

**United States Patent and Trademark Office
Before the Patent Trial and Appeal Board**

***lululemon athletica inc. et al. v.
Nike, Inc.***

**IPR2023-00349
U.S. Pat. No. 9,259,615**

**Patent-Owner's Presentation
April 4, 2024**

lululemon athletica inc. et al. v. Nike, Inc. IPR2023-00349 Patent No. 9,259,615 Demonstrative Ex. 2004
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1. Overview of '615 Patent and Instituted Grounds

2. Claim Construction

A. “receiving an activity time period”

3. lululemon Failed to Prove Unpatentability by a Preponderance of the Evidence

- A. Ground 1: lululemon Fails To Show That Hoffman Anticipates The Challenged Claims
- B. Grounds 2, 4: lululemon Fails To Show That Stivorice in view of Kobayashi (Ground 2) or Stivorice in view of Kobayashi and Brady (Ground 4) Renders Obvious The Challenged Claims
- C. Ground 3, 5: lululemon Fails To Show That Sirmans in view of Kobayashi (Ground 3) or Sirmans in view of Kobayashi and Brady (Ground 5) Renders Obvious The Challenged Claims

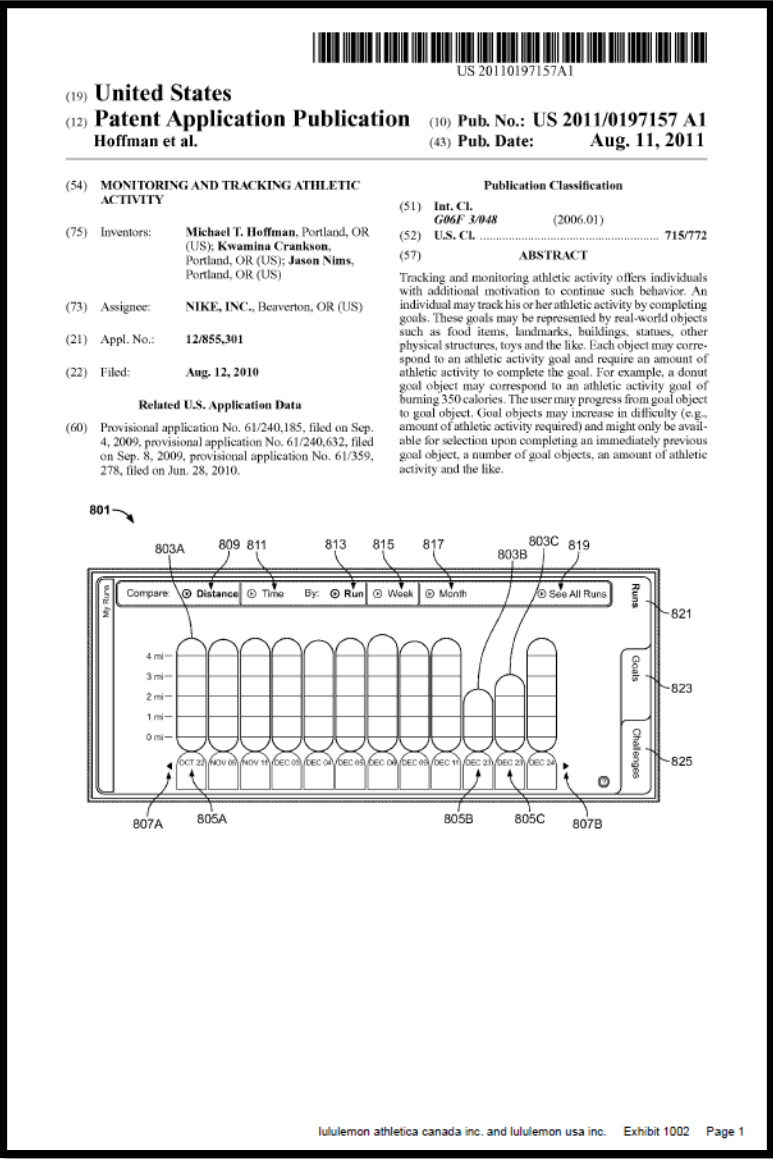


Overview of '615 Patent and Instituted Grounds





Ground	35 U.S.C. §	Claims	Reference(s)
1	102	1–5, 7, 11, 13	Hoffman
2	103	1–5, 7, 11, 13	Stivoric, Kobayashi
3	103	1–5, 7, 11, 13	Sirmans, Kobayashi
4	103	3–5	Stivoric, Kobayashi, Brady
5	103	3–5	Sirmans, Kobayashi, Brady



Hoffman, Ex. 1002 at Cover





US 2004/0152957A1

(19) **United States**
 (12) **Patent Application Publication** (10) **Pub. No.: US 2004/0152957 A1**
 Stivoric et al. (43) **Pub. Date: Aug. 5, 2004**

(54) **APPARATUS FOR DETECTING, RECEIVING, DRIVING AND DISPLAYING HUMAN PHYSIOLOGICAL AND CONTEXTUAL INFORMATION**

(76) **Inventors:** John Stivoric, Pittsburgh, PA (US); Christopher Pacione, Pittsburgh, PA (US); Eric Teller, Pittsburgh, PA (US); David Andre, Pittsburgh, PA (US); Christopher Kassabach, Pittsburgh, PA (US); Scott Boehmke, Wexford, PA (US); Suresh Vishnuhatla, Wexford, PA (US); Scott Safer, Pittsburgh, PA (US); Jonathan Farrington, Pittsburgh, PA (US); Raymond Pelletier, Pittsburgh, PA (US)

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(21) **Appl. No.:** 10/682,759
 (22) **Filed:** Oct. 9, 2003

Related U.S. Application Data

(63) Continuation-in-part of application No. 09/923,181, filed on Aug. 6, 2001, now abandoned, which is a continuation-in-part of application No. 09/602,537, filed on Jun. 23, 2000, now Pat. No. 6,605,038, which is a continuation-in-part of application No. 09/595,660, filed on Jun. 16, 2000.

(60) Provisional application No. 60/417,163, filed on Oct. 9, 2002.

