

VOLUME: I
PAGES: 1-109
EXHIBITS: 1-7

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

IPR No. 2023-00349

Patent 9,259,615

LULULEMON ATHLETICA CANADA, INC.)
and LULULEMON USA, INC.,)
 Petitioner,)
 vs.)
NIKE, INC.,)
 Patent Owner.)
-----)

VIDEOTAPED DEPOSITION OF GREGORY
S. FISCHER, PhD, called as a witness by and on
behalf of the Patent Owner, pursuant to the
applicable provisions of the United States patent
Office Patent Trial and Appeal Board, before P.
Jodi Ohnemus, RPR, RMR, CRR, CA-CSR #13192, NH-LSR
#91, MA-CSR #123193, and Notary Public, within and
for the Commonwealth of Massachusetts, at Morrison
Foerster, 200 Clarendon Street, Boston,
Massachusetts, on Monday, 18 September, 2023,
commencing at 9:12 a.m.

lululemon v. NIKE, Inc.
IPR2023-00349
Patent No. 9,259,615
Ex. 2003

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I N D E X

TESTIMONY OF:	PAGE
GREGORY S. FISCHER, PhD,	
(By Mr. Bowling)	7

E X H I B I T S

EXHIBIT	DESCRIPTION	PAGE
Exhibit 1	Deposition Notice	8
Exhibit 2	Patent 9,259,615	11
Exhibit 3	Declaration of Gregory S. Fischer, PhD	9
Exhibit 4	table of contents to Declaration of Gregory S. Fischer, PhD, single-sided	11
Exhibit 5	Declaration of Gregory S. Fischer, PhD, single sided	11
Exhibit 6	Patent Application Publication, US 2006/0111944 A1	22
Exhibit 7	Patent Application Publication 2004/0152957	83

1 VIDEO OPERATOR: We are on the record.
2 This is the videographer speaking, Shawn Budd, with
3 Veritext Legal Solutions. Today's date is
4 September 18th, 2023; time is 9:13 a.m. We are
5 here in Boston, Massachusetts, to take the video
6 deposition of Dr. Gregory S. Fischer in the matter
7 of Lululemon Athletica Canada, Inc., versus Nike,
8 Inc.

9 Would counsel please introduce themselves
10 for the record.

11 MR. BOWLING: Aaron Bowling of Arnold &
12 Porter on behalf of Nike; and with me is Lindsey
13 Staubach, also of Arnold & Porter.

14 MR. McCLELLLEN: My name is Forrest
15 McClellen from Morrison Foerster LLP. I'm here
16 with my colleague Mehran Arjomand, and we represent
17 Lululemon and, for the purposes of this deposition,
18 Doctor Fischer.

19 VIDEO OPERATOR: And will the court
20 reporter please swear in the witness.

21 GREGORY S. FISCHER, PhD, having
22 satisfactorily been identified by
23 the production of a driver's license,
24 and being first duly sworn by the Notary
25 Public, was examined and testified as

1 follows to interrogatories

2 BY MR. BOWLING:

3 Q. Good to see you again, Doctor Fischer.

4 A. Yes, for sure.

5 Q. Okay. So we're going to go through some
6 of the basics again. I know we just did this a
7 week ago, but refresh your memory a little bit.

8 So today we're going to be asking you a
9 series of questions. If there's anything that you
10 don't hear, let me know. I'm happy to repeat
11 myself. If there's anything that you don't
12 understand, same thing, let me know. I'll work
13 with you to figure out what it is you don't
14 understand.

15 A. Okay.

16 Q. But if you answer my question, I'm going
17 to assume that you heard me and you understood me
18 and that you're answering to the best of your
19 ability.

20 A. Okay. I understand.

21 Q. Sound good?

22 Today's deposition is going to be
23 transcribed. So if you could please give verbal
24 answers instead of head nods and things like that.

25 A. Yes, makes sense.

1 Q. Okay. We can take breaks whenever you
2 want. The only exception is that if I have a
3 question pending, I'll ask that you answer the
4 question and then we can take a break right after
5 that.

6 A. Okay.

7 Q. Okay?

8 MR. BOWLING: Okay. Okay. We'll start
9 with the -- do the '615 and declaration.

10 Q. Okay. Doctor Fischer, I'm handing you
11 what we've marked as Fischer Exhibit 1. This is
12 Paper 16.

13 (Exhibit 1, Deposition Notice.)

14 Q. This is Paper No. 16 in the 349 IPR
15 proceeding.

16 Do you recognize this document, Doctor
17 Fischer?

18 A. I don't believe I have seen this document
19 before.

20 Q. Okay. I can represent to you that this is
21 a -- a notice of today's deposition, September
22 18th, in case No. IPR 2023-349.

23 Do you understand that you're here
24 testifying on behalf of Lululemon today?

25 A. I know that I'm here to represent my

1 opinions in this case related to the '615 patent.

2 Q. Okay. And you understand that you're
3 under oath today?

4 A. Yes, I do.

5 Q. Any reason you can't testify truthfully
6 today?

7 A. Not that I'm aware of.

8 Q. Okay. I'm handing you what we've marked
9 as Fischer Exhibit 2. This is Exhibit 1001 in the
10 349 IPR proceeding.

11 (Exhibit 2, Patent 9,259,615.)

12 A. Yes, I see it.

13 Q. Do you recognize this document?

14 A. This appears to be what we've been
15 referring to as the '615 patent.

16 Q. Okay. I'm also handing you what we've
17 marked as Fischer Exhibit 3. This is Exhibit 1006
18 in the 349 IPR proceeding.

19 (Exhibit 3, Declaration of Gregory
20 S. Fischer, PhD.)

21 Q. Do you recognize this document, Doctor
22 Fischer?

23 A. This appears to be my declaration.

24 Q. I'm going to ask you to flip to page 116
25 of Fischer Exhibit 3, and let me know when you're

1 there.

2 A. (Witness reviews document.) When we're
3 talking about page numbers, we're referring to the
4 original page numbers on the document?

5 Q. I think they're one and the same for this
6 one.

7 A. Oh, actually they are. You're correct.

8 MR. McCLELLLEN: Before you dig in, just so
9 you know, Doctor Fischer has a clean single-sided
10 copy of his declaration and a clean single-sided
11 copy of table of contents for his declaration next
12 to him as well.

13 MR. BOWLING: Perfect.

14 Q. If you want to use those, Doctor Fischer,
15 we can go -- I know we used the table of contents
16 last time.

17 A. Yes.

18 Q. We can go ahead and mark that as an
19 exhibit. Would you prefer to use your copy of the
20 declaration? Or are you okay working with Fischer
21 Exhibit 3?

22 A. I think this one would be easiest since
23 it's not stapled together.

24 Q. Okay. We can go ahead and enter those as
25 Fischer Exhibits 4 and 5 respectively.

1 (Exhibit 4, Table of Contents to
2 Declaration of Gregory S. Fischer, PhD,
3 Single-sided.)

4 COURT REPORTER: 4 is the table of
5 contents?

6 MR. BOWLING: Yes. 4 will be the
7 single-sided table of contents.

8 And 5 will be Doctor Fischer's
9 single-sided copy of the declaration.

10 (Exhibit 5, Declaration of Gregory
11 S. Fischer, PhD, single sided.)

12 Q. As far as you're aware, Doctor Fischer,
13 aside from being single-sided, Fischer Exhibits 4
14 and 5 are identical to Fischer Exhibit 3?

15 A. I believe that we've labeled Fischer 5 as
16 the exact declaration verbatim that you provided as
17 Exhibit 3. And I believe Exhibit 4 is just the
18 table of contents.

19 Q. Okay.

20 A. Another copy of that.

21 Q. No differences you're aware of?

22 A. None that I'm aware of.

23 Q. Okay. So you want to work with Exhibit 5,
24 then?

25 A. I think that will probably be preferable,

1 yes.

2 Q. Okay. You can put away Exhibit 3.

3 Okay. So in Fischer Exhibit 5 I'm going
4 to ask you to turn to page 116.

5 A. Yes, I'm in it.

6 Q. Okay. There's a date there about
7 two-thirds of the way down the page, January 3rd,
8 2023, and then next to that there's a signature.

9 Do you see that?

10 A. Yes, I do.

11 Q. Is that your signature?

12 A. Yes, that is.

13 Q. Okay. And is January 3rd, 2023, the date
14 when you completed this declaration?

15 A. I believe that is the date that we -- that
16 I completed and signed off on the declaration.

17 Q. Okay. As you sit here today, are you
18 aware of any inaccuracies in your declaration?

19 A. I noticed some minor typographical errors
20 as I was reviewing the material but nothing that
21 changes my opinions.

22 Q. Okay. Anything specifically you recall?

23 A. I couldn't recall off the top of my head
24 exactly where they are, but if they come up during
25 our discussion, I'll be happy to point them out.

1 Q. Okay. Since January 3rd, 2023, have you
2 changed your opinion with respect to any of the
3 issues you discuss in your declaration?

4 A. No, the opinions expressed in my
5 declaration still represent my opinions today.

6 Q. I'm going to ask you to turn to page 24 of
7 Fischer Exhibit 5.

8 You can let me know when you're there.

9 A. You said page 24?

10 Q. Yes.

11 A. Yes, I'm there now.

12 Q. Okay. See at the top of the page it says
13 "Materials Considered"?

14 A. Yes, I see that heading.

15 Q. And underneath that, paragraph 18.

16 Do you see that?

17 A. Yes, I do.

18 Q. Paragraph 18 reads (as read):

19 "In performing my analysis in forming the
20 opinions below, I considered the '615 patent, its
21 prosecution history, the applications that it
22 incorporates by reference, and the materials listed
23 as exhibits to the petition in this IPR."

24 Do you see that?

25 A. I see that, yes.

1 Q. Is that list of materials in paragraph 18
2 a complete list of all the materials you considered
3 in forming your opinions in this proceeding?

4 A. I believe there is a list that I prepared
5 in my declaration of the materials that I
6 considered in forming these opinions.

7 Q. Okay. And where is that?

8 A. I believe I had a list of specific
9 documents in here, but the -- what I note in
10 paragraph 18 is, you know, correct and that
11 summarizes the materials that, to the best of my
12 understanding, I reviewed in preparing this
13 opinion.

14 Q. Okay. Are there any other materials that
15 you considered when forming your opinions in this
16 proceeding that you can think of that are not
17 listed in paragraph 18?

18 A. In terms of under -- providing an
19 understanding and background for the technology and
20 the state of the art at the time, I prepared a
21 background, which is included in my declaration,
22 which provides a number of additional citations.
23 They were not instrumental in forming or
24 identifying my opinions, but they were very helpful
25 for understanding what the current state of the art

1 was at the time of the invention.

2 Q. Okay. And all those materials are
3 specifically cited in the "Background" section?

4 A. I believe I cite it and a number of them
5 are included as exhibits.

6 Q. Aside from the materials listed in
7 paragraph 18 and the materials that you
8 specifically call out in the "Background," are you
9 aware of any other materials you considered when
10 forming your opinions in this proceeding?

11 A. I performed searches to identify prior art
12 references and literature and other products at the
13 time as I was preparing my declaration. I
14 couldn't, off the top of my head, as I sit here
15 today, identify any specific references beyond
16 what --

17 Q. How do you perform -- sorry.

18 A. -- beyond what I cite directly in my
19 declaration.

20 Q. How did you perform searches to identify
21 prior art references and literature?

22 MR. McCLELLLEN: Objection. Calls for
23 privilege and attorney work product.

24 Doctor Fischer, you can go ahead and
25 answer to the extent you're describing what you did

1 independently of your -- your contacts with
2 Morrison Foerster, but to the extent you were
3 performing searches at Morrison Foerster's
4 direction, you should not provide that information.

5 THE WITNESS: Okay.

6 A. To the best of my recollection, I
7 performed searches related to the technology and
8 the current state of the art of related technology
9 at the time of the invention -- or to the best that
10 I could identify that was at the time of the
11 invention -- to provide some context and to
12 identify potential references that would be helpful
13 in forming my opinion.

14 Q. Okay. And how did you perform those
15 searches?

16 MR. McCLELLLEN: Objection. Same
17 objection.

18 And same caution, Doctor Fischer.

19 A. You know, I couldn't tell you exactly
20 where I searched, but I searched patents and
21 literature references.

22 Q. You don't remember the websites?

23 A. I believe I used patent search websites as
24 well as library and literature searching websites,
25 including but not limited to the Google Scholar and

1 Google Patents.

2 Q. Do you remember anything else specifically
3 beyond Google?

4 MR. McCLELLEN: Same objection.

5 And same caution, Doctor Fischer.

6 A. Again, I -- I performed a number of
7 searches. I really couldn't tell you specifically
8 where; and, as I noted, I included the references
9 that I incorporated in forming my opinion as well
10 as identifying useful information to provide
11 background at the time of the invention within my
12 disclosure here.

13 Q. What terms did you search for?

14 MR. McCLELLEN: Same objection.

15 And same caution, Doctor Fischer.

16 A. I really could not recall the search terms
17 that were used.

18 Q. You can't remember any of them?

19 MR. McCLELLEN: Same objection and same
20 caution.

21 A. I really could not recall the search terms
22 that we used when we were preparing this.

23 Q. Okay. When did you perform these
24 searches?

25 A. I believe I --

1 MR. McCLELLLEN: Same objection and same
2 caution.

3 Sorry.

4 A. I believe I performed the majority of the
5 searches and the majority of the preparation for
6 this in fall of 2022.

7 Q. In the time between January 3rd, 2023, and
8 now, have you considered any other materials beyond
9 what you considered in preparing your declaration?

10 A. Nothing that I have seen since then has
11 changed any of the opinions that are expressed
12 within my declaration.

13 Q. Have you considered any other materials
14 related to this case?

15 A. Considered in what way?

16 Q. Have you reviewed any materials between
17 January 3rd, 2023, and today that are related to
18 this case or your opinions?

19 A. I believe I saw copies of the initial
20 institution decision and the patent owner response,
21 although I did not use them to change or update my
22 opinions in any way.

23 Q. What do you mean you saw copies of them?

24 MR. McCLELLLEN: Objection. Calls for
25 attorney-client privilege and work product.

1 Q. Did you read them?

2 A. I was provided copies, and I had briefly
3 reviewed both of those.

4 Q. About how much time did you spend
5 reviewing the institution decision?

6 A. I would say my best estimate would be
7 about one hour for each of those two documents.

8 Q. Did you read them in their entirety?

9 A. I reviewed those documents, but I did not
10 study them in preparation for this declaration --
11 deposition. I'm sorry.

12 Q. Did you read them in their entirety?

13 A. I reviewed the documents from start to
14 finish, but I can't say that I've put the amount of
15 time and effort that I would have into the other
16 references that I cite in my declaration.

17 Q. What do you mean "I can't say I've put in
18 the amount of time and effort that I would have
19 into the other references"?

20 A. When preparing my declaration, it was
21 really important to understand in their entirety
22 all of the prior art references as well as the '615
23 patent. That was the material that I used in
24 preparing my opinions that are within my
25 declaration.

1 Those other supplemental documents was
2 primarily just to have a better understanding of
3 the case.

4 Q. Having reviewed the institution decision
5 in the preliminary response, would you say you have
6 a better understanding of the case now?

7 A. I believe they helped provide some context
8 of the case.

9 Q. In what way?

10 MR. McCLELLLEN: Objection.

11 Attorney-client privilege. Calls for work product.

12 Doctor Fischer, if those documents altered
13 your opinions or refreshed your recollection in any
14 way, you can answer Aaron's question; otherwise, I
15 instruct you not to answer.

16 A. Yeah, as I noted, the opinions that I
17 prepared in my -- my declaration stand today.
18 Nothing in there changed any of my opinions. I
19 just briefly reviewed the documents that were
20 provided to me.

21 Q. And you testified that you did that to
22 gain a better understanding of the case?

23 MR. McCLELLLEN: Same objection.

24 And same caution, Doctor Fischer.

25 A. I just felt that it was helpful to have

1 some context of the documents that are related to
2 these proceedings.

3 Q. What did you do to prepare for the
4 deposition today, Doctor Fischer?

5 A. Primarily I reviewed my declaration and
6 the associated prior art references as well as the
7 '615 patent.

8 Q. Anything else?

9 A. I have had brief meetings with the lawyers
10 from Morrison & Foerster.

11 Q. Okay. How many meetings?

12 A. It would be hard for me to put an exact
13 number on it, but probably a combination of
14 in-person and virtual meetings totaling about six
15 related to this case.

16 Q. And when were those meetings?

17 A. As I sit here today, I couldn't tell you
18 the exact dates of every meeting, but it would be
19 over the last few weeks.

20 Q. So six meetings in the last few weeks?

21 A. I think that's a pretty reasonable
22 representation.

23 Q. What would you say the total number of
24 time was that you spent in those six meetings?

25 A. I couldn't say for sure, but probably

1 between 10 to 15 hours in meetings.

2 Q. In any of those meetings did you meet with
3 anybody other than the attorneys at Morrison
4 Foerster?

5 A. I don't believe so.

6 Q. Okay. So you said you reviewed your
7 declaration and the prior art references?

8 A. Yes, I did.

9 Q. And I think we talked about the fact that
10 you also reviewed the institution decision and the
11 preliminary response filed by Nike?

12 A. To a lesser extent, yes.

13 Q. Anything else?

14 A. I don't believe you noted the '615 patent
15 in that list. So I reviewed that as well.

16 Q. Okay. Anything else?

17 A. Not that I can think of at this time.

18 Q. Doctor Fischer, I'm handing you what we've
19 marked as Fischer Exhibit 6.

20 (Exhibit 6, Patent Application
21 Publication, US 2006/0111944 A1.)

22 Q. Fischer Exhibit 6 is Exhibit 1004 in this
23 proceeding.

24 Do you recognize this document, Doctor
25 Fischer?

1 A. This appears to be what we refer to as the
2 Sirmans reference in my declaration.

3 Q. Okay. Doctor Fischer, I'm going to walk
4 through your understanding of how the -- the system
5 disclosed in Sirmans operates.

6 Can you briefly describe for me how this
7 would work from a -- a user standpoint, what they
8 would experience if they're using the system
9 disclosed in Sirmans?

10 A. Can you be a little bit more clear as to
11 how what would work?

12 Q. So it's -- it's your opinion that Sirmans
13 discloses the -- the same subject matter as the
14 challenged claims in this proceeding; right?

15 A. Yeah. As I note, Sirmans discloses
16 "systems and methods for encouraging an individual
17 to perform health-promoting measures," which is
18 very similar to the '615 patent.

19 Q. Okay. And how does Sirmans encourage
20 users to perform health-performing measures --
21 health-promoting measures?

22 A. So I lay out examples from within the
23 Sirmans reference that I believe meet the claims of
24 the '615 patent. So the teachings provided within
25 Sirmans do meet what's listed as the claims within

1 the '615 patent.

2 Q. Okay. Let's look at page 67 of your
3 declaration. Let me know when you're there.

4 A. Yes, I'm there right now.

5 Q. Okay. And, actually, if we flip back
6 quickly to page 65 and we look at paragraph 73, the
7 first sentence there you say (as read):

8 "An exemplary workflow, according to
9 Sirmans, is depicted in figure 1 below."

10 Do you see that?

11 A. Yes, I note that there's an example in
12 Sirmans that I reproduce as figure 1 in my
13 declaration.

14 Q. Okay. And that's reproduced on page 67;
15 correct?

16 A. Yes, possibly, among other locations.

17 Q. Okay. That figure -- that's the same
18 figure that's on page 2 of Fischer Exhibit 6?

19 A. I believe it is, yes.

20 Q. Okay. So let's walk through that quickly.

21 At the very top of figure 1 on page 2 of
22 Fischer Exhibit 6 there's the "Start" box or oval
23 there at the top.

24 Do you see that?

25 A. I see that.

1 Q. Okay. And right below that there's a box
2 labeled number 5.

3 Do you see that?

4 A. Yes, I see that box.

5 Q. And that first step after "Start" in this
6 flow chart is to (as read):

7 "Establish protocol criteria for receipt
8 of rewards-based on performance of health-promoting
9 measures."

10 Do you see that?

11 A. I believe that's what it says inside that
12 box in the figure, yes.

13 Q. What's the protocol criteria referred to
14 in that box?

15 A. So the Sirmans, you know, presents a way
16 to promote behavioral modification based on
17 providing incentives for compliance in forming
18 health-promoting measures. In that particular
19 exemplary workflow, (as read):

20 "...a user receives 'protocol criteria'
21 for performing 'health-promoting measures.'"

22 These (as read):

23 "Protocol criteria are generally
24 established by an entity familiar with health and
25 well-being, such as insurance carrier, a health

1 professional, or a government entity."

2 And then I go on to say (as read):

3 "Health-promoting measures include
4 activities designed to improve individual fitness
5 and wellness, such as 'exercise regimens....'"

6 And I provide some additional examples in
7 my declaration that were pulled from the Sirmans
8 reference.

9 Q. Okay. So you said that (as read):

10 "Protocol criteria are generally
11 established by an entity familiar with health and
12 well-being, such as an insurance carrier, health
13 professional, or government entity."

14 What are these protocol criteria that are
15 being described in Sirmans?

16 A. That's actually not what I said. I said
17 protocol criteria can be, not generally are
18 established (as read):

19 "...by any entity that has appropriate
20 knowledge or access to knowledge regarding human
21 well-being and health, including but not limited to
22 an employer, an insurance carrier, health
23 professional, government entity, self-insured
24 entity, or any combination thereof."

25 And that's in paragraph 58 of the Sirmans

1 reference.

2 Q. What are the -- the protocol criteria that
3 are being described there?

4 A. So there are a number of options for what
5 can be used for protocol criteria, and as I
6 prepared my opinions, I pointed out some such
7 examples.

8 Q. Okay. What would be one example?

9 A. (Witness reviews document.) So as I
10 identified in my declaration, the protocol criteria
11 can be related to goals, and one such set of
12 examples is provided within the reference as
13 example 1 in paragraph 84.

14 I'm sorry. Let me clarify. I think I was
15 in the wrong -- the wrong spot. I apologize. Let
16 me strike that.

17 (Witness reviews document.) So starting
18 on page 69 of my declaration, from paragraph 77 on
19 I describe activity goals and how they relate to
20 protocol criteria and specific examples within the
21 Sirmans reference.

22 Q. And in that paragraph of your declaration,
23 you point to paragraph 68 of Sirmans; is that
24 right?

25 A. In paragraph 77 of my declaration, I point

1 to paragraph 68 of the Sirmans reference.

2 Q. And these protocol criteria that are
3 described, these are the ones that are also
4 described in paragraph 67 as being established by
5 an entity that has appropriate knowledge or access
6 to knowledge regarding human well-being and health;
7 is that right?

8 A. I believe before I was previously talking
9 about paragraph 58 rather than 67. But those
10 protocol criteria can come from a government entity
11 or other source that has appropriate knowledge or
12 access to knowledge regarding human health,
13 well-being.

14 Q. Okay. So the protocol criteria can come
15 from any third party with appropriate knowledge or
16 access to knowledge regarding human health and
17 well-being; is that right?

18 A. I never put the word "any" on there, but
19 the Sirmans reference certainly leaves it open for
20 a large variety of sources to provide those
21 protocol criteria.

