “view[] the recorded data of ten athletes.” Petition, 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.*, 33–36; Ex. 2001, ¶ 74. In other words, lululemon focuses on what user Rauchholz can view, not what user Rauchholz has shared. Ex. 2001, ¶ 74. lululemon’s reliance on an ambiguous

disclosure—with only a superficial corresponding explanation and analysis—is insufficient to establish anticipation. *See Sinjimoru v. Geneze Innovation Inc.*, IPR2021-00493, Paper 8 at 11 (PTAB July 28, 2021); *Wasica Fin. GmbH*, 853 F.3d at 1284.

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, 68:25–28.

For at least the reasons discussed above, lululemon fails to show that Johnson anticipates claim 11. As such, lululemon has failed to prove by a preponderance of the evidence that any Challenged Claim based on Ground 1 is unpatentable.

3. lululemon fails to show that Johnson anticipates claim 12

Claim 12 depends from claim 11 and recites “wherein 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, 68:29–32. The plain language of the claim requires that a summary of metrics from the recorded athletic activity of the user in claim 11 is tagged with identifiers of at least one “other user[.]” Ex. 2001, ¶¶ 77–81.

lululemon’s reliance on Johnson’s disclosure of “milestone achievement” tags does not show that Johnson anticipates claim 12 because each tag lists only one user.

Petition, 38–39. The “milestone achievement” tags are used to identify whether a user has met a workout milestone. *Id.*, 38; Ex. 1004, ¶ 146. Below is Figure 3 as annotated by lululemon.