Publication Classification

(51) **Int. Cl.** A61B 5/00
 (52) **U.S. Cl.** 600/300; 128/903

(57) **ABSTRACT**

A monitoring apparatus that includes a sensor device and an I/O device in communication with the sensor device that generates derived data using the data from the sensor device. The derived data cannot be directly detected by the associated sensors. Alternatively, an apparatus that includes a wearable sensor device and an I/O device in communication with the sensor device that includes means for displaying information and a dial for entering information. Alternatively, an apparatus for tracking caloric consumption and caloric expenditure data that includes a sensor device and an I/O device in communication with the sensor device. The sensor device includes a processor programmed to generate data relating to caloric expenditure from sensor data. Alternatively, an apparatus for tracking caloric information for an individual that utilizes a plurality of classification identifiers for classifying meals consumed by the individual, each of the classification identifiers having a corresponding caloric amount.

lululemon athletica canada inc. and lululemon usa inc. Exhibit 1003 Page 1

Stivoric, Ex. 1003 at Cover





US 20060111944A1

(19) **United States**
 (12) **Patent Application Publication** (10) **Pub. No.: US 2006/0111944 A1**
 Sirmans, JR. et al. (43) **Pub. Date: May 25, 2006**

(54) **SYSTEM AND METHOD FOR ENCOURAGING PERFORMANCE OF HEALTH-PROMOTING MEASURES**

(76) Inventors: **James R. Sirmans JR.**, Gainesville, FL (US); **Kristofer F. Jurski**, Fort McCoy, FL (US)

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(21) Appl. No.: **11/293,702**
 (22) Filed: **Dec. 2, 2005**

Related U.S. Application Data

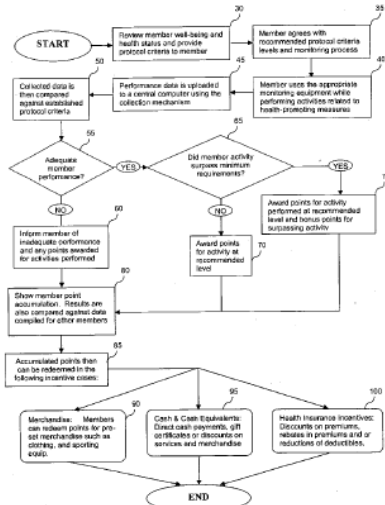
(63) Continuation-in-part of application No. 10/974,186, filed on Oct. 27, 2004.
 (60) Provisional application No. 60/516,075, filed on Oct. 31, 2003.

Publication Classification

(51) **Int. CL**
A61B 5/00 (2006.01)
G07G 1/14 (2006.01)
U.S. CL **705/3; 705/14**

(57) **ABSTRACT**

The present invention relates to systems and methods for monitoring and promoting behavioral modification with regard to an individual's health. In particular, the present invention provides a means for monitoring an individual's performance of health-promoting measures and, based on the member compliance to health-promoting measures, issuing tangible and/or intangible incentive products. In one embodiment, exercise/activity monitors are worn by members to verify their identity and to record and transmit member compliance in performing health-promoting measures (i.e., heart rate, type of exercise, exercise intensity and duration). All health-related information, including physical examination results and recorded participation in health-promoting measures, are used to determine appropriate incentives (i.e., subsidize membership fees for health club) to be rewarded to said member.



lululemon athletica canada inc. and lululemon usa inc. Exhibit 1004 Page 1

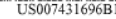
Sirmans, Ex. 1004 at Cover

Overview of Kobayashi



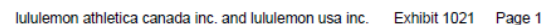
(19) Japan Patent Office (JP)		(12) Publication of Unexamined Patent Application (A)		(11) Kokai Number Kokai (2003) 141260 (P2003-141260A)	
				(43) Date of Publication: May 16, 2003	
(51) Int. Cl. ⁷	Identification Number	FI			Theme Code (Reference)
G 0 6 F 17/60	126 324 ZEC	G 0 6 F 17/60	1 2 6 W 3 2 4 Z E C		2F024
G 0 1 C 22/00		G 0 1 C 22/00	W		
G 0 6 M 7/00		G 0 6 M 7/00	J		
Audit request: Not requested, Number of Claims: 21 OL (Total 25 pages)					
(21) Application No.: Kokai (2001) 334883 (P2001-334883)		(71) Applicant: 000002945 OMRON Corporation 801 Shiokoji-Dori, Shimogyo-Ku, Horikawa Higashini, Minami Fudodo-cho, Kyoto City.			
(22) Date of Application: October 31, 2001 (2001.10.13)		(72) Inventor: Kobayashi Yo 801 Shiokoji-Dori, Shimogyo-Ku, Horikawa Higashini, Minami Fudodo-cho, Kyoto City, OMRON Corporation (72) Inventor: Ogawa Koji 801 Shiokoji-Dori, Shimogyo-Ku, Horikawa Higashini, Minami Fudodo-cho, Kyoto City, OMRON Corporation (74) Agent: 100085006 Attorney, Kazumobu Sera (and one other person)			
Continued on last page					
(54) [Title of the Invention] Health devices, a server, health points bank systems, health points storage methods, health points bank programs and a computer-readable recording medium that records health points bank programs					
[57] [Abstract] [Problem to be Solved] To provide health devices, servers, health points bank systems, health points storage methods, health points bank programs, and a computer-readable recording medium that records health points bank programs to sustain effective action for maintaining health using health devices. [Solution] A user who acquires the pedometer registers the ID with the server (step 101), starts walking using this pedometer, then points are given to the user according to this pedometer, and goods and services can be exchanged for these points.					
Registration - S101 ↓ Points acquisition S102 ↓ Product Exchange - S103					
lululemon athletica canada inc. and lululemon usa inc. Exhibit 1005 Page 26					

Kobayashi, Ex. 1005 at Cover



U.S. PATENT DOCUMENTS

- 1 Claim, 16 Drawing Sheets**





Claim Construction



“receiving an activity time period” (claims 1 and 11)



What is claimed is:

1. A method, comprising:

receiving athletic activity data from a device configured to be worn by a user;

receiving an activity time period;

receiving a first activity goal for the activity time period;
determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods;
and

presenting a streak reward to the user when the received athletic activity data exceeds the first activity goal for the predetermined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 80:28

Board invited the parties to submit proposed constructions



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.

IPR2023-00349
Patent 9,259,615 B2

Before JOSIAH C. COCKS, GEORGE R. HOSKINS, and
STEPHEN E. BELISLE, *Administrative Patent Judges*.

BELISLE, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

We note that claim 1 does not explicitly recite “what” *receives* the activity time period, although at some point “a processor” makes a “determin[ation]” using the activity time period, or “when” the activity time period is received or used relative to the received activity data and activity goal.

Institution Decision, Paper 11 at 35



Limitations 1[B]/11[B]	Nike’s Construction
“receiving an activity time period”	ordinary & customary meaning * * * “receiving an activity time period from a user during a goal setting operation”

'615 patent, Ex. 1001 at 80:28

Patent Owner's Response, Paper 17 at 11–12



33. In my opinion, it is clear that a POSITA reading the claims in light of the '615 patent specification would have understood that the activity time period was received from a user as the user set his or her goal(s).

Stone Declaration, Ex. 2002 at ¶33 (cited in Patent Owner's Response, Paper 17 at 12)



From the detailed information display, the user may select a goal setting option 8713. The goal may correspond to a specified amount of time such as a day, an hour, a week, a month or the like. In some arrangements, the goal time period may correspond to the evaluation time period. For example, if the evaluation time period was 1 day, the goal time period may be defined as 1 day. Alternatively, the user may define his or her own goal time period.

'615 patent, Ex. 1001 at 51:1–8

“This passage confirms that a user not only selects or defines a goal time period, but that he or she does so in the course of goal setting.”