22 Q. Does that criteria come from the user
23 themselves, or does it have to be a third party?

24 A. I don't believe it is restricted to being
25 a third party.

1 MR. McCLELLAN: Excuse me. Objection.
2 Form.

3 Go ahead, Doctor Fischer.

4 A. So as noted, you know, "Sirmans notes that
5 these protocol criteria can be established by --"
6 and then goes on to say what we've just referred to
7 multiple times.

8 I don't recall, as I sit here today,
9 anything that restricts it only to those sources.

10 Q. Only to third parties?

11 A. I don't believe there's anything in
12 Sirmans that restricts it to only third parties
13 providing the protocol criteria or the goals.

14 Q. Okay. Is there anything in Sirmans that
15 describes the user generating these protocol
16 criteria?

17 A. (Witness reviews document.) Well, it does
18 clearly say in paragraph 68 that (as read):

19 "Once the protocol criteria are
20 established, they are presented to the member for
21 member acceptance of both the protocol criteria as
22 well as surveillance of member activity relating to
23 health-promoting measures."

24 So that would mean the users are certainly
25 in the loop in at least some fashion.

1 Q. Okay. So the user is able to choose from
2 among certain protocol criteria that have already
3 been established; is that right?

4 A. So in particular the example that I
5 provide is that the user can agree to the
6 recommended or minimum level of exercise to be
7 performed as well as, you know, appropriate use of
8 the monitoring equipment.

9 So in that example it's related to a level
10 of -- of that goal, for example.

11 Q. Right. So the user can agree to what's
12 being recommended or a minimum level, but the user
13 themselves isn't setting the criteria or establishing
14 what's recommended; correct?

15 MR. McCLELLLEN: Objection.

16 Sorry. Go ahead, Aaron.

17 Q. Correct?

18 A. Yeah --

19 MR. McCLELLLEN: Objection. Form.

20 A. -- as I've noted, the Sirmans reference
21 provides examples where there are third parties
22 that provides examples where the user is in the
23 loop in agreeing to these. I don't believe there
24 is anything in the Sirmans reference that would
25 preclude the user from identifying their own sets

1 of goals or protocol criteria, as I refer to them.

2 Q. Is there anything in the Sirmans reference
3 where the user establishes their own protocol
4 criteria? Any disclosure of that in Sirmans?

5 A. Well, the (as read):

6 "Protocol criteria can be established by
7 any entity that has appropriate knowledge or access
8 to knowledge regarding human well-being and health,
9 including but not limited to an employer, insurance
10 carrier, health professional, a government entity,
11 self-insured entity, or any combination thereof."

12 But I see no reason why the user
13 themselves would not be considered an entity that
14 has appropriate knowledge about their own health
15 and well-being.

16 So I don't think it restricts that by any
17 way.

18 Q. Does Sirmans ever disclose a user
19 establishing the protocol criteria described in
20 paragraphs 58 and 67 of Sirmans?

21 MR. McCLELLAN: Objection. Form.

22 A. Specifically only in paragraph 67 and 68,
23 which is, I believe, what you referred to. It
24 leaves it open-ended that, you know, any entity
25 that has appropriate knowledge can be used to

1 generate these criteria. I don't see it explicitly
2 referring to the user generating these on their
3 own, but it does explicitly note that they have the
4 ability to agree to the recommended levels; and I
5 believe there was some other language that puts
6 them in the loop in deciding their goals.

7 Q. So let's look at the first sentence of
8 paragraph 68 of Sirmans.

9 It says (as read):

10 "Once the protocol criteria are
11 established, they are presented to the member."

12 Do you see that?

13 A. I see that, yes.

14 Q. So by the time the member views the
15 protocol criteria, they've already been
16 established; correct?

17 A. I don't believe that precludes the member
18 from being involved in generating them.

19 Q. But you can't point to anywhere in Sirmans
20 where there's a disclosure of the user establishing
21 the types of protocol criteria discussed in
22 paragraph 68?

23 MR. McCLELLEN: Objection. Form.

24 A. (Witness reviews document.) So I don't
25 see anything, again, in the Sirmans reference that

1 restricts who is able to make those goals or -- or
2 when they're made, necessarily.

3 Again, it notes that any entity with the
4 appropriate knowledge can generate these
5 performance criteria -- or, sorry, protocol
6 criteria.

7 And then, even in paragraph 60 it notes
8 (as read):

9 "Based on protocol criteria level, either
10 established or chosen...."

11 So, again, even adding more flexibility in
12 the way that those are established and provided to
13 the user or that the user helps to establish or
14 choose their compliance levels or protocol
15 criteria.

16 Q. So you just pointed to one disclosure
17 where the user can choose among certain protocol
18 criteria, but I don't see anything where Sirmans
19 discloses the user establishing that protocol
20 criteria; is that right?

21 MR. McCLELLLEN: Objection. Form.

22 A. (Witness reviews document.) I -- I really
23 disagree with that statement because even, as I
24 noted before, the user has the ability to adjust
25 the, you know, recommended or level of performance.

1 And the level of performance is part of the goal.

2 So, for example, in paragraph 84 where we
3 provide the Center for Disease Control recommended
4 levels of exercise, as an example of protocol
5 criteria, there's the ability to choose, for
6 example, moderate intensity for 30 minutes a day,
7 five days a week or vigorous intensity 20 minutes a
8 day or three days a week.

9 So in both cases in that example the level
10 of activity and the amount of time both associated
11 with the goals or protocol criteria would be
12 considered the level of performance that you're
13 looking at.

14 Therefore I do believe the user is
15 certainly involved; and if not explicitly
16 identifying what their goals or protocol criteria
17 would be.

18 Q. Because they can select from among certain
19 options; right?

20 A. I don't believe there is anything in
21 Sirmans that restricts a more-open ended set of
22 performance criteria, but at a minimum, it very
23 explicitly identifies the ability for the user to
24 define and establish important aspects of their --
25 their goals, including the level of performance,

1 which is part of what we identified as the goal,
2 such as moderate intensity for 20 minutes or
3 vigorous intensity for 20 minutes.

4 I apologize. That was 30 minutes in the
5 first statement.

6 Q. So I understand it's your opinion that
7 there's the possibility, based on some of this
8 language, for the user to establish protocol
9 criteria, but I'm asking you something a little bit
10 different.

11 Aside from the user's ability to choose
12 certain preestablished protocol activity, does
13 Sirmans ever disclose expressly a user-establishing
14 protocol criteria, the type of protocol criteria
15 disclosed in paragraph 68?

16 MR. McCLELLLEN: Objection. Form.

17 A. I believe setting the, you know, level of
18 exercise to be performed would be considered
19 setting a goal, at least in terms of the context of
20 the '615 patent, and would also be related to
21 setting a protocol criteria or the use of a
22 protocol criteria in Sirmans.

23 Q. Let's go to where a user is choosing
24 certain protocol criteria. Can you point me to an
25 example of that in Sirmans.

1 A. So as noted, the Sirmans reference leaves
2 a lot of flexibility in the way protocol criteria
3 can be identified.

4 In my declaration I refer to example 1 of
5 Sirmans. Starting on paragraph 84. And example 1
6 of Sirmans specifically notes that the user,
7 wearing the monitoring device, will be asked to
8 perform moderate intensity for 30 minutes a day.
9 So that relates to the goal and actually also the
10 time period within the meaning of them in the '615
11 patent, and those at least come from or related to
12 the protocol criteria the way Sirmans refers to
13 them.

14 Q. So where in paragraph 84 does the user
15 choose certain protocol criteria?

16 A. So paragraph 84 is an example set of
17 criteria that come from the Center for Disease
18 Control recommended levels of exercise.

19 And as I previously noted, (as read):

20 "Protocol criteria can be established by
21 any entity that has appropriate knowledge or access
22 to knowledge regarding human well-being and health,
23 including --" skipping ahead -- "to a governmental
24 entity...."

25 I think any person of ordinary skill in

1 the art would understand that the Center for
2 Disease Control, a federal government agency, would
3 meet that criteria and therefore would have been
4 envisioned as a source of protocol criteria by
5 Sirmans.

6 Q. Okay. I'm not sure if you understood my
7 question, Doctor Fischer.

8 Where in paragraph 84 does the user choose
9 protocol criteria?

10 A. Paragraph 84 provides examples that can be
11 used to generate protocol criteria, as we have just
12 been discussing, and the rest of the disclosure has
13 substantial discussion about how those protocol
14 criteria would be used to incentivize member
15 performance of health-promoting measures.

16 Q. You're still not answering my question,
17 Doctor Fischer.

18 Can you point me to any examples in
19 Sirmans where the user chooses a certain protocol
20 criteria?

21 A. Well, we just said that in paragraph 84
22 one of the examples of the Center for Disease
23 Control recommended level of exercise is -- and
24 this is i.e., moderate intensity for 30 minutes a
25 day or vigorous intensity for 20 minutes a day.

1 And we also previously identified a
2 location within the description of Sirmans where
3 the user has the ability to make selections or
4 approvals of their goals or protocol criteria.

5 So I believe --

6 Q. Where is that?

7 MR. McCLELLLEN: Hang on, Doctor Fischer.
8 Were you done answering your question?

9 THE WITNESS: I believe so for that
10 statement.

11 A. So we referred before -- at least in one
12 example -- to paragraph 68 that (as read):

13 "...they are presented to the member for
14 member acceptance of the protocol criteria."

15 And then later in that paragraph a (as
16 read):

17 "...member can agree to both the
18 recommended/minimum level of exercise to be
19 performed."

20 So in this example, it's clear that
21 Sirmans understands that the user at least could,
22 if not would, be very involved in generating these
23 protocol criteria and the criteria upon which they
24 are assessed.

25 Q. So the member can agree to a certain level

1 of exercise.

2 Where does the member get to choose
3 between certain protocol criteria? I still don't
4 see anything.

5 A. So as we've noted, these protocol criteria
6 can be goals, as referred to in the '615 patent. A
7 goal, for example, could be moderate intensity or a
8 goal is moderate intensity for 30 minutes a day or
9 vigorous intensity for 20 minutes a day.

10 So selecting one of those levels of
11 exercise, that seems to me like that would be the
12 user selecting their goals.

13 Q. Where does the user select their level of
14 exercise?

15 A. I'm sorry. Can you clarify that?

16 Q. Yeah, you just said that the -- the user
17 selects one of the levels of exercise.

18 A. Yeah.

19 Q. Where is that?

20 A. So --

21 MR. McCLELLLEN: Objection. Form.

22 A. At least in one location it notes in
23 paragraph 68 that (as read):

24 "...the member can agree to the
25 recommended level of exercise to be performed."

1 Going on beyond that, as I've noted
2 earlier in our discussion, I don't believe there's
3 any restriction within the Sirmans reference who
4 generates these protocol criteria in the first
5 place that would preclude the user from generating
6 their own health-promoting measures.

7 Q. So the -- the member can agree -- the user
8 can agree to engage in a certain level of exercise,
9 but you still haven't pointed to anything where the
10 user is choosing a certain set of protocol
11 criteria.

12 Can you point me to an example of that?

13 MR. McCLELLEN: Objection. Form.

14 A. I believe the description that I have
15 provided describes that scenario. That being said,
16 should that not be the case, it most certainly
17 would have been obvious to a person of ordinary
18 skill in the art, in reviewing the Sirmans
19 reference, that this very open-ended way of
20 inputting protocol criteria, which are effectively
21 goals, could be coming from anybody and they could
22 be either open-ended or selecting from a list or
23 approving provided sets of goals and criteria.

24 Q. So you've said that one type of protocol
25 criteria could be goals.

1 Where -- where does Sirmans say that?

2 A. (Witness reviews document.) So as I note
3 in paragraph 77 of my declaration, (as read):

4 "Sirmans discloses receiving an activity
5 time period and a corresponding activity goal. As
6 previously noted, Sirmans describes an 'exercise
7 regimen,' which can be generated through a
8 multitude of means."

9 As we've been saying, there's a variety of
10 ways that those exercises and the instructions can
11 be generated.

12 (As read):

13 "A person of ordinary skill in the art
14 would understand that this 'exercise regimen'
15 includes identifying an exercise or other athletic
16 activity and an associated goal."

17 And they go on to provide examples such as
18 (as read):

19 "...heart rate, distance traveled, steps
20 taken, calories burned, level of activity,
21 etcetera. Specifically, once the protocol criteria
22 is established --" Sirmans notes, as we've been
23 describing -- "it is 'presented to the member for
24 acceptance of both the protocol criteria as well as
25 surveillance of the member activity relating to

1 these health-promoting measures.'"

2 And then the (as read):

3 "...user 'can agree to both the
4 recommended/minimal level of exercise to be
5 performed as well as appropriate use of the
6 monitoring equipment.' A person of ordinary skill
7 in the art would understand that --" this refers to
8 an activity goal that is being used to measure the
9 user's performance against.

10 Q. So I asked you where Sirmans says that a
11 protocol criteria can be a goal. And you've
12 pointed me to your declaration where you -- you
13 cite nothing except for paragraph 68 of Sirmans.

14 Is it your understanding that paragraph 68
15 of Sirmans supports your opinion that protocol
16 criteria is the same thing as a user-set goal?

17 MR. McCLELLLEN: Objection. Form.

18 A. (Witness reviews document.)

19 MR. McCLELLLEN: We've been on for about an
20 hour. After he answers this question, can we take
21 a break?

22 MR. BOWLING: Just one more after that, if
23 that's okay.

24 Is that okay with you?

25 COURT REPORTER: (Nods.)

1 A. So when the term protocol criteria, you
2 know, is used rather broadly within the Sirmans
3 reference in that it's relating to
4 health-performing measures and it uses those
5 measures to incentivize a user performance, to
6 reach certain levels of performance criteria, that
7 clearly, in my mind, meets the plain and ordinary
8 meaning of a goal.

9 Q. So, Doctor Fischer, I've asked you to
10 point me to an example where Sirmans expressly
11 discloses the user choosing protocol criteria or an
12 example where Sirmans discloses the user
13 establishing protocol criteria.

14 And if I understand you right, all you've
15 been able to tell me is that Sirmans is open-ended
16 in its description of those things. And you
17 haven't pointed me to anything in Sirmans where
18 there's an express disclosure of that.

19 A. I disagree.

20 MR. McCLELLLEN: Hang on, Doctor Fischer.
21 Give me time to object.

22 Are you done, Aaron?

23 Q. Are you able to point me to anywhere in
24 Sirmans where there's an express disclosure of the
25 user establishing or choosing protocol criteria?

1 MR. McCLELLLEN: Objection. Form.

2 A. So as I have noted repeatedly, I believe
3 I've answered that question that Sirmans expressly
4 provides a large variety of sources for these
5 performance criteria -- or I'm sorry -- protocol
6 criteria in their language. I -- it also expressly
7 allows the user to be in the loop on, at a minimum,
8 selecting the -- (witness reviews document) --
9 "recommended minimum level of exercise," which
10 certainly would be related to selecting a goal such
11 as the examples we provided before of the level of
12 intensity or the amount of time per day that they
13 are exercising.

14 Q. So when you were just describing Sirmans,
15 you said that Protocol criteria, that term, is used
16 in Sirmans as relating to health-performing
17 measures that are used to incentivize a user
18 performance.

19 So it sounds like the protocol criteria,
20 in your opinion, are what's used to help the user
21 achieve their goal; protocol criteria is not the
22 goal itself; is that right?

23 MR. McCLELLLEN: Objection. Form.

24 A. No, I disagree with that. The protocol
25 criteria, as I identified, can constitute -- let's

1 see -- (witness reviews document) -- or can be
2 provided by, you know, any entity that has
3 appropriate knowledge or access regarding human
4 well-being, including a governmental agency.

5 And I expressly point out the example
6 within the Sirmans reference where they include
7 recommended levels of exercise from the Center of
8 Disease Control.

9 Those examples would be examples of goals
10 as the '615 patent uses that term and would be
11 related to or would be the protocol criteria in at
12 least one example that are provided to the user.

13 Q. Is a recommended level of exercise a goal?

14 A. I believe Sirmans provides this example in
15 paragraph 84 as a way to show that a governmental
16 agency with significant knowledge in health and
17 well-being can provide a set of criteria that can
18 be used as performance criteria and goals. And in
19 my understanding, as a person of ordinary skill in
20 the art, looking at this reference, Sirmans would
21 have used or expressly believed that such criteria
22 would be used as protocol criteria and therefore
23 used as goals for the user.

24 Q. So your opinion is that a recommended
25 level of exercise is a goal?

1 MR. McCLELLLEN: Objection. Form.

2 A. The recommended level of effort at least
3 can be used to generate a corresponding goal.

4 Q. Right.

5 MR. McCLELLLEN: Can we take a break?

6 MR. BOWLING: Sure.

7 VIDEO OPERATOR: The time is 10:18. We're
8 off the record.

9 (Recess was taken.)

10 VIDEO OPERATOR: Okay. We are back on the
11 record. The time is 10:27.

12 Q. Okay. Doctor Fischer, I want you to
13 identify for me by paragraph number which
14 paragraphs of Sirmans disclose a user choosing
15 among certain protocol criteria.

16 A. Sure. So first I would point you to
17 paragraph 84, which is an example wherein the user
18 is asked to perform Center for Disease Control
19 recommended levels of exercise, and we provide some
20 example goals in there, including moderate
21 intensity for 30 minutes or vigorous intensity for
22 20 minutes.

23 The description in there aligns well with
24 what the Sirmans reference refers to as protocol
25 criteria and emphasizing what we noted earlier in

1 paragraph 58 of Sirmans, these (as read):

2 "Protocol criteria can be established by
3 any entity that has appropriate knowledge or access
4 to knowledge regarding human health and
5 well-being --" including a governmental entity,
6 among other scenarios.

7 So between those two paragraphs, it's very
8 clear to me that the CDC recommended level of
9 exercise provided in paragraph 84 are examples of
10 protocol criteria.

11 And as we noted previously, there are
12 other locations within the disclosure and at least
13 one example of as such is in paragraph 68 where the
14 member can agree to the recommended or minimal
15 level of exercise to be performed.

16 So I believe Sirmans expressly discloses
17 using those example goals that -- identified as
18 performance criteria or goals for the user to
19 perform. And certainly if that's not expressly
20 described, it would have been very obvious to a
21 person of ordinary skill in the art to do so since
22 all of those are right here in the disclosure, as I
23 identified.

24 Q. Okay. So we can dive into the substance
25 of the paragraphs. I just want to make sure we're

1 talking about the whole universe of -- of your
2 opinion.

3 So I asked you to identify by paragraph
4 number which paragraphs of Sirmans disclose a user
5 choosing from among certain protocol criteria. It
6 sounds like you've identified paragraph 84,
7 paragraph 58, and paragraph 68.

8 Are there any other paragraphs you want to
9 identify?

10 A. So another paragraph would be, for
11 example, paragraph 59 where it notes that "The
12 member can perform" -- sorry.

13 (As read):

14 "...the member can select a protocol
15 criteria level that he or she wishes to perform
16 from various levels of 'performance' criteria."

17 (Witness reviews document.) And I believe
18 there are a number of other disclosures that I'd be
19 happy to spend some more time digging through here.

20 What I identified in my declaration, I
21 believe, is a clear example of where Sirmans calls
22 out activity goals using a meaning that's aligned
23 with that of the '615 reference, and we provide
24 examples where the Sirmans reference meets those
25 claims, both explicitly and where it would have

1 been obvious, in addition, to support those
2 assertions that I'm making.

3 Q. Other than paragraphs 58, 59, 68, and 84,
4 are you able to identify any other paragraphs of
5 Sirmans where there's an express disclosure of a
6 user choosing from among certain protocol criteria?

7 A. (Witness reviews document.) So as I've
8 noted, Sirmans provides a number of ways in with
9 the -- which these health-promoting measures
10 referred to as protocol criteria, which can also be
11 considered goals or be used to generate the goals
12 as they have the meaning within '615 patent. As I
13 mentioned earlier, in paragraph 58, (as read):

14 "The protocol criteria can be established
15 by any entity that has appropriate knowledge or
16 access to knowledge regarding human health and
17 well-being."

18 I apologize -- "regarding human well-being
19 and health."

20 I see no reason why that cannot include
21 the user generating that list in the -- in the
22 first place.

23 (Witness reviews document.) I had a
24 follow up. (Witness reviews document.) And for
25 example, in paragraph 20 it notes (as read):

1 "Your health-promoting measure can include
2 specific exercise regimens to be performed in or
3 out of a health club."

4 So I believe it explicitly discloses the
5 user's identifying goals, as we've talked about
6 before, but certainly it would have been very
7 obvious to anyone reviewing this that a user could
8 identify a specific exercise regimen and a set of
9 goals based upon that exercise regimen.

10 Q. Doctor Fischer, is it your opinion that
11 paragraph 20 of Sirmans discloses a user choosing
12 from certain protocol criteria?

13 A. I believe paragraph 20 helps support the
14 argument that I have been saying repeatedly and as
15 I laid out in my declaration, that the user is
16 involved in identifying the criteria or the goals
17 that are used.

18 Q. What part of paragraph 20 supports that?

19 A. It notes that (as read):

20 "Health-promoting measures can include
21 specific exercise regimens."

22 Most people going to a gym would certainly
23 believe that they have some ability to identify
24 appropriate exercises for their own personal health
25 and well-being.

1 Q. So your opinion is that, because paragraph
2 20 of Sirmans describes the concept of a health
3 club and exercises being performed in a health
4 club, that that constitutes a disclosure of the
5 user choosing specific protocol criteria?

6 MR. McCLELLLEN: Objection. Form.

7 A. What I have said repeatedly is there are a
8 number of ways in which the protocol criteria can
9 be identified, which can include being open ended
10 from a user or being selected as well as coming
11 from external sources, such as a governmental
12 agency, including the example that I identify in my
13 declaration.

14 Q. Does paragraph 20 disclose a user choosing
15 from certain protocol criteria?

16 A. I identified paragraph 20 to help support
17 the assertion that I'd made noting that the
18 health-promoting measures can include specific
19 exercise regimens.

20 We've already talked about potential
21 exercise regimens and that those could come from
22 either government sources or other entities or the
23 user themselves.

24 So there is a -- a number of means in
25 which those health-promoting measures can be

1 identified and used as goals or protocol criteria.

2 Q. Does paragraph 20 disclose a user choosing
3 from certain protocol criteria?

4 A. I believe I had already provided examples
5 later in Sirmans disclosure where the protocol
6 criteria can be established by any entity. And,
7 again, there's no reason that could not be the user
8 themselves.

9 And, then, the user or member, as they're
10 typically referred to in Sirmans, can agree to the
11 recommended or minimum level of exercise.

12 So I believe in that case the user either
13 is generating the goals from scratch or selecting
14 goals.

15 Q. Does paragraph 20 disclose a user choosing
16 from certain protocol criteria?

17 A. As I noted, the reason I mention paragraph
18 20 was to talk about health-promoting measures and
19 how those health-promoting measures, which are
20 related to the protocol criteria, can be specific
21 exercise regimens.

