

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON ATHLETICA CANADA INC. and LULULEMON USA INC.
Petitioners

v.

NIKE, INC.
Patent Owner

Case IPR2023-00349
Patent 9,259,615

**PRELIMINARY RESPONSE OF PATENT OWNER
NIKE, INC.**

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Ex. No.	Description
2001	Information Disclosure Statement dated February 28, 2014 in Application No. 14/194,191

I. INTRODUCTION

Nike, Inc. (“Nike”) is the owner of U.S. Patent No. 9,259,615 (Ex. 1001, “the ’615 patent”). Nike submits this preliminary response to lululemon athletica canada inc.’s and lululemon usa inc.’s (“lululemon”) Petition, which challenges the patentability of claims 1–5, 7, 11, and 13¹ of the ’615 patent (the “Challenged Claims”). Nike requests that the Board deny institution because lululemon has not established a reasonable likelihood that it will prevail for any Challenged Claim in any of the grounds raised in the Petition.

The ’615 patent relates to a wearable system used to “record activity data, track goals, track milestones and other achievements” of a user. Ex. 1001 at 1:23–26, 2:42–49. lululemon asserts that the Challenged Claims are unpatentable on five grounds: (1) Ground 1 for anticipation based on Hoffman (Exhibit 1002); (2) Ground 2 for obviousness based on Stivoric (Exhibit 1003) in view of Kobayashi (Exhibit 1005); (3) Ground 3 for obviousness based on Sirmans (Exhibit 1004) in view of Kobayashi; (4) Ground 4 (claims 3–5 only) for obviousness based on Stivoric in view of Kobayashi and Brady (Exhibit 1021); and (5) Ground 5 (claims 3–5 only) for obviousness based on Sirmans in view of Kobayashi and Brady.

¹ The Petition states that “Petitioner requests cancellation of claims 1–8 and 11–13.” Petition at 19. However, there is no other indication in the Petition that claims 6, 8, or 12 are being challenged. Any implicit challenges to claims 6, 8, and 12 would fail for the same reasons discussed in this response.

lululemon's unpatentability grounds fail for several reasons. First, in each ground, lululemon fails to show that one or more limitations are disclosed or taught by the prior art. For example, with respect to anticipation Ground 1, lululemon fails to show that Hoffman discloses monitoring a user's progress toward a goal for a "predetermined number of consecutive activity time periods," as required by independent claims 1 and 11. As another example, with respect to obviousness Grounds 2 and 3, lululemon fails to show that any reference discloses the customizable goal setting limitation of independent claims 1 and 11, i.e., the method step of "receiving an activity time period." Because each of lululemon's unpatentability grounds lack at least one key claim limitation, the Board should deny institution.

Second, lululemon relies on hindsight in crafting its obviousness combinations—using the Challenged Claims as a roadmap to cherry-pick various aspects of the prior art references. lululemon also proposes motivations to combine based on alleged "problems" in the art that were already solved by the primary reference. For example, in Ground 3, lululemon proposes combining Sirmans with Kobayashi in order to reward compliance with a specific workout regimen. But lululemon's proposed combination would be redundant, because Sirmans already discloses rewarding user compliance with a government-recommended exercise

regimen. lululemon's obviousness challenges in Grounds 4 and 5 suffer from the same faulty analysis.

For at least these reasons, lululemon has not carried its burden of proving a reasonable likelihood of unpatentability for at least one Challenged Claim. Nike therefore respectfully requests that the Board decline to institute review.

II. TECHNICAL BACKGROUND

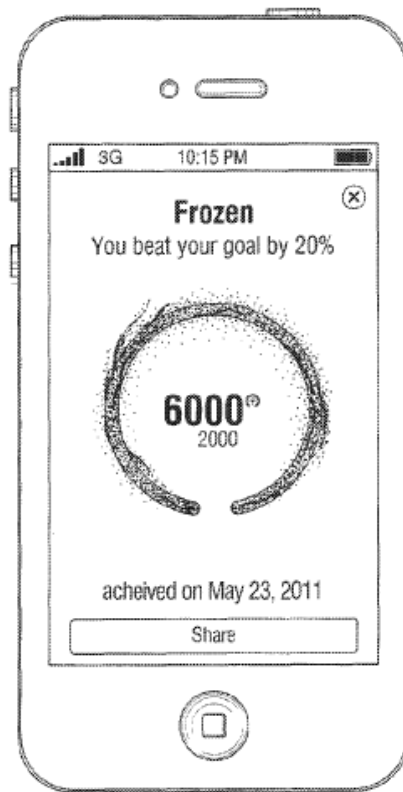
A. The '615 Patent

The '615 patent is directed to “athletic performance monitoring and tracking” using “a wearable device.” Ex. 1001 at 2:21–24. The wearable device includes an accelerometer, heart-rate monitor, or other types of sensors to receive “athletic performance data ... including but not limited to speed, distance, steps taken, and energy expenditure such as calories, heart rate and sweat detection.” *Id.* at 8:24–47. The athletic performance data “may also be expressed in terms of activity points ... or currency earned by the user based on the activity of the user.” *Id.* at 8:47–50. The wearable device may transfer the athletic performance data to a “tracking application” that records activity data and tracks goals, milestones and other achievements. *Id.* at 2:42–47.

The '615 patent describes that a user may customize activity goals for the tracking application to monitor over a particular period of time. A user may select a “goal time period” “such as a day, an hour, a week, a month or the like” or

“[a]lternatively, the user may define his or her own goal time period.” *Id.* at 51:1–8. The user may then set a certain goal for the chosen time period, the goal being “defined by any of the metrics measured and recorded by the wearable device.” *Id.* at 51:20–25; *see also id.* at 51:38–41. In some embodiments, the tracking application includes an interface that provides visualizations of a user’s progress toward the goal for the entered goal time period, including “whether the goal was met, not met, exceeded, and/or an amount by which the goal was exceeded.” *Id.* at 55:66–56:64, Figs. 96C, 97C. Figure 96C, reproduced below, shows an example of a visualization provided when a user exceeds a goal.

