

1 UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE PATENT TRIAL AND APPEAL BOARD

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4 LULULEMON ATHLETICA CANADA, INC. and LULULEMON
5 USA INC.

6 Petitioners,

7 versus

8 NIKE, INC.

9 Patent Owner.

10 Case IPR2023-00348

Patent 10,188,930

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11
12 September 7, 2023

13 9:00 a.m.

14
15 DEPOSITION of DR. GREGORY S. FISCHER,
16 taken pursuant to Notice, held at the offices
17 of Morrison & Foerster LLP, 250 West 55th
18 Street, New York, New York, before Fran Insley,
19 a Notary Public of the States of New York and
20 New Jersey.

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25

lululemon v. NIKE, Inc. IPR2023-00348 Patent No. 10,188,930 Ex. 2005

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1 ----- I N D E X -----

2 WITNESS EXAMINATION BY PAGE

3 GREGORY S. FISCHER MR. BOWLING 4

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5 -----E X H I B I T S-----

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12 Exhibit 6 Maeueller prior art 15

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15 (EXHIBITS PRODUCED.)

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1 G R E G O R Y S. F I S C H E R, the Witness
2 herein, having first been duly sworn by the
3 Notary Public, was examined and testified as
4 follows:

5 EXAMINATION BY MR. BOWLING:

6 Q. Dr. Fischer, thanks for being here
7 today. I know you've done this a handful of
8 times before so we will kind of fly through the
9 basics if that's okay with you.

10 A. Sure.

11 Q. I'm going to be asking you a series
12 of questions over the course of the day. If
13 there is anything you don't hear, just let me
14 know. I'm happy to repeat myself. If there is
15 anything that you don't understand, same thing.
16 Just let me know. I'll work with you to figure
17 out what it is you don't understand, but if you
18 answer me, I'm going to assume you heard me and
19 you understood me and that you're answering to
20 the best of your ability. Does that sound
21 good?

22 A. Yes.

23 Q. As we talked a lot about a little
24 bit off the record, everything we say today is
25 being transcribed by our friend Fran here, so

1 if you can try and talk slowly, we will try not
2 to talk over one another and we will ask that
3 all of your answers be verbal as opposed to
4 head nodding or hmm-hmm, things like that.

5 A. Yeah, that makes sense.

6 Q. Sound good? Okay. We can take
7 breaks whenever you want today. Just let us
8 know. The only exception is that if I have a
9 question pending, I'll ask that you answer the
10 question and then we can take a break right
11 after.

12 A. Okay.

13 Q. And as you probably know, if you
14 have a question about privilege or anything
15 like that, we can pause when there is a
16 question pending.

17 A. Okay.

18 Q. So we have a handful of exhibits we
19 are going to use today. I think we're going to
20 fly through them quickly. We will get them all
21 into the record, get them in front of you and
22 then we can flip through them.

23 Let's start off with what we will
24 number Fischer Exhibit 1 and this is paper
25 number 19 in this IPR proceeding.

1 (Whereupon document was marked
2 Exhibit 1 for identification as of this
3 date.)

4 Q. Dr. Fischer, do you recognize this
5 exhibit that we marked as Fischer Exhibit 1?

6 A. I'm not sure if I have seen this
7 before.

8 Q. I can represent to you that this is
9 a Notice of Deposition saying that you are here
10 to testify as an expert on behalf of Lululemon.
11 Do you understand that?

12 A. Let me just read quickly. (Witness
13 reviewing document).

14 Yes, I see it.

15 Q. Do you understand that you are
16 testifying under oath today?

17 A. Yes, I do.

18 Q. Is there any reason that you're
19 aware of that you can't answer truthfully?

20 A. Not that I'm aware of.

21 Q. I'm handing you what we are going to
22 mark as Fischer Exhibit 2. This is Exhibit
23 1001 in the IPR proceeding.

24 (Whereupon document was marked
25 Exhibit 2 for identification as of this

1 date.)

2 Q. Do you recognize this document,
3 Exhibit number 2?

4 A. I recognize it as it appears to be
5 what we have been referring to as the '930
6 patent.

7 Q. We are now going to hand you what we
8 marked as Fischer Exhibit 3. And Fischer
9 Exhibit 3 is a copy of Exhibit 1005 in the IPR
10 proceeding.

11 (Whereupon document was marked
12 Exhibit 3 for identification as of this
13 date.)

14 Q. Do you recognize Fischer Exhibit 3?

15 A. I recognize what appears to be a
16 copy of my declaration for this case.

17 Q. I'm going to ask you to flip to page
18 107. Let me know when you are there.

19 A. To clarify when you are referring to
20 page numbers, do you prefer to use the footer
21 that is added or the native page number?

22 Q. Good question. We will use the
23 bigger number there in the center.

24 A. Excellent. Yes, I'm there.

25 Q. Is that your signature on page 107

1 of Fischer Exhibit 3?

2 A. Yes, I believe so.

3 Q. And the date there is January 4,
4 2023?

5 A. Yes, that's correct.

6 Q. As you sit here today, are you aware
7 of any inaccuracies in the declaration here in
8 Fischer Exhibit 3?

9 A. I stand by all of the opinions in
10 the declaration. I did find some minor typos
11 as I was reviewing the material.

12 Q. You always do, right?

13 A. Yes.

14 Q. It happens every time. Okay, but no
15 inaccuracies, factual inaccuracies that you're
16 aware of?

17 A. I did not find any factual
18 inaccuracies that I'm aware of.

19 Q. I think you already said this, but
20 have any of your opinions changed since you
21 signed this declaration?

22 A. No, my opinions within the
23 declaration stand as I sit here today. I also
24 brought the verbatim copy of my table of
25 contents that is single sided just to help

1 accelerate looking material up, just to let you
2 know.

3 Q. Is that the same as what is listed
4 on pages Roman numeral I through Roman numeral
5 VI of Fischer Exhibit 3?

6 A. Yes, that is correct. It is the
7 title page and Roman numeral I through Roman
8 numeral VI.

9 Q. Now that you have Fischer Exhibit 3
10 in front of you, do you just want to use that
11 table of contents and we can put the other
12 document away?

13 A. I find it helpful to have a single
14 sided version in front of us to accelerate the
15 process, but I'm happy to put it away if you
16 would prefer.

17 Q. No, no, that's okay. We can go
18 ahead and mark that as Fischer Exhibit 4.

19 (Whereupon document was marked
20 Exhibit 4 for identification as of this
21 date.)

22 Q. As we stated on the record, Fischer
23 Exhibit 4 is just a copy of pages Roman numeral
24 I through Roman numeral VI of Fischer
25 Exhibit 3. I'm going to ask you to flip to

1 page 17 of Fischer Exhibit 3. Let me know when
2 you are there.

3 A. Yes, I'm there now.

4 Q. Specifically I want you to look at
5 paragraph 18 under the heading "Materials
6 Considered?"

7 A. Yes, I see paragraph 18.

8 Q. In paragraph 18 you identify the
9 materials you considered in forming your
10 opinions in performing your analysis; is that
11 right?

12 A. I identify materials that I used in
13 performing my analysis and opinions.

14 Q. And you list the '930 patent, the
15 prosecution history for the '930 patent, the
16 applications incorporated by reference in the
17 '930 patent and the materials listed as
18 exhibits to Lululemon's petition in this IPR;
19 is that right?

20 A. That's what I note there, yes.

21 Q. Did you consider any other materials
22 that aren't listed here when you performed your
23 analysis, and formed your opinions in this
24 case?

25 A. In identifying exhibits to support

1 my opinions, I certainly did a lot of
2 searching. I couldn't specifically identify
3 other materials, but I certainly did a
4 substantial amount of searching to really
5 understand what the state of the art was at the
6 time.

7 Q. What do you mean by searching?

8 A. I performed patent searches,
9 literature searches and internet searches to
10 really get a good handle on what the state of
11 the technology was at the time of the patent.

12 Q. How did you document those searches?

13 A. Much of that is documented within
14 section five of my declaration where I refer to
15 the technical background.

16 Q. So the documents that you considered
17 as part of those searches are all listed in
18 that background section of your declaration?

19 A. The references that I felt were the
20 most material are listed within that background
21 section.

22 Q. When you say references that you
23 felt were most material, what do you mean by
24 that?

25 A. Reading through that section, I

1 identify material that I felt helped provide
2 some context around what the state of the art
3 for these types of devices and systems was at
4 the time that this patent was -- at the
5 priority date of this patent.

6 Q. Did you rely on these types of
7 searches for anything other than understanding
8 the state of the art at the time of this
9 patent?

10 A. The purpose of the technical
11 background is really to set the stage or
12 provide context. It's not part of my formal
13 opinions.

14 Q. So my question was a little
15 different. I appreciate that, but I'm just
16 trying to understand whether you relied on
17 these searches, the literature searches, patent
18 searches for anything other than understanding
19 the state of the art at the relevant time
20 period.

21 A. Not that I'm aware of.

22 Q. We looked earlier at the date of
23 your declaration, which was January 4, 2023.
24 Have you considered any additional materials
25 that are not listed in paragraph 18 of your

1 declaration since that time for purposes of
2 forming opinions in this case?

3 A. No, I have not.

4 Q. Dr. Fischer, when were you first
5 contacted about participating in this case at
6 an expert?

7 A. It would be hard to put a date on
8 it, but I would say fall of 2022 I believe.

9 Q. Are you able to estimate about how
10 many hours you spent putting together this
11 report, conducting your analysis and forming
12 your opinions?

13 A. It would be hard to say for sure,
14 but probably 30 or so hours would be my guess.

15 Q. How did you prepare for your
16 deposition today?

17 A. Primarily I reviewed the material in
18 my declaration and the references that were
19 cited within my declaration.

20 Q. When you say references cited, are
21 you referring to the prior art references that
22 you opine on with respect to the validity of
23 the '930 patent?

24 A. I believe I spent my time reviewing
25 my declaration for this case, the '930 patent,

1 the Lofi patent, the Maeueler patent and the
2 Kitagawa patent.

3 Q. Anything else?

4 A. Those are the ones that I assume I
5 spent the majority of my time on. I can't
6 recall specifically what other documents I
7 pulled up.

8 Q. I'm going to hand you what we've
9 marked as Fischer Exhibit 5. I'm just going to
10 get the prior art into the record.

11 A. Sure.

12 Q. So Fischer Exhibit 5 is the Lofi
13 reference that you referred to just now and
14 that's Exhibit 1002 in the IPR proceeding.

15 (Whereupon document was marked
16 Exhibit 5 for identification as of this
17 date.)

18 Q. Do you recognize the document that
19 we've marked Fischer Exhibit 5?

20 A. This appears to be what we have been
21 referring to as the Lofi prior art reference.

22 Q. This is the reference you mentioned
23 a minute ago that you reviewed?

24 A. It appears to be that reference,
25 yeah.

1 Q. I'll hand you what has been marked
2 Fischer Exhibit 6. This is the Maeueller
3 reference that you referred to a minute ago and
4 this is Exhibit 1003 in the IPR proceeding.

5 (Whereupon document was marked
6 Exhibit 6 for identification as of this
7 date.)

8 Q. The last one. We are going to hand
9 you what we've marked as Fischer Exhibit 7 and
10 this is the Kitagawa reference we mentioned a
11 moment ago. There is Exhibit 1004 in the IPR
12 proceeding.

13 (Whereupon document was marked
14 Exhibit 7 for identification as of this
15 date.)

16 Q. Do you recognize this document
17 Fischer Exhibit 7?

18 A. This appears to what we referred to
19 as the Kitagawa reference in my declaration.

20 Q. Flipping back to Fischer Exhibit 6,
21 I should have asked you if you recognize that
22 document?

23 A. Again, I believe this represents
24 what we referred to as the Maeueller document in
25 my declaration.

1 Q. So earlier we were talking about
2 your preparation for today's deposition. You
3 said you reviewed your declaration, the '930
4 patent and then these three prior art
5 references that we've marked as Fischer
6 Exhibits 5 through 7, correct?

7 A. That is correct.

8 Q. You said those were the only
9 documents you specifically remember reviewing
10 to prepare for today; is that right?

11 A. These are the ones that I spent the
12 majority of my time preparing and the ones that
13 I recall at this moment.

14 Q. You don't recall specifically any
15 other documents you looked at?

16 A. I recall just in general flipping
17 through all the exhibits, but not spending any
18 substantial time on any of them.

19 Q. When you say all of the exhibits,
20 what are you referring to?

21 A. I believe in the file history that I
22 had, I had a number of exhibits. They may or
23 may not be all of the exhibits in this case and
24 I remember briefly just opening them to refresh
25 my memory, but not spending any substantial

1 time on anything other than the ones that are
2 in front of me right now.

3 Q. Do you remember any of them
4 specifically by name?

5 A. I don't remember the official names.

6 Q. But it was part of the '930 patent's
7 file history?

8 A. Yes. I believe I saw the patent
9 owner response, although I don't remember
10 officially what that is called.

11 Q. It sounds like that might have been
12 Nike's preliminary response?

13 A. I believe that's correct.

14 Q. So when I asked you earlier about
15 the materials you considered in forming your
16 opinions, I think you said you hadn't
17 considered anything since January 4, 2023, but
18 it sounds like you may have reviewed at least
19 Nike's preliminary patent owner response which
20 was filed after that date?

21 A. I reviewed that, but that makes no
22 changes in my opinion.

23 Q. But you did review it?

24 A. I believe so. I saw it. I did not
25 spend substantial time reviewing that.

1 Q. How much time would you say you
2 spent reviewing it?

3 A. Probably about one hour.

4 Q. Anything else specifically you
5 remember reviewing to prepare for today?

6 A. I recall seeing the response from
7 PTAB. I believe that was some preliminary
8 review. I don't know what that is referred to
9 as either.

10 Q. It may have been an institution
11 decision?

12 A. That sounds familiar.

13 Q. So you reviewed Nike's preliminary
14 response and the institution decision?

15 A. Again briefly I believe. Probably
16 about one hour's worth of reviewing.

17 Q. One hour each?

18 A. I would say so.

19 Q. Anything else that you can think of?

20 A. Not that I can recall.

21 Q. Did anything in the institution
22 decision change your opinions?

23 A. No, it didn't change my opinions.
24 In fact, I believe it justified most of my
25 opinions.

1 Q. What do you mean by that?

2 A. I believe there were a number of
3 places in there, and I can't recall which ones,
4 where the opinions that I made were confirmed.

5 Q. What do you mean they were
6 confirmed?

7 A. Statements that I made or references
8 that I made were used in the institution
9 decision.

10 Q. So we talked about the documents you
11 reviewed. Did you meet with counsel for
12 Lululemon to prepare for today's deposition?

