

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 SUR-REPLY

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Claim Construction.....	1
A.	“record”	1
1.	The claim language makes clear that “record” means “measure or capture, and then save”.....	2
2.	The specification of the ’220 patent shows that Nike’s proposed construction of “record” is correct	4
3.	The purpose of the invention supports construing “record” to mean “ measure or capture and then save”	5
B.	“in response to receiving the sharing option selection”	7
III.	lululemon Fails to Prove that the challenged Claims are Unpatentable By A Preponderance Of The Evidence	8
A.	Ground 1: lululemon Fails To Show That Johnson Anticipates the Challenged Claims	8
1.	lululemon fails to show that Johnson discloses claim limitation [11C].....	8
2.	lululemon fails to show that Johnson anticipates claim [11E].....	9
3.	lululemon fails to show that Johnson anticipates claim 12	14
B.	Ground 2: lululemon Fails To Show That Sutton Anticipates the Challenged Claims	16
1.	lululemon fails to show that Sutton anticipates claim 11	16
2.	lululemon fails to show that Sutton anticipates claim 12	19
3.	lululemon fails to show that Sutton anticipates claim 19	21
4.	lululemon fails to show that Sutton anticipates claim 20	22
C.	Ground 3: lululemon Fails To Show the Challenged Claims Are Obvious Over Sutton.....	23
1.	lululemon fails to show that Sutton renders claim 11 obvious	23

2.	lululemon fails to show that Sutton renders claim 12, 19, and 20 obvious	25
D.	Ground 4: lululemon Fails To Show That the Challenged Claims are Obvious Over the Combination of Sutton and the Plus 3 Website Pages.....	25
1.	lululemon fails to show that the combination of Sutton and the Plus 3 Website Pages renders obvious claim 11, 12, 19, and 20	25
2.	lululemon fails to show that the combination of Sutton and the Plus 3 Website Pages renders obvious claim 14.....	25
E.	Ground 5: lululemon Fails To Show That Claim 12 Is Obvious Over Sutton and Fry	26
IV.	Conclusion	26

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Blue Calypso, LLC v. Groupon, Inc.</i> , 815 F.3d 1331 (Fed. Cir. 2016)	11
<i>Finisar Corp. v. DirecTV Group, Inc.</i> , 523 F.3d 1323 (Fed. Cir. 2008)	11
<i>In re Power Integrations, Inc.</i> , 884 F.3d 1370 (Fed. Cir. 2018)	6
<i>Kennametal Inc. v. Ingersoll Cutting Tool Co.</i> , 780 F.3d 1376 (Fed. Cir. 2015)	11
<i>MModal LLC v. Nuance Commc'ns, Inc.</i> , 846 F. App'x 900, 907 (Fed. Cir. 2021)	11, 15
<i>Osram GmbH v. Int'l Trade Comm'n</i> , 505 F.3d 1351 (Fed. Cir. 2007)	4
<i>Pacing Techs., LLC v. Garmin Int'l, Inc.</i> , 778 F.3d 1021 (Fed. Cir. 2015)	7, 18
<i>PODS, Inc. v. Porta Stor, Inc.</i> , 484 F.3d 1359 (Fed. Cir. 2007)	3
<i>Sequoia Tech., LLC v. Dell, Inc.</i> , 66 F.4th 1317 (Fed. Cir. 2023)	5
<i>TI Grp. Auto. Sys. (N. Am.), Inc. v. VDO N. Am., L.L.C.</i> , 375 F.3d 1126 (Fed. Cir. 2004)	18
<i>Wm. Wrigley Jr. Co. v. Cadbury Adams USA LLC</i> , 683 F.3d 1356 (Fed. Cir. 2012)	11
<i>Yita LLC v. MacNeil IP LLC</i> , 69 F.4th 1356, 1367 (Fed. Cir. 2023)	12

EXHIBITS

Exhibit No.	Description
2001	Declaration of Dr. Robert T. Stone
2002	Transcript of August 1, 2023 Deposition Dr. Henry H. Houh
2003	Merriam Webster's Online Dictionary Entry For "Record" (excerpt)
2004	Transcript of December 14, 2023 Deposition Dr. Henry H. Houh

I. INTRODUCTION

Neither the Petition (Paper 1) nor Petitioners' Reply (Paper 22; "Reply") to Patent Owner's Response (Paper 19, "POR") demonstrates by a preponderance of the evidence that any claim of the '220 patent is unpatentable.

lululemon's reply arguments concerning Johnson's alleged anticipation of claims 11–14, and 19–20 (the "Challenged Claims") in Ground 1 fail for three reasons: (1) lululemon's arguments are based on an incorrect construction of "record" that only requires saving, (2) lululemon's arguments are based on an incorrect construction of "in response to receiving the sharing option selection" that ignores the ordinary meaning of the term and its use in the specification, and (3) lululemon improperly raises new arguments that it could have—but did not—present in the Petition. lululemon's reply arguments concerning Sutton (Grounds 2–5) also fail because they are predicated on the same incorrect construction of "record." In fact, lululemon's reply arguments underscore why a POSITA would understand "record" to include measuring or capturing data in addition to saving that data.

For at least these reasons, lululemon has not carried its burden of proving by a preponderance of the evidence that any claim of the '220 patent is unpatentable.