FIG. 96C



In addition to providing feedback about a user's activity in a single goal time period, the tracking application may provide feedback relating to multiple goal time periods. As one example, the tracking application may track "activity streaks." *Id.* at 56:65–57:4. Activity streaks "may include the completion of multiple goals corresponding to multiple consecutive goal time periods." *Id.* at 57:4–9. As a result of achieving a streak, the user "may be awarded with rewards or types of recognition including coupons, free products, virtual items including virtual apparel, icons, images etc., services, event tickets and the like." *Id.* at 57:14–18. As shown in Fig. 98B below, when a user achieves a streak, a visualization to that effect may be provided on the tracking application.



The '615 patent further describes that a user may modify a goal or set an additional goal. *Id.* at 54:12–59 (“Once a goal is set ... the user may modify the goal or set another goal for the same time period or another time period.”).

Independent claim 1² is reproduced below with limitations 1A–1E identified:

A method, comprising:

- [1A] receiving athletic activity data from a device configured to be worn by a user;
- [1B] receiving an activity time period;
- [1C] receiving a first activity goal for the activity time period;
- [1D] determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods; and
- [1E] presenting a streak reward to the user when the received athletic activity data exceeds the first activity goal for the predetermined number of consecutive activity time periods.

Id. at 80:25–37.

B. Prior Art

1. Hoffman (US Patent Publication No. 2011/0197157)

Hoffman generally relates to an “athletic information monitoring device” that “permit[s] a user to set a goal relating to his or her athletic activities, and then view one or more images graphically illustrating the user’s progress toward accomplishing those goals.” *See id.* at [0055], [0123]. Hoffman’s lengthy disclosure is dedicated to the setting and monitoring of *individual* goals, never discussing the

² Independent Claim 11 is a non-transitory computer-readable medium claim that recites substantially the same process steps as the method of Claim 1.

concept of monitoring streaks of goals. Hoffman's device includes "a sensor for measuring parameters relating to the person being monitored." Ex. 1002 at [0055]–[0056]. The sensor then "transfer[s]" "recorded athletic information to one or more separate devices, in order to view the recorded athletic data." *Id.*

With respect to goal setting, Hoffman discloses that a user may select a "goal type," that "may include steps, calories, pace and the like." *Id.* at [0189]. "For example, if a user selects calories to burn, the user may enter 500 calories as the goal." *Id.* In another embodiment, a user is able to select and set a running goal in which the user sets the frequency of runs over a time period, the distance run over a time period, the calories burned over a time period, or the average pace over a number of runs. *Id.* at [0123]–[0128].

Hoffman discloses that a "goal may be represented by an object such as a building, a food item, a road, an energy meter and the like." *Id.* at [0179]. The goal object, like the Empire State building shown in Figure 34 below, "may indicate progress toward completing the goal." *Id.* at [0184].

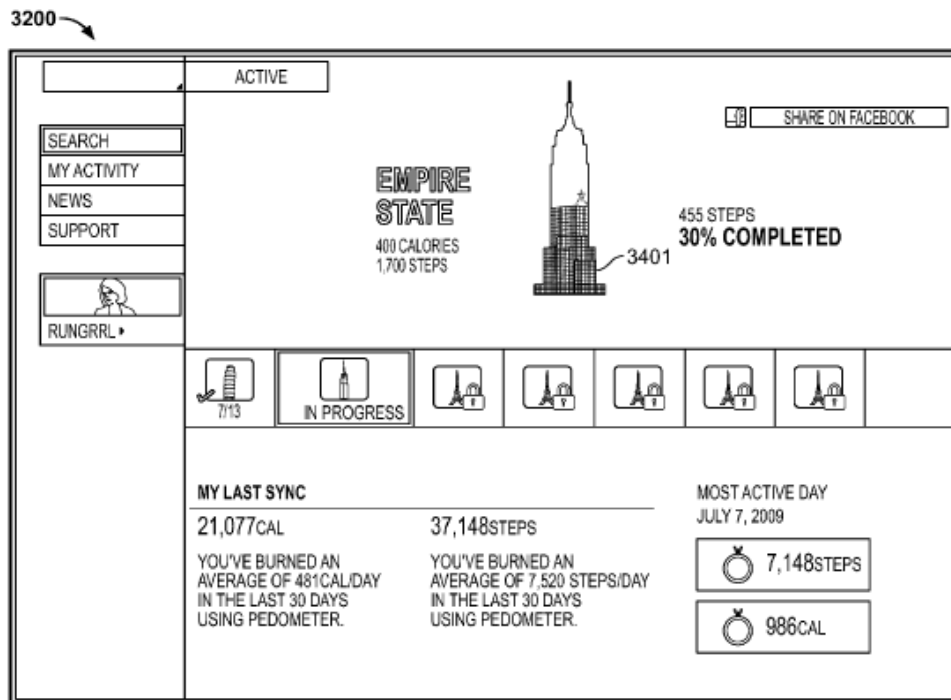


FIG. 34

As shown in Figure 34, a user has completed 455 steps (30%) of the 1,700-step goal of climbing the Empire State Building. Hoffman further explains that progress in excess of a goal, i.e., climbing more than 1,700 steps in the example shown above, may “roll over” and count toward the next goal object. *Id.* As a result of completing goals, Hoffman describes that the user may receive stamps, trophies, or medallions. *See id.* at [0212].

2. Stivorc (US Patent Publication No. 2004/0152957)

A continuation application of Stivorc (US Patent Publication No. 2014/0206955) was before the Examiner during prosecution of the application

resulting in the '615 patent.³ See Ex. 2001 at 2. Stivorice relates to an apparatus “for tracking caloric consumption and caloric expenditure data” for “individuals interested in a healthier lifestyle.” Ex. 1003 at Abstract, [0004]. The apparatus may include sensors for collecting physiological data and other parameters. *Id.* at [0002]. The apparatus may also include “a processing unit” that receives signals from the sensors and “generates data” indicative of calories expended by the user. *Id.* at [0009].

