

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

PATENT OWNER RESPONSE UNDER 37 C.F.R. § 42.120

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EXHIBITS

Exhibit No.	Description
2001	Information Disclosure Statement dated February 28, 2014 in Application No. 14/194,191
2002	Declaration of Robert Stone, Ph.D.
2003	Deposition Transcript of Dr. Gregory S. Fischer

I. INTRODUCTION

Patent Owner Nike, Inc. (“Nike”) submits this Response to the Petition of lululemon athletica canada inc. and lululemon usa inc. (collectively “lululemon”) challenging the validity of claims 1–5, 7, 11, and 13 (the “Challenged Claims”) of U.S. Patent No. 9,259,615 (“the ’615 patent”) (Ex. 1001, “’615 patent”). lululemon has failed to demonstrate by a preponderance of the evidence that any claim of the ’615 patent is unpatentable.

The ’615 patent relates to a wearable system used to “record activity data, track goals, track milestones and other achievements” of a user. ’615 patent, 1:23–26, 2:42–49. The claims of the ’615 patent recite rewarding the user for achieving activity “streaks.” *See id.*, 80:34–37. An activity streak “may include the completion of multiple goals corresponding to multiple consecutive goal time periods.” *Id.*, 57:4–9.

lululemon presents five grounds against the Challenged Claims. Ground 1 is based on anticipation by Hoffman (Ex. 1002). Grounds 2–5 assert obviousness based on Kobayashi (Ex. 1005) in combination with other references. *Id.*, 43, 56, 74. In Ground 2, lululemon asserts the Challenged Claims are obvious by Stivorice (Ex. 1003) in view of Kobayashi. Petition, 43. In Ground 3, lululemon asserts the Challenged Claims are obvious by Sirmans (Ex. 1004) in view of Kobayashi. Petition, 56. In Grounds 4 and 5, lululemon asserts that Claims 3–5 are rendered

obvious by Stivoric or Sirmans in view of Kobayashi and Brady (Ex. 1021). Petition, 74.

lululemon cannot prevail on Ground 1 because—as the Board observed in its Institution Decision (“DI”)—lululemon’s barebones, two-sentence argument for limitations 1[D]/11[D] is insufficient on its face. *See* DI, 30–31 (finding that lululemon “does not cite to any expert testimony or other evidence showing how or why the cited statements in Hoffman allegedly disclose [these] limitation[s].”) For this reason, and several others, lululemon cannot show that the Hoffman reference anticipates any of the Challenged Claims.

lululemon cannot prevail on Grounds 2–5 because none of the references in those grounds disclose “receiving an activity time period,” as recited in limitations 1[B]/11[B] and properly construed. The Board suggested it would be beneficial for the parties to provide an express construction of “receiving an activity time period.” For the reasons Nike explains below, “receiving an activity time period,” when read in the context of the ’615 patent, must mean receiving an activity time period from a user, during a goal setting operation. Under that proper construction, Grounds 3 and 5 fail because Sirmans does not teach or suggest receiving an activity time period “from a user.” Likewise, Grounds 2 and 4 fail because Stivoric does not teach or suggest receiving an activity time period “during a goal setting operation.” Grounds 2 and 4 also fail because—as the Board already observed—lululemon fails

to “explain sufficiently how its cited disclosure in Stivoric satisfies limitation 1[B].” DI, 35–36. lululemon has also not shown that any of the prior art references, alone or in combination, teach the dependent claims.

For at least these reasons, lululemon has not carried its burden of proving by a preponderance of the evidence that any Challenged Claim of the ’615 patent is unpatentable.

II. TECHNICAL BACKGROUND

A. The ’615 Patent

The ’615 patent is directed to “athletic performance monitoring and tracking” using “a wearable device.” ’615 patent, 2:21–24. The wearable device includes an accelerometer, heart-rate monitor, or other types of sensors that receive “athletic performance data” like speed, distance, and energy expenditure such as heart rate and sweat detection.” *Id.*, 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.*, 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.*, 2:42–47; 57:3–4.

The ’615 patent describes that a user may customize activity goals to be monitored over a “goal time period”—i.e., “such as a day, an hour, a week, a month or the like” —or by “defin[ing] his or her own goal time period.” *Id.*, 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.*, 51:20–25; *see also id.*, 51:38–42. 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.*, 55:66–56:64, Figs. 96C, 97C.

