

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

Record of Oral Hearing
Held: April 4, 2024

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

APPEARANCES:

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The above-entitled matter came on for hearing Thursday, April 4, 2024, commencing at 1:30 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P-R-O-C-E-E-D-I-N-G-S

1:31 p.m.

JUDGE BELISLE: Good afternoon. This is the oral hearing in IPR2023-00349 involving U.S. Patent Number 9,259,615 B2. The court reporter will prepare the official transcript for this hearing. Petitioner is lululemon athletica canada inc. and lululemon usa inc. Patent Owner is Nike, Inc.

I am Judge Belisle. I am joined by Judge Cocks and Judge Hoskins. Judge Hoskins is appearing remotely by video.

Counsel please introduce yourselves beginning with Petitioner.

MR. YAP: Good afternoon, Your Honor. I am Alex Yap with Morrison and Foerster for Petitioner. With me today is my colleague Forrest McClellan and Jean Nguyen.

JUDGE BELISLE: Thank you.

Patent Owner.

MR. BOWLING: Good afternoon, Your Honor. Aaron Bowling of Arnold and Porter on behalf of Nike. With me is Lindsey Staubach also with Arnold and Porter, Michael Harris also with Arnold and Porter, and Kim Van Voorhis, in-house at Nike.

JUDGE BELISLE: Thank you.

And as I said this morning and a few weeks ago we're going to begin with some general guidance and again this is going to sound very familiar, but we want the record to be complete.

We have the entire record available to us including the parties' demonstratives. Yesterday, April 3, 2024, Petitioner filed objections to slide 71 of Patent Owner's demonstratives. In this proceeding demonstratives are

1 not evidence and are used only as visual aids. Any arguments in evidence
2 that are not in the record in a timely manner will not be considered by the
3 panel in rendering a final decision.

4 That said, we decline at this time to strike the demonstrative at issue.
5 The Board can discern the appropriateness of the evidence and argument
6 referred to in the demonstrative.

7 Turning back to today's guidance, when referring to demonstratives,
8 papers, or exhibits please do so clearly and explicitly by slide or page
9 number. Please pause a few seconds after identifying the page you want us
10 to go to to provide us time to find it. Also just a learning point from the
11 earlier hearing, if you are going to direct us to an exhibit or some other paper
12 other than your demonstrative please give us a moment to find that.

13 Please do not interrupt the other party while that party is presenting its
14 arguments. If you have an objection raise it during your argument.

15 Pursuant to our hearing order, each party has 60 minutes to present its
16 argument. But at least one of Petitioner's Counsel and at least one of Patent
17 Owner's Counsel are participating in this hearing as lead practitioners and so
18 we have granted both parties an additional 15 minutes of argument time
19 making for a total of 75 minutes each.

20 Each party may reserve time solely to rebut the opposing party's
21 argument. You may not use rebuttal to address an issue for the first time
22 during the hearing.

23 Petitioner will proceed first because it bears the burden of proving
24 unpatentability.

25 Petitioner, how much time if any do you want to reserve for rebuttal?

26 MR. YAP: We will reserve 30 minutes, Your Honor.

1 JUDGE BELISLE: Okay. You may approach the podium and I'll get
2 the clock set here.

3 MR. YAP: Your Honors, may I pass these please?

4 JUDGE BELISLE: You may.

5 MR. YAP: Thank you.

6 JUDGE BELISLE: Just to double check, you said 30 minutes
7 rebuttal.

8 MR. YAP: Yes, sir.

9 JUDGE BELISLE: Counsel, when you're ready.

10 MR. McCLELLLEN: Thank you, Your Honor.

11 May it please the Board, my name is Forrest McClellen for Petitioner,
12 lululemon. Petitioner respectfully submits that each of the challenged claims
13 is unpatentable.

14 Beginning with slide 1 of Petitioner's demonstratives, we have the
15 first claim, it's a method claim of the '615 patent. And in very broad strokes
16 what the claim requires is receiving athletic activity data from a device
17 configured to be worn by a user; receiving a time period; receiving a goal for
18 that time period; and then checking to see whether the data exceeds the first
19 goal for a predetermined number of consecutive activity time periods and
20 rewarding the user if so. If the user achieves a streak in other words.

21 Slide 2. There are four topics that I would like to cover today. The
22 first is the claim construction dispute that the parties have briefed. And then
23 I'd like to discuss grounds 3, 2, and 1. We're going to take the two
24 obviousness grounds first, then the anticipation ground beginning with the
25 ground that the Board focused on in its preliminary -- in its Institution

1 Decision. Excuse me. I'm not going to touch on grounds 4 and 5 because
2 there are no separate disputes about those grounds.

3 Turning to slide 4. There is one term in dispute in the proceeding. It
4 is the "receiving an activity time period" term. Slide 5 shows both parties'
5 constructions of this term. As you can see on the left hand side Petitioner's
6 construction is that the term means what it says, receiving an activity time
7 period. On the right hand side of the slide you can see Patent Owner's
8 construction. Patent Owner is asking the Board to add two requirements,
9 one from a user; and two, during a goal setting operation to this term.

10 The purpose of the first addition, from a user, is to distinguish the
11 Sirmans reference. The purpose of the second addition, during a goal setting
12 operation, is to distinguish the Stivorice reference.

13 The additions do not distinguish the references. I'll get into that later,
14 but that's just some context.

15 Turning to slide 6, just to make the next argument a little easier to
16 follow I've gone ahead and color coded the parties' constructions so the
17 disputed term itself is in yellow. And then this directionality requirement,
18 from a user, is in blue. And the temporal requirement, during a goal setting
19 operation, is going to be in orange.

20 Slide 7. So Phillips says when we do a claim construction we start
21 with the claims. And that's what's shown on slide 7. And you can see on
22 slide 7 we've highlighted the claim term itself. Once again, the disputed
23 term is in yellow. And we've pointed out that in claim 1 there are other
24 directionality requirements in blue.

25 For example, the first limitation in claim 1 is receiving athletic
26 activity data from a device configured to be worn by a user. So there the

1 applicant specified where the data comes from. It did not do so for the
2 activity time period in yellow.

3 The final limitation of claim 1 is similar. You can see it reads,
4 presenting a streak reward to the user. There's another directionality
5 requirement. And then a temporal requirement, when the received athletic
6 activity data exceeds the first activity goal.

7 So it's apparent just from the structure of claim 1 that the Applicant
8 knew how to add these kind of requirements to its claim limitations and that
9 it did not do so for the disputed term.

10 Slide 8 shows independent claim 11, it's the same as claim 1 except
11 it's a CRM claim. And the structure is the same. Once again, there are
12 directionality and a temporal requirement in this claim but not associated
13 with the disputed term.

14 Slide 8 shows some of the dependent claims, claims 2, 4, and 8. And
15 you can see there are also directionality requirements in these claims by the
16 user, to the user, providing the user with. Slide 10 is the same, it has more
17 dependent claims on it, and slide 11 again is the same.

18 So if we go back to slide 7, you know, during prosecution the
19 Applicant had a choice. They could leave receiving activity time period
20 broad and sweep a lot of conduct into the scope of their method claim, or
21 they could narrow it with these limitations the Patent Owner has proposed
22 and insulate it from the invalidity challenge. They went broad.

23 If Patent Owner's construction were correct, this claim would have
24 said receiving an activity time period from the user during a goal setting
25 operation.

1 Slide 12. Phillips also says that we look at the specification. Now
2 Patent Owner in this proceeding has argued that all of the embodiments in
3 the specification require that the time periods are received from the user or
4 involve the time period being received from the user. And so what we've
5 done is we've identified an embodiment where that is not the case.

6 This is an excerpt on slide 12 from the '615 patent. That's what's
7 shown on the right hand side of the slide. And then on the left hand side of
8 the slide you can see there's figure 90 from the Patent.

9 And the key is that the lower highlighted portion in the excerpt from
10 the specifications says the device may automatically select the time period
11 for the future goal based on the first time period. So that's express
12 disclosure that the time period is being received from a device, not from the
13 user. So it's not the case that every time period disclosed in the specification
14 is received from the user.

15 JUDGE COCKS: Well, Counsel, it somewhat begs the question, are
16 there are other examples of a non-user specified?

17 MR. McCLELLLEN: Well, Your Honor, if I roll ahead to this later --
18 so just to be clear, what I showed you on the slide is what we identified in
19 our arguments. But there is one more example. If we roll forward, I'm on
20 slide 23 now. This came up in the context of Sirmans.

21 And I'll get into this a little bit later, but the top part of this excerpt
22 says the user may select a goal setting operation. The goal may correspond
23 to a specified amount of time such as a day, an hour, a week, a month, or the
24 like. The bottom part of this excerpt says, alternatively the user may define
25 his or her own goal time period.

1 So, what's going on in the top of this excerpt is that the user is picking
2 a goal that has been predefined. So, in that instance it would be I think the
3 device which is setting the goal.

4 Okay.

5 JUDGE BELISLE: Well, Counsel, isn't that still the user selecting it?
6 Even if it's available as like a pre you know, check a box, day, hour, week,
7 month. But isn't the user the one still selecting that option?

8 MR. MCCLELLLEN: Okay. Yes, Your Honor. So, on slide 12, and
9 this is an important point, I'm going to get into this more later. There are
10 actually two moments in this process where time periods are received.

11 First, it's received from the device. And then as you can see on the
12 left-hand side of slide 12, in figure 98 the device is going to present the user
13 with this button, set tomorrow's goal. And once the user clicks on that
14 button, at that point the time period has also been received from the user.

15 But the point is that here there is an instance in which the time period
16 is received from a non-user. And thus Nike's -- Patent Owner's argument
17 that it's always received from the user is incorrect.

18 JUDGE BELISLE: So, run me through again how it's obtained by
19 somebody other than the user.

20 MR. McCLELLLEN: So, in this example, Your Honor, the device may
21 automatically select a time period for the future goal based on the first time
22 period for which a goal has not been defined. And so that is an instance in
23 which a time period is received from the device.

24 I'm quoting from the lower highlighted block on slide 12. So, it
25 comes from the device in the first instance, and then when the device

1 presents it to the user for acceptance at that point it also comes from the
2 user.

3 Moving on to slide 13. Patent Owner has a rebuttal Your Honor, to
4 the argument I just made. Patent Owner's rebuttal is that actually the
5 paragraph in the specification that precedes the one that I just showed on
6 slide 12, indicates that all along is the user that always is setting the time
7 period.

8 The argument doesn't work. What's shown on the slide, on the right-
9 hand side of slide 13 in highlight, these are the portions of this disclosure
10 that Patent Owner excerpted in its brief to highlight. And beginning with
11 just the top line, the quote on the righthand side of the slide it says, a user
12 may define a goal. So, the user is defining a goal.

13 We go down to the third line it says, the user may modify the goal or
14 set another goal for the same time period or another time period. What this
15 excerpt does not say is that the time period is received from the user. It's
16 talking about the user defined goal.

17 Slide 14. We've also presented extrinsic evidence on this topic. This
18 is testimony from Petitioner's expert during his deposition. And you can see
19 Petitioner's expert testified, "the claim language notes an element of
20 receiving an activity time period. I don't believe it restricts it to receiving an
21 activity time period from the user." So, he disagrees with Patent Owner's
22 construction.

23 And then this is more testimony by Petitioner's expert. He said, "I
24 also don't believe that the time period necessarily has to be set before,
25 during, or after." So, he's disagreeing with the second part of Patent Owner's
26 construction as well.

1 Before I move on to the grounds, Your Honor, there's one more point
2 that I need to make here. And I actually, I'm going to go to Patent Owner's
3 demonstratives briefly.

4 So, I have on the screen Patent Owner's demonstratives. And let's just
5 go to slide 19. I'm displaying slide 19 of Patent Owner's demonstratives.
6 And you can see there's a sub header that says, lululemon -- that's the
7 Petitioner -- initially agrees with Nike's construction.

8 And then on slide 19 of Patent Owner's demonstratives there are
9 excerpts from paragraph 40 of our expert's opening report from page 4 of the
10 petition. And if we go forward to slide 31 of Patent Owner's demonstratives,
11 you can see a similar assertion where Patent Owner states that paragraph 40
12 of our expert's reports indicates that he agrees with Patent Owner's
13 construction.

14 Back to slide 19. This is inaccurate. It is not the case that Petitioner
15 ever agreed with Patent Owner's construction. The petition and this expert
16 report were submitted nine months before Patent Owner proposed their
17 construction. And if we look at what these excerpts say, it says the '615
18 patent explains that a user sets an activity goal to complete a certain amount
19 of activity during a specific activity or goal time period. It doesn't say the
20 time period is received from user, it's talking about the goal.