Stivorice’s apparatus optionally includes a data input and output device (“I/O device”) that displays information to the user and allows the user to enter information. *Id.* at [0002]. Stivorice discloses that a display interface of the apparatus may summarize a daily caloric expenditure target versus actual calories burned for the day. *Id.* at [0113], [0197]. In one embodiment, a user has the option to view their caloric progress and/or history over a daily, weekly, or monthly goal period. *Id.* at [0197]. Stivorice does not depict a display toggled to the weekly or monthly goal period.

lululemon focuses on one embodiment in Stivorice that discloses an I/O device with a goal-setting feature. Petition at 13 (citing Ex. 1003 at [0218]). The I/O device stores a program that may include a set of goals established by the user or a third party (e.g., trainer). Ex. 1003 at [0218]. In this embodiment, the I/O device

³ Both Stivorice and its continuation application share the same specification.

communicates with and is programmed to control an apparatus like a treadmill or weight machine. *Id.* But Stivorice never discloses using the I/O device's goal-setting feature alongside the wearable sensor device described in other embodiments of Stivorice's specification.

3. Sirmans (US Patent Publication No. 2006/0111944)

Sirmans is directed to a system that allows insurance companies to monitor an individual member's compliance with health-promoting measures. *See e.g.*, Ex. 1004 at [0014], [0030]. Specifically, Sirmans describes rewarding member compliance with incentives, such as food, gift certificates, gifts, financial reimbursements for the costs of health/well-being activities, marketing products, etc., which are issued based on the member's performance and compliance. *Id.* at [0013]–[0014], [0020].

In one embodiment, a monitoring device tracks the individual's efforts to perform health promoting measures, including wellness programs (such as yoga classes and alcohol-ending courses), wellness visits (such as annual breast or prostate exams), and exercise regimes (such as weight training or aerobic exercise like swimming). *Id.* at [0031]. The individual's level of compliance is then summarized into a legend with an assessment summary. *Id.* The device sends this tracked data to a third-party such as the individual's insurance carrier.

4. Kobayashi (JP 2003-141260)

Kobayashi discloses a system that measures a user's activity using a "health device" and then converts the measured activity to "health points." Ex. 1005 at [0001]. When a user reaches a certain number of health points, he or she may "purchase" products and/or services. *Id.* Kobayashi generally describes a three-step process: (1) the user registers a health device with his or her user profile; (2) the user accumulates health points based on activity measured by the health device; and (3) the user purchases products and/or services using the accumulated points. *Id.* at [0058]. In one embodiment, Kobayashi discloses a user-worn pedometer as an exemplary health device. *Id.* at [0023], [0041], Fig. 7.

5. Brady (US Patent No. 7,431,696)

lululemon relies on Brady for its disclosure of a wrist-worn heart-rate sensor. Petition at 17 (citing Ex. 1021 at 5:16–41, 6:1–13). lululemon only relies on Brady for arguments relating to certain dependent claims,⁴ and therefore it is not substantively addressed in this Preliminary Response.

III. DEFINITION OF A PERSON OF ORDINARY SKILL IN THE ART

For the purposes of this Preliminary Response only, Nike applies lululemon's proposed level of skill in the art: a POSITA for the technology of the '615 patent

⁴ Nike reserves the right to address lululemon's arguments relating to the challenged dependent claims if *inter partes* review is instituted.

would have had (1) a bachelor's degree in engineering, computer science, industrial design, biomechanics, or a related field, and (2) at least two years of experience researching, developing, designing, and/or testing fitness or physiological sensors, wearable devices, physiological or biomechanical devices, remotely-controlled systems or interfaces, network-based applications and/or equipment, or the equivalent experience or education. Petition at 18. Nike reserves the right to further address lululemon's proposed level of ordinary skill and/or propose a different level of ordinary skill if the Board institutes trial.

IV. CLAIM CONSTRUCTION

lululemon contends that no claim construction is necessary for the purposes of this proceeding. Petition at 18. Nike agrees. All terms and phrases in the '615 patent have their ordinary and customary meanings, which are readily apparent, and no further construction is required.

V. INSTITUTION SHOULD BE DENIED BECAUSE LULULEMON FAILS TO SHOW A REASONABLE LIKELIHOOD OF PREVAILING FOR ANY CHALLENGED CLAIM

lululemon bears the burden on institution of demonstrating a reasonable likelihood that it will prevail in showing the unpatentability of at least one Challenged Claim. *SMIC, Ams. v. Innovative Foundry Techs., LLC*, IPR2020-00837, Paper 13 at 13–14 (PTAB Oct. 9, 2020) (citing 35 U.S.C. §§ 314(a) and 312(a)(3)). To meet its burden, “[i]t is of the utmost importance” that lululemon

“identify ‘with particularity’ the ‘evidence that supports the grounds for the challenge to each claim.’” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (citing 35 U.S.C. § 312(a)(3)).

As to the alleged anticipation in Ground 1, lululemon must show a reasonable likelihood of proving that “the four corners of a single, prior art document describe every element of the claimed invention.” *See Net Money, Inc., v. Verisign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008). When asserting a ground of anticipation, “it is not enough that the prior art reference . . . includes multiple, distinct teachings that the artisan might somehow combine to achieve the claimed invention to show anticipation.” *BlephEx, LLC v. Myco Indus., Inc.*, 24 F.4th 1391, 1400 (Fed. Cir. 2022). Instead, the Federal Circuit “has long held that anticipation requires the presence in a single prior art disclosure of all elements of a claimed invention *arranged as in the claim.*” *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1334 (Fed. Cir. 2008) (internal quotations omitted); *see also Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1063 (Fed. Cir. 2017) (holding mixing and matching embodiments in single reference not “understood” to be “used together” as “insufficient to anticipate”).