In addition to providing feedback about a user’s activity in a single goal time period, the tracking application may provide feedback for a number of multiple goal time periods. The tracking application may track “activity streaks,” which “include the completion of multiple goals corresponding to multiple consecutive goal time periods.” *Id.*, 56:65–57:9. 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.*, 57:14–18. The ’615 patent further describes that a user may modify a goal or set an additional goal. *Id.*, 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 1¹ is reproduced below with limitations 1[A]–1[E] identified:

A method, comprising:

- 1[A] receiving athletic activity data from a device configured to be worn by a user;
- 1[B] receiving an activity time period;
- 1[C] receiving a first activity goal for the activity time period;
- 1[D] 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
- 1[E] 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., 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* Ex. 1002, [0055], [0123]. Hoffman’s device includes “a sensor for measuring parameters relating to the person being monitored.” *Id.*, [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.*

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

Hoffman’s lengthy disclosure is dedicated to the setting and monitoring of *individual* goals. *Id.* Hoffman never discusses the concept of monitoring “streaks” of goals.

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.*, [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.*, [0123]–[0128].

Hoffman further explains that progress in excess of a goal may “roll over” and count toward the next goal object. *Id.*, [0184]. As a result of completing goals, Hoffman describes that the user may receive stamps, trophies, or medallions. *See id.*, [0212].

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

Stivorice relates to an apparatus “for tracking caloric consumption and caloric expenditure data” for “individuals interested in a healthier lifestyle.” Ex. 1003, Abstract, [0004]. The specification of Stivorice was before the Examiner during

prosecution of the application resulting in the '615 patent.² *See* Ex. 2001, 2. The apparatus may include sensors for collecting physiological data and other parameters. Ex. 1003, [0002], [0009]. 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.*

Stivorice's apparatus optionally includes a data input and output device (“I/O device”). *Id.*, [0002]. Stivorice's display interface may summarize a daily caloric expenditure target versus actual calories burned for the day. *Id.*, [0113], [0197]. A user has the option to view his or her caloric progress and/or history over a daily, weekly, or monthly goal period. *Id.*, [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, 13 (citing Ex. 1003, [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, [0218]. In this embodiment, the I/O device 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

² The Examiner considered US Patent Publication No. 2014/0206955, a continuation application of Stivorice with the same specification.

Stivoric's specification. Stivoric also never discloses that its device receives an activity time period from a user during a goal setting operation.

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 by rewarding member performance with incentives like gift certificates and financial reimbursements for the costs of health/well-being activities. *Id.*, [0013]–[0014], [0020], [0030]. In one embodiment, a monitoring device tracks the individual's efforts to perform health promoting measures (such as yoga classes and alcohol-ending courses) and exercise regimes (such as weight training or aerobic exercise like swimming). *Id.*, [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, [0001]. When a user reaches a certain number of health points, he or she may "purchase" products and/or services. *Id.* In one embodiment, Kobayashi discloses a user-worn pedometer as an exemplary health device. *Id.*, [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, 17 (citing Ex. 1021, 5:16–41, 6:1–13).

III. LEGAL STANDARDS

A. Anticipation

Anticipation under 35 U.S.C. § 102 requires evidence “that a single prior art reference discloses each and every element of a claimed invention.” *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 607 F.3d 784, 796 (Fed. Cir. 2010). Furthermore, a single embodiment must disclose each and every element of the challenged claim. Disclosures from multiple, distinct embodiments of a prior art reference cannot be combined to anticipate the challenged claim. *Net MoneyIN, Inc. v. Verisign, Inc.*, 545 F.3d 1359, 1371 (Fed. Cir. 2008). To be anticipatory, a reference must not only explicitly or inherently disclose every claimed feature, but those features must also be “arranged as required by the claim.” *Id.*, 1369–71. A claim feature is only inherent if it is necessarily present. *Trintec Indus., Inc. v. Top-U.S.A. Corp.*, 295 F.3d 1292, 1295 (Fed. Cir. 2002) (“Inherent anticipation requires that the missing descriptive material is ‘necessarily present,’ not merely probably or possibly present, in the prior art.”). When a claim feature is only possibly, but not necessarily, present, it is not inherent in the prior art reference. *Id.*; *Allergan, Inc. v. Apotex Inc.*, 754 F.3d 952, 961 (Fed. Cir. 2014) (finding no inherent anticipation where something

“may” happen). “[D]ifferences between the prior art reference and a claimed invention, however slight, invoke the question of obviousness, not anticipation.” *Net MoneyIN*, 545 F.3d at 1371.

B. Obviousness

Obviousness under 35 U.S.C. § 103(a) requires 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 POSITA. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). An obviousness determination must be based on four factual inquiries: (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the art; and (4) objective indicia of nonobviousness. *Id.* (citing *Graham v. John Deere Co. Kan. City*, 383 U.S. 1, 17-18 (1996)). A party alleging obviousness is “required to place themselves in the minds of those of ordinary skill in the relevant art at the time the invention was made, to determine whether that which is now plainly at hand would have been obvious at such earlier time.” *Millennium Pharms., Inc. v. Sandoz Inc.*, 862 F.3d 1356, 1367 (Fed. Cir. 2017) (citation omitted).

