

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

3
4 LULULEMON ATHLETICA CANADA,)
INC., and LULULEMON USA, INC.,)
5)
Petitioner,)
6)
-vs-) Case IPR2023-00348
7) Patent 10,188,930
NIKE, INC.,)
8)
Patent Owner.)

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11 Videotaped deposition of SCOTT MCLEAN, Ph.D.
12 taken before CAROL CONNOLLY, CSR, CRR, and Notary Public,
13 pursuant to the Federal Rules of Civil Procedure for the
14 United States District Courts pertaining to the taking of
15 depositions, at 70 West Madison, Suite 4200, Chicago,
16 Illinois, commencing at 9:08 a.m. on the 29th day of
17 November, A.D., 2023.
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2 deposition the following counsel:

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I N D E X
VIDEOTAPED DEPOSITION OF SCOTT McLEAN, Ph.D.
TAKEN November 29, 2023

EXAMINATION BY	PAGE
Jean Nguyen	5, 78
Lindsey Staubach	76

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PREVIOUSLY MARKED EXHIBITS
(Retained by counsel)

		PAGE
Exhibit 1001	U.S. Patent No. 10, 188,9320	10
Exhibit 1002	WO 2006/111687	36
Exhibit 1003	European Patent Application EP 2 324 762 A1	39
Exhibit 1004	U.S. Patent No. 7,810,392	65
Exhibit 2004	Declaration of Scott McLean, Ph.D., In Support of Nike, Inc.'s Patent Owner's Response	59

1
2 THE VIDEOGRAPHER: Good morning. We are going on
3 the record at 9:08 a.m. on November 29th, 2023. Please
4 note that microphones are sensitive may pick up
5 whispering, private conversations. Please mute your
6 phones at this time. Audio and video recording will
7 continue to take place unless all parties agree to go off
8 the record.

9 This is media unit number 1 of the
10 video-recorded deposition of Dr. Scott McClean taken in
11 the matter of Lululemon Athletica Canada Incorporated,
12 et al. versus Nike Incorporated, et al.

13 The location of this deposition is being held
14 at the offices of Arnold Porter Kay, Scholer, LLP located
15 at 70 West Madison Street, Chicago, Illinois.

16 My name is Nick Page representing Veritext.
17 I'm the videographer. The court reporter is Carol
18 Connolly also from the firm Veritext.

19 I'm not related to any parties in this action,
20 nor am I financially interested in the outcome. If there
21 are any objections to the proceedings, please state them
22 at the time of your appearance.

23 Counsel all present will now please state their
24 appearances affiliations for the record beginning with

1 the noticing attorney.

2 MS. NGUYEN: Jean Nguyen along with my colleague
3 Alex Yap with Morrison and Foerster representing
4 Lulelemon, petitioner.

5 MS. STAUBACH: Lindsey Staubach. I'm here with my
6 colleague Aaron Bowling. We're both from Arnold and
7 Porter. We represent the patent owner Nike and for
8 purposes of this deposition, Dr. McClean.

9 Will the court reporter please swear in the
10 witness.

11 SCOTT McCLEAN, Ph.D.,
12 called as a witness herein, having been first duly sworn,
13 was examined upon oral interrogatories and testified as
14 follows:

15 EXAMINATION

16 By Ms. Nguyen :

17 Q Okay. Good morning.

18 A Good morning.

19 Q Dr. McLean, could you please state and spell
20 your name for the record?

21 A Yes. It's Scott McClean, S-C-O-T-T,
22 M-C-L-E-A-N.

23 Q And you understand that you have taken an oath
24 to tell the truth?

Page 5

1 A I do.

2 Q Great. Is there any reason you cannot give
3 complete and accurate testimony today?

4 A No.

5 Q Okay. So just to kind of set the stage and
6 some information, we'll try to take breaks about every
7 hour. If you need a break before then, please let me
8 know. If you ask for a break while I'm in the middle of
9 a line of questioning, I may ask to finish that line of
10 questioning before agreeing to take a break. Is that
11 okay?

12 A Yes, that's okay.

13 Q Great. So you are here to give deposition
14 testimony today. I am going to be asking a series of
15 questions. Please make sure your responses are verbal so
16 the court reporter can capture your responses. So no
17 head nodding or gesturing, if that's possible.

18 A Yep.

19 Q Great. And if there is a question that I ask
20 that you don't understand, please let me know. I will
21 repeat it or rephrase. If you don't hear me also, let me
22 know. And if you provide an answer, then I'm going to
23 assume that you did understand my question. Is that
24 okay?

1 A Yes.

2 Q Great. How many times have you served as an
3 expert before?

4 A In the last five years or total?

5 Q Let's start with the last five years.

6 A Last five years I've been an expert on
7 approximately five to six different cases.

8 Q And how about in total?

9 A In total -- expert on five to six. I've also
10 been sort of a scientific witness I believe four
11 additional times previously, but not an expert per se.

12 Q Okay. And do you recall the different
13 companies that you represented in those cases?

14 A Majority, yes.

15 Q And are they related to fitness devices in the
16 health field or what area are they related to?

17 A The majority of those have been exercise
18 equipment, or in the other case I've been an expert in
19 this particular with working -- working with Arnold and
20 Porter in previous deposition against Lulu.

21 Q Okay. Do you have an idea of what type of
22 exercise?

23 A The exercise equipment is that which you would
24 typically see in a gym, so weight machines, free weight

1 machines. Those types of pieces of equipment.

2 Q Got it. And do you know if a court has ever
3 excluded your opinions that you've offered?

4 A No.

5 Q Then in these prior cases where you were an
6 expert, would you say you represented plaintiffs more
7 than defendants?

8 A No, primarily defendants.

9 Q And how many times have you represented Nike?

10 A I'm sorry. I didn't hear you.

11 Q How many times have you represented Nike?

12 A So this is my -- the second -- This is my first
13 general representation, but this is the second
14 deposition.

15 Q Got it.

16 A With respect to Nike.

17 Q Okay. Was that previous deposition an IPR
18 deposition?

19 A To my knowledge, yes.

20 Q Do you remember how many IPRs you're working on
21 for Nike?

22 A At the moment working on two. Okay.

23 Q And do you recall the patents that you're
24 working on?

1 A I do.

2 Q So this would be one IPR, right?

3 A That's correct.

4 Q Okay. And then do you recall the subject
5 matter for the other IPR?

6 A I haven't read it in a while, but it's -- to my
7 -- best of my knowledge I think it's patent '225, which
8 is relating to data and instruction.

9 Q Would you consider the technology in the '225
10 patent IPR to be different from the technology for
11 today's IPR?

12 A Without -- without looking at it, I don't want
13 to speculate. I -- Again, I haven't read it like
14 recently, so I don't want to speculate on that.

15 Q Okay. Just to make sure we're on the same
16 page, if I say the '930 patent, you'll understand that
17 I'm referring to Patent No. 10,188,930?

18 A Uh-huh.

19 Q Okay. Then if I say IPR proceeding or IPR,
20 you'll understand I'm referring to -- I'll give you the
21 IPR number IPR 2023-00348?

22 A Okay.

23 Q Why don't I actually see if -- something to
24 reference, hand you your declaration. So I'm going to

1 introduce Exhibit 2004.

2 (Exhibit 2004 tendered to the witness)

3 MS. STAUBACH: Jean, he brought in a copy of the
4 same exhibit, and it's a clean copy. So just to let you
5 know that's there.

6 THE WITNESS: I can -- it's fine.

7 MS. NGUYEN: They're probably the same thing.

8 Q So, Dr. McLean, about when did you begin
9 working on this IPR proceeding?

10 A I'm trying to recall specifically, but I have
11 been working on this IPR probably around the start of
12 this year, I think. Again, I can't -- I don't want to be
13 exact, but it's been probably over the last 12 months.

14 Q Okay. And then as I just handed you, you have
15 Exhibit 2004. Do you recognize it?

16 A I do.

17 Q What is this?

18 A This is my declaration with regard to the '930
19 IPR.

20 Q And you signed your declaration, Exhibit 2004,
21 is that correct?

22 A Yes, I did.

23 Q Is there anything you would like to change in
24 your declaration?

1 A Not at this time, no.

2 Q There are no typos or any misstatements?

3 A Not to my knowledge, no.

4 Q And then with respect to today's deposition,
5 what did you do to prepare for it?

6 A For today's deposition, I -- let me just go
7 through. So obviously I've read through my declaration
8 again. Give me a moment. I just want to make sure I
9 don't misspeak. Primarily to prepare for today, I just
10 read my declaration.

11 Q Okay. Did you meet with anybody in preparation
12 for today's deposition?

13 A I did.

14 Q And who did you meet with?

15 A I met with Lindsey and Aaron.

16 Q How many times did you meet with -- by Lindsey,
17 are you referring to -- What is Lindsey's full name?

18 A Lindsey Staubach.

19 Q Okay. And Aaron?

20 A Aaron Bowling.

21 Q Right. How many times did you meet with
22 Lindsey Staubach and Aaron Bowling in preparation for --

23 A I met with Aaron and Lindsey once last week,
24 and Lindsey yesterday.

1 Q Do you know about how much time you spent in
2 meetings with Aaron and Lindsey?

3 A Yeah. In total, I would say around about 3 to
4 4, 3-1/2 half to 4 hours.

5 Q Okay. And earlier when you said you read your
6 declaration. Did you review any other documents in
7 preparation for today's deposition?

8 A I did not.

9 Q Let's go to paragraph 17 of your declaration.
10 Are you at paragraph 17?

11 A I am.

12 (Discussion off the written record)

13 Q Paragraph 17 of your declaration, it states:
14 As part of my declaration, I have relied upon, and then
15 you list four things. Your expertise and experience,
16 your underlying knowledge, your extensive personal
17 research and experimentation, and then books and
18 publications.

19 Is that right?

20 A That's correct.

21 Q Okay. And would you agree that all four things
22 are part of your analysis that you offered in your
23 declaration?

24 MS. STAUBACH: Objection. Form.

1 THE WITNESS: Could you just -- Can you restate that
2 again for me?

3 MS. NGUYEN: Q Okay. Starting with two questions
4 prior, paragraph 17 of your declaration, it states: As
5 part of my declaration, I have relied upon. And then you
6 list four things, so first is your expertise and
7 experience, second is your underlying knowledge, third is
8 your extensive personal research and experimentation, and
9 fourth are books and publications.

10 A Correct.

11 Q You would agree that all four of those things
12 that I just listed are part of your analysis that you
13 offer in your declaration?

14 MS. STAUBACH: Objection. Form.

15 THE WITNESS: To be more specific, I've drawn on
16 that experience, expertise, previous publications, and
17 from that information that I've been able to obtain
18 historically, I've used that in support of my opinions.

19 MS. NGUYEN: Q Okay. So your experience,
20 expertise, previous publications, and all of the
21 information that you've obtained historically, it's used
22 as part of your opinions that you offer in your
23 declaration, is that right?

24 A I wouldn't say that it's used extensively. I'm

1 not saying that everything I've done is being used for
2 this particular declaration, but I'm drawing on aspects
3 of that in support of.

4 Q Okay. So pieces of the four different things?

5 A As necessary, relevant pieces.

6 Q As part of your declaration. Got it. Okay.

7 And roughly how much time aside from meeting with Lindsey
8 Staubach and Aaron Bowling did you spend preparing for
9 today's deposition?

10 A And, again, by preparing, it was reading this
11 declaration. Probably 4 to 5 hours just reading
12 different excerpts, et cetera.

13 Q Okay. And in preparation, did you at all
14 review the '930 patent again?

15 A I didn't. Nope.

16 Q I quickly wanted to talk about your experience
17 and background. You are currently a principal in
18 Exponents Biomechanics Practice?

19 A That's correct.

20 Q And then before then you were the directive --
21 director of human innovation research at Fitbit?

22 A That's correct, right.

23 Q That was between 2016 and 2018?

24 A 2016 yeah, end of 2018, correct.

1 Q Okay. What does your job as director of human
2 innovation research at Fitbit entail?

3 A It incorporated supporting the design of
4 experiments to test and benchmark different product
5 prototypes that were being developed. It incorporated
6 developing measures that could support an assessment of
7 different products as they move through the
8 productization cycle. It supported the majority of
9 different aspects of the product that related to
10 innovation whether it be hardware or software.

11 Q Okay. So as part of your job supporting the
12 different products, it must mean you're pretty familiar
13 with the Fitbit products, is that right?

14 A Can you be more specific of what you mean
15 familiar? That's --

16 Q No. So if I gave you the name of a Fitbit
17 product, would you -- do you think you'd be able to
18 recognize it?

19 MS. STAUBACH: Objection. Form.

20 THE WITNESS: I think without seeing the product I
21 wouldn't be able to -- to ascertain that. And, again, I
22 don't think I would be able to necessarily identify
23 products post my tenure at Fitbit at this point.

24 MS. NGUYEN: Q Okay. So if I mentioned the

1 product Fitbit Zip, does that sound familiar?

2 A I'm aware of the Fitbit Zip. Again, that was
3 developed prior to me joining Fitbit.

4 Q What about Fitbit 1?

5 A Again, I'm familiar with the product, but it
6 was developed prior to me being there.

7 Q Do you remember when it was developed,
8 Fitbit 1?

9 A Not specifically, not off the top of my head.
10 Again, I know it was developed prior to my joining Fitbit
11 in 2016.

12 Q Okay. So earlier when you mentioned supporting
13 the design of experiments to test and benchmark different
14 product prototypes, were you working with products that
15 were already on the market or products that were to be
16 released?

17 A Primarily -- Actually it was a combination.
18 Depending on what the question being answered was, it
19 could have been a product in development or it could have
20 been a product that has been developed.

21 Q Got it. Okay. What about the product Fitbit
22 Ultra, does that sound familiar?

23 A Again, I'm aware of the Fitbit Ultra. It
24 wasn't something that I would have done specifically.

1 Again, it was prior to me being there.

2 Q So it was prior to I believe we said 2016?

3 A 2016 in terms of what I worked on. I didn't
4 work on the Fitbit Ultra.

5 Q Then these different product prototypes, you
6 mentioned them -- you mentioned developing measures. By
7 -- and also hardware and software. Does that mean the
8 products you were working on included sensors?

9 MS. STAUBACH: Objection. Form.

10 THE WITNESS: Can you be more specific in terms of
11 sensors?

12 MS. STAUBACH: Q Yes. So basically a device that
13 measures a user's fitness.

14 A So just to repeat, a sensor is something that a
15 device that measures a user's fitness?

16 Q Yes.

17 A I'm not -- Can you ask the question again based
18 on what you stated?

19 Q Sure. So with respect to the different devices
20 that you worked on, did those devices include sensors?

21 A The devices that I worked on incorporated
22 different types of sensors, yes.

23 Q And would you agree that the devices that you
24 worked on that incorporated different types of sensors

1 were -- scratch that.

2 Would you agree that fitness devices equipped
3 with sensors were known during your time at Fitbit?

4 A Could you mean what you mean by known? Known
5 by who?

6 Q Known by the general industry.

7 A Again, I don't -- I'm not really -- I can't
8 speak to what the broader industry was and wasn't aware
9 of. Again, in my role at Fitbit, I was aware of what we
10 were working on, but I wasn't necessarily aware of what
11 the industry as a whole was aware of without being -- you
12 know, exposed to that.

13 Q And were you aware of what was known by a
14 person of ordinary skill in the art?

15 MS. STAUBACH: Objection. Form.

16 THE WITNESS: Can you rephrase that?

17 MS. NGUYEN: Q Yeah. Earlier you said I can't
18 speak to what the broader industry was and wasn't aware
19 of. Do you recall that?

20 A I do.

21 Q Okay. Can you speak to what was known by a
22 person of ordinary skill in the art?

23 MS. STAUBACH: Objection. Form.

24 THE WITNESS: I can speak to what I knew as a person

1 of skill in the art. I can't speak necessarily to what a
2 person -- another person skilled in the art was. Without
3 knowing that person, I can't speak to that.

4 MS. NGUYEN: Q So then by person of ordinary skill
5 in the art for this proceeding, do you have any idea what
6 that timeframe is?

7 A This patent that we're speaking of was 2012.
8 So we're in that timeframe.

9 Q Okay. And would you agree that in 2012 fitness
10 devices equipped with sensors were known?

11 MS. STAUBACH: Objection. Form.

12 THE WITNESS: Again, I can't speak to what was or
13 wasn't known in the broader context. You are correct
14 there were devices, but I cannot speak to what those
15 devices were in detail.

16 MS. NGUYEN: Q Okay. Dr. McLean, what is your
17 understanding of how to construe patent claims under
18 United States law?

19 A I'm not an attorney, so I'm not going to speak
20 to that in detail. I really don't know.

21 Q Okay. Do you know whether you're required to
22 consider the claims of a patent in performing your
23 analysis?

24 A I'm just going to check this really briefly if

1 I can. As I state in paragraph 2, I understand that this
2 proceeding involves claims -- I won't list them out -- 1,
3 5, 7, 12 of the '930 patent. So I'm aware of those
4 claims being part of this analysis. As you can see, if I
5 go through paragraph 23 and 24 and 25, for example, in 23
6 I understand that a claim may be patentable over prior
7 art. So I am aware that part of this declaration
8 involves understanding those claims.

9 Q Okay. Then with respect to claim construction,
10 are you required to consider the specification of the
11 '930 patent?

12 MS. STAUBACH: Objection. Form.

13 THE WITNESS: Again, based on what I know -- and I'm
14 not an attorney -- I -- based -- I would just state this
15 again. I can read through it if you wish, but, again, I
16 can list out -- I understand that a claim may be
17 considered unpatentable for obviousness or various
18 reasons. I've listed those out.

19 I can also talk about the materials considered.
20 So, if I look at paragraph 20, my opinions are based on
21 my knowledge and professional judgment and the following
22 documents I considered. So the petition, the
23 Exhibits 1001 to 1016, and the institutional decision in
24 IPR 2023-00348, and all other materials discussed herein.