Patent Owner's Response, Paper 17 at 13 (citing Stone Declaration, Ex. 2002 at ¶133)



Once finalized, the user may then save the goal by selection option 8805. The goal may then be set for the goal time period. The goal time period may start immediately or may start at a future time (e.g., the next day, a time selected by the user, upon detecting a triggering event and the like). A triggering event may include a user selecting a button on the wearable device to start the goal time period, detection of sustained activity for greater than a specified amount of time (e.g., 5 minutes, 30 seconds, 1 minute, 1 hour, 30 minutes, 10 minutes, etc.), and the like and/or combinations thereof.

'615 patent, Ex. 1001 at 51:38–48

“Therefore, a goal period—and the goal for that goal period—are first selected and set, and only then (or later) may the goal time period begin to run.”

Patent Owner's Response, Paper 17 at 13 (citing Stone Declaration, Ex. 2002 at ¶34)

The “activity time period” must be received “from the user during ... goal setting”



lululemon initially agrees with Nike’s construction

40. In an activity-tracking application, the '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. (*Id.* at 27:10-12.)

Fischer Declaration, Ex. 1006 at ¶40 (cited in Patent Owner’s Sur-Reply, Paper 24 at 2–3)

in the '615 patent’s activity tracking application, a user sets an activity goal to “complete a certain amount of activity” during a specific activity or goal time period. (*Id.* at 27:10-12, 51:1-28.)

Petition, Paper 2 at 4 (citing '615 patent, Ex. 1001 at 27:10–12, 51:1–28)

The “activity time period” must be received “from the user during ... goal setting”



lululemon reverses course

Because the claims, specification, and
expert testimony all refute Nike’s proposed construction, the Board should reject it.

Petitioner’s Reply, Paper 22 at 2

The “activity time period” must be received “from the user during ... goal setting”



lululemon argues Nike’s construction injects new claim “requirements”

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.

Petitioner’s Reply, Paper 22 at 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.”

Patent Owner’s Sur-Reply, Paper 24 at 3

The “activity time period” must be received “from the user during ... goal setting”



lululemon argues Nike’s construction conflicts with surrounding claim limitations

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.”

Petitioner’s Reply, Paper 22 at 2



Other limitations reciting a “user” don’t compel different construction

What is claimed is:

1. A method, comprising:
receiving athletic activity data from a device configured to be worn **by a user**;
receiving an activity time period;
receiving a first activity goal for the activity time period;
determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods;
and
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.
2. The method of claim 1, further comprising:
determining a number of activity points earned **by the user** in accordance with the received athletic activity data.

’615 patent, Ex. 1001 at 80:24–40 (cited in Petitioner’s Reply, Paper 22 at 2–3)

4. The method of claim 1, further comprising:
providing a first application interface configured to communicate athletic activity data **to the user**, wherein the interface includes one or more functions configured to be invoked for at least the device.

’615 patent, Ex. 1001 at 80:43–47 (cited in Petitioner’s Reply, Paper 22 at 2–3)

8. The method of claim 1, wherein presenting a streak reward further comprises **providing the user with** at least one of a new image, a new color, or a new function to be utilized in accordance with and application interface.

’615 patent, Ex. 1001 at 80:64–67 (cited in Petitioner’s Reply, Paper 22 at 2–3)



Other limitations reciting a “user” don’t compel different construction

9. The method of claim 4, wherein the first application interface is further configured to communicate content **to the user** indicating that a streak reward is available upon performing a specified athletic activity.

10. The method of claim 1, wherein presenting a streak reward **to the user** further comprises:

transmitting, to the device, content indicating that an activity streak has been achieved or extended by the user.

11. A non-transitory computer-readable medium containing computer-executable instructions for causing a computer device to perform the steps of:

receiving athletic activity data from a device configured to be worn **by a user**;

receiving an activity time period;

receiving an activity goal for the activity time period;

determining whether the received athletic activity data exceeds the activity goal for a predetermined number of consecutive activity time periods; and

presenting a streak reward **to the user** when the received athletic activity data exceeds the activity goal for the predetermined number of consecutive activity time periods.

12. The computer-readable medium of claim 11, further containing computer-executable instructions to cause the computer device to provide a first application interface configured to communicate athletic activity data **to the user**, wherein a portion of the first application interface is configured to provide a visualization of athletic activity, and wherein different visualizations are provided in accordance with a user’s progress toward achieving or extending an activity streak.

’615 patent, Ex. 1001 at 82:1–9 (cited in Petitioner’s Reply, Paper 22 at 2–3)

14. The computer-readable medium of claim 11, wherein presenting a streak reward **to the user** includes transmitting, to the device, content indicating that an activity streak has been achieved or extended by the user.

’615 patent, Ex. 1001 at 82:16–19 (cited in Petitioner’s Reply, Paper 22 at 2–3)

’615 patent, Ex. 1001 at 81:1–22 (cited in Petitioner’s Reply, Paper 22 at 2–3)



Other limitations reciting “when” don’t compel different construction

What is claimed is:

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

’615 patent, Ex. 1001 at 80:24–37 (cited in Petitioner’s Reply, Paper 22 at 2–3)

11. A non-transitory computer-readable medium containing computer-executable instructions for causing a computer device to perform the steps of:
receiving athletic activity data from a device configured to be worn by a user;
receiving an activity time period;
receiving an activity goal for the activity time period;
determining whether the received athletic activity data exceeds the activity goal for a predetermined number of consecutive activity time periods; and
presenting a streak reward to the user when the received athletic activity data exceeds the activity goal for the predetermined number of consecutive activity time periods.

’615 patent, Ex. 1001 at 81:9–22 (cited in Petitioner’s Reply, Paper 22 at 2–3)



“That 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)

Case referenced Patent Owner’s Sur-Reply, Paper 24 at 4

“Different 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.”

Hologic, Inc. v. SenoRx, Inc., 639 F.3d 1329, 1337 (Fed. Cir. 2011)

Case referenced Patent Owner’s Sur-Reply, Paper 24 at 4–5



Phillips does not support lululemon’s argument

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.

Patent Owner’s Sur-Reply, Paper 24 at 5 (citing Petitioner’s Reply, Paper 22 at 2–3)

The “activity time period” must be received “from the user during ... goal setting”

