Trials@uspto.gov
571-272-7822

Paper No. 35
Entered: April 30, 2024

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.

IPR2023-00180
Patent 10,232,220 B2

Record of Oral Hearing
Held: February 14, 2024

Before MITCHELL G. WEATHERLY, CARL M. DEFRANCO, and STEPHEN E. BELISLE, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

ALEX S. YAP, ESQ.
JEAN NGUYEN, ESQ.
Morrison Foerster LLP
707 Wilshire Boulevard
Los Angeles, California 90017-3543

ON BEHALF OF THE PATENT OWNER:

MICHAEL J. HARRIS, ESQ.
AARON BOWLING, ESQ.
LINDSEY STAUBACH, ESQ.
Arnold & Porter Kaye & Scholer LLP
70 Madison Street, Suite 4200
Chicago, Illinois 60602-4231

ALSO PRESENT:

KIMBERLY VAN VOORHIS, ESQ.
Senior Counsel, Nike, Inc.

The above-entitled matter came on for hearing on Wednesday, February 14, 2024, commencing at 9:59 a.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

- - - - -

JUDGE WEATHERLY: Good morning, everyone. Judge DeFranco, I see you're on with us.

JUDGE DEFRANCO: Good morning, all.

JUDGE WEATHERLY: So, this is a hearing for *inter partes* review, IPR2023-00180 for U.S. Patent 10,232,220. Petitioners are Lululemon Athletica Canada Incorporated and Lululemon USA Incorporated. Patent Owner is Nike, Incorporated. I am Judge Mitchell Weatherly, and I'm joined in person by Judge Stephen Belisle, to my right, and remotely by Judge Carl DeFranco. Each of us has a copy of both parties' demonstrative exhibits and access to the full trial record. Because Judge DeFranco is attending hearing by video conference, please speak clearly and deliberately, and take extra care to avoid speaking over others. When referring to material appearing on a slide from your demonstrative exhibits, please provide the slide number so that the record is easier for us to use after the fact.

As indicated in our hearing order, each party has 60 minutes to present its argument. After we entered the hearing order, the office granted Petitioner's request for 15 additional minutes to allow a LEAP practitioner to appear at this hearing. Accordingly, Petitioner will have a total of 75 minutes to present its argument.

Each party may reserve time solely to rebut the opposing party's arguments. You may not use your rebuttal time to address an issue for the first time. Petitioner will proceed first because it bears the burden of

proving nonpatentability. A timer appears on the wall behind me, indicating your remaining time.

For the record, I ask each party to introduce the attorneys who are attending, along with any guests listening to the hearing who are associated with your client beginning with counsel for Petitioner. If you could introduce yourselves and please also indicate which counsel will present argument this morning.

MR. YAP: Sure. Alex Yap for Petitioner, Lululemon. And with me today is my colleague, Jean Nguyen. And I may have my clients online virtually.

JUDGE WEATHERLY: Okay.

MR. YAP: And I have also my other colleagues here who will be doing the next proceeding after this.

JUDGE WEATHERLY: Thank you. And for Patent Owner?

MR. HARRIS: Yeah. Good morning, Your Honor. I'm Michael Harris, and I'll be presenting for Patent Owner Nike. With me in person here today is my colleague Aaron Bowling and Lindsey Staubach. And then also with us today is Kim Van Voorhis, in-house counsel at Nike. We also have some of our colleagues on the phone. Chris Rank is on the phone listening in. Thank you.

JUDGE WEATHERLY: Okay. Thank you very much.

Petitioner, how much time, if any, do you wish to reserve for rebuttal?

MR. YAP: Forty-five -- 30 minutes.

JUDGE WEATHERLY: Thirty minutes. Okay. So, I'm going to load the timer with 45 minutes. And Petitioner, you may begin whenever you're ready.

MR. YAP: Thanks, Your Honor. Your Honor, we have some demonstratives for the copy (inaudible).

JUDGE WEATHERLY: I have access to the -- unless something has changed since yesterday, I've got an electronic copy. Judge Belisle.

MR. YAP: Great, thank you.

JUDGE WEATHERLY: All right, great. Thank you for bringing those as a backup, by the way.

MR. YAP: No worries. Thanks a lot. May it please the Board, my name is, and good morning, Your Honors, my name is Alex Yap of Morrison and Forrester, representing Petitioner Lululemon at Alaska Canada and Lululemon USA, Inc. Petitioner respectfully submits that the challenged claims of the '220 Patent are unpatentable.

If you can please turn to slide 2. We have prepared a number of slides for today's hearings. I will be covering the first two modules. We have divided it up into five modules, and my colleague Jean Nguyen will cover the last three module concerning the instituted claims -- grounds.

Can we turn to slide 4 please?

JUDGE BELISLE: Counsel, just for the benefit of our remote Judge and the court reporter, if you can elevate the voice level.

MR. YAP: Sure.

JUDGE BELISLE: It would be useful to everybody.

MR. YAP: Thank you. So, the '220 Patent is directed to an athletic performance monitoring device that motivates the user to engage in athletic activities and improve his or her fitness. And according to the patent, there are multiple ways for doing that. For example, shown here in -- reproduced

here in slide 4, column 45, lines 55 to 57 of the patent, it says that the user may choose to share workout information through a social networking site.

Let's move on to slide 5. So, slide 5 shows independent claim 11, and that's the only independent claim challenged in this proceeding. And independent claim 11 recites an apparatus that performs three steps. The first step is to record an athletic activity, second step is to receive a sharing option selection, and the third step is in response to receiving that sharing option selection, transmitting the workout information to a social networking site. So, Patent Owner has raised two claim construction issues: the construction of record in green, and in response to receiving the sharing option selection reproduced here in blue. In addition, there are other art-related issues that Patent Owner has raised, and we will deal with that later.

If you can please turn to slide 6. Figure 2 here shows the athletic information monitoring device 201, which measures or receive athletic activity data. That data is then transmitted to device 501 of figure 5 in the middle you see there, and device 501 then transmits the data to device 601 shown here on the right. And as stated in column 17, lines 50 to 53, device 601 stores the athletic data in the athletic data storage 607 for future use.

If we can, please turn to slide 7. So, one example of future use is the use of the recorded athletic activity data is to share it on a social networking site. And as pointed out on page 5 of DI, figures 54A and figures 68B are examples of that. In sum, the ‘220 Patent encourages and motivates the user by sharing the data to a social networking site.

Let's move on to claim construction. Slide 9, please. So, the term at issue is the meaning of the term "record" shown here in 11[C], "record athletic activity performed by a user."

If we can turn to slide 10. So, as the Board preliminarily found on this DI, record more broadly means writing to memory, and Petitioner agrees with the Board's construction, that record should just simply means safe. Now, nevertheless, Patent Owner, in order to differentiate the prior art, suggests to the Board that there should be an additional requirement added to the construction that that should be measured or captured before saving. But as I will show in the next few slides, Patent Owner's construction is inconsistent with the plain meaning of the term and the intrinsic record.

If you can turn to slide 11, please. Now, because the ‘220 Patent treats measure and record as separate concepts, as shown here reproduced here in slide 11, I reproduce two portions of the spec, and we have actually cited to many more in our papers. The top reproduced portion of the spec shows that record is associated with storage, saving. The bottom specification that is reproduced here shows that measure or measuring is associated with sensors, sensing. And if you look at Exhibit 1001, that is the -- if you look at the ‘220 Patent line -- column 8, lines 45 to 50, for example, and that's reproduced in slide 15 of Patent Owner's slides, demonstratives, the ‘220 Patent uses the phrase "measure" and "record" in the same sentence, suggesting that record does not include measure.

Let's move on to slide 12. The spec further describes its device as measuring while not recording. So, for example, this portion of the spec reproduced here in slide 12, that's column 20, lines 2 to 6, it says the GPS device is always active, but recording is turned on and off. Separate concept. And so regardless of whether the GPS device is actually -- because the GPS device is always measuring, because it's always active, whether you choose to record or not is completely separate. So, Patent Owner doesn't

have a good response to this, so it results to mischaracterizing Petitioner's expert.

So, Your Honors, if you turn to the top of page 5 of the Patent Owner's sur-reply, and that's paper 26, Patent Owner cited to paragraph 17 of Petitioner's experts declaration, and that's Exhibit 1017. So, in its sur-reply Patent Owner stated in the parentheses, "Dr. Houh, admitting that a GPS device is nonfunctional and is not calculating a location." Well, let's take a look at Exhibit 1017, paragraph 17 of Dr. Houh's -- whether Dr. Houh actually said that.

As you can see, Dr. Houh did not say this. In fact, Dr. Houh says that the GPS device will still be measuring signals from one or more satellites. So, far from being nonfunctional, the GPS device is measuring independent of whether there is any recording. And this is because in order to calculate a GPS location, the GPS device needs to receive signals from at least three satellites. But in order to receive any signals, the GPS device needs to be constantly measuring.

Now the takeaway is this, the GPS device is constantly measuring when it is active. But whether that signal or whether that location that's calculated is recorded or not is a separate issue, as we had discussed earlier.

Now, that's not the only instance that the Patent Owner is playing fast and loose with the record, so let me give you another example. Let's turn to page 3 of Patent Owner's sur-reply. So, if you look four lines from the bottom of page 3, it starts with, "But more importantly." It says -- it continues to, "A POSITA will understand that claim 1 is using record to mean measure or capture and then save." That's their construction. And then they cited to the expert's declaration. That's fair.

And then they continue to say, "And Dr. Houh," and that Petitioner's expert, "agreed," top of page 4, decided to three pieces of evidence: Dr. Houh's expert declaration, and two portions of his deposition transcript. Let's take a look at those.

So if we took a look at Exhibit 1017, paragraph 23 of Dr. Houh's reply declaration, as you can see here, Dr. Houh was commenting about whether record in claim 1 -- claim 11 should be given the same meaning as recorded in claim 1. Not agreeing to Petitioner's construction.

Let's take a look at the two deposition transcript -- the two portions of the deposition transcript reproduce at the end of the debt demonstrative. Let's take a look first at slide 82. You can read this simply here, Your Honor, not agreeing to Petitioner's construction. I think he's talking about sensors, safe data.

And the next slide, slide 83, same thing, not agreeing with Petitioner's -- Patent Owner's construction. So, let's move on to slide 13.

There are additional specification passages that are consistent with Petitioner's construction of record. And as described here in specification column 20, line 52 to 52, record can include manual input. And because Patent Owner has no response to this passage Patent Owner in page 17 of their sur-reply, that's paper 26, tries to deflect this by addressing a different passage that was cited by Petitioner. And the Patent Owner there suggests that element 11[C] requires record to happen simultaneously with the user performing the athletic activity.

Now, nevertheless, Patent Owner's construction argument is actually inconsistent with the plain reading of 11[C]. It only requires that record

athletic activity be performed by a user, not simultaneously performed by a user.

Let's turn to slide 15. Yes, Your Honor?

JUDGE WEATHERLY: So, the recording isn't -- the user isn't doing the recording. The software that's running on the apparatus is doing the recording instead, but the activity is being performed by the user, right?

MR. YAP: Correct.

JUDGE WEATHERLY: Okay. It sounded like you were saying that the user was doing the recording, and I just wanted to be sure that I understood.