II. CLAIM CONSTRUCTION

A. "record"

The ordinary and customary meaning of "record" is to "measure or capture,

and then save.” The parties agree that “record” involves saving in some capacity. lululemon argues that “record” means “saving” and nothing more. Reply, 2. But lululemon’s principle argument is that the specification distinguishes between “record” and “measure.” *E.g.*, Reply, 1, 2. This distinction is irrelevant because Nike agrees that “record” and “measure” have different meanings.¹

1. The claim language makes clear that “record” means “measure or capture, and then save”

The language of claim 1 makes clear that “record” has two requirements: measuring or capturing data *and* then saving that data. POR, 11–12. lululemon challenges this construction by arguing that (1) claim 1 does not specify the device that performs the recording and (2) the different tenses in claim 1 and 11 somehow disconnect “record” from “recorded.” Reply, 5–6. Both arguments fail.

First, lululemon asserts that claim 1 “says nothing about what performed the recording.” Reply, 5. But it does. Claim 1 recites an “athletic information monitoring device” that includes a “sensor or multiple sensors for *measuring* parameters relating to the person being monitored.” These devices of claim 1

¹ lululemon mischaracterizes Nike’s position by arguing that Nike failed to meet the exacting standards necessary to show lexicography. Reply 5, 13. But Nike is not relying on lexicography (or disclaimer). Instead, Nike’s proposed constructions are the ordinary and customary meanings of the challenged claim terms.

perform the recording. POR, 11–12 (citing EX1001, 8:50–53); EX2001, ¶50.

Second, lululemon asserts—without citing any case law—that “recorded” as recited in claim 1 does not inform the meaning of “record” as recited in claim 11. lululemon faults Nike for failing to address the different tenses of “record.” Reply, 6. lululemon has it backwards. It is not Nike’s burden to show that “record” and “recorded” have the same meaning. The meaning of “record” in claim 11 is presumed to have the same meaning as “recorded” in claim 1 “unless it is clear from the specification and prosecution history that the terms have different meanings.” *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1366 (Fed. Cir. 2007); EX2003 (identifying “recorded” as a synonym of “record”). lululemon has not pointed to any evidence in the specification or prosecution history to overcome the presumption that “recorded” in claim 1 and “record” in claim 11 have the same meaning.

Contrary to lululemon’s assertion, neither Dr. Stone nor Dr. Houh testified that “recorded” in claim 1 and “record” in claim 11 have different meanings. Reply, 5–6. At best, they testified that tense “could” inform the meaning of a term in some circumstances. EX1016, 32:21–33:17. But more importantly, Dr. Stone opined that “when claim 1 recites 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.’” EX2001, ¶50. And Dr. Houh agreed.

EX1017, ¶23; EX2004, 29:10–14, 30:9–17. The Board should disregard lululemon’s arguments on this point.

2. The specification of the ’220 patent shows that Nike’s proposed construction of “record” is correct

Nike’s proposed construction of “record”—“measure or capture, and then save”—“is better supported by the specification, and...provides the better description” of the claimed invention than lululemon’s proposed construction (saving only). *Osram GmbH v. Int’l Trade Comm’n*, 505 F.3d 1351, 1357 (Fed. Cir. 2007).

The specification’s different uses of “measure” and “record” is consistent with Nike’s proposed construction. lululemon points to examples in the specification in which sensors measure data—arguing that the specification “repeatedly distinguishes between ‘record’ and ‘measure.’” Reply, 2–3 (citing EX1001, 8:51–53, 11:44–48; 11:61–62, 11:65–67, 13:5–6, 15:18–24, 15:41–45). But Nike agrees that “record” and “measure” are not exactly the same: “record” requires measuring or capturing, and then saving. lululemon’s identification of sensors that only “measure” is not inconsistent with Nike’s proposed construction of “record.”

Dr. Houh opined that the specification describes a GPS device “that records data separately from measuring/capturing it.” Reply, 3 (citing EX1017, ¶16). But the GPS device he identifies has lost its signal and connectivity. EX1001, 1:62–

2:1; EX1017, ¶17 (Dr. Houh admitting that the GPS device is nonfunctional and is not “calculat[ing] a location”). The GPS device is thus not recording, measuring, or saving any athletic activity at all. *Id.* The GPS device’s loss of signal is entirely unrelated to the meaning of “record.”

In fact, this portion of the specification *supports* Nike’s construction because the mobile device only “records” athletic activity if an appropriate activity sensor (a GPS device for mobile activity; an accelerometer for stationary activity) is measuring or capturing the athletic activity. EX1001, 1:52–2:1. Depending on the conditions (e.g., if the GPS device loses a signal), the mobile device will “switch from one device to the other device” (e.g., switch to using the accelerometer). *Id.*, 1:60–62. Other portions of the specification reflect the same point. *Id.*, 19:59–66, 59:6–9. Dr. Houh’s opinion should be thus be disregarded as inconsistent with the specification.