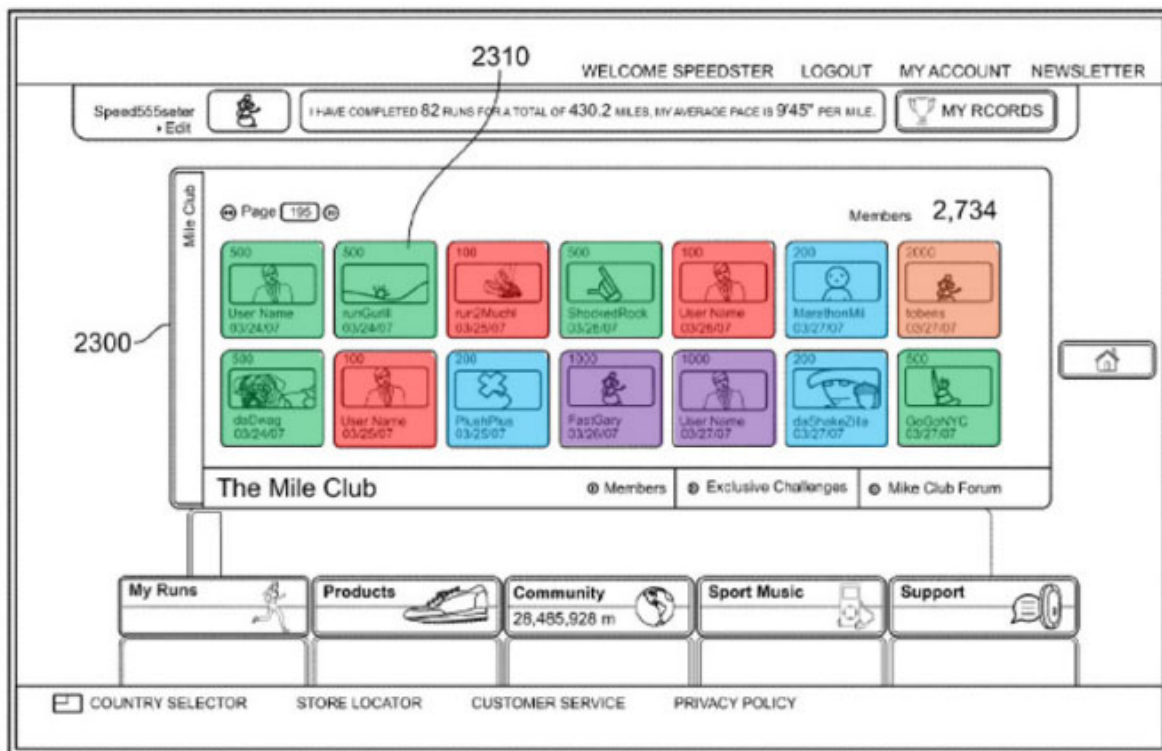


FIG. 23

Petition at 39. There is not one “500-Mile Club” tag which lists other users. Ex. 2001, ¶78. Instead, as Dr. Houh confirmed, each user has its own tag. *Id.*; Ex. 2002, 210:11-211:9. The tags do not include identifiers of the club member and “one or more other users,” as required by the plain language of the claim. Ex. 2001, ¶ 78; *see also* Ex. 2002, 210:11-211:9. It is unclear if lululemon is alleging that the name listed in a tile of Figure 23 is supposed to be the same “user” recited in claim 11 or the “other user[]” recited in claim 12. Ex. 2001, ¶ 78. Under either interpretation,

lululemon's showing fails. Ex. 2001, ¶ 78. The flaws in lululemon's argument are illustrated using the tile in the bottom left of Figure 23 listing the name "daDwag" as an example.

If lululemon contends that "daDwag" is the "user" of claim 11 then the 500-Mile Club tile does not show the "other user[]" recited in claim 12. Ex. 2001, ¶ 79. The 500-Mile Club tile, which lululemon alleges is the claimed "summary of one or more metrics" contains (1) an achievement identifier and (2) an identifier for only one user—"daDwag." *Id.*; Ex. 2002 210:11-211:9. There is no name listed that could be a claimed "other user[]."

If lululemon contends that the "daDwag" is the "other user[]," then there is no showing that the 500-Mile Club tile contains the "summary of one or more metrics from the recorded athletic activity," recited in claim 12. Ex. 2001, ¶ 80. The recited "recorded athletic activity" is the activity performed by the "user" of claim 11. *Id.* But, the 500-Mile Club tile only contains summary information for "daDwag's" workout, not the "user" of claim 11. *Id.* Therefore, under either interpretation, lululemon's argument is not sufficient.

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

In Ground 2, lululemon asserts anticipation based on Sutton. *See* Petition, 24. But lululemon fails to prove by a preponderance of the evidence 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.A. lululemon instead relies on Sutton’s disclosure of an apparatus that merely stores manually entered activity data. *See* Petition, 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.” *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, 47. lululemon has thus failed to meet its burden to show by a preponderance of the evidence that Sutton anticipates any Challenged Claim.

1. lululemon fails to show that Sutton anticipates claim 11

- a. 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 measures or captures, and then saves athletic activity performed by a user. Ex. 1001, 68:21. lululemon instead relies on Sutton’s disclosure of an apparatus that merely saves activity data.

The Board acknowledged that “[w]hether [Sutton’s] system 110 ‘records athletic activity’ when it writes information about a user’s athletic activity into database 115 turns on the precise scope of ‘record’ as recited in element 11C.” Decision, 12. As discussed in Section V, the parties agree that the term “record” in claim 11 has its ordinary and customary meaning. Petition, 22. A POSITA would understand in view of the intrinsic record, that the ordinary and customary meaning of “record athletic activity performed by a user” as recited in claim 11 means “measure or capture, and then save athletic activity performed by a user.” See Section V.A.

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, 42. But Sutton’s system 110 does not “record” (i.e., measure or capture, and then save) athletic activity. Ex. 2001, ¶ 85. Sutton’s system 110 cannot measure or capture, and then save athletic activity because it comprises only a database (115) and a server (111). Ex. 1005, ¶ 28. Sutton’s system 110 merely “store[s]” activity data in database 115. *Id.* lululemon expressly admits this by asserting that “[s]ystem 110 records athletic activity by **writing user exercise and activity data to memory** in database 115.” Petition, 46. (emphasis added). This is different than capturing or measuring and then saving

activity data. Ex. 2001, ¶ 85. Thus, lululemon fails to show that Sutton’s system 110 “records athletic activity.” Ex. 1001, 68:21; Ex. 2001, ¶ 85.

On this basis alone, lululemon has failed to prove by a preponderance of the evidence that any Challenged Claim in Ground 2 is unpatentable.

b. 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” [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.” Ex. 1001, 68:25–28 (emphasis added). lululemon relies on Figures 3 and 9 of Sutton to meet this limitation. Petition, 48–52. But neither figure shows the transmission of workout information associated with “recorded” athletic activity. Instead, both figures show the transmission of workout information associated with manually entered workout information.