21 The quotations -- excuse me -- the citations to column 27 and column
22 51 of the '615 patent, those are citations just of various embodiments within
23 the patent. The claims don't start until column 80, so it's simply not accurate
24 that we have agreed with or that our expert has agreed with Patent Owner's
25 construction.

1 Back to Petitioner's demonstratives. All right. I'm now going to talk
2 about the grounds. And one point I want to make before I get into the details
3 here is that if the Board declines to adopt Patent Owner's additions to the
4 claim language, then there is no dispute that the two Sirmans grounds, that's
5 ground 3, and ground 5, collectively render unpatentable, all the challenge
6 claims. If the Board adopts Patent Owner's construction however, as I'll
7 explain now, the claim still would be compatible.

8 So now slide 17. For the Sirmans ground, roughly speaking, there are
9 three limitations that the parties have briefed. I think at this point only one
10 really remains in dispute and it's this first receiving an activity time period
11 limitation under Patent Owner's construction. I'll get into why I don't think
12 the other two are in dispute when I reach them.

13 Here's slide 18. What slide 18 shows is excerpts from the Sirmans
14 reference. And what Sirmans teaches is protocol criteria. So, it's protocol,
15 it's how you're going to exercise your goals and how long and criteria.
16 Because Sirmans is going to evaluate you based on how well you do it.

17 The protocol criteria include both goals and time periods. On the
18 bottom part of slide 18 there's an excerpt from paragraph 84 of Sirmans.
19 And you can see at the very bottom of that paragraph it's got a parenthetical.
20 It says, well it begins, moderate intensity for 30 minutes -- so that's a goal --
21 and then, a day, which is highlighted as a time period. There's no dispute
22 then, under Petitioner's view of the claims that satisfies the receiving activity
23 time period of the petition.

24 Let's move to slide 20. But how about under Patent Owner's
25 construction? Well in Sirmans protocol there is a moment when the user
26 accepts the protocol criteria. So, the protocol criteria are presented to the

1 user, and then you can see they are presented to the member for member
2 acceptance of both the protocol criteria. And then the lower highlighted
3 portion of slide 20, a member can agree to both.

4 The moment that the member accepts or agrees to the criteria, at that
5 moment the protocol criteria also are received from the user, which Sirmans
6 calls a member by the way.

7 Slide 21. Patent Owner disagrees with us on this point but their
8 arguments regarding claim construction, and statements they have made
9 about the meaning of certain passages in the '615 patent actually confirm
10 that Sirmans does teach this limitation under their construction.

11 So, what I have on slide 21 here is an excerpt from Patent Owner's
12 certified brief. And you can see I've gone ahead and highlighted the quote,
13 "in other words, the interface described in Figure 90A is user-driven from
14 beginning to end, and the 'activity time period' is received from the user."

15 And this is what we talked about earlier. So, I'm going to go back to
16 slide 12. Slide 12 has Figure 90A of the patent and it's got the excerpt and
17 spec. in column 54 lines 27 through 42.

18 So, as I mentioned, we disagree that this is user-driven from the
19 beginning. Because it says, the device may automatically select a time
20 period. But how about the end? Well, as we just discussed a few moments
21 ago, the end of this process is the user clicking to set tomorrow's goal.
22 That's just like in Sirmans when the user agrees to the protocol criteria. It's
23 the same level of agency. So, this indicates that Sirmans disclosure of the
24 user agreeing or accepting the goal actually is sufficient under Patent
25 Owner's construction.

1 Okay. Slide 22. We also have testimony from their expert regarding
2 parts of the '615 patent which parallel Sirman's disclosure again, which we
3 think also confirms our argument here.

4 So shown on slide 22 is an excerpt from the deposition of Patent
5 Owner's expert. What's the context here? Well, the expert is looking at
6 paragraph 33 of his report. Paragraph 33 of his report is where he talks
7 about claim construction. He points to here are the parts of the '615 patent
8 specification which I think support Patent Owner's construction.

9 So, we've asked him, is the passage of column 51 lines 1 through 8 of
10 the '615 patent an example of what satisfies the limitation. He says, yes.
11 And he's talking about under Patent Owner's construction.

12 All right. Slide 23. And this is the slide that I showed earlier. It
13 depicts column 51 lines 1 through 8 again. This is the part that their expert
14 agreed essentially embodies the limitation.

15 The highlighting on this quote, on this excerpt, looks a little odd.
16 That's because we've highlighted exactly what their expert quoted and put in
17 his report in paragraph 33.

18 So once again, we've got basically two embodiments here. First, the
19 user may select a goal setting option where that goal is going to correspond
20 to a specific, specified amount of time such as a day, an hour, and so on.
21 And so that's an instance where the user is basically selecting a predefined
22 time period. And at the bottom it says, alternatively the user may define his
23 or her own goal time period.

24 So, this again just confirms, this top embodiment confirms that when
25 Sirman's user agrees or accepts the criteria that satisfies Patent Owner's
26 construction.

1 Okay. The next limitation in dispute. So, this is, what I'm showing
2 on the screen is the table of contents from Patent Owner's certified brief.
3 Part of it. And I'm showing this because in the Patent Owner response
4 Patent Owner disputed whether the Sirmans grounds rendered unpatentable
5 claim 3.

6 In our reply we explained how the Sirmans grounds did so, and we
7 further pointed out that Patent Owner had not disputed our alternative
8 obviousness theory for claim 3 in ground 5. And so on sur-reply Patent
9 Owner no longer is contesting claim 3, the Sirmans ground. You can see
10 that in the table of contents. It goes from limitations 1B, 11B to claim 7.

11 So, on slides 25 and 26, I have some disclosures from Sirmans and the
12 patent that Sirmans incorporated by reference but I'm just going to skip over
13 them for now.

14 Slide 27. The last limitation that is in dispute for Sirmans is this
15 receiving a second activity goal for the activity time period from claim 7.
16 And what's shown on the screen here is an excerpt from the Patent Owner
17 response.

18 And as you can see from the highlighted portion of this excerpt,
19 Patent Owner's argument for claim 7 for the Sirmans ground, ground 3, is
20 basically that Sirmans doesn't disclose a limitation from which claim 7
21 depends in claim 1. And so, the argument is derivative of claim 1. So, if the
22 Board agrees with Petitioner on claim 1 then I believe there's no dispute that
23 it should also agree with Petitioner on claim 7.

24 All right. That was Sirmans. The next ground is ground 2. And this
25 is the Stivorice and Kobayashi ground. I'm on slide 29 now. There are three
26 limitations in dispute for the Stivorice ground. There is the receiving an

1 activity time period limitation which we're now very familiar with; there's a
2 determining step; and then the receiving a second activity goal for an
3 activity time period limitation as well. I'm going to take these in order.

4 Turning to slide 31. So once again, there is no dispute as far as I'm
5 aware that Stivorik satisfies the receiving activity time period limitation
6 under Petitioner's view of the claims. The dispute the parties have is
7 whether it satisfies this limitation under Patent Owner's construction which
8 adds that during a goal setting operation requirement.

9 What's shown on slide 31 here is an excerpt from paragraph 197 of
10 Stivorik and then also an image of Figure 43 from Stivorik on the left. And
11 the key here is that Stivorik says, I'm reading from the lowest highlighted
12 block now, "a daily goal of 2,400 calories burned was set by the individual."

13 This disclosure satisfies Patent Owner's construction because when a
14 user sets a daily goal they are simultaneously setting both the time period or
15 the day, and a goal. And so, in Stivorik, the goal is set during -- excuse me --
16 - the time period is set during the goal setting operation just as Petitioner
17 says the claims -- Patent Owner says the claims require.

18 There's also been a dispute about whether the time period has to be set
19 in advance of the user exercising. Stivorik covers that too, it says the daily
20 goal was set by the individual, past tense.

21 Slide 32. Our expert, during his deposition, confirmed that paragraph
22 197 taught this limitation under Patent Owner's construction. So, slide 33 --
23 32, that's just testimony by our expert.

24 Slide 34. Now Patent Owner has rebutted this argument. In Patent
25 Owner's view, Stivorik's disclosure of setting a daily goal does not indicate
26 that the user is both defining the time period and the goal. In Patent Owner's

1 view, Stivoric just says you're setting the goal. You're not setting the time
2 period.

3 The problem with that though is that Patent Owner's expert has given
4 testimony about analogous disclosure in the '615 patent that we think
5 confirms our position here. And to be clear, their expert does not agree with
6 us on this. Their expert thinks that Stivoric does not disclose this limitation
7 under their construction but let's look at what he said about the '615 patent.

8 Shown on slide 34, this is another excerpt from Patent Owner's
9 deposition testimony where he was looking at some of the disclosures he
10 cited in that key paragraph 33 of his report where he's explaining what parts
11 of the specs support Patent Owner's construction. So, he says, well, he's
12 asked, is the passage that you cited at column 46, lines 61 through 63 an
13 example of what you believe meets the receiving activity time period
14 limitation. He says, yes.

15 Okay. What are lines 61 through 63 of column 46? Well, on the left-
16 hand side of the slide, it's the lower three lines of that blocked quote. You
17 can see it starts, "In some examples." It's highlighted. It says, "In some
18 examples, portions of the registration process may be optional (e.g. setting a
19 daily goal, display setup, etc.)."

20 Slide 35. We asked him, how does that passage support your opinion.
21 How does it support? And look at what he did. He focused on the text. He
22 says, "The very last line reads, setting a daily goal. So, setting a daily goal is
23 a time period in which it must be accomplished. And the goal, whatever it is
24 that you're setting, is what he's in the process of putting in." So, the expert
25 has looked at the text and he said, all right, this means that you're defining
26 both the time period and the goal.

1 Slide 36. So, let's compare the disclosure from the '615 patent that
2 Patent Owner agrees meets their construction with what Stivorice discloses.
3 On the left-hand side of slide 36 you can see the '615 patent says setting a
4 daily goal. Stivorice says a daily goal was set once in the active voice, once
5 in the passive voice, but otherwise there's no delta between the disclosures.
6 So, Stivorice satisfies even Patent Owner's construction of this claim.

7 Slide 37. The next limitation in dispute is this determining step in the
8 independent claims. I'm just showing you claim 1 here but it also appears in
9 claim 11. And I'm not going to go into all of the elements because it's not
10 disputed that the art teaches every element of this limitation. It's also not
11 disputed that a person of ordinary skill would have been motivated to
12 combine the art.

13 The sole dispute here is whether a person of ordinary skill would have
14 been motivated -- excuse me -- would have combined the references with a
15 reasonable expectation of success. So, let's go to slide 38.

16 This just shows graphically what the combination is, at least in
17 summary. On the left-hand side of slide 38 you can see Figure 43A from
18 Stivorice. The figure is showing its IO device 1200. It's got an LCD screen.
19 On the screen you can see it's indicating how well the user is doing towards
20 their goal. The user has burned 122 percent of their calories for their goal.

21 On the right-hand side of the slide you can see disclosures from
22 Kobayashi. And what Kobayashi tell us is that you can reward users for
23 completing goals on consecutive days. You can give them 5 extra points for
24 10 consecutive days, 10 extra points for 20 consecutive days. And you can
25 also give them bonus points if they exceed the goal in each of those days.
26 That's the final highlighted of paragraph 142 of Kobayashi on the slide. So,

1 what we proposed was combining these concepts from Kobayashi with
2 Stivoric and modifying Stivoric's software.

3 Slide 39. Patent Owner's argument against reasonable expectation of
4 success is basically it would have been too hard to change Stivoric's
5 hardware. So, it's basically a bodily incorporation argument.

6 But the real problem here, if we go to slide 40, is that it does not
7 respond to what we argued. Our argument was that a person of ordinary
8 skill would have modified Stivoric by incorporating these concepts from
9 Kobayashi and thereby modifying Stivoric's software.

10 Here's slide 41. We also presented evidence on reasonable
11 expectation of success. This is from our expert's expert report. He opines
12 that a modification would require nothing more than basic programming
13 skills. We also showed how it could be done.

14 Here's slide 42. This is testimony from Patent Owner's expert's
15 deposition. He's asked basically how some example computer code that's
16 shown on the right-hand side of the slide works. And he -- the question
17 goes, if the user enters Monday for variable A and Tuesday for variable B,
18 then according to the if statement, the program will print, a streak award --
19 I'm paraphrasing. He says, that's correct.