13 A. Yes.

14 Q. When did you do that?

15 A. I think I had one in person meeting
16 yesterday for about half a day and I have had a
17 few Zoom based phone calls.

18 Q. When were those?

19 A. Over the past few weeks.

20 Q. How many Zoom phone calls did you
21 have with Lululemon's attorneys?

22 A. It would be hard to put a number on
23 it, but a few, may be five-ish. I can't say
24 for sure.

25 Q. If you were to estimate collectively

1 how much time you spent on those Zoom calls,
2 what would you guess?

3 A. I would make my best guess to about
4 five hours on the Zoom calls.

5 Q. Five hours total?

6 A. That sounds about correct.

7 Q. So you had five hours of Zoom calls
8 over the past few weeks with Lululemon's
9 attorneys and then a half day yesterday meeting
10 with Lululemon's attorneys; is that right?

11 A. That would be my best guess.

12 Q. Any other meetings you had?

13 A. Not that I can think of.

14 Q. Anyone else you talked to about
15 today's deposition?

16 A. No.

17 Q. In those Zoom calls and the half day
18 meeting yesterday, was it just you and
19 attorneys for Lululemon or was there anyone
20 else there?

21 A. I believe that's correct.

22 Q. Did you review any documents
23 yesterday during the half day meetings?

24 A. Is that something I'm able to
25 discuss? I'm not sure.

1 MS. NGUYEN: Objection. Privilege.
2 You can answer to the extent it excludes
3 any communications between yourself and
4 me.

5 A. I just wanted to make sure. I did
6 review the materials that are sitting in front
7 of me today.

8 Q. I'm going to ask you to put Fischer
9 Exhibit 2 in front of you which is the '930
10 patent.

11 A. Okay. I have that in front of me.

12 Q. I'm going to ask you to flip to page
13 35 of Fischer Exhibit 2.

14 A. Can you repeat the page number?

15 Q. Yes, 35.

16 A. Yes, I'm there.

17 Q. Specifically I want you to look at
18 Column 26 beginning at line 15.

19 A. Yes, I'm there.

20 Q. What we are looking at here are the
21 claims of the '930 patent; is that right?

22 A. Yes, that appears to be the case.

23 Q. And Claim 1 begins on line 16?

24 A. Yes, it appears to.

25 Q. So I just want to walk through this

1 quickly. We will go through the claim and then
2 we can talk about different parts of it. Does
3 that sound okay?

4 A. Okay.

5 Q. So Claim 1 recites "A computer-
6 implemented method comprising" a number of
7 steps, right?

8 A. Would you like me to read the rest
9 of the claim?

10 Q. Sure. You can take your time to
11 read whatever you would like.

12 A. (Witness reading document). Okay.
13 Could you repeat the question?

14 Q. Sure. So Claim 1 recites "A
15 computer-implemented method comprising" a
16 number of steps, is that right?

17 A. "A computer-implemented method
18 comprising" there appear to be some steps,
19 among other claim elements in here.

20 Q. The first step is "providing first
21 instructions to a user to perform a first
22 athletic movement." Do you see that?

23 A. That's listed as the first claim
24 element, yes.

25 Q. And the next is "receiving, from a

1 sensor, first activity data representing the
2 first athletic movement." Do you see that?

3 A. I see that.

4 Q. And those two steps they happen
5 sequentially; is that right?

6 MS. NGUYEN: Objection to form.

7 A. The second claim element,
8 "receiving, from a sensor, first activity data
9 representing the first athletic movement" is
10 receiving from a sensor activity data from the
11 athletic movement that was based on the
12 instructions in the first claim element.

13 Q. So that first activity data is
14 related to the first athletic movement in the
15 earlier claim element and the first
16 instructions inform the user to perform that
17 first athletic movement; is that right?

18 MS. NGUYEN: Objection. Form.

19 A. So, I would like to refer to
20 paragraph 38 of my declaration. "The '930
21 patent describes 'athletic movement' as
22 'movements relating to fitness, exercise,
23 flexibility, including movements that may be
24 part of one or more single and multiple
25 participant athletic competitions, exercise

1 routines, and/or combinations thereof'."

2 So, in my opinion, there is no
3 reason that there couldn't be some interleaving
4 of the first two elements in which the first
5 athletic movement has multiple
6 sub-instructions, if you will, and sensor data
7 is acquired during each of those.

8 Q. What do you mean by interleaving of
9 the first two elements?

10 A. So if you go to paragraph 43 of my
11 declaration, the '930 patent describes how
12 various exemplary fitness and athleticism
13 attributes may be measured.

14 For example, "An endurance fitness
15 attribute may be 'determined from drills
16 comprising or consisting of vertical jumps'
17 based on 'the quantity of vertical jumps the
18 user conducts within a predetermined time
19 period'.

20 "A flexibility fitness attribute may
21 be 'determined from reps of leg raises and/or
22 reverse reaches.'

23 "A strength fitness attribute may be
24 calculated by evaluating a user's 'performance
25 of reps of static lunges and/or push-ups' or

1 'ability to maintain their performance within a
2 predetermined range of tempo during the
3 activities.'

4 "A power athleticism attribute may
5 be 'determined from drills comprising or
6 consisting of vertical jump' by measuring the
7 vertical distances user achieves.

8 "A balance athleticism attribute may
9 be calculated based on 'hop and sticks' drills
10 wherein the user's stability may be measured."

11 And "Finally, speed, agility, and
12 reaction athleticism may be determined from
13 'drills comprising or consisting of cone
14 sprints' by measuring a user's 'reaction and/or
15 target return...'"

16 As you can see here, one athletic
17 movement may have multiple drills or steps or
18 whatever term you would prefer to use for them
19 and there is no reason to believe that the
20 system would not provide instructions at each
21 individual step within an athletic movement.

22 Q. I think a couple of things. One,
23 since we don't have the videographer today, for
24 Fran's benefit we want to try and go slow if we
25 can. I think it may help Fran if instead of

1 reading a full page, we can just talk about
2 certain parts of it. I can ask you specific
3 questions.

4 I understand your opinions are here
5 in the paragraphs and I'll try to ask you some
6 specific questions about them if that's okay.

7 A. Okay, understood.

8 Q. So I think we might be getting ahead
9 of ourselves a little bit talking about
10 athletic movement and multiple drills and
11 things like that. I just want to go back to
12 the claim, Claim 1 on page 35 of Fischer
13 Exhibit 2 quickly. Are you there?

14 A. Yes, I'm there.

15 Q. I'm trying to understand just
16 quickly and I think you said this earlier, so I
17 just wanted to confirm that in this claim
18 whether you agree that the first activity data,
19 the first athletic movement and the first
20 instructions are all related to one another?

21 MS. NGUYEN: Objection. Form.

22 A. That's a pretty big generalization.
23 I think we have to go step by step to go
24 through that a little bit more.

25 Q. So earlier you said that the second

1 claim element, "receiving, from a sensor, first
2 activity data representing the first athletic
3 movement" is received from a sensor data from
4 the athletic movement that was based on the
5 instructions in the first claim element; do you
6 remember that?

7 MS. NGUYEN: Objection. Form.

8 A. I recall saying that and then I
9 followed up by noting that there may be
10 multiple portions of the first instruction and
11 there may be multiple portions of the athletic
12 movement and they may be interleaved.

13 Q. And we can get to that, but I think
14 we both agree it sounds like that the first
15 instructions are for first athletic movement,
16 right?

17 MS. NGUYEN: Objection. Form.

18 A. The first instruction provides the
19 user instructions to perform the first athletic
20 movement and the first activity data represents
21 that first athletic movement.

22 Q. So that first activity data
23 represents the athletic movement that the user
24 was instructed to perform in that first claim
25 element, correct?

1 MS. NGUYEN: Objection. Form.

2 A. As I noted and the reason for the
3 aside and going to the paragraphs in my
4 declaration was that the first athletic
5 movement as defined by Nike may include a
6 series of drills or exercises.

7 Therefore, there may be, in fact,
8 multiple subsets of that first instruction and
9 multiple subsets of that sensor data or first
10 activity data.

11 Q. Where does it say that in the first
12 two claim elements?

13 MS. NGUYEN: Objection. Form.

14 A. As noted, the '930 patent describes
15 athletic movement as "Movements," plural,
16 "relating to fitness exercise, flexibility,
17 including movements that may be part of one or
18 more single and multiple participant athletic
19 competitions, exercise routines and/or
20 combinations thereof."

21 So the '930 patent very clearly
22 identifies athletic movement as potentially
23 multiple movements or routines or exercises.

24 Q. But that's not what it says, does
25 it? Let's go to that citation, Column 4, 7

1 through 11.

2 MS. NGUYEN: Objection. Form.

3 Q. I think you might have excluded a
4 word there. In your declaration in paragraph
5 38, Fischer Exhibit 3, you say that the '930
6 patent describes athletic movement as movements
7 relating to fitness, exercise, flexibility, and
8 so on, right?

9 MS. NGUYEN: Objection. Form.

10 A. Reviewing Column 4 of line 8 it uses
11 the word "includes as used herein, an 'athletic
12 movement' includes movements relating to
13 fitness, exercise, flexibility, including
14 movements that may be part of one or more
15 single and multiple participant athletic
16 competitions, exercise routines, and/or
17 combinations thereof."

18 So the Nike patent defines movement
19 in its own wording, plural, "movements" and
20 provides a number of examples.

21 Q. But the specification doesn't say
22 that an athletic movement is movement the way
23 you recited it in paragraph 38. It says
24 something different. It says "athletic
25 movement includes movements," right?

1 MS. NGUYEN: Objection. Form.

2 A. And the fact that that is even
3 broader in the Nike's language which includes
4 it as well as potentially additional movements.

5 Q. So why did you not include the word
6 "includes" in paragraph 38 there?

7 MS. NGUYEN: Objection. Form.

8 A. I don't disagree with the wording
9 that I put in the paragraph 38 of my
10 declaration. I believe paragraph 38 is
11 accurate and, in fact, Nike's description of it
12 is, in fact, even broader than I defined in my
13 declaration.

14 Q. My question is a little different.
15 I'm asking why -- I'll step back a minute. Did
16 you write paragraph 38?

17 MS. NGUYEN: Objection. Form.

18 A. It would be hard to say exactly
19 which elements of my declaration I specifically
20 wrote, but the large majority of this I
21 provided the initial draft and then through a
22 collaborative effort we landed on the final
23 product.

24 Q. Did you decide to exclude from that
25 last sentence in paragraph 38 the word

1 "includes" that is in the segment quoted there?

2 MS. NGUYEN: Objection. Privileged.

3 Dr. Fischer, you can answer to the extent
4 it doesn't include any communication
5 between --

6 A. I don't recall in general as I was
7 writing my declaration. I tried to make it as
8 clear as possible and in this case I included
9 two sets of quotes. One quote is for athletic
10 movement, which is the claim term, and then I
11 included a quote starting at the word
12 "movements." It is not two separate quotes.

13 The word athletic movement in quotes
14 is from the claim and then my quote that I'm
15 quoting from, lines 7 through 11 begins with
16 the word "movements," so it is not misquoted.

17 Q. The citation there, if I'm looking
18 right at paragraph 38, it cites to Column 4, 7
19 through 11, right?

20 MS. NGUYEN: Objection. Form.

21 A. If you looked in the quotes that are
22 identified as "Id. at 4:7-11" that reference is
23 only on the second quote. It is possible that
24 that is a typo and it should be "4:8-11."

25 Q. I think 7 through 11, 8 through 11

1 that's not my point. My point is that you're
2 quoting a portion of the specification here,
3 specifically a portion from Column 4, right?

4 MS. NGUYEN: Objection. Form.

5 A. I'm quoting a statement starting
6 with the word movements relating to fitness
7 exercise, flexibility, et cetera and then the
8 term athletic movement in quotes is from the
9 language of the claims that you were just
10 talking about in Claim 1.

11 The word athletic movement in that
12 does not have a citation on it and is really
13 referring to the claim work.

14 Q. So the fact that include -- the fact
15 that the word includes is not provided there is
16 just coincidence?

17 MS. NGUYEN: Objection. Form.

18 A. That was not part of the quote. I
19 did not misquote anything. My quote starts at
20 the word "movements" and I use that to relate
21 to the word "athletic movement" which appears
22 both in Column 4 and in the first claim element
23 of Claim 1.

24 Q. So in your opinion this portion --
25 let's go back to just the patent itself.

1 Specifically lines 7 through 11. Let me know
2 when you are there.

3 A. Yes, I'm there.

4 Q. The specification says "As used
5 herein 'athletic movement' includes movements
6 relating to fitness, exercise, flexibility and
7 so on," right?

8 MS. NGUYEN: Objection. Form.

9 A. It includes what I just repeated
10 multiple times. I'd be happy to read it again
11 if you would like.

12 Q. What does the word "includes" there
13 indicate to you, a skilled artisan, in the
14 context of this patent?

15 A. That refers that --

16 MS. NGUYEN: Objection. Form. Dr.
17 Fischer, if you could give me a little bit
18 of time to lodge my objection. Thank you.

19 A. So here the term athletic movement
20 is used and an athletic movement could include
21 and these are the -- the word "include" means
22 these are examples of what could be included in
23 the term "athletic movement" and that could
24 include "fitness, exercise, flexibility,
25 including movements that may be part of one or

1 more single and multiple participant athletic
2 competitions, exercise routines and/or
3 combinations thereof."

4 Q. In that portion that we are looking
5 at here, Column 4, line 7 through 11, in your
6 opinion is includes there the same way as it
7 would be used in everyday English language?

8 MS. NGUYEN: Objection. Form.

9 A. I think that's a broad term. I have
10 explained the way I feel it is used and to me
11 this means that this paragraph lists examples
12 of what could be considered as athletic
13 movements as Nike refers to it.

14 Q. So is include there introducing a
15 class of movements that could be considered as
16 an athletic movement?

17 MS. NGUYEN: Objection. Form.

18 A. Well, I don't recall seeing the word
19 class in here and I'm not sure of the context
20 that you are using that. Is there a specific
21 place that word is used?

22 Q. No, you said that it lists examples,
23 right?

24 A. Yes.

25 Q. I don't see the word examples there,

1 but I'm trying to understand what your opinion
2 is about how the word "include" is being used
3 here. If I understand you right, it sounds
4 like you are saying the word includes there is
5 introducing types of movements, examples of
6 movements, that would constitute an athletic
7 movement; is that right?

8 MS. NGUYEN: Objection. Form.

9 A. I identified a number of examples
10 that are listed after the word includes in
11 Column 4 that I believe are examples Nike puts
12 forth as what could be considered athletic
13 movements.