MR. YAP: So, there are instances in the spec, and especially for that portion and some example.

JUDGE WEATHERLY: Well, but even then, a manual input would still be the software on a device asking the user to input text or something.

MR. YAP: Exactly, exactly.

JUDGE WEATHERLY: So, I just want to make sure that the claim that we're talking about, the claim, the claimed apparatus. I understand your argument, though, that the specification of the patent lists as an option manual input into the device by the user --

MR. YAP: Rather than --

JUDGE WEATHERLY: -- activity that happened before where no measurements happened --

MR. YAP: Correct.

JUDGE WEATHERLY: -- where the user says, I ran a mile today.

MR. YAP: Precisely, yeah.

JUDGE WEATHERLY: Okay. For example.

MR. YAP: Yeah, thank you for that, Josh. So, let's go to slide 15. Now, Patent Owner turns to an unchallenged claim, claim 1, to support this construction of record for claim 11. Now, if you look at page 2 of Patent Owner's sur-reply reproduced here on the right, Patent Owner states that claim 1 recites an athletic information monitoring device, those are in quotes, that includes a "sensor or multiple sensors for measuring parameters relating to the person being monitored." There's no citation here. The implication is that claim 1 actually recites this. Claim 1 is reproduced on the left.

JUDGE WEATHERLY: I realize claim 1 doesn't recite that.

MR. YAP: But nevertheless --

JUDGE WEATHERLY: There is a portion of the specification that they recite.

MR. YAP: Correct, correct.

JUDGE WEATHERLY: It's easy to find. I think it's probably --

MR. YAP: Correct.

JUDGE WEATHERLY: It very well might be column 8, I don't know that detail the way I'm sure everyone in this door does.

MR. YAP: You are correct. Your Honor, it's column 8, line 50 to 53, Your Honor.

JUDGE WEATHERLY: Yeah.

MR. YAP: So, nevertheless, this is the essence of Patent Owner's argument here. Claim 1 recites an athletic activity monitoring system. The spec in column 8, as Your Honor pointed out, describes an athletic information monitoring device that includes sensors. Now, sensors measure. So, let's just import measure into recorded in claim 1. Now, because

recorded in claim 1 is a past tense of record in claim 11, let's just freight that into record for claim 11.

Well, let me just point out that the cited passage do not even include the word "record" in the spec. Claimant only requires the recorded athletic activity be received from the athletic activity monitoring system. The claim doesn't require the recorded athletic activity data also be measured by the athletic activity monitoring system. Regardless, unlike claim 1, claim 11 recites an apparatus, as Your Honor just pointed out earlier, not an athletic monitoring system or device.

JUDGE WEATHERLY: I'll just interject that there are so many differences in the scope between claim 1 and claim 11 that I can't see how the use of the word "recorded" in claim 1 is probative in any meaningful way. You don't have to spend a lot of time on it. If the Patent Owner raises it during their primary argument, you'll certainly have an opportunity to respond, but I don't need you to go through it very deeply.

MR. YAP: Thank you, Your Honor.

JUDGE WEATHERLY: I mean, claim 1 as it's written, as far as I can tell, which isn't an issue in the proceeding, even could cover activity that's performed mostly manually by a person sitting at a keyboard.

MR. YAP: Thank you, Your Honor.

JUDGE WEATHERLY: I don't see them as being very closely related. I mean, they're closely related in some ways, but not on this issue, the meaning of "record".

MR. YAP: And feel free to jump in to let me know if I'm covering something that you don't want to hear about.

JUDGE WEATHERLY: You'll come to realize that I'm not shy about jumping in.

MR. YAP: Thank you. Let's turn to slide 16. So, I want to address Patent Owner's last argument for record regarding the alleged express purpose of the ‘220 Patent. Here they attempt to freight in (phonetic) measure by arguing that the express purpose of the ‘220 Patent should include measure. But as the Board correctly pointed out, the purpose of the ‘220 Patent is to motivate the user. And as discussed at page 8 of the reply, that's paper 22. The ‘220 Patent provides multiple ways to motivate the user, not limited strictly to measuring athletic activities.

Now, Your Honor, unless there are any further questions, I'll move on to the next term at issue.

JUDGE WEATHERLY: You can move on. Thank you.

MR. YAP: Can we please turn to slide 18, please? The term "at issue" is in response to receiving the sharing option selection.

And here in slide 19, here are the parties' constructions. And trying again to differentiate the prior art the Patent Owner' construction seeks to narrow a sharing option selection to an individual user command or confirmation to share the recorded athletic activity. Sorry, it's a little bit of a mouthful.

So Patent Owner relies on just one sentence in the spec, and that's column 46, 28 to 30 for basically support for their construction. And for good measure, they threw in the word "individual." It just magically added in. And that's for a reason, because as Your Honor knows, they are trying to differentiate the prior art. So, the Board should reject Patent Owner's

construction because it contradicts with the intrinsic record and excludes several embodiments.

Now, Patent Owner also contradicts with case law because the '220 Patent did not provide clear expression of intent to narrow the claims as discussed on page 13 of the reply. And that's paper 22.

So I'm going to skip slide 20. Let's go to slide 21. So, this is an example of an embodiment that will be read out by Patent Owner's construction. Same thing for these three different embodiments in slide 22. Same thing for --

JUDGE WEATHERLY: So, these embodiments, essentially are sort of like configuring your device to sort of automatically share.

MR. YAP: Precisely, yeah. As Your Honor sort of pointed out.

JUDGE WEATHERLY: And so -- well, my questions really are for Patent Owner on this issue. If I were to ask you a question, I'd be asking you to explain what Patent Owner is saying. I'd rather ask Patent Owner, so.

MR. YAP: We have a lot of questions on this, too, Your Honor, so I'm interested to hear that.

Lastly, can we turn to slide 24? So, Patent Owner relies on *Pacing Tech v. Garmin* to argue at page 7 of the sur-reply, paper 26, that the claims do not need to cover every embodiment. However, Patent Owner is taking a very liberal reading of *Pacing Tech* because the Federal Circuit stated there that where the plain language of a limitation of a claim does not appear to cover that embodiment, then the claim doesn't need to cover that embodiment. So, that makes sense. But as explained here, the plain language of claim 11 merely states that the showing option selection when received --

JUDGE WEATHERLY: It (inaudible) embodiments that Patent Owner says should be excluded is the point.

MR. YAP: Thank you.

JUDGE WEATHERLY: I get it.

MR. YAP: Thank you. You make my job easier. Thank you. Unless there are any further questions, I'll turn it over to my colleague, Jean Nguyen.

JUDGE WEATHERLY: Thank you.

MR. YAP: Thank you, Your Honor.

JUDGE WEATHERLY: Thank you.

MR. YAP: Appreciate it.

MS. NGUYEN: Thank you, Mr. Yap. Good morning, Your Honors. Before I begin my discussion, I just wanted to express my appreciation for allowing me to participate in today's hearing via the LEAP program.

Turning to slide 26, the Board instituted *inter partes* review based on five grounds, having *Johnson* and *Sutton* as the two primary references. Unless Your Honors have a particular preference with respect to the order that I discuss, the primary art and the grounds, I will cover *Sutton* first and corresponding grounds 2 to 4, followed by *Johnson* and corresponding ground 1.

Patent Owner does not dispute the specifics of ground 5, so I was not planning on discussing ground 5 today or Fry, unless Your Honors have any questions.

Turning to slide 28, I wanted to provide a brief overview of *Sutton*. *Sutton* discloses tracking and recording athletic activity data using device 104 shown in purple from figure 1B of *Sutton* and this device 104 displays a

user interface, 151 shown in blue that provides athletic activity data such as speed, distance and time. And this user interface also provides track and record buttons shown at the bottom left in green, which allows a user to select whether to track and and/or record the athletic activity.

Now turning to slide 29, this provides an overview of *Sutton*'s system. It includes device 104 in purple shown at the top, again tracking athletic activity, and transmits this data to system 110 shown in red on the left. System 110 includes a database 115 shown in green that records the athletic activity data.

Now if you could please turn to slide 30. Your Honors, there are two grounds in this proceeding that involve *Sutton* alone. Ground 2 is an anticipation ground and ground 3 is an obviousness ground, and *Sutton* discloses three pathways for its device operation.

Now, aside from anticipation versus obviousness, the difference between the two grounds is which pathway each ground relies on. For ground 2 and anticipation, the petition relies on what is shown on the slide as the blue pathway, and *Sutton* calls this the manual transfer pathway as explained in the text shown here on the slide highlighted in blue. In the manual transfer pathway, the user provides data by manually entering it using the device.

And if you could turn to slide 31. This shows the data entry form that the user uses to manually enter the data. For example, the time distance is entered by the user and then in the bottom right in red, the user selects whether to make the athletic activity data private or public using a sharing option selection.

Turning to slide 32 for ground 3, the obviousness ground, the petition relies on the red or green pathways and *Sutton* calls this the manual device transfer pathway and the automatic device transfer pathway. In the device pathways, as explained in the yellow highlighted text of paragraph 60 of *Sutton*, the user provided data is generated from the user's device. In other words, the device measures athletic activity data. And contrary to what the Patent Owner says at page 24 of the sur-reply, *Sutton* calls the athletic activity data user-provided data regardless of whether it's manually entered by the user or whether it's generated by the device. And this is shown in paragraph 60 of *Sutton*.

JUDGE WEATHERLY: So, the manual device transfer pathway, help me make sure that I understand it correctly, when there's not a direct connection present between the device and the database, is it like a manual upload?

MS. NGUYEN: That's correct, Your Honor.

JUDGE WEATHERLY: So, a user makes a connection and then pushes their data from the device?

MS. NGUYEN: Correct. So, if, Your Honors, if I may refer you to -- back to slide 28. In the manual transfer pathway, the user selects record, whereas in the automatic device transfer pathway, the data is automatically transferred and there's no need for the user to select record.

JUDGE WEATHERLY: But I'm more interested in the distinction between the red pathway and the green pathway on slide 32.

MS. NGUYEN: Correct. That would be the same.

JUDGE WEATHERLY: In both instances, the device itself is pushing data up to a network of some kind.

MS. NGUYEN: Correct.

JUDGE WEATHERLY: But in one instance, it's because the green pathway is when there's a connection already present.

MS. NGUYEN: Correct.

JUDGE WEATHERLY: The red pathway is when they're --

MS. NGUYEN: That is correct.

JUDGE WEATHERLY: Not when there isn't a connection present, but when a manual connection is necessary, I suppose.

MS. NGUYEN: Correct.

JUDGE WEATHERLY: Yes. Okay.

MS. NGUYEN: And in both red and green pathways, the device is measuring or tracking the athletic activity data.

JUDGE WEATHERLY: Yes. The blue pathway does not involve the data that's been measured by the device at all, correct?

MS. NGUYEN: That is correct.

JUDGE WEATHERLY: Thank you.

MS. NGUYEN: And one thing I wanted to note, Your Honors, is the pathways. It's a bit confusing differentiating amongst the three, but when *Sutton* uses the word "device" in the name of its pathway, that refers to the device tracking or providing the data to the database. And when *Sutton* does not use the word "device," also, the blue pathway shown in slide 30, the user is manually entering the data because the device is not providing the data.