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

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). Here, the express purpose of the ’220 patent is to measure athletic activity and thereby motivate the user. EX1001, 1:29–35. An interpretation of “record” to simply mean saving data fails to accomplish the invention’s purpose. EX2001, ¶¶54–56.

lululemon asserts that measuring athletic activity is not relevant to the express purpose of the '220 patent because the patent “provides multiple ways” to “encourage and motivate the user to engage in athletic activities and improve his or her fitness.” Reply, 8 (citing EX1001, 66:67–67:9.). This argument fails for two reasons. First, lululemon does not provide any case law to support its assertion that only features “solely” responsible for achieving an express purpose should be considered in construing a claim. Instead, a construction that is inconsistent with the purpose of the invention is improper. *In re Power Integrations, Inc.*, 884 F.3d 1370, 1376–77 (Fed. Cir. 2018).

Second, lululemon points to examples in the specification of ways to “encourage and motivate the user to engage in athletic activities and improve his or her fitness.” Reply, 8. But all of these ways to encourage and motivate the user identified by lululemon include using a “single device” that measures or captures athletic activity data. *See id.*, (citing EX1001, 66:67–67; EX1017, ¶29). The single device’s ability to “record” is dependent on its ability to *measure* workout data for both indoor (e.g., stationary) workouts using an accelerometer and outdoor workouts using a GPS. EX2001, ¶55. But a device’s ability to merely save data is independent of location. Thus, the ways to encourage and motivate the user to engage in athletic activities identified by lululemon more reasonably suggest a construction of “record” that includes measuring or capturing workout data.

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 is “in response to receiving an individual user command or confirmation to share the recorded athletic activity.” EX2001, ¶¶57–61; EX1001, 68:24.

lululemon’s Reply ignores the “in response to” portion of the disputed term and only addresses a “sharing option selection.” Reply, 9. lululemon argues that a POSITA would understand “sharing option selection” according to its ordinary and customary meaning as a selection whether to share. Reply, 9. But the entire term “in response to receiving the sharing option selection” is at issue. Institution Decision, 20.

Instead of actually addressing the “in response to” portion of the disputed term, lululemon claims that Nike is attempting to read out embodiments in Figures 53F, 53V, 54C, 77, 78B, 82 of the specification. Reply, 9–10. Nike does no such thing. Instead, Nike determined ordinary and customary meaning based on the plain language of the claim term and its use in the specification. POR, 19–22. “It is true that constructions that exclude the preferred embodiment are disfavored.” *Pacing Techs., LLC v. Garmin Int’l, Inc.*, 778 F.3d 1021, 1026 (Fed. Cir. 2015). But “where the patent describes multiple embodiments, every claim does not need to cover every embodiment.” *Id.* “This is particularly true”—as is the case here—“where the plain

language of a limitation of the claim does not appear to cover th[e] embodiment[s]” described in Figures 53F, 53V, 54C, 77, 78B, 82. *Id.*; POR, 19–22.

III. LULULEMON FAILS TO PROVE THAT THE CHALLENGED CLAIMS ARE UNPATENTABLE BY A PREPONDERANCE OF THE EVIDENCE

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

1. lululemon fails to show that Johnson discloses claim limitation [11C]

lululemon still fails to show that Johnson’s device 601 is an apparatus that “record[s] athletic activity performed by a user” because it twice applies the incorrect ordinary and customary meaning of “record” to argue that a single device records athletic activity. EX1001, 68:21; POR, 23–24; EX2004, 36:13–22.

First, Nike previously explained that Johnson’s device 601 merely displays pre-recorded athletic activity data that it “receives” from a separate “collection” device. POR, 24. lululemon’s Reply only confirms Nike’s position, explaining that device 601 “stor[es]” athletic data. Reply, 14. lululemon does not even argue that device 601 measures or captures the data. *Id.*

Second, the POR explains that Dr. Houh confirms that the separate “monitoring” device (201) disclosed in Johnson—not device 601—is what measures athletic activity data. POR, 24 (citing EX1003, ¶55). lululemon’s only rebuttal is that Dr. Houh testified that the device 601 “store[s] the athletic data.” Reply, 14.

Under the correct ordinary and customary meaning of “record,” this is insufficient because it does not address measuring or capturing data.

2. lululemon fails to show that Johnson anticipates claim [11E]

a. Johnson does not teach “in response to receiving the sharing option selection” (Element [11E])

lululemon does not explain how any of the four purported sharing options disclose recorded athletic activity being shared “in response to receiving an individual user command or confirmation to share the recorded athletic activity.” Reply, 15–17; Petition 32–38. lululemon argues that even under Nike’s proposed ordinary and customary meaning, Johnson teaches “at least three button-based sharing option selections on which a user clicks”—namely (1) “Brag to Friends”; (2) “Share this Run”; and (3) “Blog Promotion.” Reply, 15–16. lululemon’s response is simply to allege that it did make the arguments in the Petition. Reply, 17. But a review of the Petition shows that lululemon only addressed the “Brag to Friends” and “Share this Run” options in a catchall section that discusses Johnson’s disclosure of a “social network page.” See Petition, 32–38. But lululemon does not specify how that “social network page” is provided by either the “Brag to Friends” or “Share this Run” option. *Id.*, 33.

Johnson’s “Blog Promotion” option also fails. 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.” POR, 28; Petition, 37–38; EX2001, ¶¶69–70. lululemon still 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.*; EX1001, 68:25–28; Reply, 16. lululemon’s conclusory statement is not evidence that the supposed buttons are sharing options. EX2001, ¶¶69–70.

b. Johnson Does Not Disclose Transmitting Workout Information to “a social network site viewable by one or more other users” (Element [11E])

lululemon argues that Nike’s explanations as to why Johnson does not teach “a social networking site viewable by one or more users.” lululemon is wrong for three reasons.