Sutton’s Figure 3 depicts methods of transferring “user-provided data”; it says nothing about the transfer of “recorded athletic activity.” See Ex. 1005, Fig. 3, ¶ 60; Ex. 2001, ¶ 87. Similarly, Figure 9 depicts a data entry form that bears the title “Enter Activity by Hand.” Exhibit 1005, Fig. 9. Figure 9’s form allows the user to manually enter certain details about a previously performed athletic activity, such as

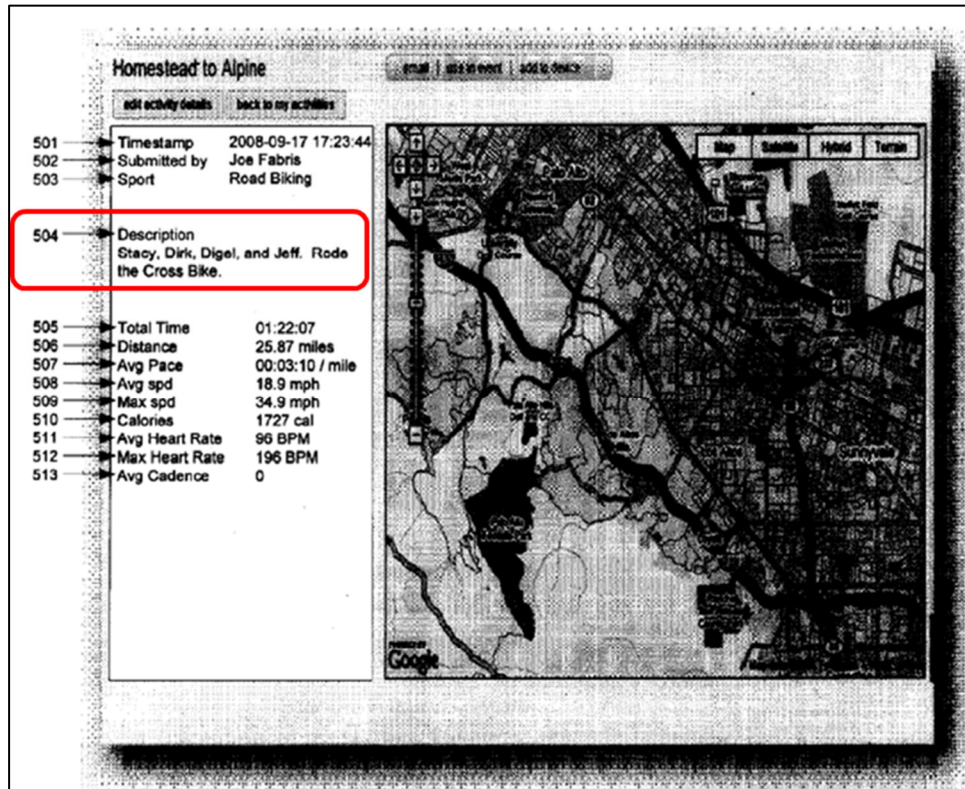
the “Sport,” “Description,” “Course Rating,” “Total Time,” and “Total Distance.” *Id.*, Fig. 9. lululemon admits that Figure 9 relates only to manually entered data. Petition at 47 (“Sutton’s users can manually enter activity data via an exemplary data entry form.”). As a result, to the extent Figure 9 shows a “sharing option,” that option is only presented to the user in conjunction with manual entry of a previously performed athletic activity—not “recorded activity.” *See id.*; Ex. 2001, ¶ 87.

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.” Ex. 1001, 68:25–28. On this basis, lululemon has failed to prove by a preponderance of the evidence that any Challenged Claim in Ground 2 is unpatentable.