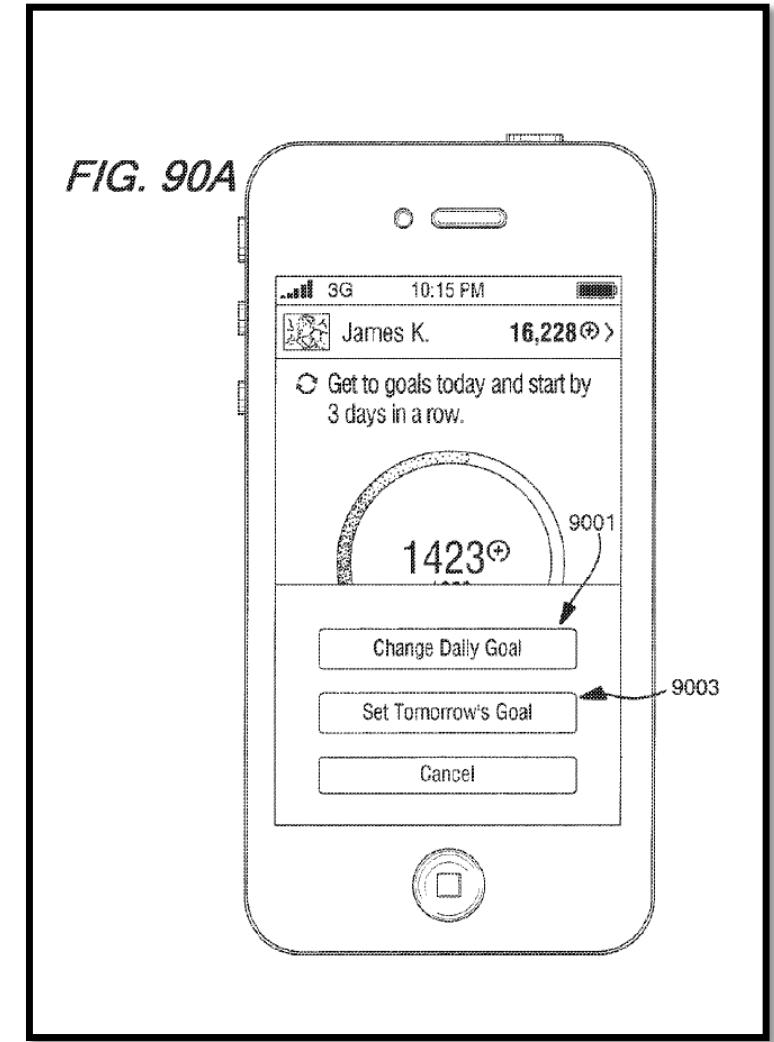


lululemon argues that Nike’s construction excludes the embodiment shown in Fig. 90A ...

Petitioner’s Reply, Paper 22 at 3

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.)

Petitioner’s Reply, Paper 22 at 3



'615 Patent, Ex. 1001 at Fig. 90A (cited in Petitioner’s Reply, Paper 22 at 3–4)



lululemon omits surrounding disclosure in specification

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).

Patent Owner’s Sur-Reply, Paper 24 at 6 (citing ’615 patent, Ex. 1001 at 54:12–28)

The “activity time period” must be received “from the user during ... goal setting”



The '615 patent specification discloses the *user* selects the “future goal”

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:

Patent Owner's Sur-Reply, Paper 24 at 6–7

FIG. 90A illustrates an example interface by which a user may activate a goal modification or setting function. 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. For example, the user may be required to depress a button for a predefined amount of time to activate the goal option menu 9001. In another example, the user may activate the goal option menu 9001 by entering a gesture on a touch sensitive display device. 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.

'615 Patent, Ex. 1001 at 54:27–42 (cited in Patent Owner's Sur-Reply, Paper 24 at 6–7)



Both experts agree with Nike’s construction

In my opinion, these passages confirm that a user not only selects or defines a goal time period, i.e., an “activity time period,” but that he or she does so in the course of goal setting. In this way, a user is able to customize his or her goals by choosing not only the activity to take place, but the time over which the activity will take place.

Stone Declaration, Ex. 2002, ¶133 (cited in Patent Owner’s Sur-Reply, Paper 24 at 7–8)

40. In an activity-tracking application, the ’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. (*Id.* at 27:10-12.)

Fischer Declaration, Ex. 1006, ¶140 (cited in Patent Owner’s Sur-Reply, Paper 24 at 2–3)



**Ground 1: lululemon Fails To Show That Hoffman Anticipates The
Challenged Claims**



Ground	35 U.S.C. §	Claims	Reference(s)
1	102	1–5, 7, 11, 13	Hoffman
2	103	1–5, 7, 11, 13	Stivoric, Kobayashi
3	103	1–5, 7, 11, 13	Sirmans, Kobayashi
4	103	3–5	Stivoric, Kobayashi, Brady
5	103	3–5	Sirmans, Kobayashi, Brady



lululemon Fails To Show That Hoffman Discloses Limitations 1[D]/11[D]



What is claimed is:

1. A method, comprising:

receiving athletic activity data from a device configured to be worn by a user;

receiving an activity time period;

receiving a first activity goal for the activity time period;

determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods; and

presenting a streak reward to the user when the received athletic activity data exceeds the first activity goal for the predetermined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 80:30-33



The step recited in limitations 1D and 11D determines whether the user has completed a "streak." According to the '615 patent specification, “streaks may include the completion of multiple goals corresponding to multiple consecutive goal time periods,” i.e., “when the user has completed goals for X number of consecutive goal time periods, where X may be any number greater than 1.”

Patent Owner’s Response, Paper 17 at 15 (citing '615 patent, Ex. 1001 at 57:3–9)

lululemon's barebones argument for “consecutive” feature of 1[D]/11[D]



lululemon cites one paragraph in Hoffman

Hoffman’s computing unit also determines when a user has exceeded an activity goal for consecutive activity time periods. In particular, Hoffman discloses that its computing unit recognizes when a user has completed “3 goals in 3 consecutive days.” (*Id.* at [0198].) In this example, completing three goals exceeds a first activity goal, and three consecutive days constitute the predetermined number of consecutive active time periods.

Petition, Paper 2 at 28

[0198] Badges may be awarded by the athletic activity tracking and monitoring site based on various achievements. For example, in the location themed workout plan, users may be awarded badges for each location that the user completes. Badge **4329** may be displayed in an outline or broken line form to indicate that the badge is available but has not yet been achieved. In one or more arrangements, only those badges that are achievable in the present location and/or badges that have already been achieved may be displayed in badges section **4331**. Badges may be defined for other types of achievements as well. For example, a badge may be awarded for a user completing 3 goals in 3 consecutive days, completing 2 goals in a single day, being the first to complete a particular goal and the like. Upon being awarded a badge, the badge may be displayed in an alternate appearance. For example, the badge may be displayed in solid line form, with color, with writing, with texture and the like.

Hoffman, Ex. 1002 at [0198] (cited in Petition, Paper 2 at 28)

The Board found Nike's arguments for 1[D]/11[D] persuasive



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.

IPR2023-00349
Patent 9,259,615 B2

Before JOSIAH C. COCKS, GEORGE R. HOSKINS, and
STEPHEN E. BELISLE, *Administrative Patent Judges*.

BELISLE, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

In the context of anticipation, we currently find Patent Owner's argument persuasive on the record before us.

In particular, Petitioner cites merely a few words from Hoffman (i.e., "3 goals in 3 consecutive days") that on their face do not appear to explicitly or inherently disclose the features of the subject limitation, and we discern no explanation as to how or why the cited disclosure in Hoffman allegedly discloses such limitation (or whether Petitioner is relying on a particular claim construction to give effect to its argument). Likewise, Petitioner does not cite to any expert testimony or other evidence showing how or why the cited statements in Hoffman allegedly disclose such limitation. Indeed, Petitioner appears to place the onus on Patent Owner—and the Board—to ascertain how or why the cited statements (i.e., paragraph 198) allegedly discloses limitation 1[d].

