

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON ATHLETICA CANADA INC. and LULULEMON USA INC.
Petitioners

v.

NIKE, INC.
Patent Owner

Case IPR2023-00349
Patent 9,259,615

PATENT OWNER'S SUR-REPLY

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EXHIBITS

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

I. INTRODUCTION

Neither the Petition nor Petitioners' Reply to Patent Owner's Response (Paper 22; "Reply") demonstrates by a preponderance of the evidence that any Challenged Claim of the '615 patent is unpatentable.

As to Ground 1, where lululemon argues anticipation by Hoffman, lululemon's Reply does nothing to rebut the initial findings of the Board, i.e., that Hoffman does "not appear to explicitly or inherently disclose the features of [claim limitation 1[D]/11[D]]." DI, 31. lululemon's Reply merely shows that Hoffman describes a user completing three goals over a single period of time: three consecutive days. lululemon has not shown that Hoffman discloses "determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods." For at least this reason, lululemon's Ground 1 fails.

As to Grounds 2–5, lululemon's Reply fails to show that the prior art teaches or suggests "receiving an activity time period" as recited in claim limitations 1[B]/11[B]. The ordinary meaning of "receiving an activity time period," in view of the '615 patent, means receiving the activity time period (i) *from a user* (ii) *during a goal setting operation*. Paper 17, 11–13 ("Response"). Under the proper construction of these limitations, lululemon's proposed obvious combinations in Grounds 2–5 fail. In Grounds 2 and 4, lululemon relies exclusively on Stivoric as

teaching “receiving an activity time period.” But Stivoric only discloses a user retroactively toggling between pre-set time periods to view past performance—it does not disclose a user choosing an activity time period during a goal setting operation. In Grounds 3 and 5, lululemon relies exclusively on Sirmans as teaching “receiving an activity time period.” But Sirmans only discloses a system that receives an activity time period from a third-party—it does not disclose receiving an activity time period from a user.

For at least these reasons and the reasons discussed in Nike’s Response, lululemon has not carried its burden of proving by a preponderance of the evidence that any claim of the ’615 patent is unpatentable.

II. CLAIM CONSTRUCTION

Nike submits that the ordinary and customary meaning of “receiving an activity time period” is “receiving an activity time period from a user during a goal setting operation.” Response, 11–13; Ex. 2002, ¶¶32–35. lululemon’s expert, Dr. Fischer, agrees with Nike’s proposed construction. In his initial declaration, Dr. Fischer characterized the ’615 patent as follows:

[T]he ’615 patent explains that *a user* sets an activity goal to “complete a certain amount of activity” during a specific activity or goal time period.

Ex. 1006, ¶40. lululemon took the same position. Petition, 4 (citing Ex. 1001, 27:10–12, 51:1–28) (“[I]n the ’615 patent’s activity tracking application, *a user* sets an activity goal to ‘complete a certain amount of activity.’”).

In its Reply, lululemon tries to reverse course. lululemon now argues that Nike’s proposed construction is contradicted by “the claims, specification, and expert testimony.” Reply, 2. Each of lululemon’s arguments lack merit for the reasons discussed below.

The Claims. In its Reply, lululemon argues that the claim language contradicts Nike’s proposed construction in two ways.

First, lululemon argues that Nike’s construction injects two “requirements” that are not present in the text of the claims: that the system receives an activity time period (i) “from a user” and (ii) “during a goal setting operation.” Reply, 2. In essence, lululemon urges the Board to view the claims in a vacuum, comparing Nike’s proposed construction to the “disputed term’s text.” Reply, 2. But this approach contradicts well-settled law that claims must be read “in the context of the entire patent, including the specification.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005). When properly viewed in light of the specification, “receiving an activity time period” means receiving an activity time period from a user during a goal setting operation. Response, 11–13 (citing Ex. 1001, 46:55–63, 51:1–8, 38–52, 61-66; 54:12–20). The additional language in Nike’s proposed

construction does not inject new “requirements” into the claim—it merely articulates the ordinary meaning in a way that “aids the court and the jury in understanding the term as it is used in the claimed invention.” *Funai Elec. Co. v. Daewoo Elecs. Corp.*, 616 F.3d 1357, 1366–67 (Fed. Cir. 2010).