22 Q. I don't think you're answering my
23 question, Doctor Fischer.

24 I'm asking you whether this paragraph
25 discloses something or not.

1 A. I believe this paragraph, in combination
2 with the other ones that I've identified, show that
3 specific exercise regimens can be protocol
4 criteria, and those protocol criteria can be
5 selected by the user.

6 So in combination with the other
7 references that I've discussed, yes, I believe so.

8 Q. Okay. Anything other than paragraphs 20,
9 58, 59, 68, and 84 of Sirmans where, in your
10 opinion, there's a disclosure of a user choosing
11 from among certain protocol criteria?

12 A. (Witness reviews document.) So a number
13 of examples of health-promoting measures are
14 provided in paragraph 31. The Sirmans reference
15 goes on to say, (as read):

16 "As used herein, the term
17 'health-promoting measures' refers to recordable
18 and/or verifiable activities that are designed to
19 improve and/or maintain individual health and
20 wellness."

21 He goes on to provide a number of (as
22 read):

23 "Examples of health-promoting measures as
24 contemplated herein that include but are not
25 limited to exercise regimens --" including a whole

1 host of exercise regimens including -- "weight
2 training, aerobic exercise, swimming, kickboxing,
3 jogging, bicycling, dancing, walking, playing
4 sports, etcetera; programs designed to improve
5 wellness --" and then provides examples of --
6 "yoga, smoke-ending courses, alcoholic-ending
7 courses, weight-control courses --" and then
8 wellness visits and some other examples as well.

9 It would be understood that those goals
10 would be set or health-promoting measures would be
11 set appropriately for the needs of the user. So I
12 think it would be certainly understood that the
13 user has involvement in identifying which
14 health-promoting measures and the appropriate
15 levels of those activities.

16 Q. Have you identified any paragraphs, Doctor
17 Fischer, where there's an express disclosure of the
18 user choosing certain protocol criteria?

19 MR. McCLELLLEN: Objection. Form.

20 A. So as I've noted, there are disclosures
21 within the reference -- and we've pointed to the
22 same paragraph multiple times -- wherein the user
23 has the ability to approve or select. I believe
24 that's also included in the figures in the flow
25 chart.

1 And then the disclosure goes on to
2 describe examples of what those health-promoting
3 measures are and how they can be generated.

4 Q. What are the paragraphs of Sirmans where
5 there's an express disclosure of the user making a
6 choice about certain protocol criteria? If you
7 could just identify them for me by number.

8 A. (Witness reviews document.)

9 MR. McCLELLLEN: Objection. Form.

10 A. I believe we've already gone through this
11 and I've answered that question a number of times
12 that the disclosure identifies places where a
13 selection is made by the user or that at least they
14 have the ability to agree to levels of exercise.
15 That's related to protocol criteria.

16 And then there's a number of locations
17 that provide specific examples of those protocol
18 criteria.

19 Q. Okay. Good. So I want to know about the
20 former group. Parts of Sirmans -- I want you to
21 identify -- where there's a disclosure of a
22 selection being made by the user. If you can
23 identify specific paragraph numbers for me.

24 A. (Witness reviews document.) So I believe
25 there's a number of locations and I've identified

1 at least a couple of them as we've been going
2 along.

3 One such example is paragraph 68 where the
4 member can agree to recommended or minimum level of
5 exercise.

6 The following paragraph, paragraph 69,
7 says that (as read):

8 "...the member can select protocol
9 criteria levels that he or she wish to perform."

10 Q. Anything else?

11 A. (Witness reviews document.) Figure 2
12 there's also a step in which the member agrees to
13 recommended protocol criteria levels.

14 Q. Anything else?

15 A. You know, I believe I've identified
16 examples where the Sirmans reference clearly meets
17 the plain and ordinary meaning of "goals" as
18 defined in the '615 patent. There may very well be
19 other examples. As I sit here today, those are the
20 ones that I can readily identify.

21 Q. Okay. So as far as "portions of Sirmans
22 that expressly disclose a selection being made by
23 the user of certain protocol criteria," you've
24 identified paragraphs 68 and 69 in figure 2.

25 MR. McCLELLAN: Objection. Form.

1 Q. Is there anywhere else in Sirmans that
2 you'd like to identify?

3 MR. McCLELLLEN: Same objection.

4 A. So I believe in our discussions I've
5 identified a number of locations. I can't say
6 those were the -- the only ones. In fact, sitting
7 here, again, I just found another one, paragraph
8 71, where the user establishes a minimum or
9 recommended level of performance. At least in that
10 scenario it's referring to assessing a minimum or
11 recommended level of performance that potentially
12 the user has the ability to have input into.

13 Running through here, I believe it's quite
14 clear that the Sirmans reference expressly puts the
15 user or the member, as they refer to it, in the
16 position where they have the ability to set goals
17 or set performance criteria. And those criteria
18 can either come directly from them or can be
19 selected or approved from another source.

20 Q. So you said paragraph 71 expressly
21 discloses the user making a selection from among
22 certain protocol criteria. What -- what specific
23 sentence of paragraph 6 -- 71 are you referring to?

24 A. I believe what I was saying was that
25 paragraph 71 supports the fact that there can be

1 different levels of performance and a level of
2 performance relates to a goal, as I have defined it
3 in my declaration. So -- and also as defined in
4 the example provided in paragraph 84.

5 So, for example, moderate intensity for 30
6 minutes or vigorous intensity for 20 minutes.
7 Those can be selected by the user. And I believe
8 there are a number of locations within this
9 disclosure, including at least some that I've
10 identified already in our discussions today as well
11 as what I've described in my declaration, that
12 support that.

13 Q. So paragraph 71 doesn't disclose expressly
14 a user making a selection. It just supports your
15 opinion. That's what you're saying?

16 MR. McCLELLAN: Objection. Form.

17 A. I believe what it says in paragraph 71, it
18 refers to an (as read):

19 "...established recommended/minimum level
20 of performance," which mirrors the language that we
21 refer to in paragraph 68 that says (as read):

22 "...the member can agree to both the
23 recommended/minimum level of exercise to be
24 performed."

25 So, again, I believe the user has the

1 ability to select goals.

2 Q. So we're going back to paragraphs 68 and
3 69. 71 doesn't provide any other express
4 disclosure of a user making a choice; right?

5 MR. McCLELLLEN: Objection. Form.

6 A. I believe I identified paragraph 71 as a
7 place where Sirmans describes (as read):

8 "...member performance in health-promoting
9 activities is assessed to identify whether the
10 established recommended or minimum level of
11 performance was accomplished."

12 A person of ordinary skill in the art
13 would understand that Sirmans clearly identifies
14 when the received athletic activity exceeds the
15 first activity goal for a given time period.

16 So as I've noted multiple times, I believe
17 that corresponds to goals, using the plain/ordinary
18 meaning, you know, in light of the '615 patent.

19 Q. I'm not asking you about goals, Doctor
20 Fischer. I'm also not asking you for things that
21 support your opinion.

22 I'm asking you a really specific question.
23 And I'd like you to try and answer it if you can.

24 A. Uh-huh.

25 Q. Aside from paragraph 68, 69, and figure 2,

1 is there anywhere in the Sirmans reference where
2 there's an express disclosure of the user making a
3 selection from among certain protocol criteria?

4 MR. McCLELLLEN: Objection. Form.

5 A. So, again as I note in paragraph 77 of my
6 declaration (as read):

7 "Sirmans discloses receiving an activity
8 time period and a corresponding activity goal."
9 The goal that we were talking about.

10 (As read):

11 "As previously noted, Sirmans describes an
12 'exercise regimen' --" again, we've been talking
13 about various different ways that exercise or
14 physical activity can be performed "-- which can be
15 generated through a multitude of means."

16 As I've noted, Sirmans does not preclude
17 the way in which this exercise regimen or the
18 protocol criteria or the goals, whichever term we
19 want to use right now, are generated or selected by
20 the user. It just provides examples. (As read):

21 "A person of ordinary skill in the art
22 would understand that this 'exercise regimen'
23 includes identifying an exercise or other athletic
24 activity, an associated goal --"

25 And there are a number of goals provided

1 within Sirmans. I provide some examples, including
2 "heart rate, distance traveled, steps taken,
3 calories burned, level of activity."

4 I also note that there is an associated
5 time interval with that activity. And once these
6 protocol criteria are established, they're
7 presented to the user for acceptance of the
8 protocol criteria as well as surveillance of the
9 activity relating to these health-promoting
10 measures.

11 I do cite paragraph 68, but I'm not noting
12 that's the only place within this disclosure where
13 it's expressly provided.

14 And further, it certainly would be obvious
15 to a person of ordinary skill in the art to use
16 these goals or to have the user select these values
17 for goals.

18 Q. Is there something you don't understand
19 about the question, Doctor Fischer?

20 MR. McCLELLLEN: Objection. Form.

21 A. No, I believe I've answered the question
22 in that that paragraph, 68, is certainly one
23 location in which there is a reference to the user
24 agreeing or selecting levels of activity.

25 I believe those activities correspond --

1 levels of activity correspond to the goals as I've
2 previously noted as well.

3 Q. Do you understand the question I'm asking
4 you, Doctor Fischer?

5 A. Would you repeat the question?

6 Q. Yeah. I'm not asking you to read a full
7 paragraph of your declaration. I'm not asking you
8 your opinion about how goals is defined in the '615
9 patent.

10 A. Uh-huh.

11 Q. I'm asking you a really specific question.
12 In your opinion, where in the Sirmans
13 reference, aside from paragraph 68 and 69 and
14 figure 2, is there an express disclosure of the
15 user making a selection from among certain protocol
16 criteria?

17 MR. McCLELLLEN: Objection. Form. Asked
18 and answered.

19 A. So, as I said, I've -- I've repeated this
20 multiple times, I believe, and I'd be happy to go
21 through it again. But, again, these protocol
22 criteria can come from a number of locations,
23 including the user generating them entirely
24 themselves. So in that case clearly that would be
25 an example of them selecting or providing their own

1 criteria or goals.

2 Further, we provided the example in 68
3 where the user can select or agree to, you know,
4 recommended minimum levels of activity. I believe
5 that same language is in one of the blocks in
6 figure 2 as well and possibly elsewhere in the
7 disclosure.

8 Q. Possibly elsewhere but nowhere you can
9 identify?

10 MR. McCLELLLEN: Objection. Form.

11 A. So I've identified examples when I was
12 preparing my declaration that support my opinions.
13 In particular, I believe this is referring
14 primarily to the activity goals. I believe those
15 examples I provided do show where the Sirmans
16 disclosure meets the meaning of goals in these
17 claims. There may very well be additional places
18 in here as well to further support that argument.

19 Q. There may be, but you can't identify them?

20 MR. McCLELLLEN: Objection. Form.

21 A. So when I was preparing my declaration, my
22 focus was on identifying locations within the prior
23 art references that meet the claim language. I
24 believe I did that and have that very clearly
25 supported and justified within the -- the

1 declaration.

2 It is certainly possible that there are
3 additional places within the disclosure that
4 further support that opinion. As I sit here today,
5 I don't have a particular additional paragraph to
6 point out.

7 Q. Okay. Same question but now we want to
8 talk about express disclosures in Sirmans of the
9 user establishing protocol criteria. If you could
10 point me to specific paragraphs.

11 MR. McCLELLLEN: Objection. Form.

12 A. So one example, again, is paragraph 58
13 that we've referred to, noting (as read):

14 "Protocol criteria can be established by
15 any entity that has appropriate knowledge or access
16 to knowledge regarding human health and well --
17 human well-being and health, including" a number of
18 sources.

19 I don't believe there is anything in here
20 that precludes the user. In fact, I think it would
21 be quite clear that Sirmans envisions the user
22 could be one of the sources for establishing
23 protocol criteria.

24 Q. Doctor Fischer, when I use the word
25 "express disclosure," do you understand what I mean

1 by that?

2 A. It would be helpful if you could explain
3 the definition you're using.

4 Q. Okay. If I ask you for an express
5 disclosure in Sirmans, I'm looking for something in
6 Sirmans that affirmatively says what I'm asking
7 about. I'm not asking you whether Sirmans is open
8 ended or whether hypothetically something could be
9 added to Sirmans. I'm asking you whether it's
10 there in the four corners of the document expressly
11 disclosed.

12 Does that make sense?

13 A. I believe I understand what you're trying
14 to say.

15 Q. Okay. I want you to point me to a portion
16 of Sirmans where there's an express disclosure of
17 the user establishing protocol criteria.

18 MR. McCLELLLEN: Objection. Form.

19 A. So, again, I think it's important to
20 understand how a person of ordinary skill in the
21 art would look at the Sirmans reference in its
22 entirety as opposed to focusing on a specific
23 paragraph. And in reviewing this disclosure, it
24 seems very clear to me that a user could very well
25 be involved in establishing their protocol criteria

1 which are effectively the goals for their exercise
2 regimens.

3 And we've identified a number of
4 paragraphs in here that are related to or at least
5 support that concept.

6 Q. Okay. So you've pointed me to paragraphs
7 that are related to your opinion that Sirmans
8 teaches a user establishing their own protocol
9 criteria, but you're unable to point me to any
10 specific part of Sirmans where that's expressly
11 disclosed; is that right?

12 MR. McCLELLLEN: Objection. Form.

13 A. Again, going back to paragraph 58, and I
14 know we've recited this a number of times already.
15 It says (as read):

16 "Protocol criteria can be established from
17 any entity that has appropriate knowledge or access
18 to knowledge regarding human health -- human
19 well-being and health."

20 And it goes on to have a list that's not
21 limited to but provides examples.

22 I see no reason why a user would not be
23 somebody that has appropriate knowledge or access
24 to knowledge regarding human well-being and health
25 and could be generating protocol criteria or

1 selecting or approving examples of protocol
2 criteria provided to them.

3 Q. Is that an express disclosure, as we've
4 discussed it, of a user establishing their own
5 protocol criteria?

6 MR. McCLELLLEN: Objection. Form.

7 A. If the user is somebody that has
8 appropriate knowledge or access to knowledge
9 regarding human well-being and health, then yes.

10 Q. Is the word "user" or "member" anywhere in
11 paragraph 58?

12 MR. McCLELLLEN: Objection. Form.

13 A. (Witness reviews document.) The words
14 "member" are in preceding and following paragraphs
15 related to those protocol criteria.

16 So, again, I don't think it's fair to only
17 look at that paragraph when it is in the context of
18 the entire disclosure, in fact, even including the
19 following paragraph.

20 Q. So your opinion is that paragraph 58
21 expressly discloses the user or member establishing
22 their own protocol criteria?

23 A. I didn't use the word "expressly
24 provided." I'm not comfortable using the legal
25 language because I don't know if there's other

1 implications to that word.

2 But I believe, as I've described multiple
3 times, these protocol criteria can be established
4 by any entity, and I certainly would consider a
5 user to be an entity that can establish protocol
6 criteria; and, then, in the following paragraph, it
7 notes that if criteria are presented to a member,
8 they can select protocol criteria or level of
9 protocol criteria more specifically, which would
10 correspond to goals.

11 Q. Are there any embodiments disclosed in
12 Sirmans where the user or the member establishes
13 the protocol criteria?

14 MR. McCLELLLEN: Objection. Form.

15 A. So paragraph 59 that we were just talking
16 about, again, provides example where it says (as
17 read):

18 "In one embodiment, the member can select
19 a protocol criteria level that he or she wishes to
20 perform from various levels of 'performance'
21 criteria."

22 That would be an example of a user
23 selecting a performance criteria; which, again, a
24 level of performance criteria would be a goal as
25 I've defined it in my declaration.

1 Q. So that wasn't my question, Doctor
2 Fischer. Did you understand my question?

3 A. I believe I've answered the question. I'm
4 sorry if I haven't.

5 Q. Are there any embodiments disclosed in
6 Sirmans where the user or member establishes the
7 protocol criteria?

8 MR. McCLELLEN: Objection. Form.

9 A. (Witness reviews document.) So, again,
10 I -- I keep going back to the same -- same place,
11 and there may very well be other places in this
12 disclosure as well where these protocol criteria
13 can be established from any entity, and we
14 identified a number of sources for those.

15 And I believe Sirmans would have
16 envisioned that a user could be generating those
17 protocol criteria or, if protocol criteria are
18 established from an outside source, they have the
19 ability to select protocol criteria or levels of
20 protocol criteria.

21 Q. So your opinion is that Sirmans "would
22 have envisioned a user generating the protocol
23 criteria," but Sirmans doesn't say that, does it?

24 MR. McCLELLEN: Objection. Form.

25 A. I believe that it does disclose that.

1 Again, noting that protocol criteria can be
2 established from any entity. And I certainly would
3 consider a user or -- again, a member, as they
4 refer to it -- to meet the criteria that they
5 identify as a source for these protocol criteria.

6 Q. In example 1, which is the example you
7 discuss in your declaration, who establishes the
8 protocol criteria?

9 A. (Witness reviews document.) So in this
10 example, the Center for Disease Control is
11 identifying recommended levels of exercise. Those
12 levels of exercise can be adopted as protocol
13 criteria. It does note that a governmental entity
14 can establish that. It also could be that one of
15 the other entities within the list refers to, you
16 know, that information and they're the ones that
17 establish the criteria.

18 Q. So your opinion is that example 1 provides
19 an embodiment where the Center for Disease Control
20 establishes the protocol criteria; correct?

21 MR. McCLELLAN: Objection. Form.

22 A. That's not exactly what I said.

23 I said that these are examples from the
24 center disease control -- Center for Disease
25 Control of recommended levels of exercise that a

1 member can be asked to perform -- or will be asked
2 to perform. Those could directly be the protocol
3 criteria, in which case -- and at least in one
4 example the governmental entity is establishing
5 protocol criteria or those use -- could be used to
6 inform the creation of protocol criteria that are
7 established or utilized in the system by another
8 source.

9 Q. Are there any other sources disclosed in
10 Sirmans paragraph 84 as being involved in
11 establishing the protocol criteria?

12 A. So paragraph 84 describes recommended
13 levels of exercise from the Center for Disease
14 Control that a member wearing -- in this example a
15 body monitor -- will be asked to perform. That is
16 an example of the invention described in Sirmans,
17 which includes, as we've talked about, protocol
18 criteria based on health-promoting measures.

19 Those protocol criteria can be established
20 or used directly from the CDC or there could be an
21 intermediary before they are incorporated as
22 protocol criteria within the invention described
23 within Sirmans.

24 Q. Did you understand my question, Doctor
25 Fischer?

1 A. I believe I answered the question.

2 Q. I don't think you did.

3 Aside from the Center for Disease Control,
4 does paragraph 84 of Sirmans disclose any other
5 sources as being involved in establishing the
6 protocol criteria?

7 MR. McCLELLLEN: Objection. Form.

8 A. Paragraph 84 provides an example of
9 exercise criteria that can be used to generate
10 protocol criteria. It's hard to answer that term
11 because that paragraph doesn't necessarily have all
12 of the same language that you're referring to.

13 It's very clear that these are levels of
14 exercise that correspond to health-promoting
15 measures that would be considered protocol
16 criteria, which can be established by a variety of
17 sources, as we identified in paragraph 58 and
18 elsewhere.

19 Q. So there's no other entity disclosed
20 there?

21 MR. McCLELLLEN: Objection. Form.

22 A. Again, paragraph 84 provides recommended
23 levels of activity from the source, the Center for
24 Disease Control; and, then, these would be examples
25 of levels of activity or exercise that can be used

1 when establishing the protocol criteria.

2 Q. Aside from paragraph 58, Doctor Fischer,
3 are you able to identify any other portions of
4 Sirmans where, in your view, there's an express
5 disclosure of the user establishing the protocol
6 criteria?

7 MR. McCLELLLEN: Objection. Form.

8 A. (Witness reviews document.) Yeah, there
9 appears to be another example in paragraph 19. It
10 says (as read):

11 "In one embodiment these protocol criteria
12 are entitled 'Fitness Index Ratings.' The member
13 is offered various levels of performance criteria
14 in which each level is associated with a specific
15 incentive or points. Based on the chosen
16 performance level, the member's compliance is
17 monitored."

18 So that is another example where the user
19 is selecting performance criteria.

20 Q. I didn't ask you about where the user is
21 selecting performance criteria, Doctor Fischer.

22 Did you understand the question?

23 A. I think I've answered the question
24 already, but if you could repeat it again, I could
25 try my best.

1 Q. Sure.

2 Aside from paragraph 58 of Sirmans, are
3 you able to identify any other portions of Sirmans
4 where, in your opinion, there's an express
5 disclosure of a user establishing protocol
6 criteria?

7 MR. McCLELLLEN: Objection. Form.

8 A. Well, the paragraph 19 that I just
9 referred to is an example where Sirmans expressly
10 notes that the member identifies which protocol
11 criteria or the various levels of performance
12 criteria. So I think there are a number of
13 examples within this reference where the user is
14 involved in identifying or selecting protocol
15 criteria.

16 Q. And you understand I'm not asking you
17 about selecting performance criteria; right, Doctor
18 Fischer?

19 A. Which word did you use?

20 Q. Establishing.

21 A. (Witness reviews document.) I'm just
22 trying to identify where the word "establish" is
23 used first in the disclosure so I could answer that
24 effectively.

25 (Witness reviews document.) I see

1 multiple places in which the word "established" is
2 used. Now, in one case is in paragraph, you know,
3 58 where it notes that (as read):

4 "Protocol criteria can be established by
5 any entity that has an appropriate knowledge or
6 access to knowledge regarding human well-being and
7 health."

8 And we first cited that paragraph and the
9 following language multiple times.

10 In going through this, I see the word
11 "established" again in paragraph 60. And that's a
12 point at which it's entered into a file for the
13 user. At that point, presumably, that's happening
14 after the user has already made their selection.

15 So, again, the word "established" is used
16 in a couple of different places within the -- the
17 document. I did not opine specifically on the term
18 "establish," as far as I'm aware, because I don't
19 believe that was specific to the opinion that I've
20 presented in my declaration.

21 Q. So it's just paragraph 58?

22 MR. McCLELLAN: Objection. Form.

23 A. So as we've noted multiple times, it's
24 important to review this in its entirety. As I
25 mentioned, the word "establish" shows up at least

1 in paragraph 58. I see "establish" again in
2 paragraph 60. Presumably there are other locations
3 in here as well.

4 The invention describes numerous ways in
5 which the invention can be implemented. So at what
6 point the establishing is happening and who it is
7 coming from is not restricted only to being
8 prepared by, for example, you know, the CDC in
9 paragraph 84. It could be established by an
10 intermediary or the user.

11 Q. And I didn't ask you where the word
12 "establish" appears, Doctor Fischer. I asked you
13 where there's an express disclosure, in your
14 opinion, in Sirmans of the user or the member
15 establishing the protocol criteria.

16 So far you've identified paragraph 58.
17 Anywhere elsewhere where there's an express
18 disclosure?

19 MR. McCLELLLEN: Objection. Form.

20 A. So as we've noted, paragraph 58 is one
21 example that provides flexibility in the Sirmans
22 reference to those -- to a number of sources for
23 establishing the protocol criteria, either coming
24 up with them independently or selecting the ones
25 that are being used.

1 (Witness reviews document.) And I believe
2 we've identified a number of other paragraphs, as
3 we've had our discussion here, that are related to
4 or support that.

