

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.

Patent No. 10,232,220

Inter Partes Review No. IPR2023-00180

PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE

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<i>Wm. Wrigley Jr. Co. v. Cadbury Adams USA LLC</i> , 683 F.3d 1356 (Fed. Cir. 2012)	19, 25

Other Authorities

37 C.F.R. § 42.24	32
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Petitioner's Exhibit List

Exhibit Description	Exhibit #
U.S. Patent No. 10,232,220 to Hoffman et al.	1001
Excerpts from Prosecution File History of U.S. Patent No. 10,232,220	1002
Declaration of Dr. Henry H. Houh	1003
U.S. Patent Application Publication No. 2010/0273610 ("Johnson")	1004
U.S. Patent Application Publication No. 2009/0150178 ("Sutton")	1005
Declaration of Nathaniel E. Frank-White	1006
Martha Fry (@MarthaFry), Twitter (January 5, 2009, 3:34 PM), https://twitter.com/MarthaFry/status/1098244147	1007
Scott Tousignant (@TheFitB), Twitter (Nov. 27, 2008, 9:27AM), https://twitter.com/TheFitB/status/1026679285	1008
David Marcus (@davidmarcus), Twitter (July 9, 2009, 6:56PM), https://twitter.com/davidmarcus/status/2560866346	1009
Martha Fry (@MarthaFry), Twitter (July 11, 2009, 5:11AM), https://twitter.com/MarthaFry/status/2582964533	1010
Mark Prasatik (@mprasatik), Twitter (July 18, 2009, 5:11AM), https://twitter.com/mprasatik/status/2705395365	1011
Printout of Wayback Machine General Information, Internet Archive (Oct. 3, 2022), https://help.archive.org/help/wayback-machine-general-information/	1012
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U.S. Provisional Patent Application No. 61/172,990	1014

Exhibit Description	Exhibit #
U.S. Provisional Patent Application No. 61/183,172	1015
Transcript of October 24, 2023 Deposition of Dr. Robert Stone	1016
Reply Declaration of Dr. Henry Houh	1017
Geodesy, <i>Do you know where you are? – The Global Positioning System</i> , NOAA Ocean Service Education (Dec. 11, 2009), http://oceanservice.noaa.gov/education/tutorial_geodesy/geo09_gps.html	1018
Navigation Services, <i>GPS – How It Works</i> , Federal Aviation Administration (Oct. 9, 2007), http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/techops/navservices/gnss/gps/howitworks/index.cfm?print=go	1019
<i>What Causes GPS Signals to Get Lost?</i> , Retina Post (Mar. 24, 2019), https://www.retinapost.com/what-causes-gps-signals-to-get-lost/	1020

**Petitioner's Exhibits 1001-1015 were previously filed and are listed again here based on 37 C.F.R. § 42.63.*

***Petitioner's Exhibits 1016-1020 are newly filed.*

I. INTRODUCTION

The Board should find all claims unpatentable. Nike’s lead argument asks the Board to rewrite “record” as “measure or capture, and then save.” And its secondary argument seeks to replace “sharing option selection” with “individual user command or confirmation to share the recorded athletic activity.” But far from combining “measure or capture” and “save” for “record,” the ’220 patent refers to each concept independently. For the “sharing option selection,” the specification teaches exactly what Nike seeks to exclude. Because no evidence supports Nike’s constructions, and because plenty refutes them, the Board should decline to narrow Nike’s claims.

Apart from its narrowing constructions, Nike offers little else. It makes a grab bag of arguments—it raises disputes like whether a “500-Mile Club” includes more than one user, and whether an individual identified as a user in one interface is a user in another interface—but none warrants staying the Board’s pen. Because the prior art teaches every disputed limitation, and because Nike fails to show otherwise, the Board should cancel every challenged claim.

II. CLAIM CONSTRUCTION

To avoid the prior art, Nike proposes rewriting “record” and “in response to receiving the sharing option selection” with new, unclaimed limitations. There is no support for doing so. As the record evidence shows and the Federal Circuit’s

case law requires, the Board should instead apply the ordinary and customary meaning.

A. The Board Should Give “record” Its Ordinary and Customary Meaning

Consistent with the Board’s Decision on Institution, a POSITA would have understood that “record” means save. (DI, 7, 12.) The intrinsic evidence confirms this construction, and none of Nike’s citations to the claims, specification, or alleged “purpose” of the invention shows otherwise.

1. The evidence shows “record” requires nothing more than saving data

Nike proposes limiting “record” to additionally require “measuring or capturing.” (POR, 2 (“measure or capture, and then save”).) The Board should reject Nike’s proposal because it conflicts with the specification, “the single best guide to the meaning of a disputed term.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc).

The specification confirms that “record” requires nothing more than saving because it repeatedly distinguishes between “record” and “measure.” *Phillips*, 415 F.3d at 1314 (finding that consistent use of a claim term illuminates its meaning). As shown below, the specification uses “record” in connection with saving/storing and “measure” in connection with sensing:

- “data ***recorded*** by the mobile device (e.g., GPS data or accelerometer data) may be synchronized with the remote network site to alleviate ***storage requirements*** of the mobile device” (Ex. 1001, 2:28-34);¹
- “***a sensor or multiple sensors*** for ***measuring*** parameters relating to the person being monitored” (*Id.*, 8:51-53; *see also id.*, 11:61-62);
- “accelerometers . . . for ***measuring*** the acceleration of the athletic parameter measurement device” (*Id.*, 11:65-67; *see also id.*, 13:5-6, 15:41-45);
- “the athletic parameter measurement device 207 may be a heart rate monitor, a blood oxygen monitor, a satellite positioning device (e.g., a ***Global Positioning Satellite (GPS) navigation device***) or other location determination system, a ***device for measuring*** the electrical activity of the user (e.g., an EKG monitor), or any other ***device that measures*** one or more physical parameters of the user” (*Id.*, 15:18-24).

(Ex. 1017, ¶¶13-15.) Thus, “record” and “measure,” as used in the ’220 patent, have different meanings.

Other disclosures in the ’220 patent’s specification confirm the point. First, the specification discloses a GPS device that records data separately from measuring/capturing it. (Ex. 1017, ¶16.) It states, “if a GPS signal is lost, . . .

¹ All emphasis is added unless otherwise stated.

Once a GPS signal is reacquired, the system may *begin recording* the GPS data again.” (Ex. 1001, 1:64-2:1.) As Dr. Houh explains, a GPS signal being lost means a GPS device still is capturing some satellite signals, but not enough to calculate an athlete’s location. (Ex. 1017, ¶¶17-18.) Thus, no recording occurs even though the GPS device is measuring/capturing satellite signals. (*Id.*) Second, the specification teaches a GPS device that may be active (*i.e.*, measuring/capturing) while not recording: “***GPS device is always active, but recording is turned on and off.***” (Ex. 1001, 20:2-6.) These disclosures of actively measuring or capturing GPS data while not recording further show that “record” does not include those terms. (Ex. 1017, ¶19.)