14 Q. So let's say I tell you that for the
15 purposes of today, I'm going to use the word
16 child to include both boys and girls; do you
17 follow?

18 MS. NGUYEN: Objection. Form.

19 A. I understand what you are saying,
20 yes.

21 Q. In your view, what would be the
22 different types of children that would be
23 included in my definition of child?

24 A. Boys and girls would be examples of
25 different types of children.

1 Q. In that example would child refer to
2 one boy or one girl?

3 MS. NGUYEN: Objection. Form.

4 A. I don't see any reason it's
5 restricted to that.

6 Q. What would be another possibility?

7 A. Now we are getting into some hot
8 political topics here. There is no reason you
9 couldn't have other potential genders or A
10 gender people or people that identify other
11 ways.

12 Q. Sure. Okay, that's a good point.
13 Based on the definition I gave you, would child
14 refer to more than one child?

15 MS. NGUYEN: Objection. Form.

16 A. I don't believe there is any
17 restriction to only picking one of the examples
18 identified or even being restricted only to the
19 examples identified.

20 Q. It's not what I'm asking. So if I
21 tell you that for the purposes of today, the
22 word "child" includes boys and girls, right?

23 A. Yep.

24 Q. Have I defined child to mean
25 multiple children?

1 MS. NGUYEN: Objection. Form.

2 A. To me this is a hypothetical that is
3 not really parallel to the language here within
4 the paragraph we were talking about.

5 Q. I'm not asking you whether you think
6 it's parallel to the language. I'm just asking
7 you to answer the question.

8 A. Can you repeat the question in one
9 clear statement?

10 Q. Sure. If I tell you for purposes of
11 today that the word child includes boys and
12 girls, have I defined child to mean multiple
13 children?

14 MS. NGUYEN: Objection. Form.

15 A. I believe you used the word plural
16 on boys and girls, so I don't see any reason
17 it's restricted to only one.

18 Q. So in your opinion, because there
19 was plurals in the types of children that I
20 said are included in my definition, I now
21 changed the definition of child, which is
22 singular to mean multiple children?

23 A. Based on the definition that you
24 just gave me in this hypothetical, yes, I would
25 believe that to be the case.

1 Q. And why?

2 MS. NGUYEN: Objection. Form.

3 A. Because you very clearly defined
4 what would have typically in the plain and
5 ordinary meaning been a singular and you
6 specifically referred to it as plural.

7 Q. In your opinion did I refer to it as
8 plural when I said it includes boys and girls?

9 MS. NGUYEN: Objection. Form.

10 A. If you are referring to the word
11 child means a group of boys and a group of
12 girls, which is what it sounds like the way you
13 explained it to me, then yes, you redefined
14 what that term means.

15 Q. But I didn't say group of boys and
16 group of girls, right?

17 A. But you did use the word plural.
18 You put an S at the end of it.

19 MS. NGUYEN: Objection. Form.

20 Q. I want to look at another part of
21 this definition. On line 9 you'll see that it
22 says that athletic movement includes "movements
23 that may be part of one or more single and
24 multiple participant athletic competitions?"

25 A. I'm sorry, I didn't see that on line

1 9, Column 4. Are you back at the claims again?

2 Q. No, still on Column 4, starting on
3 line 9. You see how it says "including
4 movements?"

5 A. Yes, I see that now.

6 Q. "That may be part of one or more
7 single and multiple participant athletic
8 competitions, exercise routines, and/or
9 combinations thereof?"

10 A. Yes, I see that now.

11 MS. NGUYEN: Objection. Form.

12 Q. What does the words "part of" mean
13 in the context of that sentence?

14 MS. NGUYEN: Objection. Form.

15 A. As I sit here today, it would mean
16 that any amount from a small amount of to in
17 its entirety.

18 MS. NGUYEN: Can we take a break?

19 It's been almost an hour.

20 Q. Sure. We can finish this line of
21 questioning unless you need a break now.

22 A. We can finish this.

23 Q. So your testimony, is that "part of"
24 could mean all of?

25 MS. NGUYEN: Objection. Form.

1 A. I don't recall making an opinion on
2 that specific word, although I have to look
3 through my declaration to see if we talked
4 about that specific aspect.

5 Q. Did you consider this language when
6 you rendered your opinions in this case?

7 A. Yes, I did.

8 MS. NGUYEN: Objection. Form.

9 Q. So you knew that that language was
10 there, right?

11 A. Yes, of course.

12 Q. And you just testified a moment ago
13 that "part of" could mean any amount from a
14 small amount to its entirety. Do you remember
15 that?

16 A. Yes, I do.

17 MS. NGUYEN: Objection. Form.

18 Q. So I'm trying to understand what you
19 mean by that. Are you saying that part of in
20 this sentence, Column 4, lines 7 through 11
21 could mean all of?

22 A. Well, if we read it, for example if
23 we look at part of one or more exercise
24 routines, it could be a portion of those
25 exercise routines or a full set of exercise

1 routines would be considered the athletic
2 movement in that scenario.

3 Q. What makes you say it could be a
4 full exercise routine?

5 MS. NGUYEN: Objection. Form.

6 A. I don't see anything that precludes
7 that.

8 Q. So, just to make sure I understand
9 you, your opinion is that part of, in Column 4,
10 lines 7 through 11 could mean all of?

11 MS. NGUYEN: Objection. Form.

12 A. If you go back a couple of words, it
13 says in Column 4, line 9 of the '930,
14 "including movements that may be part of." So
15 taking that entire statement of "including
16 movements that may be part of" then yes, of
17 course, the entire exercise routine could be
18 included in there.

19 Q. Couldn't that just mean that the
20 athletic movement may not be part of an
21 exercise routine and it might be part of an
22 exercise routine?

23 MS. NGUYEN: Objection. Form.

24 A. This statement provides specific
25 examples, but it's not excluding additional

1 examples.

2 Q. So I think we keep shifting around.
3 I just want to make sure I have your opinion
4 clear.

5 Your position, reading this entire
6 sentence on lines 7 through 11 of Column 4 is
7 that the word part of could mean part of or all
8 of; is that right?

9 MS. NGUYEN: Objection. Form.

10 A. I'm not comfortable making an
11 assessment of one word that you pull out of the
12 sentence. My opinion was based on the sentence
13 in its entirety and the portion of it says
14 "including movements that may be part of" and
15 that is what my opinion is based on.

16 Q. And your opinion is that maybe part
17 of means that at an athletic movement could be
18 all of an exercise routine; is that what you
19 are saying?

20 MS. NGUYEN: Objection to form.

21 A. Maybe part of says exactly what the
22 wording -- is that it may be or can be part of,
23 but it does not exclude other options.

24 Q. So if I told you that I -- last
25 night I watched part of a movie, you would

1 understand that to mean that I may have watched
2 part of the movie or I may have watched all of
3 the movie?

4 MS. NGUYEN: Objection. Form.

5 A. In that context I find that pretty
6 unclear. It doesn't necessarily say what
7 percentage of the movie you watched.

8 Q. I'm not asking for a percentage.
9 I'm just wondering if I tell you that last
10 night I watched part of a movie, you would
11 understand that to mean that I may have watched
12 all of the movie?

13 MS. NGUYEN: Objection. Form.

14 Sorry, Dr. Fischer.

15 A. If you watched part of a movie, it's
16 not -- that would not be an inaccurate
17 statement if you also watched the whole movie.

18 Q. We can take a little break.

19 (Time noted: 10:02 a.m.)

20 (Brief recess taken.)

21 (Time noted: 10:10 a.m.)

22 BY MR. BOWLING:

23 Q. We are going to stick here with
24 Fischer Exhibit 2, the '930 patent, Dr.
25 Fischer.

1 A. Okay, I have it in front of me.

2 Q. I'm going to ask you to look at
3 Column 12, line 55. You can let me know when
4 you are there?

5 A. I'm there now.

6 Q. Starting with line 55, it says "With
7 reference again to FIG. 3 in Block 304, one or
8 more embodiments may instruct a user to perform
9 an athletic movement with predefined criteria."
10 Do you see that?

11 A. I see that it says that.

12 Q. If I understand your opinion right,
13 athletic movement, as it is used there, could
14 refer to multiple athletic movements; is that
15 right?

16 MS. NGUYEN: Objection. Form.

17 A. As described in the '930 patent as
18 we previously discussed and again, as I noted
19 in my declaration, athletic movements includes
20 or refers to "movements relating to fitness,
21 exercise, flexibility, including movements that
22 can be part of one or more single and multiple
23 participant athletic competitions, exercise
24 routines, and/or combinations thereof."

25 Q. So I know that is in the paragraph

1 we've looked at. I'm asking you whether in
2 this specific passage I'm referring you to, an
3 athletic movement could refer to multiple
4 athletic movements?

5 MS. NGUYEN: Objection. Form.

6 A. I would like to read the context for
7 this paragraph first.

8 Q. Sure.

9 A. (Witness reading document). Okay, I
10 read it again.

11 Q. In Column 12, lines 55 through 57,
12 in your opinion, does the word "athletic
13 movement" potentially refer to multiple
14 athletic movements?

15 MS. NGUYEN: Objection. Form.

16 A. I don't see anything in those lines
17 that would change my opinion on what the word
18 athletic movements and, in fact, the examples
19 later on in the paragraph described those
20 instructions to include one or more exercises
21 and they provide a number of examples of
22 exercises.

23 Q. I don't think you answered my
24 question. In Column 12, lines 55 through 57,
25 in your opinion, does the word athletic

1 movement potentially refer to multiple athletic
2 movements?

3 MS. NGUYEN: Same objection.

4 A. So in that paragraph, and again I
5 think it's important to look at it in context,
6 they provide an example. The examples of that
7 paragraph or one set of examples in that
8 paragraph is push-ups, squats, lunges, et
9 cetera.

10 If you look in my declaration at
11 paragraph 43, I make a citation noting that "A
12 strength fitness attribute may be calculated by
13 evaluating a user's 'performance of reps of
14 static lunges and/or push-ups.' So, therefore,
15 at least two of the elements in that would be
16 considered to be able to be used in calculating
17 a single attribute of strength which would be
18 part of an athletic movement.

19 Q. So is that a yes?

20 MS. NGUYEN: Objection. Form.

21 A. I stand by the way that I described
22 it. I'm really not comfortable making a
23 generalization.

24 Q. I'm not asking for a generalization
25 nor am I asking about calculating scores. What

1 I'm asking is a little bit more simple.

2 In your opinion, does the word
3 athletic movement in Column 12, lines 55
4 through 57, potentially refer to multiple
5 athletic movements?

6 MS. NGUYEN: Same objection.

7 A. As I described, I believe that
8 athletic movement could include, for example,
9 lunges and push-ups, which are noted as
10 examples later in that paragraph. Therefore,
11 those two exercises, if you want to call those
12 movement or movements, that may be the case,
13 there are at least two exercises that are part
14 of that athletic movement.

15 Q. So what in this sentence tells you
16 that the athletic movement would include both
17 lunges and push-ups?

18 MS. NGUYEN: Objection. Form.

19 A. I based my opinion based on the
20 entirety of the '930 reference, not specific
21 sentences or subsets of sentences.

22 Q. So in your opinion, is push-ups as
23 it is used in Column 12, line 63, an athletic
24 movement?

25 MS. NGUYEN: Objection. Form.

1 A. A push-up is an exercise and one or
2 more exercises could be considered an athletic
3 movement.

4 Q. Is that a yes?

5 MS. NGUYEN: Objection. Form.

6 A. Again, I like to stick by the way I
7 just framed it.

8 Q. So you're unable to provide me with
9 an opinion as to whether push-ups, as that is
10 used in Column 12, line 63, is an athletic
11 movement?

12 A. I disagree with that assessment. I
13 think I gave a very clear answer noting that
14 push-ups are an exercise and that exercise
15 could be either in its entirety or part of an
16 athletic movement. I think I answered that
17 very clearly.

18 Q. So in your opinion, the athletic
19 movement could include one exercise or more
20 than one exercise; is that right?

21 MS. NGUYEN: Objection. Form. Dr.
22 Fischer, please give me a chance to note
23 my objection. Thank you.

24 A. So, my opinion is informed by the
25 language of the '930 patent and I believe it is

1 quite clear in multiple places where an
2 athletic movement as used in the claim language
3 can include one or more exercises or exercise
4 routines or a host of other examples as we have
5 discussed.

6 Q. So your opinion is that an athletic
7 movement as used in Claim 1 in the '930 patent
8 can include one or more exercises or one or
9 more exercise routines; is that right?

10 MS. NGUYEN: Objection. Form.

11 A. I believe that is what the language
12 we were discussing in Column 4 of the '930
13 patent states, yes.

14 Q. So going back to Column 12, your
15 opinion is that push-ups could be an athletic
16 movement and push-ups, squats and lunges could
17 be one athletic movement; is that right?

18 MS. NGUYEN: Objection. Form.

19 A. I believe the characterization that
20 one or more than one of those examples or other
21 combinations could be considered an athletic
22 movement as used in the claim language.

23 Q. So if I did push-ups, squats and
24 lunges, that would be one athletic movement?

25 A. I did not say would be. I said

1 could be.

2 Q. So your opinion is that if I do
3 push-ups, then squats, then lunges, that could
4 be considered one athletic movement as it's
5 used in the context of Claim 1 in the '930
6 patent?

7 MS. NGUYEN: Objection. Form.

8 A. Depending on the context of multiple
9 exercises, including one or more of that list,
10 could certainly be considered an athletic
11 movement.

12 Q. Could it be considered three
13 athletic movements?

14 MS. NGUYEN: Objection. Form.

15 A. As we said, it depends on the
16 context and the athletic movement is further
17 defined in the claim of what is comprised
18 within that athletic movement.

19 Q. So you keep saying depends on the
20 context. We are talking about within this '930
21 patent, right? So is there some other context
22 that you are referring to that would change the
23 definition?

24 A. Within Claim 1 of the '930 patent,
25 claim element number three says "calculating

1 with a processor, based on the first activity
2 data, a first combinatory fitness-athleticism
3 score."

4 So in order to meet the meaning of
5 the word athletic movement, it must include
6 exercises or a host of other examples of
7 athletic movements, if you will, to generate
8 the data that creates a fitness score and
9 athleticism score and a combinatory fitness
10 athleticism score.

11 So that certainly could mean one
12 exercise, if and only if, that exercise is able
13 to provide all of the information necessary to
14 calculate that data. If not, multiple
15 exercises or other motions would have to be
16 performed.