A determination of obviousness “cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR*, 550 U.S. at 418

(“[I]t can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.”); *see also Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1342 (Fed. Cir. 2020) (affirming Board’s finding of nonobviousness where petitioner’s contentions were “based on attorney argument rather than evidence in the record”). In addition to motivation to combine, lululemon must show a reasonable expectation of success in making a prior art combination. *See Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016).

IV. LEVEL OF ORDINARY SKILL IN THE ART

For purposes of this Response, Nike does not dispute lululemon’s proposed level of skill in the art. Petition, 18.

V. CLAIM CONSTRUCTION

In its Institution Decision, the Board signaled that it would benefit from an express construction of limitations 1[B]/11[B]—“receiving an activity time period.” DI, 19, 35–36. Nike does so below.

Nike contends that all terms and phrases in the ’615 patent, including limitations 1[B]/11[B], should be given their ordinary and customary meaning. Nike submits that the ordinary and customary meaning of “receiving an activity time period” is “receiving an activity time period from a user during a goal setting

operation.” See Ex. 2002, ¶¶32–35. lululemon’s expert, Dr. Fischer, agrees. He opined that, in the system claimed in the ’615 patent, the “user sets an activity goal ... during a specific activity or goal time period.” Ex. 1006, ¶40; see also Petition, 4; Ex. 2002, ¶35. This construction is also consistent with and supported by the intrinsic record of the ’615 patent. *Lexion Med., LLC v. Northgate Techs., Inc.*, 641 F.3d 1352, 1354 (Fed. Cir. 2011) (“The ordinary and customary meaning of each term should not be determined in a vacuum but should instead be harmonized, to the extent possible, with the intrinsic record, as understood within the technological field of the invention.”) (internal quotations omitted); *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (“The construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.”).

Nike’s construction is proper because a POSITA reading the claims in light of the ’615 patent specification would have understood that the activity time period was received from a user as the user set his or her goal(s). Ex. 2002, ¶33. For example, the ’615 patent discloses that a “daily goal” may be set during registration of the wearable device. ’615 patent, 46:61–63. In that case, a user—when setting up the device—chooses a goal to accomplish over the course of a day. *Id.*, 46:55–63. The specification further discloses that a “user may select a goal setting option” corresponding to “a specified amount of time such as a day, an hour, a week, a month

or the like,” or “alternatively, the user may define his or her own goal time period.” *Id.*, 51:1–8. This passage confirms that a user not only selects or defines a goal time period, but that he or she does so in the course of goal setting. Ex. 2002, ¶33. Once a user chooses a goal and a goal time period, “the user may save the goal” and the “goal may then be set for the goal time period.” *Id.*, 51:38–48. The goal time period “may start immediately or may start at a future time.” *Id.*; *see also id.*, 51:61–66, 54:12–20. This makes clear that the user first enters a goal related to the activity time period and then at some future point, e.g., “immediately” after setting the goal, a day later or “at a future time,” or even by “detecting a triggering event” in the future, the “activity may be tracked based on a specified goal.” *Id.*, 51:49–52. Therefore, a goal period—and the goal for that goal period—are first selected and set, and only then (or later) may the goal time period begin to run. Ex. 2002, ¶34.

VI. GROUND 1: LULULEMON FAILS TO DEMONSTRATE THAT HOFFMAN ANTICIPATES CLAIMS 1–5, 7, 11, and 13

lululemon fails to show that Hoffman anticipates independent claims 1 or 11.³ The Board appeared to agree with this conclusion. In its Institution Decision, the Board was not persuaded by lululemon’s two-sentence argument pertaining to limitation 1[D]. DI, 30–31. Limitation 1[D] recites “determining, at a processor,

³ Claim 11 is substantially identical to claim 1. For purposes of brevity, this Response will primarily address claims 1. Unless otherwise noted, all discussion related to claim 1 should be understood as applying equivalently to claim 11.

whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity periods.” The Board opined that the “few words from Hoffman (i.e., ‘3 goals in 3 consecutive days’)” upon which lululemon relies “do not appear to explicitly or inherently disclose the features of the subject limitation.” *Id.* The Board’s analysis is correct. That disclosure in Hoffman simply describes a user completing three goals over a single period of time: three consecutive days. 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. For this reason alone, lululemon fails to meet its burden to show by a preponderance of the evidence that Hoffman anticipates any Challenged Claim of the ’615 patent.

lululemon also fails to show that Hoffman anticipates the dependent claims. Specifically, lululemon fails to show that Hoffman discloses “receiving a second activity goal for the activity time period” (claim 7), or “determin[ing] whether the received athletic activity data exceeds the activity goal for a greater number of consecutive activity time periods than the predetermined number of consecutive activity time periods” (claim 13). Dr. Fischer provides no opinions for Ground 1.