Institution Decision, Paper 11 at 31



“The system in Hoffman merely determines whether the user has completed three goals over a *single* activity time period: three consecutive days.”

Patent Owner’s Sur-Reply, Paper 24 at 10

“Hoffman does not determine whether the user has completed a goal on *each* of the three days.”

Patent Owner’s Sur-Reply, Paper 24 at 10

[0198] Badges may be awarded by the athletic activity tracking and monitoring site based on various achievements. For example, in the location themed workout plan, users may be awarded badges for each location that the user completes. Badge 4329 may be displayed in an outline or broken line form to indicate that the badge is available but has not yet been achieved. In one or more arrangements, only those badges that are achievable in the present location and/or badges that have already been achieved may be displayed in badges section 4331. Badges may be defined for other types of achievements as well. For example, a badge may be awarded for a user completing 3 goals in 3 consecutive days, completing 2 goals in a single day, being the first to complete a particular goal and the like. Upon being awarded a badge, the badge may be displayed in an alternate appearance. For example, the badge may be displayed in solid line form, with color, with writing, with texture and the like.

Hoffman, Ex. 1002 at [0198] (cited in Patent Owner’s Sur-Reply, Paper 24 at 10)



“Allowing the option” to complete one goal per day is insufficient

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.”

Petitioner’s Reply, Paper 22 at 20

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.

Patent Owner’s Sur-Reply, Paper 24 at 11



For example, Hoffman describes a user input system 222 that “allow[s] a person to specify a goal related to an athletic activity [such as] a goal of running a specified total distance within a specified period of time.” (*Id.* at [0009].) The “specified period of time” is “an activity time period.”

Hoffman also discloses receiving activity time periods with respect to display of activity data. (*Id.* at [0161] (“The step tracker 2105 may be configured to display the number of steps taken on other time scales such as per minute, per 30 minutes, per 2 hours, per day and the like.”), [0211] (“Additionally, a leaderboard 7705 may be displayed to identify individuals having earned the most fuel or other activity metric over a specified time period (*e.g.*, a week, a month, a day, etc.).”).)

Petition, Paper 2 at 23



“[A]nticipation is not proven by multiple, distinct teachings that the artisan might somehow combine to achieve the claimed invention.”

Microsoft Corp. v. Biscotti, Inc., 878 F.3d 1052, 1069 (Fed. Cir. 2017)

Case referenced Patent Owner’s Sur-Reply, Paper 24 at 11



[0009] In addition, some examples of the invention may allow a person to specify a goal related to an athletic activity. A person may, e.g., set a goal of running a specified total distance within a specified period of time. With these implementations of the invention, data from multiple sets of a person's athletic data may be aggregated and displayed in contrast with the person's specified goal. The goal may be displayed, for example, as an empty shape, like an oval. The aggregated data may then be displayed as fill within the empty shape. Thus, if the aggregated data shows that the person is within 80% of his or her goal, then the shape representing the goal will be displayed as 80% filled. In another example, a person may specify a goal to walk a certain number of steps or burn a number of calories by walking. Accordingly, the user's progress in burning the number of calories or walking the number of steps may be reflected in the visual appearance of a goal object such as a donut (e.g., for calories burned) or a building (e.g., for steps walked).

Hoffman, Ex. 1002 at [0009] (cited in Petition, Paper 2 at 23, 24)

[0198] Badges may be awarded by the athletic activity tracking and monitoring site based on various achievements. For example, in the location themed workout plan, users may be awarded badges for each location that the user completes. Badge 4329 may be displayed in an outline or broken line form to indicate that the badge is available but has not yet been achieved. In one or more arrangements, only those badges that are achievable in the present location and/or badges that have already been achieved may be displayed in badges section 4331. Badges may be defined for other types of achievements as well. For example, a badge may be awarded for a user completing 3 goals in 3 consecutive days, completing 2 goals in a single day, being the first to complete a particular goal and the like. Upon being awarded a badge, the badge may be displayed in an alternate appearance. For example, the badge may be displayed in solid line form, with color, with writing, with texture and the like.

Hoffman, Ex. 1002 at [0198] (cited in Petition, Paper 2 at 27, 28)



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.

Patent Owner’s Sur-Reply, Paper 24 at 12



lululemon Fails To Show That Hoffman Discloses Limitations 1[E]/11[E]



What is claimed is:

1. A method, comprising:

receiving athletic activity data from a device configured to be worn by a user;

receiving an activity time period;

receiving a first activity goal for the activity time period;

determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods; and

presenting a streak reward to the user when the received athletic activity data exceeds the first activity goal for the predetermined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 80:34–37



Even if Hoffman discloses presenting rewards to a user for the completion of a goal(s), i.e., “badges” (Petition, 28), Hoffman never discloses presenting badges to a user for the completion of a “streak,” as recited in the independent claims. More particularly, Hoffman does not show that the user is rewarded for the completion of goals “for a predetermined number of consecutive activity time periods.”

Patent Owner’s Response, Paper 17 at 20



lululemon Fails to Show That Hoffman Discloses Claim 7



7. The method of claim 1, further comprising:
receiving a second activity goal for the activity time period;
and
determining, at a processor, whether the received athletic
activity data exceeds the second activity goal for a pre-
determined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 80:58–33



“lululemon identifies only one embodiment in Hoffman where the system ‘receives’ an activity time period.”

“Claim 7 recites receiving a second activity goal for the *same* activity time period as the activity time period recited in limitation 1[B].”

“lululemon points to no disclosures in Hoffman that show receipt of a second activity goal for that same activity time period.”

Patent Owner’s Response, Paper 17 at 20–21

[0009] In addition, some examples of the invention may allow a person to specify a goal related to an athletic activity. A person may, e.g., set a goal of running a specified total distance within a specified period of time. With these implementations of the invention, data from multiple sets of a person’s athletic data may be aggregated and displayed in contrast with the person’s specified goal. The goal may be displayed, for example, as an empty shape, like an oval. The aggregated data may then be displayed as fill within the empty shape. Thus, if the aggregated data shows that the person is within 80% of his or her goal, then the shape representing the goal will be displayed as 80% filled. In another example, a person may specify a goal to walk a certain number of steps or burn a number of calories by walking. Accordingly, the user’s progress in burning the number of calories or walking the number of steps may be reflected in the visual appearance of a goal object such as a donut (e.g., for calories burned) or a building (e.g., for steps walked).

Hoffman, Ex. 1002 at [0009] (cited in Petition, Paper 2 at 23, 24)



Hoffman’s “series of goals” not undertaken during same activity time period

Instead, lululemon points to other unrelated embodiments from Hoffman discussing “series of goals” which may be “presented to the user for completion” in a specified order. Petition, 40–41 (citing Ex. 1002, [0190], [0195]).

But these goals are not undertaken simultaneously during the same activity time period, they are introduced to the user progressively.