JUDGE WEATHERLY: So, you're saying that when *Sutton* uses the phrase "the user 101 device," it's referring to device 104?

MS. NGUYEN: Essentially, that's correct.

JUDGE WEATHERLY: All right.

MS. NGUYEN: And if we may turn to slide 33, this shows claim 11, the '220 Patent. The only element that Patent Owner disputes with respect to *Sutton* and claim 11 is element 11[C], namely whether *Sutton* teaches record. And as we've been discussing, record means save. This includes manual input of athletic activity data. So, in all three pathways, *Sutton* discloses savings, saving, and the parties do not dispute this. This means that *Sutton*'s manually entered blue pathway teaches element 11[C] as explained for ground 2. But even if Your Honors, for some reason, find that record means measure or capture and then save, *Sutton* still teaches record. Because as we discussed in the red and green pathways, *Sutton* measures sorry, *Sutton*'s device measures athletic activity data, and that's for ground 3.

So if we may turn to slide 34 --

JUDGE WEATHERLY: Well, before you move on, the petition appears to rely only on the manual pathway in the anticipation ground.

MS. NGUYEN: That's correct, Your Honor.

JUDGE WEATHERLY: Okay. So, on the anticipation ground, we would need to essentially agree with your interpretation of record rather than Patent Owner's interpretation for you to prevail.

MS. NGUYEN: That's correct, Your Honor.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: All right. So, turning to slide 34, page 9 of Your Honors' DI, paper 11, it shows that Your Honors correctly understood that *Sutton* teaches both measuring and saving, as shown in the green. If activity data originated from a data device, *Sutton* uses the manual device transfer pathway or the automatic device transfer pathway. And therefore, because

Sutton teaches both measuring and saving, *Sutton* teaches element 11[C] under both parties constructions.

And Your Honors, even though you got it right, Patent Owner still argues at page 23 of the sur-reply, paper 26, that all three pathways relate only to manually entered activity data. But again, that's incorrect. The blue pathway shown in slide 30 refers to manually entered workout data and the red and green pathways. The device pathways the device tracks, or in other words, measures the athletic activity data.

JUDGE WEATHERLY: And records it.

MS. NGUYEN: Yeah, that's correct.

JUDGE WEATHERLY: And then forwards it for recording again elsewhere.

MS. NGUYEN: Correct.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: And this measurement of the data by the device, that's the whole purpose of that track button shown in user interface 151 in green.

JUDGE WEATHERLY: Remind me the distinction, if there's any relevant distinction, between tracking and recording on the *Sutton* device.

MS. NGUYEN: Track is similar to measure and record is similar to the '220's record. So, in other words, safe.

JUDGE WEATHERLY: I'm not sure that helps me that much, but do I need to understand the distinction between the two?

MS. NGUYEN: No, you do not, Your Honor.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: Bottom line, *Sutton* teaches element 11[C] under both parties' constructions.

JUDGE WEATHERLY: Okay. That's not really, though, how you argued it, at least in connection with the anticipation ground. I want to make sure that we keep these two grounds, grounds 2 and 3, distinct. I'm trying to look briefly.

MS. NGUYEN: So for ground 2, *Sutton* teaches element 11[C] under Petitioner's construction.

JUDGE WEATHERLY: Right. I'm looking right now at ground 3, element 11[C]. Okay, you're not showing me the green and red pathways that you had on your earlier slide. Do those appear anywhere in your petition?

MS. NGUYEN: Yes, they are Paper 2, which is a petition. Page 12 through (phonetic) 14.

JUDGE WEATHERLY: In the general discussion of *Sutton*. Okay.

MS. NGUYEN: Yes, there is an annotated figure 3, which provides all three pathways.

JUDGE WEATHERLY: Yeah, no, I see that now at page 12.

MS. NGUYEN: Right.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: So, if we could please turn to slide 35. For *Sutton* obviousness, ground 3, Patent Owner made one additional argument, which is that the device pathways need to be modified different from the theory in the petition. The theory for the petition is explained at pages 62 and 63 of paper 2. And that theory talks about how the user would fill out a modified version of figure 9 form, shown here on the left, where the fields in the red

box would be omitted. And the reason why these fields would be omitted is because, again, for ground 3 and the device pathways, the device tracks athletic activity data, so there's no need for the user to manually enter the athletic activity data.

JUDGE WEATHERLY: So, is this really a modification of *Sutton* or is it just simply -- I mean, figure 9 at least the way the interface is shown is for entering activity by hand. So, this is an interface that - is it, to get out the public versus private aspect? Is that why you're proposing this a modification?

MS. NGUYEN: That's correct, Your Honor. It provides the user the option whether to share the data publicly.

JUDGE WEATHERLY: Is this because *Sutton* doesn't describe in particularly clear terms how the sharing is done in connection with data that's recorded on the device by the device?

MS. NGUYEN: That's correct, Your Honor.

JUDGE WEATHERLY: Okay. All right.

MS. NGUYEN: And we presented that in the petition.

JUDGE WEATHERLY: Thank you.

MS. NGUYEN: You're welcome. So, with respect to Patent Owner's argument regarding the modification as presented in ground 3, Patent Owner argues at page 24 of its sur-reply without any expert support or any evidence, that Petitioner's theory would need to be modified by presenting figure 9 twice. And the reason for the second time to present figure 9 is so that the user can manually enter activity data. But Your Honors, this doesn't make any sense. Again, for ground 3 and the device pathways, there's no

manual entry of activity data, so Patent Owner is really just trying to set up a straw man so that the modification falls outside of its construction of record.

Unless Your Honors have any questions about *Sutton* and independent claim 11, I wanted to turn to claim 12. Turning to slide 37. Before looking at the language of claim 12, I wanted to preview one of *Sutton*'s features, which is to generate an invitation using figure 10 of *Sutton*. And then turning to slide 38, this provides *Sutton* figure 5, which shows in the bottom red box a summary of the metrics from the group event. And then the top red box includes tagging identifiers of users who participated in the group event.

Now, if you could turn to slide 39, this shows the language of claim 12, specifically requiring tagging a summary of the one or more metrics with identifiers of one or more other users. And for *Sutton* and claim 12, Patent Owner makes two arguments. The first one relates to the meaning of the word "user" highlighted in yellow, and then the second one I'll discuss in a bit relates to whether the two figures, figures 5 and 10, are distinct embodiments.

Now turning to slide 40. In the context of claim twelve's, tagging, the '220 describes a patent or sorry describes a user broadly as an individual. And this is discussed in column 39, the paragraph that encompasses lines 51 to 58, talking about a user as being an individual, such as friends, individuals who are participating in the same athletic activities, such as running a route, or individuals that have a relationship with the primary user. And Your Honors, you should reject Patent Owner's suggestion to narrow the meaning of a user to a person that is registered with a service. Because first, this is a

new argument that was raised for the first time on sur-reply. And also, this would depart from the ordinary and customary meaning of user.

JUDGE WEATHERLY: So, it is true, though, that on *Sutton*'s figure 5 in that box 504, where it lists Stacy, Dirk, I can't read the third name. And Jeff, they appear to be names of people, but they may or may not be registered users with the system, right?

MS. NGUYEN: Well, as far as --

JUDGE WEATHERLY: And --

MS. NGUYEN: -- we believe they are registered with the system. So, *Sutton* does disclose the users being members of a service. And you can see that in paragraph 79 of *Sutton*.

JUDGE WEATHERLY: 79? Okay.

MS. NGUYEN: And more specifically, the users are registered with the service because *Sutton* disclosed rewarding users for participating in the athletic activity.

JUDGE WEATHERLY: So, your contention is that 504 does actually show tagging registered, other registered users?

MS. NGUYEN: Yes.

JUDGE WEATHERLY: Figure 5 at box 504.

MS. NGUYEN: That's correct. We believe user has a meaning that more broadly means an individual. But to the extent that Your Honors find that user must be one that's registered with a service, *Sutton* discloses.

JUDGE WEATHERLY: Well, I mean, the portion of the specification that you have here on slide 40 talks about two different people, a user and a friend. Okay. Username associated with the friend. All right. The devil will be in the details on this one.

MS. NGUYEN: Understood, understood. Okay, if I may turn to slide 42. So, Patent Owner's final argument for *Sutton* and claim 12 is that figures 5 and 10 must be distinct embodiments. And Patent Owner argues it's because they concern different activities. But, Your Honors, we do not agree. First, *Sutton* applies its invention to a variety of user activities, including biking, running, walking and swimming. And this is listed in the table of figure 7 of *Sutton*. Additionally, both figures are described as being applied to the same activity. Figure 5 on the right of the slide shows a trace map for biking as the user activity. And then paragraph 84, describing figure 10, states that figure 10 is applicable to riding, shown as in blue. And as *Sutton* describes in paragraph 87, riding is another term used for biking. Thus, figures 5 and 10 do not concern different activities and thus are not distinct embodiments. And --

JUDGE WEATHERLY: Your position is that they are examples of interfaces for distinct events, instances of exercise activity that may differ, but the interface itself is generally applicable to all different kinds of activities.

MS. NGUYEN: That's correct, Your Honor.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: Figure 10 is an invitation, oh sorry, that is sent before an event involving a user activity. And figure 5 is the summary post event of the user activity.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: And Your Honors, I just wanted to point out Patent Owner's argument regarding figures 5 and 10 being distinct embodiment

would not apply to ground three. Because, again, ground three is an obviousness argument.

JUDGE WEATHERLY: It's not quite that simple, but I understand, I think, the point you're trying to make.

MS. NGUYEN: Okay, so in the interest of time, just wanted to cover one additional point.

JUDGE WEATHERLY: Are we going to discuss *Johnson*?

MS. NGUYEN: Yes. Unless Your Honors have any questions about *Plus 3*, I'm happy to move on to *Johnson*.

JUDGE WEATHERLY: I don't have any questions about *Plus 3*. If you go over the time, I mean, there's still 30 minutes. You're free to use some of the rebuttal time in the opening.

MS. NGUYEN: Okay, okay.

JUDGE WEATHERLY: In the opening presentation. And I want to caution you that you can't address things for the first time in the rebuttal session.

MS. NGUYEN: Understood.

JUDGE WEATHERLY: So, don't use your reserve time to address something for the first time. If there's something you want to address, you need to address it in this portion.

MS. NGUYEN: Okay. Thank you, Your Honor, having heard that, perhaps I could quickly touch upon claim 14 and *Plus 3*, which is shown here on slide 54. The only argument with respect to claim 14 and *Plus 3* that Patent Owner makes is not whether *Plus 3* teaches the two steps recited. So, in other words, the receive and transmit steps shown in blue. But Patent Owner disputes whether petition showed that it is an apparatus that performs

the two steps. But if we could turn to slide 55, Your Honors, as we cited in paper 2, page 72, Dr. Houh provided -- and Dr. Houh is Petitioner's expert, provided an explanation. In paragraph 130 of his declaration, he states, the user could then select delete using that device; the device would transmit the delete request. So, this means that --

JUDGE WEATHERLY: So, selecting delete is receiving a request and transmitting delete is transmitting a modification request?

MS. NGUYEN: That's correct.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: And it is the device that is performing these steps.