20 Slide 43. And he also confirmed that this kind of if statement, it's a
21 basic computer program, and a person of ordinary skill could have written it.
22 So, we believe that we have carried our burden on reasonable expectation of
23 success.

24 Slide 44. The last limitation in dispute for Stivoric is this receiving a
25 second activity goal for the activity time period limitation. And if we go to
26 slide 45, and this gets to the objection that was submitted yesterday.

1 So, in the Petition, the argument was that, well there are these
2 disclosures in Stivorice, paragraph 218, paragraph 227, it's got this table with
3 these metrics that the system can monitor. 218 says you can have multiple
4 goals. And in essence, it would have been obvious to modify Stivorice's
5 system to have a second goal. That was the argument in the Petition.

6 Patent Owner disputed whether Stivorice expressly disclosed this
7 limitation, but they didn't challenge motivation to combine or anything else I
8 believe. But in their sur-reply they then did challenge why a person of
9 ordinary skill would have made the combination.

10 Slide 46. So, to the extent that the Board considers this, it's just a
11 simple substitution. Slide 47. And you can see how it would be done. This
12 is Stivorice's Figure 43A. It's already tracking two goals of a user, one's
13 calories consumed, one's calories burned. And to the extent that calories
14 consumed isn't already an athletic activity goal, then it would have been
15 trivial for the user to add a goal corresponding to one of those metrics that
16 we just looked at on slide 45. It's got you know, running, walking, and so
17 on.

18 JUDGE COCKS: Counsel, one question.

19 MR. McCLELLAN: Yes, Your Honor.

20 JUDGE COCKS: You said to the extent the Board considers this.
21 What is the "this" there specifically? Is it the entire argument in terms of --

22 MR. McCLELLAN: The challenged motivation to combine, Your
23 Honor. Challenged motivation.

24 So, Your Honor, I said that because as we identified in the objection
25 we believe that this is a new argument raised for the first time on sur-reply
26 that could have been raised earlier.

1 JUDGE COCKS: So, the "this" is the new argument.

2 MR. McCLELLLEN: This is the new argument referring to the
3 motivation to combine argument.

4 Turning to slide 48. The last ground I'm going to discuss is this
5 Hoffman ground. This is an --

6 JUDGE BELISLE: Counsel. Okay. Sorry.

7 MR. McCLELLLEN: Yes, Your Honor.

8 JUDGE BELISLE: So, I didn't realize you had switched over to
9 Hoffman.

10 MR. McCLELLLEN: Okay.

11 JUDGE BELISLE: Still on slide 47.

12 MR. McCLELLLEN: Yes, Your Honor.

13 JUDGE BELISLE: Should it concern us that this reference seems to
14 be talking about historical performance as opposed to goals of future
15 performance?

16 MR. McCLELLLEN: I understand your question, Your Honor. And
17 the answer -- well let me give you a two-part answer. The first is, under
18 Petitioner's construction, no. Even if the reference concerned historical
19 performance it would satisfy the claims. But the second part of my answer
20 is that we don't agree that it concerns historical performance.

21 Now, this figure shown on slide 47 is depicting historical
22 performance. You can see that because you know, the user has gone 122
23 percent on one goal and 59 percent on the other. But if we roll back to slide
24 36, this has an excerpt from Stivoric's paragraph 198 on it. And the excerpt
25 says, a daily goal of 2,400 burned was set by the individual.

1 So, our position is that that text was set by the individual indicates the
2 goal and the time period are set first before you start exercising because it's
3 written in the past tense. And if we go back to slide 32 you can see our
4 expert confirm the point in his deposition.

5 He was asked, where is it disclosed that in Stivoric there's one -- I'm
6 paraphrasing the question -- there's one example of the system receiving the
7 time period prior to the start of activities. He says, within paragraph 197.
8 And he's pointing to the same language that I just showed on the slide we
9 were just looking at.

10 So, our position is that Stivoric is not just concerned with historical
11 data, it's also setting the goal and the time period in advance.

12 Okay. Slide 48. This is the last ground. It's Hoffman. Slide 49.
13 There are four limitations in dispute here.

14 The second limitation, it's got the number 2 next to it. The dispute
15 there is derivative of the dispute on the first limitation, but I'll get into that
16 when I get there.

17 Slide 50. So, the first limitation in dispute for Hoffman is in the
18 independent claims, it's been called limitation 1D by the parties. And it's
19 this determining step. And the key here is the phrase, consecutive activity
20 time periods. That's really what the parties are fighting about for this
21 limitation.

22 So, if I go to slide 51, this is the disclosure in Hoffman that the
23 Petitioner contends satisfies that consecutive activity time period's element.
24 Hoffman says 3 goals in 3 consecutive days. Now at institution the Board
25 preliminarily did not agree with us because Patent Owner had argued well,
26 this could mean you're completing three goals in three consecutive days.

1 You know for example, three goals in one day, zero on day two, and zero on
2 day three. So, it doesn't meet this consecutive activity time period's
3 limitation.

4 The record has developed since the institution. And what has
5 changed, I'm on slide 52 now, is that Patent Owner's expert has testified
6 about what this phrase means in his deposition. We asked him, do you
7 understand that phrase, that's referring to the one that's highlighted on slide
8 51, 3 goals in 3 consecutive days.

9 Back to slide 52. Do you understand that phrase to mean one goal in
10 each of three consecutive days? And what he says is it could mean two
11 things. It can mean 3 goals in each of three days, so nine goals total, or it
12 can mean one goal in each of those days aligning with what we initially
13 proposed.

14 Both of those interpretations that Patent Owner's expert proposed
15 satisfy the claims because in each of those interpretations you've got goals in
16 each of the consecutive days. And so, you know, Patent Owner has argued
17 that we are now arguing that Hoffman satisfies this limitation because it
18 would be possible to perform one goal per day. That's not our argument.

19 Our argument is that Hoffman expressly discloses performing one
20 goal per day, or it expressly discloses performing three goals each of those
21 days because this is what Patent Owner's expert testified to. There are two
22 permutations, and when a person of ordinary skill would immediately
23 apprehend each.

24 JUDGE COCKS: Counsel, one question, sir.

25 MR. McCLELLLEN: Yes, Your Honor.

1 JUDGE COCKS: I think I just heard you say that, is three goals for
2 three consecutive days necessarily meets the claim because of their declarant
3 testimony. Is it because of that testimony that you challenge that. Is that
4 what I heard you say?

5 MR. McCLELLEN: Let me rephrase it a little bit, Your Honor. We
6 believe their expert's testimony on this point confirms that this disclosure
7 from Hoffman which is shown on slide 51 satisfies the limitation. And we
8 believe that because under the Federal Circuit's Kennametal doctrine, when
9 a person of ordinary skill would immediately apprehend a certain number of
10 permutations that are possible, here there's -- we've got two on this slide, it's
11 three goals in three days or one goal in each of the days. And each of those
12 is expressly disclosed. So that's our argument.

13 Slide 53. This is a chart of some permutations. If you assume there
14 are only three goals total, but we don't need to go into this.

15 JUDGE COCKS: Well actually, I would like to go into it.

16 MR. McCLELLEN: Okay. Let's go into it.

17 JUDGE COCKS: So, looking at slide 53. So, I think your position,
18 and this is an anticipation ground, if I recall.

19 MR. McCLELLEN: Yes, Your Honor.

20 JUDGE COCKS: So, the three goals in three consecutive days.
21 That's the disclosure in Hoffman.

22 MR. McCLELLEN: Correct.

23 JUDGE COCKS: You're saying that that disclosure necessarily
24 amounts to what we're seeing on slide 53 here?

25 MR. McCLELLEN: Your Honor, I wouldn't use the word
26 necessarily. I'm saying it expressly discloses each of these 10 permutations.

1 There's an eleventh which is not shown on this slide. It's the three goals in
2 each of those days. We're saying it expressly discloses each of those
3 permutations. We're not making an inherency argument, we're making an
4 express disclosure argument.

5 JUDGE COCKS: I'm curious, why not include the eleventh option?

6 MR. McCLELLLEN: Because when I created this chart in the briefing
7 I was solely referring to the second possibility of one goal in each of those
8 days.

9 JUDGE COCKS: Okay.

10 MR. McCLELLLEN: Okay. Slide 54. The remaining disputes about
11 the Hoffman grounds basically boil down to Patent Owner's arguments that
12 we have improperly combined different embodiments within Hoffman,
13 because of course it's an anticipation ground. So, we have to be careful of
14 that.

15 We disagree that we've improperly combined any embodiments. So,
16 Patent Owner contends that we've improperly combined paragraphs 198, and
17 paragraph 9 of Hoffman. But paragraph 9 of Hoffman, it's general
18 disclosure at the start of the reference. It confirms that user can specify the
19 goal and the time period. And paragraph 198 is just what you can do with
20 that.

21 Paragraph 198 says you can reward users for completing goals for
22 consecutive days. So, it's the same system, same embodiment.

23 Slide 55. Patent Owner also disputes, also contends that we've
24 improperly combined paragraphs 198 and 184 of Hoffman. Again, we
25 disagree.

1 Paragraph 184 indicates the Hoffman system is able to roll over
2 calories and steps burned from completing a first goal to a second goal. And
3 again, paragraph 198 is saying what you can do with this kind of capability.
4 It's saying Hoffman system can reward the user for completing three goals in
5 three consecutive days for the batch.

6 Slide 56. These are just the figures associated with the two
7 paragraphs I just discussed. As you can see, they're in interface with the
8 social and media network. It's being displayed from the perspective of the
9 same user. They both have the badges on them. One has this empire state
10 goal, one's got the hot dog goal, but you know, it's the same embodiment,
11 they're just showing different pictures.

12 JUDGE BELISLE: So, the goal of exercising here is a hot dog?

13 MR. McCLELLEN: Your Honor, if you read Hoffman, what's
14 showing in Figure 4 --

15 JUDGE BELISLE: I'm sorry, Counsel. I was just trying to be
16 humorous.

17 MR. McCLELLEN: Well that literally is what it is. You're trying to
18 burn off the calories of a hot dog which is says is 8,000 steps or 400 calories.

19 All right. Slide 57. This is the next limitation that's in dispute. It's
20 presenting a streak award to the user. And Patent Owner's dispute on this
21 point is that we haven't shown in the preceding limitation that Hoffman
22 detects the streak basically, what we just discussed, and therefore there's no
23 presenting of the streak award. So, it's derivative of the last dispute.

24 And so, if the Board rules in our favor on the preceding dispute, then
25 we believe the Board should also rule in our favor on this limitation as well.

1 Turning to slide 59. This is claim 7. And the disputed limitation here
2 is receiving a second activity goal for the activity time period. Once again,
3 the dispute is not whether Hoffman discloses all the pieces but whether
4 we've improperly combined different embodiments.

5 Turning to slide 60. So back to slide 59. Specifically Patent Owner
6 has contended that we've improperly combined paragraphs 9, 165, 190, and
7 195. So, four paragraphs at issue.

8 So, slide 60. Let's take the first paragraph. It's paragraph 165. So,
9 before I get into what paragraph 165 discloses, I actually just want to look at
10 Patent Owner's argument on this point. So again, their position is that we've
11 improperly combined paragraph 165 and paragraph 9.

12 Their argument is paragraph 165 is also unrelated to any activity time
13 period as it merely discloses an interface, thereby the user can toggle
14 between daily steps taken and daily calories burned. Well, remember
15 paragraph 9 is about Hoffman's system let's the user set the goal and the time
16 period. And Patent Owner has acknowledged that paragraph 165 does relate
17 to these time periods, it's the daily time period.

18 Slide 61. This is Hoffman's Figure 21C. Why am I showing you this
19 figure? Well, this is the figure that paragraph 165 describes. So here we
20 have the hot dog goal again. This time the user just hasn't finished it, but in
21 any event, what this shows is Hoffman's system is capable of measuring
22 these multiple goals simultaneously. You've got steps and calories, it's
23 highlighted in the bottom of the slide right there. You can see, well it's kind
24 of hard to see, but once again the goal is 8,000 calories. And then you can
25 see the user's progress towards the goal in this little bar graphs. So, it's the
26 same embodiment.

1 Slide 62. This is Hoffman's figures 37. This relates to paragraph 190
2 of Hoffman. And what paragraph 190 of Hoffman is doing is it's basically
3 saying the user can set goals. So, it's, again, it's just describing an
4 underlying functionality of Hoffman's system.

5 And slide 63, we've got paragraphs 9 and 195 on the screen here. And
6 195 again, just confirms that you can have multiple goals. Here it's actually
7 talking about some of the same goals as we've already seen. You can see
8 195 has a distance to run, paragraph 9 is also talking about running.