The Board regularly denies petitions that “lack particularity or present deficient or conclusory analysis.” *Sinjimoru v. Geneze Innovation Inc.*, IPR2021-00493, Paper 8 at 11 (PTAB July 28, 2021). The requirement for particularity “takes

on heightened importance when considered in conjunction with” the “all-or-nothing approach” that applies to decisions on institution. *Adaptics Ltd. v. Perfect Co.*, IPR2018-01596, Paper 20 at 17 (PTAB Mar. 6, 2019) (informative).

As to its obviousness grounds (i.e., Grounds 2–5), lululemon must show a reasonable likelihood of proving that “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made” to a skilled artisan. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). lululemon “must articulate specific reasoning, based on evidence of record, to support the legal conclusion of obviousness.” *U.S. Well Servs., LLC v. Halliburton Energy Servs., Inc.*, IPR2022-01163, Paper 9 at 10 (PTAB Dec. 20, 2022) (quoting *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1380 (Fed. Cir. 2016)). lululemon’s obviousness arguments “must be made with particularity, not opacity.” *Microsoft Corp. v. FG SRC, LLC*, 860 Fed. App’x 708, 713 (Fed. Cir. 2021). It is not enough to show that a POSITA could have made the proposed combination, lululemon must also demonstrate that a POSITA would have been motivated to do so. *See InTouch Techs., Inc. v. VGO Commc’ns, Inc.*, 751 F.3d 1327, 1352 (Fed. Cir. 2014) (finding hindsight bias in expert’s testimony that “primarily consisted of conclusory references to her belief that one of ordinary skill in the art *could* combine these references, not that they *would* have been motivated to do so.”).

As discussed on a ground-by-ground basis below, lululemon has not met its reasonable likelihood burden as to any ground of unpatentability for any Challenged Claim. Nike thus respectfully requests that the Board deny institution.

A. Ground 1: lululemon Fails To Demonstrate That Hoffman Anticipates Claims 1–5, 7, 11, and 13

lululemon fails to show to a reasonable likelihood that Hoffman anticipates claim 1 or claim 11⁵. Specifically, lululemon fails to adequately show that Hoffman discloses (1) limitation 1D (“determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods”) or (2) limitation 1E (“presenting a streak reward to the user when the received athletic activity data exceeds the first activity goal for the predetermined number of consecutive activity time periods”). All other claims challenged in Ground 1 depend from either claim 1 or claim 11, and thus the deficiencies for claims 1 and 11 are fatal to all claims challenged in this Ground.

- 1. lululemon fails to show that Hoffman discloses “determining [, at a processor, /] whether the received athletic activity data exceeds the [first /] activity goal for a predetermined number of consecutive activity time periods” (Limitation [1D / 11D])**

⁵ Claim 11 is substantially identical to claim 1. For purposes of brevity, this Preliminary Response will primarily address claim 1. Unless otherwise noted, all discussion related claim 1 should be understood as applying equivalently to claim 11.

Limitation 1D recites “determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods.” Limitation 11D recites a substantially similar limitation. As described in the ’615 patent specification, these limitations recite determining whether the user has completed a “streak.” Ex. 1001 at 57:3–9. For example, the specification describes streaks as “the completion of multiple goals corresponding to multiple consecutive goal time periods,” i.e., “when the user has completed goals for X number of consecutive goal time periods, where X may be any number greater than 1.” *Id.* For two reasons, lululemon fails to adequately show that Hoffman discloses limitations 1D and 11D.

First, lululemon’s assertions as to limitation 1D are inconsistent with its assertions for limitation 1B.⁶ When arguing that Hoffman discloses limitation 1B, i.e., “receiving an activity time period,” lululemon identifies only one embodiment in Hoffman where the system “receives” an “activity time period.” Petition at 23 (citing Ex. 1002 at [0009]). Specifically, lululemon relies on Hoffman’s disclosure of “a user input system 222 that ‘allow[s] a person to specify a goal related to an athletic activity [such as] a goal of running a specified total distance within a

⁶ Both the claim language and the specification of the ’615 patent make clear that the recitation of “consecutive activity time periods” in limitation 1D refers to the “activity time period” recited in limitation 1B. *Id.* at 27:10–12, 29:1–4, 51:2–4, 56:1–2, 56:65–57:2.

specified period of time.” *Id.* This user “specified period of time” is the only disclosure in Hoffman where the system “receives” an “activity time period” as required by limitation 1B.⁷ *Id.*

When arguing that Hoffman discloses limitation 1D, lululemon points to a different, unrelated embodiment. Specifically, lululemon points to Hoffman’s disclosure of awarding “badges” to the user. *Compare* Petition at 23 (citing Ex. 1002 at [0009], [0161], [0211]) with *id.* at 27–28 (citing Ex. 1002 at [0198]). lululemon’s alternation between unrelated embodiments is exactly the type of “cobbling together [of] disparate elements in a prior art reference” that is improper for anticipation. *See Sherwin-Williams Co. v. PPG Indus., Inc.*, No. CV 17-1023, 2021 WL 5648019, at *4 (W.D. Pa. Dec. 1, 2021). lululemon’s argument is also meritless because the Hoffman system does not award badges when the user completes a streak by exceeding a goal in multiple, consecutive “specified period[s] of time.” Hoffman only awards badges when the user exceeds a goal for a single, pre-determined period of time. Ex. 1002 at [0198] (disclosing that “a badge may be awarded for a user for

⁷ lululemon points to two other embodiments in Hoffman as allegedly disclosing limitation 1B, but neither of those embodiments involve the system “receiving” an activity time period. *See* Petition at 23 (citing Hoffman at [0161], [0211]). Instead, these two additional embodiments of Hoffman merely disclose a user retroactively viewing certain athletic information over pre-programmed periods of time. *Id.* For example, the user in Hoffman may, at any time, review information about their athletic activity over the past day, week, or month. *Id.* But these embodiments do not disclose a user selecting an activity time period or the system “receiving” an athletic time period. *Id.*

completing 3 goals in 3 consecutive days, completing 2 goals in a single day, being the first to complete a particular goal and the like.”).

lululemon points to paragraph 198 of Hoffman as disclosing the determination of whether a user “exceeds the activity goal for a predetermined number of consecutive time periods.” Petition at 28. In paragraph 198, Hoffman discloses that:

“[A] badge may be awarded for a user completing 3 goals in 3 consecutive days, completing 2 goals in a single day, being the first to complete a particular goal and the like.”