17 Q. So I want to make sure I understand
18 your opinion right.

19 So, in your opinion, if a user does
20 push-ups and then squats and then lunges, that
21 could be one athletic movement, depending on
22 the context or it could be multiple athletic
23 movements depending on the context; is that
24 right?

25 MS. NGUYEN: Objection. Form.

1 A. What I noted was that the one or
2 more exercises together must be able to
3 generate the data necessary to create the
4 fitness sub-score and the athleticism sub-score
5 and the combinatory fitness-athleticism score,
6 as described in Claim 1. So, therefore, in
7 some cases a single exercise may be able to
8 generate all of that data. In other cases,
9 multiple exercises together may generate that
10 data.

11 Q. Let's look back at paragraph 43 in
12 your declaration. Let me know when you are
13 there.

14 A. Yes, I'm at paragraph 43 of my
15 declaration.

16 Q. So you opine that a strength fitness
17 attribute can be evaluated by lunges or
18 push-ups; is that right?

19 MS. NGUYEN: Objection. Form.

20 A. I note that "A strength fitness
21 attribute may be calculated by evaluating a
22 user's 'performance of reps of static lunges
23 and/or push-ups' or 'ability to maintain their
24 performance within a predetermined range of
25 tempo during activities'," and that's provided

1 as one example of a strength fitness attribute.

2 Q. So if the user is doing lunges that
3 could be used as described in the '930 patent
4 to calculate a strength fitness attribute,
5 right?

6 MS. NGUYEN: Objection. Form.

7 A. I believe it notes that there is a
8 scenario in which the performance of reps of
9 static lunges can be used to generate a
10 strength fitness attribute.

11 Q. And then in the next sentence you're
12 talking about an athleticism attribute, a
13 balance athleticism attribute, right?

14 A. I believe the next sentence is a
15 power athleticism attribute.

16 Q. Okay. Yeah, sure. And that's
17 determined from in one scenario a vertical
18 jump; is that right?

19 MS. NGUYEN: Objection. Form.

20 A. Yeah. The specific wording says "A
21 power athleticism attribute may be 'determined
22 from drills comprising or consisting of
23 vertical jump' by measuring the vertical
24 distance the user achieved."

25 Q. I'm not asking you to just read the

1 quote. I'm just asking you what you mean by
2 something.

3 A. I understand, but when you reword
4 it, it doesn't necessarily have the same
5 meaning.

6 Q. Sure. Sure. So I understand your
7 opinions in paragraph 43, right? You are
8 saying that there is a scenario where you can
9 measure a fitness attribute using lunges or
10 push-ups and you can calculate an athleticism
11 attribute using a vertical jump; is that right?

12 MS. NGUYEN: Objection. Form.

13 A. I believe there is a scenario
14 wherein the strength fitness can be calculated
15 based on performance of lunges and athleticism
16 attribute can be determined from performance of
17 a user performing vertical jumps, yes.

18 Q. So earlier we were talking about how
19 your definition of an athletic movement depends
20 on whether that movement can be used to
21 calculate the combinatory score, right?

22 MS. NGUYEN: Objection. Form.

23 A. I believe what I said was that the
24 meaning of the term athletic movement in the
25 claim refers to a scenario in which at least

1 one athleticism sub-score and at least one
2 fitness sub-score and at least one combinatory
3 fitness athleticism score can be generated from
4 the data collected.

5 Q. Given what we just looked at, if I
6 do static lunges and then a vertical jump, can
7 that be one athletic movement within the
8 meaning of Claim 1 of the '930 patent?

9 MS. NGUYEN: Objection. Form.

10 A. If the appropriate data were
11 collected to generate a fitness attribute and
12 an athleticism attribute, then I believe that
13 example of what you refer to as two separate
14 exercises would be a single athletic movement.

15 Q. Are those not two separate exercises
16 in your view?

17 MS. NGUYEN: Objection. Form.

18 A. I believe those are examples of
19 exercises we specifically identify; static
20 lunges, push-ups and vertical jumps.

21 Q. So those two exercises in the
22 scenario we just discussed are one athletic
23 movement; is that right?

24 MS. NGUYEN: Objection. Form.

25 A. They could be considered one

1 athletic movement.

2 Q. I want to direct you now to Column
3 22, specifically line 51. Let me know when you
4 are there.

5 A. Okay, I'm there now.

6 Q. Do you see the sentence that begins
7 with "As one example?"

8 A. I see that.

9 Q. "As one example, embodiments may
10 include prompting a first user, such as user
11 124 shown in FIG. 1 to perform athletic
12 movements, including completing at least one
13 drill and/or exercise." Do you see that?

14 A. I see that sentence, yes.

15 Q. Why did the inventors use the word
16 athletic movements plural in that sentence,
17 Column 22?

18 MS. NGUYEN: Objection. Form.

19 A. I think the inventors had in mind
20 that at least one, meaning possibly multiple
21 drills and/or exercises, would comprise an
22 athletic movement as defined in the claim.

23 Q. But they said athletic movements
24 plural?

25 A. Yes, and that is consistent with the

1 language we talked about earlier in Column 4,
2 starting on line 7 where the inventors describe
3 athletic movement as including movements,
4 plural.

5 Q. Sure. So if that is true, why
6 didn't they just say to perform an athletic
7 movement?

8 MS. NGUYEN: Objection. Form.

9 Q. Singular?

10 A. So as we have described the term
11 athletic movement as used in the claim can mean
12 multiple exercises or drills.

13 Q. Exactly. So if that's your opinion
14 then, what does athletic movements plural mean
15 in the specification here in Column 22?

16 A. To the best of my knowledge, the
17 only place where the word athletic movement is
18 quoted in the specification of the '930 patent
19 is Column 4, line 7, which provides a meaning
20 for athletic movement in the claim language in
21 my opinion to include movements, plural.

22 Q. You're not answering my question,
23 Dr. Fischer. I'm trying to understand why the
24 specification uses athletic movements, plural
25 here, if you're right that athletic movement

1 singular, already includes multiple movement?

2 MS. NGUYEN: Objection. Form.

3 A. I don't think this is inaccurate.

4 It says athletic movements plural which we
5 already said is within the scope of the term
6 athletic movement in quotes in Column 4 and in
7 the claim language.

8 Q. I'm not asking you if you think it's
9 inaccurate. Let's try this a different way.

10 In your opinion does the word
11 athletic movements, plural, have any different
12 meaning than the word athletic movement
13 singular in the context of the '930 patent?

14 MS. NGUYEN: Objection. Form.

15 A. Athletic movement singular, as I
16 noted is in quotes, meaning that the inventors
17 found it important to clearly describe in
18 Column 4, therefore, I would assume the
19 description in Column 4, line 7 where they
20 quote athletic movement to include movements
21 plural is what they intended to mean in the
22 claim.

23 Q. Right and you keep going back to
24 that. We are not talking about Column 4 at
25 this point. We are accepting what you are

1 saying is true.

2 Let's say for purposes of today, we
3 agree with your interpretation. If that's
4 true, then why do the inventors need to use the
5 word athletic movements plural ever in the
6 specification?

7 MS. NGUYEN: Objection. Form.

8 A. I don't believe there is any
9 inaccuracy in using the word athletic movements
10 as that is within the scope of the term
11 athletic movement as they describe it.

12 So I don't see any inaccuracy in the
13 way that they've used it. I would tend to
14 agree that they probably should have written it
15 in a clearer way.

16 Q. In your opinion, when they say
17 athletic movements plural here, they mean
18 athletic movement singular?

19 MS. NGUYEN: Objection. Form.

20 A. No, I disagree with that. They are
21 referring to athletic movements which can
22 include a bunch of exercises which are part of
23 the athletic movement of the claim language. I
24 don't believe they are interchangeable in that
25 regard.

1 Q. Help me understand that a little bit
2 more. How are they different?

3 MS. NGUYEN: Objection. Form.

4 A. The athletic movements as described
5 within Column 12, line 47 in my understanding
6 would be within the scope of a portion of the
7 movement described in Column 4, line 7, meaning
8 they can be one or more of the exercises,
9 drills or other motions of the user, that
10 comprise the athletic movement.

11 Q. I'm just not sure I follow that, Dr.
12 Fischer.

13 How are the words athletic movement
14 and athletic movements as they are used in the
15 specification of the '930 patent different?

16 MS. NGUYEN: Objection.

17 A. In the lines we were just talking
18 about in Column 22, it says "To perform
19 athletic movements, including completing at
20 least one drill and/or exercise."

21 They are clearly noting that
22 movements, plural, can include more than one
23 drill and/or more than one exercise and then
24 they follow up with specific examples that
25 include push-ups, squats, lunges and I believe

1 some other examples.

2 Q. How is that different from the way
3 you define athletic movement?

4 MS. NGUYEN: Objection. Form.

5 A. As we previously noted, athletic
6 movement in the claim term means that at least
7 one athleticism attribute and at least one
8 fitness attribute and a combinatory score is
9 able to be generated so that you would need to
10 have, in the context of the language in Column
11 22 multiple -- potentially need multiple drills
12 or exercises to generate the data necessary for
13 it to be considered an athletic movement with
14 regard to the claim.

15 Q. So you keep referring us back to
16 Column 4, lines 7 through 11, where the
17 inventor defines athletic movement in quotes.

18 Does that say anything about whether
19 the athletic movement can calculate an
20 athleticism attribute or a fitness attribute?

21 MS. NGUYEN: Objection. Form.

22 A. As noted, my opinions are based on
23 the patent in its entirety. As we referred to
24 the claim language, the athletic movement
25 they're referring to has a host of other

1 characteristics if you will, including
2 "calculating, with a processor, based on the
3 first activity data, a first combinatory
4 fitness-athleticism score."

5 So it would not be an athletic
6 movement within Claim 1 if it's not able to
7 meet all of the claim elements that are
8 associated with it.

9 Q. Does athletic movements, plural,
10 have the same requirement?

11 MS. NGUYEN: Objection. Form.

12 A. I'm sorry, I lost my placeholder.
13 Can you refer to the line and the column we
14 were talking about with the plural movements
15 again?

16 Q. Sure. It's Column 22, line 53.

17 A. I believe in that portion of this
18 investigation where they say to perform
19 athletic movements, including completing at
20 least one drill and/or exercise, that is
21 referring to the plain and ordinary meaning of
22 athletic movements and providing examples of
23 what one would consider athletic movements.

24 Q. Is the plain and ordinary meaning of
25 athletic meaning movements, plural, different

1 than the plain and ordinary meaning of athletic
2 movement singular?

3 MS. NGUYEN: Objection. Form.

4 A. As we have noted in the context of
5 the '930 patent, the inventors provide examples
6 of what includes an athletic movement with
7 regard to what is in the claim and they note
8 that that athletic movement in quotes includes
9 movements, plural, and then a host of examples
10 that we have discussed multiple times.

11 Q. Okay. That's not what I asked you.
12 Is the plain and ordinary meaning of
13 athletic movements plural different from the
14 plain and ordinary meaning of athletic
15 movements singular?

16 MS. NGUYEN: Same objection.

17 A. As noted, we need to be looking at
18 them in the appropriate context and as used in
19 the claim language, the inventors provide
20 examples of what they consider to be an
21 athletic movement in quotes and that includes
22 multiple movements.

23 Q. So in your opinion, if an inventor,
24 through lexicography, defines a certain
25 singular term, does that definition apply to

1 plurals of that term?

2 MS. NGUYEN: Objection. Form.

3 A. I based my opinions on the way that
4 I believe the inventors used the term within
5 the specification in the claims.

6 Q. Okay, great and in the specification
7 they used plural athletic movements, correct?

8 A. There are places where they use the
9 plural athletic movements.

10 Q. In those instances does the
11 lexicography that they provided for athletic
12 movements singular apply to the plural athletic
13 movements?

14 MS. NGUYEN: Objection. Form.

15 A. Are you saying the plural of the
16 quoted term athletic movements does it include
17 the plural of the definition that I just
18 provided or the meaning that I just provided?

19 Q. Yes.

20 A. I see no reason why the athletic
21 movements could not include more than one
22 exercise in their own right.

23 Q. So they are the same?

24 A. No, I did not say that.

25 MS. NGUYEN: Objection. Form.

1 Q. How are they different?

2 MS. NGUYEN: Dr. Fischer, let me
3 note my objection.

4 A. I think we described this multiple
5 times. They specifically used the word
6 athletic movement in quotes and define it to
7 mean multiple movements and I believe that
8 plural of the word movements that is not in
9 quotes takes on a plain and ordinary meaning in
10 which it could be one or more multiple
11 exercises.

12 Q. So your opinion is that the
13 lexicography does not apply to plural athletic
14 movements; is that right?

15 MS. NGUYEN: Objection. Form.

16 A. I think you would have to point me
17 to a specific spot where you are referring to.
18 I rather not make a generalization to that.

19 Q. You said that your understanding is
20 informed by the entire specification in the
21 claim language, right?

22 A. I believe I said that, yes.

23 Q. I think you said that you don't see
24 any reason why the lexicography of athletic
25 movement singular would not apply to athletic

1 movements plural, right?

2 MS. NGUYEN: Objection. Form.

3 A. I believe when you say athletic
4 movements plural not in quotes, it can be one
5 or more exercises or other examples.

6 Q. So does the lexicography apply to
7 the plural version of athletic movement?

8 MS. NGUYEN: Objection. Form.

9 A. I believe athletic movement, when it
10 is used in quotes and when it is used in the
11 claim language, has the meaning that we have
12 just discussed and the term movements or
13 athletic movements in the other paragraphs that
14 we've looked at take on the plain and ordinary
15 meaning.

16 Q. And why do you think that?

17 MS. NGUYEN: Objection. Form.

18 A. So, as noted, unless you can point
19 me otherwise, I only see one place in the
20 specification where the term athletic movement
21 is in quotes which to me indicates that the
22 inventors found that to be a very important
23 place to describe what they mean by that term
24 that they use later in the claim.

25 Q. Let's look on the next page, Column

1 23, line 25 specifically. Are you there?

2 A. I'm there now, yes.

3 Q. Starting with "In one embodiment."
4 Do you see that?

5 A. I see that.

6 Q. It says, "In one embodiment, a
7 workout session or drill may consist of a
8 single athletic activity." Do you see that?

9 A. I see that.

10 Q. "And sub-scores may be calculated
11 therefrom," correct?

12 A. I see it says that, yes.

13 Q. And it says, "Yet in another
14 embodiment, at least a first exercise may be
15 designed to specifically test attributes of
16 athleticism and at least a second exercise may
17 be utilized to specifically test attributes of
18 fitness." Do you see that?