9 So, we don't agree we've improperly combined any embodiments,
10 Your Honor. It's all one embodiment.

11 Okay. My last slide is slide 64. This is claim 13. There's actually no
12 separate dispute about claim 13, but Patent Owner contends that Hoffman
13 doesn't satisfy claim 13 because it doesn't disclose this limitation 1D which
14 we were discussing previously. This -- it's shown in claim 1 here but it's the
15 determining step. So, if the Board rules in our favor on the determining step,
16 then we believe it also should rule in our favor on claim 13.

17 So, unless the Board has any further questions, Your Honor, I'll sit
18 down and pass the podium to Patent Owner.

19 JUDGE BELISLE: Judge Hoskins?

20 JUDGE HOSKINS: No thank you.

21 MR. McCLELLLEN: Thank you, Your Honor.

22 JUDGE BELISLE: Thank you.

23 All set?

24 MR. BOWLING: All set. Thank you, Your Honor.

25 JUDGE BELISLE: Okay. Before you begin, would you like to
26 reserve any rebuttal time?

1 MR. BOWLING: Yes. Fifteen minutes please.

2 Okay. So, we wanted to begin with claim construction. The parties
3 are in agreement that a lot here turns on claim construction, so we'll follow
4 the same order that lululemon's counsel did.

5 And as they noted, one of the big disputes here is about, at least from
6 the two obviousness grounds, receiving an activity time period, what that
7 means, who it can come from, when it must happen.

8 Now lululemon wants the Board to construe this term in a vacuum.
9 But as we know, Phillips and all sort of other Federal Circuit law requires
10 the Board to read claim terms in the context of the entire patent. This is a
11 big patent, it's 210 pages. Hundreds of figures, lots and lots of disclosure.

12 So, the question is how would a skilled artisan view this term,
13 receiving an activity time period, in view of that entire disclosure. And you
14 don't have to take our word for it, you can look at what their expert and what
15 lululemon themselves said out of the gate. Right when they look at this
16 patent, how are they describing how it works, where this time period is
17 coming from?

18 And their expert says in no uncertain terms, and we're here on slide 19
19 of Nike's demonstratives. And in the top left we're quoting from their
20 expert, Dr. Fisher's declaration paragraph 40. And Dr. Fisher said, in an
21 activity tracking application, the '615 patent explains that a user sets an
22 activity goal to complete a certain amount of activity during a specific
23 activity or goal time period. A user. What did lululemon say in their
24 petition? The same thing. In the '615 patent's activity tracking application a
25 user sets an activity goal to complete a certain amount of activity during a
26 specific activity or goal time period.

1 So rather than construing it in a vacuum, let's look at what this patent
2 is all about. The '615 patent is directed to a user-driven system for setting,
3 tracking, and achieving goals in a way that motivates users to increase their
4 activity, to increase their physical fitness, and to make this a lifestyle so that
5 you can adapt your goals, adapt your time periods to things that will allow
6 you to embrace this new fitness lifestyle and continue to become more
7 athletic, more fit, and overall in better health.

8 So here at the very outset we see that the system involves a couple of
9 different pieces. And now I'm on the front page of the patent. This is page
10 170 of the patent.

11 Right up top at the summary it says, the present invention provides a
12 wearable device, a separate USB device that's carried by the user, a user
13 interface display, so the user is interacting with this system, and then last
14 there's an activity tracking application that executes on the mobile device,
15 that USB device. And at the very bottom here beginning at line 45, the
16 tracking application may be used to record activity data, track goals, track
17 milestones, and other achievements.

18 So that's what this patent is about. And that's the context in which we
19 need to view this term.

20 Okay. I can direct Your Honors now to column 57 of the '615 patent.
21 This is page 198. This patent also involves what are called streaks. This is
22 when the user completes multiple goals corresponding to multiple
23 consecutive goal periods. And why is that important? Because as the
24 specification recognizes, the tracking and recognition of streaks may provide
25 a further motivating factor for the user to maintain or elevate his or her
26 activity level and to meet all goals.

1 Streaks encourage consistency which may lead to the adoption of a
2 healthier, more active lifestyle. Same thing. That's what this patent's about.

3 Streaks, meeting your goals, continuing this over an extended period of time
4 as you meet these broader goals of an active, more-healthy lifestyle.

5 We can see that throughout this patent. Almost every single one of
6 these figures is shown on an iPhone. It's an application with buttons, with
7 bars for the user to make modifications. The user is in control from
8 beginning to end. The user sets the goal, they set the goal time period. Over
9 and over again, lots of different figures demonstrating that specific aspect of
10 this invention.

11 If we now go to column 51 of the patent, and that's on page 195. And
12 lululemon highlighted this portion. Beginning right at the top of column 51.
13 From the detailed information display, so all those figures we just looked at,
14 the user may select a goal setting option. There's a specific option that's
15 described. And this is described over and over in the specification. The user
16 selects this option and they're presented with the screen where they set the
17 goal and the goal time period.

18 The next sentence reads, the goal may correspond to a specified
19 amount of time such as a day, an hour, a week, a month, or the like. You
20 can also have a goal time period that corresponds with an evaluation time
21 period. So, if the user decides they want to set some broader evaluation time
22 period they can do that as well.

23 And it says very clearly here at the bottom of that paragraph,
24 alternatively the user may define his or her own goal time period. The rest
25 of this column and the columns that follow go into detail about this goal

1 setting menu, all of which involves user input, and the user is selecting that
2 time period at the same time they set their goal.

3 JUDGE HOSKINS: Mr. Browning?

4 MR. BOWLING: Yes -- Bowling, yes.

5 JUDGE HOSKINS: Bowling, I'm sorry. I apologize.

6 MR. BOWLING: No problem. No problem.

7 JUDGE HOSKINS: What about the Figure 90A that Petitioner was
8 pointing us to?

9 MR. BOWLING: So, Figure 90A, I'll just flip to that quickly. Figure
10 90A is shown here. And let's look at this entire disclosure. So, this is in
11 column 54 now of the patent which is on page 196.

12 And as lululemon's Counsel pointed out, we think the prior paragraph,
13 the one highlighted in full here, is important context. So, it says, as
14 described herein a user may define a goal to which the user's activity is
15 compared. Once a goal is set, in some arrangements the user may modify
16 the goal or set another goal for the same time period or another time period,
17 the next day, the next week, the weekend. The user is in control of all of
18 this.

19 For example, during the course of a day or other time period, the user
20 may realize that he or she is on track to exceed the currently set goal. And
21 what does this patent talk about over and over? Motivating the user. We
22 want to push the user. So, what does it allow them to do? The user may
23 wish to modify a goal to a more challenging setting.

24 In another example, if a user realizes that he or she is unlikely to
25 complete a currently set goal, maybe they're injured, maybe they're busy
26 with something else going on in their life. The user may modify the goal to

1 make it less challenging. They can drop the number of miles maybe they
2 had for that week, or they can say I'm going to give myself three extra days,
3 I'm going to modify that time period as was just described in column 51.

4 They may also be allowed to set additional goals without having to
5 wait for a current goal or goal time period to expire. For example, while
6 resting for a first day of activity, the user may set a goal for the next day or
7 an upcoming week or the like. So that's the context.

8 Then what do we see in Figure 90A? Right here, right off the bat, the
9 first sentence. Figure 90A illustrates an example interface by which a user
10 may activate a goal modification or setting function. So, we just heard all
11 about how the user may be motivated to make it less challenging or more
12 challenging, and this is the interface through which they're going to do that.

13 This is how they modify the goal. They activate the goal option menu,
14 9001, by selecting a displayed option or interacting with the display device.

15 The user may be required to press a button, it goes into some detail
16 about how exactly the user is doing this, but it's clear again, the user is the
17 one who is interacting with the device and is making these changes.

18 Then you'll see in the next highlighted sentence, the goal option menu
19 9001 may include an option for modifying a current goal or for setting a
20 future goal. The next sentence is what lululemon is highlighting. The
21 device may automatically select a time period for the future goal based on a
22 first time period for which a goal has not been defined.

23 So, all that's saying, it's a shortcut. The user has already set their goal.
24 And they come in and they want to modify their goal, and so what it's
25 saying is we present the user with the option to just repeat the goal. The
26 device can automatically select the time period for a future goal. You can

1 again pick nine days if that's what you had last time. And you can base that
2 on a first time period.

3 The first time period was already chosen by the user so all that Figure
4 90A is talking about, it's a shortcut on your phone so you don't have to type
5 it in again. You previously had a 12-day time period, now you're repeating
6 that for some future time period. That's all that 90A discloses. It doesn't
7 discuss some third party setting the goal. It isn't some historical view back
8 at data. This is a future goal that you're setting based on user input. The
9 user is still in control here, they're just being provided a shortcut to copy and
10 paste what they did.

11 Okay. Here, I want to direct you quickly, another example in the
12 specification. Now we're in column 55. And this is page 197. And this
13 talks a little bit about again the benefits of being able to modify these goals.
14 The user being able to modify the goals.

15 So, goals may be further modified, starting at line 35, even after the
16 user has completed a currently set goal. There's a couple of different ways
17 that you can do this. You can manually set the goal. It may recommend you
18 some prior goal that you had. Either way the user is still deciding what the
19 goal time period is.

20 And then it says allowing the user to increase a current goal, even
21 upon completion, may allow the user to further challenge themselves, or
22 herself, rather than permitting the user to register little to activity after
23 completing the goal.

24 The next paragraph points down to Figure 93. And we can see what
25 this looks like. Here, it shows you, you've completed your goal. Figure 93,
26 and this is on page 93 of the specification. It says, you've already hit your

1 goal, do you want to reset it higher? It suggests maybe you want to set it
2 200 percent higher, but at the end of the day the user is still the one who's
3 selecting this.

4 You can change the goal, not change the goal, and here we see on
5 Figure 88 just a couple of pages above, it may present you with various
6 options. You can add 20 percent more. You can dial it down 20 percent
7 less. These are all different options for the user to alter the goal.

8 Okay. So that's the context of the specification. That's the context in
9 which we need to view this term, receiving an activity time period.

10 JUDGE BELISLE: So, Counsel, let's -- that was the spec. Let's back
11 up to the claim. In claim 1, is there anything in the text of claim 1 that
12 suggests that receiving an activity time period must be done by the user?

13 MR. BOWLING: It's not explicitly written there, Your Honor. We
14 think in view of the entire specification that's a given because of how much
15 the user is repeated over and over and over again. The user is, the interfaces,
16 the figures, everything is about user input, user control. So, there's no
17 express language in there but we don't think there has to be. We think when
18 that claim term is read in view of the context of the specification, as we have
19 to read the claim term, then it's very clear that a user is the one who's doing
20 this and is doing it at a specific time when it's setting the goal.

21 JUDGE HOSKINS: Counsel, what's your best Federal Circuit case
22 that would analogize this to the facts of this case to support that argument?

23 MR. BOWLING: So, we think Phillips actually provides a very clear
24 reading of how the specification plays into reading claim terms. The Phillips
25 case says that you have to read claim terms in view of the entire

1 specification and that's been repeated in probably hundreds of cases at this
2 point.

3 And so pretty much every claim construction case we would suggest
4 involves this same concept which is reading the claim term in view of the
5 specification.

6 JUDGE BELISLE: So, Counsel, what about the large number of
7 cases that say we're not supposed to import a limitation from the
8 specification of the claim unless there's something in the claim that suggests
9 it?

10 MR. BOWLING: Yes, Your Honor. So, we don't think we're
11 importing a limitation from the specification into the claims. We think we're
12 just reading it in view of the context. We're not departing from the ordinary
13 meaning here. We're not arguing lexicography or disclaimer or anything
14 like that.

15 We think the ordinary meaning of this term as it appears in view of
16 the specification must be read in a way that the user is the one who's giving
17 the activity time period. They're the one who's setting it, and it's happening
18 at a specific time.

19 And it's not just us who felt that way, both lululemon and their expert,
20 before they saw any of the arguments, when they first looked at this claim
21 term, they said in no uncertain terms the user is doing this, the user is doing
22 this, and it's happening at the time of setting their goal. They both said that.

23 So, we think that's really important support, and that was in their
24 Petition right out of the gate.

1 JUDGE BELISLE: Is it your position that that phrase, receiving an
2 activity time period, in claim 1 excludes receiving it from anything or
3 anybody other than the user?

4 MR. BOWLING: Yes.

5 JUDGE BELISLE: And your construction adds not just from a user
6 but from a user during a goal setting operation. So I'm supposed to portal
7 from a user during a goal setting operation which is not recited in the claim
8 and does not appear to be suggested by the claim itself, and reach to the spec
9 for general disclosure of what the invention is and pull that on in. I think
10 that's your request.