5 Q. Does Sirmans disclose a wrist-worn device,
6 Doctor Fischer?

7 A. (Witness reviews document.) So I refer to
8 this at least in paragraph 86 of my declaration
9 where Sirmans refers to a prior art reference
10 wherein the system is designed to be connected to
11 the body of the user.

12 And then they say that the (as read):

13 "...system can be very intrusive to an
14 individual and can be distracting during exercise."

15 To me, this means that Sirmans clearly
16 notes the importance of a conveniently placed and
17 comfortable monitoring device. You know, a person
18 of ordinary skill in the art looking to implement
19 Sirmans would have been motivated for ways to have
20 a user wear a sensor. And wearing a sensor on a
21 wrist -- for example, a watch-like device -- would
22 have been an obvious solution.

23 Going beyond that, Sirmans expressly
24 refers in paragraph 48 to patents that are
25 incorporated in their disclosure. And one of those

1 ones that they explicitly identify acknowledges a
2 wristwatch capable of converting a wearer's pulse
3 to determine a user's number of calories.

4 Q. I don't think you answered my question,
5 Doctor Fischer.

6 Does Sirmans disclose a wrist-worn device?

7 MR. McCLELLLEN: Objection. Form.

8 A. (Witness reviews document.) So I would
9 refer you to paragraph 48 of Sirmans. That notes
10 (as read):

11 "A monitoring device of the invention
12 includes a means for recording the identity of the
13 individual wearing the monitoring device and at
14 least one sensor for monitoring the physiologic
15 status of the member wearing the monitoring device.
16 The sensors of the monitoring device can preferably
17 monitor the type of exercise being performed by the
18 individual, the intensity and duration of the
19 exercise activity, as well as physiological
20 conditions such as heart rate or blood pressure,
21 caloric energy expended, or number of steps taken.
22 The sensors for monitoring physiologic status of an
23 individual and the means for recording the identity
24 of the individual can be based on known monitoring
25 devices and sensors such as disclosed in --" and

1 they note four specific patents in that paragraph.

2 One of those very specific -- specifically
3 identifies a wristwatch capable of converting the
4 wearer's pulse to the user's number of calories
5 expended.

6 In summary, Sirmans provides a broad swath
7 of types of sensors and monitoring devices that can
8 be used with the invention or that would be used
9 with the invention. They identify a number of
10 patents that they explicitly call out as examples
11 of known monitoring devices and sensing --
12 sensors, and among those identified by the
13 inventors of Sirmans are explicit examples of a
14 wristwatch.

15 Q. So it cites to other patents, but it
16 doesn't expressly disclose a wrist-worn device; is
17 that right?

18 MR. McCLELLLEN: Objection. Form.

19 A. I'm not a lawyer; so I don't want to
20 comment in detail what that specific term you just
21 said means, but my understanding is that it
22 discloses specific patents as examples, and those
23 specific patents that it expressly discloses, as
24 example, sensors in wearable devices, do show a
25 wristwatch.

1 So it's clear to me, as a person of
2 ordinary skill in the art reviewing Sirmans, that
3 they were well aware of these types of sensors,
4 felt that these would have been valuable, pointed
5 to them as examples of the types of sensors; and
6 the person of ordinary skill in the art would have
7 found it obvious to implement Sirmans' monitoring
8 device using the common wrist-worn sensors that
9 were well known long before the '615 priority date.

10 Q. Is there an express disclosure in Sirmans
11 of a wrist-worn device?

12 MR. McCLELLLEN: Objection. Form.

13 A. Again, not being a lawyer, I'm not
14 comfortable commenting on the word "express
15 disclosure."

16 They expressly identify a number of
17 patents that are examples that they incorporate
18 into their discussion, and those patents do discuss
19 a wristwatch.

20 Q. We talked about the words "express
21 disclosure" earlier; right?

22 A. Yes.

23 Q. And we kind of agreed to a -- a definition
24 of what that means; right?

25 MR. McCLELLLEN: Objection. Form.

1 A. I believe I understood what you presented
2 to me.

3 Q. Okay. Is there an express disclosure of a
4 wrist-worn device in Sirmans?

5 MR. McCLELLEN: Objection. Form.

6 A. If the disclosures of the patents that are
7 identified in here would be considered part of the
8 disclosure of Sirmans, then, yes, absolutely.

9 Q. Otherwise?

10 MR. McCLELLEN: Objection. Form.

11 A. Yeah, otherwise, as I noted, Sirmans very
12 clearly describes a variety of different types of
13 sensing and monitoring devices. In fact, they
14 even point out why some other types of devices
15 might not be convenient.

16 So, yes, I -- I do believe that it
17 describes sensors of the type of a wristwatch
18 within the disclosure, as well as within the
19 references that are included within the disclosure.

20 Q. Okay. So aside from patents, the only
21 disclosure of a wrist-worn device you can point to
22 is in paragraph 48 of Sirmans; is that right?

23 MR. McCLELLEN: Objection. Form.

24 A. (Witness reviews document.) So I would
25 just point you to some background that I provided

1 within my declaration, in particular on paragraph
2 26. And I note that (as read):

3 "To enable self-tracking --" is an example
4 within -- at least included within the Sirmans
5 reference of tracking user performance in athletic
6 activity -- "wearable sensors were introduced into
7 the market and used for monitoring physical
8 activity. The monitoring of athletic activity has
9 a number of different purposes. These include the
10 assessment of heart rate, pulse rate, blood
11 pressure data, body temperature, caloric energy
12 expended, number of steps taken, as well as gait
13 and balance. Wearable sensors can also collect
14 speed and distance data, altitude data, GPS data,
15 among a variety of other parameters. At the time
16 of the invention, wearable health monitors had a
17 place in both monitoring athletic activity of
18 healthy individuals as well as for monitoring the
19 activity of sick or disabled or otherwise impaired
20 individuals."

21 And I provide a number of examples, you
22 know, within my declaration that just should go on
23 to show that there are many means of wearable
24 sensing devices that could be incorporated within
25 Sirmans and they expressly identify a variety of

1 ways of doing so.

2 (Exhibit 7, Patent Application

3 Publication 2004/0152957.)

4 MR. McCLELLEN: So, Aaron, we've been
5 going for about an hour and we've got lunch coming
6 at 12:30, so maybe now would be a good time for a
7 break?

8 MR. BOWLING: Five minutes.

9 VIDEO OPERATOR: The time is 11:27. We're
10 off the record.

11 (Recess was taken.)

12 VIDEO OPERATOR: We are back on the
13 record. The time is 11:37.

14 Q. Okay. Doctor Fischer, we're going to hand
15 you what we've marked as Fischer Exhibit 7.

16 Do you recognize this document, Doctor
17 Fischer?

18 A. I believe this is what we referred to as
19 the Stivorik prior art reference.

20 Q. Okay. And it's your opinion that Stivorik
21 teaches the system receiving an activity time
22 period; is that right?

23 MR. McCLELLEN: Objection. Form.

24 A. I believe the Stivorik reference meets the
25 claim language "receiving a first activity goal for

1 the activity time period."

2 Q. And what about the limitations for
3 "receiving an activity time period"? Is it your
4 understanding that Stivoric teaches that as well?

5 A. Yeah, as I've identified, I believe the
6 Stivoric patent discloses "receiving a first
7 activity for the activity time period" as well as
8 "receiving an activity time period" as noted -- or
9 as described in the '615 patent.

10 Q. Okay. Let's look at paragraph 57 of your
11 declaration. The second sentence.

12 Let me know when you're there.

13 A. Yeah, reads (as read):

14 "Stivoric discloses receiving an activity
15 time period."

16 Q. Okay. That's your opinion?

17 A. Yes, that is my opinion.

18 Q. And you point to a couple of different
19 embodiments. And those are disclosed in paragraphs
20 180, 185 through 187, and 197; is that right?

21 MR. McCLELLAN: Objection. Form.

22 A. In that paragraph I describe the I/O
23 device 1200 as an example of such device and then I
24 refer to examples of that device in paragraphs 180
25 and 185 to 187. That's not to say those are the

1 only references associated with that device.

2 Q. Okay. So paragraph 197, that's -- that is
3 the portion of Stivoric where you think there's a
4 disclosure of the system receiving an activity time
5 period?

6 MR. McCLELLLEN: Objection. Form.

7 A. I believe paragraph 197 is an example
8 associated with where Stivoric receives an activity
9 time period and specific time periods that it
10 identifies are such as a day, a week, or a month.

11 Q. And in this example the user selects a
12 specific time period; is that right?

13 MR. McCLELLLEN: Objection. Form.

14 A. (Witness reviews document.) In one
15 example that I pull out in paragraph 57 of my
16 declaration I note (as read):

17 "The different time periods are received
18 from the user via a selection made 'by rotating
19 dial 1220 and, in one embodiment, also pressing
20 button 1215.'"

21 I believe that text that I pulled was from
22 that same paragraph, 197.

23 Q. Okay. And I think the sentence you're
24 pointing to begins with "Depending upon the
25 rotation of dial 1220"? It's about two-thirds of

1 the way down through that paragraph 197; is that
2 right?

3 A. (Witness reviews document.) Trying to
4 find the same text. Hang on one second here. I
5 believe that is one place where rotating the dial
6 1220 and 1215 is referred to.

7 Q. So in this example that's described in
8 paragraph 197 of Stivoric, the user is viewing data
9 that's already been recorded over different periods
10 of time; correct?

11 MR. McCLELLLEN: Objection. Form.

12 A. So in this section of my declaration,
13 including paragraph 57, it's focused on the claim
14 element "receiving an activity time period." And
15 in this paragraph and the citations that I refer to
16 I am focused on supporting the opinion that the
17 invention in Stivoric is receiving an activity time
18 period.

19 Q. And if I understand you right, the system
20 is receiving an activity time period because the
21 user is toggling between different windows of time
22 to view data that's already been recorded?

23 A. No --

24 MR. McCLELLLEN: Objection. Form.

25 Go ahead.

1 Q. What's wrong with that statement?

2 A. No, I did not say that.

3 While I do believe that the user may have
4 the ability to change these time periods, this is
5 focused on the fact that there is an activity time
6 period that -- that is received, and that time
7 period could be or would be a day, a week, or a
8 month as disclosed within this paragraph, that's
9 paragraph 197, of the Stivorice reference.

10 The user can certainly change views and
11 make other selections as well.

12 Q. So does paragraph 197 describe a user
13 toggling between different time periods of
14 prerecorded data?

15 MR. McCLELLAN: Objection. Form.

16 A. So the points within the Stivorice
17 reference that I'm referring to, which are also
18 associated with figures 43, are referring to
19 activity time periods within the system; and, for
20 example, there is in figure 43A an energy goal as a
21 daily goal. Below that in figure 43B is an energy
22 balance and a daily goal; and, then, 43C also
23 refers to an energy balance and a daily goal.

24 So there are goals that are in the system
25 that have been received by the system that can be

1 daily goals, weekly goals, or monthly goals. And
2 the user can select which of those goals they would
3 like to be looking at.

4 Q. And when -- when in the process can the
5 user select among one of those three time periods?

6 MR. McCLELLLEN: Objection. Form.

7 A. I believe as part of my analysis, at least
8 in this portion of my declaration, the opinion is
9 based on the fact that the system of Stivorice or
10 the invention of Stivorice has and receives an
11 activity time period. Whether that was selected by
12 the user or not -- while I do make some comments
13 related to that -- I don't believe that's the
14 primary focus of the opinion related to the fact
15 that Stivorice does receive an activity time period.

16 Q. So, in your opinion, does Stivorice receive
17 an activity time period from the user?

18 MR. McCLELLLEN: Objection. Form.

19 A. (Witness reviews document.) I believe
20 Stivorice receives an activity time period, and a
21 person of ordinary skill in the art would
22 understand that any reasonable activity time period
23 could be set. And I also just say that an example
24 one could be per day because that is explicitly
25 called out within the reference. Other periods may

1 also be used; thus Stivoric teaches, you know,
2 receiving a daily activity time period.

3 I don't believe, as part of this portion
4 of my declaration, I opined as to that it must come
5 from the user, although I do believe it could come
6 from the user.

7 Q. At what point in time, in your opinion,
8 does the user select an activity time period in
9 the --

10 MR. McCLELLLEN: Objection.

11 Q. -- example in paragraph 197?

12 MR. McCLELLLEN: Objection. Form.

13 A. Can you refer to where you're talking
14 about when you're saying "select"? Because I
15 believe the claim language and what I base my
16 opinion on was "receive an activity time period."

17 Q. Okay. So earlier you pointed me to part
18 of the disclosure where the user is toggling
19 between day, week, and month.

20 Do you remember that?

21 A. I believe --

22 MR. McCLELLLEN: Objection. Form.

23 Go ahead.

24 A. Yeah. I believe the user can view their
25 progress towards goals, either daily goals, weekly

1 goals, or monthly goals, for example, by rotating
2 the dial.

3 Q. And that occurs after the -- the data's
4 already been recorded; right? Because they're, as
5 you said, viewing their progress?

6 MR. McCLELLLEN: Objection. Form.

7 A. I believe at least in, you know, one
8 example the time periods could be defined prior to
9 the start of the activities, but I don't believe
10 there's anything that restricts within the Stivorik
11 reference to updating goals or time periods as the
12 user goes through their exercise routines.

13 Q. So you just said that in Stivorik there's
14 one example of the system receiving a time period
15 prior to the start of activities.

16 Where is that disclosed?

17 A. So within paragraph 197 I know there's a
18 sentence that says (as read):

19 "The example shown in figure 43A shows
20 that a daily goal of 2,000 calories was consumed
21 was set by the individual and that the individual
22 has consumed 1,483 calories on the day in question
23 and that the daily goal of 2,400 calories burned
24 was set by the individual and that the individual
25 has burned 2750 calories on one day in the day in

1 question."

2 So this statement points to the user
3 setting goals.

4 Q. But where do they set the activity time
5 period?

6 A. So the disclosure presents activity time
7 periods or examples of activity time periods that
8 include a day, a week, or a month, and the user can
9 toggle which goal they are assessing their progress
10 against.

11 Q. But isn't Stivoric monitoring that time
12 period regardless of what the user selects?

13 MR. McCLELLLEN: Objection. Form.

14 A. Well, it notes that "a daily goal of 2,400
15 calories burned was set by the individual."

16 So therefore the individual has the
17 ability to set daily goal, which could be another
18 time period, and 2,400 calories burned, which would
19 be the actual goal.

20 Q. You said "which could be another time
21 period."

22 What do you mean by that?

23 A. Previously within that paragraph we note
24 example time periods such as day, week, or month.

25 Q. So is there an embodiment where the user

1 selects not to record data over a certain time
2 period?

3 MR. McCLELLEN: Objection. Form.

4 A. So you just used the word "record," which
5 is one that we hadn't been talking about.

6 My opinion was based on the system
7 receiving time periods and receiving goals and
8 receiving athletic activity data that it used to
9 create an assessment.

10 Q. Okay. So is there an embodiment where
11 Stivorik is not receiving athletic activity data
12 for the time periods of a day, a week, or a month?

13 MR. McCLELLEN: Objection. Form.

14 A. I believe Stivorik receives a time period
15 or at least one time period. It receives a goal or
16 at least one goal; and, then, it receives athletic
17 activity data that it uses to assess the activity
18 goal over a given time period.

19 Q. Right. So -- so my question is more that
20 Stivorik seems to have these three preset time
21 periods and the user can adjust their goal -- how
22 many calories they burn, for example, over the
23 course of a day, a week, or a month -- but can you
24 identify anywhere in Stivorik where the user is
25 setting the activity time period to be something

1 other than a day, a week, or a month?

2 MR. McCLELLLEN: Objection. Form.

3 A. So Stivorice, you know, provides many
4 activities -- or many examples of activity-related
5 goals. These goals or activities can be related
6 to, you know, routines, and they're very clear that
7 a variety of different types of routines can be
8 utilized; and there's nothing that restricts it to
9 being a single day, or a day, a week, or a month.

10 In fact, even in my declaration I note
11 that it's not uncommon to use other activity time
12 periods. For example, intervals of two or three
13 days if you're alternating various different
14 exercises.

15 So, you know, I believe that the user
16 could select an arbitrary time period for which
17 they are assessing their exercise. I specifically
18 identify examples related to a day where a day is
19 received as the time period.

20 Q. And when is that received from the user?

21 MR. McCLELLLEN: Objection. Form.

22 Q. Is that before the activity is performed?

23 MR. McCLELLLEN: Same objection.

24 A. So you added a word in there "from the
25 user."

1 You know, my opinions are based on the
2 claim language, and the claim language notes an
3 element of "receiving an activity time period." I
4 don't believe it restricts it to receiving an
5 activity time period from the user.

6 Q. Is there anywhere in Stivoric that there's
7 a disclosure of the user selecting an activity time
8 period and the system receiving that activity time
9 period before activity begins?

10 MR. McCLELLLEN: Objection. Form.

11 A. So, yeah, as I previously noted, my
12 opinion is -- that I've prepared in my declaration,
13 is based upon identifying where in the Stivoric
14 reference Stivoric refers to receiving an activity
15 time period. Based on the plain and ordinary
16 meaning from the language of the '615 patent, I
17 don't see the word "user" in that claim
18 restriction, and I don't recall opining explicitly
19 whether it had to be coming from the user or being
20 received from an alternate source.

21 Q. Okay. Did you understand my question,
22 Doctor Fischer?

23 A. So I believe the Stivoric reference
24 identifies a number of potential time periods that
25 could be used for assessing goals against. The

1 user can select which one they would like to see
2 their progress against. And I believe the user
3 selects or approves what is provided in terms of
4 their plan or set of goals.

5 So therefore they are selecting or
6 approving that time period, and there's nothing
7 that precludes that time period from being anything
8 other than a day.

9 Q. Doctor Fischer, can you identify anywhere
10 in Stivoric where there's a disclosure of the user
11 selecting an activity time period and where the
12 system then receives that activity time period
13 before activity begins?

14 MR. McCLELLLEN: Objection. Form.

15 A. So my opinion prepared in my declaration
16 is based on identifying where Stivoric identifies
17 receiving an activity time period. I believe you
18 added at least two additional restrictions on top
19 of that that I don't believe I have previously
20 opined upon or elaborated upon in my declaration.

21 Q. Okay. So you don't have any opinion on
22 whether Stivoric discloses a user selecting an
23 activity time period and then the system receiving
24 that activity time period before activity begins;
25 is that right?

1 MR. McCLELLAN: Objection. Form.

2 A. That's not what I said.

3 What I said was my opinion prepared within
4 my declaration is directed towards identifying
5 where the Stivorik reference identifies receiving
6 an activity time period, which is the claim
7 language within the '615 patent.

8 Q. Do you have an opinion about whether
9 Stivorik discloses a user selecting an activity
10 time period and the system then receiving that
11 activity time period before activity begins?

12 A. I would need some time to review the
13 materials because, as I said, that's --

14 Q. Sure.

15 A. -- different language than the claim
16 language.

17 Q. As you sit here today, do you have an
18 opinion on that?

19 A. I would need some time to review the
20 materials and think about that.

21 Q. Okay. Go ahead.

22 A. (Witness reviews document.) So, you know,
23 as I previously noted, my opinions were based on
24 identifying where the Stivorik prior art reference
25 meets the claim language of the '615 patent. And

1 to be clear, the claim language just notes, at
2 least in claim 1, "receiving an activity time
3 period." It does not provide a time or a source
4 requirement on where that comes from.

5 That being said, I do believe the Stivorice
6 reference identifies locations where the goals and
7 the time periods can be set, both prior to
8 commencement of exercise, as well as, you know,
9 during or after that point.

10 Q. Are you able to identify any specific
11 paragraphs where Stivorice discloses "a user
12 selecting an activity time period and the system
13 then receiving that activity time period before
14 activity begins"?

15 A. So, again, the receiving that I included
16 in my analysis is -- is much more broadly
17 identified in the claim language of the '615
18 patent. I'm just saying that somewhere there is
19 receiving of an activity time period, and
20 necessarily in the processor, the processor is
21 receiving an activity time period.

22 So clearly the claim language of the
23 Stivorice reference meets the claims of the '615
24 patent.

25 There are locations within the '615

1 patent, again, where these goals are clearly --
2 goals and time periods are set beforehand and also
3 identified locations where it is updated after the
4 fact. And just one example of such is where
5 Stivoric notes that (as read):

6 "Settings and/or exercise programs may be
7 transmitted over a communications connection to
8 exercise equipment prior to commencement of a
9 workout for controlling it during the workout."

10 So that would just be one example where
11 the user, using their presumably wearable
12 watch-like device, would be selecting an exercise,
13 selecting a goal, selecting a time period, and
14 loading that into the exercise equipment that
15 they're using.

16 That paragraph also identifies ways in
17 which the program may modify -- based on the
18 collection -- data collection -- the exercise
19 program being followed by the user.

20 So that paragraph also identifies the
21 scenario where that exercise program -- or in this
22 case the set of goals and time periods -- can be
23 updated as we go along.

24 Q. What paragraph is that?

25 A. I believe that was in paragraph 216.

1 But as I previously noted, my opinions put
2 forth in my declaration are focused on the claim
3 language itself and not the specific additional
4 restrictions in the question you just asked me.

5 Q. Okay. And we don't need you to keep
6 repeating that, Doctor Fischer. We understand.
7 You put that on the record quite clearly.

8 So if I understand you right, your opinion
9 is that paragraph 216 of Stivoric discloses a user
10 selecting an activity time period and the system
11 then receiving that activity time period before
12 activity begins?

13 A. The lang- --

14 MR. McCLELLEN: Objection. Form.

15 A. Yeah. The language you're using in that
16 sentence, I'm not sure where that's coming from.
17 That's not from any of the claim language, and it
18 was not part of the opinions that I provided prior
19 to coming here.

20 Q. Got it. Thank you.

21 MR. McCLELLEN: And, I'm sorry, just one
22 more -- one more thing: Aaron, you know, Doctor
23 Fischer is -- is answering your questions here.
24 He's not just repeating his prior responses.

25 MR. BOWLING: Okay. We can disagree on

1 that.

2 Okay. Let's take a quick break if y'all
3 don't mind.

4 MR. McCLELLEN: Sure.

5 VIDEO OPERATOR: The time is 12:20. We're
6 off the record.

7 (Recess was taken.)

8 VIDEO OPERATOR: We are back on the
9 record. The time is 2:30 -- 12:30.

10 Q. Okay. Doctor Fischer, looking again at
11 page 40 of Fischer Exhibit 7, which is where the --
12 the figures are shown that we were looking at
13 earlier.

14 A. Which exhibit number?

15 Q. Actually, I believe it's page 39 of
16 Fischer.

17 MR. McCLELLEN: Can you restate it?

18 A. Are you referring to the --

19 Q. I'm sorry. Fischer Exhibit 7.
20 39 of -- I'm sticking with Stivorich.

21 A. Did you say page 39?

22 Q. Yes. And let me know when you're there.

23 A. I guess I'm there now.

24 Q. Okay. So earlier you testified that, in
25 your opinion, a user could review certain activity

1 data for other periods of time, like two or three
2 days.