2. Nike fails to show the Board should rewrite “record” as “measure or capture and then save”

Nike asks the Board to narrow “record” to additionally require “measuring or capturing.”² (POR, 2.) The Board should reject Nike’s proposal because none of the claims, specification, or alleged “purpose” of the invention supports it.

² Nike’s expert, Dr. Stone, seems to suggest a different construction: “measure or capture” without “saving.” Dr. Stone argues that the same system in Johnson that performs the “record[ing]” does not save. (Ex. 2001, ¶53; Ex. 1017, ¶24.)

a) Nothing in the claims supports Nike’s construction

Nike fails to show the claims support its construction. It gestures at claim 1 for support (POR, 11-12), but that claim just recites “receiving . . . athletic activity data recorded during an athletic activity.” (Ex. 1001, 67:12-13; Ex. 1017, ¶20.) It says nothing about what performed the recording nor whether “record” means to measure/collect and then save. (Ex. 1017, ¶21.)

What Nike offers instead is a complicated theory about rewriting claim 1 to require “multiple sensors” and then injecting that requirement into claim 11.

(POR, 11-12.) From the outset, Nike’s theory fails. Lexicography and disclaimer—if either is what Nike meant to argue—are “exacting” doctrines.

Thorner v. Sony Comp. Entm’t Amer. LLC, 669 F.3d 1362, 1365-66 (Fed. Cir.

2012). They require “clear” expressions of intent by a patentee to redefine claim terms, which none of Nike’s passages provides. *Id.* In fact the passages that Nike cites do not even use the word “record.” (POR, 12 (citing Ex. 1001, 8:44-45

(“athletic information [is] **obtained** from an individual person”); 8:50-53 (“a sensor or multiple sensors **measuring** parameters”); 11:24-27 (“athletic information monitoring device 201 that may be employed . . . to **measure** athletic information corresponding to a user’s athletic activity”); Ex. 1017, ¶¶21-22.) There is no basis to modify claim 1 as Nike proposes, much less claim 11.

Finally, even if “recorded” in claim 1 meant what Nike says, Nike still has not shown that its construction of “recorded” in claim 1 should extend to claim 11. Both parties’ experts³ testified that a term in the present tense has a different meaning than in past tense. (Ex. 2002, 180:18-22; Ex. 1016, 33:5-15; Ex. 1017, ¶23.) And apart from incorrectly stating that claim 1 “is using ‘record’” (it does not), Nike never tries to reconcile the tenses. (POR, 12.) Nike’s argument that the claims support its construction fails at every step.

b) Nothing in the specification supports Nike’s construction

With no support in the claims, Nike retreats to the specification. But Nike’s hodge podge of specification citations relate to, at most, measuring—not “record[ing]” and certainly not measuring/capturing *and* saving. (*Id.*, 13-14.) For example, Nike, cites to column 11, lines 44-48, to contend that “the specification uses ‘record,’ ‘recorded,’ and ‘recording’ to describe an action performed by an ‘athletic parameter *measurement* device 207.’” (POR, 13.) Not so. That passage merely states “[t]he athletic parameter measurement device 207 may be worn or carried by the user while he or she is performing an athletic activity, and *measures*

³ Nike is wrong that Dr. Houh misunderstood “record.” (POR, 17-19.) Dr. Houh properly formed an understanding of “record” based on the intrinsic evidence and based his analysis on the same. (Ex. 2002, 18:9-16, 31:3-32:15, 162:16-163:7.)

one or more athletic parameters relating to the athletic performance being performed by the user.” (Ex. 1001, 11:44-48; Ex. 1017, ¶24.) Nike’s other citations are similarly unavailing:

- 1:60-62 and 19:59-61 discuss the measurement device having two types of sensors (accelerometer and GPS) for multiple workout settings (indoor and outdoor);
- 57:22-26 discusses audio/video messages not related to recording athletic activity; and
- 59:6-9 discusses a mode of recordation without providing more.

(Ex. 1017, ¶¶25-26.)

Nike also points to portions of the specification that discuss the use of a sensor or monitoring device (*e.g.*, GPS) to support its position that “record” requires measure/collect and then save. (POR, 13-14 (citing Ex. 1001, 26:7-9 (“the run was recorded **using** a GPS device”); 36:26-32 (“activate and/or begin recording accelerometer data”); 41:3-6 (“the run was recorded **using** a GPS”); 41:21-24 (“recorded **using** GPS information”); 41:56-59 (“portions of the route recorded **using** GPS data”); 51:62-65 (“associate a corresponding monitoring device”)).) But Nike’s citations actually support lululemon’s position. Record “using a GPS device” means “recording **data from that [GPS] device.**” (Ex. 1001, 22:11-13.) In other words, “using”/“associat[ing]” a sensor device or sensor

information/data does not mean the sensor device is performing the recording, just that sensor data is *provided for* recording. (Ex. 1017, ¶¶27-28.) In the GPS example, the GPS device measures/collects the data, and the recording is done separately. (See also Ex. 1001, 20:10-15 (“accelerometer 715 or *recording data therefrom*”); 20:31-36 (“(e.g., *record data from*) *both GPS device 713 and accelerometer 715*”); 22:11-12 (“Using a device may include *recording data from that [sensor] device*”); Ex. 1017, ¶28.)

c) Nothing about the “purpose” of the claimed invention supports Nike’s construction