A. Hoffman does not disclose “determining [at a processor /] whether the received athletic activity data exceeds the [first /] activity goal for a predetermined number of consecutive activity time periods” (Limitations 1[D]/11[D])

lululemon fails to show by a preponderance of the evidence that Hoffman discloses limitations 1[D] and 11[D]. Limitation 1[D] 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.” ’615 patent, 80:30–32. Limitation 11[D] recites a practically identical limitation. *Id.*, 81:16–18. The step recited in limitations 1D and 11D determines whether the user has completed a "streak." According to the ’615 patent specification, “streaks may include 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.” ’615 patent, 57:3–9.

The Board acknowledged several deficiencies in lululemon’s argument that Hoffman disclosed limitations 1[D] and 11[D]. The Board first highlighted the barebones and conclusory nature of lululemon’s analysis (DI, 30–31), which consists of two sentences in its entirety:

Hoffman discloses that its computing unit recognizes when a user has completed “3 goals in 3 consecutive days.” ([Ex. 1002] at [0198].) In this example, completing three goals exceeds a first activity goal, and three consecutive days

constitute the predetermined number of consecutive active time periods.

Petition, 28. The Board also found lululemon’s argument substantively deficient. The Board observed that Hoffman “do[es] not appear to explicitly or inherently disclose the features of the subject limitation.” DI, 31. The Board was correct, for three independent reasons.

First, lululemon’s assertions as to limitation 1[D] are inconsistent with its assertions for limitation 1[B]. These two claim terms are related: the “consecutive activity time periods” recited in limitation 1[D] refers to the same “activity time period” recited in limitation 1[B]. *Id.*, 27:10–12, 28:1–4, 51:2–4, 56:1–2, 56:65–57:2.

When arguing that Hoffman discloses limitation 1[B]—i.e., “receiving an activity time period”—lululemon identifies only one embodiment in Hoffman where the system “receives” an “activity time period.” Petition, 23 (citing Ex. 1002, [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 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 1[B].⁴ *Id.*

But when arguing that Hoffman discloses limitation 1[D], lululemon points to a different, unrelated embodiment. Specifically, lululemon points to Hoffman’s disclosure of awarding “badges” to the user. *Compare* Petition, 23 (citing Ex. 1002, [0009], [0161], [0211]), with *id.*, 27–28 (citing Ex. 1002, [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 grounds of invalidity. *See Sherwin-Williams Co. v. PPG Indus., Inc.*, No. CV 17-1023, 2021 WL 5648019, at *4 (W.D. Pa. Dec. 1, 2021).

Second, lululemon’s argument is meritless because the Hoffman system does not award badges for completing goals over multiple, consecutive activity time periods. Hoffman only discloses awarding badges when the user meets a goal for a single, pre-determined period of time. Ex. 1002, [0198]. lululemon points to

⁴ 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, as properly construed in Section V above. *See* Petition, 23 (citing Hoffman, [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 his or her 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.*

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, 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, [0198]. That disclosure does not describe determining whether a user “exceeds the activity goal for a predetermined number of consecutive activity 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 activity time periods.” lululemon's arguments fail for this reason alone.

Third, lululemon fails to show that Hoffman’s system determines whether received activity data *exceeds* the activity goal for a predetermined number of activity time periods. In addressing this limitation, lululemon continues to improperly mix and match embodiments of Hoffman, pointing to yet another disparate embodiment for this limitation. Petition, 27–28 (citing Ex. 1002, [0184]). lululemon points to paragraph 184 of Hoffman, which discloses that once a user

meets a goal, any surplus activity will rolled-over and applied to the *next* goal. Ex. 1002, [0184] (“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.”) (emphasis added). lululemon then points to paragraph 198, discussed above in this section, which discloses awarding badges. The embodiment of paragraph 184 is unrelated to the embodiment of paragraph 198. Hoffman’s discussion of badges is silent to determining whether activity data exceeds a user’s activity goal. This improper mixing and matching of embodiments alone dooms lululemon’s anticipation Ground 1. *Sherwin-Williams*, 2021 WL 5648019, at *4 (holding that a party asserting anticipation must show that the reference teaches all of the claimed limitations “arranged as in the claim”).