JUDGE WEATHERLY: The device is presenting an interface that allows the user to initiate those things. I understand. Okay. Thank you.

MS. NGUYEN: Okay, so, if we may turn to *Johnson* and Slide 57. So, *Johnson* discloses a device used to measure and record athletic activity data. Like the '220 Patent, *Johnson* discloses motivating the user and describes multiple features for doing so. Turning to Slide 58, one of the features that *Johnson* discloses for motivating the user is sharing data with other users. And this is discussed throughout *Johnson*, but one example is paragraph 135 and also the interface shown in figure 43.

Turning to slide 59, *Johnson* is another patent owned by Patent Owner Nike. It has identical disclosures for its devices 201, 501, and 601. Device 601 is the device that stores athletic activity data in storage shown in green. And just for slide 60, we provided a side by side comparison in the figures shown in the box and also provided the passages in the '220 that are identical to the passages in *Johnson*.

So, turning to slide 61, *Johnson* discloses several sharing option selections, but there are four that are particularly relevant for this proceeding. I'll provide a brief overview of each one of them, starting with slide 62. This shows *Johnson*'s leaderboard. And *Johnson*'s leaderboard is a social networking site that displays athletic activity data shared amongst the users who have agreed to share. As *Johnson* describes in paragraph 131, it's an interactive comparison of a user's athletic data with other users. This means that the user Rauchholz shown in green, is sharing workout information with other users of the leaderboard, such as the 10 users shown in the purple box, and vice versa.

Now if we could turn to slide 63. This shows figure 21 of *Johnson*. It's an interface presented to the user when the user has recorded running 500 miles. And this system allows the user to brag to their friends about their achievement by clicking on the red brag to friends button shown in red. Slide 64, if you may turn to it, it provides figure 43 of *Johnson*. It's an interface that's presented to the user after completing a workout. There are two sharing option selections there. One is the share this run button shown in red. And there's also the blog promotion button shown in blue, which if you turn to slide 65 when the user clicks on it, leads to transmitting the workout information to the blog shown in figure 29.

So, if we could turn to slide 66 Patent Owner disputes two elements for claim 11 and *Johnson*. The first is element 11[C], and the only dispute there between the parties is whether *Johnson* teaches record. And as we discussed, record, it means save. And turning to slide 67. Mirroring the '220 Patent, *Johnson*'s device 601 records athletic activity data and this is discussed in paragraph 88 of *Johnson*, which is identical to column 17, lines

44 to 58 of the '220 Patent. So, to the extent that the '220 Patent discloses record, *Johnson* must also.

Turning to slide 68. The last element that Patent Owner disputes is element 11[E], and that's specifically with respect to the two highlighted recitations in response to receiving the sharing option selection and the social networking site being viewable by one or more other users. So, then if we could quickly turn to slide 69 as I discussed, there are four sharing option selections. Your Honors, if you're convinced that any one of these sharing option selections meets element 11[E], then you should also find that *Johnson* teaches claim 11.

Turning to the first sharing option selection, the leaderboard and slide 70, paragraph 135 of *Johnson* explains that participating users are those who agree to have their data shared with other users. So, Patent Owner's argument here is that this agreement in advance is not a sharing option selection. But as my colleague discussed earlier, sharing option selection in the '220 includes automatic sharing and this is one form of automatic sharing. Now if we could turn to slide 71, Patent Owner's other argument for the leaderboard social networking site is that it is not viewable by one or more other users. Specifically Patent Owner argues that Rauchholz, the user in green, is not sharing information with other users, but Your Honors, paragraphs 134 and 135 of *Johnson* show otherwise. As stated at the bottom of the passage shown on the slide, Rauchholz having a ranking of 2932 relative to other participating users means Rauchholz is a participating user. And since Rauchholz is a participating user, as described at the top of the passage, that means he's agreeing to have his data shared with other users, thereby sharing data with other users.

JUDGE WEATHERLY: So, if another user who happened to be ranked 2931 on the leaderboard called up this screen, they would see Rauchholz's data at 2932, ranked 2932.

MS. NGUYEN: Yeah, Your Honors, if this other user 2931 selects an option in the interface that allows the user to see --

JUDGE WEATHERLY: Show where I am on the leaderboard.

MS. NGUYEN: Yes.

JUDGE WEATHERLY: He would see his own data and Rauchholz's data.

MS. NGUYEN: That's correct. This is --

JUDGE WEATHERLY: As is sort of shown by the way, this *Johnson*'s figure 14A, although just shows the top 10 and Rauchholz, so. Okay.

MS. NGUYEN: Yes. And *Johnson* does talk about, and this is around the paragraphs 134 and 135 about how the user is allowed to select different viewing options. So, for example, 1411, 1413, 1415 those are some of those buttons, sorry, in the figure, those are some of the many options that allow changing the display to the user.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: But nevertheless, the claim is related to transmitting workout information to the social networking site. It's not limited to displaying.

Turning to slide 72. I wanted to briefly talk about brag to friends and share this run. Patent Owner collectively argues the two together, arguing that petition did not adequately show that they are sharing option selections. If we could turn to slide 73, Patent Owner, having nothing else to say about

these sharing option selections says that the petition does not provide an adequate showing. However, Your Honors, we respectfully disagree. Page 30 and 20 -- sorry, page 29 and 30 of the petition talks about the four sharing options in element 11[D] and the second sharing option selection is brag to friends. The third sharing option selection is share this run. And then when discussing element 11[E] at page 33 of the petition, the petition refers to all four sharing option selections.

And Your Honors, Patent Owner clearly understood that brag to friends and share this run were sharing option selections because for example, if you look at page 25 of the POR paper 17, Patent Owner spells out the same four sharing option selections. The second one is brag to friends. The third one is share this run. And that's exactly how the petition identified it. So, it's a bit of a mystery how Patent Owner can say that the petition did not show that these were sharing option selections when they knew all along what they were.

Now turning to slide 74, Patent Owners other argument is that the petition did not adequately show that the sharing option selections lead to social networking site. And if I just may, refer Your Honors to page 33 of the petition which talks about the information reaching a user's social networking page that the device has transmitted to. Additionally, as shown on slide 75, we provided an explanation. Dr. Houh, Petitioner's expert, explains that when you click on the buttons, the device transmits the data to the social networking site. We cited this in our reply page 22, sorry, page 18, paper 22, but Patent Owners did not argue against that.

With respect to blog promotion, if we could turn to slide 76. The only argument Patent Owner makes is that figures 43 and 29 are distinct

embodiments. But this is described in pages 70, sorry, pages 37 and 38, where clicking on the blog promotion button leads to transmitting workout information to figure 29. And that makes sense. Figure 43's blog promotion is for promoting a blog. Figure 29 is a blog. And in slide 78 we provide not only the connection, but we provide the paragraphs that *Johnson* himself provides the connection. So, in paragraph 167 discussing figure 29, the blog provides that *Johnson* states that any athletic information described herein. And then in figure 43 and paragraph 183, *Johnson* discusses the completed workout. And Dr. Houh explained in paragraph 42 of his reply declaration that any information, athletic information, described herein refers to completed workout.

Lastly, I wanted to turn to claim 12 and *Johnson*. As I explained earlier, claim 12 is directed to tagging and the plain language of the claim shows that the claim requires that the tagging be of a summary that is of one or more metrics from the recorded athletic activity data. But instead, Patent Owner argues at page 16 of its sur-reply that the claim language requires tagging a summary of the recorded athletic activity. In other words, Patent Owners suggesting we strike out one or more metrics from the language of claim 12. And Your Honors, you should reject this because it's improper.

And then just briefly --

JUDGE WEATHERLY: You continue argument in the sur-reply?

MS. NGUYEN: That's correct.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: Lastly, just to give you a brief overview of *Johnson* and how *Johnson* teaches tagging a summary with identifiers, this is shown in slide 81. *Johnson* discloses a 500 Mile Club that a user becomes a

member of after running a total distance of 500 miles. This is shown in figure 23. The five users highlighted in green are members of this 500 Mile Club, and we've enlarged the identifier D-A-D-W-A-G shown on the left. And as you can see, the number 500 shown at the top left of each of the green boxes shows that the 500 Mile Club is tagged with identifiers of the user.

So, if Your Honors have no other questions, this completes my presentation.

JUDGE WEATHERLY: I don't have any questions. Colleagues?

JUDGE BELISLE: None.

JUDGE WEATHERLY: Okay.

JUDGE DEFRANCO: No.

JUDGE WEATHERLY: So, we have you having gone 11-1/2 minutes. I'll call it 11 minutes into the 30-minute rebuttal time, which leaves 19 minutes.

MS. NGUYEN: Thank you, Your Honor.

JUDGE WEATHERLY: Patent Owner, you can come to the podium whenever you're ready. Thank you. How much time would you like to reserve for rebuttal?

MR. HARRIS: Let's do 10 minutes.

JUDGE WEATHERLY: Ten minutes.

MR. HARRIS: Thank you.

JUDGE WEATHERLY: So, we've got 50 minutes in your opening.

MR. HARRIS: Okay.

JUDGE WEATHERLY: And you can begin whenever you're ready.

MR. HARRIS: All right, give me one second to get set up. Thank you, Your Honor.

JUDGE WEATHERLY: I'll start the timer after you begin.

MR. HARRIS: Okay, I'm ready, Your Honor.

JUDGE WEATHERLY: Okay.

MR. HARRIS: Thank you. May it please the Board. Again, my name is Michael Harris, and I'm presenting on behalf of the Patent Owner. And just to give you a roadmap of what I would like to do with my time, I want to address three topics. First, I'm going to address claim 14. Second, I'm going to address claim 20. And then third, I'm going to address this dispute around the construction of record and what the impact of that construction is on the remainder of the claims. The reason I want to start with claims 14 and 20 is because regardless of the claim construction dispute, regardless of how you decide record, and we'll talk a lot about record and why I think our construction is right and why the intrinsic record supports that. But regardless of the construction that you adopt for record, Lululemon has failed to show that claims 14 and 20 are unpatentable.

So, let's start with claim 14 on the Lulu slide 54 that they showed you, as we know, claim 14 is dependent on claim 11. And claim 14 adds that the apparatus or device of claim 11 has two additional features or requirements. One, it receives a request to deactivate sharing. And two, it transmits a modification request to the social networking site. So, this apparatus does everything in claim 11. It records, it receives a selection, it transmits workout information, and it also receives a deactivation request, and it transmits a modification request. The apparatus has to do all of that.

JUDGE WEATHERLY: I'm sorry, what you have on the display, which slide is this?

MR. HARRIS: Oh, this is Lulu's slide 54.

JUDGE WEATHERLY: Okay.

MR. HARRIS: I want to respond to the arguments that they made and presented to you --

JUDGE WEATHERLY: Okay.

MR. HARRIS: -- with respect to 14.

JUDGE WEATHERLY: Okay.

MR. HARRIS: Okay. So, what is the unpatentability ground that Lulu has argued for claim 14? This is Lulu slide 26 that they presented to you. It comes from their petition at page 34. The only unpatentability ground for claim 14 is ground four. Obviousness. Combination of *Sutton* and the *Plus 3* website pages. That's it. No anticipation arguments, only obviousness. And as this Court knows, to prevail on an obviousness argument, Lulu has to prove obviousness with particularity. It can't make just conclusory statements. Conclusory statements aren't enough. The burden is on Lululemon to prove with particularity that a skilled artisan would have combined *Sutton* and *Plus 3* in a way that renders claim 14 obvious.