1 Q So while we're on your declaration, if you
2 could turn to paragraph 38.

3 A Okay. I'm there.

4 Q Okay. So the first sentence of paragraph 38,
5 it states: Second, the inventor's definition
6 demonstrates that athletic movement recited in Claim 1 of
7 the '930 patent refers only to a single athletic
8 movement.

9 Then you reproduce the passage at 4 --
10 Column 4, line 7 to 11 of the '930 patent.

11 A Correct.

12 Q Okay. So is it your opinion that the athletic
13 movement term should be given the same meaning as what
14 you call the inventor's definition?

15 A I'll read that again for you. So the
16 inventor's definition demonstrates that athletic movement
17 recited in Claim 1 of the '930 patent refers only to a
18 single athletic movement, and I'll recite again what the
19 specification discloses. As used herein, an athletic
20 movement includes movements relating to fitness,
21 exercise, flexibility, including movements that may be
22 part of one or more single and multiple participant
23 athletic competitions, exercise routines, and
24 combinations thereof.

1 Q Okay. So, in your opinion, the inventor's
2 definition is a single athletic movement, is that right?

3 A The term athletic movement refers to, in my
4 opinion, a single athletic movement.

5 Q Okay. And do you agree that the term athletic
6 movement referring to a single athletic movement is
7 consistent with the inventor's definition?

8 A In my opinion, my interpretation, as I've read
9 through the specifications in the patent, I interpret it
10 as an athletic movement is defined as a single athletic
11 movement.

12 Q Okay. And is your interpretation based on the
13 inventor's definition?

14 A My interpretation is based on my reading of the
15 patent and specification, my prior understanding, my
16 prior knowledge and expertise and experience.

17 Q Is it your opinion that the term athletic
18 movement should not be given its ordinary and customary
19 meaning?

20 MS. STAUBACH: Objection. Form.

21 THE WITNESS: I don't understand that question.

22 MS. NGUYEN: Q I'll say it again. Is it your
23 opinion that the term athletic movement should not be
24 given its ordinary and customary meaning?

1 MS. STAUBACH: Same objection.

2 THE WITNESS: It's my opinion that, you know,
3 again -- I'll state it again. My opinion is that an
4 athletic movement as defined within or written within the
5 '930, I interpret it as an athletic movement is a single
6 athletic movement. I'm not sure how else to answer that.

7 MS. NGUYEN: Q Okay. So your interpretation is
8 based on the '930 passage, Column 4, line 7 to 11,
9 correct?

10 MS. STAUBACH: Objection. Form.

11 THE WITNESS: My interpretation is based on all of
12 the material provided across the '930 patent. I consider
13 all of the information provided, not just a single
14 passage. I considered the entire patent in its entirety.

15 MS. NGUYEN: Q Okay. What is your understanding
16 of the phrase ordinary and customary?

17 MS. STAUBACH: Objection. Form.

18 THE WITNESS: Again, I'm not a lawyer so I'm not
19 going to try to speak to it in terms of a legal
20 consideration. I think from my perspective, ordinary
21 means I guess common.

22 MS. NGUYEN: Q Okay. And what does customary
23 mean?

24 MS. STAUBACH: Objection. Form.

1 THE WITNESS: I think, again, for me ordinary and
2 customary -- so -- just means common.

3 MR. SNAO: Q If we could move a little bit further
4 to paragraph 40 of your declaration. So paragraph 40 of
5 your declaration, specifically the second sentence, it
6 says: Further, it is my opinion that the athletic
7 movement of Claim 1 may include a single type of exercise
8 or athletic activity such as running, push-ups, squats,
9 or cycling.

10 A Correct.

11 Q So, in your opinion, running meets the term
12 athletic movement of Claim 1, is that right?

13 A In my opinion running is -- supports that it is
14 a single athletic movement.

15 Q Okay. And, in your opinion, push-ups is a
16 single athletic movement, is that right?

17 A As I state in my declaration, and I'll just
18 read it: It is my opinion that the single athletic
19 movement, or the athletic movement of Claim 1 may include
20 a single type of exercise or athletic activity such as
21 running, push-ups, squats or cycling.

22 Q So as stated in your declaration at
23 paragraph 40, running, push-ups, squats or cycling are
24 all single types of exercises, is that right?

1 A They may be considered as single athletic
2 movements.

3 Q Okay. According to Claim 1 of the '930?

4 A Based on my understanding of the patent,
5 Claim 1 of the patent, my interpretation and opinion is
6 that each of these activities or any of these activities
7 may be considered as a single athletic movement.

8 Q Then moving to the next paragraph of your
9 declaration, paragraph 41, again the second sentence,
10 there it says: And based on my opinion regarding
11 athletic movement discussed above, instructions provided
12 to a user to perform a single type of exercise or
13 activity.

14 A Correct.

15 Q So would you agree that in your opinion the
16 meaning of instructions depends on the meaning of
17 athletic movement?

18 A As I state, my opinion is that instructions are
19 provided to a user to perform a single type of exercise
20 or activity. So the activity or the single activity is
21 informed by that set of single instructions.

22 Q Okay. So when you say single instructions,
23 would it be fair to say that in your opinion a single
24 athletic movement can only be met with a single

1 instruction?

2 MS. STAUBACH: Object to form.

3 THE WITNESS: Can you provide me with an example?
4 Without seeing an instruction and a movement, I don't
5 want to like opine on that. Can you give me an example?

6 MS. NGUYEN: Q Sure. So if -- going Back to our
7 example of running. So if the instructions are,
8 Dr. McLean, run for 5 minutes, would you agree that's a
9 single set of instructions?

10 MS. STAUBACH: Objection. Form.

11 THE WITNESS: I think it's -- I don't necessarily
12 view that as a set of single set of instructions.
13 Without knowing more about how to run, how far to run,
14 speed, these things are all potentially part of that
15 instruction.

16 MS. NGUYEN: Q Okay. When you say how to run, how
17 far to run and speed, can you give me an example of a
18 single instruction regarding running?

19 A Let me think about it as I read it in context
20 of this paragraph.

21 So as an example of running, a single
22 instruction may be to run -- to perform a running task by
23 moving your arms and legs specifically in a certain way
24 to move it in a certain direction over a certain

1 distance.

2 Q Okay.

3 A Again, without being given in context of a run,
4 you know, I'm not in a position to opine what that
5 instruction would be specifically.

6 Q Understood. Okay. So then maybe we can go
7 back to paragraph 41 of your declaration, same sentence.
8 Right? It states again: And based on my opinion
9 regarding athletic movement discussed above.

10 Then it says: Instructions provided to a user
11 to perform a single type of exercise or activity.

12 So earlier we were talking about how, in your
13 opinion, a single type of exercise or activity satisfies
14 the term athletic movement?

15 A With regard to the '930, correct.

16 Q Yes. So in paragraph 41, when you say
17 instructions provided to a user to perform a single type
18 of exercise or activity, would you agree that the meaning
19 of instructions depends on the meaning of athletic
20 movement?

21 MS. STAUBACH: Objection. Form.

22 THE WITNESS: As I define it here, I'll state again,
23 that my opinion is athletic movement refers to a single
24 athletic movement and instructions provided, in view of

1 the '930, are instructions as I say -- instructions
2 provided to a user to perform that single type of
3 activity or movement.

4 MS. NGUYEN: Q Okay. So would it be fair to say
5 that instructions provided to a user to perform a single
6 athletic movement?

7 MS. STAUBACH: Objection. Form.

8 THE WITNESS: Can you rephrase that for me?

9 MS. NGUYEN: Q Yeah. I actually think there's a
10 word missing in this sentence. But -- yeah. Let me
11 rephrase this differently.

12 A Sure.

13 Q So, in your opinion, in order to satisfy a
14 single athletic movement, would you need a single
15 instruction?

16 MS. STAUBACH: Objection. Form.

17 THE WITNESS: Can you give me an example again?
18 You've sort of rephrased it.

19 MS. NGUYEN: Q Let's turn to paragraph 61 of your
20 declaration.

21 A Yep.

22 Q Okay. So in paragraph 61, actually starting
23 from the bottom, the third to last sentence starting with
24 the word because, there you say: Because the activities

1 identified by Lululemon are performed in response to
2 different instructions, they are not part of the same
3 athletic movement as required by Claim 1.

4 So, in your opinion, if there is disclosure of
5 multiple instructions, then there must be multiple
6 athletic movements, is that right?

7 MS. STAUBACH: Objection. Form.

8 THE WITNESS: I think if I read it with regard to
9 paragraph 61, I'll just read that again: So because the
10 activities identified by Lululemon are performed in
11 response to different instructions, they are not part of
12 the same athletic movement.

13 So, with respect specifically to this
14 paragraph, we're talking about a series of discrete
15 single athletic movements with each of these having their
16 own set of instructions.

17 MS. NGUYEN: Q Okay. So if there are multiple
18 instructions, does that mean there are multiple athletic
19 movements?

20 A Again, with regard to my opinions, if we talk
21 about paragraph 61, and we're talking about -- in here
22 you're talking about Lofi, for example, in this
23 particular instance, there are discrete, single athletic
24 movements with each of those movements being supported by

1 a set of single instructions or different instructions.

2 Q So when you say discrete, single athletic
3 movements with each of these movements being supported by
4 a set -- excuse me -- a set of single instructions, does
5 that mean a single athletic movement can only be met with
6 a single instruction?

7 MS. STAUBACH: Objection. Form.

8 THE WITNESS: Without -- I guess a better way for me
9 to describe it is -- and I should have said this upfront.
10 Without seeing and being aware of every potential
11 movement, it's possible, it's hard for me to speculate on
12 whether each is going to be informed by a single set of
13 instructions. I'm interpreting it -- for example, within
14 paragraph 61, I'm speaking to the way it's described
15 within Lofi, but, again, without being privy to every
16 potential movement or single activity, I can't speak to
17 how many or different instructions.

18 MS. NGUYEN: Q So let's -- excuse me -- pivot back
19 to paragraph 42 of your declaration. I'll give you a
20 second. So paragraph 42 of your declaration, it states
21 first sentence: It is my opinion that a POSITA at the
22 relevant time would have understand the ordinary and
23 customary meaning of these terms to be data received from
24 a sensor that represents the athletic movement.

1 A Correct.

2 MS. STAUBACH: Objection. Form. Give me just a
3 second.

4 MS. NGUYEN: Q Okay. When you say data received
5 from a sensor that represents the athletic movement, you
6 would agree that, in your opinion, data must represent
7 the athletic movement?

8 MS. STAUBACH: Objection. Form.

9 THE WITNESS: Taken collectively, it's my opinion
10 that -- I'll read it -- that the ordinary and customary
11 meaning of these terms to be data received from a sensor
12 that represents either the first or second single
13 athletic movement.

14 MS. NGUYEN: Q Okay. So the data must -- so for
15 the first athletic movement, the data must be related to
16 the first athletic movement?

17 A Can you explain what you mean by related to?

18 Q Represents.

19 A Or do you mean collected from?

20 Q Sure. Collected from. So is it your opinion
21 that the data for the athletic movement must be collected
22 from the first athletic movement?

23 MS. STAUBACH: Objection. Form.

24 THE WITNESS: I'll restate. I'll start with, again,

1 in my opinion, in terms of the '930 opinion, athletic
2 movement corresponds to a single athletic movement. So
3 based on that, activity data as defined here, a POSITA
4 would understand that these data being received from a
5 sensor represent that first or second single athletic
6 movement.

7 MS. NGUYEN: Q Okay. So when you say data
8 received from a sensor that represents the first or
9 second single athletic movement, would you agree that the
10 meaning of first or second activity data depends on the
11 meaning of first or second athletic movement?

12 MS. STAUBACH: Objection. Form.

13 THE WITNESS: Again, my opinion is, and I'll restate
14 it, athletic movement is defined as -- or I interpret it
15 as a single athletic movement, therefore, data received
16 from a sensor corresponds to data received from that
17 first or second single athletic movement.

18 MS. NGUYEN: Q So taking a look at Claim 1 of the
19 '930 patent, I believe paragraph 34 of your declaration
20 actually reproduces it.

21 A Yep.

22 Q So just to make sure we're on the same page,
23 there is a limitation, I'll call it 1B.

24 A Uh-huh.

1 Q All right. So it recites: Receiving from a
2 sensor first activity data representing the first
3 athletic movement.

4 A Correct.

5 Q And just to refresh our memory, your definition
6 of activity data, as stated in paragraph 42 of your
7 declaration, is data received from a sensor that
8 represents the first or second athletic movement?

9 A It says data received from a sensor that
10 represents the first or second athletic movement.

11 Q So, would you agree that your definition of
12 activity data and element B both recite data?

13 A So I'll just recite 1B. It says: Receiving
14 from a sensor first activity data representing the first
15 athletic movement. And then if you go to paragraph 42:
16 It's my opinion based on limitation 1B that activity data
17 corresponds to data received from a sensor that
18 represents the first or second individual athletic
19 movement.

20 Q So both your definition of activity data and
21 element 1B both recite data?

22 A They both recite data, correct.

23 Q And your definition of activity data and
24 element 1B both recite receiving from a sensor?

1 MS. STAUBACH: Objection. Form.

2 THE WITNESS: So 1B states receiving from a sensor,
3 and paragraph 42 say data received from a sensor.

4 MS. NGUYEN: Q Okay. So one states receiving, one
5 states received.

6 A Correct.

7 Q Both from a sensor?

8 A Both from a sensor.

9 Q Okay. And then both your definition of
10 activity data and element 1B recite representing or
11 represents the athletic movement?

12 MS. STAUBACH: Objection. Form.

13 THE WITNESS: Can you restate that for me?

14 MS. NGUYEN: Q Sorry about that.

15 A No. That's okay.

16 Q So, your definition of activity data and
17 element 1B both recite representing in element 1B or
18 represents in your definition activity -- athletic
19 movement?

20 MS. STAUBACH: Objection. Form.

21 THE WITNESS: So 1B states representing the first
22 athletic movement. Paragraph 42 and aligning that with
23 what I mentioned in terms of my opinion in what athletic
24 movement means, represents the first individual athletic

1 movement.

2 MS. NGUYEN: Q When you say first individual
3 athletic movement, does individual have the same meaning
4 as single?

5 A I apologize. For me -- I'll restate that.
6 I'll go a little further down in paragraph 42 to
7 highlight what I'm trying to say: It is further my
8 opinion that the activity data recited in Claim 1 must
9 derive from a single athletic movement as I discuss above
10 in Section 8A performed in response to a first or second
11 set of instructions as I discuss above in Section 8B.

12 Q Okay. So both your definition of activity data
13 and element 1B requires some sort of representation of
14 athletic movement?

15 MS. STAUBACH: Objection. Form.

16 THE WITNESS: Can you be more specific what you mean
17 by representation of athletic movement?

18 MS. NGUYEN: Q Sure. So, going back to
19 paragraph 34, which shows element 1B, it states:
20 representing the first athletic movement.

21 A Okay.

22 Q So then paragraph 42, your definition states --
23 represents the first or second athletic movement.

24 MS. STAUBACH: Objection. Form.

1 THE WITNESS: Correct. And it explains that -- I'll
2 go further again down in that paragraph where it is --
3 and I state: Activity data recited in Claim 1 must
4 derive from a single athletic movement.

5 MS. NGUYEN: Q And both your definition and
6 element 1B represents the athletic movement?

7 MS. STAUBACH: Objection. Form.

8 MS. NGUYEN: Q Right?

9 A I'm not sure I understand your question in
10 addition to how I'm responding. I'll say it again so --
11 My opinion is that the term athletic movement informs a
12 single athletic movement, and so data received from a
13 sensor that represents the first or second single
14 athletic movement is my definition.

15 MS. NGUYEN: Okay. Why don't we take a break.

16 THE VIDEOGRAPHER: Off the record at 9:58.

17 (Off the record)

18 THE VIDEOGRAPHER: Back on the record at 10:13.

19 MS. NGUYEN: Q Okay. Dr. McLean, just -- you
20 didn't talk to counsel during the break about any of the
21 substance of the proceeding?

22 A No.

23 Q Let me hand to you Exhibit 1001.

24 (Exhibit 1001 tendered to the witness)

1 Q Do you recognize this exhibit?

2 A I do.

3 Q What is it?

4 A It is the '930 patent.

5 Q And you cited parts of the '930 patent in your
6 declaration, right?

7 A Correct.

8 Q Did you review the '930 patent in its entirety?

9 A In support of my declaration, yes, I've
10 reviewed it in its entirety.

11 Q Okay. Is there anything about the '930 patent
12 that you don't understand?

13 MS. STAUBACH: Objection. Form.

14 THE WITNESS: No, I think you'd probably have to
15 walk me through each aspect for me to answer that.

16 MS. NGUYEN: Q Okay. But is there anything during
17 your review where you thought that doesn't make sense
18 that you recall?

19 A I will say I'm not like a patent attorney, I'm
20 not an attorney, so I'm not going to speak to
21 understanding any of the terminologies that relate to
22 anything in a legal aspect. But in terms of reviewing
23 the patent, I was able to understand in support of my
24 declaration any information I gleaned from the patent in

Page 37

1 support of that I understood.

2 Q Okay. Let's turn to Column 12 of the '930.
3 Specifically if I could have you take a look at line 60.

4 A Yeah. I need glasses. You said line 6?

5 Q 60.

6 A 60. I'm sorry. I'm going to apologize because
7 it's so small, and I don't have my glasses, but I'm
8 there.

9 Q Okay. Do you need your glasses?

10 A No, I didn't bring them. It's okay. I can
11 read it.

12 Q Okay. So line 60 states: In an example,
13 System 100 may prompt a user to perform one or more
14 exercises during a workout session.

15 A Correct.

16 Q And would you agree that one or more exercises
17 includes a single exercise?

18 MS. STAUBACH: Objection. Form.

19 THE WITNESS: Can you restate?

20 MS. NGUYEN: Q Yes. Would you agree that one or
21 more exercises as stated in Column 12, line 60 to 61 of
22 the '930 patent includes a single exercise?

