

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON ATHLETICA CANADA INC.
and LULULEMON USA INC.
Petitioner,

v.

NIKE, INC.
Patent Owner.

Patent No. 9,259,615

Inter Partes Review No. IPR2023-00349

PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE

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Other Authorities

37 C.F.R. § 42.23(b)	11
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Petitioner's Exhibit List

Exhibit Description	Exhibit #
U.S. Patent No. 9,259,615 (“’615 patent”)	1001
U.S. Patent Publication No. 2011/0197157 (“Hoffman”)	1002
U.S. Patent Publication No. 2004/0152957 (“Stivoric”)	1003
U.S. Patent Publication No. 2006/0111944 (“Sirmans”)	1004
JP Patent Publication No. 2003-141260 and Certified English Translation of Same (“Kobayashi”)	1005
Declaration and <i>Curriculum Vitae</i> of Dr. Gregory S. Fischer	1006
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June 12, 2015 Requirement for Restriction/Election for Application No. 14/194,191	1008
August 11, 2015 Response to Restriction Requirement for Application No. 14/194,191	1009
October 2, 2015 Notice of Allowance for Application No. 14/194,191	1010
December 7, 2015 Amendment after Notice of Allowance for Application No. 14/194,191	1011
January 27, 2016 Issue Notification for Application No. 14/194,191	1012
U.S. Provisional Patent Application No. 61/240,185	1013
Motorola DROID PRO XT610 Description	1014
Lara Allet et al, Wearable Systems for Monitoring Mobility-Related Activities in Chronic Disease: A Systematic Review, Sensors 2010	1015

Exhibit Description	Exhibit #
Praveen Kumar Diwakar et al, Personal Digital Exercise Trainer for Managing, Monitoring and Recording the Exercise, IEEE, September 1-4, 2005	1016
Nike + iPod web page, Internet Archive waybackmachine, http://www.apple.com/ipod/nike/	1017
Nike + iPod manual, 2009	1018
U.S. Patent No. 6,635,015 (“Sagel”)	1019
U.S. Patent No. 6,898,550 (“Blackadar”)	1020
U.S. Patent No. 7,431,696 (“Brady”)	1021
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**Petitioner’s Exhibits 1001 – 1021 were previously filed and are listed again here based on 37 C.F.R. § 42.63.*

***Petitioner’s Exhibits 1022-1026 are newly filed.*

I. INTRODUCTION

The Board was right to institute this IPR proceeding. Nike's lead argument for patentability is that the Board should add new, "from a user" and "during a goal setting operation" requirements to the independent claims. But the claims' texts refute Nike's proposal and, contrary to Federal Circuit precedent, Nike's additions would exclude a preferred embodiment. Nike's lone argument for its construction, meanwhile, that the specification discloses some embodiments with the same scope as its proposed, additional limitations, fails as a matter of law.

With or without Nike's construction, however, the prior art disposes of Nike's claims. Despite the Board's focus on the Sirmans reference at institution, Nike devotes only four-and-a-half pages to it. Nike's argument that Sirmans does not satisfy its proposed additions fails because its construction is wrong and because, regardless, Sirmans meets it. And Nike's only other argument, that Sirmans does not teach a wrist-worn monitoring device, ignores both lululemon's obviousness theories and that Sirmans incorporated such a device by reference.

The Board also should reject Nike's arguments for the Stivorice and Hoffman references. Even accepting Nike's construction—and the Board shouldn't—Stivorice discloses users setting goals *before* exercising per Nike's construction. For Hoffman, Nike's own expert contradicted Nike's arguments by testifying that Hoffman discloses rewarding a user for meeting "three goals *in each of* three

days.” And the rest of Nike’s arguments, most of which boil down to accusing lululemon of combining different embodiments, fare no better, either. As set forth in the Petition and this brief, the Board should cancel every challenged claim.

II. CLAIM CONSTRUCTION

Nike asks the Board to rewrite “receiving an activity time period” as “receiving an activity time period [1] from a user [2] during a goal setting operation.” (Paper 17 (“POR”), 11-13.) Because the claims, specification, and expert testimony all refute Nike’s proposed construction, the Board should reject it.

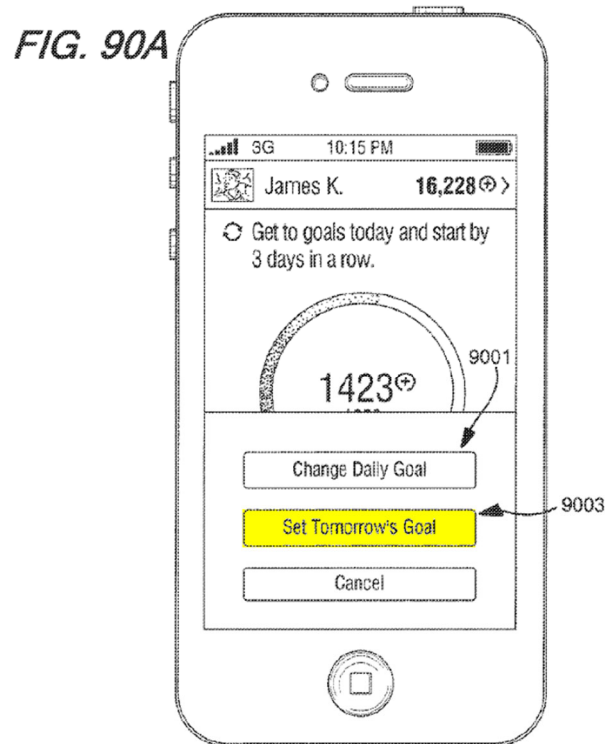
The Claims. Claim construction begins with the claims’ text. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (en banc). Here, the claims contradict Nike’s construction because the disputed term’s text includes neither of Nike’s “from a user” or “during a goal setting operation” requirements. (Ex. 1001, 80:28, 81:13.) Nike never addresses this omission; in fact, apart from identifying what it wants to change, it makes no argument about the claims’ text at all.