3 Do you remember that?

4 MR. McCLELLLEN: Objection. Form.

5 A. I believe what I had said was that the
6 activity time period could be a different period.
7 It did not be -- it was not restricted to a day, a
8 week, or a month; and that it would be known to a
9 person in the art, for example, that, in some
10 exercises, it will alternate between different
11 types of exercises. So it could be a two-day
12 interval, for example.

13 Q. But Stivorice only discloses the
14 intervals -- if we're looking at these figures --
15 of day, week, and month; right?

16 MR. McCLELLLEN: Objection. Form.

17 A. So as I have previously, you know, noted,
18 my focus, when preparing the opinions in my
19 declaration, was to identify examples in the prior
20 art references, in this case Stivorice, that meet
21 the language of the claims; and I believe we're
22 referring to the subelement "receiving an activity
23 time period."

24 I don't see any reason why, based on
25 reading the '615 patent in its entirety, that the

1 receiving needs to be coming from a user. It could
2 be coming from an external source or an internal
3 source or potentially other sources.

4 And I also don't believe that that time
5 period necessarily has to be set before, during, or
6 after. I believe all of those can be options.

7 Q. So if a user wanted to look at their
8 activity data for a period of two days, how would
9 they do that using the system disclosed in
10 Stivoric?

11 A. So my opinion is based on the teachings of
12 Stivoric. And in Stivoric, if not expressly
13 disclosed, it certainly would have been obvious to
14 a person of ordinary skill in the art implementing
15 this system that any time period could be used.
16 There's no reason to believe it would only be a
17 day, a week, or a month.

18 Q. Okay. So it -- how would they look at a
19 two-day period using the system disclosed in
20 Stivoric?

21 MR. McCLELLAN: Objection. Form.

22 A. So as I've noted, these are exemplary
23 embodiments within the Stivoric reference, and I'm
24 focused on -- basing my opinions on the teachings
25 of the Stivoric reference in its entirety. It

1 would have been readily apparent to one
2 implementing such a system to set any time interval
3 to be used in the calculations on the processor --
4 or elsewhere -- to determine whether these goals
5 were met over a given time period or time interval.

6 So, for example, in figure 43A where it
7 talks about goals for a day, it would have been
8 trivial for an operator or somebody implementing
9 such a system to set any arbitrary time interval,
10 not just a day.

11 Q. And I think you opined that all you would
12 need is basic programming skills to make those
13 changes to Stivorice; is that right?

14 MR. McCLELLAN: Objection. Form.

15 A. If you can point me to specifically where
16 I said that, I'd be happy to comment on it.

17 Q. Paragraph 115 of your declaration.

18 A. Oh, did you say paragraph 115 or page 115?

19 Q. Paragraph 115.

20 A. Oh, okay.

21 Q. If you wanted to look at more than one
22 day, wouldn't you have to change this whole
23 interface the way that the -- the data is
24 presented?

25 MR. McCLELLAN: Objection. Form.

1 A. So, first off, paragraph 115 is in a
2 different section of my declaration related to the
3 combinations of the teachings of Stivoric and
4 teachings of Kobayashi, but as I've noted, this is
5 related to the teachings of Stivoric, not the --
6 not restricted only to the specific examples within
7 the Stivoric reference.

8 And if you just give me one second, I'd
9 like to elaborate upon that. (Witness reviews
10 document.) So I believe you were pointing to
11 figures 43A, B, and C and similar when you were
12 asking that question; is that correct?

13 Q. That's right.

14 A. And I believe those are referring to I/O
15 device -- or sensor device, I apologize, 1201; is
16 that correct?

17 Q. You tell me.

18 A. (Witness reviews document.) I believe
19 your question was looking at this entire device,
20 could you implement a different visualization, if
21 you will, for different time periods? And I would
22 like to emphasize that this is just yet one example
23 of the different types of sensor devices disclosed
24 within the Stivoric reference.

25 And in particular, I point you to

1 paragraph 185 of Stivorice that notes that (as
2 read):

3 "Sensor device 1201 detects human
4 physiologic and/or contextual parameters and may be
5 any one of sensor devices 400 shown in figures 12
6 to 17, stand-alone sensor devices 700 shown in
7 figure 21, or sensor devices 800 shown in figures
8 22 to 26. I/O device 1200 includes housing, LCD,
9 another housing."

10 And then it goes on to say that (as read):

11 "Various alternative display devices may
12 be used instead of an LCD for displaying
13 information, and such displaying of information and
14 display devices are not limited to visual devices
15 but may include various tactile or audible displays
16 as described elsewhere herein."

17 I think that the example that you're
18 pointing to is a very specific implementation or
19 example described in the Stivorice reference. The
20 teaching is substantially more broad, and they
21 disclose a wide array of ways in which the system
22 could be implemented to a user, and modifying any
23 of these to change the time period certainly would
24 have been a very simple task, readily, you know,
25 implemented by modifying the software on there to

1 display and use in the calculations of a different
2 time period.

3 Q. Do you have any evidence you point to or
4 any sort of reference you can point to that those
5 modifications would be a "simple task," as you say?

6 MR. McCLELLLEN: Objection. Form.

7 A. (Witness reviews document.) So just for
8 example, you know, within the Stivorice reference,
9 figures 20, 21, 27, among, presumably, many others,
10 show what appears to me to be a very standard
11 embedded system that really any embedded system
12 software engineer readily could use any time period
13 in a very simple calculation when effectively
14 counting the progress towards a goal and comparing
15 it over a given time period.

16 Q. Does Stivorice anywhere teach modifying its
17 interface to cover different time periods other
18 than day, week, or month?

19 MR. McCLELLLEN: Objection. Form.

20 A. (Witness reviews document.) So as we had
21 previously noted, Stivorice identifies example time
22 periods which include a day, a week, a month. It
23 also shows very standard or what I would consider
24 to be very standard implementations of embedded
25 systems which a person of ordinary skill in the art

1 could readily configure to receive a time period or
 2 the processing unit could receive a particular time
 3 period to be used in a comparison when assessing
 4 the performance of the user; and, in fact, they
 5 specifically identify memory storage chips and
 6 additional details in figure 44 that could be
 7 storing those values, and it would be a simple
 8 substitution of a different value for a different
 9 time period.

10 MR. BOWLING: I don't think we have
 11 anything further.

12 MR. McCLELLLEN: Can you give us five
 13 minutes?

14 MR. BOWLING: Sure.

15 VIDEO OPERATOR: The time is 12:44. We're
 16 off the record.

17 (Recess was taken.)

18 VIDEO OPERATOR: We are back on the
 19 record. The time is 12:49.

20 MR. McCLELLLEN: So Lululemon does not have
 21 any redirect examination. So we can end the
 22 deposition.

23 MR. BOWLING: Thank you.

24 MR. McCLELLLEN: Thank you.

25 VIDEO OPERATOR: The time is 12:49. We're

1 off the record.

2 (Whereupon the deposition ended at
3 12:50 p.m.)
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Commonwealth of Massachusetts
Middlesex, ss.

I, P. Jodi Ohnemus, Notary Public
in and for the Commonwealth of Massachusetts,
do hereby certify that there came before me
on the 18th day of September, 2023, the deponent
herein, who was duly sworn by me; that the ensuing
examination upon oath of the said deponent was
reported stenographically by me and transcribed
into typewriting under my direction and control;
and that the within transcript is a true record of
the questions asked and answers given at said
deposition.

I FURTHER CERTIFY that I am neither
attorney nor counsel for, nor related to or
employed by any of the parties to the action
in which this deposition is taken; and, further,
that I am not a relative or employee of any
attorney or financially interested in the outcome
of the action.

IN WITNESS WHEREOF I have hereunto set my
hand and affixed my seal of office this
18th day of September, 2023.



P. Jodi Ohnemus, RPR, RMR, CRR
CSR, Notary Public,
Commonwealth of Massachusetts
My Commission Expires:
3/3/2028

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

September 19, 2023

To: Mr. McClellen

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

Veritext Reference Number: 6066739

Witness: Gregory S. Fischer , PhD Deposition Date: 9/18/2023

Dear Sir/Madam:

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

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

Sincerely,
Production Department

NO NOTARY REQUIRED IN CA

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 6066739

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

DATE OF DEPOSITION: 9/18/2023

WITNESS' NAME: Gregory S. Fischer , PhD

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

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

Date Gregory S. Fischer , PhD

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

They have read the transcript;

They signed the foregoing Sworn Statement; and

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

I have affixed my name and official seal

this _____ day of _____, 20____.

Notary Public

Commission Expiration Date

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 6066739

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

DATE OF DEPOSITION: 9/18/2023

WITNESS' NAME: Gregory S. Fischer , PhD

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

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

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

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

Date

Gregory S. Fischer , PhD

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

They have read the transcript;

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

They signed the foregoing Sworn Statement; and

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

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

Notary Public

Commission Expiration Date

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& 2:3,15 3:5 6:11,13 21:10	86:6	2,400 90:23	2750 90:25
1	123193 1:21	91:14,18	2:30 100:9
1 5:4 8:11,13 24:9,12,21 27:13 36:4,5 70:6,18 97:2	12:20 100:5	20 34:7 35:2,3	3
1,483 90:22	12:30 83:6	37:25 39:9	3 5:6 9:17,19
1-109 1:1	100:9	46:22 49:25	9:25 10:21
1-7 1:2	12:44 107:15	50:11,13,18	11:14,17 12:2
10 22:1	12:49 107:19	51:2,14,16	3/3/2028
1001 9:9	107:25	52:2,15,18	109:22
10019-9601	12:50 108:3	53:8 58:6	30 34:6 35:4
2:19	13192 1:20	106:9 111:16	36:8 37:24
1004 22:22	15 22:1	112:22 113:22	39:8 46:21
1006 9:17	16 8:12,14	200 1:23	58:5
10:18 46:7	17 105:6	2004/0152957	31 53:14
10:27 46:11	18 1:24 13:15	5:17 83:3	349 8:14 9:10
11 5:5,8,11	13:18 14:1,10	2006/0111944	9:18
1100 110:1	14:17 15:7	5:14 22:21	39 100:15,20,21
115 103:17,18	180 84:20,24	20071-3743	3rd 12:7,13
103:18,19	1820 110:2	3:13	13:1 18:7,17
104:1	185 84:20,25	2022 18:6	4
116 9:24 12:4	105:1	2023 1:24 6:4	4 5:8 10:25
11:27 83:9	187 84:20,25	12:8,13 13:1	11:1,4,6,13,17
11:37 83:13	18th 6:4 8:22	18:7,17 109:6	40 100:11
12 105:5	109:6,16	109:16 110:4	400 105:5
1200 84:23	19 73:9 74:8	2023-00349 1:5	4200 3:7
105:8	110:4	2023-349 8:22	425 2:5
1201 104:15	197 84:20 85:2	21 105:7 106:9	43 87:18
105:3	85:7,22 86:1,8	216 98:25 99:9	43a 87:20
1215 85:20	87:9,12 89:11	216-523-1313	90:19 103:6
86:6	90:17	110:3	104:11
	2	22 5:13 105:8	43b 87:21
	2 5:5 9:9,11	24 13:6,9	43c 87:22
	24:18,21 56:11	250 2:18	44 107:6
	56:24 59:25	26 82:2 105:8	
	62:14 63:6		

44114 110:2 48 77:24 78:9 81:22	21:7 22:14 23:18,24 24:1 35:20 36:10 39:6 45:10 48:23 49:12 56:18 59:18 62:8 80:9 84:9 94:16 96:7,25 97:17,23,25 101:25	71 57:8,20,23 57:25 58:13,17 59:3,6 73 24:6 77 27:18,25 41:3 60:5	a
5		8	a.m. 1:25 6:4 a1 5:15 22:21 aaron 3:6 6:11 30:16 43:22 83:4 99:22 aaron's 20:14 aaron.bowling 3:9 ability 7:19 32:4 33:24 34:5,23 35:11 38:3 50:23 54:23 55:14 57:12,16 59:1 69:19 87:4 91:17 able 30:1 33:1 43:15,23 49:4 73:3 74:3 97:10 above 110:17 absolutely 81:8 acceptance 29:21 38:14 41:24 61:7 access 26:20 28:5,12,16 31:7 36:21 45:3 47:3 49:16 64:15 66:17,23 67:8 75:6 accomplished 59:11
5 5:11 10:25 11:8,10,14,15 11:23 12:3 13:7 25:2 55th 2:18 57 84:10 85:15 86:13 58 26:25 28:9 31:20 47:1 48:7 49:3,13 53:9 64:12 66:13 67:11,20 72:17 73:2 74:2 75:3,21 76:1,16,20 59 48:11 49:3 53:9 68:15	6433 109:18 65 24:6 67 24:2,14 28:4 28:9 31:20,22 68 27:23 28:1 29:18 31:22 32:8,22 35:15 38:12 39:23 42:13,14 47:13 48:7 49:3 53:9 56:3,24 58:21 59:2,25 61:11 61:22 62:13 63:2 69 27:18 56:6 56:24 59:3,25 62:13	8 5:4 800 105:7 83 5:16 84 27:13 34:2 36:5,14,16 37:8,10,21 45:15 46:17 47:9 48:6 49:3 53:9 58:4 71:10,12 72:4 72:8,22 76:9 86 77:8	
6		9	
6 5:13 22:19,20 22:22 24:18,22 57:23 60 33:7 75:11 76:2 601 3:12 60602-4231 3:8 6066739 110:7 111:2 112:2 113:2 615 8:9 9:1,15 13:20 19:22	7 4:6 5:16 83:2 83:15 100:11 100:19 70 3:7 700 105:6 707 2:10	9 5:6 9,259,615 1:6 5:5 9:11 9/18/2023 110:8 111:3 112:3 90017 2:11 91 1:21 94105-2482 2:6 9:12 1:25 9:13 6:4	

accordance 111:5 112:5 achieve 44:21 acknowledge 111:11 112:16 acknowledges 78:1 act 111:14 112:20 action 109:12 109:14 activities 26:4 53:18 54:15 59:9 61:25 90:9,15 93:4,5 activity 27:19 29:22 34:10 35:12 41:4,5 41:16,20,25 42:8 48:22 59:14,15 60:7 60:8,14,24 61:3,5,9,24 62:1 63:4,14 72:23,25 78:19 82:6,8,8,17,19 83:21,25 84:1 84:3,7,7,8,14 85:4,8 86:14 86:17,20 87:5 87:19 88:11,15 88:17,20,22 89:2,8,16 91:4 91:6,7 92:8,11 92:17,17,25	93:4,11,22 94:3,5,7,8,9,14 95:11,12,13,17 95:23,24,24 96:6,9,11,11 97:2,12,13,14 97:19,21 99:10 99:11,12 100:25 101:6 101:22 102:8 actual 91:19 actually 10:7 24:5 26:16 36:9 100:15 added 65:9 93:24 95:18 adding 33:11 addition 49:1 additional 14:22 26:6 63:17 64:3,5 95:18 99:3 107:6 address 110:15 adjust 33:24 92:21 adopted 70:12 aerobic 54:2 affirmatively 65:6 affixed 109:16 111:15 112:21 agency 37:2 45:4,16 51:12	ago 7:7 agree 30:5,11 32:4 38:17,25 39:24 40:7,8 42:3 47:14 52:10 55:14 56:4 58:22 63:3 agreed 80:23 agreeing 30:23 61:24 agrees 56:12 ahead 10:18,24 15:24 29:3 30:16 36:23 86:25 89:23 96:21 al 110:6 111:3 112:3 alcoholic 54:6 alex 2:17 aligned 48:22 aligns 46:23 allows 44:7 altered 20:12 alternate 94:20 101:10 alternating 93:13 alternative 105:11 altitude 82:14 amount 19:14 19:18 34:10 44:12	analysis 13:19 88:7 97:16 angeles 2:11 answer 7:16 8:3 15:25 20:14,15 59:23 72:10 74:23 answered 44:3 55:11 61:21 62:18 69:3 72:1 73:23 78:4 answering 7:18 37:16 38:8 52:22 99:23 answers 7:24 42:20 109:9 anybody 22:3 40:21 apologize 27:15 35:4 49:18 104:15 apparent 103:1 appeal 1:4,19 appear 111:11 112:15 appearances 2:1 3:1 appears 9:14 9:23 23:1 73:9 76:12 106:10 appended 112:11,18 applicable 1:18
--	---	---	--

application 5:13,16 22:20 83:2 applications 13:21 appropriate 26:19 28:5,11 28:15 30:7 31:7,14,25 33:4 36:21 42:5 45:3 47:3 49:15 50:24 54:14 64:15 66:17,23 67:8 75:5 appropriately 54:11 approvals 38:4 approve 54:23 approved 57:19 approves 95:3 approving 40:23 67:1 95:6 arbitrary 93:16 103:9 argument 50:14 63:18 arjomand 2:9 6:16 arnold 3:5 6:11 6:13 arnoldporter.... 3:9,14	array 105:21 art 14:20,25 15:11,21 16:8 19:22 21:6 22:7 37:1 40:18 41:13 42:7 45:20 47:21 59:12 60:21 61:15 63:23 65:21 77:9,18 80:2,6 83:19 88:21 96:24 101:9,20 102:14 106:25 aside 11:13 15:6 35:11 59:25 62:13 72:3 73:2 74:2 81:20 asked 36:7 42:10 43:9 46:18 48:3 62:17 71:1,1 71:15 76:12 99:4 109:9 asking 7:8 35:9 52:24 59:19,20 59:22 62:3,6,7 62:11 65:6,7,9 74:16 104:12 aspects 34:24 assertion 51:17 assertions 49:2 assess 92:17	assessed 38:24 59:9 assessing 57:10 91:9 93:17 94:25 107:3 assessment 82:10 92:9 assignment 111:2 112:2 113:2 associated 21:6 34:10 41:16 60:24 61:4 73:14 85:1,8 87:18 assume 7:17 athletic 41:15 59:14 60:23 82:5,8,17 92:8 92:11,16 athletica 1:8 6:7 110:6 111:3 112:3 attached 112:7 attorney 15:23 18:25 20:11 109:11,13 attorneys 22:3 audible 105:15 authorize 112:11 ave 110:1 avenue 3:12 aware 9:7 11:12,21,22	12:18 15:9 75:18 80:3 ayap 2:21 b b 5:1 104:11 back 24:5 46:10 59:2 66:13 69:10 83:12 100:8 107:18 110:15 background 14:19,21 15:3 15:8 17:11 81:25 balance 82:13 87:22,23 base 89:15 based 25:8,16 33:9 35:7 50:9 71:18 73:15 78:24 88:9 92:6 94:1,13 94:15 95:16 96:23 98:17 101:24 102:11 basic 103:12 basics 7:6 basing 102:24 begins 85:24 94:9 95:13,24 96:11 97:14 99:12 behalf 1:17 6:12 8:24
--	---	---	---

behavioral 25:16 believe 8:18 11:15,17 12:15 14:4,8 15:4 16:23 17:25 18:4,19 20:7 22:5,14 23:23 24:19 25:11 28:8,24 29:11 30:23 31:23 32:5,17 34:14 34:20 35:17 38:5,9 40:2,14 44:2 45:14 47:16 48:17,21 50:4,13,23 52:4,12 53:1,7 54:23 55:10,24 56:15 57:4,13 57:24 58:7,17 58:25 59:6,16 61:21,25 62:20 63:4,13,14,24 64:19 65:13 68:2 69:3,15 69:25 72:1 75:19 77:1 81:1,16 83:18 83:24 84:5 85:7,21 86:5 87:3 88:7,13 88:19 89:3,5 89:15,21,24 90:7,9 92:14	93:15 94:4,23 95:2,17,19 97:5 98:25 100:15 101:5 101:21 102:4,6 102:16 104:10 104:14,18 believed 45:21 best 7:18 14:11 16:6,9 19:6 73:25 better 20:2,6 20:22 beyond 15:15 15:18 17:3 18:8 40:1 77:23 bicycling 54:3 bit 7:7 23:10 35:9 blocks 63:5 blood 78:20 82:10 board 1:4,19 body 71:15 77:11 82:11 boston 1:23 6:5 boulevard 2:10 bowling 3:6 4:6 6:11,11 7:2 8:8 10:13 11:6 42:22 46:6 83:8 99:25 107:10,14,23	box 24:22 25:1 25:4,12,14 break 8:4 42:21 46:5 83:7 100:2 breaks 8:1 brief 21:9 briefly 19:2 20:19 23:6 broad 79:6 105:20 broadly 43:2 97:16 budd 3:18 6:2 burn 92:22 burned 41:20 61:3 90:23,25 91:15,18 button 85:20 c c 3:11 104:11 ca 1:20 2:6,11 110:25 calculation 106:13 calculations 103:3 106:1 call 15:8 79:10 called 1:16 88:25 calls 15:22 18:24 20:11 48:21 caloric 78:21 82:11	calories 41:20 61:3 78:3 79:4 90:20,22,23,25 91:15,18 92:22 canada 1:8 6:7 110:6 111:3 112:3 capable 78:2 79:3 carrier 25:25 26:12,22 31:10 case 8:22 9:1 18:14,18 20:3 20:6,8,22 21:15 40:16 52:12 62:24 71:3 75:2 98:22 101:20 110:6 111:3 112:3 cases 34:9 caution 16:18 17:5,15,20 18:2 20:24 cdc 47:8 71:20 76:8 center 34:3 36:17 37:1,22 45:7 46:18 70:10,19,24,24 71:13 72:3,23 certain 30:2 33:17 34:18 35:12,24 36:15 37:19 38:25
---	---	---	--