Thus, lululemon has not shown by a preponderance of the evidence that Hoffman anticipates any Challenged Claim in Ground 1.

B. Hoffman does not disclose “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” (Limitations 1[E]/11[E])

lululemon fails to show by a preponderance of the evidence that Hoffman discloses limitation 1[E], which 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.” ’615 patent, 80:34–37. Limitation

11[E] recites a practically identical limitation. *Id.*, 81:19–22. In simple terms, these limitations recite that a user is presented with a streak reward if he or she achieves the streak recited in limitations 1[D]/11[D].

lululemon fails to adequately show that Hoffman discloses this limitation. As discussed above with respect to limitations 1[D]/11[D], 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, 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.”

Thus, lululemon has not shown by a preponderance of the evidence that Hoffman anticipates any Challenged Claim in Ground 1.

C. Hoffman does not disclose “receiving a second activity goal for the activity time period” (Claim 7)

Claim 7 recites “receiving a second activity goal for the activity time period.” Hoffman does not disclose this limitation.

For limitation 1[B], as discussed above in Section VI.A, lululemon identifies only one embodiment in Hoffman where the system “receives” an “activity time

period.” Petition, 23 (citing Ex. 1002, [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 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 1[B]. *Id.*

Claim 7 recites receiving a second activity goal for the *same* activity time period as the activity time period recited in limitation 1[B]. lululemon points to no disclosures in Hoffman that show receipt of a second activity goal for that same activity time period. Instead, lululemon points to other unrelated embodiments from Hoffman discussing “series of goals” which may be “presented to the user for completion” in a specified order. Petition, 40–41 (citing Ex. 1002, [0190], [0195]). But these goals are not undertaken simultaneously during the same activity time period, they are introduced to the user progressively. Moreover, lululemon makes no effort to explain how or why it combines multiple separate embodiments from Hoffman to reach this claim. *See Sherwin-Williams*, 2021 WL 5648019, at *4.

lululemon points to yet one more embodiment from Hoffman, Figure 21C, which shows “element 2175 that allows the user to switch between” the number of steps taken and the number of calories burned during a week. *Id.* (citing Ex. 1002,

[0165]). But this embodiment similarly does not teach a “receiv[ed]” “activity time period,” as properly construed.

Thus, lululemon fails to show by a preponderance of the evidence that Hoffman discloses the additional limitation of claim 7.

D. Hoffman does not disclose “determin[ing] whether the received athletic activity data exceeds the activity goal for a greater number of consecutive activity time periods than the predetermined number of consecutive activity time periods” (Claim 13)

Claim 13 recites “determin[ing] whether the received athletic activity data exceeds the activity goal for a greater number of consecutive activity time periods than the predetermined number of consecutive activity time periods.” ’615 patent, 82:10–15. Hoffman fails to disclose this limitation for the same reasons that it fails to disclose limitation 11[D] discussed above in Section VI.A. More specifically, for the same reasons that Hoffman does not teach “determining ... whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods,” it also does not teach making that determination for “a greater number of consecutive activity time periods.”

Thus, lululemon fails to show by a preponderance of the evidence that Hoffman discloses the additional limitation of claim 13.

VII. GROUND 2: LULULEMON FAILS TO DEMONSTRATE THAT THE COMBINATION OF STIVORIC AND KOBAYASHI RENDERS OBVIOUS CLAIMS 1–5, 7, 11, and 13

lululemon has not shown that the proposed combination of Stivorice and Kobayashi teaches or suggests several features of the Challenged Claims. lululemon's argument for the proposed combination fails for three reasons. First, the combination of Stivorice and Kobayashi fails to teach or suggest "receiving an activity time period," as recited in limitations 1[B]/11[B], because neither reference teaches or suggests receiving a time period from a user "during a goal setting operation." *See supra*, §V. Dr. Fischer confirmed during his deposition that he has not offered any opinions on this point. *See, e.g.*, Ex. 2003, 96:8–20. Second, the proposed combination fails to teach or suggest a system that determines "whether the received athletic activity data exceeds the [first] activity goal for a predetermined number of consecutive activity time periods," as recited in limitations 1[D]/11[D]. Third, lululemon fails to show that the combination of Stivorice and Kobayashi teaches or suggests "receiving a second activity goal for the activity time period," as recited in dependent claim 7.

For at least these reasons, lululemon fails to show by a preponderance of the evidence that the combination of Stivorice and Kobayashi renders obvious any Challenged Claim of the '615 patent.