The claims also conflict with Nike’s construction because they include requirements like the ones Nike proposes for some limitations, but not for “receiving an activity time period.” *See Phillips*, 415 F.3d at 1314 (“steel” before “baffles” meant that baffles” did “not inherently mean objects made of steel”). For instance, the claims make no secret when something must come “from” a certain source. (*See id.*, 80:26-27 (Claim 1: “receiving athletic activity data *from* a device

configured to be worn by a user”), 81:12-13 (Claim 11: same).¹ They leave no doubt when communication with “a user” is required. (*See id.*, 80:34 (Claim 1: “presenting a streak reward *to* the user”), 81:19 (Claim 11: same); *see also id.* 80:38-40 (Claim 2: “by the user”), 80:43-47 (Claim 4: “to the user”), 80:64-67 (Claim 8: “providing the user with”), 81:1-4 (Claim 9: “to the user”), 81:5-8 (Claim 10: “to the user”), 82:1-9 (“to the user”), 82:17-20 (“to the user”). And when they impose temporal requirements, like presenting a streak reward “*when* the received athletic activity data exceeds the first activity goal,” they say that explicitly, too. (*Id.*, 80:34-35, 81:19-20.) As in *Phillips*, the fact that the claims recite such requirements shows the disputed term does not already include them.

The Specification. The ’615 patent’s specification also refutes Nike’s construction. The Federal Circuit has explained that “[a] claim construction that excludes a preferred embodiment is rarely, if ever, correct.” *Kaneka Corp. v. Xiamen Kingdomway Grp., Co.*, 790 F.3d 1298, 1304 (Fed. Cir. 2015) (cleaned up). Here, the specification discloses a preferred embodiment in which a “*device* may automatically select a time period for the future goal based on a first time period *for which a goal has not been defined.*” (Ex. 1001, 54:37-42.) In other words, as shown in Figure 90A, the ’615 patent teaches receiving an activity time period of a single day, “tomorrow,” from a device rather than from a user:

¹ All emphasis is added unless otherwise stated.



(*Id.*, Fig. 90A (highlighted).) Moreover, the fact that “FIG 90A illustrates an example interface by which a user *may activate* a goal modification or setting function,” shows that the device sets the time period before a user begins a goal setting operation. (Ex. 1001, 54:27-28.) Thus, Nike’s proposed construction conflicts with and would improperly exclude the forgoing embodiment.

Rather than addressing this tension, Nike focuses on other parts of the specification. Nike argues that because it sometimes describes a user setting an activity time period while setting a goal, that is the scope of the claims. (POR, 12-13.) Nike is wrong as a matter of law. Narrowing claims from their ordinary and customary meaning requires “clear” lexicography or disclaimer, neither of which Nike even mentions. *Thorner v. Sony Comp. Entm’t Amer., LLC*, 669 F.3d 1362,

1365-66 (Fed. Cir. 2012). Alternatively, even if the specification only had disclosed embodiments matching Nike’s construction—and it discloses far more—the Federal Circuit “has expressly rejected contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment.” *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed. Cir. 2004). Thus, the specification provides Nike no support.

Expert Testimony. Expert testimony can “establish that a particular term in the patent or the prior art has a particular meaning in the pertinent field.” *Phillips*, 415 F.3d at 1318. But “conclusory, unsupported assertions by experts ... are not useful,” and the Board “should discount any expert testimony that is clearly at odds with ... the written record of the patent.” *Id.* (cleaned up).

The expert testimony weighs against Nike’s construction. Nike’s expert asserts that Nike’s construction is correct and then, for support, recites the same arguments and the same citations as Nike. (*Compare* Ex. 2002, ¶¶32-34 *with* POR, 11-13.) Those arguments and citations fare no better when presented through Nike’s expert than in Nike’s brief. lululemon’s expert, meanwhile, testified that he does not believe the claim language “restricts it [receiving an activity time period] to receiving an activity time period *from the user*.” (Ex. 2003, 93:24-95:5.) And he also testified, “I ... don’t believe that [the] time period necessarily has to be set

before, *during*, or after” (Ex. 2003, 102:4-6). So, far from “agree[ing]” with Nike’s construction, as Nike asserts, lululemon’s expert explained that it is wrong.

* * *

The Board should reject Nike’s narrowing construction. If Nike wanted to add new limitations to its claims, it should have moved to amend.

III. GROUNDS 3, 5: EVERY CHALLENGED CLAIM IS OBVIOUS OVER SIRMANS IN VIEW OF KOBAYASHI AND BRADY

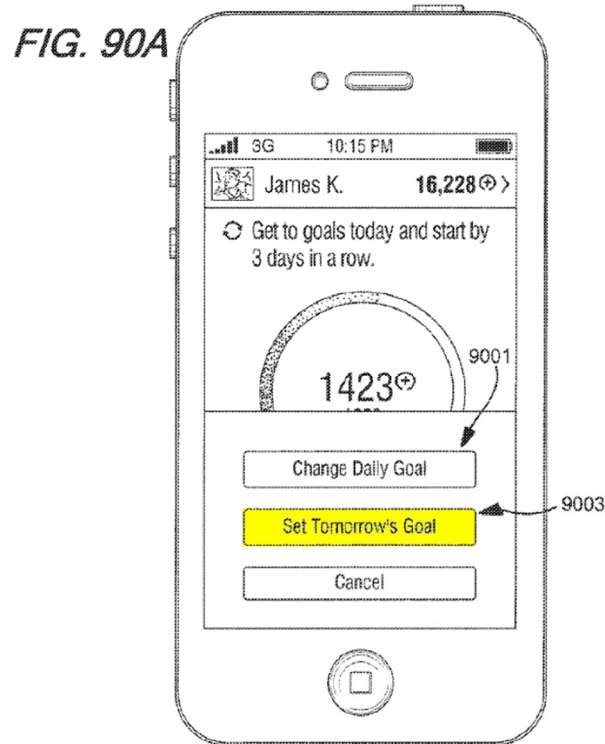
At institution, the Board preliminarily found that Sirmans and Kobayashi teach every limitation of claim 1. (Paper 11 (“DI”), 13-29.) The Board’s findings were correct and it should adopt them in its final written decision. It also should reject Nike’s arguments about dependent claims 3 and 7, which have no merit.

A. Sirmans Teaches “receiving an activity time period” (claims 1, 11)

For Grounds 3 and 5, Nike’s only argument for preserving the independent claims—and most dependent claims—is that Sirmans does not teach receiving an activity time period “[1] from a user [2] during a goal setting operation.” (POR, 31, 34.) Because there are no such limitations, the Board should reject it. (*Supra*, §II.) As the Board preliminarily found at institution, Sirmans’s computer system receives CDC daily goals and thereby meets the “receiving an activity time period” limitation. (*See* DI, 18-20; Ex. 1004, ¶¶58, 77-78, 84; Ex. 1006, ¶¶77-78.)