39:3 40:8,10 43:6 46:15 48:5 49:6 50:12 51:15 52:3,16 53:11 54:18 55:6 56:23 57:22 60:3 62:15 92:1 100:25 certainly 28:19 29:24 34:15 40:16 44:10 47:19 50:6,22 54:12 61:14,22 64:2 68:4 70:2 87:10 102:13 105:23 certificate 112:11 certification 111:1 112:1 certify 109:5,11 challenged 23:14 change 18:21 87:4,10 103:22 105:23 110:13 110:14 112:8 113:3 changed 13:2 18:11 20:18 changes 12:21 103:13 110:12 111:7 112:7,9	chart 25:6 54:25 chicago 3:8 chips 107:5 choice 55:6 59:4 choose 30:1 33:14,17 34:5 35:11 36:15 37:8 39:2 chooses 37:19 choosing 35:23 40:10 43:11,25 46:14 48:5 49:6 50:11 51:5,14 52:2 52:15 53:10 54:18 chosen 33:10 73:15 citations 14:22 86:15 cite 15:4,18 19:16 42:13 61:11 cited 15:3 75:8 cites 79:15 civil 111:5 112:5 claim 63:23 83:25 86:13 89:15 94:2,2 94:17 96:6,15 96:25 97:1,2 97:17,22 99:2	99:17 claims 23:14,23 23:25 48:25 63:17 97:23 101:21 clarendon 1:23 clarify 27:14 39:15 clean 10:9,10 clear 23:10 38:20 47:8 48:21 57:14 64:21 65:24 72:13 80:1 93:6 97:1 clearly 29:18 43:7 56:16 59:13 62:24 63:24 77:15 81:12 97:22 98:1 99:7 cleveland 110:2 client 18:25 20:11 club 50:3 51:3 51:4 colleague 6:16 collect 82:13 collection 98:18,18 combination 21:13 26:24 31:11 53:1,6 combinations 104:3	come 12:24 28:10,14,22 36:11,17 51:21 57:18 62:22 89:4,5 comes 97:4 comfortable 67:24 77:17 80:14 coming 40:21 51:10 76:7,23 83:5 94:19 99:16,19 102:1 102:2 commencem... 97:8 98:8 commencing 1:25 comment 79:20 103:16 commenting 80:14 comments 88:12 commission 109:21 111:19 112:25 113:25 common 80:8 commonwealth 1:22 109:1,5 109:21 communicati... 98:7 comparing 106:14
---	--	--	---

comparison 107:3 complete 14:2 completed 12:14,16 110:15 compliance 25:17 33:14 73:16 concept 51:2 66:5 conditions 78:20 configure 107:1 connected 77:10 connection 98:7 consider 68:4 70:3 106:23 considered 13:13,20 14:2 14:6,15 15:9 18:8,9,13,15 31:13 34:12 35:18 49:11 72:15 81:7 constitute 44:25 constitutes 51:4 consumed 90:20,22	cont'd 3:1 contacts 16:1 contemplated 53:24 contents 5:8 10:11,15 11:1 11:5,7,18 context 16:11 20:7 21:1 35:19 67:17 contextual 105:4 control 34:3 36:18 37:2,23 45:8 46:18 54:7 70:10,19 70:24,25 71:14 72:3,24 109:8 controlling 98:9 convenient 81:15 conveniently 77:16 converting 78:2 79:3 copies 18:19,23 19:2 copy 10:10,11 10:19 11:9,20 corners 65:10 correct 10:7 14:10 24:15 30:14,17 32:16 70:20 86:10	104:12,16 corrections 110:12 112:17 correspond 61:25 62:1 68:10 72:14 corresponding 41:5 46:3 60:8 corresponds 59:17 counsel 6:9 109:11 counting 106:14 county 111:10 112:15 couple 56:1 75:16 84:18 course 92:23 courses 54:6,7 54:7 court 6:19 11:4 42:25 111:7 cover 106:17 create 92:9 creation 71:6 criteria 25:7,13 25:20,23 26:10 26:14,17 27:2 27:5,10,20 28:2,10,14,21 28:22 29:5,13 29:16,19,21 30:2,13 31:1,4 31:6,19 32:1	32:10,15,21 33:5,6,9,15,18 33:20 34:5,11 34:16,22 35:9 35:14,14,21,22 35:24 36:2,12 36:15,17,20 37:3,4,9,11,14 37:20 38:4,14 38:23,23 39:3 39:5 40:4,11 40:20,23,25 41:21,24 42:11 42:16 43:1,6 43:11,13,25 44:5,6,15,19,21 44:25 45:11,17 45:18,21,22 46:15,25 47:2 47:10,18 48:5 48:15,16 49:6 49:10,14 50:12 50:16 51:5,8 51:15 52:1,3,6 52:16,20 53:4 53:4,11 54:18 55:6,15,18 56:9,13,23 57:17,17,22 60:3,18 61:6,8 62:16,22 63:1 64:9,14,23 65:17,25 66:9 66:16,25 67:2 67:5,15,22
---	--	--	--

68:3,6,7,8,9,13 68:19,21,23,24 69:7,12,17,17 69:19,20,23 70:1,4,5,8,13 70:17,20 71:3 71:5,6,11,18,19 71:22 72:6,9 72:10,16 73:1 73:6,11,13,19 73:21 74:6,11 74:12,15,17 75:4 76:15,23 crr 1:20 109:20 csr 1:20,21 109:20 current 14:25 16:8	111:19 112:3 112:13,25 113:20,25 dates 21:18 day 34:6,8 36:8 37:25,25 39:8 39:9 44:12 85:10 87:7 88:24 89:19 90:22,25,25 91:8,24 92:12 92:23 93:1,9,9 93:18,18 95:8 101:7,11,15 102:17,19 103:7,10,22 106:18,22 109:6,16 111:16 112:22 113:22 days 34:7,8 93:13 101:2 102:8 110:18 dc 3:13 dear 110:10 deciding 32:6 decision 18:20 19:5 20:4 22:10 declaration 5:6 5:9,11 8:9 9:19 9:23 10:10,11 10:20 11:2,9 11:10,16 12:14 12:16,18 13:3	13:5 14:5,21 15:13,19 18:9 18:12 19:10,16 19:20,25 20:17 21:5 22:7 23:2 24:3,13 26:7 27:10,18,22,25 36:4 41:3 42:12 48:20 50:15 51:13 58:3,11 60:6 62:7 63:12,21 64:1 68:25 70:7 75:20 77:8 82:1,22 84:11 85:16 86:12 88:8 89:4 93:10 94:12 95:15,20 96:4 99:2 101:19 103:17 104:2 deed 111:14 112:20 deemed 110:19 define 34:24 defined 56:18 58:2,3 62:8 68:25 90:8 definition 65:3 80:23 department 110:22 depending 85:24	depicted 24:9 deponent 109:6 109:7 deposition 1:15 5:4 6:6,17 7:22 8:13,21 19:11 21:4 107:22 108:2 109:9,12 110:8,11 111:1 111:3 112:1,3 describe 23:6 27:19 55:2 84:22 87:12 described 26:15 27:3 28:3,4 31:19 47:20 58:11 68:2 71:16,22 84:9 86:7 105:16,19 describes 29:15 40:15 41:6 51:2 59:7 60:11 71:12 76:4 81:12,17 describing 15:25 41:23 44:14 description 5:2 38:2 40:14 43:16 46:23 designed 26:4 53:18 54:4 77:10
d			
d 4:1 daily 87:21,22 87:23 88:1 89:2,25 90:20 90:23 91:14,17 dancing 54:3 data 82:11,14 82:14,14 86:8 86:22 87:14 92:1,8,11,17 98:18 101:1 102:8 103:23 data's 90:3 date 6:3 12:6 12:13,15 80:9 110:8 111:3,9			

detail 79:20 details 107:6 detects 105:3 determine 78:3 103:4 device 36:7 77:5,17,21 78:6,11,13,15 78:16 79:16 80:8,11 81:4 81:21 84:23,23 84:24 85:1 98:12 104:15 104:15,19 105:3,8 devices 78:25 79:7,11,24 81:13,14 82:24 104:23 105:5,6 105:7,11,14,14 dial 85:19,25 86:5 90:2 differences 11:21 different 35:10 58:1 60:13 75:16 81:12 82:9 84:18 85:17 86:9,21 87:13 93:7,13 96:15 101:6,10 104:2,20,21,23 106:1,17 107:8 107:8	dig 10:8 digging 48:19 directed 96:4 direction 16:4 109:8 directly 15:18 57:18 71:2,20 disabled 82:19 disagree 33:23 43:19 44:24 99:25 disclose 31:18 35:13 46:14 48:4 51:14 52:2,15 56:22 58:13 69:25 72:4 77:5 78:6 79:16 105:21 disclosed 23:5 23:9 35:15 65:11 66:11 68:11 69:5 71:9 72:19 78:25 84:19 87:8 90:16 102:9,13,19 104:23 discloses 23:13 23:15 33:19 41:4 43:11,12 47:16 50:4,11 52:25 57:21 60:7 67:21 79:22,23 84:6 84:14 95:22	96:9 97:11 99:9 101:13 disclosure 17:12 31:4 32:20 33:16 37:12 43:18,24 47:12,22 49:5 51:4 52:5 53:10 54:17 55:1,5,12,21 58:9 59:4 60:2 61:12 62:14 63:7,16 64:3 64:25 65:5,16 65:23 67:3,18 69:12 73:5 74:5,23 76:13 76:18 77:25 80:10,15,21 81:3,8,18,19,21 85:4 89:18 91:6 94:7 95:10 disclosures 48:18 54:20 64:8 81:6 discuss 13:3 70:7 80:18 discussed 32:21 53:7 67:4 discussing 37:12 discussion 12:25 37:13 40:2 77:3	80:18 discussions 57:4 58:10 disease 34:3 36:17 37:2,22 45:8 46:18 70:10,19,24,24 71:13 72:3,24 display 105:11 105:14 106:1 displaying 105:12,13 displays 105:15 distance 41:19 61:2 82:14 distracting 77:14 dive 47:24 doctor 6:18 7:3 8:10,16 9:21 10:9,14 11:8 11:12 15:24 16:18 17:5,15 20:12,24 21:4 22:18,24 23:3 29:3 37:7,17 38:7 43:9,20 46:12 50:10 52:23 54:16 59:19 61:19 62:4 64:24 69:1 71:24 73:2,21 74:17 76:12 77:6 78:5 83:14,16
---	---	--	---

94:22 95:9 99:6,22 100:10 document 8:16 8:18 9:13,21 10:2,4 22:24 27:9,17 29:17 32:24 33:22 41:2 42:18 44:8 45:1 48:17 49:7,23 49:24 53:12 55:8,24 56:11 65:10 67:13 69:9 70:9 73:8 74:21,25 75:17 77:1,7 78:8 81:24 83:16 85:14 86:3 88:19 96:22 104:10,18 106:7,20 documents 14:9 19:7,9,13 20:1,12,19 21:1 doing 83:1 dr 6:6 driver's 6:23 duly 6:24 109:6 duration 78:18	100:13,24 easiest 10:22 effectively 40:20 66:1 74:24 106:13 effort 19:15,18 46:2 either 33:9 40:22 51:22 52:12 57:18 76:23 89:25 elaborate 104:9 elaborated 95:20 element 86:14 94:3 email 110:17 embedded 106:11,11,24 embodiment 68:18 70:19 73:11 85:19 91:25 92:10 embodiments 68:11 69:5 84:19 102:23 emphasize 104:22 emphasizing 46:25 employed 109:12 employee 109:13	employer 26:22 31:9 enable 82:3 enclosed 110:11 encourage 23:19 encouraging 23:16 ended 31:24 34:21 40:19,22 43:15 51:9 65:8 108:2 energy 78:21 82:11 87:20,21 87:23 engage 40:8 engineer 106:12 ensuing 109:6 enter 10:24 entered 75:12 112:9 entire 67:18 104:19 111:5 112:5 entirely 62:23 entirety 19:8 19:12,21 65:22 75:24 101:25 102:25 entities 51:22 70:15 entitled 73:12	entity 25:24 26:1,11,13,19 26:23,24 28:5 28:10 31:7,10 31:11,13,24 33:3 36:21,24 45:2 47:3,5 49:15 52:6 64:15 66:17 68:4,5 69:13 70:2,13 71:4 72:19 75:5 envisioned 37:4 69:16,22 envisions 64:21 equipment 30:8 42:6 98:8 98:14 errata 110:13 110:18 112:7 112:10,18 113:1 errors 12:19 esq 2:4,9,16,17 3:6,11 establish 25:7 33:13 34:24 35:8 68:5 70:14,17 74:22 75:18,25 76:1 76:12 established 25:24 26:11,18 28:4 29:5,20 30:3 31:6
--	---	--	--

32:11,16 33:10 33:12 36:20 41:22 47:2 49:14 52:6 58:19 59:10 61:6 64:14 66:16 68:3 69:13,18 70:2 71:7,19 72:16 75:1,4,11,15 76:9 establishes 31:3 57:8 68:12 69:6 70:7,20 establishing 30:13 31:19 32:20 33:19 35:13 43:13,25 64:9,22 65:17 65:25 66:8 67:4,21 71:4 71:11 72:5 73:1,5 74:5,20 76:6,15,23 estimate 19:6 et 110:6 111:3 112:3 etcetera 41:21 54:4 evidence 106:3 exact 11:16 21:12,18 exactly 12:24 16:19 70:22	examination 107:21 109:7 examined 6:25 example 24:11 27:8,13 30:4,9 30:10 34:2,4,6 34:9 35:25 36:4,5,16 38:12,20 39:7 40:12 43:10,12 45:5,12,14 46:17,20 47:13 47:17 48:11,21 49:25 51:12 56:3 58:4,5 62:25 63:2 64:12 68:16,22 70:6,6,10,18 71:4,14,16 72:8 73:9,18 74:9 76:8,21 77:21 79:24 82:3 84:23 85:7,11,15 86:7 87:20 88:23 89:11 90:1,8,14,19 91:24 92:22 93:12 98:4,10 101:9,12 103:6 104:22 105:17 105:19 106:8 106:21 examples 23:22 26:6 27:7,12	27:20 30:21,22 37:10,18,22 41:17 44:11 45:9,9 47:9 48:24 52:4 53:13,23 54:5 54:8 55:2,17 56:16,19 60:20 61:1 63:11,15 66:21 67:1 70:23 72:24 74:13 79:10,13 79:22 80:5,17 82:21 84:24 91:7 93:4,18 101:19 104:6 exceeds 59:14 except 42:13 exception 8:2 excuse 29:1 executed 112:10 execution 111:14 112:19 exemplary 24:8 25:19 102:22 exercise 26:5 30:6 34:4 35:18 36:18 37:23 38:18 39:1,11,14,17 39:25 40:8 41:6,14,15 42:4 44:9 45:7 45:13,25 46:19	47:9,15 50:2,8 50:9,21 51:19 51:21 52:11,21 53:3,25 54:1,2 55:14 56:5 58:23 60:12,13 60:17,22,23 66:1 70:11,12 70:25 71:13 72:9,14,25 77:14 78:17,19 90:12 93:17 97:8 98:6,8,12 98:14,18,21 exercises 41:10 50:24 51:3 93:14 101:10 101:11 exercising 44:13 exhibit 5:2,4,5 5:6,8,11,13,16 8:11,13 9:9,9 9:11,17,17,19 9:25 10:19,21 11:1,10,14,17 11:17,23 12:2 12:3 13:7 22:19,20,22,22 24:18,22 83:2 83:15 100:11 100:14,19 exhibits 1:2 10:25 11:13 13:23 15:5
---	--	--	--

expended 78:21 79:5 82:12 experience 23:8 expiration 111:19 112:25 113:25 expires 109:21 explain 65:2 explicit 79:13 explicitly 32:1 32:3 34:15,23 48:25 50:4 78:1 79:10 88:24 94:18 express 43:18 43:24 49:5 54:17 55:5 59:3 60:2 62:14 64:8,25 65:4,16 67:3 73:4 74:4 76:13,17 80:10 80:14,20 81:3 expressed 13:4 18:11 expressly 35:13 43:10 44:3,6 45:5,21 47:16 47:19 56:22 57:14,20 58:13 61:13 65:10 66:10 67:21,23 74:9 77:23 79:16,23 80:16	82:25 102:12 extent 15:25 16:2 22:12 external 51:11 102:2 f fact 22:9 57:6 57:25 64:20 67:18 81:13 87:5 88:9,14 93:10 98:4 107:4 fair 67:16 fall 18:6 familiar 25:24 26:11 far 11:12 56:21 75:18 76:16 fashion 29:25 federal 37:2 feed 2:14 felt 20:25 80:4 figure 7:13 24:9,12,17,18 24:21 25:12 56:11,24 59:25 62:14 63:6 87:20,21 90:19 103:6 105:7 107:6 figures 54:24 87:18 100:12 101:14 104:11 105:5,7 106:9	file 75:12 filed 22:11 financially 109:13 find 86:4 110:11 finish 19:14 first 6:24 24:7 25:5 32:7 35:5 40:4 46:16 49:22 59:15 74:23 75:8 83:25 84:6 104:1 fischer 1:16 4:5 5:7,10,12 6:6 6:18,21 7:3 8:10,11,17 9:9 9:17,20,22,25 10:9,14,20,25 11:2,11,12,13 11:14,15 12:3 13:7 15:24 16:18 17:5,15 20:12,24 21:4 22:18,19,22,25 23:3 24:18,22 29:3 37:7,17 38:7 43:9,20 46:12 50:10 52:23 54:17 59:20 61:19 62:4 64:24 69:2 71:25 73:2,21 74:18	76:12 77:6 78:5 83:14,15 83:17 94:22 95:9 99:6,23 100:10,11,16 100:19 110:8 111:4,9 112:4 112:13 113:20 fischer's 11:8 fitness 26:4 73:12 five 34:7 83:8 107:12 flexibility 33:11 36:2 76:21 flip 9:24 24:5 flow 25:6 54:24 fmcclellen 2:7 2:20 focus 63:22 88:14 101:18 focused 86:13 86:16 87:5 99:2 102:24 focusing 65:22 foerster 1:23 2:3,15 6:15 16:2 21:10 22:4 foerster's 16:3 follow 49:24 followed 98:19 following 56:6 67:14,19 68:6
---	--	---	---

75:9 follows 7:1 foregoing 111:13 112:18 form 29:2 30:19 31:21 32:23 33:21 35:16 39:21 40:13 42:17 44:1,23 46:1 51:6 54:19 55:9 56:25 58:16 59:5 60:4 61:20 62:17 63:10,20 64:11 65:18 66:12 67:6,12 68:14 69:8,24 70:21 72:7,21 73:7 74:7 75:22 76:19 78:7 79:18 80:12,25 81:5 81:10,23 83:23 84:21 85:6,13 86:11,24 87:15 88:6,18 89:12 89:22 90:6 91:13 92:3,13 93:2,21 94:10 95:14 96:1 99:14 101:4,16 102:21 103:14 103:25 106:6 106:19	former 55:20 forming 13:19 14:3,6,15,23 15:10 16:13 17:9 25:17 forrest 2:4 6:14 forth 99:2 forward 110:15 found 57:7 80:7 four 65:10 79:1 francisco 2:6 free 111:14 112:20 full 62:6 further 61:14 63:2,18 64:4 107:11 109:11 109:12	49:21 52:13 62:23 66:25 69:16,22 give 7:23 43:21 104:8 107:12 given 59:15 92:18 103:5 106:15 109:9 go 7:5 10:15,18 10:24 15:24 26:2 29:3 30:16 35:23 41:17 62:20 82:22 86:25 89:23 96:21 98:23 goal 30:10 34:1 35:1,19 36:9 39:7,8 41:5,16 42:8,11,16 43:8 44:10,21 44:22 45:13,25 46:3 58:2 59:15 60:8,9 60:24 68:24 83:25 87:20,21 87:22,23 90:20 90:23 91:9,14 91:17,19 92:15 92:16,18,21 98:13 106:14 goals 27:11,19 29:13 31:1 32:6 33:1 34:11,16,25	38:4 39:6,12 40:21,23,25 45:9,18,23 46:20 47:17,18 48:22 49:11,11 50:5,9,16 52:1 52:13,14 54:9 56:17 57:16 59:1,17,19 60:18,25 61:16 61:17 62:1,8 63:1,14,16 66:1 68:10 87:24 88:1,1,1 88:2 89:25,25 90:1,1,11 91:3 92:7 93:5,5 94:25 95:4 97:6 98:1,2,22 103:4,7 goes 29:6 53:15 53:21 55:1 66:20 90:12 105:10 going 7:5,8,16 7:22 9:24 12:3 13:6 23:3 40:1 50:22 56:1 59:2 66:13 69:10 75:10 77:23 83:5,14 good 7:3,21 55:19 83:6 google 16:25 17:1,3
	g		
	gain 20:22 gait 82:12 generally 25:23 26:10,17 generate 32:1 33:4 37:11 46:3 49:11 72:9 generated 41:7 41:11 55:3 60:15,19 generates 40:4 generating 29:15 32:2,18 38:22 40:5		

government 26:1,13,23 28:10 31:10 37:2 51:22 governmental 36:23 45:4,15 47:5 51:11 70:13 71:4 gps 82:14 gregory 1:15 4:5 5:6,9,11 6:6,21 9:19 11:2,10 110:8 111:4,9 112:4 112:13 113:20 group 55:20 guess 100:23 gym 50:22	heading 13:14 health 23:17,20 23:21 25:8,18 25:21,24,25 26:3,11,12,21 26:22 28:6,12 28:16 29:23 31:8,10,14 36:22 37:15 40:6 42:1 43:4 44:16 45:16 47:4 49:9,16 49:19 50:1,3 50:20,24 51:2 51:3,18,25 52:18,19 53:13 53:17,19,23 54:10,14 55:2 59:8 61:9 64:16,17 66:18 66:19,24 67:9 71:18 72:14 75:7 82:16 healthy 82:18 hear 7:10 heard 7:17 heart 41:19 61:2 78:20 82:10 help 44:20 51:16 helped 20:7 helpful 14:24 16:12 20:25 65:2	helps 33:13 50:13 hereunto 109:15 history 13:21 holder 3:15 host 54:1 hour 19:7 42:20 83:5 hours 22:1 housing 105:8 105:9 huh 59:24 62:10 human 26:20 28:6,12,16 31:8 36:22 45:3 47:4 49:16,18 64:16 64:17 66:18,18 66:24 67:9 75:6 105:3 hypothetically 65:8	57:5 58:10 59:6 63:11 66:3 69:14 72:17 76:16 77:2 79:12 81:7 84:5 97:17 98:3 identifies 34:23 55:12 59:13 74:10 79:3 85:10 94:24 95:16 96:5 97:6 98:16,20 106:21 identify 15:11 15:15,20 16:10 16:12 46:13 48:3,9 49:4 50:8,23 51:12 55:7,21,23 56:20 57:2 59:9 63:9,19 70:5 73:3 74:3 74:22 78:1 79:9 80:16 82:25 92:24 93:18 95:9 97:10 101:19 107:5 identifying 14:24 17:10 30:25 34:16 41:15 50:5,16 54:13 60:23 63:22 70:11
h			
h 5:1 hand 83:14 109:16 handing 8:10 9:8,16 22:18 hang 38:7 43:20 86:4 happening 75:13 76:6 happy 7:10 12:25 48:19 62:20 103:16 hard 21:12 72:10 head 7:24 12:23 15:14		i	
		i.e. 37:24 identical 11:14 identified 6:22 27:10 35:1 36:3 38:1 44:25 47:17,23 48:6,20 51:9 51:16 52:1 53:2 54:16 55:25 56:15,24	