Patent Owner’s Response, Paper 17 at 21

In step 3730, the goal may be added to a workout plan consisting of a single goal or a series of goals. In one or more arrangements, the user may further be permitted to specify an order in which goals in a workout plan are arranged and presented to the user for completion.

Hoffman, Ex. 1002 at [0190] (cited in Petition, Paper 2 at 41)



Moreover, lululemon makes
no effort to explain how or why it combines multiple separate embodiments from
Hoffman to reach this claim. *See Sherwin-Williams*, 2021 WL 5648019, at *4.

Patent Owner's Response, Paper 17 at 21



lululemon Fails to Show That Hoffman Discloses Claim 13



13. The computer-readable medium of claim **11**, further containing computer-executable instructions to cause the computer device to determine whether the received athletic activity data exceeds the activity goal for a greater number of consecutive activity time periods than the predetermined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 82:10–15



**Ground 2: lululemon Fails To Show That The Stivoric-Kobayashi
Combination Renders Obvious the Challenged Claims**



Ground	35 U.S.C. §	Claims	Reference(s)
1	102	1–5, 7, 11, 13	Hoffman
2	103	1–5, 7, 11, 13	Stivoric, Kobayashi
3	103	1–5, 7, 11, 13	Sirmans, Kobayashi
4	103	3–5	Stivoric, Kobayashi, Brady
5	103	3–5	Sirmans, Kobayashi, Brady



**lululemon Fails To Show That The Stivoric-Kobayashi Combination
Teaches or Suggests Limitations 1[B]/11[B]**



What is claimed is:

1. A method, comprising:

receiving athletic activity data from a device configured to be worn by a user;

receiving an activity time period;

receiving a first activity goal for the activity time period;

determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods; and

presenting a streak reward to the user when the received athletic activity data exceeds the first activity goal for the predetermined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 80:28

Stivorik lacks receiving an activity time period “from a user” “during ... goal setting”



lululemon—relying on Dr. Fischer—alleges that Stivorik’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 Stivorik 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 Stivorik’s “user is who ‘presets’” the *day* in the *daily goal* embodiment (Reply, 13), there is no disclosure or suggestion in Stivorik 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 Stivorik’s “daily goal” embodiment is received “from the user.”

example shown in **FIG. 43A** shows that a daily goal of 2000 calories consumed was set by the individual and that the individual has consumed 1,483 calories on the day in question, and that a daily goal of 2,400 calories burned was set by the individual and that the individual has burned 2,750 calories on the day in question.

Stivorik, Ex. 1003 at [0197] (cited in Petition, Paper 2 at 44–45)



Stivorik’s pre-programmed “D W M” indicators fail to meet Nike’s construction

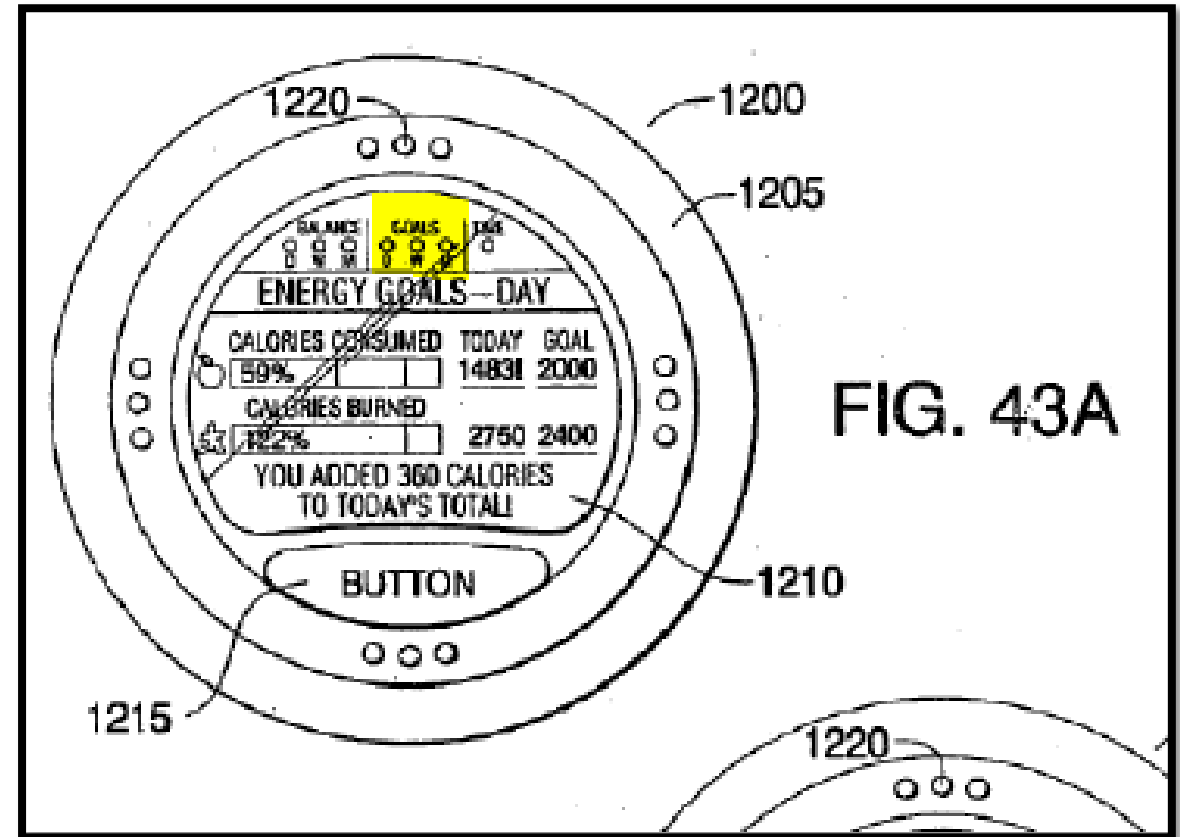
The input

devices allow I/O device 1200 to receive activity time periods, such as “a day, a week or a month”:

As seen in FIGS. 43A-C, the energy related data may include calories consumed and calories burned by the individual over *specific time periods such as a day, a week or a month*. In FIG. 43A, this data is presented in a format that provides a comparison to a predetermined goal for each value.

(*Id.* at [0197] (emphasis added).) The different time periods are received from a user via a selection made “by rotating dial 1220” or “pressing button 1215.” (*Id.*)

Petition, Paper 2 at 44



Stivorik, Ex. 1003 at Fig. 43A (cited in Petition, Paper 2 at 44–45)



Stivoric’s pre-programmed “D W M” indicators don’t meet Nike’s construction

Although a user of Stivoric’s system may rotate a dial or press a button to view past progress towards a goal, the user is only able to *retroactively* view his or her caloric expenditure achievement for either the current day, week, or month. Ex. 1003, [0197]–[0198]. In other words, the Stivoric system never “receiv[es]” an activity time period, as recited in limitation 1B. Instead, all of the available time periods are pre-programmed in the system (i.e., a day, a week, and month) and a user may “toggle” between “the various time periods within each [goal], by rotating dial 1220.” *Id.*, [0197]; *see also* Ex. 2003, 86:19–88:15, 91:4–10. Therefore, all of Stivoric’s activity time periods are preset and displayed regardless of whether the activity time period is received. *See e.g.*, Ex. 1003, Figs. 43A–C; Ex. 2002, ¶43.