23 MS. STAUBACH: Objection. Form.

24 THE WITNESS: Without knowing what that exercise is,

1 I can't opine on that, but per my definition of a
2 movement activity in my declaration, a movement activity
3 is a single movement activity.

4 MS. NGUYEN: Q Okay. The phrase one or more,
5 would you agree that includes one?

6 A It includes the word one, correct.

7 Q Yes. Does it include the one -- Sorry.

8 Does it include the word more?

9 A It includes the word more.

10 Q Would you agree the word more means multiple?

11 A I think more means more than one --

12 Q Okay.

13 A -- in my interpretation.

14 Q So let me hand you Exhibit 1002, and -- Do you
15 recognize this exhibit?

16 (Exhibit 1002 tendered to the witness)

17 A I do.

18 Q What is it?

19 A I'll just -- I'll define it as Lofi, the Lofi
20 patent.

21 Q So before your work on this case, were you
22 familiar with the Lofi reference?

23 A I was not.

24 Q Did you find the Lofi reference yourself?

1 A No.

2 Q And did you review Lofi in its entirety when
3 forming your opinion for your declaration?

4 A I reviewed it in entirety, yes.

5 Q Is there anything that you didn't understand in
6 Lofi?

7 MS. STAUBACH: Objection. Form.

8 THE WITNESS: Well, I definitely didn't understand
9 the French.

10 MS. NGUYEN: Q Okay.

11 A But I will say again, in formulating my
12 opinions as part of my declaration, there was nothing
13 that precluded me from being able to formulate my
14 opinions with confidence based on my review of the
15 document.

16 Q Okay. Do you recall about how much time you
17 spent reviewing Lofi?

18 A It's been a while, but probably three or four
19 hours of reviewing Lofi.

20 Q So let's pivot back over to your declaration.

21 A Sure.

22 Q Paragraph 44.

23 A Yep.

24 Q So the -- actually on page 21, the second to

1 last sentence of paragraph 44 of your declaration, so it
2 says: To do so, the terminal prompts the user to perform
3 a series of exercises.

4 A Correct.

5 Q Would you agree that these prompts are
6 instructions?

7 A Just let me read through a couple things.

8 Q Take your time.

9 A I just wanted to read through some of the other
10 materials. Can you just ask your question again now
11 based on that.

12 Q Yes. So the second to last sentence of your
13 declaration -- sorry -- of paragraph 44 of your
14 declaration, it says to do so, the terminal prompts a
15 user to perform a series of exercises.

16 Would you agree that these prompts are
17 instructions?

18 A What I'll say is that -- if you actually go to
19 page 30 of my declaration, which is paragraph 61, if you
20 go to I think probably the third to last sentence, it
21 states that's within my opinion. So, in my opinion, this
22 confirms that Lofi's series of tests are performed in
23 response to multiple sets of instructions. So each of
24 these exercises is performed in response to a set of

1 instructions.

2 Q Okay. So would you agree that Lofi provides a
3 set of instructions?

4 A For a particular each activity, Lofi -- and
5 I'll say it again. It's my opinion this confirms that
6 Lofi's series of tests are performed in response to
7 multiple sets of instructions.

8 Q Okay. What is providing the multiple sets of
9 instructions?

10 MS. STAUBACH: Objection. Form.

11 THE WITNESS: Can you ask that again by what it is?

12 MS. NGUYEN: Q Sure. You referred me to
13 paragraph 61 of your declaration, and there you talk
14 about Lofi's series of tests being performed in response
15 to multiple sets of instructions. So my question was
16 what is providing the multiple sets of instructions?

17 MS. STAUBACH: Objection. Form.

18 THE WITNESS: I just want to read through another
19 part of my declaration and I'll answer your question.

20 I'll answer it. If you go to page 21, which is
21 paragraph 46 of my declaration, and I'll quote: Lofi's
22 terminal instructs the user to perform a series of tests
23 for evaluating the four categories listed above.

24 So the terminal provides those instructions.

1 MS. NGUYEN: Q Lofi's terminal?

2 A Sorry. Apologize. Lofi's terminal provides
3 those instructions.

4 Q If you don't mind, if we can go back to that
5 same sentence in paragraph 44 because I had only read the
6 first half of it. So the second half says: And measures
7 data during the performance of those exercises to
8 evaluate a user's endurance, body composition, muscular
9 strength, and coordination or motricity.

10 A Let me just read it again. I want to make sure
11 you're saying it's page 21, paragraph 44: To do so the
12 terminal prompts a user to perform a series of exercises
13 and measures data during the performance of those
14 exercises to evaluate a user's endurance, body
15 composition, muscular strength, and coordination or
16 motricity, correct?

17 Q Yes. So you agree that Lofi's terminal
18 measures data during the performance of those exercises?

19 MS. STAUBACH: Objection. Form.

20 THE WITNESS: I'll state it again. Lofi's terminal
21 provides instructions -- a set of instructions for each
22 activity. So each activity is informed by a set of
23 instructions provided by that terminal.

24 MS. NGUYEN: Q And Lofi's terminal measures data?

1 MS. STAUBACH: Objection. Form.

2 MS. NGUYEN: Q Right?

3 A Let me read from paragraph 45 of my
4 declaration. So Lofi discloses that terminal 12, so the
5 terminal has a means of measurement specifically terminal
6 provides one, a means of measurement of endurance; two, a
7 means of measurement of body composition; three, a means
8 of measurement of muscular strength; and, four a means of
9 measurement of coordination or motricity.

10 Q So you would agree that Lofi's terminal has a
11 means of measurement?

12 A I would agree that for each of those activities
13 that we've stated, Lofi's terminal has a means of
14 measurement for each of those activities.

15 Q Okay. And you would agree that Lofi's terminal
16 having a means of measurement must be receiving data from
17 a sensor, is that right?

18 A So for each of those activities that we
19 mentioned, so in regard to a means of measurement, each
20 of those activities, that means of measurement is able to
21 measure data for each of those single activities.

22 Q Okay. And how is the means of measurement able
23 to measure data?

24 A So if you go to paragraph 46, I'll give you --

1 I'll read, as an example -- so second sentence: For
2 example, in determining muscle strength, the device
3 instructs the user to contract their abdominal muscles
4 while wearing an abdominal belt, and the belt then
5 transmits a signal proportionate to the effort exerted by
6 the abdominal muscles.

7 So, for this particular measurement, being
8 muscular strength, the data is measured or the strength
9 is measured based on data being transmitted or the signal
10 being transmitted from the belt that's proportionate to
11 the effort exerted by the muscles for that particular
12 activity.

13 If you go to the next page, as another example,
14 to measure flexibility being another individual or single
15 activity, the device instructs the user to stand on a
16 hardened pedestal and then to bring a pallet to as low as
17 possible bending forward without giving way to their
18 legs. So each activity -- single activity has a means of
19 measurement with each of those means of measurement being
20 different.

21 Q Okay. So going back to the abdominal belt, as
22 you had just said, the belt transmits a signal
23 proportionate to the effort exerted by the abdominal
24 muscles?

1 A Correct.

2 Q So does that mean the belt has a sensor?

3 MS. STAUBACH: Objection. Form.

4 THE WITNESS: I don't have the belt, so I can't
5 speak to that. But, again, what the belt does in my
6 understanding and interpreting and reading from Lofi, and
7 it's directly from Lofi, the belt transmits a signal
8 proportionate to the effort exerted by the abdominal
9 muscles. That's my understanding, it transmits a signal.

10 MS. NGUYEN: Q Do you know whether it measures the
11 signal?

12 A Based on my understanding, the belt itself
13 transmits a signal.

14 Q Do you know whether something else measures the
15 signal?

16 MS. STAUBACH: Objection. Form.

17 THE WITNESS: Can you be more specific what you mean
18 by that?

19 MS. NGUYEN: Q Yeah. So you had said based on your
20 understanding the belt itself transmits a signal. So I'm
21 trying to understand whether it's the belt or another
22 component that's measuring the signal.

23 MS. STAUBACH: Objection. Form.

24 MS. NGUYEN: Q Do you know?

1 A I'm going to read through just to make sure I'm
2 a understanding with respect to what I'm reading.

3 I'm actually going to go to Lofi. If you go to
4 page 6, line 24, to measure the quality of the abdominal
5 muscles, an abdominal belt is used, which is what I
6 assume you're referring to. The belt contains one or
7 more pressure sensors or strain gauges which can measure
8 the action of the abdominal muscles on the belt.

9 So the measurement of the action of the
10 abdominal muscles is being performed by the pressure
11 sensors or strain gauges.

12 Q And just to confirm because Lofi has both a
13 French version and English version --

14 A I'm sorry.

15 Q No. When you say page 6 --

16 A Of the English version.

17 Q Yeah. You're also referring to page 35 of
18 the --

19 A 35, that's correct, I apologize.

20 Q No. It's okay. It's confusing.

21 Okay. Great. So if we could go back to that
22 same sentence in paragraph 44. I'll read it one more
23 time. To do so, the terminal prompts a user to perform a
24 series of exercises, and measures data during the

1 performance of those exercises to evaluate a user's
2 endurance, body composition, muscular strength, and
3 coordination or motricity?

4 A Correct.

5 Q So Lofi calculates a score using the user's
6 endurance, is that right?

7 A So -- with regard to -- you're asking
8 specifically with regard to endurance?

9 Q Yes.

10 A So there is a single activity prompted by the
11 terminal, instructions provided by the terminal to
12 provide that activity, and based on that activity, a
13 single score for endurance is calculated.

14 Q And is a single score for strength calculated?

15 MS. STAUBACH: One second. Objection. Form.

16 THE WITNESS: So can you be more specific? Are you
17 relating it to Lofi's terminal or --

18 MS. NGUYEN: Q Yes. More specifically the one
19 sentence we've been reading in paragraph 44 of your
20 declaration.

21 A So with regard to strength -- muscular strength
22 in a similar way, the terminal prompts you a set of
23 specific instructions, the user to perform a specific
24 single activity or exercise from which muscular strength

1 is calculated.

2 Q Does Lofi calculate a score using coordination?

3 MS. STAUBACH: Objection. Form.

4 THE WITNESS: So, again, I'll go back become to that
5 sentence. So, again, based on a set of specific
6 instructions provided by the terminal, the user is
7 required to perform an activity or in particular -- let
8 me just -- I want to read briefly with regard to
9 motricity if I could because I don't want to misspeak.
10 It may take me a little bit, but I'll get there.

11 MS. NGUYEN: Q No worries.

12 A So with regard to coordination or motricity,
13 I'm going to rely on this paragraph, but I'm also going
14 to go back to page 36 of Lofi. And so I'll start with
15 looking at paragraph 44 of my declaration, which to your
16 point, so the terminal through a set of instructions
17 prompts the user to perform a series -- a set of
18 exercises that relate to coordination or motricity from
19 which an aggregated score for coordination or motricity
20 is calculated.

21 I use the word aggregated because if you now go
22 to Lofi on page 36, let me go to line 10: The means 22
23 of measurement of at least one characteristic relating to
24 the coordination or motricity preferably include a means

1 to measure the reflexes of the person, a means to measure
2 their flexibility, and a means to measure their balance.

3 If you then go to line 20, it explains -- or
4 Lofi explains the activity performed from which a single
5 score for flexibility is calculated.

6 If you then go to page 37, and you look at
7 line 8, and I quote: Then to measure the balance, the
8 preference is to use a statokinesimeter 56 -- I'm not
9 going to pretend to say that word, I won't even do that
10 twice -- as illustrated in Figure 5.

11 So for balance, a different activity is being
12 performed and a different score is being calculated. And
13 similarly, if we then look at -- bear with me -- if you
14 look on page 38, line 3, it says; hence, the means of
15 measurement of balance transmit to the means of
16 processing a signal proportionate to a measure indicated
17 as a result of measure of the balance per unit area.

18 So if I now go back to your question with
19 regard to does it support measurement of coordination and
20 motricity, the terminal prompts the user to perform a
21 series of exercises relating to balance, flexibility as
22 an example. Each of those is an individual activity from
23 which each -- a single individual score is calculated
24 from which an aggregated score relating to coordination

1 or motricity is derived.

2 Q Okay. So let's turn to paragraph 60 of your
3 declaration. Paragraph 60 of your declaration is
4 discussing Lofi's 8 minute pedaling test, is that right?

5 A Correct.

6 Q Okay. And Lofi's 8 minute pedaling test
7 measures endurance, is that right?

8 A I'll just -- I'll state directly from that
9 paragraph: Pedaling test measures only one attribute
10 that is used in the calculation of an aggregate score,
11 endurance, correct.

12 Q Okay. Towards the bottom of page 29, same
13 paragraph, you state: In my opinion -- I'm sorry. Next
14 sentence: Lofi only discloses that an endurance
15 measurement is expressed as maximum oxygen consumption.

16 A Correct.

17 Q Using watts as the unit of measurement?

18 A Correct.

19 Q Dr. McLean, what is a watt?

20 MS. STAUBACH: Objection. Form.

21 THE WITNESS: Are you asking me what a watt is in
22 terms of a physics-based measurement?

23 MS. NGUYEN: Q What does a watt mean in terms of
24 what you've stated in your declaration?

1 A A watt is a measurement of force times
2 velocity. It basically corresponds to how much force I
3 produce at a given velocity.

4 Q And Lofi's 8 minute pedaling test expresses a
5 result in watts, is that right?

6 A Lofi's 8 minute pedaling test expresses
7 calculation of a score which is endurance and in only
8 endurance derived as maximum oxygen consumption.

9 Q What is maximum oxygen consumption?

10 MS. STAUBACH: Objection. Form.

11 THE WITNESS: Can you be more specific in what you
12 mean?

13 MS. NGUYEN: Q Yeah. So in your declaration,
14 paragraph 60, when you say Lofi only discloses that an
15 endurance measurement is expressed as a -- and you put it
16 in quotes, maximum oxygen consumption, I'm trying to
17 understand what you mean by maximum oxygen consumption.

18 A Okay. So with regard to an 8 minute endurance
19 test, for example, maximum oxygen consumption corresponds
20 to the maximum amount of oxygen that your body utilizes
21 during an activity.

22 Q And this maximum amount of oxygen that your
23 body utilizes during an activity is expressed in watts as
24 the unit of measurement?

1 MS. STAUBACH: Objection. Form.

2 MS. NGUYEN: Q Is that right?

3 A So, again, it's my understanding again that
4 what Lofi provides is a single score, being endurance,
5 and based on this 8 minute test, and endurance which is a
6 common way that it is expressed relates to the maximum
7 amount of oxygen consumed during that test.

8 Q What do you mean by common way that it is
9 expressed?

10 A I apologize. That's a pretty general word. So
11 typically if you are undertaking a test for endurance,
12 for example, let's use the 8 minute cycling test as a
13 direct example as defined in Lofi, the maximum amount of
14 oxygen that you consume during that test corresponds to
15 endurance.

16 Q Okay. And in your declaration, same
17 paragraph, 60, you say -- sixth sentence of paragraph 6,
18 you say: In fact, Lofi has no mention of power in the
19 reference.

20 A Correct. The power isn't used in the
21 reference.

22 Q Okay. Would you agree that watts represents
23 power?

24 MS. STAUBACH: Objection. Form.

1 THE WITNESS: Can you be more specific what you mean
2 by --

3 MS. NGUYEN: Q Yeah. So earlier you had told me
4 that watts is force times velocity.

5 A Uh-huh. Correct.

6 Q Would you agree that force times velocity
7 represents the user's power?

8 A In terms of an equation, power is equal to
9 force times velocity, correct.

10 Q And would you agree that Lofi's pedaling test
11 results in force times velocity?

12 A I actually based on my definition and the way I
13 stated in this paragraph, what Lofi's 8 minute cycling
14 test does is it arrives at a measurement of maximum
15 oxygen consumption which informs endurance. It doesn't
16 inform power.

17 Q Okay. And when you say watts as a unit of
18 measurement, are watts the unit of measurement for
19 maximum oxygen consumption?

20 A As stated in Lofi, watts are being used as a
21 unit of measurement, but if you're asking me is maximum
22 oxygen consumption defined in terms of watts, typically
23 it's defined as milliliters of oxygen per unit body mass.

24 Q Okay. So sticking with paragraph 6 of your

1 declaration, if we can go to page 30 at the top, which is
2 paragraph 6. You state: Dr. Fischer offers a similar
3 opinion on Lofi's test for measuring lower limb strength.

4 So when you mention lower limb strength, are
5 you referring to Lofi's -- and I'll call it the
6 pedal-as-fast-as-possible test?

7 A Bear with me. I just want to make sure I don't
8 misspeak on that.

9 Q I'm happy to refer you to Lofi's disclosure.

10 A That would help you if you could.

11 Q So if you turn to page 34 of Lofi, line 9 to
12 21. Let me know when you've had a chance to review it.

13 A You said line 9?

14 Q Yes.

15 A Okay. Thanks.

16 Yes, I've read it.

17 Q So I'm just trying to give it a name. So in
18 page 34, line 9 to 21, Lofi talks about asking the person
19 to pedal as fast as possible?

20 A As fast as they can.

21 Q So I'll call it the pedal-as-fast-as-possible
22 test if that's okay to distinguish over the 8 minute
23 test. So would you agree that Lofi calculates this
24 aggregate score using the pedal-as-fast-as-possible test?

1 MS. STAUBACH: Objection. Form.

2 THE WITNESS: Can you be more specific with what you
3 mean by aggregate score?

4 MS. NGUYEN: Q Yeah. So earlier you had clarified
5 that there are exercises in Lofi where single scores are
6 calculated and then those single scores are used to
7 derive an aggregate score. Do you recall that?

8 A Correct, uh-huh.

9 Q So what I'm asking is that aggregate score in
10 Lofi, is it derived from the pedal-as-fast-as-possible
11 test?

12 MS. STAUBACH: Objection. Form.

13 THE WITNESS: So the pedal-as-fast-as-possible test
14 is used to calculate muscular strength which is an
15 individual score based on a single activity.