And that's important because let's look at Lulu's petition for claim 14. It's really thin. The only arguments that Lulu makes for claim 14, the obviousness of claim 14, it's less than a page. It spans pages 71 and 72 in the petition. This is it. This is the totality of their argument for claim 14.

They start by the first paragraph. This is on page 71 of the petition. They identify three portions of the *Plus 3* website pages and *Sutton* that they

contend a skilled artisan would combine to achieve claim 14. What are the three excerpts or portions of the prior art that a skilled artisan would allegedly combine? Well, it's *Plus 3*'s disclosure of a user having the ability to set an activity to public or private. That's at *Plus 3*, page 12. *Plus 3* is Exhibit 1006. Second, they say skilled artisan would combine *Plus 3*'s disclosure that users can remove their user content from the site at any time. And then third, a skilled artisan would allegedly combine with all of that *Sutton*'s disclosure that a user can edit data if a correction is required. That's *Sutton* at paragraph 63.

Okay, so what do we know so far? Lulu says there are three portions of these two prior art references that a user would combine together to get claim 14. Okay. How and why would a user do that? Lulu's entire argument in the petition is two sentences. Bear with me for a second. Okay. Lulu's entire argument is two sentences in the petitions. The first sentence is on the bottom of page 71. The second sentence is on the top of page 72.

First sentence. It would have been obvious to configure the same apparatus that received a user's sharing option selection to also receive a request to deactivate sharing. Well, that just parrots the claim language. That parrots the first additional limitation of claim 14. Receive a request to deactivate sharing of the workout information. Second sentence, it further would have been obvious to configure the apparatus to then transmit the request to the *Plus 3* network website so that the website could remove the data. Another conclusory sentence. Two conclusory sentences. If those aren't conclusory sentences, I don't know what would be.

Now Lulu will say, yeah, but we cited our experts declaration, so there's more. They cited the expert's declaration at paragraphs 129 and 130.

Let's take a look at that. It doesn't add anything more. It's not any better. Paragraph 129 of the experts declaration, it merely cites the three portions of *Sutton* and the *Plus 3* website pages that Lulu contends a skilled artisan would combine. So, nothing new there.

Paragraph 130 of the expert's declaration. This is an Exhibit 1003, by the way. Paragraph 30, what's the expert say? It would have been trivial for a POSITA to implement this modification. Not really clear what modification he was talking about, but it would have apparently been trivial. That's a conclusory sentence. He goes on to say, well, let me give you an example. A POSITA could have modified the stored webpage template for user profile pages to include a quote delete button underneath activities. End sentence, no record site, nothing. No support. A conclusory sentence.

He then goes on to say, it would have been obvious to allow a user to view the webpage of the same device through which the user uploaded their data in the first place. What device is he talking about? We don't know. No record citations, no explanation. There are lots of devices in *Sutton*. We've heard Lulu talk about it today. There is a mobile device. There's the server that's labeled 111. What's he talking about here? We don't know. It was Lulu's job to prove with particularity why a skilled artisan would have combined and how they would have combined these references. Conclusory sentences, conclusory statements are not enough, and that's all that Lulu provided.

Can we speculate? What's he talking about here? What device is he talking about? Well, elsewhere in his declaration, in other parts of his declaration, which is, again, Exhibit 103 or 1003, Dr. Houh talks about webserver 111, uploading data. Well, if that's what he was talking about

here, and again, we don't know what he was talking about. There's no record citations, no support. But if that's what he's talking about here, it doesn't make a whole lot of sense, does it? Because if that's what he's talking about, this webserver is the device that the user would somehow use to select, delete, and then the webserver would transmit data to itself, which doesn't make any sense.

But the point is, this is a conclusory statement. No record citations, no support. Lululemon needed to do more, and it didn't. So, regardless of claim construction, Lululemon has not satisfied its burden of proving claim 14 unpatentable. Okay, moving on.

Let's move on to claim 20. Again, this is another claim that regardless of claim construction, Lulu has failed to satisfy its burden. I apologize, my computer is not cooperating, Your Honors. Okay, so what are Lulu's unpatentability grounds for claim 20? Well, on page 24 of the petition, where they have their table identifying the grounds, they allege that claim 20 is subject to three grounds 2, 3, and 4. In the body of the petition for ground 4, which is pages 67 to 72 of the petition, Lululemon does not address claim 20 at all. There are no arguments. Lulu provides no arguments for ground 4 with respect to claim 20. So, for claim 20, the only grounds are really grounds 2 and 3, which is anticipation by *Sutton* and obviousness by *Sutton*. And for ground 3, Lulu doesn't really add any arguments that it already made for ground 2. So, this all really collapses into ground 2 with respect to claim 20 and whether *Sutton* anticipates claim 20.

Okay, we'll go without the slide. Since the computer is not working.

JUDGE WEATHERLY: I can pause the time if you want to try to get it.

MR. HARRIS: Do you mind?

JUDGE WEATHERLY: I don't mind.

MR. HARRIS: Yeah. Thank you. Let me try to restart it here.

JUDGE WEATHERLY: I would prefer that you have access to the material that you want to use.

MR. HARRIS: Thank you, Your Honor. All right. No luck. Let's just, we can go without it. I'm ready when you are.

JUDGE WEATHERLY: All right.

MR. HARRIS: Okay. The next claim is claim 20. Claim 20 depends from claim 19, which depends from claim 11. And claim 20, this is Exhibit 1001, the '220 Patent, in column 68. Claim 20 adds transmitting the workout information, including modifying the social network message. So, claim 20, which depends on claim 19, references the social network message. So, what is that social network message that's referenced in claim 20? Well, we have to look to claim 19. Right?

Claim 19 says that the apparatus generates a social network message on the network page. So, the social network message in claim 20 is referencing, or is referring to this message that's on a network page. That's not data that's going to be sent to a network. It's not a message that will be sent in the future. It's a message on a network page.

What does Lululemon allege anticipates claim 20? In its petition, on pages 56 and 57, Lulu points to figure 3 of *Sutton*. In figure 3, they point to what they call the manual transfer pathway in figure 3. And in figure 3, they point to box 304, which is where a user can edit activity data that has been entered. What happens after box 304? Next step, the user saves the data at 305. And then we keep going down the flowchart, and we get to 307. And

Lulu says, well, that's where the data is sent to a network site. That's where the message is posted to the social networking site. That happens after the activity data is edited.

So, under a proper reading of claim 20, which provides that you're modifying a social network message that's on the site. *Sutton* does not teach that. Rather, *Sutton* teaches editing activity data before it ever gets to the social networking site. Okay. So, that's claims 14 and 20.

Now, I'm going to move on to the construction of record. And if you could bear with me, Your Honor, can I try one more time to get this to work, my laptop?

JUDGE WEATHERLY: Sure.

MR. HARRIS: Thank you. The laptop's restarting, Your Honor. Thank you.

JUDGE WEATHERLY: No problem.

MR. HARRIS: Thank you, Your Honor.

JUDGE WEATHERLY: Sure.

MR. HARRIS: Okay.

JUDGE DEFRANCO: Mr. Harris?

MR. HARRIS: Yes.

JUDGE DEFRANCO: This is Judge DeFranco.

MR. HARRIS: Yes.

JUDGE DEFRANCO: Can you hear me, okay?

MR. HARRIS: I can, thank you.

JUDGE WEATHERLY: You're actually quite loud, and you startled me.

JUDGE DEFRANCO: Sorry about that.

JUDGE WEATHERLY: It's all right.

JUDGE DEFRANCO: Let me turn down there. Is this a little bit more palatable?

JUDGE WEATHERLY: That's better.

JUDGE DEFRANCO: Didn't mean to wake anybody. Mr. Harris, I want to go back to claim 20 for a moment. You have it in front of you?

MR. HARRIS: I do.

JUDGE WEATHERLY: You can mention the slide that you're on.

JUDGE DEFRANCO: Claim 20 says wherein transmitting workout information includes modifying the social network message. So, the modification in that claim, it appears to me it can happen as part of the transmission, as part of the transmitted message. It doesn't necessarily have to be after the message has been transmitted. And it seems like Petitioner is relying on the fact that they have edited, or I guess, is it *Sutton*? Yes, *Sutton* has edited that message and then sent it. So, I understand, you know, when you have that diagram in front of you, that the edited message occurred after the transmission or, no, the edited message occurred before the transmission in step 307. However, it doesn't seem like the claim excludes that from happening, in my opinion, the way it's written. It says, transmitting the work information includes modifying or editing.

MR. HARRIS: Yeah. Thank you, Your Honor. And I'm on the screen right now. Slide 49 of Lulu's demonstratives, where they show claims 19 and 20. And Your Honor, we would disagree with your reading of claim 20. Claim 20 refers to the social network message in 19. And claim 19 provides that the social network message is on a network page. It's on the

page. It's on the social networking site's page. What's being modified in claim 20 --

JUDGE WEATHERLY: I'm going to stop you right there. Claim 19 says the apparatus is caused to generate a social network message on the network page. That doesn't necessarily mean that the message is on the page yet. It's generating a message for the page. And in a sense, I think what we're trying to tease out is whether the claims -- you're implying that the claims, the set of claims, all the limitations that appear first in element 11[E], and then in claim 19, and then in claim 20, that there is an implied order, temporal limitation, so to speak. I realize that these claims are not written as method claims with steps, but they're sort of an adaptation, an apparatus that's programmed to cause certain things to happen.

So, first of all, I don't know if you've thought of it like that. That what you're arguing for is temporal limitations and the steps, the order of steps that are caused on the apparatus. I mean, the claim is a software, I'm going to paraphrase, software stored on a medium that, when executed, causes the apparatus to and then essentially perform steps. First of all, do you agree with me, or am I understanding your argument correctly, that what you're arguing for is sort of a temporal limitation? Or --

MR. HARRIS: Well, no --

JUDGE WEATHERLY: -- am I off track there?

MR. HARRIS: -- not in the context of all three claims. I think in the context of --

JUDGE WEATHERLY: It’s not all three claims, see.

MR. HARRIS: Okay.

JUDGE WEATHERLY: Don't think of it as all three claims. This is a claim.

MR. HARRIS: Okay.

JUDGE WEATHERLY: And the claim includes limitations in connection with the network page, with activity. Well, so, 11[E] says transmitting workout information associated with the recorded athletic activity to a network page of a social networking site. Claim 19, 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. And 20 is wherein transmitting the workout information includes modifying the social network message based on a received user edit. So, the concept of a message, social network message is introduced in claim 19. But claim 20 is not a new claim. It subsumes claim 19.

MR. HARRIS: Agreed. Agreed. And that's our position, Your Honor.

JUDGE WEATHERLY: Yeah.

MR. HARRIS: And claim 20 is referencing this social network message that 19 says is on the page. And Your Honor, your language --

JUDGE WEATHERLY: I don't know that 19 says that it's on the page yet, just yet. I think what Judge DeFranco is asking, and frankly, I think, at first blush, I agree with him, that the way Petitioner has argued this is that *Sutton* describes a mechanism for a user to intervene in a social networking message and edit it before it's posted. And they'll get to it. I'm sure that in their reply, they'll correct me if I'm wrong, and you can correct me.