**lululemon Fails To Show That The Stivoric-Kobayashi Combination
Teaches or Suggests Limitations 1[D]/11[D]**



What is claimed is:

1. A method, comprising:

receiving athletic activity data from a device configured to be worn by a user;

receiving an activity time period;

receiving a first activity goal for the activity time period;

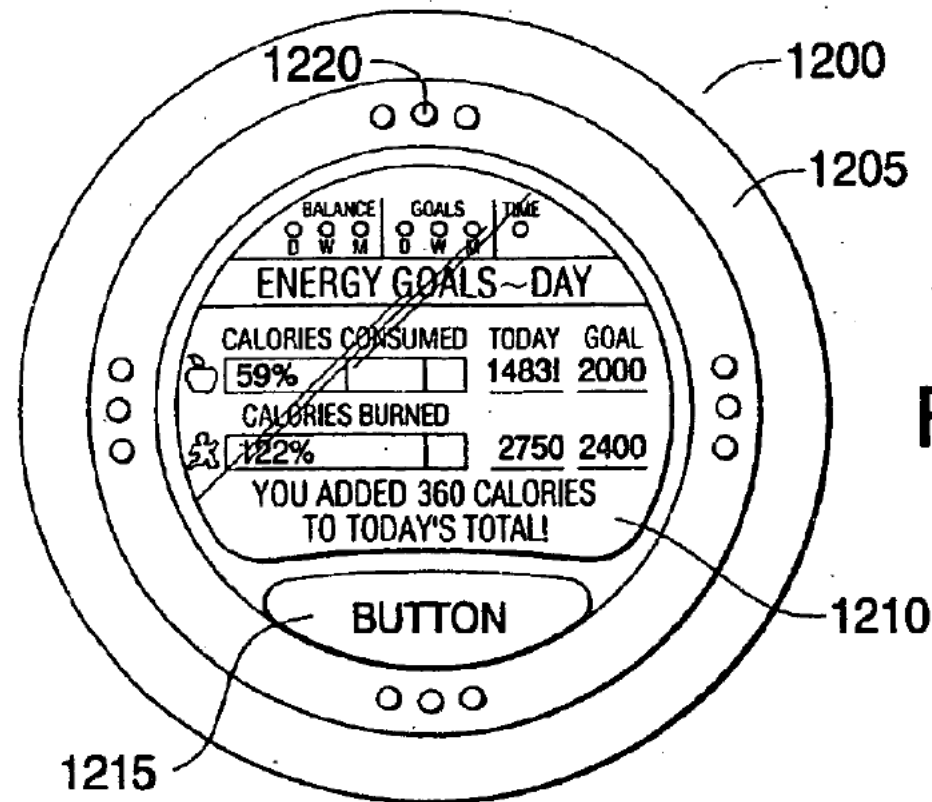
determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods; and

presenting a streak reward to the user when the received athletic activity data exceeds the first activity goal for the predetermined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 80:30–33



Stivorice's "I/O device" doesn't allow the user to view *2 or more days, weeks, months*



Petition, Paper 2 at 45 (citing Stivorice, Ex. 1003 at [0197])



**lululemon Fails to Show That The Stivoric-Kobayashi Combination
Renders Obvious Claim 7**



7. The method of claim 1, further comprising:
receiving a second activity goal for the activity time period;
and
determining, at a processor, whether the received athletic
activity data exceeds the second activity goal for a pre-
determined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 80:58–63



Stivorice describes that its device can be used with any “set of goals that may be established [] by the user or a third party.” (*Id.* at [0218].)

Petition, Paper 2 at 54

[0218] According to one aspect of the present invention, I/O device 1200 stores a program or regimen preferably including a set of goals that may be established by set by the user or a third party such as a trainer or care giver. I/O device

Stivorice, Ex. 1003 at [0218] (cited in Petition, Paper 2 at 54)

Stivoric doesn't teach multiple goals for the same activity time period



Stivoric discloses

dozens of potential “specific personal characteristics, continual measurements, durative measurements, instantaneous events, and cumulative conditions” that its device can track. (Ex. 1003 at [0227], Table 3.)

Petition, Paper 2 at 54

TABLE 3

personal characteristics	age, sex, weight, gender, athletic ability, conditioning, disease, height, susceptibility to disease, activity level, individual detection, handedness, metabolic rate, body composition
continual measurements	mood, beat-to-beat variability of heart beats, respiration, energy expenditure, blood glucose levels, level of ketosis, heart rate, stress levels, fatigue levels, alertness levels, blood pressure, readiness, strength, endurance, amenability to interaction, steps per time period, stillness level, body position and orientation, cleanliness, mood or affect, approachability, caloric intake, TEF, XEF, ‘in the zone’-ness, active energy expenditure, carbohydrate intake, fat intake, protein intake, hydration levels, truthfulness, sleep quality, sleep state, consciousness level, effects of medication, dosage prediction, water intake, alcohol intake, dizziness, pain, comfort, remaining processing power for new stimuli, proper use of the armband, interest in a topic, relative exertion, location, blood-alcohol level
durative measurements	exercise, sleep, lying down, sitting, standing, ambulation, running, walking, biking, stationary biking, road biking, lifting weights, aerobic exercise, anaerobic exercise, strength-building exercise, mind-centering activity, periods of intense emotion, relaxing, watching TV, sedentary, REM detector, eating, in-the-zone, interruptible, general activity detection, sleep stage, heat stress, heat stroke, amenable to teaching/learning, bipolar decompensation, abnormal events (in heart signal, in activity level, measured by the user, etc), startle level, highway driving or riding in a car, airplane travel, helicopter travel, boredom events, sport detection (football, baseball, soccer, etc), studying, reading, intoxication, effect of a drug
instantaneous events	falling, heart attack, seizure, sleep arousal events, PVCs, blood sugar abnormality, acute stress or disorientation, emergency, heart arrhythmia, shock, vomiting, rapid blood loss, taking medication, swallowing
cumulative conditions	Alzheimer's, weakness or increased likelihood of falling, drowsiness, fatigue, existence of ketosis, ovulation, pregnancy, disease, illness, fever, edema, anemia, having the flu, hypertension, mental disorders, acute dehydration, hypothermia, being-in-the-zone

Stivoric, Ex. 1003 at Table 3 (cited in Petition, Paper 2 and 54)



A

POSITA would have found it obvious to add the ability to set and track goals for any of these other parameters, in the same manner as Stivoric as modified by Kobayahsi already discloses for calories consumed and calories expended.

Petition, Paper 2 at 55



Neither of paragraphs 218 and 227 disclose activity time periods

And as further discussed, the combination fails because the portions of Stivoric 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.

Patent Owner's Sur-Reply, Paper 24 at 19–20



lululemon has not shown why paragraphs 218 and 227 are combined

lululemon also has not shown *why* a
POSITA would combine the teachings of Stivorice's unrelated embodiments of
paragraph 218 and paragraph 227.