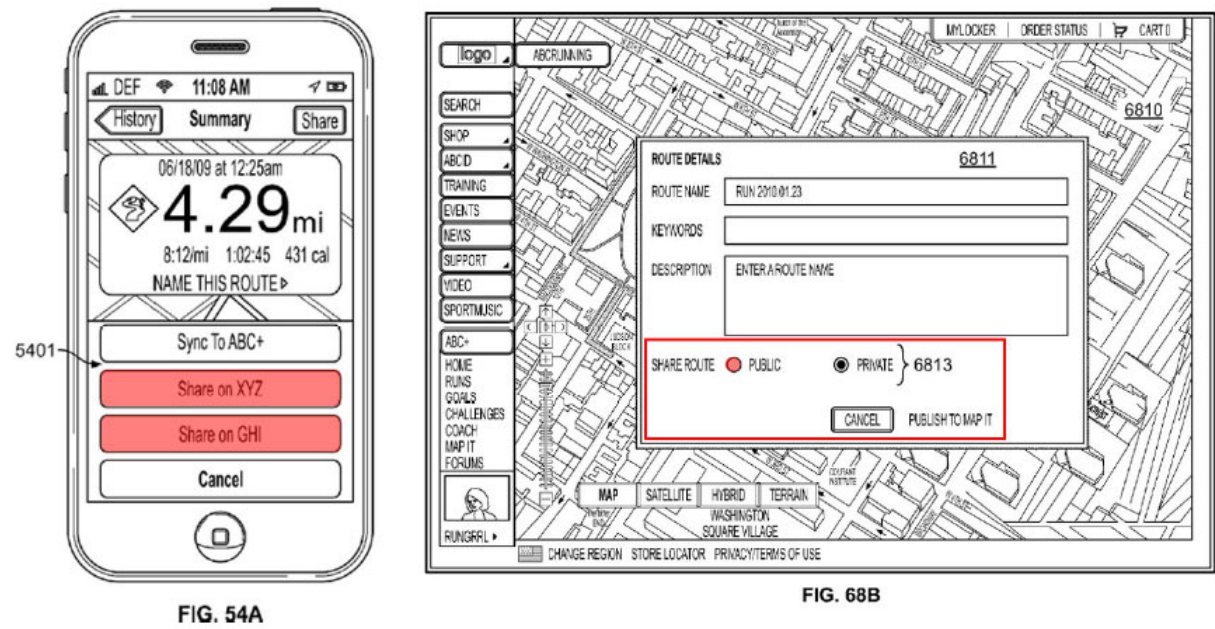
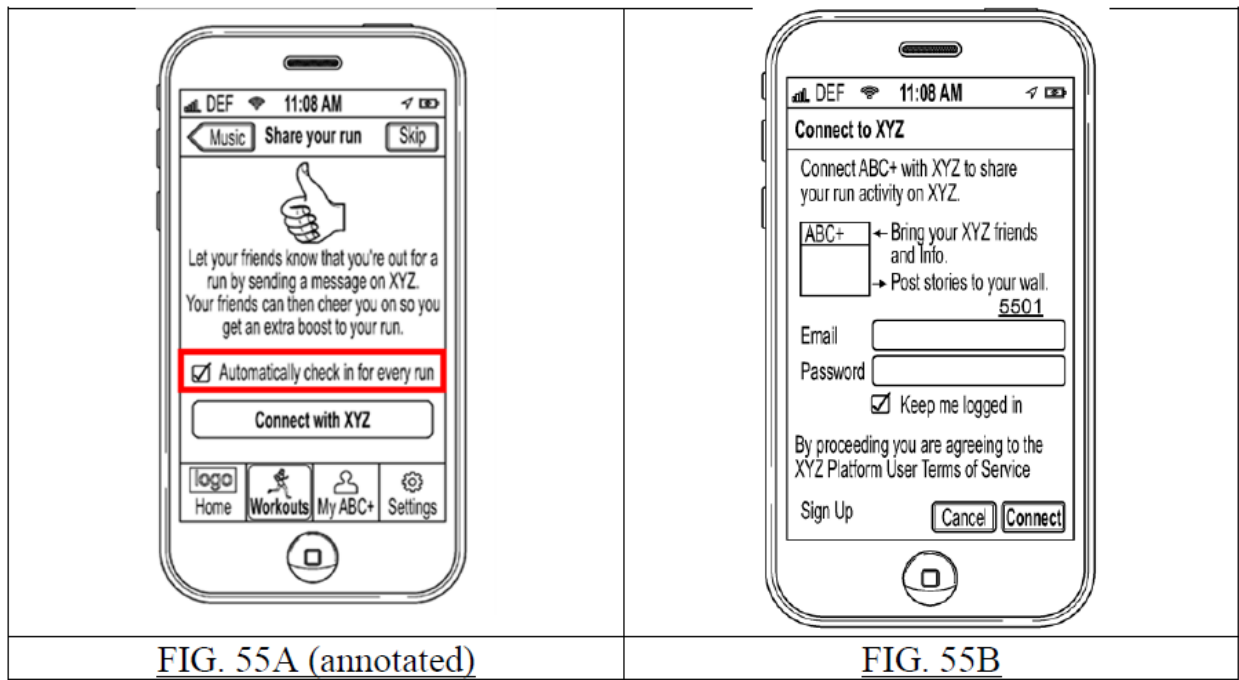
Finally, Nike tries and fails to import measure/capture into “record” by arguing that the “express purpose” of the invention requires it. (POR, 14.) Even assuming the purpose of the claimed invention is to motivate the user, as Nike contends, this purpose is not accomplished solely by measuring athletic activity. (Ex. 1017, ¶29.) The ’220 patent discloses “*one or more of the features . . . [to] encourage and motivate the user to engage in athletic activities and improve his or her fitness.*” (Ex. 1001, 66:63-67.) And it provides multiple ways to do so. (See, e.g., Ex. 1001, 66:67-67:9 (“encouraging the user to exceed previous statistics,” “us[ing] a single device for both indoor and outdoor workouts,” “issu[ing] live challenges to other users”); Ex. 1017, ¶29.) This case is unlike *Sequoia Tech., LLC v. Dell, Inc.*, where the patent expressly stated the goal of the invention and provided only one way for achieving that goal. 66 F.4th 1317, 1326

(Fed. Cir. 2023). And as for *In re Power Integrations, Inc.*, that case involved the Board having an unduly broad reading of the claim language that rendered it meaningless and was unsupported by the specification, which has not happened here. 884 F.3d 1370, 1376 (Fed. Cir. 2018). Nike’s alleged “express purpose” provides no basis to narrow the term.

B. The Board Should Give “in response to receiving the sharing option selection” Its Ordinary and Customary Meaning

Element [11E] recites “in response to receiving the sharing option selection.” Nike asks the Board to replace “sharing option selection” with “individual user command or confirmation to share the recorded athletic activity.” (POR, 19.) As support, Nike points to one instance in the specification, which states, “in response to receiving a user command or confirmation.” (*Id.*, 21 (citing Ex. 1001, 46:26-30).) According to Nike, because both the claim term and specification use “in response to receiving,” what comes after should be the same. (*Id.*) Where Nike got the term “individual,” it never says. (Ex. 1017, ¶¶30-31.)

Contrary to Nike’s argument, a POSITA would not read the specification and an additional term into the claim. Instead, a POSITA would understand “sharing option selection” according to its ordinary and customary meaning as a selection whether to share. (Ex. 1017, ¶32.) For example, Figs. 54A, 55A-B, and 68B (below) show sharing option selections where the user makes a selection of whether to share. (*See also* Ex. 1001, Figs. 53F, 53V, 54C, 77, 78B, 82.)



These interfaces do more than just receive “an individual user command or confirmation” after an athletic activity, as Nike proposes. Figure 55A, for example, depicts making the sharing option selection for “every run,” which

includes individual future runs. (Ex. 1001, Fig. 55A.) Because Nike's construction would exclude these and other sharing option selections, like those shown in Figs. 53F, 53S, 53V, 54C, 77, and 82 (all below) and described at 45:22-44, 46:23-28, 47:42-44, 47:63-48:15, 53:27-52, the Board should reject it. *Oatey v. IPS*, 514 F.3d 1271, 1277 (Fed. Cir. 2008) ("At least[t] where claims can reasonably [be] interpreted to include a specific embodiment, it is incorrect to construe the claims to exclude that embodiment, absent probative evidence on the contrary."); (Ex. 1017, ¶¶33-34).