11 MR. BOWLING: Yeah, we think Your Honor -- yes. That's our
12 position. And we think the only way to not view the claim in that way
13 would be to just look at the claim and view it in a vacuum.

14 When we look at it and view it in the entire patent, that's the only
15 thing that's discussed. It's 210 pages and lululemon can't find a single
16 instance where someone other than the user is setting the goal, activity time
17 period, or where it's being set at any time other than during the goal setting
18 operation. It just doesn't make sense in view of the specification.

19 And so we think that's the only way that you can read the claim unless
20 you view the claim term in a vacuum.

21 JUDGE BELISLE: Well but viewing that claim term, received in an
22 activity time period, even if all of the embodiments in the specification are
23 talking about a user, there's nothing in the spec that precludes something
24 other than the user providing that activity time period, is there?

25 MR. BOWLING: We think as a whole the specification does
26 preclude that because it's so clearly discussing the user interface, the iPhone

1 being there, all the diagrams where the user is dragging a bar to increase the
2 goal, decrease the goal, increase the time period, decrease the time period.
3 None of that could happen if someone other than the user was setting the
4 activity time period.

5 And so in a way the specification repeatedly precludes someone other
6 than the user doing that because a lot of the specification wouldn't make
7 sense if that were the interpretation.

8 JUDGE BELISLE: Okay. To help me understand this, I'm going to
9 just talk about something that's not in the spec. But just an example.

10 Assume this claim is directed to discuss streak rewards. It has rewards for
11 achieving a goal in a particular time period. So let's say an insurance
12 company, United Healthcare wants to help promote health amongst its
13 members. So it has a rewards program that allows users, or that it can send
14 to users' phones to their app that has time periods with goals and if you do
15 that you get a reward.

16 So the phone would receive that set of parameters, you receive a time
17 period, receive a goal, which a known reward for that activity, achieving that
18 goal within the time period. But what I'm hearing from you is, if the user is
19 not the one who actually selects it or receives it, then we're outside what this
20 limitation means.

21 MR. BOWLING: Yes, that's right Your Honor. That's our position.
22 And that's because a lot of the figures and the description that we just went
23 through talking about the user may do this, the user may modify this, the
24 user can realize that it's Thanksgiving week and they take a couple of days
25 off, so they extend their goal time period. None of that would make sense if
26 the only thing the user could do is just accept or decline to participate.

1 JUDGE BELISLE: Is there anything in the prosecution that supports
2 the additional terms here of a user during a goal setting operation modifying
3 this interpretation of receiving an activity time period?

4 MR. BOWLING: Well, Your Honor, our position would be that we're
5 not modifying the term but we're just reading it in terms of the specification.
6 And the prosecution history doesn't go one way or the other.

7 JUDGE BELISLE: All right. So, it says nothing about this phrase.

8 MR. BOWLING: Right.

9 JUDGE BELISLE: Okay.

10 MR. BOWLING: Okay. So lululemon pointed to, still staying on
11 claim construction, they pointed to some other claims where to the user or
12 by a user was referenced. There's really no authority that supports them
13 making that argument. They point to Phillips in their briefing about baffles
14 and steel baffles. And we think that's a lot different.

15 The Phillips case, when they were talking about steel baffles and
16 baffles, the Federal Circuit was discussing how if you have a claim term that
17 says steel baffles and another claim term that says just baffles, that means
18 baffles must be something other than steel. It could be steel, and it could be
19 something else. It's essentially a claim differentiation argument.

20 But we don't have that here. What they're pointing to are completely
21 different limitations. If there was a claim term here that said receiving an
22 activity time period from a user, and then we were looking at a claim term
23 that just said receiving an activity time period, that would be analogous to
24 the baffle situation. But that's not what we have.

25 What they're pointing to are totally different limitations about whether
26 the device is worn by the user, whether the activity data is provided to the

1 user. Those are completely different limitations, and they don't support the
2 idea, as lululemon would suggest, that the word user needs to appear in this
3 limitation in order for receiving an activity time period to come from a user.

4 And we pointed to some law in our briefing that the Federal Circuit
5 has said over and over again. You can use different phrases, different words
6 in different limitations and that doesn't mean that you have to construe them
7 differently. So, the absence of "from a user," in receiving an activity time
8 period doesn't mean that it doesn't come from a user just because other claim
9 terms say that.

10 We talked about Figure 90A. We think that supports our position. It
11 hammers home the fact that this is user driven, user has decided how to
12 modify the time period, how to set the time period.

13 JUDGE BELISLE: Going back to your prior argument. You know,
14 initially -- I wasn't I guess sure how much weight to put to the idea that some
15 of these limitations in claim 1 state by user or to the user.

16 The more we talk about this it kind of begs the question, as important
17 as the user is according to what you're telling me about the specification, it
18 seems noticeably absent from that phrase of receiving an activity time period
19 when other aspects of that claim do specify where or to which something is
20 going. But then we have this phrase in a method nonetheless that just says
21 receiving something.

22 MR. BOWLING: Sure.

23 JUDGE BELISLE: But I guess we don't have to rehash all of what
24 you said but it does, to the extent that you can sort of summarize your points
25 as to why that must be from a user, that might be helpful before you
26 conclude today.

1 MR. BOWLING: Yeah. Well, we think again, the specification
2 requires that reading. And it's no surprise that at first blush both lululemon's
3 expert and lululemon said, even though the words "from a user" aren't in the
4 claim, they both said a user sets the activity time period. A user sets the
5 activity time period.

6 It was clear to them, even without those words in the claim because
7 the specification in its entirety requires that term to be viewed that way. It
8 was only when they saw our arguments that they changed gears, reversed
9 course, and said oh wait no, this could come from anywhere not just from a
10 user.

11 Okay. So now we'll turn to the prior art.

12 JUDGE COCKS: Actually, before we do.

13 MR. BOWLING: Sure.

14 JUDGE COCKS: I do want to make one point or have one question.
15 So, it's not -- your construction is not just from a user. It's not just the user
16 viewpoint. It's also during a goal setting operation. And I think you said
17 that all, that that's required upon reading the patent because that's the only
18 situation that occurs.

19 I guess, is there any tension with that during a goal setting operation
20 part of the construction with the now familiar 90A we've been talking about
21 that says, the automatic selection, putting that aside, based on a first time
22 period for which a goal has not been defined.

23 If a goal has not been defined, how is that during a goal setting
24 operation?

25 MR. BOWLING: So, the way we read that sentence, Your Honor, is
26 saying that you haven't yet set this future goal generally. So, the goal

1 requires both the time period and the goal. In order for there to be a goal,
2 5000 calories, you need to put some bounds on that. So, we read that
3 sentence as saying if you haven't yet set a goal for this future time period, we
4 can basically roll over your prior activity time period and we'll just start with
5 that.

6 It's a shortcut. The user still modifies it. The user can change it. It's
7 just putting it there as a starting point.

8 JUDGE COCKS: So, let me refine my question. Where is the goal
9 setting operation in those lines of 90A, discussing Figure 90A? Specifically,
10 the automatic selection bit. So, lines 37 through 40 I guess of column 54.

11 MR. BOWLING: So, I think, Your Honor, the very next sentence
12 says for example, if the goal has been defined for each of the next two days,
13 the device may define the future goal option. So, what it's presenting to the
14 user as an option as being directed to the third day.

15 So, the user is presented with all these options. We looked at some of
16 it in the figures. And all this is saying is it's just popping up a shortcut to say
17 hey, you did this last two days, Monday and Tuesday, why don't you set the
18 same goal for Wednesday.

19 And then the user, at that point, once it gets the option, selects the
20 time period and the goal at the same time. So, the goal time period is being
21 set as part of the goal setting operation. So, at the same time.

22 JUDGE COCKS: And so, in your view, this embodiment or Figure
23 90A, that's covered by the construction.

24 MR. BOWLING: Absolutely. Yeah. We think it supports our
25 construction. It's user driven from start to finish. And it really hammers
26 home that the modification ability, and this ability for the user to dictate the

1 time period and dictate the goal is really what's central here. That's the
2 motivating piece. Because a user can, if they're starting to get faster, if
3 they're getting more fit, they can start changing their goals. They're not just
4 tied to the CDC guidelines.

5 It's user interactive. They're tweaking it as they go. And that's
6 furthering their fitness journey.

7 Okay. So, we'll turn now to some of the prior art references. I'm
8 going to be handling the first two, or the two obviousness grounds, Sirmans
9 and Stivoric. And my colleague, Ms. Staubach, is going to be handling the
10 Hoffman reference.

11 Okay. So, starting with Sirmans. We know that the term that's at
12 issue here. And the problem with Sirmans is that the activity time period is
13 never received from the user, ever. There's not a single instance where the
14 activity time period is received from the user.

15 It's instead received from the CDC or this gatekeeper, this third party
16 that's discussed. So, in paragraph 32 it discusses the gatekeeper. It's some
17 organizational entity. It's doing all these calculations in the background and
18 it's setting the goals for the user. The user is completely uninvolved in this
19 process.

20 And then paragraph 84, and this was highlighted by lululemon
21 counsel, but we think this really supports our point. And we're at slide 77 of
22 Nike's demonstrative now.

23 Paragraph 84 of Sirmans, the second sentence says, wearing the body
24 monitor the member will be asked to perform the Center for Disease Control
25 recommended levels of exercise. So, the user doesn't set the goal time

1 period, they don't set the goal. They're asked by the CDC to perform some
2 level of exercise.

3 Now they might be recommended or asked to perform moderate
4 intensity or vigorous intensity, but the user doesn't pick. The user is just
5 asked to perform one of those things. They're completely uninvolved in the
6 process.

7 The only thing they can do is after the fact, upload their compliance as
8 it says here, back to the system. So Sirmans is just fundamentally different
9 from the '615 patent. It doesn't have any of those motivating aspects where
10 the user is in control, they're setting their own goals, they're setting their own
11 time periods. The user is just waiting to be told what to do and then they
12 perform that activity.

13 JUDGE BELISLE: Counsel, so the disclosure in paragraph 84, do
14 you agree that that at least discloses receiving an activity time period?

15 MR. BOWLING: Yes, but not from a user. We agree with what
16 lululemon --

17 JUDGE BELISLE: But not from the user.

18 MR. BOWLING: Yes, Your Honor.

19 JUDGE BELISLE: During a goal setting operation.

20 MR. BOWLING: Yes. Correct. We agree with what they said earlier
21 that if you don't agree with our construction then Sirmans would cover that
22 limitation.

23 Okay. So, staying on Sirmans, we wanted to turn to lululemon's slide
24 18. Again, this is what they pointed to. This is the entirety of their evidence
25 for receiving an activity time period. They highlighted a day, a day -- what
26 they didn't tell you was that the member is asked to perform these things.

1 JUDGE BELISLE: What slide are we on counsel?

2 MR. BOWLING: I'm sorry. Lululemon slide 18.

3 And now if we turn to Nike slide 80, what we're highlighting here is
4 paragraph 68 of Sirmans. And this drives home that point. Paragraph 68
5 says, once the protocol criteria are established. Protocol criteria as we just
6 heard from lululemon's counsel, is both the time period and the goal itself.
7 That's already established. It's set. It cannot be modified.

8 Once it's established it's presented to the member, which is the user,
9 for acceptance. They don't have a choice to change it. They don't have any
10 choice in the matter at all. They're completely uninvolved.

11 JUDGE HOSKINS: And does the user have the choice to decline it?

12 MR. BOWLING: I think the user could easily decline to do any of
13 this. They could -- they could click yes and not do it or they could click no.
14 So that the user of course has a choice of whether to participate in these
15 protocol kind of criteria or not.

16 But aside from that decision they're completely uninvolved in the
17 process.

18 JUDGE HOSKINS: I think we saw some earlier disclosures in the
19 '615 patent where the user was presented with predefined things. I think it
20 was time periods like an hour, or 15 minutes. There were four or five --

21 MR. BOWLING: Sure.

22 JUDGE HOSKINS: -- predefined, whatever properties they were.

23 MR. BOWLING: Yeah.

24 JUDGE HOSKINS: And then the user selected it. And your view, I
25 think, is that that is a selection by the user.

1 MR. BOWLING: Well in that case, Your Honor, the user is being
2 presented again with some shortcut options. Right. It's just faster to say
3 they present the user with a couple of options, and you can still choose hour,
4 day, you're still setting the time period.