The Board also should find that Sirmans teaches this limitation if it adopts Nike’s construction. Under *Kaneka Corp.*, adopting Nike’s construction would

require a finding that the '615 patent's disclosure of a user "Set[ting] Tomorrow's Goal" meets Nike's "from a user during a goal setting operation" requirements:



(Ex. 1001, Fig. 90A (highlighted), 54:27-46.) *See* 790 F.3d 1304 (“[a] claim construction that excludes a preferred embodiment is rarely, if ever, correct”). And if Figure 90A’s “Set Tomorrow’s Goal” button meets Nike’s construction, then so would Sirmans’s disclosure. In Sirmans, the CDC proposes “recommended levels of exercise,” including a daily time period. (Ex. 1004, ¶84.) But, just as the ’615 patent’s user must click Figure 90A’s “Set Tomorrow’s Goal” button, Sirmans’s “member” must “agree to” and thereby concurrently set the CDC goals and time periods. (*Id.*, ¶68; *see also id.*, ¶¶36, 71, 84; Ex. 1006, ¶¶77-78; Ex. 2003, 64:19-

23 (“Sirmans envisions the user could be one of the sources for establishing protocol criteria”).² Thus, if Nike’s construction is correct, then Sirmans meets it.

Nike’s own arguments confirm this point. To illustrate the scope of “receiving an activity time period,” Nike points to still more disclosure in the ’615 patent that mirrors Sirmans’s. It cites the ’615 patent’s description of a user selecting a pre-defined time period, “such as a day, an hour, a week, a month or the like.” (POR, 12-13 (quoting Ex. 1001, 58:1-8); *see also* Ex. 1025, 36:21-37:3 (Nike’s expert agreeing that passage embodies “receiving an activity time period”).) Again, that is what Sirmans discloses. (*See, e.g.*, Ex. 1004, ¶¶68, 84.) As for Nike’s lone rebuttal—that Sirmans’s “gatekeeper” initially presents a time period to a user—it does nothing to refute that user later selects it. (POR, 31.)

B. Sirmans, Kobayashi, and Brady Teach “a wrist-worn monitoring device” (claim 3)

For claim 3, the Board does not need to reach Nike’s arguments. Nike does not dispute that it would have been obvious to combine Kobayashi’s sensor “worn on any position” with Sirmans’s system. (*Compare* Paper 2 (“Petition”), 66-67 *with* POR, 32-33.) Nor does Nike dispute that a POSITA would have combined Sirmans’s system with Brady’s wrist-worn monitoring device. (*Compare* Petition,

² As Dr. Fischer’s deposition transcript shows, Nike’s assertion that he “agrees” Sirmans does not teach this limitation is false. (*See* POR, 31; Ex. 2003, 64:19-23.)

77-78 *with* POR, 32-33, 34.) Thus, it makes no difference whether Sirmans alone discloses this limitation; the Board can simply cancel claim 3 according to the undisputed combinations of Sirmans, Kobayashi, and Brady.

If the Board reaches Sirmans’s disclosures, however, it should find that Sirmans teaches “a wrist-worn monitoring device.” Sirmans describes sensors that monitor “body core temperature, galvanic skin response, pulse, blood pressure, respiration, activity, heat flow, and certain electrical currents associated with electrocardiogram and electroencephalograph measurements.” (Ex. 1005, ¶16.) It further discloses that its sensors “can be based on known monitoring devices and sensors, such as those disclosed in U.S. Patent No[] 6,635,015” (*Id.*, ¶48.) And that patent, in turn, discloses that pulse sensors can take the form of “a wristwatch,” *i.e.*, a wrist-worn monitoring device. (Ex. 1019, 8:3-31.)

Nike’s lone rebuttal to these disclosures, a vague statement that they are “not incorporated by reference,” fails. (POR, 32.) Sirmans states that “[a]ll patents ... referred to or cited herein are incorporated by reference in their entirety.” (Ex. 1004, ¶89.) The Federal Circuit has called such language “plainly sufficient to incorporate [a reference] in its entirety.” *Paice LLC v. Ford Motor Co.*, 881 F.3d 894, 907 (Fed. Cir. 2018). And even if otherwise, Sirmans’s discussion of “known monitoring devices and sensors, such as those disclosed in [the ’015 patent]” (Ex. 1005, ¶48), in combination with its broader statement of incorporation (*id.*, ¶89),

would incorporate at least the '015 patent's disclosure of a "monitor in the form of a wristwatch" (Ex. 1019, 8:8). *See Husky Injection Molding Sys. Ltd. v. Athena Automation Ltd.*, 838 F.3d 1236, 1248 (Fed. Cir. 2016) (similar statements "work[ed] in concert to incorporate at least some portions of [another patent]"). Thus, even setting aside obviousness, Sirmans expressly discloses claim 3.³

C. Sirmans and Kobayashi Teach "receiving a second activity goal for the activity time period" (claim 7)

Most of claim 7's limitations are not in dispute. Nike does not dispute the combination would have been obvious, nor that Sirmans's paragraph 72 teaches determining whether data "exceeds" activity goals. (POR, 33.) It also does not dispute that Sirmans teaches doing so for multiple activity goals for a predetermined number of daily, consecutive activity time periods. (*Id.*) After all, Nike's own expert conceded that Sirmans's disclosure of exercising "5 days a week" means at least three consecutive days in a week (Ex. 1025, 41:22-44:11), and that a POSITA reading Sirmans's "3 days a week" would have recognized that phrase encompasses three consecutive days (*id.*, 44:18-21, 46:6-47:8). Both qualify as express disclosures at least under *Kennametal, Inc. v. Ingersoll Cutting*

³ For the same reason, Nike is mistaken that Dr. Fischer was "unable to point to any disclosure in the Sirmans reference showing a wrist-worn device." (POR, 32.) He pointed to its incorporation of the '015 patent. (Ex. 2003, 77:7-78:3, 81:3-19.)

Tool Co.’s “at once envisage” rule, and the former also qualifies as an inherent disclosure. 780 F.3d 1376, 1781 (Fed. Cir. 2015).