16 MS. NGUYEN: Q Okay. And then this individual
17 score for calculating muscular strength, is that used to
18 calculate the aggregate score?

19 MS. STAUBACH: Objection. Form.

20 THE WITNESS: So I'll go back to I think it is
21 paragraph 42 -- I think it was. Bear with me. I don't
22 want to -- or was it 44? It's paragraph 44, so page 21,
23 which is what we talked about previously. So the
24 aggregate score -- with reference to that, to do so the

1 terminal prompts a user to perform a series of exercises
2 to measure data during the performance of each of those
3 exercises to evaluate a user's endurance, body
4 composition, muscular strength and coordination or
5 motricity.

6 So the aggregate score which you're referring
7 to takes into consideration those single scores
8 calculated for each of those single activities with one
9 of those being muscular strength.

10 MS. NGUYEN: Q And Lofi's pedal-as-fast-as-possible
11 test is used to measure muscular strength, is that right?

12 A Correct.

13 Q Okay. And, more specifically, Lofi talks about
14 this peak of the strength/speed curve.

15 A Are you referring to I think line 15?

16 Q 16.

17 A 16. I'm sorry.

18 Q 16 to 17.

19 A Yeah.

20 Q Is that right?

21 A I do need my glasses. I just want to make
22 sure. It says: Given that the resistance is
23 increasingly greater, the speed of pedaling decreases
24 after a few seconds. The peak of the strength speed

1 curve corresponds to the maximum capacity of legs
2 expressed in watts.

3 Q Okay. And would you agree that the
4 strength/speed curve is related to strength?

5 MS. STAUBACH: Objection. Form.

6 THE WITNESS: As -- as Lofi describes it, Lofi
7 calculates their measurement of muscular strength, and
8 they use information gleaned from that curve.

9 MS. NGUYEN: Q So the strength speed curve is
10 related to strength, right?

11 MS. STAUBACH: Objection to form.

12 THE WITNESS: Again, what Lofi provides is a single
13 measure of muscular strength based on performing that
14 pedal-as-fast-as-you-can activity using that information,
15 and, again, I'll quote: The peak of the strength speed
16 curve corresponds to the maximum capacity of the legs
17 expressed in watts, Lofi describes a measurement of
18 muscular strength.

19 MS. NGUYEN: Q How does Lofi determine the peak of
20 the strength speed curve?

21 MS. STAUBACH: Objection. Speculation.

22 THE WITNESS: Again, I don't have those curves in
23 front of me. I can't see them. I don't know how Lofi
24 does that. I'm basing it on what's stated here.

1 MS. NGUYEN: Q Okay. Would it be fair to say that
2 the strength/speed curve is related to speed?

3 MS. STAUBACH: Objection. Speculation.

4 THE WITNESS: In my opinion Lofi uses information
5 from the strength speed curve and produces and calculates
6 a single measurement which is muscular strength.

7 MS. NGUYEN: Q Do you know how Lofi generates the
8 speed strength curve?

9 A Again, I don't know exactly. I don't have that
10 information. I'm basing it on what I read in front of
11 me.

12 Q So let me -- Let me hand you Exhibit 1004.

13 (Exhibit 1004 tendered to the witness)

14 Q Do you recognize Exhibit 1004?

15 A I do. I'll call it Kitagawa.

16 Q Perfect. And before your work on this case,
17 were you familiar with Kitagawa?

18 A I was not.

19 Q Did you find Kitagawa yourself?

20 A No.

21 Q And did you review Kitagawa in its entirety?

22 A I did.

23 Q And is there anything in Kitagawa that you did
24 not understand?

1 A Again, like with the previous question, with
2 regard to me formulating my opinions and putting together
3 my expert declaration, there was nothing that I read in
4 Kitagawa that precluded me from doing that.

5 Q Okay. Do you recall roughly how much time you
6 spent reviewing Kitagawa?

7 A Probably three or four hours. It's been a
8 while.

9 Q Yeah.

10 A It's an estimate.

11 Q If we could take a look at paragraph 52 of your
12 declaration. It discusses Kitagawa, correct?

13 A It does.

14 Q And paragraph 52 of your declaration talks
15 about Table 3 and reproduces it.

16 A Correct.

17 Q And states each exercise course has its own
18 pre-defined index values?

19 A Correct.

20 Q And table 3 of Kitagawa has seven exercise
21 courses, is that right?

22 MS. STAUBACH: Objection. Form.

23 THE WITNESS: I'm going to read the paragraph to
24 give some context. So Kitagawa's system uses a

1 pre-defined index of the amount of exercise that a user
2 performs. And each exercise course has its own
3 pre-defined index values as shown in Table 3. And if I
4 want -- I want to now go to paragraph -- bear with me --
5 if we go to paragraph 55 -- don't want to give context to
6 that table. In one embodiment, Kitagawa teaches a 12
7 part exercise course as shown below in Figure 1.

8 And so within Figure 1, there are a series of
9 individual activities.

10 Kitagawa in Figure 1 -- Kitagawa discloses that
11 the various types of exercise and various conditions are
12 designed so that each physical ability can be evaluated
13 by measuring the completion time for each exercise
14 course.

15 So the course itself corresponds to those
16 activities. So it now -- if I look at Table 3 to your
17 point, so here are -- each exercise course has its own
18 pre-defined index value as shown below in Table 3 as an
19 example of a course that incorporates these activities.
20 And I count seven activities with index scores, and it
21 also has rings which has no scores.

22 Q I think rings is part of stretch with --

23 A Yeah. Sorry. Look at that. It is. So you're
24 correct, it's seven.

1 Q So let's take a look at the second exercise
2 course. It's called climb of grief in Table 3.

3 MS. STAUBACH: Objection. Form.

4 MS. NGUYEN: Q So climb of grief has a value of 7
5 for legs, is that right?

6 A Correct.

7 Q And would you agree that legs refers to leg
8 muscle strength?

9 A I'm going to go a little bit further in this.
10 Give me a second and I'll -- I'll respond to your
11 question.

12 So if you go to page 35, paragraph 69, I think
13 it is the third to last -- second to last sentence, and I
14 state: Kitagawa's indexes, so if you -- to your question
15 an index of seven for the second exercise -- Kitagawa's
16 indexes are pre-defined constants stored in the memory of
17 Kitagawa's system that do not vary by user. Table 3
18 shows the amounts of exercise shown as indexes to be
19 performed in exercise courses 1 to 7. Thus, it is my
20 opinion that Kitagawa does not use activity data, i.e.,
21 data received from a sensor.

22 What I'm getting at here, it is an index that
23 is used to inform a measurement of strength age. It is
24 not a measurement of strength.

1 Q So going back to Table 3, there is a legs
2 column?

3 A Correct.

4 Q What does that legs column represent?

5 MS. STAUBACH: Objection. Form.

6 THE WITNESS: Without like knowing Kitagawa's
7 intent, it is my understanding based on the description
8 that it corresponds to an index, a pre-defined and
9 predetermined index, a constant for each of these
10 particular activities. So to answer your question, there
11 is a constant or an index for legs for the log range,
12 there is another constant or index for climb of grief,
13 et cetera.

14 MS. NGUYEN: Q Does the index for legs represent
15 the length of the legs?

16 MS. STAUBACH: Objection. Speculation.

17 THE WITNESS: I don't -- without knowing the intent,
18 I can't speak to that, but, again, what I will say is --
19 I'll go back to what I said a moment ago. Bear with me.
20 They're pre-defined constant supported in the memory of
21 Kitagawa's system, they do not vary by user.

22 So based on that definition alone, and I'm
23 going to take a stab here and say that not every user has
24 the same leg length, it's a constant value that wouldn't

1 correspond.

2 MS. NGUYEN: Q Okay. Maybe I could have you turn
3 to Column 4 of Kitagawa.

4 A Sure.

5 Q There is a paragraph starting at line 26 ending
6 at line 41 that discusses the second exercise course
7 which I have been calling climb of grief.

8 A Okay. 26 to 41?

9 Q Yes. Please let me know when you're done
10 reviewing it.

11 A Yes.

12 Q So back to Table 3. There is a legs value of 7
13 for the second exercise course climb of grief.

14 MS. STAUBACH: Objection. Form.

15 THE WITNESS: Can you restate the question for me?

16 MS. NGUYEN: Q Yeah. So back to Table 3. There
17 is a -- Let me know when you're there.

18 A I'm there.

19 Q Okay. A legs value of 7 for the second
20 exercise course also called climb of grief. Right?

21 A What you're saying is for climb of grief there
22 is an index score or constant score provided for the
23 legs, and that constant or index score is 7?

24 Q Yes.

1 A Correct.

2 Q And based on your review of Kitagawa,
3 specifically Column 4, the paragraph starting at line 26,
4 which I just had you read, would you agree that that
5 constant represents leg muscle strength?

6 MS. STAUBACH: Objection. Form.

7 THE WITNESS: So based on reading that excerpt, the
8 index or the constant of 7 Kitagawa describes as
9 corresponding to leg muscle strength.

10 MS. NGUYEN: Q Okay. And Kitagawa also describes
11 index values for balance, agility, and flexibility,
12 correct?

13 A Within that excerpt, constants or index values
14 or these pre-defined constant values are defined for
15 balance, agility, and flexibility, correct.

16 Q So let's -- Let's move on to Exhibit 1003.

17 (Exhibit 1003 tendered to the witness)

18 Q Dr. McLean, do you recognize Exhibit 1003?

19 A I do. I'll call it Maeueler. Let's call it
20 Maeueler. Let's do it that way.

21 Q Earlier you said Maeueler.

22 A I said Maeueler. Let's just call it Maeueler.
23 Let's do Maeueler. It's easier for me to repeat.

24 Q Before your work on this case, were you

1 familiar with the Maeueller reference?

2 A No.

3 Q Did you find this reference yourself?

4 A No.

5 Q Okay. And like Kitagawa and Lofi, is there
6 anything you didn't understand in Maeueller?

7 MS. STAUBACH: Objection. Form.

8 THE WITNESS: Based -- are you -- Let me slow down
9 on that. In formulating my opinions and in developing my
10 declaration, there was nothing in Maeueller that precluded
11 me from being able to formulate those opinions.

12 MS. NGUYEN: Q Earlier you said you spent about 3
13 to 4 hours reviewing Kitagawa and Lofi individually.
14 Would you say you spent about 3 to 4 hours reviewing
15 Maeueller?

16 A In reviewing Maeueller I spent about 3 to 4
17 hours, correct.

18 Q So let's take a look at paragraph 49 of your
19 declaration. Paragraph 49 discusses Maeueller, is that
20 right?

21 A Correct.

22 Q Paragraph 49 of your declaration states
23 Maeueller's system conducts tests related to five
24 components of physical fitness. And then you name the

1 five components, cardiovascular endurance, muscle
2 strength, flexibility, balance, and body composition?

3 A Correct.

4 Q Would you agree that Maeueller calculates a
5 score for cardiovascular endurance?

6 A So based on the language there, there are a
7 series of tests, five tests and -- which talk about the
8 five components of physical fitness, cardiovascular
9 endurance, muscle strength, flexibility, balance, and
10 body composition, each of those being an individual
11 activity from which individual scores are calculated.

12 Q One of the individual scores is a score for
13 endurance, correct?

14 A Correct, one of the individual scores
15 calculated based on performance of an individual movement
16 activity is cardiovascular endurance.

17 Q And Maeueller also calculates a score for muscle
18 strength, is that right?

19 A So, again, those five components, Maeueller
20 prescribes individual activity, one of which being or --
21 from which for that one muscle strength is calculated.

22 Q And what about a score for flexibility, does
23 Maeueller calculate a score for flexibility?

24 A In a similar manner, for the five components,

1 this time related to flexibility, there is a specific
2 test supporting flexibility from which a single score for
3 flexibility is calculated.

4 Q Would it be fair to say Maeueller discloses
5 calculating a score for balance?

6 A In a similar way, as you stated, balance being
7 one of the five components, Maeueller prescribes a test to
8 support calculation of a single score of balance.

9 Q So same paragraph of your declaration,
10 paragraph 49, the next sentence then states: Maeueller
11 discloses specific exercises that the user may perform in
12 response to an instruction.

13 Would you agree that in Maeueller the user
14 performs exercises in response to an instruction?

15 A Just bear with me for a moment.

16 I'll actually use -- If you go to paragraph 93
17 of my declaration, page 48, I use language there to
18 answer that question. If you go to the -- I think the
19 third sentence -- actually we'll go to the -- Lululemon
20 identifies only a single athleticism attribute balance.
21 I actually I think I'll go a little bit further. No,
22 that's fine.

23 Q Hold on, Doctor. You said paragraph 93 --

24 A 93.

1 Q And you said the third sentence?

2 A We'll start with the third sentence, which is
3 Lululemon alleges. Lululemon alleges that Maeueller
4 provides instructions for plurality of drills such as
5 strength, flexibility, endurance, and balance drills.

6 So by -- to your question, Maeueller provides
7 instructions to perform activities such as strength,
8 flexibility, endurance and balance drills.

9 Q If we can go back to paragraph 49, moving on to
10 the next sentence, which would be the third sentence of
11 paragraph 49, you state: As the user performs exercises
12 associated with a particular component of physical
13 fitness, a peripheral device measures one or more input
14 parameters to determine a fitness test result.

15 A Correct.

16 Q Since the peripheral device is measuring one or
17 more input parameters, does that mean it comprises a
18 sensor?

19 MS. STAUBACH: Objection. Form.

20 THE WITNESS: Without having access to those
21 devices, I can't speak to whether it does or does not
22 include a sensor.

23 MS. NGUYEN: Q Do you know whether Maeueller
24 includes any sensors?

1 A If you go to paragraph 48 of my declaration --
2 I'll take the last sentence. As depicted in Figure 2,
3 Maeueller discloses three peripheral devices containing
4 one or more sensors.

5 So based on that, Maeueller does incorporate one
6 or more sensors in these peripheral devices.

7 Q And these -- Sorry. This peripheral device, as
8 you state in paragraph 49, measures one or more input
9 parameters. Right?

10 A Uh-huh.

11 Q Would it be fair to say that these one or more
12 input parameters is data?

13 MS. STAUBACH: Objection. Form.

14 THE WITNESS: Without actually having access to the
15 device and understanding the way if it does or doesn't
16 incorporate a sensor what's being measured, I can't speak
17 to whether that information is reasonable data.

18 MS. NGUYEN: Q Okay. So then what is an input
19 parameter?

20 MS. STAUBACH: Objection. Form.

21 THE WITNESS: Can you be a little bit more specific
22 with that?

23 MS. NGUYEN: Q Yeah. So I'm trying to understand
24 your sentence in paragraph 49 of your declaration. More

1 specifically when you say a peripheral device measures
2 one or more input parameters, I'm asking what an input
3 parameter is.

4 A Just bear with me. I want to make sure.

5 I'll give you an example of an input parameter.
6 If you go to Maeueller, page 6, and you look under
7 flexibility, which is at the very bottom of page 6, which
8 I think is line 56. I'll just read: So the flexibility
9 test in embodiments made by averaging the test results of
10 two flexibility tests a sit to stand -- a sit and reach
11 test and a shoulder flexibility test.

12 So an input parameter as an example may be the
13 measurement derived from the sit and reach test.

14 Q Would you agree that an input parameter as an
15 example may be the measure derived from the shoulder
16 flexibility test?

17 A So I'm going to read that sentence in
18 completeness first because I want to highlight something.
19 I'll say it again. So the flexibility test may in
20 embodiments be tested averaging the test result of two
21 flexibility tests. So the flexibility test is an
22 averaging of tests, one of the tests a shoulder
23 flexibility test from which an input parameter may be
24 derived.

1 Q Can we turn to paragraph 86 of your
2 declaration? It's discussing Maeueller's endurance test,
3 correct?

4 A Correct.

5 Q Okay. More specifically Maeueller's endurance
6 test in which a user is instructed to run for 12 minutes.

7 A Correct.

8 Q And if I say Maeueller's 12-minute run test,
9 you'd understand that's what I'm referring to?

10 A Yes.

11 Q Okay. So running for 12 minutes, i.e.,
12 Maeueller's 12-minute run test, that's related time,
13 correct?

14 MS. STAUBACH: Objection. Form.

15 THE WITNESS: Can you restate that?

16 MS. NGUYEN: Q Sure. So my question was,
17 Maeueller's 12-minute run test is related to time, is that
18 right?

19 MS. STAUBACH: Objection. Form.

20 THE WITNESS: So specifically -- I'll just read:
21 Lululemon points to Maeueller's endurance test in which a
22 user is instructed to run for 12 minutes. So time is --
23 corresponds to the length or the duration of the test.

24 MS. NGUYEN: Q Of the run test?

1 A Of the run test.

2 Q Okay. And from that 12-minute run test related
3 to 12 minutes of time --

4 A Correct.

5 Q -- the user is monitored by one or more
6 peripheral devices that collects speed data, right?

7 A So -- I'll just quote: The user is monitored
8 by one or more peripheral devices that collect heart rate
9 data and speed data.

10 Q So the 12-minute run test is collecting speed
11 data?

12 MS. STAUBACH: Objection. Form.

13 THE WITNESS: The 12-minute run test, the user is
14 being monitored -- I'll just say it again -- and it
15 collects heart rate data and speed data.

16 MS. NGUYEN: Q And heart rate data and speed data
17 includes speed data, right?

18 A Correct.

19 Q So would it be fair to say that Maeueler's
20 12-minute run test is collecting speed data?

21 A I'm going to read from paragraph 86. At the
22 top of page 45 -- Actually I'll go just to the very last
23 sentence on page 44. According to Lululemon, Maeueler's
24 computing module calculates a fitness index numerical

1 score that is a combination of the endurance and speed
2 attributes being assessed. I disagree. Maeueller does
3 not teach calculating a speed component as part of its
4 aggregate fitness index. And as I mentioned, the only
5 component of physical fitness that's being associated or
6 measured through the run test is endurance.

7 So speed is not being incorporated into that
8 score for endurance.

9 MS. STAUBACH: Jean, whenever you reach a stopping
10 point, can we take a five-minute break? It's been like
11 an hour and 20 minutes.