Ex. 1002 at [0198]. That disclosure does not describe determining whether a user “exceeds the activity goal for a predetermined number of consecutive time periods.” The disclosure simply describes a user completing three goals over a single period of time: three consecutive days. *Id.* A user could accomplish that feat by completing zero goals on the first day, zero goals on the second day, and then three goals on the third day. lululemon has not shown that paragraph 198—or any other aspect of Hoffman—discloses determining whether a user “exceeds the activity goal for a predetermined number of consecutive time periods.” As a result, lululemon has not demonstrated a reasonable likelihood of prevailing on Ground 1 as to any claims. *Sinjimoru v. Geneze Innovation Inc.*, IPR2021-00493, Paper 8 at 11 (PTAB July 28, 2021) (discussing that the Board regularly denies petitions that “lack particularity or present deficient or conclusory analysis”).

Second, Hoffman also never discloses a system that determines whether received activity data *exceeds* the specified activity goal. In addressing this limitation, lululemon continues to improperly mix and match embodiments of Hoffman, pointing to yet another, unrelated and disparate embodiment for this limitation. Petition at 27–28 (citing Ex. 1002 at [0184]). For example, paragraph 184 of Hoffman does not address a running goal or a user specification of goal activity period. Instead, this embodiment generically discusses awarding badges to users for completion of multiple goals. *See id.* at [0184]. This is improper and alone dooms lululemon’s Ground 1. *Sherwin-Williams*, 2021 WL 5648019, at *4; *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1334 (Fed. Cir. 2008) (holding that a party asserting anticipation must show that the reference teaches all of the claimed limitations “arranged as in the claim”). But once again, even the unrelated embodiment cited by lululemon fails to show disclose limitations 1D and 11D. In paragraph 184—cited by lululemon—Hoffman discloses that “if 1500 steps are required to complete goal 3209 and the user performs 1955 steps, the extra 455 steps may be applied to new goal.” Ex. 1002 at [0184]. In other words, once a user meets a goal, any surplus may be applied to the *next* goal. *Id.* This disclosure does not describe the Hoffman system making a determination of whether the activity data *exceeds* the goal. Instead, Hoffman merely determines whether a user has met the goal, and then rolls over any other activity data to the next goal. *See id.*

Because lululemon has failed to show that Hoffman discloses limitations 1D or 11D as recited in the claims, lululemon has not met its burden to show a reasonable likelihood of prevailing as to any Challenged Claim on Ground 1.

2. lululemon fails to show that Hoffman discloses “presenting a streak reward to the user when the received athletic activity data exceeds the [first /] activity goal for the predetermined number of consecutive activity time periods” (Limitation [1E / 11E])

Limitation 1E recites “presenting a streak reward to the user when the received athletic activity data exceeds the first activity goal for the predetermined number of consecutive activity time periods.” Claim 11 recites a substantially similar limitation. In simple terms, this limitation recites that a user is presented with a streak reward if they achieve the streak recited in limitations 1D and 11D.

lululemon fails to adequately show that Hoffman discloses this limitation. As discussed above with respect to limitations 1D and 11D, lululemon fails to show that Hoffman discloses determining whether “the received athletic activity data exceeds the activity goal for a predetermined number of consecutive activity time periods.” Even if Hoffman discloses presenting rewards to a user for the completion of a goal(s), i.e., “badges” (Petition at 28), Hoffman never discloses presenting badges to a user for the completion of a “streak,” as recited in the independent claims. More particularly, Hoffman does not show that the user is rewarded for the completion of goals “for a predetermined number of consecutive activity time periods.”

Because lululemon has failed to show that Hoffman discloses limitations 1E or 11E as recited in the claims, lululemon has not met its burden to show a reasonable likelihood of prevailing as to any Challenged Claim on Ground 1.

B. Ground 2: lululemon Fails To Demonstrate That Stivorice In View Of Kobayashi Renders Obvious Claims 1–5, 7, 11, and 13

lululemon fails to show a reasonable likelihood that Stivorice in view of Kobayashi renders obvious claim 1 or claim 11. As noted above, the Examiner considered a continuation application of Stivorice (among other references) during prosecution of the '615 patent, and nonetheless allowed the Challenged Claims. (Ex. 2001 at 2).

lululemon's assertions for Ground 2 fail for two reasons. First, lululemon fails to show that the combination of Stivorice and Kobayashi renders obvious limitation 1B and 11B of the '615 patent, which recites "receiving an activity time period." Specifically, neither reference teaches nor suggests "received" time periods. Stivorice discloses only pre-set time periods, and Kobayashi does not mention time periods at all.

Second, lululemon fails to show that the combination of Stivorice and Kobayashi renders obvious limitations 1D and 11D, which recite determining "whether the received athletic activity data *exceeds* the [first] activity goal for a predetermined number of consecutive activity time periods." lululemon's own

arguments seem to acknowledge that Stivorice and Kobayashi only teach or suggest systems that determine “whether goals relating to calories consumed and calories expended *are met*”—not exceeded. *See* Petition at 46. Other than stating “it would have been a simple modification,” lululemon provides no support for its assertion that a POSITA would have “implement[ed] determining whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods.” *Id.* at 47.