74:14 94:13 95:16 96:4,24 identity 78:12 78:23 il 3:8 impaired 82:19 implement 77:18 80:7 104:20 implementati... 105:18 implementati... 106:24 implemented 76:5 105:22,25 implementing 102:14 103:2,8 implications 68:1 importance 77:16 important 19:21 34:24 65:19 75:24 improve 26:4 53:19 54:4 inaccuracies 12:18 incentive 73:15 incentives 25:17 incentivize 37:14 43:5 44:17	include 26:3 45:6 49:20 50:1,20 51:9 51:18 53:24 82:9 91:8 105:15 106:22 included 14:21 15:5 17:8 54:24 81:19 82:4 97:15 110:13 includes 41:15 60:23 71:17 78:12 105:8 including 16:25 26:21 31:9 34:25 36:23 45:4 46:20 47:5 51:12 53:25 54:1 58:9 61:1 62:23 64:17 67:18 86:13 incorporate 80:17 incorporated 17:9 71:21 77:25 82:24 112:12 incorporates 13:22 independently 16:1 76:24 index 73:12	indicating 110:13 individual 23:16 26:4 53:19 77:14 78:13,18,23,24 90:21,21,24,24 91:15,16 individuals 82:18,20 inform 71:6 information 16:4 17:10 70:16 105:13 105:13 initial 18:19 input 57:12 inputting 40:20 inside 25:11 institution 18:20 19:5 20:4 22:10 instruct 20:15 instructions 41:10 instrumental 14:23 insurance 25:25 26:12,22 31:9 insured 26:23 31:11 intensity 34:6,7 35:2,3 36:8 37:24,25 39:7	39:8,9 44:12 46:21,21 58:5 58:6 78:18 interested 109:13 interface 103:23 106:17 intermediary 71:21 76:10 internal 102:2 interrogatories 7:1 interval 61:5 101:12 103:2,5 103:9 intervals 93:12 101:14 introduce 6:9 introduced 82:6 intrusive 77:13 invention 15:1 16:9,11 17:11 71:16,22 76:4 76:5 78:11 79:8,9 82:16 86:17 88:10 inventors 79:13 involved 32:18 34:15 38:22 50:16 65:25 71:10 72:5 74:14 involvement 54:13
--	---	---	--

ipr 1:5 8:14,22 9:10,18 13:23 issues 13:3	93:15 94:1 96:22 97:8 99:22 100:22 101:17 105:24 106:8	99:15,17 101:21 large 28:20 44:4 lawyer 79:19 80:13 lawyers 21:9 lay 23:22 lcd 105:8,12 leaves 28:19 31:24 36:1 legal 6:3 67:24 110:1 113:1 lesser 22:12 letter 110:19 level 30:6,9,12 33:9,25 34:1,9 34:12,25 35:17 37:23 38:18,25 39:13,25 40:8 41:20 42:4 44:9,11 45:13 45:25 46:2 47:8,15 48:15 52:11 56:4 57:9,11 58:1 58:19,23 59:10 61:3 68:8,19 68:24 73:14,16 levels 32:4 33:14 34:4 36:18 39:10,17 43:6 45:7 46:19 48:16 54:15 55:14	56:9,13 58:1 61:24 62:1 63:4 68:20 69:19 70:11,12 70:25 71:13 72:13,23,25 73:13 74:11 library 16:24 license 6:23 light 59:18 limitations 84:2 limited 16:25 26:21 31:9 53:25 66:21 105:14 lindsey 3:11 6:12 lindsey.staub... 3:14 line 110:13 112:7 113:3 list 14:1,2,4,8 22:15 40:22 49:21 66:20 70:15 listed 13:22 14:17 15:6 23:25 112:7,17 listing 112:7 literature 15:12,21 16:21 16:24 little 7:7 23:10 35:9
j	knowledge 26:20,20 28:5 28:6,11,12,15 28:16 31:7,8 31:14,25 33:4 36:21,22 45:3 45:16 47:3,4 49:15,16 64:15 64:16 66:17,18 66:23,24 67:8 67:8 75:5,6		
january 12:7 12:13 13:1 18:7,17 jean 2:16 jodi 1:20 109:4 109:20 jogging 54:3 justified 63:25	known 78:24 79:11 80:9 101:8 kobayashi 104:4		
k	labeled 11:15 25:2 laid 50:15 lang 99:13 language 32:5 35:8 44:6 58:20 63:5,23 67:25 72:12 75:9 83:25 89:15 94:2,2 94:16 96:7,15 96:16,25 97:1 97:17,22 99:3		
kaye 3:5 keep 69:10 99:5 kickboxing 54:2 kind 80:23 know 7:6,10,12 8:25 9:25 10:9 10:15 13:8 14:10 16:19 24:3 25:15 29:4 30:7 31:24 33:25 35:17 43:2 45:2 55:19 56:15 59:18 63:3 66:14 67:25 70:16 75:2 76:8 77:17 82:22 84:12 89:1 90:7,17 93:3,6	l		

llp 2:3,15 3:5 6:15 loading 98:14 location 38:2 39:22 61:23 locations 24:16 47:12 55:16,25 57:5 58:8 62:22 63:22 76:2 97:6,25 98:3 long 80:9 look 24:2,6 32:7 65:21 67:17 84:10 102:7,18 103:21 looking 34:13 45:20 65:5 77:18 88:3 100:10,12 101:14 104:19 loop 29:25 30:23 32:6 44:7 los 2:11 lot 36:2 lsr 1:20 lululemon 1:8,9 6:7,17 8:24 107:20 110:6 111:3 112:3 lunch 83:5	m ma 1:21 madam 110:10 made 33:2 51:17 55:13,22 56:22 75:14 85:18 111:7 madison 3:7 maintain 53:19 majority 18:4,5 make 33:1 38:3 47:25 65:12 87:11 88:12 103:12 makes 7:25 making 49:2 55:5 57:21 58:14 59:4 60:2 62:15 marjormand 2:12 mark 10:18 marked 8:11 9:8,17 22:19 83:15 market 2:5 82:7 massachusetts 1:22,24 3:12 6:5 109:1,5,21 material 12:20 19:23 materials 13:13 13:22 14:1,2,5 14:11,14 15:2	15:6,7,9 18:8 18:13,16 96:13 96:20 matter 6:6 23:13 mcclellen 2:4 6:14,15 10:8 15:22 16:16 17:4,14,19 18:1,24 20:10 20:23 29:1 30:15,19 31:21 32:23 33:21 35:16 38:7 39:21 40:13 42:17,19 43:20 44:1,23 46:1,5 51:6 54:19 55:9 56:25 57:3 58:16 59:5 60:4 61:20 62:17 63:10,20 64:11 65:18 66:12 67:6,12 68:14 69:8,24 70:21 72:7,21 73:7 74:7 75:22 76:19 78:7 79:18 80:12,25 81:5,10,23 83:4,23 84:21 85:6,13 86:11 86:24 87:15 88:6,18 89:10	89:12,22 90:6 91:13 92:3,13 93:2,21,23 94:10 95:14 96:1 99:14,21 100:4,17 101:4 101:16 102:21 103:14,25 106:6,19 107:12,20,24 110:5 mean 18:23 19:17 29:24 64:25 91:22 meaning 36:10 43:8 48:22 49:12 56:17 59:18 63:16 94:16 means 41:8 51:24 60:15 77:15 78:12,23 79:21 80:24 82:23 measure 42:8 50:1 measures 23:17 23:20,21 25:9 25:18,21 26:3 29:23 37:15 40:6 42:1 43:4 43:5 44:17 49:9 50:20 51:18,25 52:18 52:19 53:13,17
---	---	--	---

53:23 54:10,14 55:3 61:10 71:18 72:15 meet 22:2 23:23,25 37:3 63:23 70:4 101:20 meeting 21:18 meetings 21:9 21:11,14,16,20 21:24 22:1,2 meets 43:7 48:24 56:16 63:16 83:24 96:25 97:23 mehran 2:9 6:16 member 29:20 29:21,22 32:11 32:14,17 37:14 38:13,14,17,25 39:2,24 40:7 41:23,25 47:14 48:12,14 52:9 56:4,8,12 57:15 58:22 59:8 67:10,14 67:21 68:7,12 68:18 69:6 70:3 71:1,14 73:12 74:10 76:14 78:15 member's 73:16	memory 7:7 107:5 mention 52:17 mentioned 49:13 75:25 met 103:5 methods 23:16 middlesex 109:2 midwest 110:17 113:1 mind 43:7 100:3 minimal 42:4 47:14 minimum 30:6 30:12 34:22 38:18 44:7,9 52:11 56:4 57:8,10 58:19 58:23 59:10 63:4 minor 12:19 minutes 34:6,7 35:2,3,4 36:8 37:24,25 39:8 39:9 46:21,22 58:6,6 83:8 107:13 mirrors 58:20 moderate 34:6 35:2 36:8 37:24 39:7,8 46:20 58:5	modification 25:16 modifications 106:5 modify 98:17 modifying 105:22,25 106:16 mofo.com 2:7 2:12,20,21 monday 1:24 monitor 71:15 78:17 monitored 73:17 monitoring 30:8 36:7 42:6 77:17 78:11,13 78:14,15,16,22 78:24 79:7,11 80:7 81:13 82:7,8,17,18 91:11 monitors 82:16 month 85:10 87:8 89:19 91:8,24 92:12 92:23 93:1,9 101:8,15 102:17 106:18 106:22 monthly 88:1 90:1 morrison 1:22 2:3,15 6:15	16:2,3 21:10 22:3 motivated 77:19 multiple 29:7 54:22 59:16 62:20 68:2 75:1,9,23 multitude 41:8 60:15 n n 4:1 name 6:14 110:6 111:3,4 111:15 112:3,4 112:21 necessarily 33:2 72:11 97:20 102:5 need 96:12,19 99:5 103:12 needs 54:11 102:1 neither 109:11 never 28:18 new 2:19 nguyen 2:16 nh 1:20 nike 1:12 6:7 6:12 22:11 110:6 111:3 112:3 nods 7:24 42:25
---	---	--	--

notarized 110:14 notary 1:21 6:24 109:4,20 110:25 111:10 111:18 112:15 112:23 113:23 note 14:9 23:15 24:11 32:3 41:2 60:5 61:4 70:13 79:1 82:2 85:16 91:23 93:10 110:12 noted 17:8 20:16 22:14 29:4 30:20 33:24 36:1,19 39:5 40:1 41:6 44:2 46:25 47:11 49:8 52:17 54:20 59:16 60:11,16 62:2 75:23 76:20 81:11 84:8 94:11 96:23 99:1 101:17 102:22 104:4 106:21 notes 29:4 33:3 33:7 36:6 39:22 41:22 48:11 49:25 50:19 68:7 74:10 75:3	77:16 78:9 91:14 94:2 97:1 98:5 105:1 notice 5:4 8:13 8:21 noticed 12:19 noting 51:17 61:11 64:13 70:1 number 14:22 15:4 17:6 21:13,23 25:2 27:4 46:13 48:4,18 49:8 51:8,24 53:12 53:21 55:7,11 55:16,25 57:5 58:8 60:25 62:22 64:17 66:3,14 69:14 74:12 76:22 77:2 78:3,21 79:4,9 80:16 82:9,12,21 94:24 100:14 110:7,13 numbers 10:3,4 55:23 112:7 numerous 76:4 nw 3:12 ny 2:19	o o 84:22 104:14 105:8 oath 9:3 109:7 object 43:21 objection 15:22 16:16,17 17:4 17:14,19 18:1 18:24 20:10,23 29:1 30:15,19 31:21 32:23 33:21 35:16 39:21 40:13 42:17 44:1,23 46:1 51:6 54:19 55:9 56:25 57:3 58:16 59:5 60:4 61:20 62:17 63:10,20 64:11 65:18 66:12 67:6,12 68:14 69:8,24 70:21 72:7,21 73:7 74:7 75:22 76:19 78:7 79:18 80:12,25 81:5 81:10,23 83:23 84:21 85:6,13 86:11,24 87:15 88:6,18 89:10 89:12,22 90:6 91:13 92:3,13 93:2,21,23	94:10 95:14 96:1 99:14 101:4,16 102:21 103:14 103:25 106:6 106:19 obvious 40:17 47:20 49:1 50:7 61:14 77:22 80:7 102:13 occurs 90:3 offered 73:13 office 1:3,19 109:16 official 111:15 112:21 oh 10:7 103:18 103:20 ohio 110:2 ohnemus 1:20 109:4,20 okay 7:5,15,20 8:1,6,7,8,8,10 8:20 9:2,8,16 10:20,24 11:19 11:23 12:2,3,6 12:13,17,22 13:1,12 14:7 14:14 15:2 16:5,14 17:23 21:11 22:6,16 23:3,19 24:2,5 24:14,17,20 25:1 26:9 27:8
---	---	--	--

28:14 29:14 30:1 37:6 42:23,24 46:10 46:12 47:24 53:8 55:19 56:21 64:7 65:4,15 66:6 81:3,20 83:14 83:20 84:10,16 85:2,23 89:17 92:10 94:21 95:21 96:21 99:5,25 100:2 100:10,24 102:18 103:20 once 29:19 32:10 41:21 61:5 ones 28:3 53:2 56:20 57:6 70:16 76:24 78:1 open 28:19 31:24 34:21 40:19,22 43:15 51:9 65:7 operates 23:5 operator 3:18 6:1,19 46:7,10 83:9,12 100:5 100:8 103:8 107:15,18,25 opine 75:17 opined 89:4 95:20 103:11	opining 94:18 opinion 13:2 14:13 16:13 17:9 23:12 35:6 42:15 44:20 45:24 48:2 50:10 51:1 53:10 58:15 59:21 62:8,12 64:4 66:7 67:20 69:21 70:18 74:4 75:19 76:14 83:20 84:16,17 86:16 88:8,14,16 89:7,16 92:6 94:12 95:15,21 96:3,8,18 99:8 100:25 102:11 opinions 9:1 12:21 13:4,5 13:20 14:3,6 14:15,24 15:10 18:11,18,22 19:24 20:13,16 20:18 27:6 63:12 94:1 96:23 99:1,18 101:18 102:24 opposed 65:22 options 27:4 34:19 102:6 ordinary 36:25 40:17 41:13	42:6 43:7 45:19 47:21 56:17 59:12,17 60:21 61:15 65:20 77:18 80:2,6 88:21 94:15 102:14 106:25 original 10:4 outcome 109:13 outside 69:18 oval 24:22 own 30:25 31:3 31:14 32:3 40:6 50:24 62:25 66:8 67:4,22 owner 1:13,17 18:20	pages 1:1 paper 8:12,14 paragraph 13:15,18 14:1 14:10,17 15:7 24:6 26:25 27:13,18,22,23 27:25 28:1,4,9 29:18 31:22 32:8,22 33:7 34:2 35:15 36:5,14,16 37:8,10,21 38:12,15 39:23 41:3 42:13,14 45:15 46:13,17 47:1,9,13 48:3 48:6,7,7,10,11 49:13,25 50:11 50:13,18 51:1 51:14,16 52:2 52:15,17,24 53:1,14 54:22 55:23 56:3,6,6 57:7,20,23,25 58:4,13,17,21 59:6,25 60:5 61:11,22 62:7 62:13 64:5,12 65:23 66:13 67:11,17,19,20 68:6,15 71:10 71:12 72:4,8 72:11,17,22 73:2,9 74:2,8
---	---	--	--

75:2,8,11,21 76:1,2,9,16,20 77:8,24 78:9 79:1 81:22 82:1 84:10,22 85:2,7,15,22 86:1,8,13,15 87:8,9,12 89:11 90:17 91:23 98:16,20 98:24,25 99:9 103:17,18,19 104:1 105:1 paragraphs 31:20 46:14 47:7,25 48:4,8 49:3,4 53:8 54:16 55:4 56:24 59:2 64:10 66:4,6 67:14 77:2 84:19,24 97:11 parameters 82:15 105:4 part 34:1 35:1 50:18 66:10 81:7 88:7 89:3 89:17 99:18 112:9 particular 25:18 30:4 63:13 64:5 82:1 104:25 107:2	parties 29:10 29:12 30:21 109:12 parts 55:20 party 28:15,23 28:25 patent 1:3,4,6 1:13,17,18,19 3:15 5:5,13,16 9:1,11,15 13:20 16:23 18:20 19:23 21:7 22:14,20 23:18,24 24:1 35:20 36:11 39:6 45:10 49:12 56:18 59:18 62:9 83:2 84:6,9 94:16 96:7,25 97:18,24 98:1 101:25 patents 16:20 17:1 77:24 79:1,10,15,22 79:23 80:17,18 81:6,20 pending 8:3 people 50:22 perfect 10:13 perform 15:17 15:20 16:14 17:23 23:17,20 36:8 46:18 47:19 48:12,15	56:9 68:20 71:1,2,15 performance 25:8 33:5,25 34:1,12,22,25 37:15 42:9 43:5,6 44:5,18 45:18 47:18 48:16 57:9,11 57:17 58:1,2 58:20 59:8,11 68:20,23,24 73:13,16,19,21 74:11,17 82:5 107:4 performed 15:11 16:7 17:6 18:4 30:7 35:18 38:19 39:25 42:5 47:15 50:2 51:3 58:24 60:14 78:17 93:22 performing 13:19 16:3 23:20 25:21 43:4 44:16 period 36:10 41:5 59:15 60:8 83:22 84:1,3,7,8,15 85:5,9,12 86:14,18,20 87:6,7 88:11	88:15,17,20,22 89:2,8,16 90:14 91:5,12 91:18,21 92:2 92:14,15,18,25 93:16,19 94:3 94:5,8,9,15 95:6,7,11,12,17 95:23,24 96:6 96:10,11 97:3 97:12,13,19,21 98:13 99:10,11 101:6,6,23 102:5,8,15,19 103:5 105:23 106:2,12,15 107:1,3,9 periods 85:9,17 86:9 87:4,13 87:19 88:5,25 90:8,11 91:7,7 91:24 92:7,12 92:21 93:12 94:24 97:7 98:2,22 101:1 104:21 106:17 106:22 person 21:14 36:25 40:17 41:13 42:6 45:19 47:21 59:12 60:21 61:15 65:20 77:17 80:1,6 88:21 101:9
---	---	---	--

102:14 106:25 personal 50:24 personally 111:11 112:15 petition 13:23 petitioner 1:10 2:22 phd 1:16 4:5 5:7,10,12 6:21 9:20 11:2,11 110:8 111:4,9 112:4,13 113:20 phone 110:3 physical 60:14 82:7 physiologic 78:14,22 105:4 physiological 78:19 place 40:5 49:22 59:7 61:12 69:10 82:17 86:5 placed 77:16 places 55:12 63:17 64:3 69:11 75:1,16 plain 43:7 56:17 59:17 94:15 plan 95:4 playing 54:3 please 6:9,20 7:23 110:11,11	point 12:25 27:23,25 32:19 35:24 37:18 40:12 43:10,23 45:5 46:16 64:6,10 65:15 66:9 75:12,13 76:6 81:14,21 81:25 84:18 89:7 97:9 103:15 104:25 106:3,4 pointed 27:6 33:16 40:9 42:12 43:17 54:21 66:6 80:4 89:17 pointing 85:24 104:10 105:18 points 73:15 87:16 91:2 porter 3:5 6:12 6:13 portion 65:15 85:3 88:8 89:3 portions 56:21 73:3 74:3 position 57:16 possibility 35:7 possible 64:2 possibly 24:16 63:6,8 potential 16:12 51:20 94:24	potentially 57:11 102:3 preceding 67:14 preclude 30:25 40:5 60:16 precludes 32:17 64:20 95:7 preestablished 35:12 prefer 10:19 preferable 11:25 preferably 78:16 preliminary 20:5 22:11 preparation 18:5 19:10 prepare 21:3 prepared 14:4 14:20 20:17 27:6 76:8 94:12 95:15 96:3 preparing 14:12 15:13 17:22 18:9 19:20,24 63:12 63:21 101:18 prerecorded 87:14 present 3:17	presented 29:20 32:11 38:13 41:23 61:7 68:7 75:20 81:1 103:24 presents 25:15 91:6 preset 92:20 pressing 85:19 pressure 78:20 82:11 presumably 75:13 76:2 98:11 106:9 pretty 21:21 previously 28:8 36:19 38:1 41:6 47:11 60:11 62:2 91:23 94:11 95:19 96:23 99:1 101:17 106:21 primarily 20:2 21:5 63:14 primary 88:14 prior 15:11,21 19:22 21:6 22:7 63:22 77:9 83:19 90:8,15 96:24 97:7 98:8 99:18,24 101:19
--	---	--	--

priority 80:9 privilege 15:23 18:25 20:11 probably 11:25 21:13,25 procedure 111:5 112:5 proceeding 8:15 9:10,18 14:3,16 15:10 22:23 23:14 proceedings 21:2 process 88:4 processing 107:2 processor 97:20,20 103:3 product 15:23 18:25 20:11 production 6:23 110:15,17 110:22 products 15:12 professional 26:1,13,23 31:10 program 98:17 98:19,21 programming 103:12 programs 54:4 98:6 progress 89:25 90:5 91:9 95:2	106:14 promote 25:16 promoting 23:17,21 25:8 25:18,21 26:3 29:23 37:15 40:6 42:1 49:9 50:1,20 51:18 51:25 52:18,19 53:13,17,23 54:10,14 55:2 59:8 61:9 71:18 72:14 prosecution 13:21 protocol 25:7 25:13,20,23 26:10,14,17 27:2,5,10,20 28:2,10,14,21 29:5,13,15,19 29:21 30:2 31:1,3,6,19 32:10,15,21 33:5,9,14,17,19 34:4,11,16 35:8,12,14,14 35:21,22,24 36:2,12,15,20 37:4,9,11,13,19 38:4,14,23 39:3,5 40:4,10 40:20,24 41:21 41:24 42:11,15 43:1,11,13,25	44:5,15,19,21 44:24 45:11,22 46:15,24 47:2 47:10 48:5,14 49:6,10,14 50:12 51:5,8 51:15 52:1,3,5 52:16,20 53:3 53:4,11 54:18 55:6,15,17 56:8,13,23 57:22 60:3,18 61:6,8 62:15 62:21 64:9,14 64:23 65:17,25 66:8,16,25 67:1,5,15,22 68:3,5,8,9,13 68:19 69:7,12 69:17,17,19,20 69:22 70:1,5,8 70:12,20 71:2 71:5,6,11,17,19 71:22 72:6,10 72:15 73:1,5 73:11 74:5,10 74:14 75:4 76:15,23 provide 16:4,11 17:10 20:7 26:6 28:20 30:5 34:3 41:17 45:17 46:19 48:23 53:21 55:17	59:3 61:1 82:21 97:3 provided 11:16 19:2 20:20 23:24 27:12 33:12 40:15,23 44:11 45:2,12 47:9 52:4 53:14 58:4 60:25 61:13 63:2,15 67:2 67:24 81:25 95:3 99:18 provides 14:22 30:21,22 37:10 44:4 45:14 49:8 54:5 60:20 66:21 68:16 70:18 72:8,22 76:21 79:6 93:3 providing 14:18 25:17 29:13 62:25 provisions 1:18 public 1:21 6:25 109:4,20 111:10,18 112:15,23 113:23 publication 5:14,17 22:21 83:3 pull 85:15
---	---	---	--