MR. HARRIS: I would like to.

JUDGE WEATHERLY: Absolutely.

MR. HARRIS: Yeah.

JUDGE WEATHERLY: Go ahead.

MR. HARRIS: So, *Sutton* discloses editing data, not the message that's ultimately posted to the social networking site. *Sutton* discloses entering data, editing that data, saving it, and then later posting information, some type of a message, which presumably will include some or all that data to a networking site. And, Your Honor, you used some language earlier when you were reading claim 19. You said, oh, well, I think claim 19 is generating a social network message for a network page. But that's not what claim 19 says. It generates a message on the network page. That's what's happening in claim 19. And then when you get to claim 20, which subsumes 19, you're modifying that social network message, which is on a network page. *Sutton* discloses something very different.

JUDGE WEATHERLY: So, this is the temporal limitation that I'm talking about.

MR. HARRIS: Yes. Yes.

JUDGE WEATHERLY: Okay.

MR. HARRIS: And *Sutton* discloses something very different. *Sutton* discloses entering activity data, editing that data, saving it to memory, and then later posting information. The data or a message to the social networking page, not modifying a social network message on the network page.

JUDGE DEFRANCO: Counsel, let me ask you, you admit that the data is on the message? Correct?

MR. HARRIS: In *Sutton*, what's ultimately published to the network page? Is that the question, Your Honor?

JUDGE DEFRANCO: Right, it is the data?

MR. HARRIS: Well, it may include the data. The message may be something more or different.

JUDGE DEFRANCO: Okay.

MR. HARRIS: Yeah.

JUDGE DEFRANCO: That's actually my question. So, the message includes the data? The message, conceivably, could just be the data? Right?

MR. HARRIS: Potentially.

JUDGE DEFRANCO: Right. Okay.

MR. HARRIS: But *Sutton* doesn't disclose or teach, modifying the message that's posted in. What's the box for *Sutton*? It's 307. *Sutton* does not teach or disclose. This is box 307 of figure 3 of *Sutton*. *Sutton* does not disclose, modifying what's posted to the network page at 307.

JUDGE DEFRANCO: Mr. Harris, I don't necessarily disagree with you, as far as that diagram, figure 3 goes. He does seem to indicate that the message that's going to be posted is edited before it's posted. So, I don't disagree with you on that. Maybe Petitioner has a different argument. But my trouble is the claim language. I don't think it excludes figure 3, the scenario that's depicted in figure 3. Because I don't think it does put a temporal limitation on it. Just at first blush, the way I'm looking at it here. Now, I may change my mind, or Judge Weatherly and Judge Belisle might change my mind, too. But just right now, I don't see transmitting the information or transmitting the message, a modified message is when it occurs.

MR. HARRIS: Fair enough, Your Honor.

JUDGE DEFRANCO: Before or after the transmission of posting up a message.

JUDGE WEATHERLY: Well, and I'd like to sort of expand on that concept. And it's why I was reading from claim 11 also, at the beginning of my sort of dialogue. Claim 20 talks about wherein transmitting the workout information. That refers to the transmitting workout information that's recited in step 11, not step, limitation 11[E]. So, that's why I'm -- to see how it's -- if anything, temporarily, claim 20 seems to be tying its action back to the original transmission of information from element 11[E], not reciting a modification of a message that's already been posted, that was posted, through action that's recited in claim 19. Claim 19 is a narrower, appears to recite a kind of narrower way of, or a more specific type of information that's being transmitted to the social media site. But claim 20 refers back to the act of transmitting that information from the beginning. It seems.

I mean, I -- so, the reason I like hearings to be in person is because we need to have conversations like this. I'm not convinced one way or the other. You're raising some very good points about claims 19 and 20, and they bear very close scrutiny. And you can tell that I'm struggling a little bit with them. I'm not convinced one way or the other at this point either. So, help -- play with me a little bit on this notion of transmitting the workout information. That phrase that's recited in claim 20. And what significance, if any, that has.

MR. HARRIS: Very good. Your Honor.

JUDGE DEFRANCO: And Mr. Harris. Mr. Harris, just to follow on what Judge Weatherly said, because I think it's very good point. I think that

claim 19 is really talking about an additional step in the process, an additional limitation to the apparatus, claim 11. Whereas claim 20 appears to just be more modifying, a further modification of element 11[E]. So, I tend to agree with Judge Weatherly in that aspect. I think it's a very good point made. So, yeah, continue. Go ahead and respond.

MR. HARRIS: Okay. And I think there are several points and questions in there, so I'll do my best to capture all of it. I think Judge Weatherly, you're right earlier when you said, this is just one claim. It's one, 19 and 20 all combined.

JUDGE WEATHERLY: Right.

MR. HARRIS: Right? So, I don't think it's correct to look at as. Okay, well, 19 is something different that we can't think about or look at with respect to 20. It's all one claim. And what's happening? Agreeing with you, claim 20 talks about transmitting the workout information. Transmitting that workout information includes -- so, if we go back to claim 1. Claim 1 is transmitting workout information, right. Claim 1 doesn't say anything about --

JUDGE WEATHERLY: You mean claim 11?

MR. HARRIS: I'm sorry. Claim 11 doesn't say anything about posting a social networking message. Right? So, in claim 1, workout information is being transferred -- I'm sorry. Claim 11, workout information is being transferred to a site. In claim 19, a message is posted to the site. In fact, the claim language is very clear. It's generated on the page. That's where it is. The message is on the page. It doesn't say for. It doesn't say that it's generated for a page or generated and sent to a page. It's a network, a social network message, quote, on the network page. It's there. Claim 20.

JUDGE DEFRANCO: Yes, but Mr. Harris. Mr. Harris, my point is, claim 19 actually comes after element 11[E]. So, you see the period at the end of element [E]. Then you put in, wherein the apparatus further caused to generate a social network page. Whereas claim 20 appears to be part of element 11[E]. And so, it would occur before generating a social network page. That's my point.

MR. HARRIS: Well, not necessarily. A lot of workout information can be transferred from this apparatus to the site. Under your scenario, Your Honor, I think you're limiting these claims to only one piece of workout information. And that piece of workout information has to create the message, and then it has to be amended. But that's not what the claim says. There can be multiple pieces of workout information that are transferred. Some of it might create a social network message. Some might do something else. But by the time -- in claim 20, the plain and ordinary language, the plain and ordinary reading is referring to the social network message that's in 19. And that message is on a network page.

JUDGE DEFRANCO: Yes, but Mr. Harris, you have to look first where it says, wherein transmitting. And element 11[E] says, transmitting workout information. And then right after that element would come wherein transmitting the workout information includes modifying the message, the social network message that is part of element 11[E]. And then after that, claim 19 says, wherein the apparatus. So, it's adding a step to the apparatus at the very end of the claim.

MR. HARRIS: Your Honor, respectfully, that's not what the claim language says.

JUDGE WEATHERLY: Well, here's where I'm struggling. Trying to put my finger on exactly where I'm struggling. Claim 19, when it introduces this concept of generating the social network message, and then claim 20, switching back to transmitting workout information, which is what's introduced in claim element 11[E], I'm struggling with to what extent is a social network message. It says a social network message on the network page based on a location at which the athletic activity was performed by the user. Okay. Element 11[E] talks about transmitting workout information associated with the recorded activity. Initially, it appears that what claim 19 is trying to do is narrow the information to information that includes the location at which the athletic activity occurred or was performed. But the claim 19 is switching from this notion of transmitting information related, associated with recorded athletic activity to generating a message.

So, it reads almost like, instead of a -- I mean, often when I read claims, I think of them in terms of like, some dependent claims introduce what I refer to as a new element, others introduce what I refer to as a limitation on an existing element. And claim 19, at first blush, reads like it's trying to introduce a new element, a new concept, a message, a network message that's different from the workout information that was transmitted already. But then when claim 20 comes in, it looks like the intent was to all along talk about the information that was being transmitted in element 11[E] and that a social network message is just kind of a specific type of workout information, the location.

In other words, this claim isn't written the way I would have written it. And the disconnect between social network message and information associated with recorded athletic activity is why I'm struggling. In

particular, because claim 20 seems to refer -- you want me to read claim 20 as it's modifying the message. But unfortunately, claim 20 talks about both the workout information and the message. And it says that the concept of transmitting the workout information includes modifying the message. So, do you see why I'm struggling?

MR. HARRIS: I do, but it seems to me like you're limiting these claims to just one transmission of workout information. But there could be multiple transmissions.

JUDGE WEATHERLY: I'm not limiting it that way. I'm trying to understand what the distinctions, if any, are between workout information associated with recorded activity, athletic activity, and a network message based on a location at which the athletic activity was performed. I mean, that seems to be another kind of information that's associated with the athletic activity.

MR. HARRIS: I think that's right. I mean, there are two different things. The network --

JUDGE WEATHERLY: They're not different things. One seems to be like a species of the other. I mean, network, the information, workout information is a broader concept than a message based on a location.

JUDGE BELISLE: Counsel, is there an example in the specification that these claims are directed to that we could look at, like, figures or a description?

MR. HARRIS: Yeah, it's a great question. I don't know the answer off the top of my head. I can look. But here's what I can say. The workout information is associated with the activity that was recorded, right? So,

there might be all this information that's associated with the recorded activity.

JUDGE WEATHERLY: And the location of the activity, we can agree, is information associated with the activity?

MR. HARRIS: Correct.

JUDGE WEATHERLY: Yeah.

MR. HARRIS: Yeah. In claim 19, a message is posted on, according to language, on a page that's based on that information, that workout information that's associated or linked to or based on a location.

JUDGE WEATHERLY: Yeah.

MR. HARRIS: Right? There might be all kinds of other information being sent or transferred or additional information being transferred. Claim 20, the literal reading of claim 20, Your Honor, it may not be the way that I would have drafted it or you would have drafted it, but the literal language of claim 20 says that you transmit workout information, includes that information that you're transmitting, includes modifying the message in 19.

JUDGE WEATHERLY: I understand. You understand where --

MR. HARRIS: I do.

JUDGE WEATHERLY: That what we're saying is does that mean, does that cover, not mean, does it include, does it encompass a device that allows a user to have input on the location? In other words, modify what the location information is before the message ever gets posted in the first instance. And I'm hopeful, by the way, rather than just going around and around about the specific language that's in this string of claims, I'm hopeful that your colleagues are looking in the specification for something that might

be of help. I mean, I've got all the time in the world to do that after the fact, but it would certainly be nice to have some help --

MR. HARRIS: Agreed.

JUDGE WEATHERLY: -- today, if that's possible.

MR. HARRIS: Agreed. So, let me, I've got about 11 minutes. Let me move on to the construction of record.

JUDGE WEATHERLY: Sure.

MR. HARRIS: Okay. So, as Petitioner Lulu showed you this slide. It's their slide 10. This captures the dispute. In your institution decision, you adopted a construction of record that includes the concept of writing the athletic information to memory. And we heard today Lulu say they agree with that. And all that's required for record is writing the information to memory.