Nike’s lone argument for claim 7 is, instead, that Sirmans does not disclose receiving the time period “from a user during a goal setting operation” under its construction. (POR, 33.) That argument fails for the same reasons as before. (*See supra* §§II, III.A.) Nike’s expert testimony on this point, meanwhile, is just a naked assertion with no supporting reasoning and is therefore “entitled to little weight.” (POR, 33 (citing Ex. 2002, ¶59).) *Xerox Corp. v. Bytemark, Inc.*, Case No. IPR2022-00624, Paper 9 at 15 (P.T.A.B. Aug. 24, 2022) (precedential). Finally, although Nike’s use of “during” rather than “for” in the last sentence of its argument for claim 7 appears to be a typo, Nike never explains or justifies such a substitution and it therefore is forfeit. (POR, 33.) 37 C.F.R. § 42.23(b).

IV. GROUNDS 2, 4: EVERY CHALLENGED CLAIM IS OBVIOUS OVER STIVORIC IN VIEW OF KOBAYASHI AND BRADY

Nike disputes whether Stivoric, Kobayashi, and Brady render obvious two limitations from claims 1 and 11 and one limitation from claim 7. Because none of Nike’s arguments have merit, the Board should cancel every challenged claim.

A. Stivoric and Kobayashi Teach “receiving an activity time period” (claims 1, 11)

Nike argues that Stivoric does not teach “receiving an activity time period” because it does not teach receiving that time period “during a goal setting

operation” according to Nike’s construction. Nike’s argument fails because its construction is wrong and because, regardless, Stivorice does so.

As the Petition explained, Stivorice discloses “receiving an activity time period” in its paragraph 197. (Petition, 44-45, Ex. 1003, ¶197.) According to that paragraph, Stivorice’s device 1200 receives “specific time periods such as a day, a week or a month” from a user’s “rotation of dial 1220” or “pressing of button 1215.” (*Id.*) Stivorice’s processing unit 1300 also receives that information. (*See, e.g.,* Ex. 2003, 97:15-21 (Dr. Fischer: “the processor is receiving an activity time period”); Ex. 1003, ¶¶197, 215.) Even if these disclosures only taught receiving a time period “retroactively,” as Nike insists (POR, 24), they still would satisfy the disputed limitation because it is agnostic to when the time period is received.

But contrary to Nike’s characterization, Stivorice discloses more than just a user retroactively viewing their progress. Stivorice discloses that “*a daily goal of 2000 calories consumed was set by the individual*” and that “*a daily goal of 2,400 calories burned was set by the individual.*” (Ex. 1003, ¶197 (emphasis added).) As Dr. Fischer explained, Stivorice’s use of “was set” indicates that a user sets such “daily goal[s]” *before* exercising. (Ex. 2003, 90:3-91:19.) And, by definition, setting a “daily goal” would concurrently set both a time period and a goal per Nike’s “during a goal setting operation” requirement. (*See also* Ex. 1026, 457 (defining “daily” as “[h]appening or done every day”).) In fact, Nike’s expert

conceded that a nearly identical disclosure of a user “setting a daily goal” in the ’615 patent embodies the disputed limitation. (Ex. 1025, 35:2-7 (referring to Ex. 1001, 46:61-63), 37:4-38:3); *see also id.*, 38:22-39:7, 39:17-40:3). Thus, even if the Board adopts Nike’s construction, Stivorik satisfies it.

Nike’s counterarguments on this point do not move the needle. Nike argues that “Stivorik’s activity time periods are preset,” but it ignores Stivorik’s teaching that the user is who “presets” them. (POR, 25; Ex. 1003, ¶197 (“a daily goal ... was set by the individual”); Ex. 2003, 90:3-91:19.) Equally, Nike is wrong that “[a] user is not able to customize, in a forward-looking manner ‘at the time of setting a goal,’ an activity time period for a particular goal.” (POR, 25 (citation omitted).) Again, that is exactly what Stivorik teaches. (*See* Ex. 1003, ¶197.)

Finally, Nike’s criticisms of Dr. Fischer also fail. Nike pretends that Dr. Fischer “testified that he has not offered any opinions about whether a user enters an activity time period before undertaking a goal.” (POR, 25-26 (citing Ex. 2003, 96:8-20).) He actually testified that Stivorik “identifies locations where the goals can be set ... prior to the commencement of exercise.” (Ex. 2003, 96:19-97:9; *see also id.*, 90:13-91:19 (identifying same).) Nike also is wrong that Stivorik does not teach setting “any” time period. (POR, 26.) Consistent with Dr. Fischer’s testimony, Stivorik describes “a day, a week, or a month” as non-limiting examples. (*See* Ex. 1003, ¶197 (“specific time periods *such as* a day, a week, or a

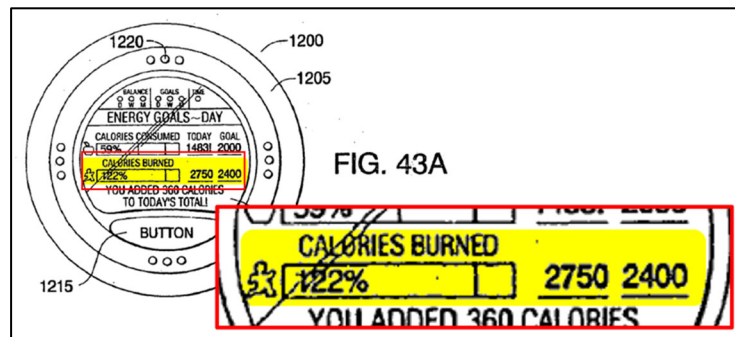
month”); *see also* Ex. 2003, 102:7-103:10 (any period would be obvious).) Nike has failed to refute that Stivorice teaches the “receiving” limitation.

B. Stivorice and Kobayashi Teach “determining [at a processor /] whether the received athletic activity data exceeds the [first /] activity goal for a predetermined number of consecutive activity time periods” (claims 1, 11)

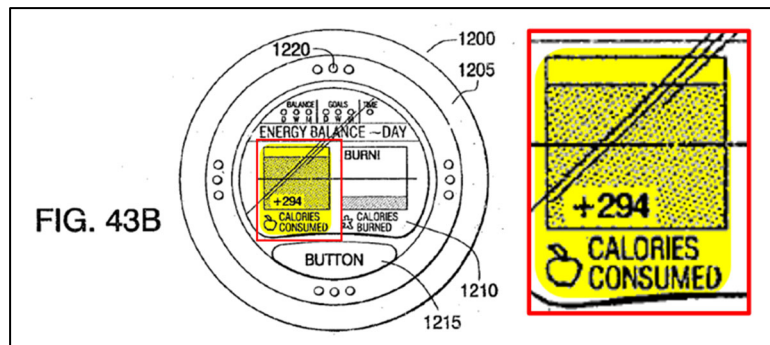
Nike does not dispute that Stivorice and Kobayashi collectively teach every element of this limitation, nor that a POSITA would have been motivated to combine them. (POR, 26-28.) Instead, it disputes only whether a POSITA could have combined the references with a reasonable expectation of success. (*Id.*) The Board should reject Nike’s argument for two independent reasons.