First, lululemon argues that it provided evidence in its Petition for the “Brag to Friends” and “Share this Run” options concerning limitation [11E]. It did not. *See* Petition at 32–38 (providing argument sections only for the “Leaderboard” and “Blog Post” options). lululemon now tries to cure the deficiency by arguing for the first time—without citing to Johnson—that clicking on either button in the “Share This Run” option would transmit user’s data to a social networking site. Reply, 18. Lack of support notwithstanding, this is a new argument concerning the prior art, and unrelated to claim construction, that could have been included in the Petition

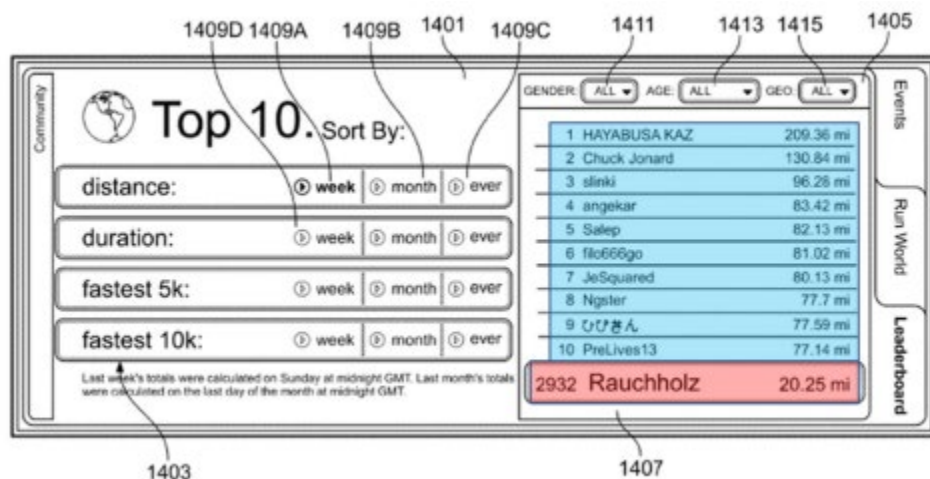
and should be disregarded. In *MModal LLC v. Nuance Commc'ns, Inc.*, the Federal Circuit affirmed the PTAB's refusal to accept reply arguments when the petition "did not assert that (or explain why) even those aspects of [a reference]—or, indeed, any aspects of [the reference]—disclose" a limitation. 846 F. App'x 900, 907 (Fed. Cir. 2021) (non-precedential). Here, lululemon has done the same. It failed to specify how Johnson transmits data to a social networking site, and now relies on Dr. Houh's Reply Declaration in an attempt to cure this deficiency. This is not a proper reply argument. *Id.*

Second, lululemon improperly combines disparate embodiments in Figures 29 and 43. Reply, 19. But "an anticipatory reference must disclose not only each limitation of the claim, but also each of those limitations as 'arranged as in the claim[.]'" *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1334, 1338 (Fed. Cir. 2008). Here, Johnson does not show Figures 29 and 43 together and so relying on disclosure from both does not show the disclosure "arranged as in the claim."

The cases lululemon cites do not support its argument for combining Figures 29 and 43. Reply, 19. Under *Kennametal Inc. v. Ingersoll Cutting Tool Co.*, a reference can anticipate a claim if it "d[oes] not expressly spell out" all the limitations only if a POSITA "would at once envisage" the claimed arrangement. 780 F.3d 1376, 1381 (Fed. Cir. 2015). *See also 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). lululemon does not argue that Johnson meets this high standard. Nor could they effectively do so. Figures 29 and 43 disclose different embodiments and blog 2900 is not a social networking page. EX2001, ¶73; EX1004, ¶167. Instead, lululemon makes a new argument (unrelated to Nike’s claim construction position) that “a POSITA would have combined Figure 43’s blog promotion with Figure 29’s blog.” Reply, 19. Such a “meaningfully distinct contention” is not permissible when, as here, it could have been presented in the Petition. *Yita LLC v. MacNeil IP LLC*, 69 F.4th 1356, 1367 (Fed. Cir. 2023); *see also id.* at 1365–67.

Third, lululemon mischaracterizes Nike’s argument regarding Johnson’s leaderboard. Nike explained that the leaderboard (copied below) shows others’ shared information, not the “user’s.” POR, 29–30.



EX1004, Fig. 14A (annotated). In the Petition, lululemon never argues that the workout information associated with user Rauchholz is shared on “a social

networking site viewable by one or more other users.” EX1001, 68:28–29; Petition, 33–36; EX2001, ¶74. lululemon argued 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 Rauchholz can view the leaderboard depicted in Figure 14A of Johnson. *See id.*, 33–36; EX2001, ¶74. In other words, lululemon focuses on what user Rauchholz can view, not what Rauchholz has shared with “one or more other users”. EX2001, ¶74. lululemon does not remedy this on reply. Instead, it explains that 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.” Reply, 20 (citing EX2002, 205:22–206:1). This is exactly Nike’s point. Other people are sharing their information with Rauchholz, but there is no evidence that the Rauchholz shares his information with *others*, as required by the claim. EX1001, 68:23–28. Neither lululemon nor Dr. Houh dispute this. *See generally* Reply, 20; EX1017, ¶44. Similarly, Johnson provides no information about any of the other users listed in Figure 14A. *See generally* EX1004, [0132]–[0134]. Johnson thus fails to teach that the disclosure of the other users meets this claim limitation. Dr. Houh argues—for the first time on reply—that Johnson’s disclosure of an “‘interactive comparison’ means both the user (e.g., Rauchholz) and the ‘other users’ are sharing workout information with each other.”