12 MS. NGUYEN: Yeah. Sorry. Yeah.

13 MS. STAUBACH: Thank you.

14 MS. NGUYEN: Q Okay. So in the passage you just
15 read of paragraph 86 of your declaration, you cite
16 Maeueller, paragraphs 31 to 36, do you see that?

17 A I do.

18 Q Okay. So if we could take a look at
19 paragraph 31 of Maeueller. Let me know when you're there.

20 A I'm there.

21 Q Okay. So paragraph 31 of Maeueller provides an
22 equation for V02 max. Do you see that?

23 A Let me make sure. I do, yes.

24 Q And specifically V02 max equals D minus 504.9

1 divided by 44.73, right?

2 A Correct.

3 Q And after this equation, Maeueller then says
4 with D being the run distance in meters.

5 A Correct.

6 Q Would you agree that Maeueller's 12-minute run
7 test is related to distance?

8 MS. STAUBACH: Objection. Form.

9 THE WITNESS: Can you restate?

10 MS. NGUYEN: Q Right. So my question was, would
11 you agree that Maeueller's 12-minute run test is related
12 to distance?

13 MS. STAUBACH: Same objection.

14 THE WITNESS: So the run test corresponds to how far
15 you've run in that 12-minute period from which a V02 max
16 score is estimated.

17 MS. NGUYEN: Q And how far you've run in the
18 12-minute period is the distance run, right?

19 A Correct.

20 Q And, Dr. McLean, is distance related to speed?

21 A Can you be more specific with that?

22 Q Yeah. So how do you determine speed?

23 A So speed or -- Let's call it speed, not
24 velocity. So speed corresponds to how far you travel

1 over a given time period.

2 Q So, in other words, speed corresponds to
3 distance over a given time period, right?

4 A Correct.

5 Q Okay. Okay. Why we don't take -- five
6 minutes.

7 MS. STAUBACH: Can we do ten please?

8 MS. NGUYEN: Ten-minute break.

9 THE VIDEOGRAPHER: Off the record at 11:32.

10 (Off the record)

11 THE VIDEOGRAPHER: Back on the record at 11:48.

12 MS. NGUYEN: We have no further questions.

13 MS. STAUBACH: We have a little bit of redirect.

14 EXAMINATION

15 By Ms. Staubach:

16 Q Dr. McLean, earlier today counsel for Lululemon
17 asked you to look at paragraph 86 of your declaration.
18 Could you turn there with me?

19 A 86. Okay. Yep.

20 Q The first sentence of paragraph 86 reads:
21 Specifically, Lululemon points to Maeueller's endurance
22 test in which a user is instructed to run for 10 minutes
23 and alleges that the user is monitored by one or more
24 peripheral devices that collect heart rate data and speed

Page 76

1 data.

2 Did I read that correctly?

3 MS. NGUYEN: Objection.

4 THE WITNESS: You did, except for the 10 minutes.
5 It should be 12 minutes.

6 MS. STAUBACH: Q Let me try that again. So
7 sentence -- first sentence says: Specifically, Lululemon
8 points to Maeueller's endurance test in which a user is
9 instructed to run for 12 minutes and alleges that the
10 user is monitored by one or more peripheral devices that
11 collect heart rate data and speed data, is that right?

12 A Correct.

13 Q Do you agree with that sentence?

14 MS. NGUYEN: Objection. Form.

15 THE WITNESS: I'm going to read what follows on in
16 that paragraph if I may to support answering that
17 question. I'll follow on with the next sentence, which
18 is: According to Lululemon most computing module
19 calculates a fitness index numerical score that is a
20 combination of the endurance and speed attributes. But
21 as I state in my declaration, I disagree. So to your
22 question do I agree, no, I disagree because Maeueller does
23 not teach calculating a speed component as part of its
24 aggregate fitness index. The only component of physical

1 fitness that Maeueller associates with the run test is
2 endurance.

3 MS. STAUBACH: Okay. No more questions.

4 FURTHER EXAMINATION

5 By Ms. Nguyen:

6 Q Dr. McLean, during the break did you speak with
7 counsel about the substance of this proceeding?

8 A No.

9 Q And did you speak with counsel about the
10 substance of what you just testified regarding your
11 redirect?

12 A No.

13 MS. NGUYEN: No questions.

14 THE VIDEOGRAPHER: This concludes the deposition.
15 Off the record at 11:52.

16 (Off the record)

17 - - - - -

STATE OF ILLINOIS)
) SS:

COUNTY OF COOK)

The within and foregoing deposition of the
aforementioned witness was taken before CAROL CONNOLLY,
CSR, CRR and Notary Public, at the place, date and time
aforementioned.

There were present during the taking of the deposition the previously named counsel.

The said witness was first duly sworn and was then examined upon oral interrogatories; the questions and answers were taken down in shorthand by the undersigned, acting as stenographer and Notary Public; and the within and foregoing is a true, accurate and complete record of all of the questions asked of and answers made by the forementioned witness, at the time and place hereinabove referred to.

Before completion of the deposition, review of the transcript {} was {X} was not requested. If requested, any changes made by the deponent, {and provided to the reporter} during the period allowed are appended hereto.

1 The undersigned is not interested in the within
2 case, nor of kin or counsel to any of the parties.

3 Witness my official signature and seal as
4 Notary Public in and for Cook County, Illinois on this
5 8th day of December, 2023 A.D.

6
7 
8

9 CAROL CONNOLLY, CSR, CRR

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1 JEAN NGUYEN

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3 December 8, 2023

4 RE: LULULEMON ATHLETICA CANADA, INC. vs. NIKE, INC.

5 November 29, 2023, SCOTT MCLEAN, Ph.D., JOB NO. 6311145

6 The above-referenced transcript has been

7 completed by Veritext Legal Solutions and

8 review of the transcript is being handled as follows:

9 ___ Per CA State Code (CCP 2025.520 (a)-(e)) - Contact Veritext
10 to schedule a time to review the original transcript at
11 a Veritext office.

12 ___ Per CA State Code (CCP 2025.520 (a)-(e)) - Locked .PDF
13 Transcript - The witness should review the transcript and
14 make any necessary corrections on the errata pages included
15 below, notating the page and line number of the corrections.
16 The witness should then sign and date the errata and penalty
17 of perjury pages and return the completed pages to all
18 appearing counsel within the period of time determined at
19 the deposition or provided by the Code of Civil Procedure.

20 ___ Waiving the CA Code of Civil Procedure per Stipulation of
21 Counsel - Original transcript to be released for signature
22 as determined at the deposition.

23 ___ Signature Waived - Reading & Signature was waived at the
24 time of the deposition.

25
Page 81

1 ___ Federal R&S Requested (FRCP 30(e)(1)(B)) - Locked .PDF
2 Transcript - The witness should review the transcript and
3 make any necessary corrections on the errata pages included
4 below, notating the page and line number of the corrections.
5 The witness should then sign and date the errata and penalty
6 of perjury pages and return the completed pages to all
7 appearing counsel within the period of time determined at
8 the deposition or provided by the Federal Rules.
9 _X_ Federal R&S Not Requested - Reading & Signature was not
10 requested before the completion of the deposition.

&	11:52 78:15	2023-00348	35 47:17,19
& 1:1 2:3,9,13 81:23 82:9	12 10:13 20:3 38:2,21 44:4 61:6 72:6,8,11 72:12,17,22 73:2,3,10,13,20 75:6,11,15,18 77:5,9	9:21 20:24 2025.520 81:9 81:12 20551 80:8 21 40:24 42:20 43:11 55:12,18 56:22	62:12 36 3:16 49:14 49:22 74:16 37 50:6 38 21:2,4 50:14 386-2000 80:12 39 3:17
0			
084-003113 80:9			
1			4
1 4:9 16:4,8 20:2 21:6,17 24:7,12,19 25:3,5 29:3 32:18 35:8 36:3 61:7,8,10 62:19 82:1 10 3:15,15 49:22 76:22 77:4 10,188,930 1:7 9:17 100 38:13 1001 3:15 20:23 36:23,24 1002 3:16 39:14,16 1003 3:17 65:16,17,18 1004 3:18 59:12,13,14 1016 20:23 10:13 36:18 11 21:10 23:8 11:32 76:9 11:48 76:11	15 57:15 16 57:16,17,18 17 12:9,10,13 13:4 57:18 188,9320 3:15 1b 32:23 33:13 33:16,21,24 34:2,10,17,17 34:21 35:13,19 36:6	213 2:6 22 49:22 225 9:7,9 23 20:5,5 24 20:5 47:4 25 20:5 26 64:5,8 65:3 29 3:3 51:12 81:5 29th 1:16 4:3	4 12:4,4 14:11 21:9,10 23:8 64:3 65:3 66:13,14,16 40 24:4,4,23 41 25:9 27:7,16 64:6,8 42 30:19,20 33:6,15 34:3 34:22 35:6,22 56:21 4200 1:15 2:15 44 40:22 41:1 41:13 43:5,11 47:22 48:19 49:15 56:22,22 73:23 44.73 75:1 45 44:3 73:22 46 42:21 44:24 48 68:17 70:1 49 66:18,19,22 68:10 69:9,11 70:8,24
	2	3	
	2 3:17 20:1 70:2 20 20:20 50:3 74:11 20001 2:10 2004 3:19 10:1 10:2,15,20 2006/111687 3:16 2012 19:7,9 2016 14:23,24 16:11 17:2,3 2018 14:23,24 202 2:11 2023 1:17 3:3 4:3 80:5 81:3,5	3 12:3 50:14 60:15,20 61:3 61:16,18 62:2 62:17 63:1 64:12,16 66:12 66:14,16 3-1/2 12:4 30 41:19 55:1 82:1 3000 80:11 31 74:16,19,21 312 2:16 80:12 324 3:17 34 32:19 35:19 55:11,18	

[5 - aggregate]

5	7,810,392 3:18	9:58 36:16	63:10 69:7
5 3:6 14:11 20:3 26:8 50:10 504.9 74:24 52 60:11,14 55 61:5 56 50:8 71:8 583-2300 2:16 59 3:19	70 1:15 2:14 4:15 707 2:4 76 3:7 762 3:17 78 3:6	a	activity 24:8,20 25:13,20,20,20 27:11,13,18 28:3 30:16 32:3,10 33:2,6 33:12,14,16,20 33:23 34:10,16 34:18 35:8,12 36:3 39:2,2,3 42:4 43:22,22 45:12,15,18,18 48:10,12,12,24 49:7 50:4,11 50:22 52:21,23 56:15 58:14 62:20 67:11,16 67:20
6	8	a.d. 1:17 80:5 a.m. 1:16 4:3 a1 3:17 aaron 2:14 5:6 11:15,19,20,22 11:23 12:2 14:8 aaron.bowling 2:16 abdominal 45:3,4,6,21,23 46:8 47:4,5,8 47:10 ability 61:12 able 13:17 15:17,21,22 37:23 40:13 44:20,22 66:11 above 25:11 27:9 35:9,11 42:23 81:6 access 69:20 70:14 accurate 6:3 79:14 acting 79:13 action 4:19 47:8,9 activities 25:6,6 28:24 29:10 44:12,14,18,20 44:21 57:8 61:9,16,19,20	actually 9:23 16:17 28:9,22 32:20 40:24 41:18 47:3 54:12 68:16,19 68:21 70:14 73:22 addition 36:10 additional 7:11 affiliations 4:24 aforemention... 79:5,7 age 62:23 aggregate 51:10 55:24 56:3,7,9,18,24
6	8 50:7 51:4,6 52:4,6,18 53:5 53:12 54:13 55:22 81:3 86 72:1 73:21 74:15 76:17,19 76:20 892-5295 2:6 8a 35:10 8b 35:11 8th 80:5		
6	9		
6 38:4 47:4,15 53:17 54:24 55:2 71:6,7 60 38:3,5,6,12 38:21 51:2,3 52:14 53:17 601 2:10 60602 2:15 60606 80:11 60th 2:5 61 28:19,22 29:9,21 30:14 38:21 41:19 42:13 6311145 81:5 65 3:18 69 62:12	9 55:11,13,18 90017 2:5 93 68:16,23,24 930 9:16 10:18 14:14 20:3,11 21:7,10,17 23:5,8,12 25:3 27:15 28:1 32:1,19 37:4,5 37:8,11 38:2 38:22 942-5000 2:11 9:08 1:16 4:3		
7			
7 20:3 21:10 23:8 62:4,19 64:12,19,23 65:8			

57:6 74:4 77:24 aggregated 49:19,21 50:24 agility 65:11,15 ago 63:19 agree 4:7 12:21 13:11 17:23 18:2 19:9 22:5 25:15 26:8 27:18 31:6 32:9 33:11 38:16,20 39:5 39:10 41:5,16 42:2 43:17 44:10,12,15 53:22 54:6,10 55:23 58:3 62:7 65:4 67:4 68:13 71:14 75:6,11 77:13 77:22 agreeing 6:10 al 4:12,12 alex 2:4 5:3 aligning 34:22 alleges 69:3,3 76:23 77:9 allowed 79:21 amount 52:20 52:22 53:7,13 61:1 amounts 62:18 analysis 12:22 13:12 19:23	20:4 angeles 2:5 answer 6:22 23:6 37:15 42:19,20 63:10 68:18 answered 16:18 answering 77:16 answers 79:12 79:16 anybody 11:11 apologize 35:5 38:6 43:2 47:19 53:10 appeal 1:1 appearance 4:22 appearances 4:24 appeared 2:8 2:18 appearing 81:18 82:7 appended 79:22 application 3:17 approximately 7:7 area 7:16 50:17 arms 26:23 arnold 2:9,13 4:14 5:6 7:19	arnoldporter.... 2:11,16 arrives 54:14 art 18:14,22 19:1,2,5 20:7 ascertain 15:21 aside 14:7 asked 76:17 79:15 asking 6:14 48:7 51:21 54:21 55:18 56:9 71:2 aspect 37:15,22 aspects 14:2 15:9 assessed 74:2 assessment 15:6 associated 69:12 74:5 associates 78:1 assume 6:23 47:6 athletic 21:6,7 21:12,16,18,19 21:23 22:2,3,4 22:5,6,10,10,17 22:23 23:4,5,6 24:6,8,12,14,16 24:18,19,20 25:1,7,11,17,24 27:9,14,19,23 27:24 28:6,14 29:3,6,12,15,18	29:23 30:2,5 30:24 31:5,7 31:13,15,16,21 31:22 32:1,2,5 32:9,11,14,15 32:17 33:3,8 33:10,15,18 34:11,18,22,23 34:24 35:3,9 35:14,17,20,23 36:4,6,11,12,14 athletica 1:4 4:11 81:4 athleticism 68:20 attorney 5:1 19:19 20:14 37:19,20 attribute 51:9 68:20 attributes 74:2 77:20 audio 4:6 avenue 2:10 averaging 71:9 71:20,22 aware 16:2,23 18:8,9,10,11,13 18:18 20:3,7 30:10 ayap 2:7
b			
b 33:12 82:1 back 26:6 27:7 30:18 35:18			

36:18 40:20 43:4 45:21 47:21 49:4,14 50:18 56:20 63:1,19 64:12 64:16 69:9 76:11 background 14:17 balance 50:2,7 50:11,15,17,21 65:11,15 67:2 67:9 68:5,6,8 68:20 69:5,8 based 17:17 20:13,14,20 22:12,14 23:8 23:11 25:4,10 27:8 32:3 33:16 40:14 41:11 45:9 46:12,19 48:12 49:5 51:22 53:5 54:12 56:15 58:13 63:7,22 65:2,7 66:8 67:6,15 70:5 basically 17:12 52:2 basing 58:24 59:10 bear 50:13 55:7 56:21 61:4 63:19 68:15	71:4 beginning 4:24 behalf 2:8,18 believe 7:10 17:2 32:19 belt 45:4,4,10 45:21,22 46:2 46:4,5,7,12,20 46:21 47:5,6,8 benchmark 15:4 16:13 bending 45:17 best 9:7 better 30:8 biomechanics 14:18 bit 24:3 49:10 62:9 68:21 70:21 76:13 board 1:1 body 43:8,14 44:7 48:2 52:20,23 54:23 57:3 67:2,10 books 12:17 13:9 bottom 28:23 51:12 71:7 boulevard 2:4 bowling 2:14 5:6 11:20,22 14:8 break 6:7,8,10 36:15,20 74:10 76:8 78:6	breaks 6:6 briefly 19:24 49:8 bring 38:10 45:16 broader 18:8 18:18 19:13 brought 10:3 c c 2:9 5:21,22 79:2 ca 81:9,12,20 calculate 49:2 56:14,18 67:23 calculated 48:13,14 49:1 49:20 50:5,12 50:23 56:6 57:8 67:11,15 67:21 68:3 calculates 48:5 55:23 58:7 59:5 67:4,17 73:24 77:19 calculating 56:17 68:5 74:3 77:23 calculation 51:10 52:7 68:8 california 2:5 call 21:14 32:23 55:5,21 59:15 65:19,19 65:22 75:23	called 5:12 62:2 64:20 calling 64:7 canada 1:4 4:11 81:4 capacity 58:1 58:16 capture 6:16 cardiovascular 67:1,5,8,16 carol 1:12 4:17 79:5 80:9 case 1:6 7:18 39:21 59:16 65:24 80:2 cases 7:7,13 8:5 categories 42:23 ccp 81:9,12 certain 26:23 26:24,24 cetera 14:12 63:13 chance 55:12 change 10:23 changes 79:20 characteristic 49:23 check 19:24 chicago 1:15 2:15 4:15 80:11 cite 74:15 cited 37:5
--	--	--	---