Patent Owner's Sur-Reply, Paper 24 at 20

Stivorice doesn't teach multiple goals for the same activity time period



lululemon says ...

the example of “calories consumed and calories expended” that lululemon gave in the Petition independently satisfies this limitation. (Petition, 55.)

Petitioner's Reply, Paper 22 at 18

Stivorice'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.

Patent Owner's Sur-Reply, Paper 24 at 20

In some arrangements, user non-activity or inactivity may also be detected and affect the user's progress toward completion of an activity goal. For example, inactivity may be detected when a user does not exhibit movement of a particular level or a type of movement for a specified amount of time, does not exhibit a heart rate of at least a threshold level, does not move a sufficient amount of distance over an amount of time and the like and/or combinations thereof.

'615 patent, Ex. 1001 at 68:6–13



**Ground 3: lululemon Fails To Show That The Sirmans-Kobayashi
Combination Renders Obvious the Challenged Claims**



Ground	35 U.S.C. §	Claims	Reference(s)
1	102	1–5, 7, 11, 13	Hoffman
2	103	1–5, 7, 11, 13	Stivorice, Kobayashi
3	103	1–5, 7, 11, 13	Sirmans, Kobayashi
4	103	3–5	Stivorice, Kobayashi, Brady
5	103	3–5	Sirmans, Kobayashi, Brady



**lululemon Fails To Show That The Sirmans-Kobayashi Combination
Teaches or Suggests Limitations 1[B]/11[B]**



What is claimed is:

1. A method, comprising:

receiving athletic activity data from a device configured to be worn by a user;

receiving an activity time period;

receiving a first activity goal for the activity time period;
determining, at a processor, whether the received athletic activity data exceeds the first activity goal for a predetermined number of consecutive activity time periods;
and

presenting a streak reward to the user when the received athletic activity data exceeds the first activity goal for the predetermined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 80:28

Sirmans' "activity time period" is not received "from a user"



[0032] The term "gatekeeper," as used herein, refers to an organizational entity or computer system that continuously manages recorded data of monitored member performance of health-promoting measures. In a preferred embodiment, the gatekeeper profiles, tracks, and stratifies the recorded data into a performance model based on previously established protocol criteria regarding health-related measures. In one embodiment, the gatekeeper can assess the performance model and has the ability to issue incentives to individuals based on individual performance profiles.

Sirmans, Ex. 1004 at [0032] (cited in Patent Owner's Response, Paper 17 at 31)

[0084] In one embodiment, a member will pay a monthly fee to an organization to receive a personal body monitor and access to a website portal. Wearing the body monitor, the member will be asked to perform the Center for Disease Control recommended levels of exercise (i.e., moderate intensity for 30 minutes a day 5 days a week and/or vigorous intensity for 20 minutes a day 3 days a week). Members can then upload their compliance data from their monitors over the Internet to the organization (which includes a computer system and member profile database). In certain instances, data from the personal body monitoring system is automatically relayed to the organization. In certain embodiments, the transferred data regarding member performance can be displayed to the member on a website.

Sirmans, Ex. 1004 at [0084] (cited in Petition, Paper 2 at 59)



lululemon argues that Sirmans mirrors the '615 patent's Fig. 90A embodiment

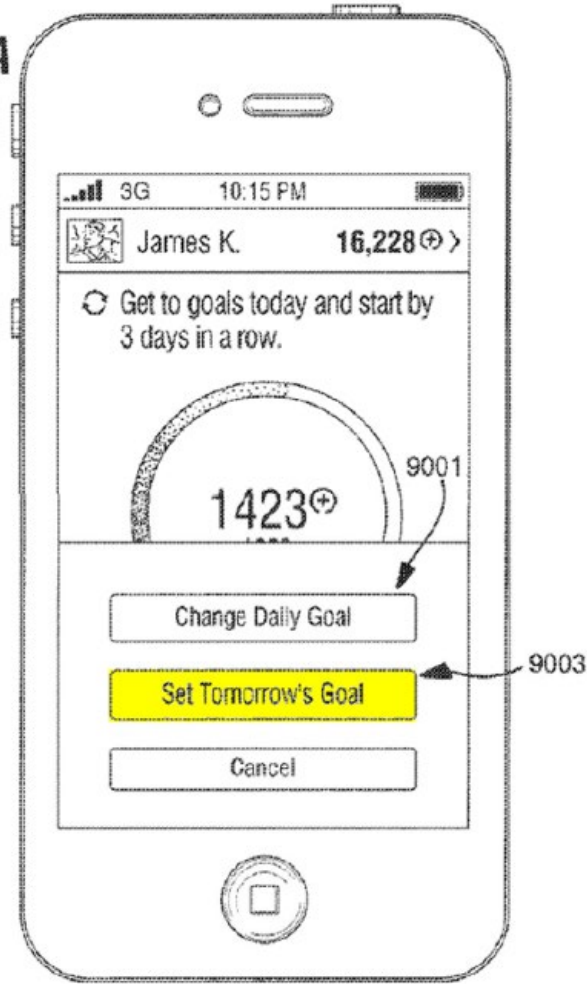
And
if Figure 90A's "Set Tomorrow's Goal" button meets Nike's construction, then so
would Sirmans's disclosure.

Petitioner's Reply, Paper 22 at 7

Sirmans' "activity time period" is not received "from a user"



FIG. 90A



Petitioner's Reply, Paper 17 at 22 (citing '615 Patent, Ex. 1001 at Fig. 90A)

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.

Patent Owner's Sur-Reply, Paper 24 at 22

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.). For example, during the course of a day or other time period, the user may realize that he or she is on track to exceed the currently set goal. Accordingly, the user may wish to modify the goal to a more challenging setting. In another example, if a user realizes that he or she is unlikely to complete a currently set goal, the user may modify the goal to be less challenging. The user may also be allowed to set additional goals without having to wait for a current goal or goal time period to expire. For example, while resting during a first day of activity, the user may set a goal for the next day or an upcoming week or the like.



Sirmans' member doesn't choose the CDC-recommended activity time period

[0068] Once the protocol criteria are established, they are presented to the member for member acceptance of both the protocol criteria as well as surveillance of member activity relating to health-promoting measures 35. For example, where the health-promoting measure is exercise and the surveillance constitutes monitoring equipment (such as a personal monitoring device or an exercise machine that includes a monitoring system), the member can agree to both the recommended/minimal level of exercise to be performed as well as appropriate use of the monitoring equipment.

Sirmans, Ex. 1004 at [0068] (cited in Petition, Paper 2 at 59)



**lululemon Fails to Show That The Sirmans–Kobayashi Combination
Renders Obvious Claim 7**



7. The method of claim 1, further comprising:
receiving a second activity goal for the activity time period;
and
determining, at a processor, whether the received athletic
activity data exceeds the second activity goal for a pre-
determined number of consecutive activity time periods.

'615 patent, Ex. 1001 at 80:58–33