5 You're still choosing what you want. And you don't even have to pick
6 one of those predefined options. You can tweak them, you can make it two
7 weeks, three weeks, whatever you want to do. And the specification goes
8 into great detail about how the user can tweak those preset options. But
9 they're --

10 JUDGE HOSKINS: So, the difference between -- the reason this one
11 is different from that is you really want to give them one option. You have
12 to say yay or nay as the user.

13 MR. BOWLING: Right. And it's a yay or nay to participate at all.
14 It's not a yay or nay, you can't decline one time period and it'll give you
15 another time period. You're just not participating. So, you're really --

16 JUDGE HOSKINS: It's not a --

17 MR. BOWLING: Yeah. So, it's just again, just really fundamentally
18 different from what the '615 patent describes.

19 Okay. We'll change gears now. Go to the other obviousness ground,
20 Stivorik. We're going to focus again primarily on the same limitation. And
21 for Stivorik we have a couple of different arguments from lululemon, two of
22 them.

23 One is that there is this daily goal of 2400 calories burned. They say
24 that because it's a daily goal, that's the time period, the user is selecting a
25 day. But they're not presented with an option. They're never -- the system

1 never receives an activity time period from the user. The system already has
2 the activity time period set. It's a day.

3 The user can then select how many calories they want to burn at that
4 point, but they never get to change the activity time period. So, the system
5 never receives anything from the user with respect to time period. It's
6 preset. It's in the system. You can never change it.

7 The only thing you can do, and Judge Cocks, you noted this earlier, is
8 you can retroactively look back at historical performance and there's a
9 couple of buttons that allow you to look at the last day, the last week, the last
10 month. That's retroactive. It's totally different from what we're talking
11 about in the '615 patent where you have the user proactively setting a future
12 goal for themselves to motivate their performance and change those options
13 to what they think is going to be the best for them at that current time.

14 So, neither the 2400 calories a day or these three buttons on the watch
15 are ever evidence that Stivorik disclosure teaching an activity time period
16 being received from the user. It never happens. It's always a day.

17 Okay. They pointed to --

18 JUDGE BELISLE: Sorry. If I understood what you just said about
19 it's always a day, but isn't that good enough? That's a time period and you
20 have a caloric amount. You have a goal. So, you have a goal and a day.
21 Isn't that receiving a time period and a goal?

22 MR. BOWLING: Well, that time period is never received, Your
23 Honor. It's preset in the system. So, the system always has a day. It's
24 hardwired into the watch, the software. It's always a day. So, the system
25 never receives anything with respect to the time period.

26 The user is only inputting a goal of calories and that's it.

1 JUDGE BELISLE: Okay.

2 MR. BOWLING: And the only time a user can pick between time
3 periods is that retroactive view of historical data which has nothing to do
4 with goal setting looking forward. It's just looking back.

5 JUDGE COCKS: So, counsel, I think you were going there, but the --
6 your expert, your declarant, the other side raised some points about setting a
7 daily goal being a time period. Do you recall that? I think it was their slide
8 35. Do you have a --

9 MR. BOWLING: Yeah. Let's flip to that quickly.

10 JUDGE COCKS: -- can you distinguish that?

11 MR. BOWLING: So, I think it was yeah, 35. So all that the expert
12 said in this instance is that in the context of the '615 patent, right, if the user
13 inputs a goal of a day, in that period. That day time period is being received
14 by the system because the user is choosing that time period.

15 So, all he was saying in the context of the deposition was that if the
16 user selects a day as opposed to two days, three days, a week, two months,
17 47 days, that selection is received by the system. So, they're trying to
18 parallel that with Sirmans but it's just not the same.

19 And the difference is that in the '615 patent the user is in control,
20 they're modifying the option, they're modifying the time period. And so,
21 what he testified to there really doesn't have anything to do with Stivoric.
22 He was just admitted the fact, which is true, that if the user of the '615 patent
23 selects a day, the system receives that as the time period.

24 JUDGE BELISLE: Is there a distinction between selecting an activity
25 time period and receiving an activity time period?

1 MR. BOWLING: So, the receiving happens from -- the system is
2 what receives the activity time period. And so as long as the system is
3 receiving that time period it doesn't matter if the user is selecting something
4 or if the user is typing it in freehand.

5 The difference is that the user is the one in control. And in Stivorice
6 that just doesn't happen. The user is simply picking the calorie goal and the
7 day is constant. It's in the system. It's hardwired in there. So, the activity
8 time period is never received by the system.

9 Okay. So, I wanted to cover a couple of extra points real quickly. On
10 the motivation to combine they argued that you could combine Stivorice with
11 Kobayashi because it's a simple software change.

12 And our position is that if you look at Stivorice it's a watch with these
13 three buttons and it would be difficult if even possible -- it would be difficult
14 to do that because the watch is only looking retroactive. So that Stivorice
15 device just isn't equipped to monitor streaks, look forward, and set time
16 periods looking forward. It's just not possible.

17 And their response to that was well, it's just a simple software change.
18 All you have to do is change the software. And so, what they did is they
19 created some code printout. We don't know what it would do. We don't
20 know if it would work with Stivorice. We don't know if it would work with
21 Kobayashi. There's no evidence of that at all. It was a one-page printout of
22 code.

23 And all they asked our expert was is this a simple software code? It
24 was 18 lines long. So, of course, he said yes. And what they asked him,
25 they said in the program shown in Exhibit 1023, "If a user enters Monday

1 for variable A, Tuesday for variable B, then according to your statement the
2 program will print a streak reward/end."

3 And our expert was just reading the code. He said yeah. That's what
4 it would do. Isn't that a simple command? Sure. It's 18 lines long. But
5 that's completely beside the point. That has nothing to do with combining
6 these two references. All it says is that if you put in two variables and use
7 some common language for printing "streak rewards", that that would be a
8 basic program. It doesn't go to the issue at all.

9 Okay. And then lastly, claim 7. They pointed to what they called a
10 new argument for Nike. They said that what we argued in our sur-reply was
11 new. And what we said in our sur-reply is for claim 7, we don't know what
12 they're talking about. They haven't explained how any of this would work.

13 We don't know how you would be combining these, why you would
14 be combining them. And the reason why we don't know is because the
15 petition doesn't tell us anything.

16 And so, we want to direct your attention to page 54 of the petition
17 which is where lululemon argues that Stivoric, in combination with
18 Kobayashi, would render obvious claim 7.

19 Okay. So, claim 7 is a dependent claim of claim 1. And what claim 7
20 adds is that now we're receiving a second activity goal for the same activity
21 time period. So now we have two activity goals in the same time period.
22 And then you determine at a processor whether the received athletic activity
23 data exceeds that second goal.

24 So, you have two goals going on in the same time period. Maybe you
25 wanted to run ten miles over the past nine days, and you also wanted to bike

1 15 miles. So, you're measuring both of those during that same time period.
2 That's what claim 7 recites.

3 Now let's look at what they say. The first sentence they say, and I
4 guess taking a step back, it's all on one paragraph here. So, it starts on page
5 54, it goes a couple lines into page 55, all one paragraph.

6 The first sentence says, Stivorik describes that its device can be used
7 with any set of goals that may be established by a user or a third party.
8 That's their argument. And what they're saying is that Stivorik can be used
9 with any goals. Okay.

10 Then they say Stivorik discloses dozens of potential personal
11 characteristics, measurements, and events and conditions. Okay. So, they
12 said that Stivorik can be used with lots of different goals. Stivorik discloses
13 a lot of different events and characteristics.

14 Third sentence they say many of these well-known parameters
15 represent athletic activity data. And they give some examples, running,
16 walking, biking, lifting weights. So, all they've said so far is that Stivorik
17 can be used for different goals, some of those goals include biking, running,
18 walking, whatever.

19 The next sentence they say Stivorik also discloses tracking other
20 activity information like the duration of aerobic activity. Nothing about two
21 activity goals in the same time period. All they've said is that you can use
22 Stivorik to track a variety of information.

23 And then in the final sentence they say a skilled artisan would have
24 found it obvious to add the ability to set and track goals for any of these
25 other parameters in the same matter as Stivorik as modified by Kobayashi
26 already discloses for calories consumed and calories expended.

1 Nothing about two activities in the same activity time period. There's
2 just nothing there. We've never understood what this refers to. And we
3 didn't present that argument for the first time in our reply. We said it right
4 out of the gate in our response.

5 On page 29 of Patent Owner's Response we said at the very bottom of
6 the page, not only does this passage not relate to a user's goals, it also does
7 not mention an activity time period or whether multiple goals are attempted
8 during the same time period. It just says nothing about that.

9 In their reply at page 18, they recognized that we made that argument.
10 And on page 18 of the reply, if you go to the sixth line from the bottom, the
11 sentence starts, Nike's rebuttal that Stivorice's paragraphs 218 and 287 are not
12 connected -- we're saying they're different. The paragraphs don't make sense
13 together. It's not related to an activity time period or to two activities.

14 They're attacking that and saying that we haven't responded to their
15 obviousness argument. We didn't understand their argument.

16 And so, in our sur-reply we drove that home. And on pages 19 and 20
17 we made the statements that they're saying are new arguments. And
18 beginning at the very bottom of 19, third line from the bottom of Nike's sur-
19 reply we say, and as further discussed, the combination fails because the
20 portions of Stivorice that lululemon relies on -- paragraphs 218 and 227 -- are
21 unrelated, the later not relating to goals, and they do not discuss activity time
22 periods or whether multiple goals are attempted during the same time period.
23 Same thing we said before.

24 And we say lululemon has also not shown why a skilled artisan would
25 combine the teachings of Stivorice's unrelated embodiments. They just
26 haven't told us what's going on. We don't understand the argument. It's a

1 failure of proof to say the least. And they just haven't met their burden to
2 show that these two references in combination render obvious claim 7.

3 So, it's not a new argument. It's just a failure of proof on lululemon's
4 part.

5 Okay. I'll turn it over now to my co-counsel, Ms. Staubach.

6 JUDGE BELISLE: When you're ready.

7 MS. STAUBACH: Ready.

8 First thank you for the LEAP program and thank you for allowing me
9 to be here to argue today. I'm going to talk about ground 1 which is
10 Hoffman anticipation.

11 And this ground is a little bit different because we're not -- the dispute
12 is not centering around limitation 1B. So, we're not arguing over whether
13 the activity time period is received from a user, instead we're talking about
14 limitation 1D which is shown here on the screen.

15 This is Nike's slide 35. And this limitation, it's the concept of a streak
16 that my colleague was talking about earlier. It is determining whether a user
17 has met or exceeded a goal for a predetermined number of consecutive
18 activity time periods.

19 And in lululemon's petition for this limitation they cite for this
20 consecutive feature, the consecutive activity time periods, they cite one
21 paragraph in Hoffman. That's shown here on the right. That's paragraph
22 198. And they quote six words. They say in particular Hoffman discloses
23 that its computing unit recognizes when a user has completed three goals in
24 three consecutive days.

25 Now in the institution decision, as opposing counsel mentioned
26 earlier, the Board preliminarily found that this does not explain how

1 paragraph 198, or those six words meet limitation 1D and it places the onus
2 on Patent Owner and the Board to figure that out for themselves. And also
3 for the Hoffman ground lululemon has provided no expert testimony.

4 Now lululemon hasn't shown that Hoffman discloses limitation 1D for
5 a couple of reasons. And the first reason is that Hoffman fails to teach the
6 consecutive determination. So even though Hoffman says three goals in
7 three consecutive days, as you saw in the permutation table that could be one
8 goal on day one, one goal on day two, one goal on day three or it could be
9 three goals on day one, no goals on day two, no goals on day three or
10 various other permutations.

11 But what they haven't shown is that there is a determination on each
12 of those three consecutive days. What Hoffman says is that there is a single
13 activity time period and that is three days. So, this would be, at the end of
14 that three days there's a determination as to whether three goals were met.
15 What this doesn't say is three goals on each of three consecutive days.

16 If we go back to the claim language, you can see that there's --
17 limitation 1B says receiving an activity time period and this determines,
18 limitation 1D determines for each of those consecutive time periods whether
19 the user exceeded the first activity goal. So, paragraph 198 of Hoffman does
20 not teach that.

21 Now lululemon argues that the consecutive determination is inherent
22 in Hoffman's disclosure. They cite the Kennametal case, and they say that a
23 POSITA would have known from looking at paragraph 198 that there could
24 be one goal accomplished on each of those three days. But as we just
25 discussed that is not sufficient.