1. lululemon Fails To Show That the Stivorice-Kobayashi Combination Teaches or Suggests “receiving an activity time period” (Limitations 1B/11B)

lululemon fails to show a reasonable likelihood that the combination of Stivorice and Kobayashi teaches or suggests “receiving an activity time period,” as recited by limitations 1B and 11B. lululemon relies solely on Stivorice for this limitation. Petition at 44–45. In particular, lululemon points to Stivorice’s disclosure of an “I/O device” that “receive[s] activity time periods, such as ‘a day, a week or a month.’” *Id.* at 44 (citing Ex. 1003 at [0197]). lululemon contends that these time periods “are received from a user via a selection made ‘by rotating dial 1220’ or ‘pressing button 1215.’” *Id.* lululemon’s arguments mischaracterize Stivorice.

Although the user in Stivorice may use a “rotating dial” or “pressing” button to view past progress towards a “goal” over a pre-determined set of time periods— all of the time periods taught or suggested in Stivorice are pre-programmed in the

system. Ex. 1003 at [0197]–[0198]. Stivorice never teaches or suggests a “received” activity time period. In other words, the Stivorice system never “receiv[es]” an activity time period, as recited in limitation 1B. Instead, all of the available time periods are pre-programmed in the system (i.e., a day, a week, and month). For example, lululemon cites to Stivorice’s Figures 43A–C. Petition at 45. But Stivorice describes Figures 43A–C as allowing a user to “toggle” between “the various time periods within each [goal], by rotating dial 1220.” Ex. 1003 at [0197]. Therefore, a user of Stivorice’s system is only able to *retroactively* view their caloric expenditure achievement for either the day, the week, or the month. *Id.* A user is not able to, in a forward-looking manner, enter an activity time period for a particular goal. All time periods in the Stivorice system are preset and displayed regardless of the device receiving an activity time period, which is required by the claim.

lululemon’s expert testimony in support of this limitation is equally unavailing for two reasons. First, Dr. Fischer’s testimony is unsupported. Dr. Fischer argues that “[a] POSITA would understand that this workout history data [in Stivorice] is readily available for analysis and for determining the status of meeting goals over a continuous set of time periods.” Ex. 1006 at ¶ 52. But nothing in Stivorice (or elsewhere) supports this proposed link between the workout history data and received, forward-looking goals. Instead, this data is only available for the user to review past performance. Ex. 1003 at [0197]. Stivorice does not teach or suggest

receiving a forward-looking activity time period of a specific activity goal based on past workout history. Second, Dr. Fischer’s testimony contradicts the express disclosure of Stivorik. Dr. Fischer opines that “*any*” reasonable activity time period could be set, and a common activity time period would be “per day.” Ex. 1006 at ¶ 57 (emphasis added). This misrepresents Stivorik’s three predetermined options to show past workout data to the user over a day, a week, or a month period. Ex. 1003 at [0197].

Because lululemon has failed to show that Stivorik discloses or suggests limitations 1B or 11B as recited in the claims, lululemon has not met its burden to show a reasonable likelihood of prevailing as to any Challenged Claim on Ground 2.

2. lululemon Fails To Show That the Stivorik-Kobayashi Combination Teaches or Suggests “determining [, at a processor, /] whether the received athletic activity data exceeds the [first /] activity goal for a predetermined number of consecutive activity time periods” (Limitation [1D/11D])

lululemon fails to show a reasonable likelihood that the combination of Stivorik and Kobayashi teaches or suggests “determining whether the received athletic activity data exceeds the activity goal for a predetermined number of consecutive activity time periods,” as recited by limitations 1D and 11D.

To meet this limitation, lululemon relies on Stivorik for determining whether the received activity data exceeds the first activity goal. Petition at 46. lululemon then relies on Kobayashi for teaching whether the goal has been exceeded for a

predetermined number of consecutive time periods. Petition at 47. But neither of these assertions hold water and lululemon's expert fails to provide support for lululemon's arguments in this section.

First, Stivoric only teaches or suggests that a goal is met, not exceeded. lululemon even acknowledges that a processing unit is programmed to generate and display information "which includes determinations of whether goals relating to calories consumed and calories expended are *met*." Petition at 46 (citing Ex. 1003, at [0197], [0199], [0215]). lululemon never addresses the requirement that the activity data must *exceed* the first activity goal. *See id.* Indeed, Stivoric is entirely silent to a determination of exceeding an activity goal, and instead repeatedly discusses deciding whether a goal has been met. *See* Ex. 1003 at [0146] ("stand alone sensor device **700** could be worn by an individual while exercising and an LED or a tone can be used to signal that a goal of a certain number of calories burned has been *reached*"). In a singular paragraph addressing whether Stivoric discloses the limitation of 1D, lululemon's expert relies on the exact argument in lululemon's petition and includes identical citations to Stivoric to make this conclusory point. *See* Ex. 1006 at ¶ 57 (citing Ex. 1003, at [0197]).

Second, lululemon has not shown that Kobayashi cures this deficiency. lululemon argues that "Kobayashi determines when a user has *completed* an activity goal for 10 or 20 consecutive days," not when a user has *exceeded* an activity goal.

Petition at 47. lululemon's expert does not address this discrepancy. Instead, Dr. Fischer asserts without any evidence, that it would be "simple" to incorporate the assessment of an activity goal for a predetermined number of consecutive activity time periods described in Kobayashi into the framework of Stivorice. Ex. 1006 at ¶ 122.

Because lululemon has failed to show that Stivorice discloses or suggests limitations 1D or 11D as recited in the claims, lululemon has not met its burden to show a reasonable likelihood of prevailing as to any Challenged Claim on Ground 2.

C. Ground 3: lululemon Fails To Demonstrate That the Combination of Sirmans And Kobayashi Renders Obvious Claims 1-5, 7, 11, and 13

lululemon fails to show a reasonable likelihood that Sirmans in view of Kobayashi renders obvious claims 1 and 11. In Ground 3, lululemon swaps the primary reference from Ground 2 (replacing Stivorice with Sirmans) and continues to use Kobayashi as the secondary reference in an attempt to cure similar deficiencies. Because lululemon combines Sirmans and Stivorice with Kobayashi in similar ways, lululemon's arguments for Ground 3 suffer from deficiencies similar to those in Ground 2.