JUDGE WEATHERLY: I don’t want this hearing to be about arguing about what we said in the DI. I would really much rather have, I mean, we invited you both to address the concept. What we said in the DI is not written in stone in any form or fashion. And we tried to signal that as clearly as possible to everyone.

MR. HARRIS: Understood. And my point only was that they agreed with your construction. And I want to talk about why the intrinsic record doesn't support that construction and suggest something different. So, in your institution decision, you referenced this dictionary definition of record. Some of these definitions do include the concept of, or do include the concept of writing data to memory, as you correctly pointed out and Lulu has said. But some of them encompass more, such as the definition 1C. To indicate or read. The thermometer recorded 90 degrees. That's something

more than writing. That's something more than writing data to memory. The thermometer measures or captures the temperature.

And in the context of the intrinsic record, the claims and the specification for the '220, we think it's clear that a skilled artisan would understand record to mean something more than just writing data to memory. So, let me go through it. And I want to start with the claim at issue, the independent claim at issue, which is claim 11. We didn't hear Lululemon Lemon talk about claim 11 in the context of this record dispute in their opening. But we think it's really important. It provides a lot of insight and context.

Okay, so what's happening in claim 11? And we know that we need to construe record in the context of this entire claim. What's happening? First, this apparatus is recording athletic activity performed by a user, right? So that's what we're calling 11[C]. And then in 11[D], the apparatus receives a selection to share that activity. But then what happens in [D], what'd the inventors say in [D]? In response to this selection to share the activity, the apparatus transmits workout information. That workout information, like we talked about in the context of claim 20, is the data that's saved to memory, that's stored in memory.

But put this in context of the entire claim in 11[C], the inventors didn't say that they were recording workout information associated with an athletic activity. If they only wanted to store workout information to memory, they could have said that. They could have said recording workout information, the data. Instead, they said recording athletic activity performed by a user. They're recording the activity. The activity doesn't get saved to memory.

It's workout information associated with the workout activity that gets saved to data.

Okay, so --

JUDGE BELISLE: Counsel.

MR. HARRIS: Yeah.

JUDGE BELISLE: Let's just go right to column 9 of the challenge patent.

MR. HARRIS: Okay.

JUDGE BELISLE: Lines 4 through 6 of column 9. And let me know when you have it.

MR. HARRIS: Okay. Column 9. I'm there.

JUDGE BELISLE: All right. So, first, at line 4 it says, for example, some aspects described herein allow a person to measure and record athletic information using a special purpose computing device. Why are we to define "record" to include measure when right here in the spec it uses them as separate terms?

MR. HARRIS: Yeah. And I think what the inventors were saying here in the spec is that you can measure and capture and then save. That accomplishes the invention. And let me show you some other examples that I think provide some insight onto what the inventors were saying here. Let's look at the '220 Patent at column 19, lines 59 to 66. This is where the inventors are describing the mobile device.

JUDGE WEATHERLY: Counsel, the slide number?

MR. HARRIS: I'm sorry. This is slide 17 of Nike's demonstratives. And this slide, slide 17 of Nike's demonstratives is the '220 Patent columns 19, 59 to 66, which is describing figure 7. And figure 7 is the mobile device

that's recording the athletic activity in this claimed invention. And what did the inventors say? They say, the inclusion of a GPS device and an accelerometer in the mobile device allows that device to record athletic data in multiple workout settings. If record was simply saving or storing information or data to memory, take a look at figure 7. What else do you see in figure 7? RAM. Memory. If the inventors intended record to mean simply storing data, they wouldn't have said that it's the GPS and the accelerometer, the sensors that capture, that measure the data. They specifically said that's what allows the device to record.

JUDGE BELISLE: Well, right, so let's take --

JUDGE DEFRANCO: Mr. Harris? Oh. Go ahead, Judge Belisle.

JUDGE BELISLE: So, what you just said, it's the GPS device, it's the accelerometer. That's doing the measuring. That's doing the capturing. It allows the device to record what was measured and captured. The device 700 or no, the single mobile device 700 allows device 700 to record. So, from what you just said, I'm still having difficulty separating the fact that there's sensors that are doing capturing, there's sensors that are doing measuring, heart rate monitoring, caloric usage, whatever, and then that gets recorded. So, that recording is the recording of what has been measured or captured, not that record itself must mean measure and capture. So, in your argument here, I mean, just help me figure out why I can blur together measure, capture, and record as all one sort of thing.

JUDGE WEATHERLY: And all being required for recording? And I will say that Petitioner --

JUDGE DEFRANCO: It's basically a precondition. A precondition to recording something is you have to generate something first to record.

JUDGE WEATHERLY: You have to sense something.

JUDGE DEFRANCO: Go ahead, Judge Weatherly.

JUDGE WEATHERLY: Whether you sense it with a sensor or you sense it with your own eyes, and you say, I ran 2 miles today, or sense it with your feet or whatever, probably a lot more than your eyes in your feet, especially if I ran 2 miles today. Petitioner focused on the top of claim 20 of your specification that explains that a GPS device is always measuring. But recording can be turned on and off in their presentation. And I know that most of your, in your presentation you've got a lot of different quotations from the spec, and they appear to be drawn from, I think it's page 17 of your response, but I'm not positive, there was a carryover from one page to another and a long string cite of citations to the spec. And those citations are for the most part reproduced in your slide deck, which I very much appreciate, by the way.

It's interesting to me that claim on your slide 17, you cite column 19, lines 59 to 66, and on the next slide, 18, you cite the next column 20, lines 31 to 36. But what you don't cite is intervening material from lines 2 through 6 that Petitioner did focus on in their presentation on slide 12. And that says that the GPS device 713, or recording of data therefrom, for example, GPS device is always active, but recording is turned on and off. So, the GPS device may be activated and used instead of a different sensor.

So, that very clearly to me illustrates that the people who wrote the specification separated the concepts of measuring something and recording something. And I don't see that record, frankly, I'm still not persuaded that we should interpret record to include these precursor steps, which essentially

would mean that it couldn't cover someone doing a manual entry. It may exclude other things, too.

MR. HARRIS: Yeah.

JUDGE WEATHERLY: So --

MR. HARRIS: Oh, sorry.

JUDGE WEATHERLY: So, why does the top of column 20 not be --

MR. HARRIS: So, in --

JUDGE WEATHERLY: Why is that not a winner for the Petitioner?

MR. HARRIS: I'll try to answer both of these questions.

JUDGE WEATHERLY: Sure.

MR. HARRIS: So, with respect to 7 and what you were struggling with, Judge Belisle, the claims require that the device, the device, do the recording. And this section of the spec on slides --

JUDGE WEATHERLY: No, it does not require that the device do the recording.

MR. HARRIS: The apparatus.

JUDGE WEATHERLY: I completely disagree with you on that. The claim is directed to a device that has software on it that, when executed, causes the apparatus to record athletic activity performed by a user. That in my view, is broad enough to include an apparatus that presents an interface to a user that allows them to enter text describing their activity. I ran a mile today. That is a form of recording athletic activity that is performed by the apparatus just giving you the option to enter that information. It doesn't say that the apparatus must measure athletic activity.

MR. HARRIS: Agreed. It says the apparatus must record.

JUDGE WEATHERLY: That's right.

MR. HARRIS: Right.

JUDGE WEATHERLY: And since your spec is all about apparatuses that can measure activity, and there are other ways to record athletic activity, you know, I don't see --

MR. HARRIS: The spec's all about a device like mobile device recording activity, which includes measuring and saving. And at the top of page 20, just to answer your question, I know I'm running out of time. On page 20. The context of that discussion on page 20 is, you know, sometimes a GPS sensor will be able to collect data, sometimes it won't.

JUDGE WEATHERLY: Sometimes it's triangulation --

MR. HARRIS: Sometimes it can't.

JUDGE WEATHERLY: Yeah.

MR. HARRIS: So, in those cases, it won't be recording. But the accelerometer, the other sensor, or whatever other sensor is on the device that enables or allows the device to record would be capturing and saving the data. Now, just one last quick point.

JUDGE WEATHERLY: Sure.

MR. HARRIS: The inventors described the purpose or motivation for this invention, and I think we agree with Lulu that the purpose is to motivate users to engage in athletic activity, exercise.

On slide 13, Nike's demonstrative slide 13, we have reproduced the background of the patent, which is column 1, 29 to 35 of the '220. And the inventors talk about how individuals will become discouraged or motivated -- or less motivated and the reasons for that. And I want to direct your attention to the portion of the fact that we've highlighted in green here. The inventors say users, individuals will become discouraged or not motivated

because they have to manually enter workout information. This supports Nike's construction. The device, the apparatus is capturing, it's measuring and then saving the data.

Okay, that's all I have for now. I'll reserve the rest of my time for rebuttal. Thank you.

JUDGE BELISLE: Thank you, Counsel.

JUDGE WEATHERLY: So, we have you --

JUDGE DEFRANCO: Mr. Harris, let me ask you one last question.

MR. HARRIS: Sure.

JUDGE DEFRANCO: If we don't adopt your construction, you lose on all but claims 20, 14 and 20?

MR. HARRIS: I want to make sure I understand it. If you do not adopt our construction --

JUDGE DEFRANCO: Of record.

MR. HARRIS: -- of record, yes, we still win on 14 and 20, but we don't win on the other claims. Correct?

JUDGE DEFRANCO: Correct. That’s the --

JUDGE WEATHERLY: I know that that's a super clean response, Judge DeFranco. And I know though that there's a dispute about element 11[E] that we haven't talked about. It's posed as a claim interpretation dispute, but.

MR. HARRIS: I think there are some, yeah, there are some claims or grounds. It gets pretty complicated --

JUDGE WEATHERLY: Yeah.

MR. HARRIS: -- with all the different grounds. Right.

JUDGE WEATHERLY: Yeah.

MR. HARRIS: So, if we're just talking about record and not the other issues, then I think that's right, but.

JUDGE WEATHERLY: Okay.

MR. HARRIS: Yeah.

JUDGE WEATHERLY: All right.

MR. HARRIS: Yeah.

JUDGE WEATHERLY: Okay. I have you having gone 3 minutes in, so.

MR. HARRIS: And thank you, again, for accommodating me --

JUDGE WEATHERLY: No problem.

MR. HARRIS: -- with the technical.

JUDGE WEATHERLY: So, that'll leave 7 minutes for the rebuttal. I'm only being a stickler for time, in part, because we got to squeeze in lunch in between these two sessions. So, Petitioner, we have 19 minutes remaining for your rebuttal session. You can begin whenever you're ready.

MS. NGUYEN: Thank you, Your Honor. Just wanted to discuss the points in the same order that Patent Owner discussed, and my colleague will discuss the record portion. So, specifically, turning to claim 14, we disagree with Patent Owner that the petition cited just two sentences for showing that claim 14 was obvious. Patent Owner never disputed that *Sutton*. It would have been obvious to combine *Sutton* with *Plus 3*.

JUDGE WEATHERLY: I mean, *Sutton* mentions the *Plus 3* network expressly, doesn't it?

MS. NGUYEN: Absolutely.

JUDGE WEATHERLY: Not a million times. But it does mention the network and the system being designed to post messages to that network.