pulled 26:7 85:21 pulse 78:2 79:4 82:10 purposes 6:17 82:9 pursuant 1:17 put 12:2 19:14 19:17 21:12 28:18 99:1,7 puts 32:5 57:14	rather 28:9 43:2 ratings 73:12 reach 43:6 read 13:18 19:1 19:8,12 24:7 25:6,19,22 26:2,9,18 29:18 31:5 32:9 33:8 36:19 38:12,16 39:23 41:3,12 41:18 42:2 47:1 48:13 49:13,25 50:19 53:15,22 56:7 58:18,21 59:7 60:6,10,20 62:6 64:13 66:15 68:17 73:10 75:3 77:12 78:10 82:2 84:13 85:16 90:18 98:5 105:2,10 111:5,6,12 112:5,6,17 readily 56:20 103:1 105:24 106:12 107:1 reading 101:25 110:19 reads 13:18 84:13	really 17:7,16 17:21 19:21 33:22 59:22 62:11 106:11 realtime 2:14 reason 9:5 31:12 49:20 52:7,17 66:22 101:24 102:16 110:14 112:8 113:3 reasonable 21:21 88:22 recall 12:22,23 17:16,21 29:8 94:18 receipt 25:7 110:18 receive 88:15 88:16 89:16 107:1,2 received 59:14 85:17 87:6,25 93:19,20 94:20 receives 25:20 85:8 88:10,20 92:14,15,16 95:12 receiving 41:4 60:7 83:21,25 84:3,6,8,14 85:4 86:14,17 86:20 89:2 90:14 92:7,7,8 92:11 94:3,4,8	94:14 95:17,23 96:5,10 97:2 97:13,15,19,21 99:11 101:22 102:1 recess 46:9 83:11 100:7 107:17 recited 66:14 recognize 8:16 9:13,21 22:24 83:16 recollection 16:6 20:13 recommended 30:6,12,14 32:4 33:25 34:3 36:18 37:23 38:18 39:25 42:4 44:9 45:7,13 45:24 46:2,19 47:8,14 52:11 56:4,13 57:9 57:11 58:19,23 59:10 63:4 70:11,25 71:12 72:22 record 6:1,10 46:8,11 83:10 83:13 92:1,4 99:7 100:6,9 107:16,19 108:1 109:8 112:9
q			
question 7:16 8:3,4 20:14 37:7,16 38:8 42:20 44:3 52:23 55:11 59:22 61:19,21 62:3,5,11 64:7 69:1,2,3 71:24 72:1 73:22,23 78:4 90:22 91:1 92:19 94:21 99:4 104:12,19 questions 7:9 99:23 109:9 quick 100:2 quickly 24:6,20 quite 57:13 64:21 99:7			
r			
rate 41:19 61:2 78:20 82:10,10			

recordable 53:17	111:2 112:2	64:16 66:18,24	repeated 62:19
recorded 86:9 86:22 90:4	referenced 111:11 112:15	67:9 75:6	repeatedly 44:2 50:14 51:7
recording 78:12,23	references 15:12,15,21 16:12,21 17:8 19:16,19,22 21:6 22:7 53:7 63:23 81:19 85:1 101:20	regardless 91:12	repeating 99:6 99:24
redirect 107:21	referred 25:13 29:6 31:23 38:11 39:6 49:10 52:10 64:13 74:9 83:18 86:6	regimen 41:7 41:14 50:8,9 60:12,17,22	reported 109:7
refer 23:1 31:1 36:4 57:15 58:21 70:4 77:7 78:9 84:24 86:15 89:13	referring 9:15 10:3 32:2 57:10,23 63:13 72:12 87:17,18 100:18 101:22 104:14	regimens 26:5 50:2,21 51:19 51:21 52:21 53:3,25 54:1 66:2	reporter 6:20 11:4 42:25 111:7
reference 13:22 23:2,23 26:8 27:1,12,21 28:1,19 30:20 30:24 31:2 32:25 36:1 40:3,19 43:3 45:6,20 46:24 48:23,24 53:14 54:21 56:16 57:14 60:1 61:23 62:13 65:21 74:13 76:22 77:9 82:5 83:19,24 87:9,17 88:25 90:11 94:14,23 96:5,24 97:6 97:23 102:23 102:25 104:7 104:24 105:19 106:4,8 110:7	refers 36:12 42:7 46:24 53:17 58:18 70:15 77:9,24 87:23 94:14	relate 27:19	represent 6:16 8:20,25 13:5
	refresh 7:7	related 9:1 16:7 16:8 18:14,17 21:1,15 27:11 30:9 35:20 36:11 44:10 45:11 52:20 55:15 66:4,7 67:15 77:3 88:13,14 93:4 93:5,18 104:2 104:5 109:11	representation 21:22
	refreshed 20:13	relates 36:9 58:2	reproduce 24:12
	regarding 26:20 28:6,12 28:16 31:8 36:22 45:3 47:4 49:16,18	relating 29:22 41:25 43:3 44:16 61:9	reproduced 24:14
		relative 109:13	request 112:9 112:11
		remember 16:22 17:2,18 89:20 101:3	required 110:25
		repeat 7:10 62:5 73:24	requirement 97:4
			respect 13:2
			respectively 10:25
			response 18:20 20:5 22:11
			responses 99:24
			rest 37:12
			restate 100:17
			restricted 28:24 76:7 101:7 104:6

restriction 40:3 94:18 restrictions 95:18 99:4 restricts 29:9 29:12 31:16 33:1 34:21 90:10 93:8 94:4 returned 110:18 review 75:24 96:12,19 100:25 110:12 111:1 112:1 reviewed 14:12 18:16 19:3,9 19:13 20:4,19 21:5 22:6,10 22:15 reviewing 12:20 19:5 40:18 50:7 65:23 80:2 reviews 10:2 27:9,17 29:17 32:24 33:22 41:2 42:18 44:8 45:1 48:17 49:7,23 49:24 53:12 55:8,24 56:11 67:13 69:9 70:9 73:8 74:21,25 77:1	77:7 78:8 81:24 85:14 86:3 88:19 96:22 104:9,18 106:7,20 rewards 25:8 right 8:4 23:14 24:4 25:1 27:24 28:7,17 30:3,11 33:20 34:19 43:14 44:22 46:4 47:22 59:4 60:19 66:11 74:17 79:17 80:21,24 81:22 83:22 84:20 85:12 86:2,19 90:4 92:19 95:25 99:8 101:15 103:13 104:13 rmr 1:20 109:20 rotating 85:18 86:5 90:1 rotation 85:25 routines 90:12 93:6,7 rpr 1:20 109:20 rules 111:5 112:5 running 57:13	s s 1:16 4:5 5:1,6 5:9,11 6:6,21 9:20 11:2,11 110:8,15 111:4 111:9 112:4,8 112:8,13 113:3 113:20 san 2:6 satisfactorily 6:22 saw 18:19,23 saying 41:9 50:14 57:24 58:15 89:14 97:18 says 13:12 25:11 32:9 42:10 56:7 58:17,21 65:6 66:15 68:16 73:10 90:18 scenario 40:15 57:10 98:21 scenarios 47:6 scholar 16:25 scholer 3:5 scratch 52:13 seal 109:16 111:15 112:21 search 16:23 17:13,16,21 searched 16:20 16:20	searches 15:11 15:20 16:3,7 16:15 17:7,24 18:5 searching 16:24 second 84:11 86:4 104:8 section 15:3 86:12 104:2 see 7:3 9:12 12:9 13:12,14 13:16,24,25 24:10,24,25 25:3,4,10 31:12 32:1,12 32:13,25 33:18 39:4 45:1 49:20 66:22 74:25 75:10 76:1 94:17 95:1 101:24 seems 39:11 65:24 92:20 seen 8:18 18:10 select 34:18 39:13 48:14 54:23 56:8 59:1 61:16 63:3 68:8,18 69:19 88:2,5 89:8,14 93:16 95:1 selected 51:10 53:5 57:19
---	--	--	---

58:7 60:19 88:11 selecting 39:10 39:12 40:22 44:8,10 52:13 61:24 62:25 67:1 68:23 73:19,21 74:14 74:17 76:24 94:7 95:5,11 95:22 96:9 97:12 98:12,13 98:13 99:10 selection 55:13 55:22 56:22 57:21 58:14 60:3 62:15 75:14 85:18 selections 38:3 87:11 selects 39:17 85:11 91:12 92:1 95:3 self 26:23 31:11 82:3 sense 7:25 65:12 sensing 79:11 82:24 sensor 77:20,20 78:14 104:15 104:23 105:3,5 105:6,7 sensoring 81:13	sensors 78:16 78:22,25 79:7 79:12,24 80:3 80:5,8 81:17 82:6,13 sentence 24:7 32:7 57:23 84:11 85:23 90:18 99:16 september 1:24 6:4 8:21 109:6 109:16 110:4 series 7:9 set 27:11 34:21 36:16 40:10 42:16 45:17 50:8 54:10,11 57:16,17 88:23 90:21,24 91:4 91:15,17 95:4 97:7 98:2,22 102:5 103:2,9 109:15 sets 30:25 40:23 setting 30:13 35:17,19,21 91:3 92:25 settings 98:6 shawn 3:18 6:2 sheet 110:13 112:7,10,18 113:1 show 45:15 53:2 63:15	79:24 82:23 106:10 shown 90:19 100:12 105:5,6 105:7 110:16 shows 75:25 90:19 106:23 sick 82:19 sided 5:10,12 10:9,10 11:3,7 11:9,11,13 signature 12:8 12:11 109:18 110:14 signed 12:16 111:13 112:18 significant 45:16 signing 110:19 similar 23:18 104:11 simple 105:24 106:5,13 107:7 sincerely 110:21 single 5:10,12 10:9,10 11:3,7 11:9,11,13 93:9 sir 110:10 sirmans 23:2,5 23:9,12,15,19 23:23,25 24:9 24:12 25:15 26:7,15,25	27:21,23 28:1 28:19 29:4,12 29:14 30:20,24 31:2,4,18,20 32:8,19,25 33:18 34:21 35:13,22,25 36:1,5,6,12 37:5,19 38:2 38:21 40:3,18 41:1,4,6,22 42:10,13,15 43:2,10,12,15 43:17,24 44:3 44:14,16 45:6 45:14,20 46:14 46:24 47:1,16 48:4,21,24 49:5,8 50:11 51:2 52:5,10 53:9,14 55:4 55:20 56:16,21 57:1,14 59:7 59:13 60:1,7 60:11,16 61:1 62:12 63:15 64:8,21 65:5,6 65:7,9,16,21 66:7,10 68:12 69:6,15,21,23 71:10,16,23 72:4 73:4 74:2 74:3,9 76:14 76:21 77:5,9 77:15,19,23
--	---	---	--

78:6,9 79:6,13 80:2,7,10 81:4 81:8,11,22 82:4,25 sit 12:17 15:14 21:17 29:8 56:19 64:4 96:17 sitting 57:6 six 21:14,20,24 skill 36:25 40:18 41:13 42:6 45:19 47:21 59:12 60:21 61:15 65:20 77:18 80:2,6 88:21 102:14 106:25 skills 103:12 skipping 36:23 smoke 54:6 software 105:25 106:12 solution 77:22 solutions 6:3 110:1 113:1 somebody 66:23 67:7 103:8 sorry 15:17 18:3 19:11 27:14 30:16 33:5 39:15 44:5 48:12 69:4 99:21	100:19 sort 106:4 sound 7:21 sounds 44:19 48:6 source 28:11 37:4 57:19 69:18 70:5 71:8 72:23 94:20 97:3 102:2,3 sources 28:20 29:9 44:4 51:11,22 64:18 64:22 69:14 71:9 72:5,17 76:22 102:3 speaking 6:2 specific 14:8 15:15 27:20 50:2,8,21 51:5 51:18 52:20 53:3 55:17,23 57:22 59:22 62:11 64:10 65:22 66:10 73:14 75:19 79:1,2,20,22,23 85:9,12 97:10 99:3 104:6 105:18 specifically 12:22 15:3,8 17:2,7 31:22 36:6 41:21	68:9 75:17 79:2 93:17 103:15 107:5 speed 82:14 spend 19:4 48:19 spent 21:24 sports 54:4 spot 27:15 ss 109:2 stand 20:17 105:6 standard 106:10,23,24 standpoint 23:7 stapled 10:23 start 8:8 19:13 24:22 25:5 90:9,15 starting 27:17 36:5 state 14:20,25 16:8 111:10 112:15 statement 33:23 35:5 38:10 87:1 91:2 111:13,14 112:19,19 states 1:3,18 status 78:15,22 staubach 3:11 6:13	stenographic... 109:7 step 25:5 56:12 steps 41:19 61:2 78:21 82:12 sticking 100:20 stivoric 83:19 83:20,24 84:4 84:6,14 85:3,8 86:8,17 87:9 87:16 88:9,10 88:15,16,20 89:1 90:10,13 91:11 92:11,14 92:20,24 93:3 94:6,13,14,23 95:10,16,22 96:5,9,24 97:5 97:11,23 98:5 99:9 100:20 101:13,20 102:10,12,12 102:20,23,25 103:13 104:3,5 104:7,24 105:1 105:19 106:8 106:16,21 storage 107:5 storing 107:7 street 1:23 2:5 2:18 3:7 strike 27:16 study 19:10
---	---	--	---

subelement 101:22	47:25 74:1 96:14 99:16 100:4 107:14	100:2 taken 41:20 46:9 61:2 78:21 82:12 83:11 100:7 107:17 109:12	53:16 60:18 72:10 75:17 79:20
subject 23:13			terms 14:18 17:13,16,21 35:19 95:3
subscribed 111:10 112:14 113:21	surveillance 29:22 41:25 61:8		testified 6:25 20:21 100:24
substance 47:24	swath 79:6 swear 6:20	talk 52:18 64:8 talked 22:9 50:5 51:20 71:17 80:20	testify 9:5 testifying 8:24 testimony 4:3 111:6,7 112:6 112:9,12
substantial 37:13	swimming 54:2 sworn 6:24 109:6 111:10 111:13 112:14 112:18 113:21	talking 10:3 28:8 48:1 60:9 60:12 68:15 89:13 92:5	text 85:21 86:4
substantially 105:20	system 23:4,8 71:7 77:10,13 83:21 85:4 86:19 87:19,24 87:25 88:9 90:14 92:6 94:8 95:12,23 96:10 97:12 99:10 102:9,15 102:19 103:2,9 105:21 106:11 106:11	talks 103:7 task 105:24 106:5	thank 99:20 107:23,24
substitution 107:8		teach 106:16 teaches 66:8 83:21 84:4 89:1	themselves 28:23 30:13
suite 3:7 110:2		teaching 105:20	thereof 26:24 31:11
summarizes 14:11		teachings 23:24 102:11,24 104:3,4,5	thing 7:12 42:16 99:22
summary 79:6		technology 14:19 16:7,8	things 7:24 43:16 59:20
superior 110:1		tell 16:19 17:7 21:17 43:15 104:17	think 10:5,22 11:25 14:16 21:21 22:9,17 27:14 31:16 36:25 52:22 54:12 64:20 65:19 67:16 72:2 73:23 74:12 78:4 85:3,23 96:20 103:11 105:17
supplemental 20:1			
support 49:1 50:13 51:16 58:12 59:21 63:12,18 64:4 66:5 77:4	systems 23:16 106:25		
supported 63:25	t		
supporting 86:16	t 5:1 table 5:8 10:11 10:15 11:1,4,7 11:18 tactile 105:15 take 6:5 8:1,4 42:20 46:5		
supports 42:15 50:18 57:25 58:14		temperature 82:11	
sure 7:4 21:25 37:6 46:6,16		term 43:1 44:15 45:10	

107:10 third 28:15,23 28:25 29:10,12 30:21 thirds 12:7 85:25 thirty 110:18 three 34:8 88:5 92:20 93:12 101:1 time 6:4 10:16 14:20 15:1,13 16:9,10 17:11 18:7 19:4,15 19:18 21:24 22:17 32:14 34:10 36:10 41:5 43:21 44:12 46:7,11 48:19 59:15 60:8 61:5 82:15 83:6,9 83:13,21 84:1 84:3,7,8,15 85:4,9,9,12,17 86:10,14,17,20 86:21 87:4,5,6 87:13,19 88:5 88:11,15,17,20 88:22 89:2,7,8 89:16 90:8,11 90:14 91:4,6,7 91:11,18,20,24 92:1,7,12,14,15 92:18,20,25	93:11,16,19 94:3,5,7,8,15 94:24 95:6,7 95:11,12,17,23 95:24 96:6,10 96:11,12,19 97:2,3,7,12,13 97:19,21 98:2 98:13,22 99:10 99:11 100:5,9 101:1,6,23 102:4,15 103:2 103:5,5,9 104:21 105:23 106:2,12,15,17 106:21 107:1,2 107:9,15,19,25 times 29:7 54:22 55:11 59:16 62:20 66:14 68:3 75:9,23 today 7:8 8:24 9:3,6 12:17 13:5 15:15 18:17 20:17 21:4,17 29:8 56:19 58:10 64:4 96:17 today's 6:3 7:22 8:21 together 10:23 toggle 91:9 toggling 86:21 87:13 89:18	top 12:23 13:12 15:14 24:21,23 95:18 total 21:23 totaling 21:14 towards 89:25 96:4 106:14 tracking 82:3,5 trademark 1:3 training 54:2 transcribed 7:23 109:7 111:7 transcript 109:8 110:11 110:12 111:5 111:12 112:5 112:11,17 transmitted 98:7 traveled 41:19 61:2 trial 1:4,19 trivial 103:8 true 109:8 truthfully 9:5 try 59:23 73:25 trying 65:13 74:22 86:3 turn 12:4 13:6 two 12:7 19:7 47:7 85:25 93:12 95:18 101:1,11 102:8 102:19	type 35:14 40:24 78:17 81:17 types 32:21 79:7 80:3,5 81:12,14 93:7 101:11 104:23 typewriting 109:8 typically 52:10 typographical 12:19
u			
uh 59:24 62:10 unable 66:9 uncommon 93:11 under 9:3 14:18 109:8 underneath 13:15 understand 7:12,14,20 8:23 9:2 19:21 35:6 37:1 41:14 42:7 43:14 59:13 60:22 61:18 62:3 64:25 65:13,20 69:2 71:24 73:22 74:16 86:19 88:22 94:21 99:6,8			

understanding 14:12,19,25 20:2,6,22 23:4 42:14 45:19 79:21 84:4 understands 38:21 understood 7:17 37:6 54:9 54:12 81:1 unit 107:2 united 1:3,18 universe 48:1 update 18:21 updated 98:3 98:23 updating 90:11 usa 1:9 use 10:14,19 18:21 30:7 35:21 42:5 60:19 61:15 64:24 67:23 71:5 74:19 93:11 106:1,12 used 10:15 16:23 17:17,22 19:23 27:5 31:25 37:11,14 42:8 43:2 44:15,17,20 45:18,21,22,23 46:3 49:11 50:17 52:1 53:16 71:5,20	72:9,25 74:23 75:2,15 76:25 79:8,8 82:7 89:1 92:4,8 94:25 102:15 103:3 105:12 107:3 useful 17:10 user 23:7 25:20 28:22 29:15 30:1,5,11,12,22 30:25 31:3,12 31:18 32:2,20 33:13,13,17,19 33:24 34:14,23 35:8,13,23 36:6,14 37:8 37:19 38:3,21 39:12,13,16 40:5,7,10 42:3 42:16 43:5,11 43:12,25 44:7 44:17,20 45:12 45:23 46:14,17 47:18 48:4 49:6,21 50:7 50:11,15 51:5 51:10,14,23 52:2,7,9,12,15 53:5,10 54:11 54:13,18,22 55:5,13,22 56:23 57:8,12 57:15,21 58:7 58:14,25 59:4	60:2,20 61:7 61:16,23 62:15 62:23 63:3 64:9,20,21 65:17,24 66:8 66:22 67:4,7 67:10,21 68:5 68:12,22 69:6 69:16,22 70:3 73:5,18,20 74:5,13 75:13 75:14 76:10,14 77:11,20 82:5 85:11,18 86:8 86:21 87:3,10 87:12 88:2,5 88:12,17 89:5 89:6,8,18,24 90:12 91:2,8 91:12,25 92:21 92:24 93:15,20 93:25 94:5,7 94:17,19 95:1 95:2,10,22 96:9 97:11 98:11,19 99:9 100:25 102:1,7 105:22 107:4 user's 35:11 42:9 50:5 78:3 79:4 users 23:20 29:24 uses 43:4 45:10 92:17	using 23:8 47:17 48:22 59:17 65:3 67:24 80:8 98:11,15 99:15 102:9,19 utilized 71:7 93:8
v			
v 110:6 111:3 112:3 valuable 80:4 value 107:8 values 61:16 107:7 variety 28:20 41:9 44:4 72:16 81:12 82:15,25 93:7 various 48:16 60:13 68:20 73:13 74:11 93:13 105:11 105:15 verbal 7:23 verbatim 11:16 verifiable 53:18 veritext 6:3 110:1,7 113:1 veritext.com. 110:17 versus 6:7 video 3:18 6:1 6:5,19 46:7,10			

83:9,12 100:5 100:8 107:15 107:18,25 videographer 6:2 videotaped 1:15 view 73:4 86:22 89:24 viewing 86:8 90:5 views 32:14 87:10 vigorous 34:7 35:3 37:25 39:9 46:21 58:6 virtual 21:14 visits 54:8 visual 105:14 visualization 104:20 volume 1:1 vs 1:11	64:7 65:15 79:19 wanted 102:7 103:21 washington 3:13 watch 77:21 98:12 way 12:7 18:15 18:22 20:9,14 25:15 31:17 33:12 36:2,12 40:19 45:15 60:17 86:1 103:23 ways 41:10 49:8 51:8 60:13 76:4 77:19 83:1 98:16 105:21 we've 8:11 9:8 9:14,16 11:15 22:18 29:6 39:5 41:9,22 42:19 50:5 51:20 54:21 55:10 56:1 60:12 64:13 66:3,14 67:3 71:17 75:23 76:20 77:2,3 83:4,5,15 wear 77:20 wearable 79:24 82:6,13,16,23	98:11 wearer's 78:2 79:4 wearing 36:7 71:14 77:20 78:13,15 websites 16:22 16:23,24 week 7:7 34:7,8 85:10 87:7 89:19 91:8,24 92:12,23 93:1 93:9 101:8,15 102:17 106:18 106:22 weekly 88:1 89:25 weeks 21:19,20 weight 54:1,7 wellness 26:5 53:20 54:5,8 west 2:18 3:7 whereof 109:15 whichever 60:18 wide 105:21 wilshire 2:10 windows 86:21 wish 56:9 wishes 48:15 68:19 witness 1:16 6:20 10:2 16:5 27:9,17 29:17 32:24 33:22	38:9 41:2 42:18 44:8 45:1 48:17 49:7,23,24 53:12 55:8,24 56:11 67:13 69:9 70:9 73:8 74:21,25 77:1 77:7 78:8 81:24 85:14 86:3 88:19 96:22 104:9,18 106:7,20 109:15 110:8 110:11 111:1,4 111:11 112:1,4 112:15 witness' 110:14 word 28:18 64:24 67:10,23 68:1 74:19,22 75:1,10,15,25 76:11 80:14 92:4 93:24 94:17 words 67:13 80:20 work 7:12 11:23 15:23 18:25 20:11 23:7,11 workflow 24:8 25:19 working 10:20
w			
waived 110:19 walk 23:3 24:20 walking 54:3 waltham 109:16 want 8:2 10:14 11:23 46:12 47:25 48:8 55:19,20 60:19			

workout	98:9,9
worn	77:5 78:6 79:16 80:8,11 81:4,21
wrist	77:5,21 78:6 79:16 80:8,11 81:4 81:21
wristwatch	78:2 79:3,14 79:25 80:19 81:17
wrong	27:15,15 87:1
x	
x	4:1 5:1
y	
y'all	100:2
yap	2:17
yeah	20:16 23:15 30:18 39:16,18 62:6 73:8 81:11 84:5,13 89:24 94:11 99:15
yoga	54:6
york	2:19

Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

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

(A) to review the transcript or recording; and

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

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

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

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