First, lululemon fails to show that Sirmans alone, or in combination with Kobayashi, teaches or suggests limitations 1B and 11B, which recite "receiving an activity time period." Second, lululemon fails to show that Sirmans alone, or in

combination with Kobayashi, teaches or suggests limitations 1D and 11D, which recite determining “whether the received athletic activity data *exceeds* the first activity goal for a predetermined number of consecutive activity time periods.” Third, lululemon fails to demonstrate a reasonable likelihood that Sirmans in view of Kobayashi renders obvious claims 1 and 11 because lululemon relies on an impermissible hindsight rationale.

1. lululemon Fails To Show That the Sirmans-Kobayashi Combination Teaches or Suggests “receiving an activity time period” (Limitations [1B/11B])

lululemon fails to show a reasonable likelihood that the combination of Sirmans and Kobayashi teaches or suggests “receiving an activity time period,” as recited by limitations 1B and 11B. lululemon contends that Sirmans “receiv[es] an activity time period” because a user of Sirmans’ “personal monitor” may be instructed to follow protocol criteria established by a third party, such as an employer or an insurance carrier. Petition at 58–59 (citing Ex. 1004 at [0058], [0084]). But in Sirmans, the user wearing a personal monitor to track his or her compliance with an exercise regimen involving suggested exertion levels recommended by the Center for Disease Control (“CDC”) is different from a personal monitor “receiving” an activity time period over which a user will strive to meet a goal. Sirmans’ personal monitor does not receive any activity time period.

lululemon cites an embodiment described in Sirmans that does not teach or suggest receiving an activity time period. Instead, the user independently uses Sirmans' device to track compliance with a recommended activity regimen. *See* Ex. 1004 at [0084]. In this embodiment, the user pays a fee to an organization to receive the personal body monitor and the user "will be asked to perform the Center for Disease Control recommended levels of exercise (i.e., moderate intensity for 30 minutes a day 5 days a week and/or vigorous intensity for 20 minutes a day 3 days a week)." Ex. 1004 at [0084]. The user can then upload his or her compliance tracked via the personal monitor to an online portal to allow the employer and/or insurance carrier to review the user's performance. *Id.* This cited embodiment differs from the '615 patent that is directed to customizable goal setting in which the system receives an activity goal and an activity time period over which a user's activity is measured. Many of the regimens disclosed in Sirmans do not involve any "activity time period" at all. In Sirmans, the user's compliance may be tracked by the type of exercise performed, i.e., intensity level (calories burned) and duration, but a specific duration is not disclosed or described. Ex. 1004 at [0019].

And contrary to lululemon's argument, Sirmans uses "protocol criteria" as a way of describing performance levels, not specific activity time periods. *Id.* at [0069]. In one embodiment described in Sirmans, the "protocol criteria" are "Fitness Index Ratings" and the user is offered various levels of performance criteria that are

associated with specific incentives or points. *Id.* at [0019]. The system then provides a protocol compliant assessment summary, and it assesses “*if and how much*” of an incentive or number of points should be issued to the member. *Id.* This implies that the user can continue to perform health-promoting activities to earn more points associated with higher or better incentives regardless of an activity time period.

Because lululemon has failed to show that Sirmans discloses or suggests limitations 1B or 11B as recited in the claims, lululemon has not met its burden to show a reasonable likelihood of prevailing as to any Challenged Claim on Ground 3.

2. lululemon Fails To Show That the Sirmans-Kobayashi Combination Teaches or Suggests “determining [, at a processor, /] whether the received athletic activity data exceeds the [first /] activity goal for a predetermined number of consecutive activity time periods” (Limitation [1D / 11D])

lululemon fails to show a reasonable likelihood that the combination of Stivoric and Kobayashi teaches or suggests “determining whether the received athletic activity data exceeds the activity goal for a predetermined number of consecutive activity time periods,” as required by limitations 1D and 11D.

As discussed above with respect to limitations 1B and 11B, Sirmans does not disclose the claimed “activity time period” required by limitations 1B and 11B. lululemon also acknowledges that Sirmans fails to teach or suggest limitations 1D and 11D and therefore looks to Kobayashi’s teachings of achieving an activity goal for consecutive days. Petition at 62.

As an initial matter, for the reasons discussed above with respect to limitations 1D and 11D in Ground 2, lululemon has not shown that Kobayashi discloses a determination of whether received activity data exceeds an activity goal. *See* Section V.B.2 (explaining that Kobayashi fails to teach or suggest that a user *exceeds* an activity goal and instead Kobayashi teaches whether a user simply *completes* an activity goal for 10 or 20 consecutive days). Additionally, because lululemon provides no further detail on what disclosure in either Sirmans or Kobayashi constitutes an “activity time period,” Kobayashi cannot cure these deficiencies in Sirmans. Assuming *arguendo*, that Sirmans’ activity time period is one day, Sirmans does not track whether users exercise on consecutive days. By contrast, Sirmans suggests that the user follow CDC exercise guidelines, which recommend working out 3 or 5 days per week, which may or may not be on consecutive days.

Thus, Kobayashi’s disclosure of rewarding a user for achieving 10 or 20 consecutive days of activity does not fill the gap in Sirmans of determining whether the received athletic activity data exceeds the first activity goal for a predetermined number of *consecutive* activity time periods.

Because lululemon has failed to show that Sirmans discloses or suggests limitations 1D or 11D as recited in the claims, lululemon has not met its burden to show a reasonable likelihood of prevailing as to any Challenged Claim on Ground 3.