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

lululemon has not shown by a preponderance of the evidence that the Stivoric-Kobayashi combination teaches or suggests “receiving an activity time period,” as recited in limitations 1[B]/11[B]. ’615 patent, 80:28, 81:14. lululemon relies solely on Stivoric for this limitation. Petition, 44–45. The Board found three deficiencies in lululemon's argument that Stivoric teaches limitation 1[B]. First, the Board found that lululemon failed to “explain sufficiently” how Stivoric satisfies limitation 1[B]. DI, 36. Second, the Board observed that Stivoric “does not teach or suggest ‘receiving’ from a user an ‘activity time period’ for use in actively (i.e., in a forward-looking manner) measuring” whether received activity data exceeds a first activity goal. DI, 35. Third, the Board indicated that Stivoric fails to teach or suggest “when” the activity time period is received. *Id.* The Board is correct. All of these issues undermine lululemon’s Ground 2 argument for limitations 1[B]/11[B].

Stivoric does not teach or suggest “receiving” an activity time period for use in actively measuring whether the received activity data exceeds a first activity goal for that received activity time period. Ex. 2002, ¶42. Although a user of Stivoric’s system may rotate a dial or press a button to view past progress towards a goal, the user is only able to *retroactively* view his or her caloric expenditure achievement for either the current day, week, or month. Ex. 1003, [0197]–[0198]. In other words,

the Stivoric 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) and a user may “toggle” between “the various time periods within each [goal], by rotating dial 1220.” *Id.*, [0197]; *see also* Ex. 2003, 86:19–88:15, 91:4–10. Therefore, all of Stivoric’s activity time periods are preset and displayed regardless of whether the activity time period is received. *See e.g.*, Ex. 1003, Figs. 43A–C; Ex. 2002, ¶43.

Stivoric also does not teach or suggest that a user selects or defines an activity time period “when” setting an activity goal, i.e., during a goal setting operation. *See supra*, §V. lululemon points to Stivoric’s disclosure of an “I/O device” that “receive[s] activity time periods, such as ‘a day, a week or a month.’” *Id.*, 44 (citing Ex. 1003, [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.* However, lululemon glosses over “when” the user makes this selection. Stivoric discloses that “calories burned by the individual over specific time periods such as a day, a week or a month” may be “compar[ed] to a predetermined goal.” Ex. 1003, [0197]. A user is not able to customize, in a forward-looking manner “at the time of setting a goal,” an activity time period for a particular goal. Ex. 2002, ¶44.

The testimony of lululemon's expert, Dr. Fischer, does not cure the deficiencies in lululemon's arguments. Dr. Fischer opines that Stivoric teaches “a

comparison to a predetermined goal” when arguing that “a POSITA would understand that this workout history data is readily available for analysis” to determine the status of meeting goals. Ex. 1006, ¶52. Dr. Fischer’s opinion supports the finding that Stivorik only uses its pre-established time periods (i.e., day, week, month) to analyze a predetermined goal. Ex. 2002, ¶45. This also supports that a goal is set in Stivorik apart from setting an activity time period. *Id.* Dr. Fischer also opines that “*any*” reasonable activity time period could be set, and a common activity time period would be “per day.” Ex. 1006, ¶57 (emphasis added). That opinion contradicts the express disclosure of Stivorik, which may show past workout data to the user over a day, a week, or a month period. Ex. 1003, [0197]; Ex. 2002, ¶46. Dr. Fischer also testified that he has not offered any opinions about whether a user enters an activity time period before undertaking a goal. *See, e.g.*, Ex. 2003, 96:8–20.

Thus, lululemon has not shown by a preponderance of the evidence that Stivorik in view of Kobayashi renders obvious any Challenged Claim in Ground 2.

B. 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” (Limitations 1[D]/11[D])

lululemon has not shown by a preponderance of the evidence 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,” as recited in limitation 1[D]. ’615 patent, 80:30–32. Limitation 11[D] recites a practically identical limitation. *Id.*, 81:16–18.

lululemon relies on Stivorice for determining whether the received activity data “exceeds the first activity goal.” Petition, 46. lululemon then relies on Kobayashi for teaching whether the goal has been exceeded “for a predetermined number of consecutive activity time periods.” Petition, 47. But lululemon fails to explain how Kobayashi’s teachings of determining whether a goal has been exceeded for a predetermined number of consecutive activity time periods would have been combined with Stivorice to reach this limitation.