EX1017, ¶44. But an “interactive comparison” does not mean that the user (Rauchholz) is sharing his data, only that he can interact with the comparison shown in Figure 14A. EX1004, Fig. 14A. And, Dr. Houh’s interpretation is contrary to the rest of Johnson. *See, e.g.*, EX1004, [0122] (disclosing an “interactive” prompt used by only one user).

3. lululemon fails to show that Johnson anticipates claim 12

lululemon has changed its position regarding claim 12 and still fails to show that Johnson teaches an apparatus that is “caused to tag a summary of one or more metrics from the recorded athletic activity with identifiers of one or more other users.” EX1001, 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[.]” EX2001, ¶¶77–81. But each tile in Johnson only shows the summary of workout information from one user and so Johnson does not meet the limitations of claim 12. POR, 30–32. In the Petition, lululemon argues that the “‘500 Mile Club’ tag is an identifier of one or more other users.” Petition, 38. It added that “device 601 tags a summary of the user’s recorded athletic activity with an identifier.” *Id.*, 39. The use of the word “tag” in both these instances shows that lululemon viewed each tile as the claimed “summary.”

lululemon now changes its position. lululemon’s new argument is that the set of “500-Mile Club” tags is a “summary of one or more metrics.” Reply, 20–21(citing EX1017, ¶46); EX2004, 35:14–18. Therefore, lululemon argues, including multiple tiles tagged with that metric means that the summary is tagged with multiple users. *Id.* In other words, the green tiles shown in Figure 23 allegedly combine to make the claimed summary of “metrics from the recorded athletic activity.”

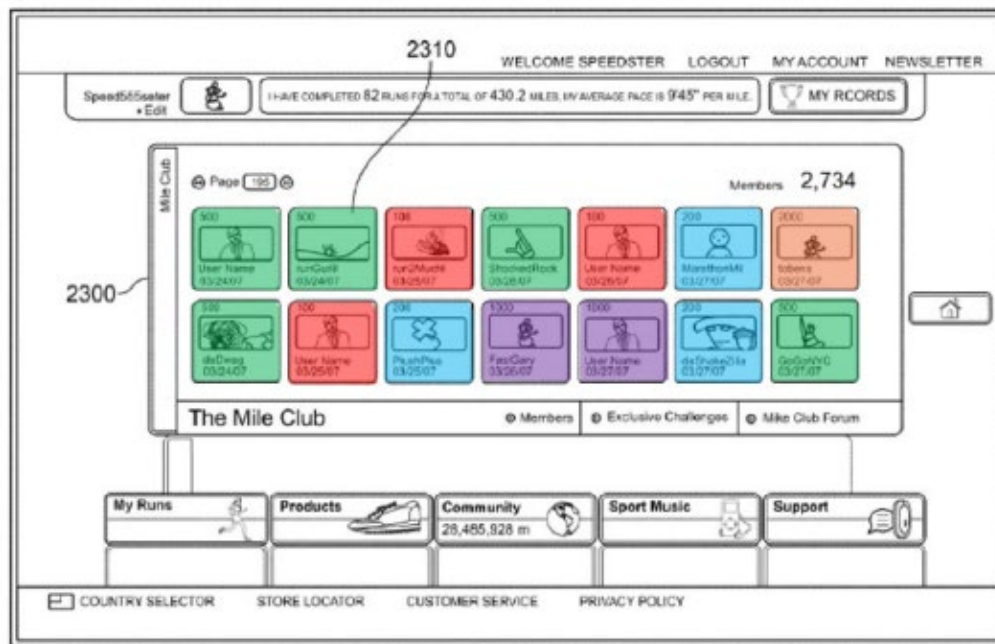


FIG. 23

EX1004, FIG. 23 (annotated); Reply, 21; EX2004, 35:14–18. This argument fails for two reasons.

First, lululemon’s new argument should be rejected because it is outside the scope of an appropriate reply. *Mmodal*, 846 F. App’x at 907. lululemon could have

made this argument in its Petition, and the new argument is not related to any new claim construction—and thus should be rejected. *Id.*

Second, lululemon’s new argument fails on the merits. lululemon does not provide any explanation as to why multiple tiles could combine to make a “summary” and so fails to support its new position. EX1004, FIG. 23; Reply, 21; EX2004, 35:14–18. lululemon has not shown that Johnson discloses “a summary of one or more metrics from the recorded athletic activity.” EX1001, 68:31–32. The “summary” is based on “the” “recorded athletic activity performed by a user,” i.e., the antecedent “recorded athletic activity” previously recited in the claim. EX1001, 68:15–28. Johnson does not suggest that the alleged “summary” contains metrics from the same recorded athletic activity. Specifically, lululemon argues that “‘daDwag’ (bottom left) is one identifier of one user, and ‘User Name’ (top left) and ‘GoGoNYC’ (bottom right) are identifiers of other users.” Reply, 21. But Johnson does not teach, nor does lululemon allege, that daDwag, User Name, and GoGoNYC ran the same 500 miles or are tagged to a summary of metrics from the claimed recorded athletic activity.