3. Lululemon Relies on Impermissible Hindsight Reasoning in Arguing Motivation to Combine Sirmans and Kobayashi

lululemon argues that there would be a motivation to combine Sirmans and Kobayashi “to further incentivize regular exercise with a high likelihood of success.” Petition at 62 (citing Ex. 1006, ¶¶ 124–128). lululemon contends that “it would be a simple modification to include Kobayashi’s recognition of consecutive activity time periods into Sirmans’ protocol criteria.” Petition at 62. lululemon’s reasoning for the Sirmans-Kobayashi combination is rife with hindsight reasoning. This impermissible hindsight in lululemon’s motivation-to-combine analysis is evident in at least two ways: (1) lululemon proposes a redundant combination, and (2) lululemon selectively combines incompatible teachings from the prior art to meet the claimed invention.

First, lululemon’s proposed combination is redundant, and thus a skilled artisan would have had no motivation to combine the references in the way lululemon proposes. The Federal Circuit frequently finds no motivation to combine where the proposed combination is redundant. *S.-Tek Sys., LLC v. Engineered Corrosion Sols., LLC*, 748 F. App’x 1003, 1007 (Fed. Cir. 2018) (finding that a person of ordinary skill would not have been motivated to use Wood’s drain to allow water to drain from Viking’s system because Viking’s system already included a drum drip drain that served this purpose and thus the combination proposed redundant functions). Here, lululemon combines Sirmans’ protocol criteria with

Kobayashi's rewards system but Sirmans already discloses whether the user has met predetermined goals, i.e., by issuing appropriate incentives/rewards for compliance with health-promoting measures. Ex. 1004 at [0029]. lululemon's expert agrees that Sirmans discloses this feature. Ex. 1006 at ¶ 124 (citing an example in Sirmans of automatically doubling points if a member is complaint in performing health promoting measures for the week). Because Sirmans already discloses a system that determines when a user has met a goal, there would be no motivation to combine Sirmans with Kobayashi to incorporate this feature.

Second, motivation to combine cannot be found when (1) there is no reasonable expectation of success because the teachings of the prior art references are incompatible, *Samsung Elecs. Co. v. Elm 3DS Innovations, LLC*, 925 F.3d 1373, 1383–84 (Fed. Cir. 2019), or (2) the combination is “based on the hindsight combination of components selectively culled from the prior art to fit the parameters of the patented invention” (*Univ. of Strathclyde v. Clear-Vu Lighting LLC*, 17 F.4th 155, 162 (Fed. Cir. 2021)). lululemon combines Kobayashi's consecutive activity time periods with Sirmans' protocol criteria, but Kobayashi rewards users based on a number of consecutive days. Ex. 1004 at [142], [144]. If Kobayashi's functionality of rewarding additional points when the user performs an activity for 10 or 20 consecutive days is combined with Sirmans' protocol, it would no longer be compatible with the CDC guidelines that recommend 3 to 5 workouts per week

based on varying levels of intensity. *See Samsung Elecs. Co. v. Elm 3DS Innovations, LLC*, 925 F.3d 1373, 1383–84 (Fed. Cir. 2019) (affirming the Board’s finding of non-obviousness over a two reference combination because the process disclosed in the first reference was incompatible with the process disclosed in the second reference). Through the CDC guidelines, Sirmans encourages and rewards a non-consecutive day workout regimen. Ex. 1004 at [0084]. lululemon’s expert also overlooks the difference between *continuous* sets of activity periods and *consecutive* activity time periods. *See* Ex. 1006 at ¶ 127 (“Sirmans describes a reward structure that could readily be configured to provide a reward for meeting an activity goal over a defined continuous set of activity periods (i.e., a streak reward), such as described by Kobayashi.”).

lululemon fails to show that a POSITA would have been motivated to combine Sirmans and Kobayashi to render the Challenged Claims obvious. lululemon thus has not shown a reasonable likelihood of prevailing as to any Challenged Claim on Ground 3.

D. Ground 4: lululemon Fails to Demonstrate That Stivorice And Kobayashi And Brady Render Obvious Claims 3–5

For the reasons discussed above with respect to Ground 2, lululemon fails to show a reasonable likelihood that Stivorice in view of Kobayashi renders obvious claims 1, 2, 7, 11, and 13. At least for the same reasons, lululemon fails to show

with a reasonable likelihood that Stivoric in view of Kobayashi and Brady renders obvious claims 3–5.

E. Ground 5: lululemon Fails to Demonstrate That Sirmans And Kobayashi And Brady Render Obvious Claims 3–5

For the reasons discussed above with respect to Ground 3, lululemon fails to show a reasonable likelihood that Sirmans in view of Kobayashi renders obvious claims 1, 2, 7, 11, and 13. At least for the same reasons, lululemon fails to show with a reasonable likelihood that Sirmans in view of Kobayashi and Brady renders obvious claims 3–5.

VI. CONCLUSION

For the reasons set forth above, Nike respectfully requests that the Board deny institution of the Petition for all Challenged Claims of the '615 patent.

Dated: April 11, 2023

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

The undersigned certifies that this preliminary response complies with the type-volume limitations of 37 C.F.R. § 42.24(a)(1)(i). This preliminary response (including figure labels and annotations) contains 7,619 words as calculated by the “Word Count” feature of Microsoft Office 365 Word application, the word processing program used to create it, and manual counting of the annotations in the figures.

The undersigned further certifies that this preliminary response complies with the typeface requirements of 37 C.F.R. § 42.6(a)(2)(ii) and typestyle requirements of 37 C.F.R. § 42.6(a)(2)(iii). This preliminary response has been prepared in a proportionally spaced typeface using Microsoft Office 365 Word application in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR §§42.6(e)(4)(i) *et seq.* and 42.105(b), the undersigned
Certifies that on April 11, 2023, a true and entire copy of this **PRELIMINARY
RESPONSE OF PATENT OWNER NIKE, INC TO IPR2023-00349**, and all
supporting exhibits, were served via e-mail to the Petitioner by serving the
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