Second, lululemon argues that Nike’s construction conflicts with the surrounding claim language. lululemon points to other claim limitations that expressly recite information going “to” or “from” a “user.” Reply, 2–3. According to lululemon, the absence of this language in the disputed term means that “receiving an activity time period” does not necessarily come “from a user.” *Id.* This argument also fails as a matter of law. As the Federal Circuit has explained, the fact “the patentee chose several words in drafting a particular limitation of one claim, but fewer (though similar) words in drafting the corresponding limitation in another, does not mandate different interpretations of the two limitations.” *Kraft Foods, Inc. v. International Trading Co.*, 203 F.3d 1362, 1368 (Fed. Cir. 2000). Moreover, the other limitations cited by lululemon are different from the disputed term at issue. Reply, 2–3. None of those limitations relate to “receiving an activity time period.” *Id.* They relate to “activity points earned by the user” or “a streak reward achieved or extended by the user.” *Id.* The express mention of the “user” in these other limitations does not require that the “activity time period” be received from someone *other* than the user. *See Hologic, Inc. v. SenoRx, Inc.*, 639 F.3d 1329, 1337 (Fed.

Cir. 2011) (“[d]ifferent terms or phrases in separate claims may be construed to cover the same subject matter where the written description and prosecution history indicate that such a reading . . . is proper.”).

The Federal Circuit’s decision in *Phillips* does not support lululemon’s argument. In *Phillips*, the Court merely said that an adjective in front of a noun (i.e., “steel” in front of “baffles”) may imply that the noun inherently lacks that characteristic (i.e., the term “‘baffles’ does not inherently mean objects made of steel.”). *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005). That holding has no bearing here. Unlike the apples-to-apples comparison of “baffles” and “steel baffles” in *Phillips*, lululemon compares apples to oranges—relying on the presence of “user” in different limitations to inform the construction of the disputed term—“receiving an activity time period.” Reply 2,3. Neither *Phillips* nor any other authority support this argument.

The Specification. In its Reply, lululemon argues that Nike’s proposed construction contradicts the specification because it excludes the embodiment shown in Figure 90A. Reply, 3 (citing Ex. 1001, 54:37–42). According to lululemon, Figure 90A teaches an activity time period received *from a device*. *Id.* But lululemon misunderstands the specification. Figure 90A teaches receiving an activity time period *from a user*—and thus supports Nike’s proposed construction. Ex. 1001, 54:12–56.

In support of its argument, lululemon points to one passage in the specification’s description of Figure 90A. Reply 3–4 (citing Ex. 1001, 54:37–42). There, the specification discloses that 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.” But by cherry-picking this single sentence, lululemon omits important surrounding disclosure in the specification. The immediately preceding disclosure explains that Figure 90A relates to an “example interface” in which “*a user*” modifies a goal or sets another goal for a goal time period of their choosing:

As described herein, *a user may define a goal* to which the user’s activity is compared. Once a goal is set, in some arrangements, the *user may modify* the goal or set another goal for the same time period or another time period (e.g., the next day, a next week, the weekend, etc.). . . .

FIG. 90A illustrates an example interface by which *a user may activate* a goal modification or setting function.

Ex. 1001, 54:12–28 (emphasis added). The next passage of the specification—which includes the sentence cited by lululemon (shown in italics below)—merely describes a scenario in which *the user’s* selection of a “future goal” is automatically applied to the next available time period. For example, if the user sets a “future goal”—but the user already set a goal for Monday and Tuesday—the “future goal” is automatically assigned to Wednesday:

The user may activate goal option menu 9001 by selecting a displayed option and/or by interacting with the display

device in a specified manner. . . . The goal option menu 9001 may include an option for modifying a current goal or for setting a future goal. *The 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.* For example, if a goal has been defined for each of the next 2 days, the device and/or application may define the future goal option 9003 as being directed to the third day.

Ex. 1001, 54:27–42. Similarly, if a user already set a goal for this weekend and then sets a new “future goal,” the “future goal” would automatically apply to the next weekend. In either case, the goal time period is received from the user. Nike’s proposed construction does not exclude the interface in Figure 90A. Instead, Figure 90A is consistent with Nike’s construction: the activity time period is received “from a user” and “during a goal setting operation.” *See* Ex. 1001, 54:12–46.