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

1. lululemon fails to show that Sutton anticipates claim 11

- a. lululemon fails to show that Sutton discloses claim limitation [11C]*

lululemon fails to show that Sutton discloses an apparatus that measures or captures, and then saves (i.e. “records”) athletic activity performed by a user. EX1001, 68:21; EX2004, 37:14–38:17. lululemon instead relies on Sutton’s disclosure of an apparatus that merely saves activity data. *See* POR, 33–35. Thus, whether Sutton anticipates claim [11C] turns on the construction of “record.” *See* Institution Decision, 12. In support of its proposed construction that “record” means “save,” lululemon now asserts that “the ’220 patent repeatedly describes the same sort of manual recording as Sutton.” Reply, 22 (citing EX1001, 20:52–54, 40:65–67, 1:29–35). lululemon’s new arguments fail for three reasons.

First, lululemon mischaracterizes the disclosure of the ’220 patent in an effort to argue it discloses manual recording. Reply, 22–23. But the cited disclosures do not teach manual “recording.” lululemon relies on the ’220 patent’s description of how prior art is flawed because it requires manual entry. *Id.*, (citing EX1001, 1:29–35). lululemon also cites explanations of tagging a location of a workout after the fact, not “recording” route data as athletic activity data. *Id.*, 40:59–67 (“[A] user may wish to register a note indicating that he or she felt tired at a certain point along the route...the note may be entered after the run and the location manually specified.”). *See also, id.* 20:52–54. None of these disclosures show manual “recording.”

Second, even if the specification does disclose certain embodiments that describe the same sort of manual recording as Sutton, claim 11 recites an “*apparatus*” that “records” athletic activity performed by a user.” EX2001, 68:16–21 (emphasis added). Thus, claim 11 does not encompass manual entry of data. *See Pacing Techs.*, 778 F.3d at 1026 (“[W]here the patent describes multiple embodiments, every claim does not need to cover every embodiment.”). In fact, the ’220 patent criticizes earlier systems that required manual entry of athletic activity. POR, 14–15 (citing EX1001, 1:29–35).

Third, lululemon is applying the wrong standard. It is well-established that the “validity analysis is a two-step procedure.” *TI Grp. Auto. Sys. (N. Am.), Inc. v. VDO N. Am., L.L.C.*, 375 F.3d 1126, 1139 (Fed. Cir. 2004). “The first step involves the proper interpretation of the claims. The second step involves determining whether the limitations of the claims as properly interpreted are met by the prior art.” *Id.* But here lululemon is comparing Sutton to the specification—not the claims—of the ’220 patent.

b. lululemon fails to show that Sutton discloses claim limitation [11E]

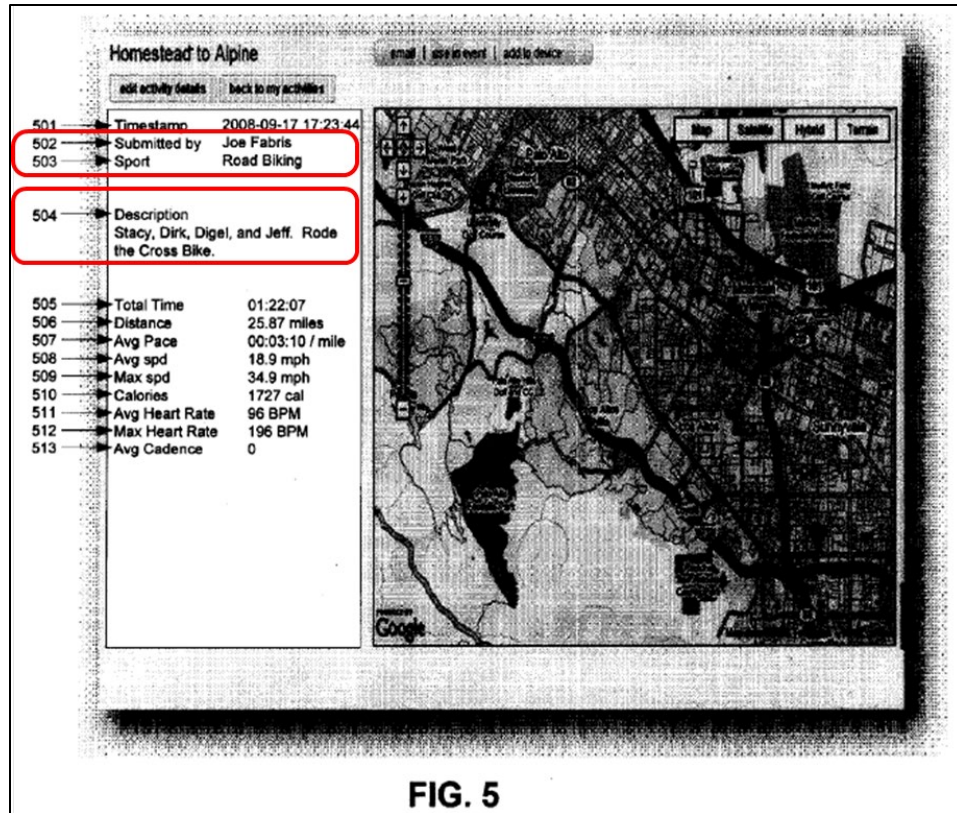
lululemon does not provide any rebuttal for claim [11E], reiterating its disagreement with Nike’s proposed ordinary and customary meaning. Reply, 23.