19 A. I see that, yes.

20 Q. "So in one embodiment using a single
21 athletic activity, the next embodiment we are
22 using a first exercise and a second exercise."
23 Do you see that?

24 MS. NGUYEN: Objection. Form.

25 A. They provide an example where they

1 give one exercise that could comprise the
2 athletic activity and then they provide another
3 example of a different embodiment where
4 multiple exercises would comprise the athletic
5 activity.

6 Q. So the specification describes both
7 of those scenarios. Why isn't it possible that
8 Claim 1 is specifically claiming the embodiment
9 where there is only a single exercise being
10 used to calculate the combinatory score?

11 MS. NGUYEN: Objection. Form.

12 A. I see no reason why it would be
13 restricted in the claims since the inventors in
14 my mind provide examples of athletic movements
15 in the specifications where it can be multiple
16 and, in fact, you just provided a good example
17 where multiple exercises would be a single
18 athletic movement. I do not see anything in
19 the claim language that would restrict it to
20 only a single exercise.

21 Q. So in your opinion, because the
22 specification describes both of those
23 embodiments, the claim language has to include
24 both embodiments as well; is that right?

25 MS. NGUYEN: Objection. Form.

1 A. The specification provides numerous
2 examples and I don't see anything in the claims
3 that restricts it to a particular embodiment.

4 Q. What would you need to see in the
5 claims, as far as you understand them, that
6 would restrict the claims to one of those two
7 embodiments?

8 MS. NGUYEN: Objection. Form.

9 A. In fact, even in the embodiments
10 that you just described in Column 23, line
11 24 -- line 25, sorry -- in one embodiment a
12 workout session or drill may consist of a
13 single athletic activity. Even that embodiment
14 I don't feel restricts it to only a single
15 activity.

16 Q. Because of the word may?

17 A. That indicates to me that even in
18 that embodiment there may be additional
19 exercises or activities.

20 Q. Is your opinion the same in line 31
21 of Column 23 where it says, "In yet another
22 embodiment, a single exercise may be utilized
23 to measure at least one athleticism attribute
24 and at least one fitness attribute?"

25 MS. NGUYEN: Objection. Form.

1 A. I believe the '930 patent identifies
2 embodiments where a single exercise could be
3 considered. I want to emphasize could. An
4 athletic movement, if it's able to identify
5 athleticism and fitness attributes, but even in
6 that case, it does not appear to be restricted
7 because it uses the word may.

8 Q. We want to shift now to Fischer
9 Exhibit 7, which is the Kitagawa reference.

10 A. Do you mind if we take a quick
11 break?

12 Q. Sure.

13 (Time noted: 10:55 a.m.)

14 (Brief recess taken.)

15 (Time noted: 11:01 a.m.)

16 BY MR. BOWLING:

17 Q. Back on the record. Dr. Fischer, I
18 want to quickly flip back to the claim language
19 of the '930 patent on page 35 of Fischer
20 Exhibit 2.

21 A. Yes, I'm there.

22 Q. That second claim element we were
23 talking about that begins with "receiving" in
24 Claim 1; do you see that?

25 A. I see that, yes.

1 Q. "Receiving from a sensor, first
2 activity data;" is that right?

3 A. Yes, I see that.

4 Q. It says "Receiving from a sensor,
5 first activity data representing the first
6 athletic movement," correct?

7 A. I see that, yes.

8 Q. So the activity data must be
9 received from a sensor, correct?

10 A. It's at least saying that there is
11 first activity data that is received from a
12 sensor.

13 Q. The first activity data represents a
14 first athletic movement, right?

15 A. It says, "First activity data
16 representing the first athletic movement in the
17 claim."

18 Q. And then let's go down to the next
19 element which says "Calculating, with a
20 processor, based on the first activity data, a
21 first combinatory fitness-athleticism score."
22 Do you see that?

23 A. I see that, yes.

24 Q. So we get first activity data from a
25 sensor that represents the first athletic

1 movement and then that activity data is used to
2 calculate a combinatory first athleticism
3 score; is that right?

4 A. A processor uses data from the
5 sensor that was collected as the first activity
6 data from the first athletic movement in the
7 process of generating a combinatory first
8 athleticism score.

9 Q. Now, I want to flip to Fischer
10 Exhibit 7, which is the Kitagawa reference.
11 Let's flip to Column 8 of Kitagawa. Actually
12 let's flip to the next page, Column 9. We will
13 start at the second line of Column 9.

14 It begins with the word "After." Do
15 you see that?

16 A. I see that, yes.

17 Q. It says, "After the user's
18 completion time for each course is entered, the
19 age on the basis of the physical strength is
20 calculated with reference to this statistical
21 data." Do you see that?

22 A. I see that.

23 Q. What is that describing? Can you
24 help us understand that?

25 MS. NGUYEN: Objection. Form.

1 A. Can I review the context? (Witness
2 reviewing document).

3 I believe in Kitagawa, in that
4 section, it is noting that the time for each
5 course, at least in part, combined with the
6 physical data to determine a physical strength.

7 Q. That physical strength age, what is
8 that?

9 MS. NGUYEN: Objection. Form.

10 A. The Kitagawa identifies measuring
11 physical fitness and more particularly relates
12 to a system for measuring a user's age. In
13 this case, I think it is really referring to an
14 apparent age on the "basis of physical
15 strength, with the system (1) including various
16 types of exercise courses that may have in them
17 some elements of amusement so as to encourage
18 the user to perform various exercises, and (2)
19 being able to measure how long a user takes to
20 progress through the exercises, so as to
21 calculate the physical-strength age of the user
22 and to assess which athletic activities the
23 user is good or bad at." And that's from
24 paragraph 117 of my declaration.

25 Q. So physical strength age, that is

1 the score so to speak that Kitagawa is
2 calculating?

3 MS. NGUYEN: Objection. Form.

4 A. So, what Kitagawa refers to as
5 physical strength age is an example of a
6 calculated value of the user's apparent age or
7 ability.

8 Q. Does Kitagawa disclose calculating
9 any other values or scores?

10 A. Can you be a little bit more clear?
11 Are you referring to a specific user?

12 Q. So you testified that Kitagawa
13 discloses calculating physical strength age,
14 which is a value of the user's apparent age or
15 ability, right?

16 A. Yes, I said that.

17 Q. Does Kitagawa disclose any other
18 values or scores being calculated for a user?

19 MS. NGUYEN: Objection. Form.

20 A. So even earlier in that same
21 paragraph, Kitagawa refers to a statistical
22 relationship. So presumably there had to be
23 some sort of a calculation to be used to
24 generate that.

25 Within other portions of this

1 disclosure they refer to determining index
2 values and they must have had a process for
3 identifying what those index values would be.
4 So I don't think it's fair to say that is
5 necessarily the only calculation that would be
6 performed.

7 Q. So as far as you understand,
8 Kitagawa discloses calculating a physical
9 strength age, determining index values, and
10 determining a statistical relationship between
11 the user's time and those index values; is that
12 right?

13 A. Those are among the factors that
14 must be calculated within Kitagawa. I did not
15 say that is exclusive to this.

16 Q. What are the other factors that are
17 calculated within Kitagawa?

18 MS. NGUYEN: Objection. Form.

19 A. I believe those are the ones that I
20 have identified, but as I sit here today, I'm
21 not comfortable saying that somewhere within
22 the specification it doesn't describe another
23 calculation.

24 Q. But as you sit here today, you're
25 not aware of any other values being calculated

1 in the system disclosed in Kitagawa, right?

2 MS. NGUYEN: Objection. Form.

3 A. I mean Kitagawa notes that the
4 system for calculating a user's age on the
5 basis of a user's particular strength could be
6 created using a personal computer for example.

7 So presumably, if they are writing a
8 software program, there are some series of
9 calculations going on within that program. It
10 would be hard for me to say that there is not
11 some other calculation described.

12 Q. Let's focus less on the word
13 calculation and on the values that are being
14 calculated as disclosed in Kitagawa, okay?

15 A. Okay.

16 MS. NGUYEN: Objection. Form.

17 Q. We talked about one value that is
18 being calculated that is physical strength age,
19 right?

20 A. Kitagawa describes calculating a
21 physical strength age value.

22 Q. What other values does Kitagawa
23 describe being calculated aside from physical
24 strength age?

25 A. Kitagawa describes a means for

1 calculating index values for a given course.

2 Q. Anything else?

3 A. There are a number of other
4 parameters that Kitagawa describes, including
5 blood pressure, pulse rate, bending forward,
6 distance, and possibly others that may require
7 some calculation to determine.

8 Q. Does it disclose those things being
9 calculated?

10 MS. NGUYEN: Objection. Form.

11 A. I don't believe it provides
12 substantial detail on the way in which those
13 values are determined.

14 Q. Does it provide any information at
15 all?

16 MS. NGUYEN: Objection. Form.

17 A. I believe it notes that a user can
18 record those values.

19 Q. But it doesn't describe calculating
20 them, right?

21 MS. NGUYEN: Objection. Form.

22 A. As I sit here today, I cannot see
23 where it describes that.

24 Q. So as you sit here today, you're
25 aware of Kitagawa disclosing two values being

1 calculated, one is the physical strength age
2 and the other are the index values for a given
3 course, correct?

4 MS. NGUYEN: Objection. Form.

5 A. I believe at least those would be
6 calculated.

7 Q. As you sit here today, you're not
8 aware of any other being disclosed in Kitagawa,
9 correct?

10 A. Could you clarify the question,
11 please?

12 Q. Sure. As you sit here today, are
13 you aware of Kitagawa disclosing any values
14 being calculated, other than physical strength
15 age or the index values for a given course?

16 MS. NGUYEN: Objection. Form.

17 A. So a person of ordinary skill in the
18 art, seeing that they note blood pressure and
19 pulse rate, would recognize that presumably
20 some calculation would have to be determined in
21 order to generate those values.

22 Q. But as we discussed, those aren't
23 described as being calculated in Kitagawa,
24 right?

25 MS. NGUYEN: Objection. Asked and

1 answered.

2 A. I don't believe Kitagawa goes into
3 detail to describing how those are calculated,
4 but a person in ordinary skill in the art would
5 realize that some calculation would have to be
6 performed to generate those values.

7 Q. Let's start with the first of two --
8 the two calculated values. Physical strength
9 age. What data does Kitagawa disclose being
10 used to calculate physical strength age?

11 MS. NGUYEN: Objection. Form.

12 A. So from paragraph 118 of my
13 declaration, "Kitagawa describes a system for
14 an entertaining way to assess a user's physical
15 fitness attributes through a variety of
16 specially designed courses each intended to
17 assess a particular attribute, generating a
18 score (such as time) for each course and a
19 composite score that is referred to as the
20 'physical-strength age'."

21 Q. I think this will go a little faster
22 if you try to answer the question I'm asking.

23 What does Kitagawa disclose -- what
24 data does Kitagawa disclose being used to
25 calculate physical strength age?

1 MS. NGUYEN: Objection. Form.

2 A. So going back to Column 9, line -- I
3 believe it would be six -- Kitagawa notes that
4 "Physical-strength age is calculated taking
5 into consideration the time that a user takes
6 in completing the entire series of courses.
7 However, age on the basis of physical strength
8 can also be calculated by the time that the
9 user takes in completing any one of the
10 courses. In either case, the age of the basis
11 of the physical strength data is stored."

12 Q. So physical strength age as
13 disclosed in Kitagawa is calculated using one
14 type of data which is time, correct?

15 A. They provide at least an example of
16 time and using that time as part of the
17 calculation.

18 Q. Does Kitagawa disclose physical
19 strength age being calculated using any data
20 other than the time to complete a course?

21 A. Kitagawa discloses using the time to
22 complete a course or multiple courses combined
23 with index values that are generated for that
24 course or courses to generate a physical
25 strength age value.

1 Q. Any other data?

2 MS. NGUYEN: Objection. Form.

3 A. So referring to figure two of
4 Kitagawa, the box labeled S21, notes that "The
5 user measures, and records on a scorecard,
6 his/her blood pressure, pulse rate, and degree
7 to which he/she can bend forward."

8 So those are other measurements that
9 at least could be used in creating the score
10 generated by Kitagawa.

11 Q. Where does Kitagawa disclose using
12 blood pressure, pulse rate or the degree to
13 which he/she can bend forward as part of
14 calculating physical strength age?

15 MS. NGUYEN: Objection. Form.

16 A. So Kitagawa describes "a method by
17 which an index of the amount of exercise that a
18 user performs is measured by the extent of a
19 user's ability is demonstrated, exercise
20 courses that each combine a unique set of
21 exercises such that an index value for one
22 exercise course is different from another
23 exercise course," which is essentially stating
24 that Kitagawa generates and they provide a
25 detailed description of how they generate index

1 values for a course and then a weighted sum.
2 Then those index values can be used in
3 combination for the time for that course to
4 generate a score or that can be -- multiple
5 courses can be used in a weighted sum between
6 those courses to calculate a score.

7 Q. You're not answering my question,
8 Dr. Fischer. I know you're reading from your
9 declaration, but my question didn't have
10 anything to do with what you just said.

11 Is there anywhere where Kitagawa
12 discloses using blood pressure, pulse rate or
13 the degree to which the user can bend forward
14 as part of calculating physical strength age?

15 MS. NGUYEN: Note my objection.

16 A. I believe Kitagawa describes
17 measuring those parameters and incorporating
18 them into the system and it describes examples
19 of calculating a physical age. As I sit here
20 today, I don't see an example where they
21 specifically use those values in that
22 calculation, but they also provide this as an
23 exemplary way to generate a physical strength
24 age.

25 Q. So as you sit here today, you're not

1 able to point to anywhere in Kitagawa where
2 blood pressure, pulse rate or the degree to
3 which the user can bend forward are used to
4 calculate physical strength age, correct?

5 MS. NGUYEN: Objection. Form.

6 A. The flow chart in figure two
7 describes those parameters, including blood
8 pressure, pulse rate and the degree to which
9 the user can bend forward required in the
10 beginning and then toward the bottom of the
11 flow chart, after reaching the end point of the
12 course, the user then measures blood pressure,
13 pulse rate and a degree to which he/she can
14 bend forward.

15 Then the following block describes
16 creating a certificate with the user's age. So
17 there is a calculation being performed and
18 example calculations are identified within the
19 disclosure, but this flow chart shows that the
20 various parameters are collected and there is
21 no reason to believe that they could not be
22 used in the determination of the user's age.

23 Q. There is nowhere in all of Kitagawa
24 where there is an affirmative disclosure of
25 blood pressure, pulse rate or the degree to

1 which the user can bend forward being used to
2 calculate physical strength age, right?