1 JUDGE BELISLE: So, counsel why is it that the skilled artisan
2 reading that would not immediately understand that three goals in three
3 consecutive days, that that disclosure could be three goals day one, three
4 goals day two, three goals day three? Why is it that somebody who knows
5 that they're doing in this field reading that would not come away with that as
6 being at least one interpretation of what that says?

7 MS. STAUBACH: A POSITA, and actually we're looking at Dr.
8 Stone's deposition testimony here where he did say it could be one goal in
9 each of those days. But that doesn't mean that there is a determination made
10 on each one of those three days which is required by the claim.

11 So that could mean, just allowing one goal each of those three days is
12 not enough to meet the claim language. And that's what Nike's position is.

13 And there's another issue with lululemon's argument. That is if we
14 once again go back to the claim language. So, in limitation 1B as we just
15 discussed this says, receiving an activity time period. And then limitation
16 1D cites that same activity time period, consecutive activity time periods.
17 But lululemon's petition for limitation 1B cites only other paragraphs that
18 are unrelated to paragraph 198 which is what they're citing for limitation 1D.

19 So, they're pointing to paragraph 9 which talks about an individual
20 goal of setting running a specified total distance within a specified period of
21 time. And Hoffman, Hoffman's paragraph 198 never takes that same
22 activity time period that's received and then says well a user needs to meet
23 multiple consecutive activity time periods that were set by the user in that
24 paragraph.

25 JUDGE BELISLE: So, Counsel, help me understand the determining
26 part here. It says for example this is paragraph 198 on slide 39 --

1 MS. STAUBACH: Okay.

2 JUDGE BELISLE: -- of Patent Owner's demonstrative. The
3 highlighted portion. A badge may be awarded. So, if it's awarding a badge,
4 seemingly a determination has been made about something. So, a badge
5 may be awarded for a user completing 3 goals in 3 consecutive days. And if
6 I'm reading that and I interpret that to be I had three goals and I had to do
7 those three goals in three straight days. I had three days, consecutive, to
8 accomplish those three goals. And if I did I get an award. How does that
9 not fit with the claim language of claim 1?

10 MS. STAUBACH: That doesn't fit with the claim language because
11 the claim language requires -- well first of all the user sets an activity time
12 period, right. And the --

13 JUDGE BELISLE: Yeah, but you said we're not talking about that.
14 We're just talking about the determination and the consecutiveness.

15 MS. STAUBACH: Okay. Right. So, but the system would need to
16 know for each activity time period whether the user actually completed or
17 exceeded the goal for that activity time period, for multiple activity time
18 periods in a row. And Hoffman instead says completing three goals in three
19 consecutive days. It doesn't say completing three goals on each of three
20 consecutive days.

21 And this is an anticipation ground. Lululemon provided no
22 explanation as to why this would be on each of three consecutive days. So,
23 it's just not here in Hoffman.

24 And we have a couple of other limitations and claims that we dispute
25 in the Hoffman ground. And claim limitation 1E is about presenting a streak

1 reward. And simply because Hoffman doesn't teach determining a streak, it
2 doesn't teach presenting a streak reward.

3 For claim 7 -- I'm sorry. We're on Nike's slide 49. Lululemon hasn't
4 shown that Hoffman teaches a second activity goal tracked over the same
5 activity time period. That is received in claim 1. Lululemon points to
6 various other paragraphs including, we're on Nike's slide 51 now, they point
7 to other paragraphs such as paragraph 190 here that discusses a goal, or a
8 series of goals set by a user. It's essentially like a workout routine. A user
9 finishes one goal, they move on to the next goal. These are undertaken in a
10 series.

11 And there's no disclosure of the same activity time period or an
12 activity time period at all. And certainly not the same activity time period
13 which was identified by lululemon in paragraph 9 from claim 1.

14 This is lululemon slide 62. This is also one of the disclosures from
15 Hoffman that they point to. And this is a, like a flow chart where a user
16 would input a goal at 3706, and then later in 3730 they could add a goal to a
17 workout plan. But once again, this is like goals undertaken one at a time, no
18 activity time periods disclosed at all.

19 The other claim that Nike disputes is claim 13 which depends from
20 independent claim 11. And similar to limitation 1E this is a derivative
21 argument because we're saying that claim 11, the streak determination isn't
22 met and so the greater number of consecutive activity time periods also isn't
23 satisfied.

24 Any questions?

25 JUDGE BELISLE: No. We will place your one extra minute into
26 your rebuttal.

1 MS. STAUBACH: What's that?

2 JUDGE BELISLE: Oh, sorry. Nothing.

3 All set?

4 MR. McCLELLEN: Yes, Your Honor. Thank you.

5 JUDGE BELISLE: Proceed.

6 MR. McCLELLEN: Okay. Good afternoon may it please the Board,
7 once again my name is Forrest McClellen for Petitioner, lululemon.

8 I want to begin with claim construction. And one thing stuck out to
9 me about Patent Owner's presentation just now. And it was Patent Owner's
10 assertion that they are not adding anything to the claims.

11 What I'm showing here on the screen is Petitioner's slide 5. And slide
12 5 depicts the parties' two constructions. Make no mistake, from a user,
13 during a goal setting operation, those are additions to the claims.

14 On the point about the claim language here, we heard some discussion
15 of the fact that perhaps these blue and orange highlighted sections, it might
16 not make a difference to receiving an activity time period. That's not the
17 case. What these show on slide 7 is that the applicant knew how to add
18 these kind of features to the claims and that it affirmatively chose not to do
19 so for the receiving an activity time period limitation.

20 I don't think it would be appropriate to just dismiss this evidence.
21 These show the Applicant chose how they were going to draft their claims.
22 They chose to draft this particular limitation broadly.

23 JUDGE BELISLE: So, counsel, you have a bit of time to talk about
24 this.

25 MR. McCLELLEN: Yes, Your Honor.

1 JUDGE BELISLE: So, let me tell you our situation. We have to
2 construe this term, receiving an activity time period, and we are in this gray
3 area of the difference between reading that claim language in view of that
4 spec versus importing limitations from that spec.

5 And so I have some confidence that no matter which way we go the
6 other side is going to take the opposite view that we either imported or we
7 didn't read it in view. So, help me get out of this gray area. Walk me
8 through why your interpretation is correct again.

9 MR. McCLELLLEN: Yes, Your Honor. This interpretation is correct
10 because the alternative would be importing limitations from the specification
11 into the claims. And just beginning with the claim language, those words
12 literally are not written in the claims.

13 So, if we go to the specification, I want to just skip back to Figure
14 90A here. The reason we think that Patent Owner's construction is
15 importing limitations from the specification into the claims is in part because
16 there are embodiments where the time period is not always received from
17 the user.

18 Here is one example. The time period is received from the device
19 because the device is automatically selecting the time period. Now we heard
20 a lot from Patent Owner's counsel about how this actually all along is the
21 user defining the time period. But if we look at the preceding paragraph in
22 the specification it's just not what it says.

23 What it says is the user sets the goal. And Patent Owner's counsel
24 showed you citations throughout the specification where the user sets the
25 goal. But what you did not see, excuse me, what we did not see was an

1 example of -- for example -- excuse me -- evidence that is always the user
2 that is setting the time period.

3 And so, if the Board were to construe the claims such that they always
4 require the user to set the time period or the time period is always received
5 from the user, then that is dragging these purported limitations from the spec
6 into the claims.

7 JUDGE BELISLE: So, Counsel, Patent Owner says everything in the
8 spec talks about the user doing this.

9 MR. McCLELLLEN: Yes, Your Honor.

10 JUDGE BELISLE: Why is that not enough to bring in user?

11 MR. McCLELLLEN: Well, Your Honor, first of all, the Federal circuit
12 has said you know, in the case that we cited in our reply briefing, that even if
13 every single embodiment is consistent with proposed construction, that does
14 not mandate the construction. So, it just, as a matter of law, even if every
15 single embodiment did do what Patent Owner said it would not mandate the
16 construction.

17 Instead, Phillips says you need to look at the claims, specification,
18 prosecution history -- well in this case prosecution history isn't really
19 relevant but -- and the extrinsic evidence to figure out what the claims mean.

20 So that's what we've presented here.

21 JUDGE COCKS: But counsel I -- when it comes to what you've got
22 highlighted down there, I think their view is that, if I understood correctly, is
23 that because this time period that's automatically selected is based on a first
24 time period that had previously been established by a user, that it's from the
25 user. And I guess, I think I understand that is what's been going on here.

1 The device isn't just picking a time period. It's selecting it based on a user's
2 input.

3 MR. McCLELLEN: Respectfully Your Honor, I disagree.

4 JUDGE COCKS: Okay.

5 MR. McCLELLEN: I disagree. So, this is the paragraph that
6 precedes the one that relates to Figure 90A which we're looking at. And I
7 just do not see in this paragraph where it says the user is establishing that
8 initial time period.

9 Now maybe Patent Owner's counsel is going to point to this third line,
10 it says the user may modify the goal or set another goal for the same time
11 period or another time period. But I just don't think that gets us there.

12 JUDGE COCKS: So just to be clear, based on the first time period
13 which is the bottom of the column --

14 MR. McCLELLEN: Yes, Your Honor.

15 JUDGE COCKS: -- if that is not -- if that first, that reference to first
16 time period is not a prior time -- in your view it's not a prior time period
17 established by the user.

18 MR. McCLELLEN: Correct, Your Honor. Because if you look at the
19 full sentence, well the later half of the sentence it says, based on the first
20 time period for which a goal has not yet been defined. So, what that is
21 talking about is a future time period where there's no goal that's been defined
22 and the device is going to propose a time period as is shown on the left-hand
23 side of the slide in Figure 90A.

24 Okay. Another thing I want to note is that Patent Owner's counsel
25 discussed a lot of citations from the specification that I did not see in their
26 briefing. Some examples are column 45, column 55, Figure 93, Figure 88,

1 Figure 98A, Figure 98B. These were a lot of the examples that were shown
2 at the beginning of the presentation to illustrate the claim construction points
3 that Patent Owner made.

4 Again, I don't think those were previously cited. I don't believe it is
5 fair for the Board to consider them at this point. But even if the Board does
6 consider them, when I was watching that screen what I saw was a lot of
7 evidence that the user sets the goal. What I didn't see was evidence that it is
8 always the user that sets the time period.

9 Okay, I also have to go back to slide 19 of Petitioner's
10 demonstratives. It simply is not true that our expert and lululemon have
11 agreed to Patent Owner's construction. Once again, these excerpts are from
12 the background section of the report and the petition. They are not from
13 claim construction arguments. And actually if we go back to Petitioner's
14 demonstratives --

15 This is expert testimony from Petitioner's expert. Patent Owner was
16 deposing him, and he tells Patent Owner, the claim language notes an
17 element of receiving an activity time period. I don't believe it restricts it to
18 receiving an activity time period from the user. It continues, I also don't
19 believe that that time period necessarily has to be set before, during, or after.

20 So, this statement on -- well I'm showing Patent Owner's slide 19 but
21 we can go to Patent Owner's slide 31. Both experts agree with Nike's
22 construction. It's just not true.

23 And that deposition was taken before Patent Owner's -- Patent
24 Owner's response, before the sur-reply, before these demonstratives.

25 Okay. Your Honor, while we do agree that claim construction is a
26 very important issue in this case, I want to get back the Sirmans ground

1 because I do think that even under Patent Owner's construction Sirmans
2 satisfies this dispute of receiving an activity time period limitation.

3 One thing that I heard form Patent Owner was that Sirmans step in
4 which -- I'm on slide 20 of Petitioner's deck -- Sirmons step in which the
5 member agrees or accepts the protocol criteria. That is not receiving the
6 time period from the user because the user didn't have a choice about what
7 time period they wanted. That was I believe, Patent Owner's argument.

8 That does not work because the claims don't require the user to have a
9 choice. Even under Patent Owner's construction. Let's go back to Patent
10 Owner's construction.

11 I'm now on slide 5 of Petitioner's deck. What it requires is receipt of
12 the activity time period from the user. It's not receipt of the activity time
13 period from the user when the user had options of several different time
14 periods to choose from. So long as the time period is received from the user,
15 then that satisfies -- well during goal setting operation, but that's not an issue
16 of concern. So long as the time period is received from a user that satisfies
17 Patent Owner's construction. And that is what Sirmans does.

18 We go back to slide 20 which depicts paragraph 68 from Sirmans.
19 Okay. Now I want to talk about the Stivorice reference. And I want to begin
20 with the same point. Patent Owner's point of distinction over the Stivorice
21 reference was that well, the time period -- well I don't want to
22 mischaracterize what they said but, as I understand it Your Honor, they're
23 saying once again that in Stivorice the user doesn't have a choice.