[civil - correct]

civil 1:13 81:19 81:20 claim 20:6,9,16 21:6,17 24:7 24:12,19 25:3 25:5 29:3 32:18 35:8 36:3 claims 19:17,22 20:2,4,8 clarified 56:4 clean 10:4 climb 62:2,4 63:12 64:7,13 64:20,21 code 81:9,12,19 81:20 colleague 5:2,6 collect 73:8 76:24 77:11 collected 31:19 31:20,21 collecting 73:10,20 collectively 31:9 collects 73:6,15 column 21:10 23:8 38:2,21 63:2,4 64:3 65:3 combination 16:17 74:1 77:20	combinations 21:24 commencing 1:16 common 23:21 24:2 53:6,8 companies 7:13 competitions 21:23 complete 6:3 79:15 completed 81:7 81:17 82:6 completeness 71:18 completion 61:13 79:18 82:10 component 46:22 69:12 74:3,5 77:23 77:24 components 66:24 67:1,8 67:19,24 68:7 composition 43:8,15 44:7 48:2 57:4 67:2 67:10 comprises 69:17 computing 73:24 77:18 concludes 78:14	conditions 61:11 conducts 66:23 confidence 40:14 confirm 47:12 confirms 41:22 42:5 confusing 47:20 connolly 1:12 4:18 79:5 80:9 consider 9:9 19:22 20:10 23:12 consideration 23:20 57:7 considered 20:17,19,22 23:14 25:1,7 consistent 22:7 constant 63:9 63:11,12,20,24 64:22,23 65:5 65:8,14 constants 62:16 65:13 construction 20:9 construe 19:17 consume 53:14 consumed 53:7 consumption 51:15 52:8,9 52:16,17,19	54:15,19,22 contact 81:9 containing 70:3 contains 47:6 context 19:13 26:19 27:3 60:24 61:5 continue 4:7 contract 45:3 conversations 4:5 cook 80:4 coordination 43:9,15 44:9 48:3 49:2,12 49:18,19,24 50:19,24 57:4 copy 10:3,4 correct 9:3 10:21 12:20 13:10 14:19,22 14:24 19:13 21:11 23:9 24:10 25:14 27:15 31:1 33:4,22 34:6 36:1 37:7 38:15 39:6 41:4 43:16 46:1 47:19 48:4 51:5,11 51:16,18 53:20 54:5,9 56:8 57:12 60:12,16 60:19 61:24
---	--	--	---

[correct - depends]

62:6 63:3 65:1 65:12,15 66:17 66:21 67:3,13 67:14 69:15 72:3,4,7,13 73:4,18 75:2,5 75:19 76:4 77:12 corrections 81:14,15 82:3 82:4 correctly 77:2 correspond 64:1 corresponding 65:9 corresponds 32:2,16 33:17 52:2,19 53:14 58:1,16 61:15 63:8 72:23 75:14,24 76:2 counsel 2:2 3:13 4:23 36:20 76:16 78:7,9 79:9 80:2 81:18,21 82:7 count 61:20 county 79:2 80:4 couple 41:7 course 60:17 61:2,7,14,15,17 61:19 62:2	64:6,13,20 courses 60:21 62:19 court 4:17 5:9 6:16 8:2 courts 1:14 crr 1:12 79:6 80:9 csr 1:12 79:6 80:9,9 currently 14:17 curve 57:14 58:1,4,8,9,16 58:20 59:2,5,8 curves 58:22 customary 22:18,24 23:16 23:22 24:2 30:23 31:10 cycle 15:8 cycling 24:9,21 24:23 53:12 54:13	36:12 43:7,13 43:18,24 44:16 44:21,23 45:8 45:9 47:24 57:2 62:20,21 70:12,17 73:6 73:9,9,11,15,15 73:16,16,17,20 76:24 77:1,11 77:11 date 79:6 81:16 82:5 day 1:16 80:5 dc 2:10 december 80:5 81:3 decision 20:23 declaration 3:19 9:24 10:18,20,24 11:7,10 12:6,9 12:13,14,23 13:4,5,13,23 14:2,6,11 20:7 21:1 24:4,5,17 24:22 25:9 27:7 28:20 30:19,20 32:19 33:7 37:6,9,24 39:2 40:3,12 40:20 41:1,13 41:14,19 42:13 42:19,21 44:4 48:20 49:15 51:3,3,24	52:13 53:16 55:1 60:3,12 60:14 66:10,19 66:22 68:9,17 70:1,24 72:2 74:15 76:17 77:21 decreases 57:23 defendants 8:7 8:8 define 27:22 39:19 defined 22:10 23:4 32:3,14 53:13 54:22,23 60:18 61:1,3 61:18 62:16 63:8,20 65:14 65:14 definitely 40:8 definition 21:5 21:14,16 22:2 22:7,13 33:5 33:11,20,23 34:9,16,18 35:12,22 36:5 36:14 39:1 54:12 63:22 demonstrates 21:6,16 depending 16:18 depends 25:16 27:19 32:10
	d		
	d 3:1 74:24 75:4 data 9:8 30:23 31:4,6,11,14,15 31:21 32:3,4,7 32:10,15,16 33:2,6,7,9,12 33:12,14,16,17 33:20,21,22,23 34:3,10,16 35:8,12 36:3		

[depicted - endurance]

depicted 70:2 deponent 79:20 deposition 1:11 2:2 3:2 4:10,13 5:8 6:13 7:20 8:14,17,18 11:4,6,12 12:7 14:9 78:14 79:4,9,18 81:19,22,24 82:8,10 depositions 1:15 derive 35:9 36:4 56:7 derived 51:1 52:8 56:10 71:13,15,24 describe 30:9 described 30:14 describes 58:6 58:17 65:8,10 description 63:7 design 15:3 16:13 designed 61:12 detail 19:15,20 determine 58:19 69:14 75:22 determined 81:18,22 82:7	determining 45:2 developed 15:5 16:3,6,7,10,20 developing 15:6 17:6 66:9 development 16:19 device 17:12,15 45:2,15 69:13 69:16 70:7,15 71:1 devices 7:15 17:19,20,21,23 18:2 19:10,14 19:15 69:21 70:3,6 73:6,8 76:24 77:10 different 7:7,12 9:10 14:4,12 15:4,7,9,12 16:13 17:5,19 17:22,24 29:2 29:11 30:1,17 45:20 50:11,12 differently 28:11 direct 53:13 direction 26:24 directive 14:20 directly 46:7 51:8 director 14:21 15:1	disagree 74:2 77:21,22 discloses 21:19 44:4 51:14 52:14 61:10 68:4,11 70:3 disclosure 29:4 55:9 discrete 29:14 29:23 30:2 discuss 35:9,11 discussed 20:24 25:11 27:9 discusses 60:12 64:6 66:19 discussing 51:4 72:2 discussion 12:12 distance 27:1 75:4,7,12,18,20 76:3 distinguish 55:22 district 1:14 divided 75:1 doctor 68:23 document 40:15 documents 12:6 20:22 doing 60:4 dr 4:10 5:8,19 10:8 19:16 26:8 36:19	51:19 55:2 65:18 75:20 76:16 78:6 drawing 14:2 drawn 13:15 drills 69:4,5,8 duly 5:12 79:10 duration 72:23 <tr> <td colspan="4">e</td></tr> <tr> <td colspan="4"> e 3:1 5:22 81:9 81:12 82:1 earlier 12:5 16:12 18:17 27:12 54:3 56:4 65:21 66:12 76:16 easier 65:23 effort 45:5,11 45:23 46:8 either 31:12 element 33:12 33:21,24 34:10 34:17,17 35:13 35:19 36:6 embodiment 61:6 embodiments 71:9,20 endurance 43:8 43:14 44:6 48:2,6,8,13 51:7,11,14 52:7,8,15,18 53:4,5,11,15 54:15 57:3 </td></tr>	e				e 3:1 5:22 81:9 81:12 82:1 earlier 12:5 16:12 18:17 27:12 54:3 56:4 65:21 66:12 76:16 easier 65:23 effort 45:5,11 45:23 46:8 either 31:12 element 33:12 33:21,24 34:10 34:17,17 35:13 35:19 36:6 embodiment 61:6 embodiments 71:9,20 endurance 43:8 43:14 44:6 48:2,6,8,13 51:7,11,14 52:7,8,15,18 53:4,5,11,15 54:15 57:3			
e											
e 3:1 5:22 81:9 81:12 82:1 earlier 12:5 16:12 18:17 27:12 54:3 56:4 65:21 66:12 76:16 easier 65:23 effort 45:5,11 45:23 46:8 either 31:12 element 33:12 33:21,24 34:10 34:17,17 35:13 35:19 36:6 embodiment 61:6 embodiments 71:9,20 endurance 43:8 43:14 44:6 48:2,6,8,13 51:7,11,14 52:7,8,15,18 53:4,5,11,15 54:15 57:3											

67:1,5,9,13,16 69:5,8 72:2,5 72:21 74:1,6,8 76:21 77:8,20 78:2 english 47:13 47:16 entail 15:2 entire 23:14 entirety 23:14 37:8,10 40:2,4 59:21 ep 3:17 equal 54:8 equals 74:24 equation 54:8 74:22 75:3 equipment 7:18,23 8:1 equipped 18:2 19:10 errata 81:14,16 82:3,5 estimate 60:10 estimated 75:16 et 4:12,12 14:12 63:13 european 3:17 evaluate 43:8 43:14 48:1 57:3 evaluated 61:12	evaluating 42:23 exact 10:13 exactly 59:9 examination 3:5 5:15 76:14 78:4 examined 5:13 79:11 example 20:5 26:3,5,7,17,21 28:17 29:22 30:13 38:12 45:1,2,13 50:22 52:19 53:12,13 61:19 71:5,12,15 except 77:4 excerpt 65:7,13 excerpts 14:12 excluded 8:3 excuse 30:4,18 exercise 7:17 7:22,23 21:21 21:23 24:7,20 25:12,19 27:11 27:13,18 38:17 38:22,24 48:24 60:17,20 61:1 61:2,7,11,13,17 62:1,15,18,19 64:6,13,20 exercises 24:24 38:14,16,21 41:3,15,24	43:7,12,14,18 47:24 48:1 49:18 50:21 56:5 57:1,3 68:11,14 69:11 exerted 45:5,11 45:23 46:8 exhibit 3:15,16 3:17,18,19 10:1,2,4,15,20 36:23,24 37:1 39:14,15,16 59:12,13,14 65:16,17,18 exhibits 3:12 20:23 experience 12:15 13:7,16 13:19 14:16 22:16 experimentat... 12:17 13:8 experiments 15:4 16:13 expert 7:3,6,9 7:11,18 8:6 60:3 expertise 12:15 13:6,16,20 22:16 explain 31:17 explains 36:1 50:3,4 exponents 14:18	exposed 18:12 expressed 51:15 52:15,23 53:6,9 58:2,17 expresses 52:4 52:6 extensive 12:16 13:8 extensively 13:24
			f
			fact 53:18 fair 25:23 28:4 59:1 68:4 70:11 73:19 familiar 15:12 15:15 16:1,5 16:22 39:22 59:17 66:1 far 26:13,17 75:14,17,24 fast 55:6,19,20 55:21,24 56:10 56:13 57:10 58:14 federal 1:13 82:1,8,9 field 7:16 figure 50:10 61:7,8,10 70:2 financially 4:20 find 39:24 59:19 66:3 fine 10:6 68:22

[finish - go]

finish 6:9 firm 4:18 first 5:12 8:12 13:6 21:4 30:21 31:12,15 31:16,22 32:5 32:8,10,11,17 33:2,2,8,10,14 33:14,18 34:21 34:24 35:2,10 35:20,23 36:13 43:6 71:18 76:20 77:7 79:10 fischer 55:2 fitbit 14:21 15:2,13,16,23 16:1,2,3,4,8,10 16:21,23 17:4 18:3,9 fitness 7:15 17:13,15 18:2 19:9 21:20 66:24 67:8 69:13,14 73:24 74:4,5 77:19 77:24 78:1 five 7:4,5,6,7,9 66:23 67:1,7,8 67:19,24 68:7 74:10 76:5 flexibility 21:21 45:14 50:2,5,21 65:11,15 67:2	67:9,22,23 68:1,2,3 69:5,8 71:7,8,10,11,16 71:19,21,21,23 floor 2:5 foerster 2:3 5:3 follow 77:17 following 2:2 20:21 follows 5:14 77:15 81:8 force 52:1,2 54:4,6,9,11 foregoing 79:4 79:14 forementioned 79:16 form 12:24 13:14 15:19 17:9 18:15,23 19:11 20:12 22:20 23:10,17 23:24 26:2,10 27:21 28:7,16 29:7 30:7 31:2 31:8,23 32:12 34:1,12,20 35:15,24 36:7 37:13 38:18,23 40:7 42:10,17 43:19 44:1 46:3,16,23 48:15 49:3 51:20 52:10 53:1,24 56:1	56:12,19 58:5 58:11 60:22 62:3 63:5 64:14 65:6 66:7 69:19 70:13,20 72:14 72:19 73:12 75:8 77:14 forming 40:3 formulate 40:13 66:11 formulating 40:11 60:2 66:9 forward 45:17 four 7:10 12:15 12:21 13:6,11 14:4 40:18 42:23 44:8 60:7 fourth 13:9 franklin 80:10 frcp 82:1 free 7:24 french 40:9 47:13 front 58:23 59:10 full 11:17 further 24:3,6 35:6,7 36:2 62:9 68:21 76:12 78:4	g gauges 47:7,11 general 8:13 18:6 53:10 generates 59:7 gesturing 6:17 getting 62:22 give 6:2,13 9:20 11:8 26:5,17 28:17 30:19 31:2 44:24 55:17 60:24 61:5 62:10 71:5 given 21:13 22:18,24 27:3 52:3 57:22 76:1,3 giving 45:17 glasses 38:4,7,9 57:21 gleaned 37:24 58:8 go 4:7 11:6 12:9 20:5 27:6 33:15 35:6 36:2 41:18,20 42:20 43:4 44:24 45:13 47:3,3,21 49:4 49:14,21,22 50:3,6,18 55:1 56:20 61:4,5 62:9,12 63:19 68:16,18,19,21
---	--	--	--

69:9 70:1 71:6 73:22 going 4:2 6:14 6:22 9:24 19:19,24 23:19 26:6 30:12 35:18 37:20 38:6 45:21 47:1,3 49:13 49:13 50:9 60:23 62:9 63:1,23 71:17 73:21 77:15 good 4:2 5:17 5:18 great 6:2,13,19 7:2 47:21 greater 57:23 grief 62:2,4 63:12 64:7,13 64:20,21 guess 23:21 30:8 gym 7:24	hardware 15:10 17:7 head 6:17 16:9 health 7:16 hear 6:21 8:10 heart 73:8,15 73:16 76:24 77:11 held 4:13 help 55:10 hereinabove 79:17 hereto 79:22 highlight 35:7 71:18 historically 13:18,21 hold 68:23 hour 6:7 74:11 hours 12:4 14:11 40:19 60:7 66:13,14 66:17 huh 9:18 32:24 54:5 56:8 70:10 human 14:21 15:1	identify 15:22 illinois 1:16 2:15 4:15 79:1 80:4,11 illustrated 50:10 inc.'s 3:20 include 17:20 24:7,19 39:7,8 49:24 69:22 included 17:8 81:14 82:3 includes 21:20 38:17,22 39:5 39:6,9 69:24 73:17 including 21:21 incorporate 70:5,16 incorporated 4:11,12 15:3,5 17:21,24 74:7 incorporates 61:19 increasingly 57:23 index 60:18 61:1,3,18,20 62:15,22 63:8 63:9,11,12,14 64:22,23 65:8 65:11,13 73:24 74:4 77:19,24 indexes 62:14 62:16,18	indicated 50:16 individual 33:18 34:24 35:2,3 45:14 50:22,23 56:15 56:16 61:9 67:10,11,12,14 67:15,20 individually 66:13 industry 18:6,8 18:11,18 inform 54:16 62:23 information 6:6 13:17,21 23:13 37:24 58:8,14 59:4 59:10 70:17 informed 25:21 30:12 43:22 informs 36:11 54:15 innovation 14:21 15:2,10 input 69:13,17 70:8,12,18 71:2,2,5,12,14 71:23 instance 29:23 institutional 20:23 instructed 72:6 72:22 76:22 77:9
h	i		
half 12:4 43:6,6 hand 9:24 36:23 39:14 59:12 handed 10:14 handled 81:8 happy 55:9 hard 30:11 hardened 45:16	i.e. 62:20 72:11 idea 7:21 19:5 identified 29:1 29:10 identifies 68:20		

[instruction - located]

instruction 9:8 26:1,4,15,18,22 27:5 28:15 30:6 68:12,14 instructions 25:11,16,18,21 25:22 26:7,9 26:12 27:10,17 27:19,24 28:1 28:1,5 29:2,5 29:11,16,18 30:1,1,4,13,17 35:11 41:6,17 41:23 42:1,3,7 42:9,15,16,24 43:3,21,21,23 48:11,23 49:6 49:16 69:4,7 instructs 42:22 45:3,15 intent 63:7,17 interested 4:20 80:1 interpret 22:9 23:5 32:14 interpretation 22:8,12,14 23:7,11 25:5 39:13 interpreting 30:13 46:6 interrogatories 5:13 79:11 introduce 10:1	inventor's 21:5 21:14,16 22:1 22:7,13 involves 20:2,8 ipr 8:17 9:2,5 9:10,11,19,19 9:21,21 10:9 10:11,19 20:24 ipr2023-00348 1:6 iprs 8:20 j jean 2:3 3:6 5:2 10:3 74:9 81:1 jnguyen 2:6 81:2 job 15:1,11 81:5 joining 16:3,10 judgment 20:21 k k 79:2 kay 2:9,13 4:14 kin 80:2 kind 6:5 kitagawa 59:15 59:17,19,21,23 60:4,6,12,20 61:6,10,10 62:20 64:3 65:2,8,10 66:5 66:13	kitagawa's 60:24 62:14,15 62:17 63:6,21 knew 18:24 know 6:8,20,22 8:2 10:5 12:1 16:10 18:12 19:20,21 20:13 23:2 27:4 46:10,14,24 55:12 58:23 59:7,9 64:9,17 69:23 74:19 knowing 19:3 26:13 38:24 63:6,17 knowledge 8:19 9:7 11:3 12:16 13:7 20:21 22:16 known 18:3,4,4 18:6,13,21 19:10,13 l l 5:22 language 67:6 68:17 law 19:18 lawyer 23:18 leg 62:7 63:24 65:5,9 legal 23:19 37:22 81:7 legs 26:23 45:18 58:1,16	62:5,7 63:1,4 63:11,14,15 64:12,19,23 length 63:15,24 72:23 limb 55:3,4 limitation 32:23 33:16 lindsey 2:9 3:7 5:5 11:15,16 11:18,22,23,24 12:2 14:7 lindsey's 11:17 lindsey.staub... 2:11 line 6:9,9 21:10 23:8 38:3,4,12 38:21 47:4 49:22 50:3,7 50:14 55:11,13 55:18 57:15 64:5,6 65:3 71:8 81:15 82:4 list 12:15 13:6 20:2,16 listed 13:12 20:18 42:23 little 24:3 35:6 49:10 62:9 68:21 70:21 76:13 llp 2:9,13 4:14 located 4:14
---	---	--	--