3 MS. NGUYEN: Objection. Form.

4 A. I would say that figure two shows to
5 me at least that the computing device at the
6 service counter would have all of this
7 information and the person of ordinary skill in
8 the art would recognize any subset of this
9 information could be used to calculate a user's
10 physical age.

11 I believe the example described in
12 the Kitagawa specification, as well as what I
13 have relied on primarily in my declaration,
14 focuses on calculating a physical age based on
15 a time to complete courses as well as index
16 values associated with various parameters of
17 the particular courses.

18 Q. So you're only able to testify that
19 blood pressure and pulse rate could be used to
20 calculate something about the user, but you're
21 unable to point to anywhere in Kitagawa where
22 there is an affirmative disclosure of blood
23 pressure, pulse rate or the degree to which the
24 user can bend over being used to calculate the
25 physical strength age, right?

1 MS. NGUYEN: Objection. Form.

2 A. I believe one of the purposes of the
3 deposition is to identify what a person of
4 ordinary skill in the art would recognize
5 looking at this disclosure and entering into
6 the computer system, the blood pressure, pulse
7 rate and the degree to which the user can then
8 forward before and after the exercise seems
9 like something that one would want to include
10 in there and there is no reason that they could
11 not include in there.

12 So I don't agree that it is not
13 disclosed even though it's not described in
14 detail within the specification.

15 Q. It's not described anywhere in the
16 specification, right?

17 MS. NGUYEN: Objection. Form.

18 A. So as noted, figure two shows a flow
19 chart and that data very clearly being entered
20 and the person of ordinary skill in the art
21 would recognize that it wouldn't make sense to
22 collect data just to throw it away.

23 Q. So other than figure two and the
24 fact that the data is collected, you're unable
25 to point to anywhere in Kitagawa where the

1 user's blood pressure, pulse rate or the degree
2 of which they could bend over is used to
3 calculate the physical strength age, correct?

4 A. As I sit here today, I am not aware
5 of a specific spot within the description of
6 Kitagawa where all of that data is used in an
7 equation to calculate the physical strength
8 age.

9 Q. Can you tell me what the box S22,
10 which follows the measurement of those
11 parameters, says?

12 A. The box labeled S22 notes that "The
13 physical condition of the user is checked."

14 Q. What does the next box say below
15 that, S23?

16 A. "Is the physical condition good?"

17 Q. If you follow the no pathway, if the
18 user's condition is not good, what does the box
19 say there?

20 A. "User refrains from taking part in
21 the courses."

22 Q. So the blood pressure, pulse rate in
23 the degree to which he/she can bend over isn't
24 being thrown away; it's being used to determine
25 the user's physical condition and to see

1 whether the user should refrain from taking
2 part in the course, right?

3 MS. NGUYEN: Objection. Form.

4 A. I disagree with that point because
5 that is only one of the two boxes where those
6 measurements are taken and the second box
7 taking that measurement has no such out, if you
8 will, to tell somebody not to take the course
9 because it would have been taken after the
10 course was already completed.

11 Q. In your opinion, does the -- we can
12 put away Kitagawa for now. Let's switch over
13 to the Lofi reference, which is Fischer Exhibit
14 2. You reviewed this reference as part of your
15 analysis, right?

16 A. I don't believe that is the correct
17 exhibit number.

18 Q. I'm sorry, Fischer Exhibit 5.

19 A. Yes, I have Exhibit 5 in front of me
20 and that appears to be the Lofi reference that
21 I referred to in my declaration.

22 Q. In your opinion, does Lofi teach a
23 system where a combinatory score is calculated
24 based on a single test?

25 MS. NGUYEN: Objection. Form.

1 A. Can you repeat the question, please?

2 Q. Sure. In your opinion, does Lofi
3 disclose a system where a combinatory score is
4 calculated based on a single test?

5 MS. NGUYEN: Same objection.

6 A. Could you clarify what you mean by
7 the word test?

8 Q. Sure. Let's look to paragraph 56 of
9 your declaration, please. Do you see at the
10 top of that paragraph you say, "Another example
11 strength test is disclosed by Lofi?"

12 A. Yes, I see that.

13 Q. What did you mean by test there?

14 A. I believe in this case we are
15 referring to tests that the Lofi system
16 describes the user to perform.

17 Q. Great. Let's use that definition of
18 test when we are discussing this reference.
19 Sound good?

20 A. Sure.

21 Q. Back to the question. In your
22 opinion, does Lofi disclose the calculation of
23 a combinatory score based on a single test?

24 MS. NGUYEN: Same objection.

25 A. Lofi provides an example of a single

1 test or activity that assesses both strength
2 and power which correspond to athleticism and
3 fitness of the '930 patent respectively.

4 Q. Where is that?

5 A. So I described this in paragraph 50
6 among others in my declaration and that's at
7 least one example that I provide of a single
8 test or activity or task that calculates
9 multiple attributes.

10 Q. Let's look at Lofi itself. Can you
11 show me where Lofi discloses a single test that
12 measures both strength and power?

13 A. I would start at least with one
14 example on page 5, line 12 of Lofi wherein "the
15 ergonomic bicycle could be used to measure leg
16 strength according to an operating procedure.
17 The person that is asked to pedal as fast as
18 possible for a short period for approximately
19 10 seconds. During this period of time, the
20 means to control rapidly increased the load on
21 the pedaling, given the resistance is
22 increasingly greater, the speed of pedaling
23 decreases after a few seconds. The peak of the
24 strength speed curve corresponds to the maximum
25 capacity of legs expressed in watts."

1 Q. So if I understand your testimony
2 right, Lofi there is measuring strength and
3 some additional parameter; is that right?

4 A. This paragraph --

5 MS. NGUYEN: Objection. Form.

6 A. This paragraph describes to me that
7 Lofi is measuring with the ergonomic bicycle
8 run in this operating procedure that it could
9 measure strength, generate a strength speed
10 curve, meaning it's also measuring speed and
11 then generates a number in watts which would be
12 a measure of power.

13 Q. Where does Lofi describe generating
14 calculating a combinatory score based on
15 strength, speed and/or power?

16 MS. NGUYEN: Objection. Form.

17 A. So if we are using combined or
18 combinatory score in the context of the '930
19 patent, the '930 patent invokes that a
20 combinatory score can either be two fitness
21 sub-scores separately shown side by side for
22 example or that the combinatory score may also
23 be represented by a single score.

24 Q. So where does Lofi disclose
25 calculating that combinatory score?

1 MS. NGUYEN: Same objection.

2 A. So according to that meaning, simply
3 calculating two separate values would be
4 equivalent to calculating or determining a
5 combinatory score and as noted in Lofi, at a
6 minimum it is calculating strength and it's
7 calculating speed over time and it's
8 calculating watts, which is a measure of power.

9 Q. Where does Lofi discuss calculating
10 power?

11 A. So a person of ordinary skill in the
12 art would recognize that watts are a measure of
13 power, so if they are going to express the
14 capacity of the legs in watts, they are
15 calculating power.

16 Q. How is strength being measured in
17 this disclosure that we are discussing?

18 MS. NGUYEN: Objection. Form.

19 A. It appears that in this section Lofi
20 is describing generating a strength speed
21 curve. So as part of generating that curve,
22 it's determining the strength that each
23 instance in time that it is also calculating
24 the speed.

25 Q. How is it measuring strength; is

1 that in watts?

2 MS. NGUYEN: Objection. Form.

3 A. No, strength is not measured in
4 watts.

5 Q. What is it disclosed as being
6 measured in in Lofi?

7 MS. NGUYEN: Objection. Form.

8 A. I believe the resistance on the
9 ergonomic bicycle is being changed and I
10 believe the resistance is related to the amount
11 of force that a user would need to apply.
12 Therefore, that resistance would be related to
13 the strength of the user.

14 Q. What is the measurement for force?

15 A. Could you be more clear?

16 Q. Is force measured in watts?

17 MS. NGUYEN: Objection. Form.

18 A. Force is definitely not measured in
19 watts.

20 Q. How does watts relate to the
21 strength of force measurement?

22 MS. NGUYEN: Objection. Form.

23 A. I believe at least in this scenario
24 the power would be related to the strength or
25 force multiplied by the instantaneous

1 corresponding speed to determine the watts that
2 are given instance in time.

3 Q. So power is just a measure of force
4 over time?

5 A. No, that's not what I said.

6 Q. Help me understand the difference
7 between what you are saying and my
8 understanding.

9 A. In this scenario, it would be the
10 force times the speed with whatever appropriate
11 conversion factor is required.

12 Q. How does power relate to the
13 strength speed curve that you told me about?

14 MS. NGUYEN: Objection. Form.

15 A. (Reading). Lofi discloses that
16 there is a point on this speed strength curve
17 by stating that it's a curve. Clearly strength
18 and speed are calculated at multiple instances
19 in time and they are identifying the peak of
20 that curve presumably where strength times
21 speed is at its maximum and using that to
22 calculate the power.

23 Q. So power is calculated based on the
24 strength speed curve, right?

25 A. Power can be determined from a

1 strength speed curve at a given instance in
2 time along that curve.

3 Q. And that's why Lofi mentions watts
4 here when it is talking about the strength
5 speed curve?

6 MS. NGUYEN: Objection. Form.

7 A. So the force exerted by the user
8 multiplied by the speed at which the user is
9 exerting that force would be used to generate a
10 power measurement in watts.

11 Q. So I think you testified earlier
12 that because in your opinion Lofi discloses
13 measuring strength and speed that means it's
14 calculating a combinatory score; is that right?

15 MS. NGUYEN: Objection. Form.

16 A. That I do not believe is reflective
17 of the opinion in my declaration.

18 Q. Where in Lofi is the calculation of
19 a combinatory score disclosed?

20 A. So as I previously noted, the '930
21 patent meaning of combinatory score includes
22 two discrete scores. Therefore, calculating
23 two discrete scores could constitute a
24 combinatory score.

25 Q. So can you point me to anywhere in

1 Lofi where there is a combinatory score that is
2 being calculated?

3 MS. NGUYEN: Objection. Form.

4 A. I provide many such instances. I
5 provide many such instances in my declaration
6 primarily starting on page 41 where I describe
7 different tasks in which Lofi asked the user to
8 perform and those tasks generate different
9 measurements or parameters and combinations of
10 those results can be considered a combinatory
11 score.

12 Q. Which of those individual tasks
13 generates a combinatory score?

14 MS. NGUYEN: Objection. Form.

15 A. I would first preface by saying that
16 I don't believe an individual task alone needs
17 to generate a combinatory score. That being
18 said, I do provide examples of that.

19 Q. Where is that?

20 MS. NGUYEN: Objection. Form.

21 A. So the ergometric bicycle test that
22 we had just been discussing in my mind is an
23 example of a test that generates athleticism
24 and fitness sub-scores which together would be
25 considered a combinatory score.

1 Q. Where in your declaration do you
2 describe that?

3 A. At least in paragraph 50 and I
4 believe other locations as well.

5 Q. Can you tell me other locations?

6 MS. NGUYEN: Objection. Form.

7 A. I note in paragraph 63 of my
8 declaration, "The fitness tests of Lofi are
9 designed to assess one or more" -- sorry.

10 "The fitness tests of Lofi are
11 designed to assess," I believe there is a typo
12 in there, "designed to assess one or more
13 measures of 'fitness' or 'athleticism' as
14 defined by the claims of the '930 patent. One
15 or more such tests could be utilized to
16 generate scores corresponding individually to
17 'fitness' and 'athleticism'."

18 And it is repeating effectively what
19 I said earlier that "While the '930 patent
20 notes a combinatory score could be simply
21 showing the two scores together as shown in
22 Figure 12 of the '930 patent above, Lofi
23 further describes an example of generating an
24 aggregate combined score."

25 Going on it says that "The score

1 corresponding to physical fitness is equivalent
2 to the average scores with a coefficient 1 for
3 the measurement of body composition, a
4 coefficient 1 for measurement of endurance, a
5 coefficient 1 for measurement of the muscular
6 strength and a coefficient 1 for measurement
7 relating to motoricity," and then it provides
8 some specific details about how those
9 individual elements are even further broken
10 down.

11 Q. Anywhere other than paragraph 50 and
12 63?

13 MS. NGUYEN: Objection, form.

14 A. Paragraph 64 starts with "In an
15 example activity Lofi, the user is assessed of
16 both 'Strength' and 'Power,' thus both
17 'fitness' and 'athleticism' (as defined in the
18 claims of the '930 patent), respectively."

19 Q. It sounds like in your opinion the
20 only instance where Lofi describes a single
21 test being used to calculate the combinatory
22 score is this bike test that you described in
23 paragraph 50 of your declaration where you
24 claim that both strength and power are
25 measured; is that right?

1 MS. NGUYEN: Objection. Form.

2 A. In preparing my declaration, I
3 identified at least one example that meets the
4 claim. That is not to say that there aren't
5 other examples described within a
6 specification.

7 Q. The only one in your declaration is
8 the one described in paragraph 50, right?

9 MS. NGUYEN: Objection. Form.

10 A. I believe that is the example that I
11 elaborated on in most detail.

12 MS. NGUYEN: Can we break for lunch
13 soon?

14 MR. BOWLING: Sure. Just a couple
15 of more questions.

16 Q. You said that's the example you
17 elaborate on in most detail, but as you sit
18 here today, you're not able to identify any
19 other examples that you provide in your
20 declaration, right?

21 A. Could you provide a complete
22 statement? Examples of what?

23 Q. So I asked you whether it's true
24 that in your opinion Lofi only describes in one
25 instance a single test being used to calculate

1 the combinatory score and that's the bike test
2 that you described in paragraph 50, right?

3 MS. NGUYEN: Same objection.

4 A. In the context of the meaning of the
5 word test within the Lofi reference, I believe
6 I explicitly describe one example of such test
7 that generates the combinatory fitness
8 athleticism score as identified in the '930
9 patent.

10 I would have a hard time sitting
11 here today to confirm that is the only
12 reference that is in there without spending
13 more time as my goal in generating this
14 declaration was to identify at least one
15 example that meets the claims.

16 Q. And in that one example, you've
17 identified your opinion is that the two
18 attributes being measured are strength and
19 power, correct?

20 MS. NGUYEN: Objection. Form.

21 A. I provide another example in
22 paragraph 64 where we measure both endurance
23 and power.

24 Q. Any others?

25 MS. NGUYEN: Objection. Form.

1 A. As I sit here today, off the top of
2 my head, I would have a hard time pointing to a
3 specific location, but that's not to say there
4 aren't other examples in my declaration or
5 within the Lofi reference.