2. lululemon fails to show that Sutton anticipates claim 12

Claim 12 depends from claim 11 and recites “wherein 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, 68:29–32 (emphasis added). In addition to failing to show that Sutton’s system “records athletic activity” (*see* Section VI.B.1.), lululemon fails to show that Sutton anticipates claim 12 because lululemon offers no proof that the names it alleges are “identifiers” are associated with “one or more other users.”

lululemon does not provide any support that the people listed on a screen in Sutton are the claimed “users.” lululemon primarily relies on Figure 5 of Sutton, when arguing that Sutton allegedly discloses claim 12. *See* Petition, 52–55.



Ex. 1005, Fig. 5 (annotated). lululemon points to “description field 504”(annotated in red) and asserts that the “[d]escription field 504 includes the names of athletes Stacy, Dirk, Digel, and Jeff and, below them, summaries of metrics of athletic activity.” Petition, 54. Then, without any support, lululemon concludes that “[a]t least ‘Dirk’ is another ‘user.’” *Id.* But lululemon points only to names on a screen in Figure 5—there is no indication that these are names of “users.” Ex. 2001, ¶ 90; see also Ex. 2002, 215:4-216:15. Sutton discusses field 504 in only one paragraph,

and it never explains what these names refer to. Ex. 1005, ¶ 63. Sutton does not describe “Dirk” as a “user” and lululemon fails to provide any evidence or explanation to reach that conclusion. Ex. 2001, ¶ 90.

lululemon also cites without explanation to Sutton’s Figure 10 and the corresponding description in paragraph 84. *See* Petition, 54. This disclosure also fails to teach that “Dirk” is a “user” for three reasons. Ex. 2001, ¶ 91. First, neither Figure 10 nor paragraph 84 disclose the “summary of one or more metrics from the recorded athletic activity” recited in claim 12. In fact, in Figure 10 and paragraph 84, Sutton explains that athletic activity has not yet taken place. *See* Ex. 1005, ¶ 84 (“The group event may show a trace map 1005 to give an overview of the course that the group ***will be*** hiking, riding, running, etc.”) (emphasis added); Ex. 2001, ¶ 91. Second, none of the names listed in Figure 10 overlap with the names in field 504 of Figure 5 discussed above. Ex. 2001, ¶ 91. Sutton’s Figure 10 and the corresponding description in paragraph 84 thus fail to support lululemon’s conclusory statement that “[a]t least ‘Dirk’ is another ‘user.’” Petition, 54. Third, the examples in Figure 5 and 10 of Sutton are distinct embodiments, and a party asserting anticipation may not rely on “combinations of adjacently disclosed embodiments.” *Chamberlain Grp.*, 935 F.3d at 1350.

For these reasons, lululemon has not shown by a preponderance of the evidence that claim 12 is unpatentable under Ground 2.

3. lululemon fails to show that Sutton anticipates claim 19

Claim 19 depends from claim 11 and recites “wherein the apparatus is *further caused* to generate a social network message on the network page *based on* a location at which the athletic activity was performed by the user.” Ex. 1001, 68:59–62 (emphasis added). The plain language of the claim requires that the “social network message” be (1) generated *further* to the workout information transmitted in limitation [11E] and (2) “generate[d]” “*based on*” (e.g., depends in some way on) “a location at which the athletic activity was performed by the user.” Ex. 2001, ¶¶ 93–97. lululemon relies solely on “a hand-traced map” to meet this limitation. See Petition, 55 (citing Ex. 1005, Figs. 3, 5). For two reasons, the “hand-traced map” fails to teach the limitations of claim 19.

a. a hand-traced map is “workout information,” not “a social network message”

Sutton’s hand-traced map is “workout information,” not “a social network message” that is generated “further” to the workout information purportedly transmitted in limitation [11E]. Sutton’s description of Figure 3 discloses that “the data is checked to determine whether it includes a traced map (303).” Ex. 1005, ¶ 60. Thus, Sutton confirms that a hand traced map is “workout information” that may be manually entered into Figure 3 prior to generation of a “social network message.” Ex. 2001, ¶ 94. And, a hand traced map is not generated “further” to the workout information purportedly transmitted in limitation [11E]. lululemon relied

on this same disclosure to purportedly meet limitation [11E] that recites “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.” See Petition, 49–50 (citing Ex. 1005, Fig. 3); Ex. 1001, 68:25–27 (emphasis added). Because lululemon already relied on Sutton’s disclosure of a hand-traced map to purportedly meet limitation [11E], that map cannot also be part of a “social network message” that the claimed apparatus is “further caused to generate.” *Gaus v. Conair Corp.*, 363 F.3d 1284, 1288 (Fed.Cir.2004) (Where a claim lists elements separately, “the clear implication of the claim language” is that those elements are “distinct component[s]” of the patented invention.); *Engel Indus., Inc. v. Lockformer Co.*, 96 F.3d 1398, 1404 05 (Fed.Cir.1996) (concluding that where a claim provides for two separate elements, a “second portion” and a “return portion,” these two elements “logically cannot be one and the same”); Ex. 2001, ¶ 95.