MS. NGUYEN: Absolutely. And figure 9 of *Sutton* explicitly shows in the public sharing option selection that when you're sharing your activity data, it is shared on the *Plus 3* network community site.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: With respect to Patent Owner's argument regarding, and this is the first time we've heard of this, regarding Petitioner showing, I refer you to pages 7, 67 to 69 of the petition, which provides all of the reasons to combine. It's more than just two sentences, and additionally, the modification was trivial, as Dr. Houh explained in four paragraphs of his declaration, Exhibit 1003, paragraphs 126 to 130. And I know Patent Owner argued that it's unclear what device Dr. Houh was referring to. Patent Owner threw out this notion that perhaps the device was a webserver or system 110. However, Your Honors, we've been very clear that the device that interacts with a user to allow the user to select is that same device that has user interface 151. And that would be device 104, shown in purple in figure 1B, also shown on our slides.

So, let me stop there and see if you have any questions. Otherwise, I will discuss claim 20, briefly.

JUDGE WEATHERLY: I don't have any further questions about that. Before you get to claim 20, it does appear that ground 4, even though it's represented at the beginning of your presentation, is covering claim 20; that the body of ground 4 doesn't seem to reach claim 20. Is that correct?

MS. NGUYEN: That's correct.

JUDGE WEATHERLY: Okay.

MS. NGUYEN: If I may move on to claim 20.

JUDGE WEATHERLY: Sure.

MS. NGUYEN: We disagree with Patent Owner when Patent Owner argued that claim 20 collapses into ground 2. There is discretion in the petition for claim 20 for both grounds 2 and ground 3. And we've heard a lot of the questions and comments from both for all three, Your Honors, regarding claims 20 and claim 11 and claim 19. And we also agree that claim 20 narrows claim 11's transmitting step to include the modifying.

JUDGE WEATHERLY: Well, I don't know that it -- see, here's the problem, that it's circular and say that, first of all, to say that you agree with us that it modifies step 11[E] is a mischaracterization of what we're saying. Claim 20 appears to evoke aspects of element 11[E] and aspects of the language that's introduced in claim 19. And that's the problem. Ah. And if it's a serious enough problem for your proof to have failed, I guess the only solace you could take is that it would create a serious problem for them to prove infringement as well. I don’t know, I honestly don't know how we're going to unravel that knot at this point. And if you've got something interesting from the specification that you want to identify for us, that would be great. And if you want to just go play games and run around in the circle that is set out in element 11[E], and then the language of claim 19 and language of claim 20, we can do that for a while.

JUDGE BELISLE: Let me just ask a few specific questions about claim 11, 19 and 20. So, in claim 11, when it states transmitting workout information associated with the recorded athletic activity to a network page.

MS. NGUYEN: Mm-hmm?

JUDGE BELISLE: I assume you'd agree that we have our first transmission of workout information to a page of a social networking site. So, we have our first transmission, correct?

MS. NGUYEN: Agreed.

JUDGE BELISLE: And then in claim 19, it says, wherein the apparatus is further caused to generate a social network message. What is Petitioner's position as to whether, is that another message? Or is that somehow subsumed within that workout information that was originally transmitted in 11[E]? So, do we have two things going up to the social media page right now after claim 19?

MS. NGUYEN: Your Honors, it's our opinion that the claim language covers the possibility of either option.

JUDGE WEATHERLY: Meaning the social network message could be a type of workout information, or it could be a second message?

MS. NGUYEN: That's correct.

JUDGE WEATHERLY: Does that fit with your framework of the question, Judge Belisle?

JUDGE BELISLE: No.

JUDGE WEATHERLY: No. Okay.

JUDGE BELISLE: So, 11[E] has transmitting workout information. 19 has further cause to generate a social network message. So, what I'm trying to -- I have a difficulty accepting that that can be a single thing. I had a first transmission of workout information, and then I have something called a social network message being generated and put onto the network page. But that statement that further generation is occurring in the context of having already transmitted workout information. So, I guess my question really is, what is Petitioner's view? And it sounds like Petitioner's view is that between 11[E] and 19, you could still wind up with having only a single piece of information as opposed to two transmissions of information.

MS. NGUYEN: Right. Your Honor, we believe that the claim language, the plain reading of the claim language, is broad enough to include both possibilities.

JUDGE BELISLE: Okay.

JUDGE WEATHERLY: What are we to make then, of, since we're in this loop, of claim 20's recitation of wherein transmitting the workout information includes modifying the message?

MS. NGUYEN: Yes, Your Honors. So, in our position, it's important to, as Your Honors have pointed out, it's important to give weight to this recitation. The transmitting as including the modifying. And as we've laid out in our reply paper 22 at pages 26 to 27, 11[E]'s transmitting step would, as it states in claim 20, include the modifying. And this would be satisfied by *Sutton*.

JUDGE WEATHERLY: Okay, is there any. I know. We had asked Patent Owner to point us at something in the specification of the patent at issue, the '220 Patent that could help us with this, with untangling this. I don't know if you had any opportunity to look for something like that. If you did, now is the time to tell us about it.

MS. NGUYEN: If I may, I can look for that while my colleague is discussing record.

JUDGE WEATHERLY: If there's time remaining --

MS. NGUYEN: Understood.

JUDGE WEATHERLY: -- we'd love to hear from you.

JUDGE DEFRANCO: Counsel. Counsel, this is Judge DeFranco. So, my understanding of social networking is it's a back and forth exchange. And so, is there anything in the specification that you're aware of that would

preclude the message from going out with the data, with the activity data, being posted on the social networking site, and then the message coming back, and then the user further modifying that message. Seems like the claim covers that scenario as well. So, they're modifying a social network message as a response.

MS. NGUYEN: Your Honors, I'm not aware of anything in the specification that precludes that.

JUDGE DEFRANCO: Thank you.

MR. YAP: Your Honor, actually, we have no further comments on the term record --

JUDGE WEATHERLY: Okay.

MR. YAP: -- or any claim construction.

JUDGE WEATHERLY: Okay.

MR. YAP: But because you had asked my colleague to look for --

JUDGE WEATHERLY: Well --

MR. YAP: I mean, we are --

JUDGE WEATHERLY: It's a plea for help. It’s a pleas for help, is what I give you.

JUDGE BELISLE: I can do keyword searches myself.

JUDGE WEATHERLY: Yeah.

MR. YAP: Thanks a lot. Thank you.

JUDGE WEATHERLY: No, but if they knew something --

JUDGE BELISLE: Right.

JUDGE WEATHERLY: -- that they wanted to bring out to our attention.

JUDGE BELISLE: If you find something before we walk out of this

room, raise your hand.

MR. YAP: Appreciate it. Thank you, Judge.

JUDGE WEATHERLY: Okay.

MR. YAP: Thank you.

JUDGE WEATHERLY: Thank you.

MR. HARRIS: Okay, two things just real quick. On claim 14.

JUDGE WEATHERLY: So, you've got seven minutes.

MR. HARRIS: Thank you, Your Honor.

JUDGE WEATHERLY: Go for it.

MR. HARRIS: I don't think I'll need it. But two things. Claim 14, we heard Counsel cite to several portions of their expert declaration and their petition. None of that, none of that is in their unpatentability argument for claim 14. Again, I want to direct your attention to pages 71 and the top of 72 for claim 14. That's the extent of their argument. And then my colleagues did find an example in the spec that we'd like to direct Your Honors attentions to as you're considering --

JUDGE WEATHERLY: Okay.

MR. HARRIS: -- this issue. And it's column 49. This is the ‘220 Patent Exhibit 1001. Column 49, 40 through the end of that column, 65-ish. And in that embodiment, in that example, the inventors describe posting a map or route information to a social network site and then later modifying that message that's already been posted to the social network site.

JUDGE WEATHERLY: Okay, so --

MR. HARRIS: Thank you.

JUDGE WEATHERLY: -- column 49, the paragraph beginning figure 78 B.

MR. HARRIS: Yeah, yeah. That column.
JUDGE WEATHERLY: Okay.
MR. HARRIS: Or that paragraph, yes.
JUDGE WEATHERLY: Yes. All right.
JUDGE DEFRANCO: Counsel. Mr. Harris?
MR. HARRIS: Yes.
JUDGE DEFRANCO: I'd like to point you another part of the specification.
MR. HARRIS: Okay.
JUDGE DEFRANCO: So, column 41. And it would be right around line 13. It says, according to one of the arrangements, the interface may include notification that indicates the user has received messages, accolades, motivational items, and an option to access those messages. Do you see where I'm speaking at?
MR. HARRIS: I do see that section, yes.
JUDGE DEFRANCO: Okay. And then it says in one example, the messages are a motivational item, may be provided through the social networking site, may be linked to the user's athletic activity monitoring device. So, it seems to me, that's saying that, okay, the user has received a notification that they have a message from the social networking site, and then they turn around, they're responding to that message, and in their response, they may be modifying or incorporating whatever data they might have about their performance, and then posting it on the site. So, it's basically, it’s the response. And to me, that indicates a back and forth exchange, which may encompass claim 20 as being not necessarily a temporal thing. It's not precluding the fact that there is a message already

with the user that the user is modifying and then posting to the site. So, I just want to hear your response to that, just to give you an opportunity.

MR. HARRIS: Your Honor, with all due respect, I guess I just don't read that passage the same way as you. I don't see anything in there about modifying a message that's already been, that's posted on a social networking site.

JUDGE DEFRANCO: Isn't that usually a response to a message, a sort of modification of that message? Replying to a message?

MR. HARRIS: No, I don't see that in column 41, Your Honor.

JUDGE DEFRANCO: Because the other part of the specification you pointed to had to do with a mapping.

MR. HARRIS: Right. But in --

JUDGE DEFRANCO: It wasn't necessarily modifying messages.

MR. HARRIS: But claim 19 talks about a social network message based on location like mapping.

JUDGE DEFRANCO: Okay, I understand your position.

MR. HARRIS: Thank you, Your Honor.

JUDGE DEFRANCO: I may not accept your position.

MR. HARRIS: Thank you.

JUDGE DEFRANCO: Thank you for your candidness.

JUDGE WEATHERLY: Anything further?

MR. HARRIS: No, nothing. No.

JUDGE WEATHERLY: Okay. Thank you all for being here and for doing this in person. I've already put in one of my pitches for doing this in person. I don't know if it's more fun or less fun for you. It's more useful for me, which is why I hope that we get back to doing this in person again, and I

appreciate all of your willingness to be here in person for it. So, thank you very much for that. We've got a break between sessions. We can go off the record.

(Whereupon, the proceedings at 12:14 p.m. were concluded.)

PETITIONER:

Alex Yap
Mehran Arjomand
Forrest McClellen
Jean Nguyen
MORRISON FOERSTER LLP
ayap@mofo.com
marjomand@mofo.com
fmcclellen@mofo.com
jnguyen@mofo.com

PATENT OWNER:

Christopher Renk
Michael Harris
Michael Sebba
David McMullen
Aaron Bowling
ARNOLD & PORTER KAYE SCHOLER LLP
chris.renk@arnoldporter.com
michael.harris@arnoldporter.com
michael.sebba@arnoldporter.com
david.mcmullen@arnoldporter.com
aaron.bowling@arnoldporter.com