The disclosures that lululemon relies on in Stivorice would not have been readily combinable with Kobayashi’s teachings of rewarding meeting a goal for a predetermined number of consecutive activity time periods. Specifically, lululemon points to “processing unit 1300 of I/O device 1200” in Stivorice as determining whether the activity time period meets a first activity goal. Petition, 46. As shown in Figures 43A–C of Stivorice, I/O device 1200 includes hardware that allows a user to toggle between user performance data for three “activity time periods”: day, week, or month. Ex. 1003, [0197]; Ex. 2002, ¶49. Stivorice’s I/O device does not allow a user to see his or her performance for multiple activity time periods, i.e., two or more

days, weeks, or months. Even if Kobayashi teaches determining whether a user has met a goal for a predetermined number of consecutive activity time periods, lululemon has not explained how those teachings would be implemented in Stivoric's I/O device. lululemon merely states that "it would have been a simple modification" to implement Kobayashi's teachings that would have taken "nothing more than basic programming skills." Petition, 47. Dr. Fischer's declaration does no more than parrot this point. Ex. 1006, ¶115. Both lululemon and Dr. Fischer overlook that changing the actual hardware of Stivoric's device could not be resolved by "basic programming skills." Ex. 2002, ¶49. Thus, lululemon has not shown that a POSITA would have had a reasonable expectation of success in making this combination. *See Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016).

Thus, lululemon has not shown by a preponderance of the evidence that Stivoric in view of Kobayashi renders obvious any Challenged Claim in Ground 2.

C. lululemon Fails To Show That the Stivoric-Kobayashi Combination Teaches or Suggests "receiving a second activity goal for the activity time period" (Claim 7)

lululemon has not shown by a preponderance of the evidence that the Stivoric-Kobayashi combination teaches or suggests "receiving a second activity goal for the activity time period," as recited in dependent claim 7. '615 patent, 80:58–59. lululemon relies on Stivoric for "receiving a second activity goal for the activity time

period,” and on the Stivorik-Kobayashi combination for determining whether the user exceeds the second activity goal. Petition, 54.

lululemon argues that because Stivorik teaches a device that tracks “dozens of ‘specific personal characteristics’” and “well known parameters,” “[a] POSITA would have found it obvious to add the ability to set and track goals for any of these parameters.” *Id.*, 54–55. lululemon’s proposed combination fails for two reasons. First, Stivorik does not teach or suggest “receiving” from a user an “activity time period,” as explained above in Section VII.A. Ex. 2002, ¶52. Second, Stivorik does not teach or suggest a “second activity goal” undertaken during the same time period as any other goal. *Id.*, ¶53.

To the second point, in its Petition, lululemon cites Stivorik’s paragraph 218 for the proposition that its device “can be used with any ‘set of goals that may be established [] by the user or a third party.’” Petition, 54. This paragraph is devoid of any mention of an activity time period, and whether multiple goals are attempted during the same time period. lululemon then points to paragraph 227 of Stivorik that describes taking various measurements relating to a user of its device, and computing algorithms based on those measurements. *Id.*, 54 (citing Ex. 1003, [0227]). Not only does this passage not relate to a user’s goal(s), it also does not mention an activity time period, or whether multiple goals are attempted during the same time period. Ex. 2002, ¶53.

Thus, lululemon fails to show by a preponderance of the evidence that the Stivoric in view of Kobayashi teaches or suggests the additional limitation of claim 7.

VIII. GROUND 3: LULULEMON FAILS TO DEMONSTRATE THAT THE COMBINATION OF SIRMANS AND KOBAYASHI RENDERS OBVIOUS CLAIMS 1–5, 7, 11 and 13

lululemon has not shown that the proposed combination of Sirmans and Kobayashi teaches or suggests several features of the Challenged Claims. As to independent claims 1 and 11, the combination of Sirmans and Kobayashi fails to teach or suggest “receiving an activity time period,” as recited by limitations 1[B]/11[B] and properly construed (*see* Section V above). Dr. Fischer was unable to point to any express disclosure in Sirmans showing that a user of Sirmans’ system establishes the “protocol criteria.” *See, e.g.*, Ex. 2006, 64:7–23. As to dependent claim 3, lululemon fails to show that the combination of Sirmans and Kobayashi teaches or suggests a system includes “a wrist-worn monitoring device.” As to claim 7, lululemon fails to show that the combination of Sirmans and Kobayashi teaches or suggests “receiving a second activity goal for the activity time period.”

For at least these reasons, lululemon fails to show by a preponderance of the evidence that the combination of Sirmans and Kobayashi renders obvious any Challenged Claim of the ’615 patent.

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

lululemon has not shown by a preponderance of the evidence that the Sirmans-Kobayashi combination teaches or suggests “receiving an activity time period,” as recited in limitations 1[B]/11[B] and properly construed (*see* Section V above). lululemon relies solely on the teachings in Sirmans to meet limitations 1[B]/11[B]. Petition, 58–59.