First, Nike’s argument is a red herring. Nike contends that lululemon never explained how to combine Stivorice and Kobayashi’s *hardware*. (POR, 27-28.) But lululemon’s argument was that a POSITA would have added concepts from Kobayashi into Stivorice’s *software*. (Petition, 47 (combination would require only “basic programming skills”).) Equally, it makes no difference whether Stivorice’s device 1200 has hardware for toggling between viewing day, week, and month time periods, nor whether Figures 43A-C depict displaying periods other than days, weeks, and months. (POR, 27-28.) The disputed limitation requires “determining” whether a user exceeded a goal for consecutive days, not viewing or displaying it. (Ex. 1001, 80:30-33 (claim 1), 81:15-17 (claim 11).) So even considering the hardware—as Nike urges—it does nothing to undermine the combination.

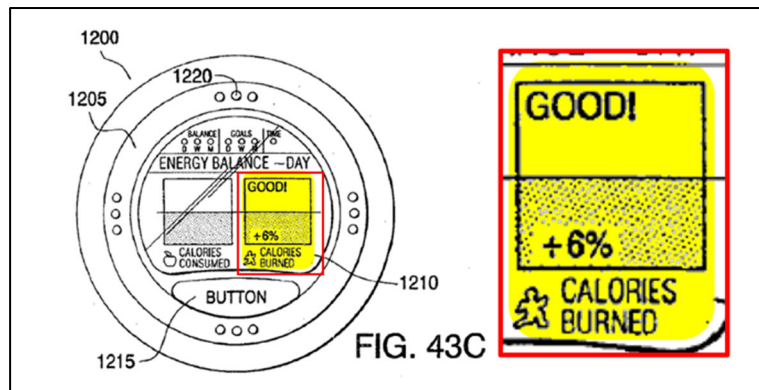
Second, on the merits, the evidence shows that a POSITA would have adapted Stivoric's software with a reasonable expectation of success. For starters, both references already disclose similar features. Stivoric teaches a processor that "is programmed to generate and display the information shown in FIGS. 43A-C" (Ex. 1003, ¶215), each of which reflects a determination of exceeding a goal:



(Ex. 1003, Fig. 43A (annotated and enlarged).)



(*Id.*, Fig. 43B (annotated and enlarged).)

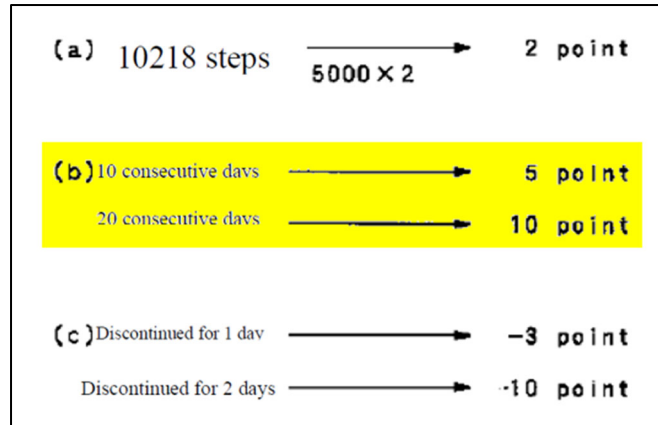


(*Id.*, Fig. 43C (annotated and enlarged).) Similarly, Kobayashi teaches awarding an extra point if an athlete exceeds a goal of 5,000 steps and reaches 10,000 steps:

(a) 10218 steps	$\xrightarrow{5000 \times 2}$	2 point
(b) 10 consecutive days	$\longrightarrow$	5 point
20 consecutive days	$\longrightarrow$	10 point
(c) Discontinued for 1 day	$\longrightarrow$	-3 point
Discontinued for 2 days	$\longrightarrow$	-10 point

(Ex. 1005, Fig. 12 (highlighted), ¶140; *see also id.*, ¶142.)

What Kobayashi adds to Stivoric in this combination is its recognition of consecutive activity time periods. For example, Kobayashi's Figure 12 shows rewarding multiple consecutive days of meeting a goal:



(Ex. 1005, Fig. 12 (highlighted).) And it further describes awarding “3 points when the total steps per day surpasses 10,000 steps” for consecutive days (*i.e.*, awarding one extra point for exceeding the goal in consecutive days). (*Id.*, ¶142.)

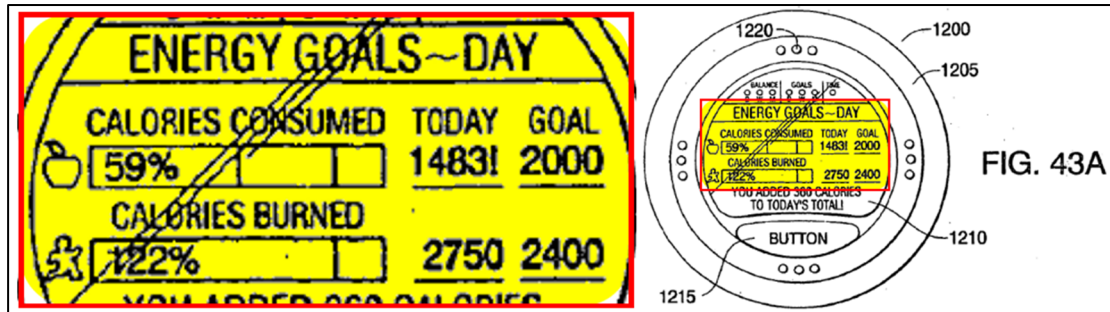
Given the existing overlap between Stivoric and Kobayashi’s features, a POSITA would have reasonably expected to succeed in modifying Stivoric’s software to determine whether a user exceeded an activity goal for consecutive days. As Dr. Fischer explained, the modification would require “nothing more than basic programming skills.” (Ex. 1006, ¶115.) Nike’s expert testified to the same, calling an algorithm for printing “a streak reward” after a user exceeded exercise goals for two consecutive days, “a basic computer program.” (Ex. 1025, 24:22-25:14 (referring to Ex. 1023).) And he further conceded that, by the ’615 patent’s date, a POSITA could have written it. (Ex. 1025, 25:15-18 (same).) Thus, Nike has again failed to show “Kobayashi’s teaching of recognizing and rewarding users for achieving goals for *consecutive* activity time periods would not have been implemented by a skilled artisan in [another reference’s] method” (DI, 26.)