Excluded under Nike's construction



FIG. 53F



FIG. 53S



FIG. 53V



FIG. 54C

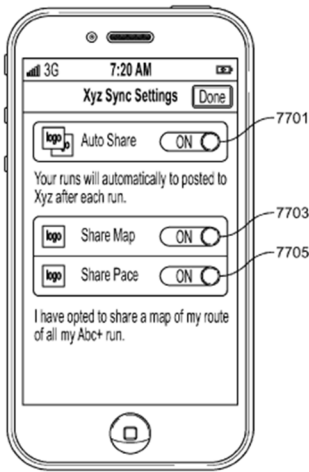


FIG. 77



FIG. 82

Nike has no real answer for these disclosures. Without explanation (but with eye on the art), Nike contends that the specification draws a “clear distinction” between “automatic” sharing and sharing “in response to receiving the sharing option selection.” (POR, 21-22.) It then concludes that claim 11 recites only the second type of sharing because of this distinction. (*Id.*) But given the specification’s disclosure of numerous sharing option selections—including many contrary to Nike’s construction—the single passage that Nike cites does not redefine the term. *Thorner*, 669 F.3d at 1365-66 (lexicography requires “clear” expression of intent to redefine the term). The Board should reject Nike’s attempt to depart from the ordinary and customary meaning.

III. GROUND 1: THE CHALLENGED CLAIMS ARE UNPATENTABLE OVER JOHNSON

A. Johnson Teaches “record[s] athletic activity performed by a user” (Element [11C])

Nike and its expert agree that Johnson’s device 601 saves athletic activity. (POR, 23; Ex. 2001, ¶¶61, 63, 64.) Nike therefore disputes element [11C] solely on its proposed construction of “record,” which is wrong. (*Supra* § II.A.) Under the correct construction, Johnson teaches element [11C]. (Ex. 1017, ¶35.)

With no viable arguments on the merits, Nike resorts to mischaracterizing the ’220 patent and Dr. Houh’s testimony. First, Nike argues that Johnson’s device 601 merely receives and displays pre-recorded athletic activity data and therefore

does not “record[s] athletic activity performed by a user.” (POR, 24.) Although Johnson’s device 601 is referred to as an “athletic data display configuration device,” Figure 6 (below) and [0088] show and describe device 601 (green) as storing (*i.e.*, “record[ing]”) athletic data. (Petition, 28; Ex. 1017, ¶36.)

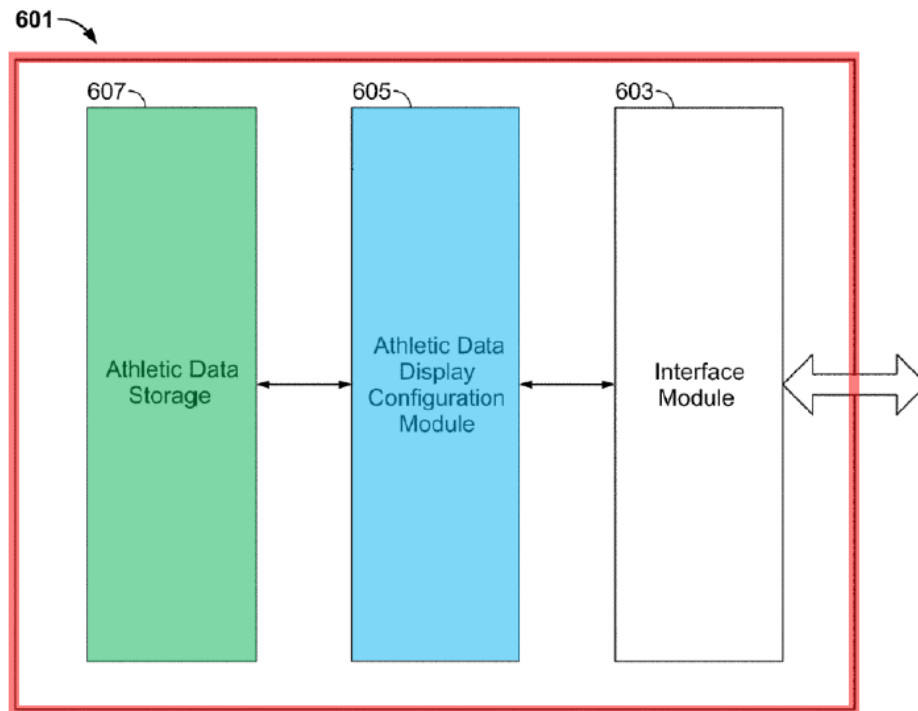


FIG. 6

(Ex. 1001, Fig. 6 (annotated).) Second, Nike’s intimation that Dr. Houh stated device 601 does not record athletic activity data is false. (POR, 24.) Dr. Houh testified that “[d]evice 601 . . . store[s] the athletic data in the athletic data storage 607,” and thus, “record[s].” (Ex. 1003, ¶55.) Nike fails to refute that Johnson teaches element 1[C].

B. Johnson Teaches “in response to receiving the sharing option selection” (Element [11E])

Nike and its expert agree that Johnson discloses an automatic sharing option selection but argue that Johnson does not teach “in response to receiving the sharing option selection” under Nike’s construction. (POR, 25-27; Ex. 2001, ¶¶68; Ex. 1017, ¶41.) Because Nike’s construction is wrong, Johnson’s automatic sharing option selection teaches element [11E]. (*Supra* § II.B; Ex. 1017, ¶37.) Johnson’s automatic sharing option selection teaches element [11E]. (Ex. 1017, ¶¶37, 39.)

Yet even if Nike’s construction were correct, Johnson still would teach this limitation. Johnson discloses at least three button-based sharing option selections on which a user clicks. For example, Figure 21’s “Brag to Friends” button is one such sharing option selection. (Petition, 29-30; Ex. 1003, ¶¶68-69; Ex. 1017, ¶38.)