b. *Sutton’s hand-traced map is not “a social network message” “generate[d]” “based on a location at which the athletic activity was performed by the user”*

Sutton’s hand-traced map is not “a social network message” “generate[d]” “based on a location at which the athletic activity was performed by the user.” See, e.g., *Power Mosfet Techs., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1410 (Fed. Cir. 2004); *Merck & Co. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005) (“A claim construction that gives meaning to all the terms of the claim is preferred

over one that does not do so.”); *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1557 (Fed. Cir. 1995) (a tribunal “must give meaning to all the words in [the] claims”). Claim 19 recites that the “social network message” is “generate[d]” “based on a location at which the athletic activity was performed by the user.” Ex. 2001, ¶ 96. But, a hand-traced map does not depend on any location—it depends solely on what the user traces with their hand. *Id.* Sutton thus fails to teach that the apparatus is “further caused to generate a social network message on the network page based on a location at which the athletic activity was performed by the user.

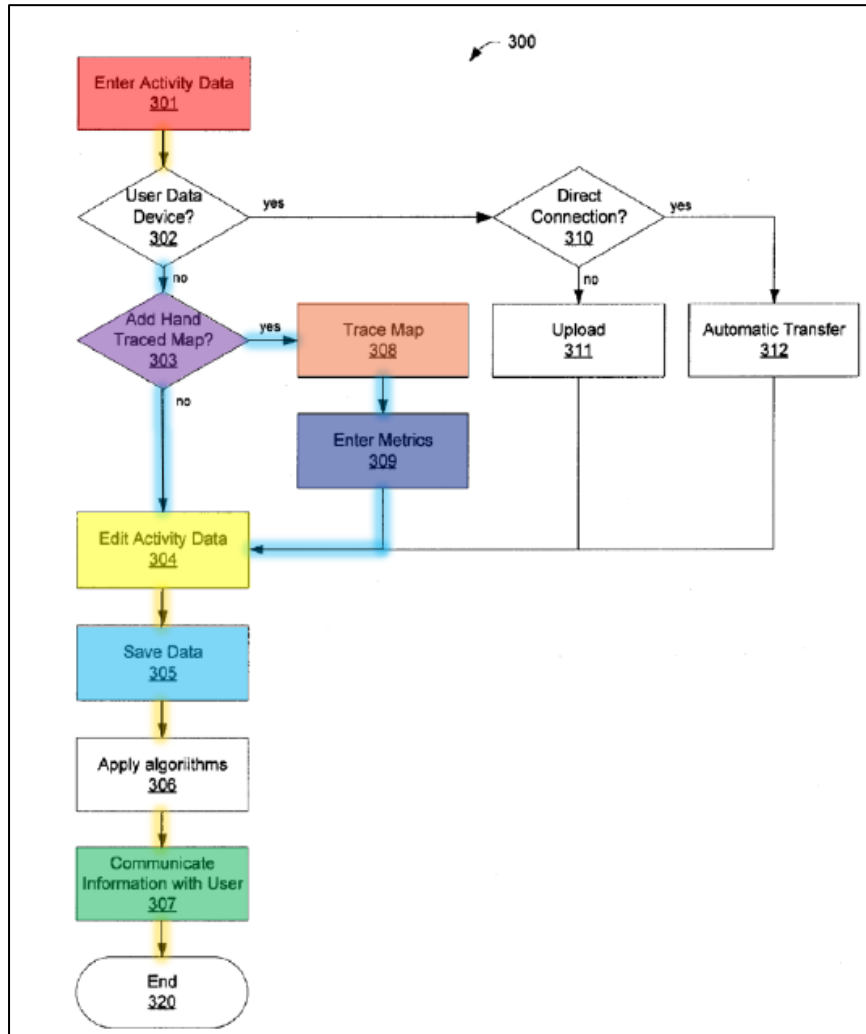
For these reasons, lululemon has not shown by a preponderance of the evidence that claim 19 is unpatentable under Ground 2.