6 Q. And the word "power" appears nowhere
7 in Lofi as we discussed, right?

8 MS. NGUYEN: Objection. Form.

9 A. The unit watts a person of ordinary
10 skill in the art would recognize is a measure
11 of power, so I disagree and I believe Lofi
12 certainly refers to power.

13 Q. Not explicitly though?

14 MS. NGUYEN: Objection. Form.

15 A. I disagree with you on that. That
16 would be like saying it's 70 degrees in here
17 and saying I'm not talking about temperature.

18 Q. Does Lofi expressly disclose the
19 word power anywhere?

20 MS. NGUYEN: Same objection.

21 A. I don't recall if the word power is
22 used within the Lofi reference, but certainly
23 the term watts is a unit of power. Therefore,
24 they are discussing power.

25 Q. One last question and then we can

1 break for lunch.

2 In paragraph 78 of your declaration,
3 I just want to ask a quick question and let me
4 know when you are there.

5 A. Paragraph 78 of my declaration?

6 Q. Yes.

7 A. I'm there now.

8 Q. In the heading you observe that "The
9 method of Claim 1 includes a predefined
10 ordering of drills." Do you see that?

11 A. No, I do not. Where are we
12 referring to?

13 Q. The heading D above paragraph --

14 A. Oh, I'm sorry, the claim language,
15 yes.

16 Q. That's from Claim 7, right?

17 A. Claim 7 includes the wording
18 "include a predefined ordering of drills."

19 Q. So you note here in paragraph 78
20 that Lofi teaches various repetitive exercises;
21 is that right?

22 A. I don't believe I used the word
23 repetitive exercises in my declaration although
24 I would need to confirm that terminology.

25 Q. I believe it's the bottom sentence

1 of paragraph 78 on page 60?

2 A. Okay, I see it now. Lofi also
3 teaches various repetitive exercises. Yes, I
4 see that.

5 Q. You give some examples; bicycling,
6 running, repetitive movements. Do you see
7 that?

8 A. I see that, yes.

9 Q. And then you say in the second to
10 last sentence of paragraph 78 that "Each
11 fitness test represents a drill, and the order
12 of these tests may be determined prior to
13 commencing the workout session." Do you see
14 that?

15 A. I see that.

16 Q. Where does Lofi disclose that?

17 MS. NGUYEN: Objection. Form.

18 A. So the quote on the previous page,
19 paragraph 78, I note that "Lofi describes the
20 sequential workflow: 'According to on
21 operating procedure, the person settles in
22 front of the terminal'," and then I skip ahead,
23 "Once this stage is completed, the different
24 measurements are implemented." I skip ahead
25 again.

1 It says "Subsequently, the following
2 tests are carried out: Measurement of
3 reflexes, measurement of the strength of upper
4 limbs, measurement of abdominal strength,
5 measurement of flexibility, measurement of
6 strengths of lower limbs and measurement of
7 endurance."

8 Q. Where does Lofi describe that order
9 of measurement is predefined?

10 MS. NGUYEN: Objection. Form.

11 A. When it says "Subsequently, the
12 following tests are carried out" that means to
13 me that there is a sequence and that sequence
14 would be or at least could be predetermined and
15 the person of ordinary skill in the art would
16 assume that there is a predetermined sequence.

17 I would need to look elsewhere in my
18 declaration disclosure to determine if there
19 are other mentions of it.

20 Q. So your opinion is that because it
21 says subsequently the following tests are
22 carried out, that a person of ordinary skill
23 would think that that could be a predetermined
24 or predefined ordering of drills?

25 MS. NGUYEN: Objection. Form.

1 A. So, I also describe this in
2 paragraph 69 of my declaration where it says,
3 "Lofi clearly describes how each test provides
4 instructions to the user at the time of the
5 test as previously detailed. According to
6 Lofi, the 'following tests are carried out:
7 Measurement of reflexes, measurement of the
8 strength of upper limbs, measurement of
9 abdominal strength, measurement of flexibility,
10 measurement of strengths of lower limbs and
11 measurement of endurance' wherein each stage
12 has a 'duration of approximately 15 minutes'.
13 The completion of each 15-minute fitness test
14 in this series serves as a triggering event
15 upon which the instructions are provided to the
16 user to perform an athletic movement associated
17 with the next test."

18 Therefore, these clearly are in a
19 sequence in this example.

20 Q. So they are in a sequence, but is it
21 a predefined sequence?

22 MS. NGUYEN: Objection. Form.

23 A. Yes. So if I go back to paragraph
24 68 in my declaration, we talk about the
25 possibility of repeating and revising results

1 and in that scenario it would only make sense
2 that the user repeats the same tests in the
3 same order so that the results could be
4 compared. So, therefore, they must be in a
5 predetermined order since they are matching a
6 previous attempt.

7 Q. Why would they have to be in the
8 same order?

9 MS. NGUYEN: Objection. Form.

10 A. If one were to provide a meaningful
11 comparison of results between different
12 attempts, it would only make sense to repeat
13 the same test.

14 Q. But why in the same order?

15 MS. NGUYEN: Objection. Same
16 objection.

17 A. In order to have consistent results
18 between tests, it would make sense and a person
19 of ordinary skill in the art would recognize
20 that the routine or order of the tests would
21 have to be the same, otherwise it would be very
22 difficult to generate meaningful, reliable
23 comparisons.

24 Q. The only disclosure in Lofi that
25 talks about the predefined ordering of drills

1 in your opinion is in the section you just
2 cited where the user is repeating the fitness
3 tests?

4 MS. NGUYEN: Objection. Form.

5 A. Just to clarify what I just said
6 earlier, I strongly believe that in order to
7 get meaningful reliable test results, it would
8 be very important to repeat the tests in the
9 same order. Therefore, if not expressly
10 disclosed though I think it is -- it certainly
11 would have been very clear to one of ordinary
12 skill in the art that these tests would be in a
13 predetermined order.

14 I also noticed in the bottom of page
15 8, starting around line 26, there is actually a
16 specific sequence wherein they say the word
17 first and then second and then third, referring
18 to an ordering.

19 Q. But that says nothing about it being
20 a predefined ordering, right?

21 MS. NGUYEN: Objection. Form.

22 A. I actually disagree because the
23 beginning of that sentence says, "According to
24 an operating procedure," which would indicate
25 to me that there is, in fact, a procedure or

1 predetermined process therein which those
2 activities are performed in that order.

3 MS. NGUYEN: Counsel, can we break
4 for lunch?

5 MR. BOWLING: Sure.

6 (Time noted: 12:14 p.m.)

7 (Lunch recess taken.)

8 AFTERNOON SESSION

9 (Time noted: 12:37 p.m.)

10 BY MR. BOWLING:

11 Q. Dr. Fischer, I'm going to ask you to
12 turn to Fischer Exhibit 6, which is the
13 Maeueller reference.

14 A. I have that here.

15 Q. We want you to also look at your
16 declaration, paragraph 136.

17 A. Is that 136?

18 Q. Yes. Are you there?

19 A. Yes, I'm there.

20 Q. In paragraph 136 of your declaration
21 you are discussing why a skilled artisan would
22 combine the teachings of Kitagawa with
23 Maeueller; is that right?

24 A. I note in paragraph 136 of my
25 declaration that "It would have been obvious to

1 a person of ordinary skill in the art to look
2 to Kitagawa and incorporate Kitagawa's
3 simultaneous monitoring of multiple physical
4 abilities into Maeueller's fitness tests."

5 Q. The paragraph is discussing why a
6 skilled artist is to do that, correct?

7 MS. NGUYEN: Object to form.

8 Q. I think in particular the first
9 sentence.

10 A. I believe that sentence is referring
11 to a sentence in the previous paragraph as
12 well.

13 Q. What is the sentence in the previous
14 paragraph that you are referring to?

15 A. I believe paragraph 135 describes
16 how techniques related to a plurality of index
17 values could readily be applied to Maeueller to
18 assign index values to scores from various
19 tests.

20 Q. Are you familiar with the concept of
21 a motivation of combined references?

22 A. Yes, I am.

23 Q. Where in your declaration do you
24 describe the motivation described to combine
25 the Kitagawa reference and the Maeueller

1 reference?

2 MS. NGUYEN: Objection to form.

3 A. There are multiple locations and at
4 least have two headings titled "Motivation to
5 Combine Maeueller and Kitagawa" on pages 100 and
6 104 of my declaration.

7 Q. In your opinion, what is the
8 motivation to combine?

9 MS. NGUYEN: Objection. Form.

10 A. I believe I refer to motivation to
11 combine for teachings related to Claim 7 and I
12 also refer to a motivation to combine for
13 teachings that I used in my arguments related
14 to Claim 1. Which one are you referring to?

15 Q. Let's start with Claim 1.

16 A. So, I note that both Maeueller and
17 Kitagawa disclose similar methods to those
18 disclosed in Claim 1 and then I follow on
19 saying, "If the patent owner contends that
20 Maeueller does not teach a second combinatory
21 fitness," which I noted before I believe it
22 does, "based on first activity data, Kitagawa
23 discloses this element."

24 Q. Is that a motivation to combine
25 opinion?

1 MS. NGUYEN: Objection. Form.

2 A. So I put my motivation to combine in
3 the following paragraph, number 133. I say
4 that, "Prior to the earliest priority date of
5 the '930 patent, there were already numerous
6 examples of testing systems that monitored
7 users while they were instructed to perform
8 various physical activities and subsequently
9 provide quantitative metrics," and then I
10 provide some examples.

11 "A person of ordinary skill in the
12 art familiar with these fitness-monitoring
13 devices and systems would have readily
14 identified a multitude of ways in which to
15 monitor and quantitatively report the overall
16 physical activity of a user as well as specific
17 subcomponents.

18 "Like Maeueler, Kitagawa presents a
19 system for measuring physical fitness. Both of
20 these systems are intended to solve the same
21 problem which is easing the burden of physical
22 fitness assessments by making it more
23 systematic and streamlined. They are both in
24 the same field of personal fitness monitoring
25 and a person of ordinary skill in the art would

1 have looked to the references like Maeueller and
2 Kitagawa in developing a physical fitness
3 assessment system."

4 Q. What part of what you just read is
5 about a motivation for a skilled artisan to
6 combine the teachings of the references?

7 I understand what you just said to
8 be drawing comparisons between the two. I'm
9 trying to understand why you think a skilled
10 artisan would combine the teachings of the two?

11 MS. NGUYEN: Objection. Form.

12 A. So there are teachings of Kitagawa
13 that are related to an algorithm for generating
14 a combinatory fitness or athleticism score and
15 if the patent owner contends that Maeueller does
16 not teach a combinatory fitness athleticism
17 score, one would turn to the teachings of
18 Kitagawa.

19 Q. Why?

20 MS. NGUYEN: Objection. Form.

21 A. Though as I noted, a person of
22 ordinary skill in the art with fitness
23 monitoring devices would have known that there
24 are a multitude of ways in which one can
25 monitor and quantitatively report or assess

1 physical activity of a user, Kitagawa is an
2 example of such system and the teachings of
3 Kitagawa include an algorithm for generating a
4 combinatory fitness or athleticism score or
5 that could readily be programmed for the
6 processor of computing module in Maeueller.

7 Q. For Fran's sake, if we are just
8 going to read from the paragraph, you can just
9 tell me that your opinion is nothing beyond
10 those paragraphs.

11 I'm just trying to understand what
12 you are saying a little bit better. It seems
13 like you're saying that the two references have
14 a lot of similar teachings, but I don't
15 understand what your opinion is as to why a
16 skilled artisan would combine these teachings.

17 MS. NGUYEN: Objection, form and I
18 also ask that you let the witness testify
19 as he wishes to.

20 A. So as we previously noted, Maeueller
21 presents both fitness related sub-scores and
22 athleticism related sub-scores and I believe,
23 in addition to a combinatory score, which can
24 be simply presenting them side by side or
25 mathematically combining them, but Kitagawa's

1 activity could comprise the user completing
2 multiple courses that have a plurality of
3 multiple index values for the various
4 attributes to generate unique scores
5 corresponding to fitness, athleticism and a
6 combinatory score. This technique could
7 readily be applied to Maeueller.

8 Q. So I note that you are just reading
9 a paragraph, but you're saying that the
10 technique could be applied to Maeueller, right?
11 Kitagawa's techniques could be applied to
12 Maeueller. I'm asking you why a skilled artisan
13 would combine the teachings of the two
14 references?

15 A. Well, as I noted, I believe Maeueller
16 does disclose a combinatory fitness athleticism
17 score, but if it does not and one would like to
18 implement a combinatory score, one would look
19 to other references in the field that are
20 similar and Kitagawa is an example of a
21 reference in the field that does discuss the
22 ability to generate what one would consider a
23 combinatory fitness or athleticism score and
24 one that has a teaching that could readily be
25 implemented into Maeueller.

1 Q. Why would a skilled artisan want to
2 implement a combinatory score?

3 MS. NGUYEN: Objection. Asked and
4 answered.

5 A. So Maeueller notes that the ability
6 to monitor and test the personal fitness level
7 is believed to be an important motivating
8 factor. So to generate a value that could
9 properly motivate a user, one may look to
10 generating a combinatory score.

11 Q. So you are saying that a skilled
12 artisan could look to generating a combinatory
13 score. Again, I'm trying to understand why a
14 skilled artisan would want to generate a
15 combinatory score?

16 MS. NGUYEN: Objection to form.

17 A. It's not only that one
18 hypothetically could. Maeueller explicitly
19 describes scenarios in which they create
20 combinatory scores, including averaging test
21 results, so this would just be a simple, easily
22 implemented improvement on a way to generate a
23 different type, if you will, of combinatory
24 score.

25 Q. So if Maeueller already teaches a

1 combinatory score, why would a skilled artisan
2 be motivated to combine the teaching of
3 Kitagawa with Maeueller?

4 MS. NGUYEN: Objection to form.

5 A. I believe one of the key teachings
6 of Kitagawa is that one would be interested in
7 is a weighted combinatory score from a given
8 course or exercise that has indices or weights
9 related to various different attributes.

10 Q. Why would a skilled artisan want to
11 combine that teaching with Maeueller?

12 MS. NGUYEN: Objection. Form.

13 A. As I noted, Maeueller does have
14 examples where they combine values together to
15 create a combinatory score. One potential
16 improvement over that that was expressed in the
17 prior art that they may look to and would have
18 been very easy to implement based on the system
19 would be the teaching of Kitagawa.

20 Q. How is Kitagawa an improvement over
21 Maeueller?

22 A. Well, I find an example at the end
23 of paragraph 136 of my declaration. "For
24 example, in Maeueller's endurance test, a user
25 may be simultaneously monitored and assessed

1 for agility. Upon completion of the endurance
2 test, a user may thus receive an index score
3 corresponding to endurance and an index score
4 corresponding to agility. The index score for
5 the endurance test represents a fitness
6 sub-score while the index score for the speed
7 or agility test corresponds to an athleticism
8 sub-score."