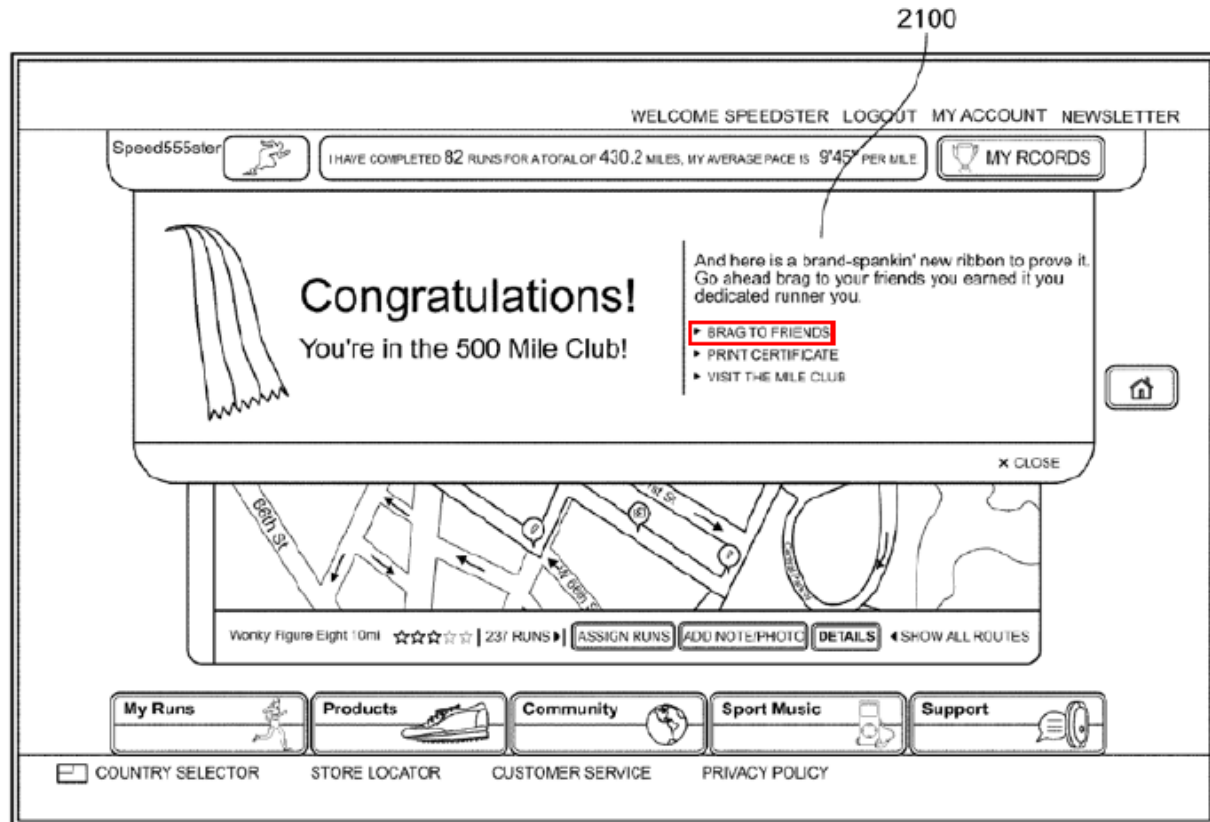
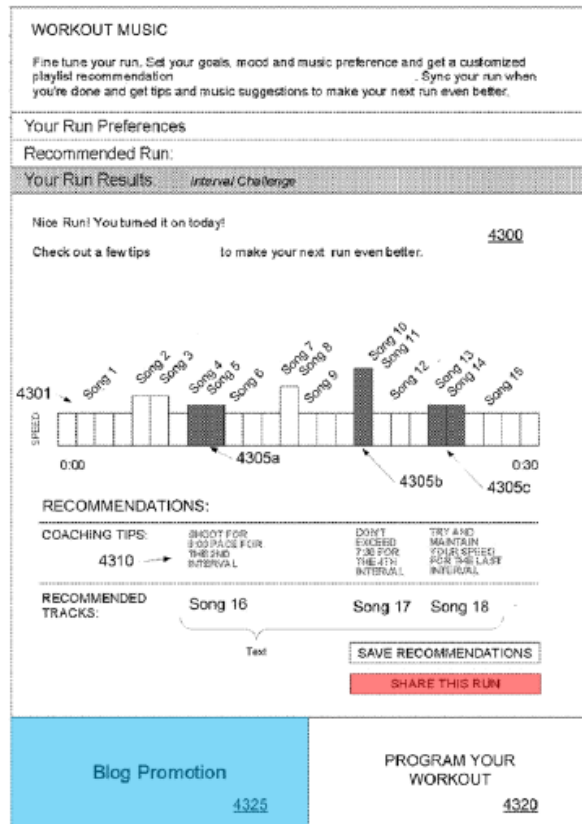


FIG. 21

Others include Figure 43's Share this Run (red) and Blog Promotion 4325 (blue) buttons shown below. (Petition, 31; Ex. 1003, ¶70; Ex. 1017, ¶38.) Neither Nike nor its expert disputes that a sharing-related button that the user clicks on is a sharing option selection.



And as for Nike’s vague argument that lululemon did not explain how “Brag to Friends,” “Share this Run,” and “Blog Promotion” meet element 11[E] in the Petition (POR, 26), the Board can see for itself that lululemon did so. (Petition, 32-37.) Thus, whether or not the Board accepts Nike’s construction—and it should not—Johnson teaches this limitation.

C. Johnson Discloses Transmitting Workout Information to “a social network site viewable by one or more other users” (Element [11E])

Nike makes three arguments why Johnson does not teach “a social networking site viewable by one or more users.” (POR, 27-30.) It is wrong on every count.

First, Nike is wrong that lululemon did not provide adequate evidence or argument regarding element [11E]. (POR, 27.) The Petition showed that Johnson’s “Brag to Friends” and “Share this Run” interfaces are social networking sites” viewable by one or more other users. (Petition, 7 (citing [0159], [0183], Fig. 21, and Fig. 43); Ex. 1003, ¶¶69-71). And as Dr. Houh further explained, “for ‘Share this Run’ . . . by clicking on either button, device 601 would transmit the user’s data from memory to a public page of the social networking site.” (Ex. 2002, 201:22-202:3; Ex. 1017, ¶40.)

Second, Nike is wrong that Johnson’s “Blog Post” does not transmit workout information as claimed. Nike does not dispute that Figure 29 shows a blog 2900, but argues that it is separate and different from a social networking page. (POR, 27.) As discussed in the Petition, “a user, athlete, or runner may include a blog 2900 in their . . . social networking page.” (Petition, 37 (citing Ex. 1004, [0067])). In other words, once shared, a POSITA would have expected the blog 2900 to be included in their social networking page. (Ex. 1017, ¶41.)

Nike argues that Figures 43 and 29 are “different disclosed embodiments,” insufficient for anticipation. (POR, 28.) That is incorrect. Figure 43 is user interface having a sharing option selection 4325 (“Blog Promotion”) for promoting (sharing) a blog, and Figure 29 is a blog 2900. (Ex. 1017, ¶42.) The two figures together demonstrate an example of the Johnson’s invention.

But even if Figures 43 and 29 were different embodiments (they are not), as Dr. Houh explains, a POSITA would have combined Figure 43’s blog promotion with Figure 29’s blog. (Ex. 2002, 202:14-17; Ex. 1017, ¶43.) *Kennametal Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1381 (Fed. Cir. 2015); *Wm. Wrigley Jr. Co. v. Cadbury Adams USA LLC*, 683 F.3d 1356, 1361 (Fed. Cir. 2012); *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1344 (Fed. Cir. 2016). For instance, in its discussion of Figure 29, Johnson states that “[t]hough described with reference [to] blog 2900, it is to be understood that **any athletic information described herein** may be provided to the user, athlete, or runner as part of their personal web page or social network page.” (Ex. 1004, [0167].) Johnson then explains how the features of Figure 29 may be combined with the features of Figure 43: “[t]he user may further be provided option[] . . . 4325 [in Figure 43] . . . to post comments or a report about the **completed workout.**” (*Id.*, [0183].) Thus, because a POSITA would understand that “any athletic information described herein” refers to the “completed workout,” it would have been readily apparent to a POSITA to combine Figure 43 with Figure 29. (Ex. 1003, ¶72; Ex. 1017, ¶43.)