Expert Testimony. lululemon’s attempt to discredit the opinions of Nike’s expert, Dr. Stone, fall flat. lululemon’s only attack on Dr. Stone is that the “support” and “citations” relied upon by Dr. Stone are the same as those included in Nike’s Response. Reply, 5. It should come as no surprise that Nike’s Response highlights portions of the ’615 specification that Dr. Stone identified as relevant to the skilled artisan’s understanding of “receiving an activity time period.” Response, 11–13; Ex. 2002, ¶33 (Dr. Stone opining that the ’615 patent discloses that “*the user* customize[s] his or her goals by choosing not only the activity to take place, but the

time over which the activity will take place.” (emphasis added)). This is not a reasonable basis for diminishing the weight of Dr. Stone’s opinions.

As noted above, lululemon’s expert, Dr. Fischer, agreed with Nike’s proposed construction in his initial declaration. Ex. 1006, ¶40 (“[T]he ’615 patent explains that a user sets an activity goal to ‘complete a certain amount of activity’ during a specific activity or goal time period.”). The expert testimony in this case—like the intrinsic record—thus supports Nike’s proposed construction.

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

Nothing in lululemon’s Petition or Response demonstrates that Hoffman anticipates any claim of the ’615 patent.

As to the independent claims, lululemon essentially repeats the same arguments the Board already found unpersuasive. *Compare* Reply, 19–22, 25 with DI, 30–31. This is especially true for limitations 1[D]/11[D], which determine if the user has achieved a “streak,” i.e., whether the user’s athletic activity exceeds an “activity goal for a predetermined number of consecutive activity time periods.” As the Board opined in its institution decision, the “few words from Hoffman” on which lululemon relies (“3 goals in 3 consecutive days”) “do not appear to explicitly or inherently disclose the features of the subject limitation.” DI, 30–31. lululemon has

presented no arguments to rebut that finding. And lululemon's expert, Dr. Fischer, failed to offer any opinions whatsoever for the independent claims under Ground 1.

For the dependent claims, lululemon fails to show that Hoffman discloses "receiving a *second* activity goal for the activity time period" (claim 7), or "determin[ing] whether the received athletic activity data exceeds the activity goal for a greater number of consecutive activity time periods than the predetermined number of consecutive activity time periods" (claim 13). For these reasons and the reasons discussed in Nike's Response, lululemon fails to meet its burden to show by a preponderance of the evidence that Hoffman anticipates any Challenged Claim of the '615 patent.

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

lululemon fails to show by a preponderance of the evidence that Hoffman discloses determining a "streak," i.e., whether the user's athletic activity "exceeds the first activity goal for a predetermined number of consecutive activity time periods." Response, 15. As the specification discloses, streaks involve "the completion of multiple goals corresponding to multiple consecutive goal time periods." Ex. 1001, 57:3–9. In other words, the user achieves a "streak" when "the user has completed goals for X number of consecutive goal time periods, where X may be any *number*

greater than 1.” Id. Both in its Petition and its Reply, lululemon fails to demonstrate that its cited disclosure in Hoffman, paragraph 198, meets this aspect of limitations 1[D]/11[D].

In its Petition, lululemon argued that Hoffman’s example of a badge awarded to a user for completing “3 goals in 3 consecutive days” met limitations 1[D]/11[D]. Petition at 9 (citing Ex. 1002, ¶198). As noted above, the Board was not persuaded by this argument. DI, 30–31. And for good reason. The system in Hoffman merely determines whether the user has completed three goals over a *single* activity time period: three consecutive days. Ex. 1002, [0198]. Hoffman does not determine whether the user has completed a goal on *each* of the three days. *Id.* For example, the user in Hoffman is awarded a badge if they complete three goals on the first day of the three-day period, and no additional goals on the second and third day. *Id.*

In its Reply, lululemon presents a slight variation of the same argument. According to lululemon, Hoffman satisfies “the consecutive requirement” because paragraph 198 would *allow the option* of completing one goal on each of the three days. Reply, 20–21 (citing Ex. 1025, 48:13–49:20) (emphasis added). But this argument fares no better.