4. lululemon fails to show that Sutton anticipates claim 20

Claim 20 depends from claim 19 and further recites “wherein transmitting the workout information includes modifying the social network message based on a received user edit.” Ex. 1001, 68:63–65. Thus, claim 20 requires the modification of “a social network message” after its creation. *Id.*

But lululemon’s cited disclosure is different because it identifies the option to edit manually entered *activity data* before a “social network message” is created. lululemon points to Sutton’s disclosure of a user having “an opportunity to correct and edit” manually entered data at step 304 of Figure 3. Petition, 56 (quoting Ex. 1005, ¶ 60). But, in arguing earlier that Sutton anticipates [11E], lululemon asserts

workout information is not transmitted to a network page of a social networking site until step 307. Petition, 49; Ex. 2001, ¶ 99. A “social network message” cannot be generated prior to this transmission of workout information because until the transmission, nothing is received by the social networking site. Ex. 1005, Fig. 3; Ex. 2001, ¶ 99. Thus, a “social network message” is not generated until at least step 307—after step 304. Ex. 2001, ¶ 99. Figure 3 of Sutton as annotated in the Petition is reproduced below:



Petition at 57. As shown, a “social network message” purportedly generated at step 307 (green box) cannot be modified based on a received user edit at step 304 (yellow box), because no “social network message” exists yet at step 304. Ex. 2001, ¶ 99. In other words, rather than identifying disclosure of a user editing an existing “social network message,” lululemon relies on disclosure of a user editing *activity data* before a social network message is ever created. Ex. 2001, ¶ 99.

For these reasons, lululemon has not shown by a preponderance of the evidence that claim 20 is unpatentable under Ground 2.

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

In Ground 3, lululemon alleges that Sutton renders claims 11, 12, 19, and 20 obvious. Petition at 57–67. lululemon fails to prove by a preponderance of the evidence that Sutton renders these claims obvious at least because lululemon fails to show that Sutton teaches transmitting “recorded athletic activity” in response to receiving a sharing option selection. Ex. 1001, 1:26-27.

1. lululemon fails to show that Sutton renders claim 11 obvious

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

As opposed to Sutton’s system (110) relied on in Ground 2, lululemon points to Sutton’s device (104) as the claimed “apparatus” when arguing obviousness in Ground 3. Petition, 58. Because Sutton’s device (104) lacks “a sharing option,” lululemon argues that “it would have been obvious” to configure the apparatus (i.e., device (104)) in two ways. Petition, 62, 63 (citing Ex. 1005, Fig. 3). First, lululemon argues it would have been obvious to configure Sutton’s device 104 to receive Figure 9’s sharing option selection in the “manual device transfer pathway.” *Id.* Second, lululemon argues it would have been obvious to configure Sutton’s device 104 to receive Figure 9’s sharing option selection in “the automatic device transfer pathway before the user started their workout.” *Id.* Both proposed combinations fail to teach the limitations of claim 11.

lululemon’s arguments as to the “manual device transfer pathway” fail because the manual device transfer pathway concerns manually entered data—not “recorded athletic activity.” *See* Section VI.B.1. Thus, combining Figure 9’s sharing option selection with Figure 3’s “manual device transfer pathway” does not teach “transmitting workout information associated with the *recorded athletic activity*” as recited in [11E]. Ex. 1001, 68:25–26.