C. Stivoric and Kobayashi Teach “receiving a second activity goal for the activity time period” (claim 7)

Nike disputes claim 7 on two bases: (1) that Stivoric does not disclose receiving an “activity time period” under Nike’s construction and (2) that Stivoric does not “teach or suggest a ‘second activity goal’ undertaken during the same time period as any other goal.” (POR, 29.) Neither argument has merit.

First, Nike’s incorporated argument about receiving an activity time period fails for the reasons stated above. (*Supra* §IV.A.)

Second, contrary to Nike’s argument, Stivoric discloses “multiple goals [that] are attempted during the same time period.” (POR, 29.) It discloses tracking dozens of parameters, and, as lululemon explained in the Petition, it would have been obvious to track goals for any of them. (*See* Petition, 54-55; Ex. 1003, ¶¶101, 216, 218, 227.) Nike’s rebuttal that Stivoric’s paragraphs 218 and 227 are not connected fails because it does not respond to lululemon’s *obviousness* argument. (*Compare* POR, 29 with Petition, 55.) And even if Nike’s argument had any merit, the example of “calories consumed and calories expended” that lululemon gave in the Petition independently satisfies this limitation. (Petition, 55.) As shown below, Stivoric discloses that its system can receive both goals for a single day:



(Ex. 1003, Fig. 43A (annotated and enlarged).) Thus, like the other challenged claims, Nike has failed to refute that claim 7 is invalid under the Stivoric grounds.

V. GROUND 1: HOFFMAN ANTICIPATES EVERY CHALLENGED CLAIM

Nike disputes whether Hoffman teaches two limitations from claims 1 and 11 and one from each of claims 7 and 13. Nike's arguments fail in the face of its own expert's testimony and Hoffman's disclosures.

A. Hoffman Teaches "determining [at a processor /] whether the received athletic activity data exceeds the [first /] activity goal for a predetermined number of consecutive activity time periods" (claims 1, 11)

Nike makes three arguments why Hoffman does not disclose this limitation ("Limitation 1[D]/11[D]"). (POR, 17-18.) None have merit.

1. Hoffman teaches the "consecutive" requirement

Nike argues that Hoffman's disclosure of rewarding a user for achieving "3 goals in 3 consecutive days" does not teach goals spread across "a predetermined number of consecutive activity time periods" because it could refer to three goals in one day. (POR, 17-18.) Nike's argument fails for two reasons.

First, Nike misreads Hoffman. Nike’s own expert, Dr. Stone, testified that a POSITA in 2011 would have interpreted “3 goals in 3 consecutive days” as either “[1] three goals in each of three days or ... [2] one goal in each of those days.” (Ex. 1025, 48:13-49:20.) Both interpretations satisfy the consecutive requirement.

Second, even if “3 goals in 3 consecutive days” also encompassed 3 goals in one day and none in others, Hoffman still would satisfy Limitation 1[D]/11[D]. Under *Kennametal*, “a reference can anticipate a claim even if it does not expressly spell out all the limitations ... if a [POSITA], reading the reference, would at once envisage the claimed arrangement.” 780 F.3d at 1781. Here, Dr. Stone envisaged that “3 goals in 3 consecutive days” could mean “three goals in each of three days” in less than two minutes on the record—*i.e.*, immediately. (Ex. 1025, 48:13-49:20.) Given that interpreting that phrase requires no particular expertise, it is fair to conclude that a POSITA would have done same. (*See also* Ex. 2002, ¶26.)

A POSITA also would have immediately envisaged that “3 goals in 3 consecutive days” discloses the second interpretation, “one goal in each of those days.” Assuming “3 goals in 3 consecutive days” refers to a total of 3 goals spread across three days, there are only 10 possible ways to distribute those goals:

#	Day 1	Day 2	Day 3
1	1	1	1
2	3	0	0
3	0	3	0
4	0	0	3
5	2	1	0

6	2	0	1
7	1	2	0
8	0	2	1
9	1	0	2
10	0	1	2

Thus, even setting aside the speed with which Dr. Stone envisaged this interpretation (Ex. 1025, 48:21-49:20), that is fewer permutations than in other cases where the Federal Circuit has affirmed a POSITA would have immediately envisaged each, *see, e.g., Kennametal*, 780 F.3d at 1380 (15 permutations).

2. lululemon relied on a single embodiment

For Limitation 1[D]/11[D], Nike also accuses lululemon of combining different embodiments. lululemon didn't. To begin with, Nike is wrong that Hoffman's paragraphs 9 and 198 teach different embodiments. (POR, 16-17.) Paragraph 9 discloses that users can specify a "period of time" for a goal and paragraph 198 discloses rewarding a user for completing multiple goals within that period. (*Id.*, ¶¶9, 198.) The two paragraphs refer to the same system, and Nike's bald claim that they are "unrelated" does not show otherwise. (POR, 17.)

Nike also is wrong that lululemon combined different embodiments from Hoffman's paragraphs 161 and 211 with embodiments from paragraph 198. (POR, 17, n.4.) Setting aside that the Board does not need to reach this issue—the Petition offered Hoffman's paragraphs 161 and 211 as independent alternatives to paragraph 9—paragraphs 161, 198, and 211 all refer to the same system. (*See* Ex.

1002, ¶¶161, 198, 211.) Paragraphs 161 and 198 outline different features of a website. (*Id.*, ¶161 (“the site”) *referring to* ¶159 (“an athletic perform tracking and monitoring site”); *id.*, ¶198 (“the athletic tracking and monitoring site”). And paragraph 211, presented under the same “Thematic Workout Plans and Goals” header as paragraph 198, just describes more of the same. (*Id.*, ¶211.)

Finally, Nike’s footnoted argument about whether Hoffman’s paragraphs 161 and 211 teach “receiving an activity time period” has no merit. (POR, 17, n.4.) Nike’s argument hangs on its proposed construction, (POR, 17, n.4), and it fails because, again, its construction is incorrect. (*Supra* §II.)