First, even though paragraph 198 *allows* the user to complete one activity in each day of the three-day activity time period—Hoffman still fails to teach the “consecutive” aspect of limitation 1[D]/11[D]. The embodiment disclosed in

paragraph 198 of Hoffman describes only one activity time period: “three days.” Ex. 1002, ¶198. Even though a user *could* complete three goals over that three-day period, the claims recite something different. The claims recite a system that determines a “streak,” i.e., whether the user has completed a goal on multiple, “consecutive activity time periods.” Ex. 1001, 57:3–9. With a three-day activity time period, a streak would require the user completing a goal for at least two back-to-back, three-day-periods. But Hoffman offers no such teaching.

Second, even with this slightly varied argument, lululemon’s attempt to combine paragraph 198 with other embodiments in the specification (¶¶ 9, 161, 211) is insufficient to prove anticipation of the “consecutive” requirement. As Nike highlighted in its Response, anticipation cannot be proven by combining multiple, distinct embodiments. Response, 16–17 (citing Ex. 1002, ¶¶ 9, 161, 211). *See Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1069 (Fed. Cir. 2017) (“[A]nticipation is not proven by multiple, distinct teachings that the artisan might somehow combine to achieve the claimed invention.”). In its Reply, lululemon argues that other embodiments—disclosed in paragraphs 9, 161, and 211—are part of the same embodiment as paragraph 198 because both paragraphs mention “goals.” Reply, 21–22. But these embodiments teach different types of goals selected and implemented in different ways. In fact, a closer examination reveals that the two embodiments are different and distinct. Paragraph 9 describes an embodiment in

which the user’s progress toward a single goal is “aggregated and displayed.” Ex. 1002, ¶9. Paragraph 198, by contrast, is directed to awarding badges for various achievements. *Id.*, ¶198. The mere fact that both embodiments disclose “goals” is insufficient to characterize them as a single embodiment that is an appropriate ground for anticipation. *See BlephEx, LLC v. Myco Indus., Inc.*, 24 F.4th 1391, 1400 (Fed. Cir. 2022) (upholding district court’s conclusion that two figures both dedicated to devices for contacting an eyelid margin were separate embodiments). The same applies for paragraphs 161 and 211 of Hoffman, which lululemon admits disclose an embodiment discussing “different features of a website.” Reply, 22.

For these reasons and the reasons discussed in Nike’s Response, lululemon has not shown by a preponderance of the evidence that Hoffman anticipates any Challenged Claim in Ground 1.

B. Hoffman does not disclose “presenting a streak reward to the user when the received athletic activity data exceeds the [first /] activity goal for the predetermined number of consecutive activity time periods” (Limitations 1[E]/11[E])

lululemon fails to show by a preponderance of the evidence that Hoffman discloses “presenting a streak reward” to the user when the athletic activity exceeds the goal for the “predetermined number of consecutive activity time periods.” For the same reasons discussed in Nike’s Response and in Section III.A above, Hoffman

does not show that the user is rewarded for the completion of goals “for a predetermined number of *consecutive* activity time periods.”

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

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

Claim 7 recites “receiving a *second* activity goal for the activity time period.” To meet this limitation, lululemon points to four paragraphs of Hoffman that relate to distinct embodiments. Reply, 25 (citing Ex. 1002, ¶¶9, 165, 190, 191). As noted above, lululemon cannot prove anticipation by combining “multiple, distinct teachings” to “achieve the claimed invention.” *Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1069 (Fed. Cir. 2017); *Sherwin-Williams Co. v. PPG Indus., Inc.*, 2021 WL 5648019, at *4 (W.D. Pa. Dec. 1, 2021); *BlephEx, LLC v. Myco Indus., Inc.*, 24 F.4th 1391, 1400 (Fed. Cir. 2022).

In its Reply, lululemon argues that the four paragraphs it cited in Hoffman to meet this limitation—paragraphs 9, 165, 190, and 191¹—“describe one coherent system” because they are in some way “associated with a goal.” Reply, 25–26. But as discussed above, lululemon’s argument fails as a matter of law. As discussed

¹ Nike notes that lululemon’s Petition cites Hoffman’s paragraph 195, not 191 for claim 7. *Compare* Petition, 40 *with* Reply, 25–26.

above with respect to limitations 1[D]/11[D], the Board should reject lululemon's argument that Hoffman's paragraph 9 is the same embodiment as paragraphs 165, 190, and 191 because combining "multiple, distinct teachings" to "achieve the claimed invention" does not prove anticipation. *Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1069 (Fed. Cir. 2017); *Sherwin-Williams Co. v. PPG Indus., Inc.*, 2021 WL 5648019, at *4 (W.D. Pa. Dec. 1, 2021); *BlephEx, LLC v. Myco Indus., Inc.*, 24 F.4th 1391, 1400 (Fed. Cir. 2022).