Third, Nike is wrong that Johnson’s leaderboard does not share workout information as claimed. (POR, 29.) Johnson’s Leaderboard is an “interactive comparison[] of a user’s athletic data with other users,” so the user Rauchholz (green, below) must have shared workout information with other users. The

alternative—Rauchholz not sharing working information—would prevent “interactive comparison.” (Ex. 1017, ¶44.) As Dr. Houh testified, “it’s clear that somebody’s sharing information. If no one was sharing information, . . . you’d just see Rauchholz. But you clearly see other people in this top ten list.” (Ex. 2002, 205:22-206:1; *see also* Ex. 1003, ¶¶65-66.)

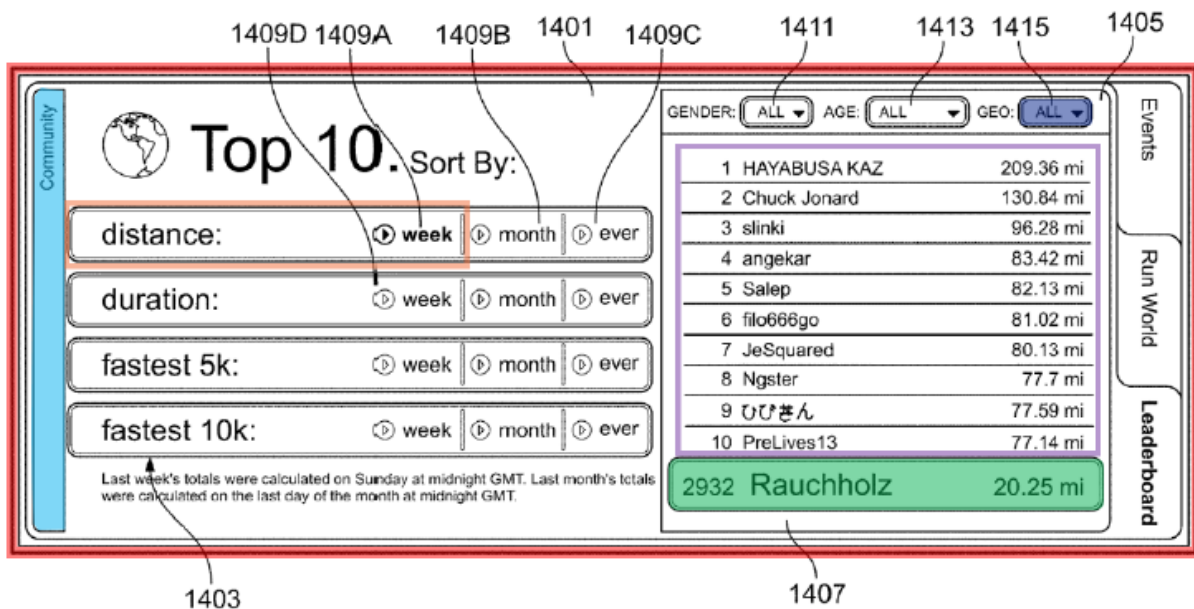


FIG. 14A

(Ex. 1001, Fig. 14A (annotated).)

D. Johnson Teaches “tag[ging] a summary of . . . metrics . . . with identifiers of one or more other users” (claim 12)

Nike next argues that Johnson does not tag a summary of metrics with identifiers of one or more *other* users because each (what it calls) “tile” (colored rectangle) in Figure 23 (below) lists only one user. (POR, 30-31.) But each “tile” is an “identifier[]” of a user—not a “summary.” (Petition, 38-39; Ex. 1017, ¶45.)

As explained in the Petition, Johnson teaches multiple identifiers of users being tagged to the 500-Mile Club summary (green rectangles). “daDwag” (bottom left) is one identifier of one user, and “User Name” (top left) and “GoGoNYC” (bottom right) are identifiers of other users, all tagged to the 500-Mile Club summary (green rectangles). (Ex. 1017, ¶46.) Nike’s expert agrees. (Ex. 1016, 70:24-72:16 (testifying that “daDwag” is tagged for achieving 500 miles and “there are other tags that show 500 miles of achievement”).) Since there are multiple green rectangles, Johnson teaches “other users.” Nike has failed to refute, so the Board should cancel this claim.

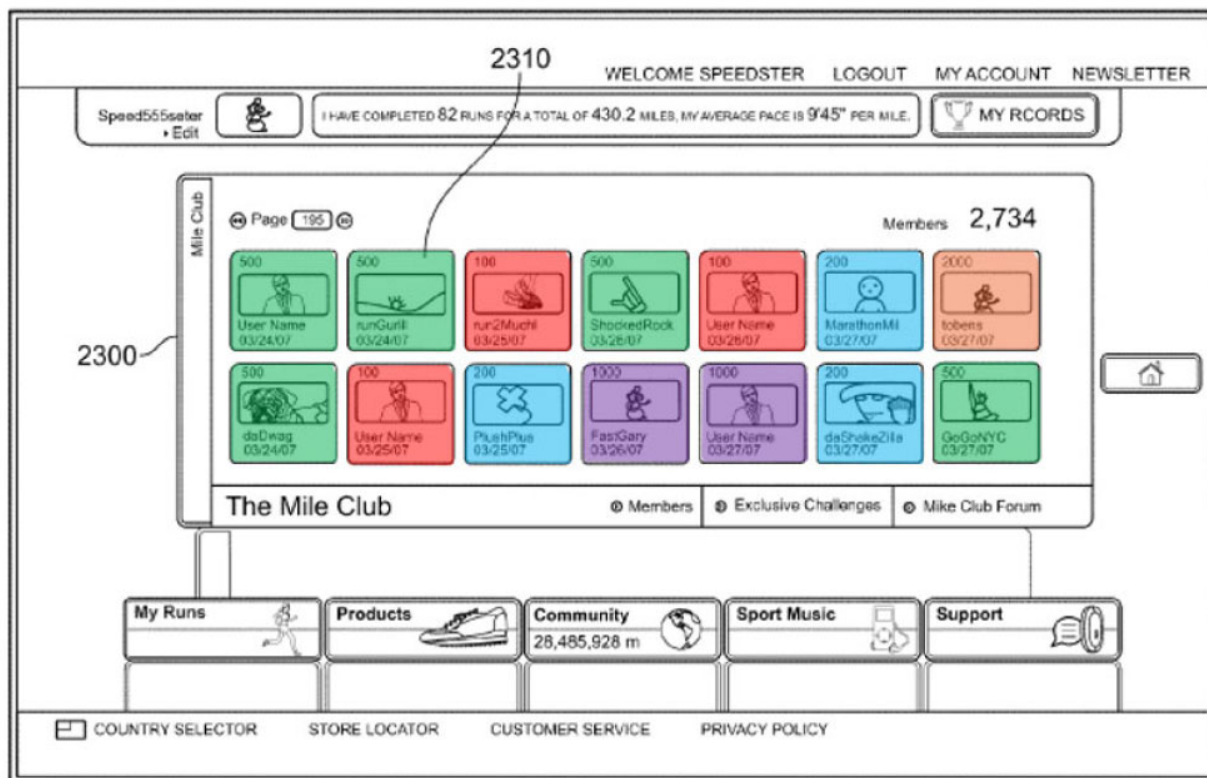


FIG. 23

E. Nike Does Not Dispute that Johnson Teaches Claims 13 and 19

Separate from challenging claim 11, Nike does not dispute lululemon’s showing that Johnson discloses claims 13 and 19. (Petition, 39-42.) Because Nike’s arguments for claim 11 fail, the Board also should cancel claims 13 and 19.