3. Hoffman teaches determining whether a user “exceeds” a goal in consecutive time periods

For Limitation 1[D]/11[D], Nike last challenges whether Hoffman teaches determining whether a user “exceed[ed]” an activity goal for the consecutive time periods. (POR, 18-19.) Hoffman does so in two ways. First, Hoffman’s system detects when a user completes “3 goals in 3 consecutive days.” (*Supra* §V.A.1.; Ex. 1002, ¶198.) By definition, recognizing whether a user completes three goals per day for three days is a determination that a user completed more than one goal—*i.e.*, exceeded a goal—for that three-day period. The same would be true if that disclosure referred to completing one goal per day.

Second, Hoffman also discloses determining whether a user exceeds a goal in its paragraph 184: “the network site may roll over calories burned and steps

performed *exceeding* the required amount to complete a previous goal.” (Ex. 1002, ¶184.) In other words, when Hoffman’s system detects a user meeting a second or a third of three goals in a day, it can do so by determining that the user exceeded a first or second goal and then rolling over the user’s progress to the next. Thus, Hoffman’s disclosure of awarding a badge for “a user completing 3 goals in 3 consecutive days” discloses the exceeding requirement for this reason, too.

Nike fails to rebut that Hoffman teaches the “exceeds” requirement. Nike ignores altogether lululemon’s argument that completing multiple goals exceeds one goal. (*Compare* POR, 18-19 *with* Petition, 28.) And for paragraph 184’s disclosure of detecting users “exceeding the required amount” (Ex. 1002, ¶184), Nike just retreats—again—to accusing lululemon of combining different embodiments. (POR, 18-19.) Again, lululemon didn’t. Paragraph 184 discloses achieving multiple goals by applying steps in excess of one goal toward the next, and its paragraph 198 discloses rewarding a user for achieving multiple goals. (Ex. 1002, ¶¶184, 198.) Further confirming the overlap, the figures associated with these paragraphs both depict the badges discussed in paragraph 198 and both display Hoffman’s site from the perspective of a single user, “RUNGRRL”:

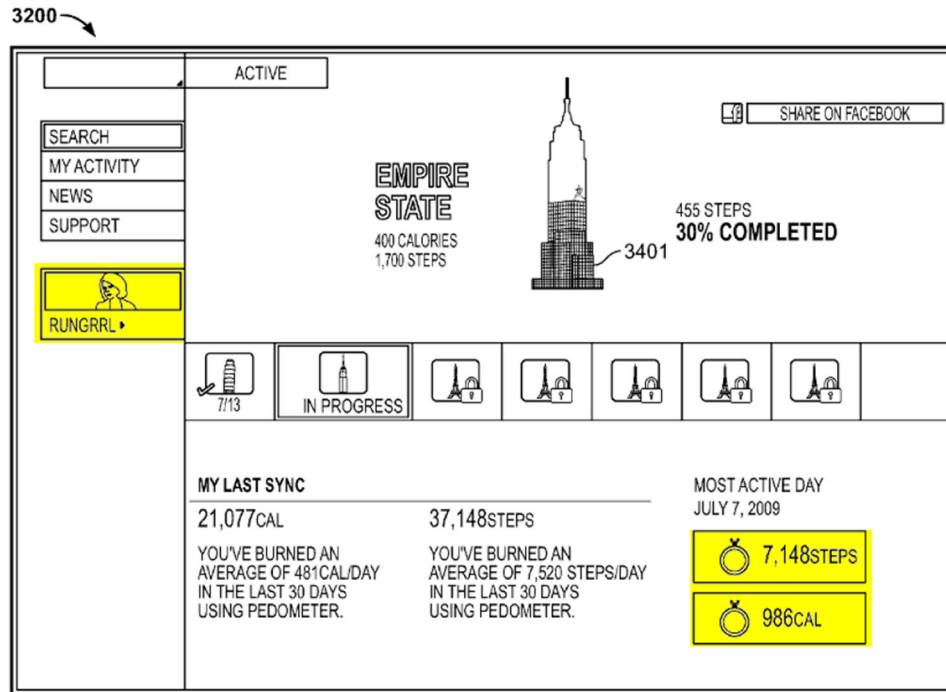


FIG. 34

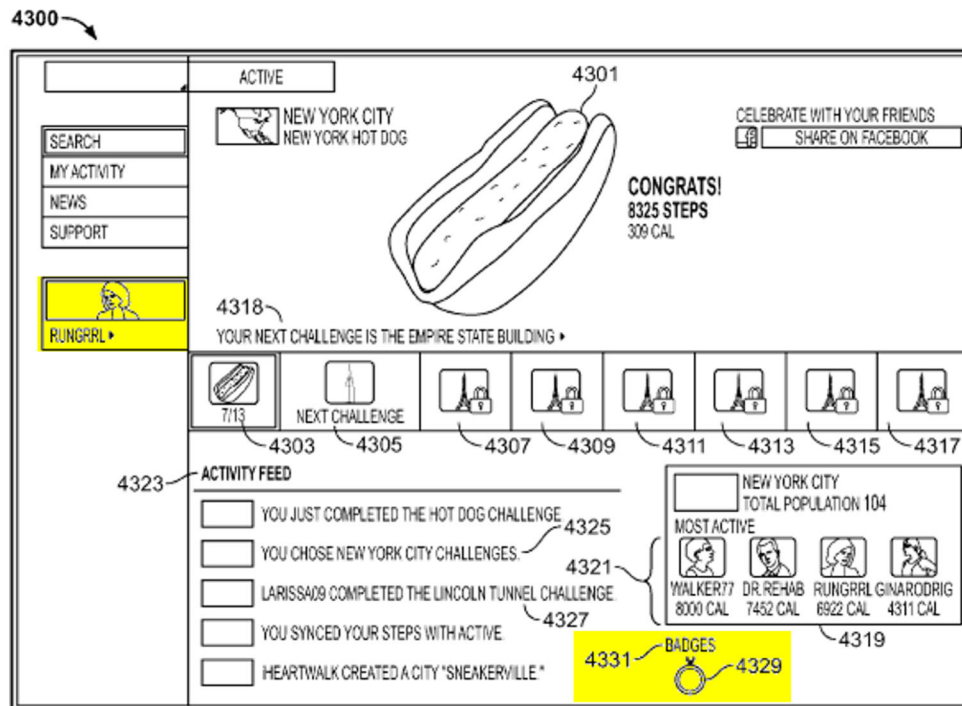


FIG. 43

(Ex. 1002, Figs. 32, 43; *see also id.*, ¶¶184 (referring to Fig. 34), 198 (referring to elements 4329, 4331 of Fig. 43).) The paragraphs refer to the same embodiment.