Specifically, lululemon takes the position that any disclosures dealing with "goals" are a part of the same embodiment. *See* Reply, 21–22, 25–26. But these disclosures refer to different types of goals selected and implemented in different ways. Paragraph 9 is dedicated to setting a single goal, e.g., distance to run, and then tracking and displaying the user's progress toward completing that one goal. Ex. 1002, ¶9. Paragraphs 190 and 195 are entirely unrelated to an "activity time period"—they disclose a user selecting goals offered sequentially as a part of a "plan or routine." Ex. 1002, ¶¶190, 195. Paragraph 165 is also unrelated to any "activity time period," as it merely discloses an interface whereby a user can toggle between daily steps taken and daily calories burned. *Id.*, ¶165. lululemon's attempt to cobble together snippets of disclosure from these various, distinct embodiments to arrive at the claimed invention is improper for anticipation. *See Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1069 (Fed. Cir. 2017).

lululemon’s last argument—that “claim 7 is agnostic to whether a user attempts goals in parallel or in serial” so long as the goals “relate to the same time period”—is irrelevant. *See Reply*, 26–27. None of lululemon’s cited embodiments for claim 7 address multiple goals (i.e., a “second activity goal”) undertaken during the same received “activity time period.”

For these reasons and the reasons discussed in Nike’s Response, lululemon thus fails to show by a preponderance of the evidence that Hoffman discloses the additional limitation of claim 7.

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

For the same reasons discussed in Nike’s Response, Hoffman fails to disclose “determin[ing] whether the received athletic activity data exceeds the activity goal for a greater number of consecutive activity time periods than the predetermined number of consecutive activity time periods,” as recited by claim 13. *Response*, 22.

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

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

lululemon’s proposed combination of Stivorice and Kobayashi fails to teach or suggest two key limitations of the independent claims. First, lululemon fails to show

that the Stivorik-Kobayashi combination teaches or suggests “receiving an activity time period,” as recited in limitations 1[B]/11[B] and properly construed. Second, lululemon fails to show that the Stivorik-Kobayashi combination teaches or suggests a system that determines “whether the received athletic activity data exceeds the [first] activity goal for a predetermined number of consecutive activity time periods,” as recited in limitations 1[D]/11[D]. And to dependent claim 7, lululemon fails to show that the Stivorik-Kobayashi combination teaches or suggests “receiving a *second* activity goal for the activity time period.”

For these reasons and the reasons discussed in Nike’s Response, lululemon fails to show by a preponderance of the evidence that the Stivorik-Kobayashi combination renders obvious any Challenged Claim of the ’615 patent.

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

lululemon relies only on Stivorik for limitation 1[B]/11[B], and lululemon has not shown by a preponderance of the evidence that Stivorik teaches or suggests “receiving an activity time period” as properly construed. lululemon makes two arguments to claim Stivorik discloses limitations 1[B]/11[B]. First, lululemon argues that receiving a time period *after* goal setting satisfies these limitations because they are “agnostic to when the time period is received.” Reply, 12. Second, lululemon argues that Stivorik’s disclosure of a user setting a “daily goal”

“concurrently set[s] both a time period and a goal,” and therefore satisfies Nike’s proposed construction of these limitations. Reply, 12–13. lululemon’s first argument is moot under the proper construction of this term. Response, 11–13; *see supra*, § II. And for the reasons discussed below, lululemon’s second argument doesn’t hold water.