Sirmans does not disclose an activity time period received from a user. *See* Petition, 58–60. lululemon's expert, Dr. Fischer, agrees. Ex. 2003, 64:7–23 (testifying only that Sirmans does not “preclude[] the user” from establishing an activity time period); *see also* Ex. 2003, 66:6–67:2. Instead, Sirmans' activity time period is received from a third party entity. In Sirmans, a “gatekeeper,” such as an insurance provider, sets a “protocol criteria” for the user. Ex. 1004, [0032]. The gatekeeper “profiles, tracks, and stratifies the recorded data into a performance model.” *Id.* lululemon points to Sirmans' embodiment that discloses a protocol criteria where “the member will be asked to perform the Center for Disease Control recommended levels of exercise.” Petition, 59–60 (citing Ex. 1004, [0084]); *see also* Ex. 1005, [0003], [0004], [0059]; Ex. 2002, ¶57. The third-party-implemented exercise regimen in Sirmans does not teach receiving an activity time period from a user. Ex. 2002, ¶57.

Thus, lululemon has not shown by a preponderance of the evidence that Sirmans in view of Kobayashi renders obvious any Challenged Claim in Ground 3.

B. lululemon Fails To Show That the Sirmans-Kobayashi Combination Teaches or Suggests “a wrist-worn monitoring device” (Claim 3)

lululemon has not shown by a preponderance of the evidence that the Sirmans-Kobayashi combination teaches or suggests “a wrist-worn monitoring device,” as recited in dependent claim 3.

Sirmans discloses “exercise/activity monitors” that “are worn by members.” Ex. 1004, Abstract; *see also id.*, [0036], [0045] (“A central computer of the invention, records and processes data provided by the monitoring device and/or exercise machine *worn by the user*” and “[s]uch exercise machines can be used in accordance with the subject invention to communicate directly with a central computer or by synchronizing data to the *member worn monitoring device*.”) (emphases added). But Sirmans simply does not teach or suggest that a monitor is worn on the wrist, as recited by claim 3 of the ’615 patent. Dr. Fischer was unable to point to any disclosure in the Sirmans reference showing a wrist-worn device. *See* Ex. 2003, 81:3–19 (referring to patents not incorporated by reference as disclosing a wrist-worn device).

Thus, lululemon fails to show by a preponderance of the evidence that the Sirmans in view of Kobayashi teaches or suggests the additional limitation of claim 3.

C. lululemon Fails To Show That the Sirmans-Kobayashi Combination Teaches or Suggests “receiving a second activity goal for the activity time period” (Claim 7)

lululemon has not shown by a preponderance of the evidence that the Sirmans-Kobayashi combination teaches or suggests “receiving a second activity goal for the activity time period,” as recited in dependent claim 7.

As discussed above in Section VIII.A, Sirmans does not disclose “receiving an activity time period,” as recited in limitations 1[B]/11[B]. Ex. 2002, ¶59. For at least that reason, lululemon fails to show by a preponderance of the evidence that the Sirmans-Kobayashi combination teaches or suggests the additional limitation of claim 7, which recites receiving a “second activity goal” during the same “activity time period.”

IX. GROUND 4: LULULEMON FAILS TO DEMONSTRATE THAT STIVORIC AND KOBAYASHI AND BRADY RENDER OBVIOUS CLAIMS 3–5

For the reasons discussed above with respect to Ground 2, lululemon fails to show that Stivorice in view of Kobayashi renders obvious independent claim 1. At least for the same reasons, lululemon fails to show that Stivorice in view of Kobayashi and Brady renders obvious claims 3–5, which depend from independent

claim 1. Ex. 2002, ¶61.

X. 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 that Sirmans in view of Kobayashi renders obvious independent claim 1. At least for the same reasons, lululemon fails to show that Sirmans in view of Kobayashi and Brady renders obvious claims 3–5, which depend from independent claim 1. Ex. 2002, ¶61.

XI. CONCLUSION

lululemon has failed to prove by a preponderance of the evidence that any of claims 1–5, 7, 11, and 13 of the '615 patent are unpatentable. Nike requests that the Board enter a final written decision affirming the patentability of those claims.

Dated: September 22, 2023

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CERTIFICATE OF WORD COUNT

Under the provisions of 37 C.F.R. § 42.24(d), the undersigned hereby certifies that the Microsoft Office word count including all footnotes for the foregoing Patent Owner's Response, excluding the table of contents, table of authorities, certificate of word count, appendix and certificate of service, totals 7,751 words, which is less than the 14,000 words allowed under 37 C.F.R. § 42.24(b)(1).

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on September 22, 2023, I caused a true and correct copy of **PATENT OWNER'S RESPONSE** to be served by electronic mail on Petitioners' counsel at the following email addresses:

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