[location - measurement]

location 4:13 locked 81:12 82:1 lofi 29:22 30:15 39:19,19,22,24 40:2,6,17,19 42:2,4 44:4 46:6,7 47:3,12 48:5 49:2,14 49:22 50:4 51:14 52:14 53:4,13,18 54:20 55:11,18 55:23 56:5,10 57:13 58:6,6 58:12,17,19,23 59:4,7 66:5,13 lofi's 41:22 42:6,14,21 43:1,2,17,20,24 44:10,13,15 48:17 51:4,6 52:4,6 54:10 54:13 55:3,5,9 57:10 log 63:11 look 20:20 32:18 38:3 50:6,13,14 60:11 61:16,23 62:1 66:18 71:6 74:18 76:17 looking 9:12 49:15	los 2:5 low 45:16 lower 55:3,4 lulelemon 5:4 lulu 7:20 lululemon 1:4,4 4:11 29:1,10 68:19 69:3,3 72:21 73:23 76:16,21 77:7 77:18 81:4 m m 5:22 machines 7:24 8:1 made 71:9 79:16,20 madison 1:15 2:14 4:15 maeueler 65:19 65:20,21,22,22 65:23 66:1,6 66:10,15,16,19 67:4,17,19,23 68:4,7,10,13 69:3,6,23 70:3 70:5 71:6 74:2 74:16,19,21 75:3 77:22 78:1 maeueler's 66:23 72:2,5,8 72:12,17,21 73:19,23 75:6 75:11 76:21	77:8 majority 7:14 7:17 15:8 make 6:15 9:15 11:8 32:22 37:17 43:10 47:1 55:7 57:21 71:4 74:23 81:14 82:3 manner 67:24 marked 3:12 market 16:15 mass 54:23 massachusetts 2:10 material 23:12 materials 20:19 20:24 41:10 matter 4:11 9:5 max 74:22,24 75:15 maximum 51:15 52:8,9 52:16,17,19,20 52:22 53:6,13 54:14,19,21 58:1,16 mcclean 4:10 5:8,11,21 mclean 1:11 3:2,20 5:19 10:8 19:16 26:8 36:19 51:19 65:18	75:20 76:16 78:6 81:5 mean 15:12,14 17:7 18:4,4 23:23 29:18 30:5 31:17,19 35:16 46:2,17 51:23 52:12,17 53:8 54:1 56:3 69:17 meaning 21:13 22:19,24 25:16 25:16 27:18,19 30:23 31:11 32:10,11 35:3 means 23:21 24:2 34:24 39:10,11 44:5 44:6,7,7,8,11 44:13,16,19,20 44:22 45:18,19 49:22,24 50:1 50:2,14,15 measure 44:21 44:23 45:14 47:4,7 50:1,1,2 50:7,16,17 57:2,11 58:13 71:15 measured 45:8 45:9 70:16 74:6 measurement 44:5,6,7,8,9,11 44:14,16,19,20
---	--	---	---

[measurement - necessary]

44:22 45:7,19 45:19 47:9 49:23 50:15,19 51:15,17,22 52:1,15,24 54:14,18,18,21 58:7,17 59:6 62:23,24 71:13 measures 15:6 17:6,13,15 43:6,13,18,24 46:10,14 47:24 51:7,9 69:13 70:8 71:1 measuring 46:22 55:3 61:13 69:16 media 4:9 meet 11:11,14 11:16,21 meeting 14:7 meetings 12:2 meets 24:11 memory 33:5 62:16 63:20 mention 53:18 55:4 mentioned 15:24 16:12 17:6,6 34:23 44:19 74:4 met 11:15,23 25:24 30:5 meters 75:4	microphones 4:4 middle 6:8 milliliters 54:23 mind 43:4 minus 74:24 minute 51:4,6 52:4,6,18 53:5 53:12 54:13 55:22 72:8,12 72:17 73:2,10 73:13,20 74:10 75:6,11,15,18 76:8 minutes 26:8 72:6,11,22 73:3 74:11 76:6,22 77:4,5 77:9 missing 28:10 misspeak 11:9 49:9 55:8 misstatements 11:2 module 73:24 77:18 mofo.com 2:6,7 81:2 moment 8:22 11:8 63:19 68:15 monitored 73:5 73:7,14 76:23 77:10	months 10:13 morning 4:2 5:17,18 morrison 2:3 5:3 motricity 43:9 43:16 44:9 48:3 49:9,12 49:18,19,24 50:20 51:1 57:5 move 15:7 24:3 26:24 65:16 movement 21:6 21:8,13,16,18 21:20 22:2,3,4 22:6,6,10,11,18 22:23 23:4,5,6 24:7,12,14,16 24:19,19 25:7 25:11,17,24 26:4 27:9,14 27:20,23,24 28:3,6,14 29:3 29:12 30:5,11 30:16,24 31:5 31:7,13,15,16 31:21,22 32:2 32:2,6,9,11,14 32:15,17 33:3 33:8,10,15,19 34:11,19,22,24 35:1,3,9,14,17 35:20,23 36:4 36:6,11,12,14	39:2,2,3 67:15 movements 21:20,21 25:2 29:6,15,19,24 29:24 30:3,3 moving 25:8 26:23 69:9 multiple 21:22 29:5,5,17,18 39:10 41:23 42:7,8,15,16 muscle 45:2 62:8 65:5,9 67:1,9,17,21 muscles 45:3,6 45:11,24 46:9 47:5,8,10 muscular 43:8 43:15 44:8 45:8 48:2,21 48:24 56:14,17 57:4,9,11 58:7 58:13,18 59:6 mute 4:5 n n 3:1 5:22 name 4:16 5:20 11:17 15:16 55:17 66:24 named 79:9 necessarily 15:22 18:10 19:1 26:11 necessary 14:5 81:14 82:3
---	--	--	---

[need - opine]

need 6:7 28:14 38:4,9 57:21 nguyen 2:3 3:6 5:2,2,16 10:7 13:3,19 15:24 18:17 19:4,16 22:22 23:7,15 23:22 26:6,16 28:4,9,19 29:17 30:18 31:4,14 32:7 32:18 34:4,14 35:2,18 36:5,8 36:15,19 37:16 38:20 39:4 40:10 42:12 43:1,24 44:2 46:10,19,24 48:18 49:11 51:23 52:13 53:2 54:3 56:4 56:16 57:10 58:9,19 59:1,7 62:4 63:14 64:2,16 65:10 66:12 69:23 70:18,23 72:16 72:24 73:16 74:12,14 75:10 75:17 76:8,12 77:3,14 78:5 78:13 81:1 nicholas 2:21 nick 4:16	nike 1:7 3:20 4:12 5:7 8:9,11 8:16,21 81:4 nodding 6:17 nope 14:15 north 80:10 notary 1:12 79:6,13 80:4 80:10 notating 81:15 82:4 note 4:4 noticing 5:1 november 1:17 3:3 4:3 81:5 number 4:9 9:21 81:15 82:4 numerical 73:24 77:19 nw 2:10	35:15,24 36:7 37:13 38:18,23 40:7 42:10,17 43:19 44:1 46:3,16,23 48:15 49:3 51:20 52:10 53:1,24 56:1 56:12,19 58:5 58:11,21 59:3 60:22 62:3 63:5,16 64:14 65:6 66:7 69:19 70:13,20 72:14,19 73:12 75:8,13 77:3 77:14 objections 4:21 obtain 13:17 obtained 13:21 obviously 11:7 obviousness 20:17 offer 13:13,22 offered 8:3 12:22 offers 55:2 office 1:1 81:11 offices 4:14 official 80:3 okay 5:17 6:5 6:11,12,24 7:12,21 8:17 8:22 9:4,15,19 9:22 10:14	11:11,19 12:5 12:21 13:3,19 14:4,6,13 15:1 15:11,24 16:12 16:21 18:21 19:9,16,21 20:9 21:3,4,12 22:1,5,12 23:7 23:15,22 24:15 25:3,22 26:16 27:2,6 28:4,22 29:17 31:4,14 32:7 34:4,9,15 35:12,21 36:15 36:19 37:11,16 38:2,9,10,12 39:4,12 40:10 40:16 42:2,8 44:15,22 45:21 47:20,21 51:2 51:6,12 52:18 53:16,22 54:17 54:24 55:15,22 56:16 57:13 58:3 59:1 60:5 64:2,8,19 65:10 66:5 70:18 72:5,11 73:2 74:14,18 74:21 76:5,5 76:19 78:3 once 11:23 opine 26:5 27:4 39:1
	o		
	o 5:21 79:2,2 oath 5:23 object 26:2 objection 12:24 13:14 15:19 17:9 18:15,23 19:11 20:12 22:20 23:1,10 23:17,24 26:10 27:21 28:7,16 29:7 30:7 31:2 31:8,23 32:12 34:1,12,20		

[opinion - pedaling]

opinion 21:12 22:1,4,8,17,23 23:2,3 24:6,11 24:13,15,18 25:5,10,15,18 25:23 27:8,13 27:23 28:13 29:4 30:21 31:6,9,20 32:1 32:1,13 33:16 34:23 35:8 36:11 40:3 41:21,21 42:5 51:13 55:3 59:4 62:20 opinions 8:3 13:18,22 20:20 29:20 40:12,14 60:2 66:9,11 oral 5:13 79:11 order 28:13 ordinary 18:14 18:22 19:4 22:18,24 23:16 23:20 24:1 30:22 31:10 original 81:10 81:21 outcome 4:20 own 29:16 60:17 61:2,17 owner 1:8 2:18 5:7 owner's 3:21	oxygen 51:15 52:8,9,16,17,19 52:20,22 53:7 53:14 54:15,19 54:22,23 p page 2:21 3:5 3:14 4:16 9:16 32:22 40:24 41:19 42:20 43:11 45:13 47:4,15,17 49:14,22 50:6 50:14 51:12 55:1,11,18 56:22 62:12 68:17 71:6,7 73:22,23 81:15 82:4 pages 81:14,17 81:17 82:3,6,6 pallet 45:16 paragraph 12:9,10,13 13:4 20:1,5,20 21:2,4 24:4,4 24:23 25:8,9 26:20 27:7,16 28:19,22 29:9 29:14,21 30:14 30:19,20 32:19 33:6,15 34:3 34:22 35:6,19 35:22 36:2 40:22 41:1,13	41:19 42:13,21 43:5,11 44:3 44:24 47:22 48:19 49:13,15 51:2,3,9,13 52:14 53:17,17 54:13,24 55:2 56:21,22 60:11 60:14,23 61:4 61:5 62:12 64:5 65:3 66:18,19,22 68:9,10,16,23 69:9,11 70:1,8 70:24 72:1 73:21 74:15,19 74:21 76:17,20 77:16 paragraphs 74:16 parameter 70:19 71:3,5 71:12,14,23 parameters 69:14,17 70:9 70:12 71:2 part 12:14,22 13:5,12,22 14:6 15:11 20:4,7 21:22 26:14 29:2,11 40:12 42:19 61:7,22 74:3 77:23	participant 21:22 particular 7:19 14:2 29:23 42:4 45:7,11 49:7 63:10 69:12 parties 4:7,19 80:2 parts 37:5 passage 21:9 23:8,14 74:14 patent 1:1,1,7,8 2:18 3:15,17 3:18,20 5:7 9:7 9:10,16,17 14:14 19:7,17 19:22 20:3,11 21:7,10,17 22:9,15 23:12 23:14 25:4,5 32:19 37:4,5,8 37:11,19,23,24 38:22 39:20 patentable 20:6 patents 8:23 pdf 81:12 82:1 peak 57:14,24 58:15,19 pedal 55:6,19 55:21,24 56:10 56:13 57:10 58:14 pedaling 51:4,6 51:9 52:4,6
--	--	--	---

[pedaling - probably]

54:10 57:23 pedestal 45:16 penalty 81:16 82:5 perfect 59:16 perform 25:12 25:19 26:22 27:11,17 28:2 28:5 38:13 41:2,15 42:22 43:12 47:23 48:23 49:7,17 50:20 57:1 68:11 69:7 performance 43:7,13,18 48:1 57:2 67:15 performed 29:1 29:10 35:10 41:22,24 42:6 42:14 47:10 50:4,12 62:19 performing 19:22 58:13 performs 61:2 68:14 69:11 period 75:15,18 76:1,3 79:21 81:18 82:7 peripheral 69:13,16 70:3 70:6,7 71:1 73:6,8 76:24 77:10	perjury 81:17 82:6 person 18:14 18:22,24 19:2 19:2,3,4 50:1 55:18 personal 12:16 13:8 perspective 23:20 pertaining 1:14 petition 20:22 petitioner 1:5 2:8 5:4 ph.d. 1:11 3:2 3:20 5:11 81:5 phone 80:12 phones 4:6 phrase 23:16 39:4 physical 61:12 66:24 67:8 69:12 74:5 77:24 physics 51:22 pick 4:4 pieces 8:1 14:4 14:5 pivot 30:18 40:20 place 4:7 79:6 79:17 plaintiffs 8:6 please 4:3,5,21 4:23 5:9,19 6:7	6:15,20 64:9 76:7 plurality 69:4 point 15:23 49:16 61:17 74:10 points 72:21 76:21 77:8 porter 2:9,13 4:14 5:7 7:20 posita 30:21 32:3 position 27:4 possible 6:17 30:11 45:17 55:6,19,21,24 56:10,13 57:10 post 15:23 potential 30:10 30:16 potentially 26:14 power 53:18,20 53:23 54:7,8 54:16 practice 14:18 pre 60:18 61:1 61:3,18 62:16 63:8,20 65:14 precluded 40:13 60:4 66:10 predetermined 63:9	preferably 49:24 preference 50:8 preparation 11:11,22 12:7 14:13 prepare 11:5,9 preparing 14:8 14:10 prescribes 67:20 68:7 present 2:1,20 4:23 79:8 pressure 47:7 47:10 pretend 50:9 pretty 15:12 53:10 previous 7:20 8:17 13:16,20 60:1 previously 3:12 7:11 56:23 79:9 primarily 8:8 11:9 16:17 principal 14:17 prior 8:5 13:4 16:3,6,10 17:1 17:2 20:6 22:15,16 private 4:5 privy 30:15 probably 10:7 10:11,13 14:11
--	---	---	--

[probably - receiving]

37:14 40:18 41:20 60:7 procedure 1:13 81:19,20 proceeding 9:19 10:9 19:5 20:2 36:21 78:7 proceedings 4:21 processing 50:16 produce 52:3 produces 59:5 product 15:4,9 15:17,20 16:1 16:5,14,19,20 16:21 17:5 productization 15:8 products 15:7 15:12,13,23 16:14,15 17:8 professional 20:21 prompt 38:13 prompted 48:10 prompts 41:2,5 41:14,16 43:12 47:23 48:22 49:17 50:20 57:1 proportionate 45:5,10,23	46:8 50:16 prototypes 15:5 16:14 17:5 provide 6:22 26:3 48:12 provided 23:12 23:13 25:11,19 27:10,17,24 28:2,5 43:23 48:11 49:6 64:22 79:21 81:19 82:8 provides 42:2 42:24 43:2,21 44:6 53:4 58:12 69:4,6 74:21 providing 42:8 42:16 public 1:12 79:6,13 80:4 80:10 publications 12:18 13:9,16 13:20 purposes 5:8 pursuant 1:13 push 24:8,15 24:21,23 put 52:15 putting 60:2	q quality 47:4 question 6:19 6:23 16:18 17:17 22:21 36:9 41:10 42:15,19 50:18 60:1 62:11,14 63:10 64:15 68:18 69:6 72:16 75:10 77:17,22 questioning 6:9 6:10 questions 6:15 13:3 76:12 78:3,13 79:11 79:15 quickly 14:16 quote 42:21 50:7 58:15 73:7 quotes 52:16 r r&s 82:1,9 range 63:11 rate 73:8,15,16 76:24 77:11 reach 71:10,13 74:9 read 9:6,13 11:7,10 12:5 20:15 21:15 22:8 24:18 26:19 29:8,9	31:10 38:11 41:7,9 42:18 43:5,10 44:3 45:1 47:1,22 49:8 55:16 59:10 60:3,23 65:4 71:8,17 72:20 73:21 74:15 77:2,15 reading 14:10 14:11 22:14 46:6 47:2 48:19 65:7 81:23 82:9 reads 76:20 really 18:7 19:20,24 reason 6:2 reasonable 70:17 reasons 20:18 recall 7:12 8:23 9:4 10:10 18:19 37:18 40:16 56:7 60:5 received 30:23 31:4,11 32:4,8 32:15,16 33:7 33:9,17 34:3,5 36:12 62:21 receiving 33:1 33:13,24 34:2 34:4 44:16
--	---	---	---