In its second argument, lululemon—relying on Dr. Fischer—alleges that Stivoric’s disclosure of a user setting a “daily goal” means the activity time period is received from the user during goal setting. Reply, 12–13 (citing Ex. 2003, 90:3–91:19). But lululemon’s argument misses the mark. lululemon mistakes the user *selecting a goal* with the user *selecting a goal time period*. This disclosure in Stivoric only allows a user to input a goal, e.g., “2400 calories burned,” for one pre-determined, system-supplied time period—a day. And contrary to lululemon’s argument that Stivoric’s “user is who ‘presets’” the *day* in the *daily goal* embodiment (Reply, 13), there is no disclosure or suggestion in Stivoric that the user selects or is able to modify that time period. *See* Ex. 1003, ¶197. lululemon therefore has not shown that the time period in Stivoric’s “daily goal” embodiment is received “from the user.”

lululemon alleges that there is “a nearly identical disclosure” to Stivoric’s “daily goal” embodiment “of a user ‘setting a daily goal’ in the ’615 patent.” Reply, 12–13 (citing Ex. 1001, 46:61–63). But the disclosure in the ’615 patent of a “daily

goal” that lululemon cites highlights the differences between the ’615 patent and Stivoric. As discussed in Nike’s Response and again in Section II of this Sur-Reply, the ’615 patent’s system allows the user to customize, i.e., define, an activity time period of his or her choosing. Response, 3 (citing Ex. 1001, 51:1–8). This, of course, could include choosing a day as the time period. Even the ’615 patent specification’s description of a “daily progress goal” confirms that the “day” time period is chosen by, and may be modified by, the user. *See, e.g.*, Ex. 1001, 27:9–34. This is different from Stivoric giving a user no other choice than to set a goal over a one-day time period.

For these reasons and the reasons discussed in Nike’s Response, lululemon thus has not shown by a preponderance of the evidence that the Stivoric-Kobayashi combination renders obvious any Challenged Claim in Ground 2.

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

lululemon has not shown by a preponderance of the evidence that the Stivoric-Kobayashi combination teaches or suggests “determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods,” as recited in limitations 1[D]/11[D]. For the reasons discussed in Nike’s Response, lululemon fails to explain how

Kobayashi's teachings of determining whether a goal has been exceeded for a predetermined number of consecutive activity time periods would have been combined with Stivorik to reach this limitation. Response, 26–28.

For these reasons and the reasons discussed in Nike's Response, lululemon thus has not shown by a preponderance of the evidence that the Stivorik-Kobayashi combination renders obvious any Challenged Claim in Ground 2.

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

lululemon has not shown by a preponderance of the evidence that the Stivorik-Kobayashi combination teaches or suggests receiving a “second activity goal for the activity time period,” as recited in dependent claim 7. lululemon relies on Stivorik for “receiving a second activity goal for the activity time period,” and on the Stivorik-Kobayashi combination for determining whether the user exceeds the second activity goal. Petition, 54.

As Nike discussed in its Response and as further explained in Section IV.A above, lululemon's proposed combination first fails because Stivorik does not teach or suggest “receiving an activity time period,” as properly construed. Response, 29. And as further discussed, the combination fails because the portions of Stivorik that lululemon relies upon—paragraphs 218 and 227—are unrelated (with the latter not relating to goals) and do not discuss activity time periods or whether multiple goals

are attempted during the same time period. *Id.* lululemon also has not shown *why* a POSITA would combine the teachings of Stivoric’s unrelated embodiments of paragraph 218 and paragraph 227. The Board should reject lululemon’s argument for this reason.

And to the extent that lululemon argues Stivoric’s goals of “calories consumed and calories expended” “satisf[y] this limitation,” that argument must also fail. Reply, 18–19. Stivoric’s measure of “calories consumed” is not representative of a “second activity goal.” Eating is not a type of physical activity envisioned by the ’615 patent. *See, e.g.*, Ex. 1001, 68:6–13.

For these reasons and the reasons discussed in Nike’s Response, lululemon thus fails to show by a preponderance of the evidence that the Stivoric-Kobayashi combination teaches or suggests the additional limitation of claim 7.

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

For the independent claims, lululemon has not shown that the proposed combination of Sirmans and Kobayashi teaches or suggests “receiving an activity time period,” as recited by limitations 1[B]/11[B] and properly construed. And for dependent claim 7, lululemon fails to show that the combination of Sirmans and Kobayashi teaches or suggests “receiving a *second* activity goal for the activity time period.”

For these reasons and the reasons discussed in Nike's Response, lululemon fails to show by a preponderance of the evidence that the Sirmans-Kobayashi combination renders obvious any Challenged Claim of the '615 patent.