lululemon’s arguments as to the “automatic device transfer pathway” also fail because even this pathway discloses a purported “sharing option” only for manually entered data—not “recorded athletic activity.” “[A]utomatic” refers to sharing, not

measuring or capturing. Ex. 2001, ¶ 105. lululemon alleges (largely by cross-referencing its arguments for limitation [11D]) that the “automatic device transfer pathway” depicted in Figure 3 of Sutton shows data transfer between a user’s device and system 110. *Id.*, 63, 65. Within Figure 3, lululemon points to box 312, titled “Automatic Transfer.” *Id.*, 62–63. By focusing on an “automatic” data transfer, lululemon is apparently attempting to overcome the failures identified above in Section VI.B.1, i.e., that Figure 9 of Sutton merely shows a “sharing option” for manually entered data—not “recorded athletic activity.” But the 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; Ex. 2001, ¶ 106. 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, 61. But both paths begin at box 301, which is labeled “Enter Activity Data.” Ex. 1005, Fig. 3; Ex. 2001, ¶ 106. Sutton confirms 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,

68:21–28; Section V.A; Ex. 2001, ¶ 106. 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; Ex. 2001, ¶ 106.

Second, even assuming that Sutton’s “automatic device transfer” related to the transfer of “recorded athletic activity” (which it does not), lululemon’s purported rational to support its claim that a skilled artisan would have been motivated to modify Sutton is flawed. 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, 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 disjointed sequence of events is nonsensical and unsupported by Sutton. Ex. 2001, ¶ 108. 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, 63 (citing Ex. 1003, ¶ 94).

For these reasons alone, lululemon has not shown that any Challenged Claim is unpatentable under Ground 3.

2. lululemon fails to show that Sutton renders claim 12 obvious

lululemon relies on its same arguments presented in Ground 2. *See* Petition, 66. lululemon thus fails to show that Sutton renders claim 12 obvious for the reasons discussed in Section VI.B.2.

3. lululemon fails to show that Sutton renders claim 19 obvious

lululemon relies on its same arguments presented in Ground 2. *See* Petition at 66–67. lululemon thus fails to show that Sutton renders claim 19 obvious for the reasons discussed in Section VI.B.3.

4. lululemon fails to show that Sutton renders claim 20 obvious

lululemon relies on its same arguments presented in Ground 2. *See* Petition at 67. lululemon thus fails to show that Sutton renders claim 20 obvious for the reasons discussed in Section VI.B.4.

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 prove by a preponderance of the evidence 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, 67.

lululemon does not identify any teachings from the Plus 3 Website Pages that relate to claims 12 and 20.

1. lululemon fails to show that the combination of Sutton and the Plus 3 Website Pages renders obvious claim 11

As to claim 11, lululemon relies on the Plus 3 Website Pages for limitations [11D] and [11E]. Petition, 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, 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.*, 70 (citing Ex. 1006, 9, 12).

Neither of these disclosures cure the flaws 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 explained in Sections VI.A.1, VI.A.2, VI.B.1. As a result, for the same reasons set forth in Section VI.B.1, lululemon fails to prove by a preponderance of the evidence that the combination of Sutton and the Plus 3 Website Pages renders claim 11 obvious.

2. lululemon fails to show that the combination of Sutton and the Plus 3 Website Pages renders obvious claim 14

Claim 14 depends from claim 11 and recites “wherein the apparatus is further caused to: [1] receive a request to deactivate sharing of the workout information; and [2] transmit a modification request to remove the workout information from the social networking site.” Ex. 1001, 68:38–43. lululemon fails to show that either requirement is obvious over Sutton in view of the Plus 3 Website pages.

First, lululemon’s arguments as to claim 14 fail because the disclosure it relies on fails to teach that the claimed “apparatus” “receive[s] a request to deactivate sharing of the workout information.” Ex. 1001, 68:40–41. Instead, lululemon points to disclosure of the Plus 3 Network itself removing shared workout information. lululemon alleges that the Plus 3 Website pages disclose that users can remove their content from the Plus 3 Network at any time. *See* Petition, 71 (selectively quoting Ex. 1006, 17). But, lululemon mischaracterizes the disclosure of the Plus 3 Website pages. Ex. 2001, ¶ 114. The Plus 3 Website pages teach that the Plus 3 Network—not the claimed “apparatus”—may remove content that violates the terms of use of the Plus 3 Network. *See* Ex. 1006, 17 (“[T]he Company may . . . delete or remove . . . any Site Content or User Content . . . that in the sole judgment of the Company violates these Terms of Use or Plus 3’s standards”); Ex. 2001, ¶ 114. lululemon identifies no teaching that a user or user’s “apparatus” may remove the content. *Id.* Thus, even if the user’s workout information is removed from the Plus

3 Network in the way lululemon identifies, the removal is not due to the claimed “apparatus” “receiv[ing] a request to deactivate sharing of the workout information.” Nor is this removal in response to the claimed “apparatus” “transmit[ing] a modification request to remove the workout information” from the Plus 3 Network. Instead, lululemon relies on removal resulting from actions taken by an administrator from the Plus 3 Network. Ex. 2001, ¶ 114.