[recently - review]

recently 9:14 recite 21:18 33:12,13,21,22 33:24 34:10,17 recited 21:6,17 35:8 36:3 recites 33:1 recognize 10:15 15:18 37:1 39:15 59:14 65:18 record 4:3,8,24 5:20 12:12 36:16,17,18 76:9,10,11 78:15,16 79:15 recorded 4:10 recording 4:6 redirect 76:13 78:11 refer 55:9 reference 9:24 39:22,24 53:19 53:21 56:24 66:1,3 referenced 81:6 referred 42:12 79:17 referring 9:17 9:20 11:17 22:6 47:6,17 55:5 57:6,15 72:9 refers 21:7,17 22:3 27:23	62:7 reflexes 50:1 refresh 33:5 regard 10:18 27:15 29:8,20 44:19 48:7,8 48:21 49:8,12 50:19 52:18 60:2 regarding 25:10 26:18 27:9 78:10 relate 37:21 49:18 related 4:19 7:15,16 15:9 31:15,17 58:4 58:10 59:2 66:23 68:1 72:12,17 73:2 75:7,11,20 relates 53:6 relating 9:8 21:20 48:17 49:23 50:21,24 released 16:16 81:21 relevant 14:5 30:22 relied 12:14 13:5 rely 49:13 remember 8:20 16:7	repeat 6:21 17:14 65:23 rephrase 6:21 18:16 28:8,11 rephrased 28:18 reporter 4:17 5:9 6:16 79:21 represent 5:7 31:6 32:5 63:4 63:14 representation 8:13 35:13,17 represented 7:13 8:6,9,11 representing 4:16 5:3 33:2 33:14 34:10,17 34:21 35:20 represents 30:24 31:5,12 31:18 32:8 33:8,10,18 34:11,18,24 35:23 36:6,13 53:22 54:7 65:5 reproduce 21:9 reproduces 32:20 60:15 requested 79:19,20 82:1 82:9,10 required 19:21 20:10 29:3	49:7 requires 35:13 research 12:17 13:8 14:21 15:2 resistance 57:22 respect 8:16 11:4 17:19 20:9 29:13 47:2 respond 62:10 responding 36:10 response 3:21 29:1,11 35:10 41:23,24 42:6 42:14 68:12,14 responses 6:15 6:16 restate 13:1 31:24 32:13 34:13 35:5 38:19 64:15 72:15 75:9 result 50:17 52:5 69:14 71:20 results 54:11 71:9 retained 3:13 return 81:17 82:6 review 12:6 14:14 37:8,17
---	---	--	---

[review - set]

40:2,14 55:12 59:21 65:2 79:18 81:8,10 81:13 82:2 reviewed 37:10 40:4 reviewing 37:22 40:17,19 60:6 64:10 66:13,14,16 right 9:2 11:21 12:19 13:23 14:22 15:13 22:2 24:12,16 24:24 27:8 29:6 33:1 36:8 37:6 44:2,17 48:6 51:4,7 52:5 53:2 57:11,20 58:10 60:21 62:5 64:20 66:20 67:18 70:9 72:18 73:6,17 75:1,10,18 76:3 77:11 rings 61:21,22 role 18:9 roughly 14:7 60:5 routines 21:23 rules 1:13 82:8 run 26:8,13,13 26:16,17,22 27:3 72:6,8,12	72:17,22,24 73:1,2,10,13,20 74:6 75:4,6,11 75:14,15,17,18 76:22 77:9 78:1 running 24:8 24:11,13,21,23 26:7,18,21,22 72:11 s s 2:4 5:21 satisfies 27:13 satisfy 28:13 saying 14:1 43:11 64:21 says 24:6 25:10 27:10 33:9,13 41:2,14 43:6 50:14 57:22 75:3 77:7 schedule 81:10 scholar 2:9,13 4:14 scientific 7:10 score 48:5,13 48:14 49:2,19 50:5,12,23,24 51:10 52:7 53:4 55:24 56:3,7,9,15,17 56:18,24 57:6 64:22,22,23 67:5,12,17,22 67:23 68:2,5,8	74:1,8 75:16 77:19 scores 56:5,6 57:7 61:20,21 67:11,12,14 scott 1:11 3:2 3:19 4:10 5:11 5:21 81:5 scratch 18:1 se 7:11 seal 80:3 second 8:12,13 13:7 21:5 24:5 25:9 30:20 31:3,12 32:5,9 32:10,11,17 33:8,10,18 35:10,23 36:13 40:24 41:12 43:6 45:1 48:15 62:1,10 62:13,15 64:6 64:13,19 seconds 57:24 section 35:10 35:11 see 7:24 9:23 20:4 58:23 74:16,22 seeing 15:20 26:4 30:10 sense 37:17 sensitive 4:4 sensor 17:14 30:24 31:5,11	32:5,8,16 33:2 33:7,9,14,17,24 34:2,3,7,8 36:13 44:17 46:2 62:21 69:18,22 70:16 sensors 17:8,11 17:20,22,24 18:3 19:10 47:7,11 69:24 70:4,6 sentence 21:4 24:5 25:9 27:7 28:10,23 30:21 41:1,12,20 43:5 45:1 47:22 48:19 49:5 51:14 53:17 62:13 68:10,19 69:1 69:2,10,10 70:2,24 71:17 73:23 76:20 77:7,7,13,17 series 6:14 29:14 41:3,15 41:22 42:6,14 42:22 43:12 47:24 49:17 50:21 57:1 61:8 67:7 served 7:2 session 38:14 set 6:5 25:21 26:9,12,12
--	---	--	--

[set - state]

29:16 30:1,4,4 30:12 35:11 41:24 42:3 43:21,22 48:22 49:5,16,17 sets 41:23 42:7 42:8,15,16 seven 60:20 61:20,24 62:15 shorthand 79:12 shoulder 71:11 71:15,22 shown 61:3,7 61:18 62:18 shows 35:19 62:18 sign 81:16 82:5 signal 45:5,9,22 46:7,9,11,13,15 46:20,22 50:16 signature 80:3 80:8 81:21,23 81:23 82:9 signed 10:20 similar 48:22 55:2 67:24 68:6 similarly 50:13 single 21:7,18 21:22 22:2,4,6 22:10 23:5,13 24:7,14,16,18 24:20,24 25:1 25:7,12,19,20	25:21,22,23,24 26:9,12,18,21 27:11,13,17,23 28:2,5,14,14 29:15,23 30:1 30:2,4,5,6,12 30:16 31:12 32:2,5,9,15,17 35:4,9 36:4,12 36:13 38:17,22 39:3 44:21 45:14,18 48:10 48:13,14,24 50:4,23 53:4 56:5,6,15 57:7 57:8 58:12 59:6 68:2,8,20 sit 71:10,10,13 six 7:7,9 sixth 53:17 skill 18:14,22 19:1,4 skilled 19:2 slow 66:8 small 38:7 snao 24:3 software 15:10 17:7 solutions 81:7 sorry 8:10 34:14 38:6 39:7 41:13 43:2 47:14 51:13 57:17 61:23 70:7	74:12 sort 7:10 28:18 35:13 sound 16:1,22 speak 18:8,18 18:21,24 19:1 19:3,12,14,19 23:19 30:16 37:20 46:5 63:18 69:21 70:16 78:6,9 speaking 19:7 30:14 specific 13:15 15:14 17:10 35:16 46:17 48:16,23,23 49:5 52:11 54:1 56:2 68:1 68:11 70:21 75:21 specifically 10:10 16:9,24 24:5 26:23 27:5 29:13 38:3 44:5 48:8 48:18 57:13 65:3 71:1 72:5 72:20 74:24 76:21 77:7 specification 20:10 21:19 22:15 specifications 22:9	speculate 9:13 9:14 30:11 speculation 58:21 59:3 63:16 speed 26:14,17 57:14,23,24 58:4,9,15,20 59:2,2,5,8 73:6 73:9,10,15,16 73:17,20 74:1 74:3,7 75:20 75:22,23,23,24 76:2,24 77:11 77:20,23 spell 5:19 spend 14:8 spent 12:1 40:17 60:6 66:12,14,16 squats 24:8,21 24:23 ss 79:1 stab 63:23 stage 6:5 stand 45:15 71:10 start 7:5 10:11 31:24 49:14 69:2 starting 13:3 28:22,23 64:5 65:3 state 4:21,23 5:19 20:1,14
---	---	---	---

[state - talks]

23:3 24:17 25:18 27:22 36:3 43:20 51:8,13 55:2 62:14 69:11 70:8 77:21 79:1 81:9,12 stated 1:1 17:18 24:22 33:6 38:21 44:13 51:24 54:13,20 58:24 68:6 states 1:14 12:13 13:4 19:18 21:5 27:8 30:20 34:2,4,5,21 35:19,22 38:12 41:21 60:17 66:22 68:10 statokinesim... 50:8 staubach 2:9 3:7 5:5,5 10:3 11:18,22 12:24 13:14 14:8 15:19 17:9,12 18:15,23 19:11 20:12 22:20 23:1,10,17,24 26:2,10 27:21 28:7,16 29:7 30:7 31:2,8,23 32:12 34:1,12	34:20 35:15,24 36:7 37:13 38:18,23 40:7 42:10,17 43:19 44:1 46:3,16 46:23 48:15 49:3 51:20 52:10 53:1,24 56:1,12,19 58:5,11,21 59:3 60:22 62:3 63:5,16 64:14 65:6 66:7 69:19 70:13,20 72:14 72:19 73:12 74:9,13 75:8 75:13 76:7,13 76:15 77:6 78:3 stenographer 79:13 sticking 54:24 stipulation 81:20 stopping 74:9 stored 62:16 strain 47:7,11 street 2:14 4:15 80:10 strength 43:9 43:15 44:8 45:2,8,8 48:2 48:14,21,21,24 55:3,4 56:14	56:17 57:4,9 57:11,14,24 58:4,4,7,9,10 58:13,15,18,20 59:2,5,6,8 62:8 62:23,24 65:5 65:9 67:2,9,18 67:21 69:5,7 stretch 61:22 subject 9:4 substance 36:21 78:7,10 suite 1:15 2:15 80:11 support 3:20 13:18 14:3 15:6 37:9,23 38:1 50:19 68:8 77:16 supported 15:8 29:24 30:3 63:20 supporting 15:3,11 16:12 68:2 supports 24:13 sure 6:15 9:15 11:8 17:19 23:6 26:6 28:12 31:20 32:22 35:18 36:9 40:21 42:12 43:10 47:1 55:7 57:22 64:4	71:4 72:16 74:23 swear 5:9 sworn 5:12 79:10 system 38:13 60:24 62:17 63:21 66:23 t t 5:21,21 table 60:15,20 61:3,6,16,18 62:2,17 63:1 64:12,16 take 4:7 6:6,10 36:15 38:3 41:8 49:10 60:11 62:1 63:23 66:18 70:2 74:10,18 76:5 taken 1:12 3:3 4:10 5:23 31:9 79:5,12 takes 57:7 talk 14:16 20:19 29:20 36:20 42:13 67:7 talked 56:23 talking 27:12 29:14,21,22 talks 55:18 57:13 60:14
--	--	--	--

[task - two]

task 26:22 teach 74:3 77:23 teaches 61:6 technology 9:9 9:10 tell 5:24 ten 76:7,8 tendered 10:2 36:24 39:16 59:13 65:17 tenure 15:23 term 21:13 22:3,5,17,23 24:11 27:14 36:11 terminal 41:2 41:14 42:22,24 43:1,2,12,17,20 43:23,24 44:4 44:5,5,10,13,15 47:23 48:11,11 48:17,22 49:6 49:16 50:20 57:1 terminologies 37:21 terms 17:3,10 23:19 30:23 31:11 32:1 34:23 37:22 51:22,23 54:8 54:22 test 15:4 16:13 51:4,6,9 52:4,6	52:19 53:5,7 53:11,12,14 54:10,14 55:3 55:6,22,23,24 56:11,13 57:11 68:2,7 69:14 71:9,9,11,11,13 71:16,19,20,21 71:23 72:2,6,8 72:12,17,21,23 72:24 73:1,2 73:10,13,20 74:6 75:7,11 75:14 76:22 77:8 78:1 tested 71:20 testified 5:13 78:10 testimony 6:3 6:14 tests 41:22 42:6 42:14,22 66:23 67:7,7 71:10 71:21,22,22 thank 74:13 thanks 55:15 thereof 21:24 thing 10:7 things 12:15,21 13:6,11 14:4 26:14 41:7 think 9:7 10:12 15:17,20,22 23:20 24:1 26:11,19 28:9	29:8 37:14 39:11 41:20 56:20,21 57:15 61:22 62:12 68:18,21 71:8 third 13:7 28:23 41:20 62:13 68:19 69:1,2,10 thought 37:17 three 40:18 44:7 60:7 70:3 time 4:6,22 11:1 12:1 14:7 18:3 30:22 40:16 41:8 47:23 60:5 61:13 68:1 72:12,17,22 73:3 76:1,3 79:6,16 81:10 81:18,24 82:7 timeframe 19:6 19:8 times 7:2,11 8:9,11 11:16 11:21 52:1 54:4,6,9,11 today 6:3,14 11:9 76:16 today's 9:11 11:4,6,12 12:7 14:9 together 60:2	told 54:3 top 16:9 55:1 73:22 total 7:4,8,9 12:3 towards 51:12 trademark 1:1 transcript 79:19 81:6,8 81:10,13,13,21 82:2,2 transmit 50:15 transmits 45:5 45:22 46:7,9 46:13,20 transmitted 45:9,10 travel 75:24 trial 1:1 true 79:14 truth 5:24 try 6:6 23:19 77:6 trying 10:10 35:7 46:21 52:16 55:17 70:23 turn 21:2 28:19 38:2 51:2 55:11 64:2 72:1 76:18 twice 50:10 two 8:22 13:3 44:6 71:10,20
---	--	--	---

[type - watts]

type 7:21 24:7 24:20 25:12,19 27:11,13,17 28:2 types 8:1 17:22 17:24 24:24 61:11 typically 7:24 53:11 54:22 typos 11:2	22:15 23:15 25:4 37:21 46:6,9,12,20 47:2 53:3 63:7 70:15 understood 27:6 38:1 undertaking 53:11 unit 4:9 50:17 51:17 52:24 54:17,18,21,23 united 1:1,14 19:18 unpatentable 20:17 upfront 30:9 ups 24:8,15,21 24:23 usa 1:4 use 49:21 50:8 53:12 58:8 62:20 68:16,17 used 13:18,21 13:24 14:1 21:19 47:5 51:10 53:20 54:20 56:6,14 56:17 57:11 62:23 user 25:12,19 27:10,17 28:2 28:5 38:13 41:2,15 42:22 43:12 45:3,15	47:23 48:23 49:6,17 50:20 57:1 61:1 62:17 63:21,23 68:11,13 69:11 72:6,22 73:5,7 73:13 76:22,23 77:8,10 user's 17:13,15 43:8,14 48:1,5 54:7 57:3 uses 59:4 60:24 using 48:5 49:2 51:17 55:24 58:14 utilizes 52:20 52:23	version 47:13 47:13,16 versus 4:12 video 4:6,10 videographer 2:21 4:2,17 36:16,18 76:9 76:11 78:14 videotaped 1:11 3:2 view 26:12 27:24 vo2 74:22,24 75:15 vs 1:6 81:4
u			w
u.s. 3:15,18 uh 9:18 32:24 54:5 56:8 70:10 ultra 16:22,23 17:4 under 19:17 71:6 underlying 12:16 13:7 undersigned 79:13 80:1 understand 5:23 6:20,23 9:16,20 20:1,6 20:16 22:21 30:22 32:4 36:9 37:12,23 40:5,8 46:21 52:17 59:24 66:6 70:23 72:9 understanding 19:17 20:8			waived 81:23 81:23 waiving 81:20 walk 37:15 want 9:12,14 10:12 11:8 26:5 42:18 43:10 49:8,9 55:7 56:22 57:21 61:4,4,5 71:4,18 wanted 14:16 41:9 washington 2:10 watt 51:19,21 51:23 52:1 watts 51:17 52:5,23 53:22
		v	
		value 61:18 62:4 63:24 64:12,19 values 60:18 61:3 65:11,13 65:14 various 20:17 61:11,11 vary 62:17 63:21 velocity 52:2,3 54:4,6,9,11 75:24 verbal 6:15 veritext 4:16,18 81:7,9,11	

[watts - zip]

54:4,17,18,20	54:1 56:2,13	x
54:22 58:2,17	56:20 58:6,12	x 3:1 79:19
way 26:23 30:8	58:22 59:4,13	82:9
30:14 45:17	60:23 63:6,17	y
48:22 53:6,8	64:15 65:7,17	yap 2:4 5:3
54:12 65:20	66:8 69:20	yeah 12:3
68:6 70:15	70:14,21 72:15	14:24 18:17
we've 44:13	72:20 73:13	28:9,10 38:4
48:19	75:9,14 77:4	46:19 47:17
wearing 45:4	77:15 79:5,10	52:13 54:3
week 11:23	79:16 80:3	56:4 57:19
weight 7:24,24	81:13,16 82:2	60:9 61:23
west 1:15 2:14	82:5	64:16 70:23
4:15	wo 3:16	74:12,12 75:22
whispering 4:5	word 28:10,24	year 10:12
wilshire 2:4	39:6,8,9,10	years 7:4,5,6
wish 20:15	49:21 50:9	yep 6:18 28:21
witness 5:10,12	53:10	32:21 40:23
7:10 10:2,6	words 76:2	76:19
13:1,15 15:20	work 17:4	yesterday
17:10 18:16,24	39:21 59:16	11:24
19:12 20:13	65:24	z
22:21 23:2,11	worked 17:3,20	zip 16:1,2
23:18 24:1	17:21,24	
26:3,11 27:22	working 7:19	
28:8,17 29:8	7:19 8:20,22	
30:8 31:9,24	8:24 10:9,11	
32:13 34:2,13	16:14 17:8	
34:21 35:16	18:10	
36:1,24 37:14	workout 38:14	
38:19,24 39:16	worries 49:11	
40:8 42:11,18	written 12:12	
43:20 46:4,17	23:4	
48:16 49:4		
51:21 52:11		

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.

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