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

lululemon has not shown by a preponderance of the evidence that the Sirmans-Kobayashi combination teaches or suggests “receiving an activity time period,” as recited in limitations 1[B]/11[B] and properly construed.² Specifically, the Sirmans-Kobayashi combination does not teach or suggest receiving an activity time period *from a user* during a goal setting operation. Response, 31.

In its Reply, lululemon argues that Sirmans teaches receiving an activity time period “from a user” because the user in Sirmans agrees to “CDC goals and time periods.” Reply, 7. lululemon attempts to draw a parallel between the “Set Tomorrow's Goal” button in the '615 patent's Figure 90A and Sirmans' member agreeing to “CDC goals and time periods.” *Id.*, 7–8. But this argument fails because, as explained above, the interface of Figure 90A involves “*a user*” modifying a goal or setting another goal. Ex. 1001, 54:12–28. As the specification makes clear, “the user” of interface 90A could have previously chosen time period of a day, week, or

² lululemon relies solely on the teachings in Sirmans to meet limitations 1[B]/11[B]. Petition, 58–59.

weekend. *See* Ex. 1001, 54:12–26. In other words, the interface described in Figure 90A is user-driven from beginning to the end, and the “activity time period” is received from the user. *See* Ex. 1001, 54:12–28 (“*a user* may define a goal”; “*the user* may modify the goal”; “*a user* may activate a goal modification”). Sirmans, on the other hand, merely presents pre-established protocols—such as the CDC recommended level of exercise—to the user for “acceptance.” Ex. 1004, ¶68. Sirmans thus receives an activity time period from *a third-party* and sends that activity time period to the user for “acceptance.” *Id.* And Sirmans doesn’t disclose the user having any choice but to accept the third-party’s activity time period. *See id.* Nowhere does Sirmans describe an alternative choice if the user declines the third-party’s activity time period. For these reasons, the “activity time period” in Sirmans is not received from the user, as required by the properly construed claims.

lululemon thus has not shown by a preponderance of the evidence that the Sirmans-Kobayashi combination renders obvious any Challenged Claim in Ground 3.

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

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

As discussed above in Section V.A, Sirmans does not disclose “receiving an activity time period,” as recited in limitations 1[B]/11[B]. Response, 33; Ex. 2002, ¶59. For at least that reason and the reasons discussed in Nike’s Response, lululemon fails to show by a preponderance of the evidence that the Sirmans-Kobayashi combination teaches or suggests the additional limitation of claim 7, which recites receiving a “second activity goal” during the same “activity time period.”

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

lululemon’s Reply fails to cure the deficiencies discussed in Nike’s Response with respect to Ground 4. For the reasons discussed above with respect to Ground 2, lululemon fails to show that Stivorik in view of Kobayashi renders obvious independent claim 1. At least for the same reasons and the reasons discussed in Nike’s Response, lululemon fails to show that Stivorik in view of Kobayashi and Brady renders obvious claims 3–5, which depend from independent claim 1. Response, 33–34; Ex. 2002, ¶61.

VII. GROUND 5: LULULEMON FAILS TO DEMONSTRATE THAT SIRMANS AND KOBAYASHI AND BRADY RENDER OBVIOUS CLAIMS 3–5

lululemon’s Reply fails to cure the deficiencies discussed in Nike’s Response with respect to Ground 5. For the reasons discussed above with respect to Ground

3, lululemon fails to show that Sirmans in view of Kobayashi renders obvious independent claim 1. At least for the same reasons and the reasons discussed in Nike's Response, lululemon fails to show that Sirmans in view of Kobayashi and Brady renders obvious claims 3–5, which depend from independent claim 1. Response, 34; Ex. 2002, ¶61.

VIII. CONCLUSION

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

Dated: January 26, 2024

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CERTIFICATE OF WORD COUNT

Under the provisions of 37 C.F.R. § 42.24(d), the undersigned hereby certifies that the Microsoft Office word count including all footnotes for the foregoing Patent Owner's Sur-Reply, excluding the table of contents, table of authorities, certificate of word count, appendix and certificate of service, totals 5,544 words, which is less than the 5,600 words allowed under 37 C.F.R. § 42.24(c)(4).

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on January 26, 2024, I caused a true and correct copy of **PATENT OWNER'S SUR-REPLY** to be served by electronic mail on Petitioners' counsel at the following email addresses:

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