2. lululemon fails to show that Sutton anticipates claim 12

lululemon fails to show that Sutton discloses claim 12 for the three reasons: (1) it misrepresents Dr. Stone’s testimony; (2) it does not establish that the listed names are claimed “users”; and (3) it fails to show that two embodiments of Sutton should be read together. *See* POR, 36–38.

First, lululemon misrepresents Nike’s expert’s testimony. By testifying that that he “identif[ies] as” “Dr. Stone,” Dr. Stone was not providing any testimony on the meaning of “user” as recited in claim 11 of the ’220 patent. Reply, 23 (citing EX1016, 6:3–6).

Second, lululemon does not prove that “Stacy, Dirk, Digel, and Jeff” listed in the description at item 504 of Figure 5 of Sutton are “users”:



EX1005, Fig. 5 (annotated). Sutton describes Figure 5 as “a trace map of *a user* activity.” EX1005, [0014] (emphasis added). As lululemon’s expert notes, the ’220 patent explains that “[t]he username or identifier may correspond to an identifier *registered* with an athletic tracking and monitoring service, a social networking site, a phone number, a nickname specified in a user’s phonebook or the like.” EX1017, ¶50 (quoting EX1001, 38:52–58) (emphasis added). Here, there is no evidence that anyone other than Joe Fabris (*see* “submitted by” at item 502) is “registered” with anything. Thus, lululemon fails to show that the names in item 504 are “user[s].” EX2001, ¶90.

Third, lululemon’s allegation that a POSITA would read Figures 5 and 10 of Sutton together is wrong. Reply, 24. lululemon argues that Figures 5 and 10 both relate to group events and follow a “natural timeline.” *Id.* But Figures 5 and 10 concern different activities: “Road Biking” and the “Palm Run.” EX1005, FIGs. 5, 10. Thus, the examples in Figure 5 and 10 of Sutton are distinct embodiments that a POSITA would not combine together.

3. lululemon fails to show that Sutton anticipates claim 19

lululemon fails to establish that Sutton anticipates claim 19 because (1) it improperly argues that a map is a social network message and (2) it misreads claim 19 to not require “generation of a social network message,” to be based on location. The plain language of claim 19 requires that a “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.” POR, 39–41. lululemon does not establish that Sutton does so.

First, lululemon’s allegation that its Petition mapped “Sutton’s user-provided data to the ‘workout information’ and hand-traced map to the ‘social network message’” is wrong. Reply, 25. lululemon admits that “the map is part of the user’s activity data” (Petition, 55), and that “Sutton’s ‘user-provided data’ is the ‘workout information’ of element [11E] (EX1017, ¶57). The Petition confirms that the “user-

provided data” is the user’s “activity data.” Petition, 49. Thus, the map is at best “workout information.” EX2001, ¶¶94–95.

Second, lululemon alleges that claim 19 requires the “social network message,” not the “generation of a social network message,” to be based on location. Reply, 26 (citing EX1017, ¶55.). lululemon’s reading is belied by the plain language of the claim. EX2001, ¶¶93–96. But even if lululemon’s reading were correct (it is not), lululemon’s argument still fails because the hand-traced map is not a “social network message.” POR, 40–41; EX2001, ¶¶96–97.

4. lululemon fails to show that Sutton anticipates claim 20

lululemon’s arguments regarding claim 20 mischaracterize the claim language. lululemon alleges that “Nike’s arguments for claim 20 fails because it assumes that information cannot be a ‘social network message’ until it is posted on a social network.” Reply, 26. By definition, a social network message does not exist until it is posted on a social network. The plain language of the claims confirms Nike’s position. 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.” EX1001, 68:63–65 (emphasis added). And Claim 19 recites “the apparatus is further caused to generate *a social network message on the network page.*” *Id.*, 68:59–61 (emphasis added). Thus, per the plain

language of the claims, information cannot be a “social network message” until it is posted on a social network page. *See* POR, 41–43.

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

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

lululemon fails to establish that (1) Sutton’s manual device transfer renders claim 11 obvious or (2) Sutton’s automatic device transfer pathways render claim 11 obvious.