B. Hoffman Teaches “presenting a streak reward to the user when the received athletic activity data exceeds the [first /] activity goal for the predetermined number of consecutive activity time periods” (claims 1, 11)

Nike argues that Hoffman does not teach this limitation because Hoffman does not teach the preceding Limitation 1[D]/11[D]. (POR, 20.) Nike’s argument fails because, as explained above, Hoffman does so. (*See supra* §V.A.) Again, “completing 3 goals in 3 consecutive days” involves a user exceeding a first activity goal for the claimed “predetermined number of consecutive activity time periods.” (*See supra* § V.A.3.) And, contrary to Nike’s assertion (POR, 20), Hoffman expressly discloses that “a badge may be awarded for a user completing 3 goals in 3 consecutive days,” *i.e.*, for such a streak (Ex. 1002, ¶198).

C. Hoffman Teaches “receiving a second activity goal for the activity time period” (claim 7)

For claim 7, Nike raises a grab bag of arguments. Nike begins by repeating its claim that Hoffman’s paragraphs 161 and 211 do not disclose “receiving an activity time period” and that only Hoffman’s paragraph 9 does so. (POR, 17, n.4, 20-21.) Again, that argument hangs on Nike’s flawed construction, and it fails because that construction is wrong. (*Supra* §II.)⁴

Nike also is wrong that Hoffman’s paragraph 9 discloses a different embodiment than its paragraphs 165, 190, and 191. These four paragraphs

⁴ Nike’s later attack on paragraph 165 also fails for this reason. (POR, 21-22.)

describe one coherent system: paragraph 9 teaches that users can specify a “period of time” associated with a goal; paragraph 195 teaches that a user can set multiple such goals; paragraph 190 teaches how a user can do so; and paragraph 165 further confirms that a user can set multiple goals for one time period by describing (along with Figure 21C) switching between them:

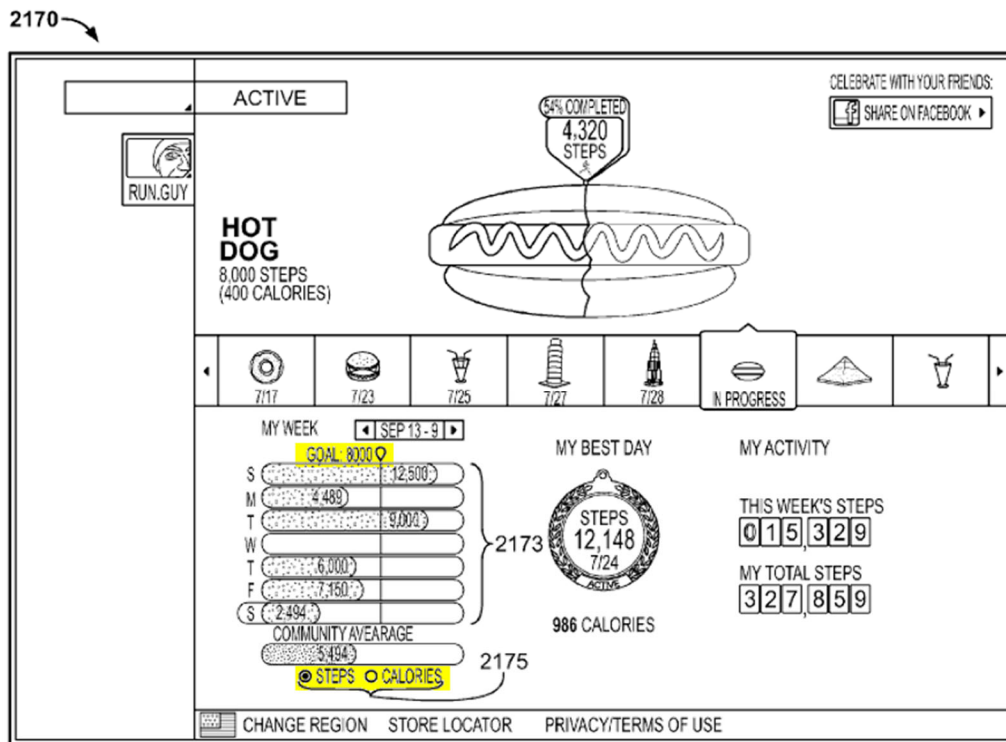


FIG. 21C

(*Id.*, Fig. 21C (highlighted); *id.*, ¶¶9, 165, 190, 195.) Rather than being “unrelated,” these paragraphs all describe how Hoffman’s system handles goals.

Last, the Board also should reject Nike’s argument that Hoffman does not teach claim 7 because its goals “are not undertaken simultaneously.” First, that is what Figure 21C (above) depicts. Second, there is no such requirement: claim 7 is agnostic to whether a user attempts goals in parallel or in serial; all it requires is

that both goals relate to the same time period. (Ex. 1001, 80:58-63.) And as Nike's expert admits, Hoffman teaches completing three goals in each day, which amounts to exceeding both a first and a second goal in each of those time periods. (Ex. 1025, 48:13-49:20; *see also supra* §V.A.3)

D. Hoffman Teaches the Determining Step for “a greater number of consecutive activity time periods than the predetermined number of consecutive activity time periods” (claim 13)

For claim 13, Nike just incorporates its earlier arguments for Limitation 1[D]/11[D]. (POR, 22.) As explained above, those arguments have no merit. (*Supra* §V.A.) The Board should cancel claim 13 along with the rest.

VI. CONCLUSION

For the foregoing reasons, the Board should cancel all challenged claims.

Dated: December 15, 2023

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Certification of Word Count (37 C.F.R. § 42.24)

I hereby certify that this Petitioner's Reply to Patent Owner's Response has 5,302 words (as counted by the "Word Count" feature of the Microsoft Word™ word-processing system), exclusive of "a table of contents, a table of authorities, a listing of facts which are admitted, denied, or cannot be admitted or denied, a certificate of service or word count, or appendix of exhibits."

Dated: December 15, 2023

By: / Forrest McClellen/
Forrest McClellen

Certificate of Service (37 C.F.R. § 42.6(e)(4))

I hereby certify that the attached Petitioner's Reply to Patent Owner's Response was served on the below date on the Patent Owner via e-mail (by consent) to the following counsel of record:

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