IV. GROUND 2: THE CHALLENGED CLAIMS ARE UNPATENTABLE OVER SUTTON BASED ON ANTICIPATION

A. Sutton Teaches “record athletic activity performed by a user” (Element [11C])

Both parties agree that Sutton discloses saving activity data. (POR, 2, 33.) Accordingly, under lululemon’s construction, which the Board applied in its DI, Sutton teaches element [11C]. (DI, 17; *supra* § II.A; Ex. 1017, ¶47.)

Nike’s lone argument to the contrary—that manually entered activity data is not workout information associated with “recorded athletic activity”—fails.

Nike’s argument depends on its incorrect construction of “record.” (POR, 33.)

And even setting aside all the other reasons why Nike’s construction is wrong (*supra* § II.A), the ’220 patent repeatedly describes the same sort of manual recording as Sutton. For instance, the ’220 teaches a user manually recording athletic activity:

- “[t]he user location may automatically be determined using GPS (e.g., location, signal strength) *or based on manual input*” (Ex. 1001, 20:52-54);

- “the location *manually specified by the user* using GPS coordinates”

(*Id.*, 40:65-67).

(Ex. 1017, ¶48.) And it teaches manually “record[ing]” other activity data:

“individuals might not be as motivated to exercise because of the extra effort that

may be required in *recording and tracking workout results. For example, an*

individual may be required to manually enter workout information . . . into a

database in order to track his or her progress.” (Ex. 1001, 1:29-35; Ex. 1017, ¶48.)

Thus, Sutton “records” athletic activity just as in the ’220 patent (element [11C]).

B. Sutton “transmit[s] workout information associated with the recorded athletic activity” (Element [11E])

Nike and its expert admit that Sutton transmits workout information to a network page of a social networking site viewable by one or more other users.

(POR, 35-36; Ex. 2001, ¶87.) Nike’s only argument for element [11E] rests—

again—on its incorrect claim construction of “record.” (POR, 35-36.) Because

Nike’s construction is wrong, the Board should find that Sutton teaches element

[11E]. (Ex. 1017, ¶49; *supra* § IV.A.)

C. Sutton Teaches “identifiers of one or more other users” (claim 12)

Nike disputes whether the names of individuals tagged in Sutton’s Figure 5 are “identifiers of . . . users” of claim 12. (POR, 36-37.)

First, names are identifiers, and Nike’s expert agrees. (Ex. 1016, 6:3-6.)

The ’220 patent confirms this point: “[t]he username or identifier may correspond

to an identifier . . . [including] a phone number, a nickname specified in a user's phonebook or the like.” (Ex. 1001, 39:52-58; Ex. 1017, ¶50.)

Second, the individuals whose names are tagged in Sutton's Figure 5 are “users.” Sutton's “invention relates generally to a computer system and method for capturing *users*' activity.” (Ex. 1005, [0002], [0014].) Figure 5 is a trace map that captures such user activity. (Ex. 1017, ¶51.) Thus, a POSITA would have understood the individuals named in Figure 5's map are users. (*Id.*)

Further supporting that the individuals named in Figure 5 are users, Sutton's paragraph 84 describes, and Figure 10 depicts, a “data entry form for generating . . . an event for *other users* to join.” (Ex. 1005, [0084], Fig. 10; *see also* Petition, 54.) Figure 10's “group event may be created by inviting a group of users, and each user can accept, decline or defer the decision to join the organized event.” (Ex. 1005, [0084].) And as Dr. Houh explains, inviting the group of users involves tagging identifiers of other users. (Ex. 1017, ¶52.)

Nike's argument that Figures 5 and 10 are “distinct embodiments” falls flat. (POR, 38.) Both figures relate to a group event of a workout and both involve tagging. (Ex. 1017, ¶53.) Following the natural timeline of a group event (*e.g.*, a party), Figure 10's invitation occurs before the group event and Figure 5's map captures the group event after it occurred. (*Id.*) As a result, a POSITA would read the figures together. (*Id.*) Yet even if the figures are distinct embodiments (they

are not), a POSITA would have combined them. Figure 10's invitation shows a proposed "trace map . . . that the group will be hiking, riding, running, etc.," and Figure 5 shows a completed "trace map of a user activity." (Ex. 1005, [0063], [0084].) A POSITA would have understood that the proposed trace map and the completed trace map are directly related. *Kennametal*, 780 F.3d at 1381; *Wm. Wrigley Jr.*, 683 F.3d at 1361; *Blue Calypso*, 815 F.3d at 1344; (Ex. 1017, ¶54.) Further, Nike's contentions that "none of the names listed in Figure 10 overlap with the names in field 504 of Figure 5" is clearly wrong. (POR, 38.) Both experts acknowledge that "Dirk" appears in both Figs. 5 and 10. (Ex. 1016, 73:16-75:15; Ex. 1017, ¶52.)

D. Sutton Teaches "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" (claim 19)

Nike's argument for claim 19 fails because it mischaracterizes the Petition and the claim. First, the Petition did not rely on Sutton's hand-traced map for both "workout information" (element [11E]) and "social network message" (claim 19). (POR, 39.) To the contrary, the Petition maps Sutton's user-provided data to the "workout information" and hand-traced map to the "social network message." (Petition, 49, 55; Ex. 1017, ¶57.)

Second, claim 19 does not require the "social network message" be '*generate[d]*' '*based on*' a location at which the athletic activity was performed by

the user’,” as Nike argues. (POR, 40-41 (emphasis added).) Claim 19 recites: “to generate a social network message on the network page.” It further requires that the social network message is “based on a location at which the athletic activity was performed by the user.” In other words, the “social network message”—not the “generat[ion of] a social network message”—is based on location. (Ex. 1017, ¶55.)

And Sutton’s social network message meets that requirement. It is a hand-traced map. (Ex. 1017, ¶57.) A map is based on location, particularly here, because the “*user 101 enters metrics* on a traced map (308, 309) to *complete the map data* along with the associated metrics.” (Ex. 1005, [0060]; Ex. 1017, ¶56.) Nike fails to show that the Board should preserve claim 19.