9 Q. Did you understand my question, Dr.
10 Fischer?

11 A. I believe I understand the question
12 and I believe that I have answered it, that one
13 implementing Maeueler would have been
14 interested in having exercises that have
15 amounts of various different attributes within
16 a given exercise and the teaching of Kitagawa
17 assigns index values to the various different
18 attributes for a given course or a given
19 exercise.

20 Q. In your opinion is that -- so your
21 opinion is that Maeueler doesn't teach
22 exercises that have amounts of different
23 attributes within a given exercise?

24 MS. NGUYEN: Objection. Form.

25 A. No, that's not what I said. What I

1 said was Kitagawa teaches what could be
2 considered an improvement upon what Maeueller
3 teaches, which is a mathematical approach to
4 assigning index values for various different
5 attributes for a given exercise.

6 Q. Why would a skilled artisan be
7 motivated to implement that improvement?

8 MS. NGUYEN: Objection. Form.

9 A. Well, if I went to paragraph 93 of
10 my declaration, I describe how Maeueller has a
11 system comprising a computing device with a
12 programmable processor that uses sensor data
13 associated with activities to calculate scores
14 or test results related to the user's physical
15 activity.

16 The teachings of Kitagawa provide
17 index values so that they could be incorporated
18 into those calculations effectively applying
19 weighting factors for the different attributes.

20 For example, I point you to the end
21 of paragraph 98 to my declaration. I quote a
22 sentence from the Maeueller reference.

23 "The result of a fitness test may be
24 represented by a fitness index in the form of a
25 numerical score value, such as a value ranging

1 from 0 to 5 for each of the components of
2 physical fitness, as a combined (average or
3 weighted average) aggregate fitness index."

4 The teachings of Kitagawa could be
5 used to identify the values used in that
6 weighted average for example.

7 Q. But doesn't Maeueller already teach
8 that?

9 MS. NGUYEN: Objection. Form.

10 A. What Kitagawa teaches is a very
11 specific mathematical relationship that can be
12 used to identify a meaningful set of weights to
13 use for that weighted average.

14 Q. So at the end of paragraph 51 of
15 Maeueller, it says "Moreover, the fitness
16 results may be compared to average test results
17 for the user's age and gender group." Do you
18 see that?

19 A. Where are you looking?

20 Q. Page 50 of Maeueller -- or paragraph
21 50 rather.

22 A. I'm at paragraph 50 of Maeueller.

23 Q. Okay. Paragraph 51, just below
24 that, the last sentence. Do you see that?

25 A. I believe that's where I just quoted

1 in my declaration.

2 Q. You omitted the last sentence,
3 right, the one that begins with "Moreover?"

4 MS. NGUYEN: Objection. Form.

5 Q. Do you see that?

6 A. I see that sentence, yes.

7 Q. So the last sentence of paragraph 51
8 of Maeueller says, "Moreover, the fitness
9 results may be compared to average test results
10 for the user's age and gender group," correct?

11 A. I see that, yes.

12 Q. How is that different from what
13 Kitagawa teaches?

14 MS. NGUYEN: Objection. Form.

15 A. So as I noted the weighted average
16 provided earlier in that paragraph indicates
17 that there are weights. I do not recall a
18 detailed description within Maeueller that
19 describes how those weights are calculated,
20 although it is possible it is in there, whereas
21 the teaching from Kitagawa provides specific
22 examples and calculations on how to determine
23 what those weights should be.

24 Q. How does Kitagawa describe
25 calculating those weights?

1 MS. NGUYEN: Objection. Form.

2 A. Kitagawa notes in Column 10, line
3 19, "For each type of exercise course, the
4 following are indexed as measurements of
5 exercise, physical abilities (i.e., leg
6 strength, arm strength, flexibility of the
7 body, balance of the body, and agility of the
8 body), and the extent to which intelligence is
9 demonstrated. The exercise courses are
10 designed so that these indices differ among the
11 exercise courses."

12 And then there is a description in
13 that column, the previous column, and I believe
14 the next couple of columns as well, of how the
15 index values are calculated.

16 Q. Aside from the calculation of these
17 fitness indices, are there any other reasons
18 why a skilled artisan would have combined the
19 teachings of Kitagawa with Maeueller?

20 A. I have another section in my
21 declaration starting on page 104 where I
22 provide another motivation of the combined for
23 a different claim and I note that, "A person of
24 ordinary skill in the art would recognize the
25 benefits of incorporating Kitagawa's teachings

1 into Maeueller's tests to provide a more
2 comprehensive fitness evaluation" and the
3 purpose of that would be "to have a consistent
4 and meaningful comparison of user's performance
5 over repeated use of the system."

6 One "would understand that it is
7 essential to have a predefined consistent
8 ordering of the drills and activities" as
9 described in Kitagawa.

10 More specifically, "Kitagawa's
11 exercise courses constitute a set of drills
12 wherein each of them involves similar exercises
13 that challenge the same physical abilities,
14 such as strength, flexibility and agility."

15 MR. BOWLING: Let's take a quick
16 five minute break.

17 (Time noted: 1:09 p.m.)

18 (Brief recess taken.)

19 (Time noted: 1:15 p.m.)

20 BY MR. BOWLING:

21 Q. Dr. Fischer, we are going to flip
22 back to the '930 patent. Let's go to page 35
23 through the claims quickly.

24 A. Yes, I'm there.

25 Q. Can you look at Claim 6, please.

1 A. Yes, I see Claim 6.

2 Q. Claim 6 says the method of Claim 1,
3 wherein the first instructions and the second
4 instructions include "a plurality of drills
5 configured to test a plurality of fitness
6 attributes of the user and a plurality of
7 athleticism attributes with the user." Do you
8 see that?

9 A. I see that, yes.

10 Q. If we look back up to Claim 1 on
11 which Claim 6 depends, what are the athleticism
12 attributes?

13 MS. NGUYEN: Objection. Form.

14 A. The claims refer to athleticism
15 sub-scores being calculated by attributes
16 related to athleticism -- sorry, speed
17 athleticism, agility athleticism, reaction
18 athleticism, power athleticism and balance
19 athleticism attributes.

20 Q. So there is five athleticism
21 attributes recited in Claim 1, speed, agility,
22 reaction, power and balance; is that right?

23 A. Can you repeat that question? I
24 just want to make sure I get it.

25 Q. Sure. There are five athleticism

1 attributes recited in Claim 1, speed, agility,
2 reaction, power and balance; is that right?

3 A. They make a list of speed
4 athleticism, agility athleticism, reaction
5 athleticism, power athleticism and balance
6 athleticism that can be used in calculating the
7 athleticism sub-score.

8 Q. So you agree that there are five
9 athleticism attributes recited there?

10 A. They list five attributes that can
11 be associated with athleticism.

12 Q. And Claim 6 requires the first
13 instructions and the second instructions to
14 include a plurality of drills configured to
15 test a plurality of athleticism attributes,
16 correct?

17 A. That's a test of plurality of
18 fitness attributes of the user and a plurality
19 of fitness attributes of the user.

20 Q. Is there anything you disagree with
21 in my characterization of the claim?

22 A. I believe these say the same. I
23 just skipped the fitness attributes portion.

24 Q. Is there anything you disagree with
25 in my characterization of the claim?

1 MS. NGUYEN: Objection. Form.

2 A. Can I hear it again, please?

3 Q. Sure. Do you agree that Claim 6
4 requires first instructions and the second
5 instructions to include a plurality of drills
6 configured to test a plurality of athleticism
7 attributes?

8 A. I believe that is what is reflected
9 in Claim 6.

10 Q. In your opinion, the Maeueller
11 reference meets the limitations of Claim 6,
12 correct? I believe in paragraph 112.

13 A. That is one place where I describe
14 it, yes.

15 Q. And you opine that Maeueller provides
16 instructions for a plurality of tests, such as
17 strength, flexibility, endurance and balance
18 tests. Do you see that?

19 A. Yes, I see that.

20 Q. Does Maeueller teach the system that
21 provides instruction for a plurality of drills
22 configured to tests of plurality of athleticism
23 attributes?

24 MS. NGUYEN: Objection. Form.

25 A. (Witness reviewing documents).

1 Okay, I think I'm ready to answer.

2 Q. Okay. Go ahead.

3 A. We define athleticism attributes as
4 related to or the '930 patent describes
5 athleticism to include speed, agility,
6 reaction, balance and power. The Maeueller
7 reference at a minimum at least describes ways
8 of assessing speed and balance. Therefore, it
9 describes at least two attributes related to
10 athleticism.

11 Q. Where does the Maeueller reference
12 describe measuring speed?

13 A. So paragraph 31 describes a running
14 test where a person is asked to run as fast as
15 possible for twelve minutes and measures the
16 distance run in meters. Therefore, the
17 distance and the time provides a speed.

18 Q. Thirty-one relates to cardiovascular
19 endurance; doesn't it?

20 A. That is the heading on the section.

21 Q. So it's measuring cardiovascular
22 endurance in that test and V02 max, not speed,
23 right?

24 MS. NGUYEN: Objection. Form.

25 A. We've had a number of discussions

1 today already where a given exercise or test,
2 or whatever the appropriate term is, measures
3 more than one parameter for attribute. I think
4 this would be a good example wherein V02 max
5 can be calculated which they consider endurance
6 at the same time one would be able to identify
7 the average speed the user ran.

8 Q. Does paragraph 31 describe measuring
9 speed exclusively?

10 MS. NGUYEN: Objection. Form.

11 A. Paragraph 31 identifies the distance
12 run for a given time period.

13 Q. But it doesn't express or mention
14 speed, correct?

15 MS. NGUYEN: Same objection.

16 A. As a person of ordinary skill in the
17 art, I would recognize that speed is the
18 distance run divided by the time it took to get
19 there.

20 Q. Paragraph 31 doesn't expressly
21 mention speed, correct?

22 MS. NGUYEN: Same objection.

23 A. They do note that a person runs as
24 fast as possible though clearly speed is at
25 least on their mind.

1 Q. Paragraph 31 expressly describes
2 measuring speed?

3 MS. NGUYEN: Same objection.

4 A. Paragraph 31 explicitly mentions the
5 distance run in a fixed time period.

6 Q. But not measuring speed
7 specifically?

8 A. It measures the specific distance
9 run for a fixed time period which would be the
10 elements of a calculation that one skilled in
11 the art would recognize as calculating speed.

12 Q. I don't think we have anything
13 further.

14 MS. NGUYEN: We would like to take a
15 break.

16 (Time noted: 1:29 p.m.)

17 (Brief recess taken.)

18 (Time noted: 1:45 p.m.)

19 MS. NGUYEN: So we have no questions
20 for you, Dr. Fischer, but we do reserve
21 the right to correct the record if there
22 are any issues that we identified in the
23 transcript.

24 (Time noted: 1:45 p.m.)

25

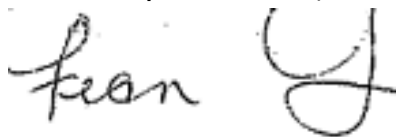
C E R T I F I C A T E

I, FRAN INSLEY, hereby certify that the Deposition of GREGORY S. FISCHER was held before me on the 7th day of September, 2023; that said witness was duly sworn before the commencement of testimony; that the testimony was taken stenographically by myself and then transcribed by myself; that the party was represented by counsel as appears herein;

That the within transcript is a true record of the Deposition of said witness;

That I am not connected by blood or marriage with any of the parties; that I am not interested directly or indirectly in the outcome of this matter; that I am not in the employ of any of the counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of September, 2023.

A handwritten signature in dark ink, appearing to read "Fran Insley", is written over the printed name.

FRAN INSLEY

Veritext Legal Solutions
1100 Superior Ave
Suite 1820
Cleveland, Ohio 44114
Phone: 216-523-1313

September 11, 2023

To: JEAN NGUYEN

Case Name: Lululemon Athletica Canada, Inc., et al. v. Nikex, Inc.

Veritext Reference Number: 6066685

Witness: Dr. Gregory S. Fischer Deposition Date: 9/7/2023

Dear Sir/Madam:

Enclosed please find a deposition transcript. Please have the witness review the transcript and note any changes or corrections on the included errata sheet, indicating the page, line number, change, and the reason for the change. Have the witness' signature notarized and forward the completed page(s) back to us at the Production address shown above, or email to production-midwest@veritext.com.

If the errata is not returned within thirty days of your receipt of this letter, the reading and signing will be deemed waived.

Sincerely,
Production Department

NO NOTARY REQUIRED IN CA

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 6066685

CASE NAME: Lululemon Athletica Canada, Inc., et al. v. Nikex,
Inc.

DATE OF DEPOSITION: 9/7/2023

WITNESS' NAME: Dr. Gregory S. Fischer

In accordance with the Rules of Civil
Procedure, I have read the entire transcript of
my testimony or it has been read to me.

I have made no changes to the testimony
as transcribed by the court reporter.

Date Dr. Gregory S. Fischer

Sworn to and subscribed before me, a
Notary Public in and for the State and County,
the referenced witness did personally appear
and acknowledge that:

They have read the transcript;

They signed the foregoing Sworn
Statement; and

Their execution of this Statement is of
their free act and deed.

I have affixed my name and official seal

this _____ day of _____, 20____.

Notary Public

Commission Expiration Date

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 6066685

CASE NAME: Lululemon Athletica Canada, Inc., et al. v. Nikex,
Inc.

DATE OF DEPOSITION: 9/7/2023

WITNESS' NAME: Dr. Gregory S. Fischer

In accordance with the Rules of Civil
Procedure, I have read the entire transcript of
my testimony or it has been read to me.

I have listed my changes on the attached
Errata Sheet, listing page and line numbers as
well as the reason(s) for the change(s).

I request that these changes be entered
as part of the record of my testimony.

I have executed the Errata Sheet, as well
as this Certificate, and request and authorize
that both be appended to the transcript of my
testimony and be incorporated therein.

Date

Dr. Gregory S. Fischer

Sworn to and subscribed before me, a
Notary Public in and for the State and County,
the referenced witness did personally appear
and acknowledge that:

They have read the transcript;

They have listed all of their corrections
in the appended Errata Sheet;

They signed the foregoing Sworn
Statement; and

Their execution of this Statement is of
their free act and deed.

I have affixed my name and official seal
this _____ day of _____, 20____.

Notary Public

Commission Expiration Date

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ASSIGNMENT NO: 6066685

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Date Dr. Gregory S. Fischer
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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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