First, lululemon provides no new arguments as to the “manual device transfer pathway” and still relies on its flawed construction of “record.” Reply, 27. Thus, lululemon’s arguments concerning Sutton’s “manual device transfer pathway” fail for the reasons discussed previously. *See* POR, 43–44. Specifically, the manual device transfer pathway concerns manually entered data—not “recorded athletic activity.” *Id.*

Second, lululemon’s arguments concerning the “automatic device transfer pathway” also fail because lululemon relies on embodiments related to manual entry of activity data—not “recorded” activity data. *See* POR, 44–47. Figure 3 and Figure 9 of Sutton relate only to manually entered athletic activity data—not “recorded athletic activity.” For example, Sutton’s Figure 3 merely depicts methods of transferring “user-provided data”; it says nothing about the transfer of “recorded

athletic activity.” *See* EX1005, Fig. 3, ¶60; EX2001, ¶106. Sutton discloses that Figure 3 “illustrates a block diagram for exemplary data transfer methods.” *Id.* All paths begin at box 301, which is labeled “Enter Activity Data.” EX1005, Fig. 3; EX2001, ¶106. Sutton confirms that the “activity data” entered in box 301 is “user-provided data.” EX1005, ¶60. In other words, “automatic” refers to sharing, not measuring or capturing. EX2001, ¶105. 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. EX1001, 68:21–28; EX2001, ¶106.

lululemon also disputes Nike’s contention that a user of Sutton’s automatic device transfer pathway would need to view Figure 9 on two separate occasions for each workout: once before and once after the workout. Reply, 28. According to lululemon, it makes no such allegation. *Id.* But regardless of what lululemon alleges, if Sutton’s “automatic device transfer” was modified with Figure 9’s alleged sharing option, the user would indeed need to interact with Figure 9 on two separate occasions for each workout: once before their workout solely to receive the “sharing option,” (*see* Reply, 29 (admitting that “Figure 9 should be presented before the workout”)) and then again after their workout to manually enter other information related to that workout because Figure 9 only pertains to manually entered data—not “recorded” data.

2. lululemon fails to show that Sutton renders claim 12, 19, and 20 obvious

lululemon provides no rebuttal arguments and thus fails to show that Sutton renders claims 12, 19, and 20 obvious for the reasons discussed previously. POR, 47.

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

1. lululemon fails to show that the combination of Sutton and the Plus 3 Website Pages renders obvious claim 11, 12, 19, and 20

lululemon provides no rebuttal arguments and thus fails to show that the combination of Sutton and the Plus 3 Website Pages renders claims 11, 12, 19, and 20 obvious for the reasons discussed previously. POR, 47–48, 51–52.

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

lululemon fails to show that claim 14 requirement is obvious over Sutton in view of the Plus 3 Website pages because it does not show that the claimed apparatus performs the required steps. 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.” EX1001, 68:38–43. lululemon shows no evidence of the *apparatus* performing these steps.

lululemon points to the Plus 3 Website pages' disclosure that "You may remove your User Content from the Site at any time." Reply, 30 (citing EX1006, 17). This is not enough. Even if the user's workout information is removed from the Plus 3 Network, lululemon has not provided any evidence that the removal is due to the claimed "apparatus" "receiv[ing] a request to deactivate sharing of the workout information." EX1001, 68:38–43. Nor is there any evidence that the removal is in response to the claimed "apparatus" "transmit[ing] a modification request to remove the workout information" from the Plus 3 Network. *Id.* And, even if a user chooses to remove content, "the Company may retain archived copies of your User Content." EX1006, 17.

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

lululemon provides no rebuttal arguments and thus fails to show that Sutton and Fry render claim 12 obvious for the reasons discussed previously. POR, 52.

IV. 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.

Dated: December 20, 2023

Respectfully Submitted,

/s/ Christopher J. Renk

Christopher J. Renk (Reg. No. 33,761)

Michael J. Harris (Reg. No. 62,957)

Aaron P. Bowling (Reg. No. 67,311)

Arnold & Porter Kaye Scholer LLP

70 West Madison Street, Suite 4200

Chicago, IL 60602-4231

Tel: (312) 583-2300

Fax: (312) 583-2360

**Counsel for Patent Owner,
Nike, Inc.**

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Sur-Reply complies with the type-volume limitations of 37 C.F.R. § 42.24(a)(1)(i). This Sur-Reply (including figure labels and annotations) contains 5592 words as calculated by the “Word Count” feature of Microsoft Office 365 Word application, which is less than the 5,600 words allowed under 37 C.F.R. § 42.24(c)(4).

The undersigned further certifies that this Sur-Reply 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 Sur-Reply has been prepared in a proportionally spaced typeface using Microsoft Office 365 Word application in Times New Roman 14 point font.

/s/ Christopher J. Renk
Christopher J. Renk (Reg. No. 33,761)
Arnold & Porter Kaye Scholer LLP
Chicago, IL 60602-42310
Tel: (312) 583-2300
Fax: (312) 583-2360
Email: chris.renk@arnoldporter.com

CERTIFICATE OF SERVICE

Pursuant to 37 CFR §§42.6(e)(4)(i) *et seq.* and 42.105(b), the undersigned
Certifies that on December 20, 2023, a true and entire copy of this **PATENT
OWNER'S SUR-REPLY**, was served via e-mail to lululemon by serving the
correspondence address of record, indicated below.

Alex S. Yap (Reg. No. 60,609)
Mehran Arjomand (Reg. No. 48,231)
Jean Nguyen (Reg. No. 71,051)
Forrest McClellen (Reg. No. 76,533)
MORRISON & FOERSTER LLP
707 Wilshire Boulevard
Los Angeles, CA 90017-3543
ayap@mofo.com
marjomand@mofo.com
jnguyen@mofo.com
fmcclellen@mofo.com
lululemon-nike-IPR@mofo.com

/s/ Timothy Haugh
Timothy Haugh