E. Sutton Teaches “wherein transmitting the workout information includes modifying the social network message based on a received user edit” (claim 20)

Nike’s argument for claim 20 fails because it assumes that information cannot be a “social network message” until it is posted on a social network. (POR, 41-42.) This is wrong for two reasons. First, claim 20’s “modifying” step narrows claim 11’s “transmitting” step, which necessarily occurs before the message reaches a social network. (Ex. 1001, 68:25-28, 68:63-65.) Second, Claim 20 requires “modifying” the same social network message that claim 19 “generate[s].” (Ex. 1001, 68:25-28, 68:58-62.) Since the “apparatus” in claim 19 is what

performs the “transmitting,” claim 19’s disclosure again confirms that claim 20’s “modifying” as part of the transmission. (Ex. 1017, ¶58.) Thus, as explained in the Petition, Sutton’s disclosure of modifying a social network message as part of Sutton’s data transfer process meets claim 20. (Petition, 54-56.)

V. GROUND 3: THE CHALLENGED CLAIMS ARE UNPATENTABLE OVER SUTTON BASED ON OBVIOUSNESS

A. Sutton Renders Obvious Claim 11

Nike fails to refute that both Sutton’s manual device transfer and automatic device transfer pathways render obvious element 11[E].

Manual Device Transfer Pathway. Nike’s lone argument for the manual device transfer pathway is the same as for Ground 2: that manually entering data does not count as recording it. (POR, 44.) Nike’s argument fails because its construction is wrong. (Ex. 1017, ¶59; *supra* § II.A.) And because lululemon presented this pathway as an alternative to the automatic device transfer pathway, the Board need not resolve Nike’s arguments about that pathway. (Petition, 62-63.) It can cancel claim 11 based on the manual device transfer pathway standing alone.

Automatic Device Transfer Pathway. If the Board reaches Nike’s grab-bag of arguments about the automated device transfer pathway, it should reject them.⁴

First, Nike repeats its argument that Sutton does not disclose “recording” data under Nike’s construction of “record.” (POR, 45-46.) Once again, this argument fails because Nike’s construction is wrong. (*Supra* § II.A, IV.A.)

Second, citing page 63 of the Petition, Nike alleges that the Petition modifies Sutton’s automatic device transfer pathway by presenting Figure 9 to the user on two separate occasions for each workout: one before and one after the workout. (POR, 46.) However, there is no mention whatsoever in the Petition of presenting Figure 9 twice or after the workout. (Ex. 1017, ¶60.)

Third, Nike alleges that “lululemon provides no citations to Sutton whatsoever in support of this proposition.” (POR, 46-47.) That is wrong. The Petition states, “Sutton discloses that the automatic device transfer can include ‘real-time’ data transfer and sharing,” and then provides citations to [0075] and [0087] of Sutton. (Petition, 63.) As Dr. Houh explained, a POSITA when

⁴ Nike alleges that lululemon points to Sutton’s Automatic Transfer box 312 to suggest that “automatic” refers to measuring or capturing. (POR, 45.) This is incorrect and a red herring. The Petition points to box 312 for “automatic . . . data transfer and sharing.” (Petition, 63.)

considering these citations in Sutton would recognize that Figure 9 should be presented before the workout to ensure real-time data transfer and sharing.

(Ex. 1003, ¶94.) Nike has failed to refute that claim 11 is obvious according to Sutton’s automated pathway.

B. Sutton Renders Obvious Claims 12, 19, and 20

For these claims, Nike recycles its earlier arguments from Ground 2. (POR, 47.) The Board should reject Nike’s arguments and find that Sutton teaches claims 12, 19, and 20 as explained above. (Ex. 1017, ¶61; *supra* § IV.C, IV.D, IV.E.)

VI. GROUND 4: THE CHALLENGED CLAIMS ARE UNPATENTABLE OVER SUTTON AND PLUS 3 WEBSITE PAGES

A. Sutton and Plus 3 Render Obvious Claim 11

Nike attacks the combination of Sutton and Plus 3 website pages for claim 11 based solely on its construction of “record.” (POR, 48.) Once again, Nike’s arguments fail with its construction. (Ex. 1017, ¶62; *supra* § IV.A.)

B. Sutton and Plus 3 Render Obvious Claim 14

Nike’s arguments for preserving claim 14 have no merit. First, Nike spends a page refuting whether Sutton’s apparatus removes content from Plus 3’s website. (POR, 49-50.) That is irrelevant: far from “mischaracteriz[ing] the . . . Plus 3 Website pages” (POR, 49), lululemon argued it would have been obvious to modify Sutton’s apparatus to receive and transmit modification requests as

claimed. (Petition, 71.) By failing to address lululemon’s actual argument, Nike has forfeited any response.

Second, Nike argues that it is “ambiguous” from Plus 3’s website whether shared activity is removed from the social networking site. (POR, 50.) There is no ambiguity: Plus 3’s website states “[u]sers can also ‘*remove* [their] User Content *from the Site* at any time.’” (Petition, 71 (citing Ex. 1006, 17); Ex. 1017, ¶¶63-65.) The Board should cancel claim 14 as set forth in the Petition.

C. Sutton and Plus 3 Render Obvious Claims 12, 19, and 20

For these claims, Nike recycles its earlier arguments from Ground 2. (POR, 51.) The Board should reject Nike’s arguments and find that Sutton teaches claims 12, 19, and 20 as explained above. (Ex. 1017, ¶66; *supra* § IV.C, IV.D, IV.E.)

D. Nike Does Not Dispute that Sutton and Plus 3 Render Obvious Claim 13

Apart from its arguments for claim 11, Nike does not dispute lululemon’s showing that Sutton and Plus 3 render obvious claim 13. (Petition, 70-71.) Because Nike’s arguments for claim 11 lack merit, the Board should cancel claim 13. (*Supra* § III.E.)

VII. GROUND 5: THE CHALLENGED CLAIMS ARE UNPATENTABLE OVER SUTTON AND FRY

For this ground, Nike argues only that Sutton’s manually entered activity data is not “recorded athletic activity data. (POR, 52.) Once again, Nike’s argument fails with its construction. (Ex. 1017, ¶67; *supra* § IV.A.)

VIII. CONCLUSION

For the foregoing reasons, as well as those set forth in its Petition, Petitioner respectfully requests cancellation of claims 11-14, 19, and 20 of the '220 patent.

Dated: November 6, 2023

Respectfully submitted,

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Certification of Word Count (37 C.F.R. § 42.24)

I hereby certify that this Petitioner's Reply to Patent Owner's Response has 5,466 words (as counted by the "Word Count" feature of the Microsoft Word™ word-processing system), exclusive of "a table of contents, a table of authorities, a listing of facts which are admitted, denied, or cannot be admitted or denied, a certificate of service or word count, or appendix of exhibits."

Dated: November 6, 2023

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Certificate of Service (37 C.F.R. § 42.6(e)(4))

I hereby certify that the attached Petitioner's Reply to Patent Owner's Response was served on the below date on the Patent Owner via e-mail (by consent) to the following counsel of record:

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