Second, lululemon fails to show that either Sutton or the Plus 3 Website pages teaches deactivating the “sharing of the workout information” that has *already* been shared are required by limitation [11E]. lululemon points to the Plus 3 Website pages’ disclosure that “[i]f an Activity is set to Private, it is not displayed to other Users and only you can see it.” Petition, 71 (citing Ex. 1006 at 12). This disclosure is, at best, ambiguous as to whether setting an activity to “Private” functions retroactively or only prospectively. Ex. 2001, ¶ 115. It is unclear from the cited disclosure if changing an activity to Private after the activity has already been shared would make past activities private and “remove the workout information from the social networking site.” *Id.* Because this disclosure does not establish that a user can remove information already on the social network cite, it fails to teach the requirements of claim 14.

For these reasons alone, lululemon has not shown by a preponderance of the evidence that claim 14 is unpatentable under Ground 4.

3. lululemon fails to show that the combination of Sutton and the Plus 3 Website Pages renders obvious claim 19

As discussed above, claim 19 requires a “social network message” that is (1) *generated further* to the workout information transmitted in limitation [11E] and (2) “*based on*” “a location at which the athletic activity was performed by the user.” Ex. 2001, ¶ 117. lululemon relies on essentially the same arguments presented in Ground 2. *See* Petition, 72. Specifically, lululemon alleges that the Plus 3 Network Pages disclosure of a user’s route information satisfies the additional requirements of claim 19. *See id.* (“[W]hen you post an activity ... Users may see the route you have covered, including your start and end points, which may include your residence or place of work.”) (citing Ex. 1006, 12). But, for the reasons discussed in Section VI.B.3, a map where the user completed their athletic activity is merely “workout information”—and neither 1) generated *further* to the workout information transmitted in limitation [11E], nor (2) “*generate[d]* . . . *based on* a location at which the athletic activity was performed by the user.” lululemon thus fails to show by a preponderance of the evidence that Sutton renders claim 19 obvious for the reasons discussed in Section V.B.3.

4. lululemon fails to show that the combination of Sutton and the Plus 3 Website Pages renders obvious claims 12 and 20.

lululemon does not make any arguments relating to claims 12 and 20 in Ground 4, and does not identify any teachings from the Plus 3 Website Pages that

relate to claims 12 and 20. *See* Petition at 67–72. lululemon thus fails to show that the combination of Sutton and the Plus 3 Website Pages renders obvious claims 12 and 20.

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, 72. lululemon fails to meet its burden to show by a preponderance of the evidence 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, 68:29–32. lululemon relies on Fry only for this additional limitation. Petition, 72–76. lululemon does not assert that Fry teaches any of the claim elements of claim 11. *See id.* Notably, Fry does not cure lululemon’s identification of an alleged “sharing option” for manually entered workout information as opposed to “record[ed] athletic activity.” *See* Section VI.B.1. As a result, for the same reasons that lululemon failed to prove by a preponderance of the evidence that claim 11 is obvious in view of Sutton, *see* Section VI.B.2, lululemon likewise fails to prove by a preponderance of the evidence that the combination of Sutton and Fry render claim 12 obvious.

VII. CONCLUSION

For the reasons set forth above, Nike respectfully requests that the Board find that lululemon has not proven by a preponderance of the evidence that any challenged claim of the '220 Patent is unpatentable.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this response complies with the type-volume limitations of 37 C.F.R. § 42.24(a)(1)(i). This response (including figure labels and annotations) contains 12,144 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 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 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 August 7, 2023, a true and entire copy of this **RESPONSE OF
PATENT OWNER NIKE, INC TO IPR2023-00180**, was served via e-mail to
lululemon by serving the correspondence address of record, indicated below.

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