24 But once again, it doesn't matter whether the user has a choice. What
25 matters is whether the time period was set by the individual. And here on
26 slide 31 you can see the quote from paragraph 197 in Sirmans. It says that

1 time period was set by the individual regardless of whether the individual
2 had a choice about which time period to pick.

3 Now I will note that Sirmans does appear to disclose that the
4 individual actually does have a choice. If we look at the top highlighted
5 block of paragraph 197 of Stivorice shown on slide 31 it talks about specific
6 time periods such as a day, a week, or a month.

7 And then if we roll down the paragraph a few more lines it says the
8 example shown in Figure 43A shows that a daily goal was set by the
9 individual. Or if we go even further down, that a daily goal of 2400 calories
10 burned was set by the individual.

11 So, what's shown in Figure 43A, what's described in the text, is an
12 example. It's pretty clear that Stivorice is disclosing that the user also could
13 set a weekly period, a monthly period, or some other period. That's what the
14 words such as mean in the highlight.

15 JUDGE BELISLE: Counsel, I think here is a good point to help us
16 again with the historical versus forward looking aspect of this reference.

17 MR. McCLELLAN: Yes, Your Honor.

18 JUDGE BELISLE: Because it's difficult to reconcile how historical
19 data where I can select windows of time and find out my performance aligns
20 with the active steps of this method of receiving the data from the user and
21 the time period, and then determining the, whether it exceeds the goal or not.

22 So, take me through that again for Petitioner's argument here.

23 MR. McCLELLAN: Okay. Two points, Your Honor. The first point
24 is we respectfully disagree that Sirmans is only talking about historical data.

25 We believe the statements in paragraph 197 of Stivorice that say was set by

1 the individual indicate the goal and the time period are set before the user
2 begins exercising.

3 But if we go back to the claim language, and I'll go to slide 1 of
4 Petitioner's demonstratives. It just displays claim 1. Our argument is that
5 the claim does not require that time period to be received before anything
6 else.

7 The claim language simply does not recite that those first three steps
8 have to happen in any particular order. They're listed in a particular order,
9 but they don't say first receiving, second receiving, third receiving, and so
10 on. So, we don't agree that there's a temporal restriction here that would
11 eliminate Stivorik from contention.

12 And along the same vein Your Honor, an argument was made that
13 because this day time period might preprogram into Stivorik and the user
14 then selects that day program, that doesn't count as receiving the day from
15 the user. We disagree. That still counts. Because once the user has clicked
16 accept or selected the day, that is an instance in which a time period is
17 received from the user.

18 Okay. Slide 42 and 43. The software code. Your Honor --

19 JUDGE BELISLE: Let me stop you.

20 MR. McCLELLLEN: Yes, Your Honor.

21 JUDGE BELISLE: Before we leave slide 31. I just want to make
22 sure I understand your argument regarding the time period. So, I'm going to
23 give you my understanding, you can tell me if it's correct or not to what your
24 argument is.

25 My understanding is you're looking at, on slide 31, the disclosure of
26 Stivorik that says you have energy related data namely calories consumed,

1 and calories burned by the individual over specific time periods such as day,
2 week, or month. And then down a sentence or so we say that the example in
3 the figure is showing me a daily goal. But what I hear you saying is the
4 demonstration that this disclosing and receiving a time period is that that
5 example of a daily goal could also have been the week or the month from the
6 prior time periods that were provided as an example.

7 Now you're looking skeptical. Do you want to move on to that one
8 more time for me then?

9 MR. McCLELLEN: I apologize, Your Honor. I wasn't trying to look
10 skeptical. I just wasn't sure I was following. I believe I follow.

11 So yes, Your Honor. One point I made was that Patent Owner's
12 counsel said Stivorice is restricted to the day time period. I do not agree that
13 is correct based on this disclosure. This, the first highlighted block here says
14 a day, a week, or a month. So, our position is that indicates Stivorice can
15 accept different time periods other than a day.

16 It's not critical to be frank, because even just setting a day is enough.
17 It doesn't matter if you can also set weeks or months. Even if the user just
18 sets the day that is actually --

19 JUDGE BELISLE: Well but that -- sorry. Patent Owner's argument
20 though is that the daily goal is hard wired. But what I'm hearing you argue
21 is that it's not hard wired because it could have been a day, it could have
22 been a week, or it could have been a month for that time period.

23 MR. McCLELLEN: Correct, Your Honor. I don't agree it's hard
24 wired, but I also don't think it matters if it's hard wired or not because it says
25 a daily goal was set by the individual. So, the user is picking the day time
26 period.

1 JUDGE COCKS: Well just to go a little bit farther. So even if this
2 reference Stivoric only allowed for daily selection. You can only pick daily,
3 that's still sufficient for the claims.

4 MR. McCLELLEN: Yes, Your Honor because the user picks it.
5 Even if they had no other choice. Even -- of course, they could not pick it.

6 JUDGE COCKS: So not pick it, I guess you're saying.

7 MR. McCLELLEN: Correct. Even if they've got one option and it's
8 pick day, that still satisfies the claims because the claims require the time
9 period to be received. That's it. Or received from a user in Patent Owner's
10 view.

11 Okay. The computer code. Very briefly, Your Honor. This is the
12 first time I've heard a rebuttal to this point raised on the computer code. If
13 you look at the sur-reply they did not respond to this testimony from their
14 expert when we raised it in our reply brief.

15 But all this illustrates is that determining whether somebody has
16 exercised in two consecutive days is trivial. We've just shown an if function
17 here. If Monday and Tuesday then reward. So that's the point of these
18 slides, that's it.

19 Okay. We have this dispute about the objection that we submitted
20 earlier, and I just want to clarify something here. So I'm going to pull up the
21 petition. This is page 55 of the petition. And what I heard Patent Owner's
22 counsel say is that well really their argument is they don't understand, or
23 they think that we haven't recited this argument with particularity in our
24 petition.

25 I've highlighted on slide -- excuse me, on page 55 of the petition part
26 of the first paragraph shown on that page. The argument is this. A person of

1 ordinary skill would have found it obvious to add the ability to set and track
2 goals for any of these other parameters.

3 I'll go back to Petitioner's demonstratives briefly. I'm on slide 55 of
4 Petitioner's demonstratives. On the right-hand side of the slide you can see
5 some of the other parameters that we're talking about.

6 Now I'll go back to the petition, page 55. Would have found it
7 obvious to add the ability to set and track goals for any of these other
8 parameters in the same manner as Stivorice as modified by Kobayashi already
9 discloses for calories consumed and calories expended.

10 Well, what's that talking about? I will show you. Let's go back to the
11 slides, Petitioner's demonstratives. I'm on slide 47. This is how Stivorice
12 already tracks calories consumed and calories burned. It's on the LCD
13 screen on device 1200. So, what we were saying in the petition is look, you
14 just swap out one of these two goals here. That's what that meant.

15 Okay. Hoffman very briefly, Your Honor. Patent Owner criticized us
16 because we basically cited this three goals in three consecutive days
17 language from Hoffman for the limitation 1D. We cited it because in our
18 view it's sufficient. And their expert confirmed. I'm on Petitioner's
19 demonstratives 52, that what it meant was three goals in each of three days
20 or one goal in each of those days. And that is sufficient to meet this
21 limitation.

22 There was some discussion about determining. But if what the
23 language shown on 51, three goals in three consecutive days means is for
24 example, one goal in each of three days and then you reward a user if they
25 complete one goal in each of three days then the system's made a

1 determination that you completed a goal in each of those days. So, the
2 determining step is satisfied.

3 One moment, Your Honor.

4 JUDGE BELISLE: Counsel, what's your position as to how many
5 determinations have to be made when I have three consecutive activity time
6 periods?

7 MR. McCLELLLEN: Your Honor, the claim requires a single
8 determination. So, it could be a determination that the user exceeded the
9 goal in each of those consecutive time periods, but you could make that
10 determination after the time periods had elapsed, for example or you could
11 make it during the time periods. I don't think it makes a difference.

12 JUDGE BELISLE: Would I have to make the determination for each
13 time period or the set together?

14 MR. McCLELLLEN: You have to make the determination that the
15 goal was exceeded in each of the time periods. Does that answer your
16 question, Your Honor?

17 JUDGE BELISLE: I believe so. So, I determine it's exceeded or met
18 in the first period. Then the next period, the next consecutive period, then
19 the next consecutive period. So determine, determine, determine.

20 MR. McCLELLLEN: Yes, Your Honor. And if this language shown
21 on slide 51, three goals in three consecutive days means one goal in each of
22 those days or three goals in each of those days, then if the system is
23 rewarding the user with a badge for doing that then it's made a determination
24 that they've exceeded or met on each of those days.

25 So, with that Your Honor, I'll -- with that Your Honor, I'll end my
26 presentation. Thank you very much for your attention.

1 JUDGE BELISLE: Thank you.

2 Patent Owner you have a total of 16 minutes. Just let me know when
3 you're all hooked up.

4 MR. BOWLING: Thank you, Your Honor.

5 Okay. All set, Your Honor. Thank you.

6 We wanted to quickly start off, counsel has indicated that some of the
7 citations we walked the court through at the beginning were new. We don't
8 believe we cited any new columns. Column 54 was cited in our sur-reply
9 pages 3, 5, 6, 7, and 21. Column 55 is in our Patent Owner response at page
10 4. Column 51 we referred to in our Patent Owner response at page 4, and
11 our Patent Owner preliminary response at page 4. And so, all of those
12 columns we walked through were in the papers.

13 But we think that's beside the point. We think it would be fairer for
14 the Board not to consider in the claim term in view of the entire patent which
15 is very clearly stated in Phillips. So, it's kind have been our point all along is
16 that we need to look at the whole patent in its appropriate context. We find
17 it telling that lululemon does not want the Board to look at the specification
18 and instead do what it's encouraged you to do so far which is construe the
19 terms in a vacuum.

20 Next we wanted to direct Your Honors to column 51 of the '615
21 patent. That's at page 195. At the very top of column 51, both parties have
22 pointed to this, but we think it drives home a couple of points. It says from
23 the detailed information display, again we're talking about the application
24 here, user may select a goal setting option, 8713.

25 It's that same goal setting option that's discussed throughout the
26 specification over and over. And then it says the goal may correspond to a

1 specified amount of time such as a day, an hour, a week, a month, or the
2 like. And then at the bottom of that paragraph it says alternatively the user
3 may define his or her own goal time period.

4 What we want to point out here is what we've been saying all along
5 which is the goal in the '615 patent corresponds with the goal time period,
6 that's the only way it makes sense. The user is setting both of them at the
7 same time. And that's why we think those two portions of our proposed
8 construction need to be in there.

9 And so lululemon's counsel pointed out that a lot of these portions of
10 the specification just talk about modifying the goal. But that includes the
11 goal time period and the actual activity goal. So, all of that discussion about
12 modifying the goal, the user being in control of the goal, and changing their
13 goal in different circumstances. All of that relates to the time period when
14 it's central to the invention that's claimed in the '615 patent.

15 When we were talking about the specification and the gray area that
16 Your Honors pointed to, lululemon's counsel pointed you to the Libra-
17 Fleisching case. This is in error because that's a disclaimer case. It's not
18 specification disclaimer. In that case the Court was departing from the
19 ordinary meaning. It was giving a totally different meaning to the term.
20 That's not what we're doing here, and that case law does not apply here.

21 In that case they said even if all the embodiments are one thing, it's
22 not enough for a specification disclaimer. But that's not what we're claiming
23 here. We're encouraging the Board, as it must, to view the claim term in
24 view of the entire specification. And earlier we pointed to Phillips as
25 supporting law on that point.

1 Judge Hoskins, I believe you asked for our best Federal Circuit law.
2 And we just wanted to read some of the quotes from Phillips that we think
3 are on point here. And we're pointing to Phillips beginning at 415 F.3d
4 1315. And the en banc Federal Circuit in that case said claims must be read
5 in view of the specification in which they are a part. The specification is
6 always highly relevant to the claim construction analysis. Usually it is
7 dispositive. It is the single best guide to the meaning of a disputed term.

8 And they go on to say in the next paragraph, this principle has a long
9 pedigree in Supreme Court decisions. And then they say in the following
10 paragraph, the importance of the specification in claim construction derives
11 from its statutory role. This close kinship between the written description
12 and the claims is enforced by the statutory requirement that the specification
13 describe the claimed invention in full, clear, concise, and exact terms.

14 And that's what the inventors did here. Over and over again. Two-
15 hundred and ten pages of this patent repeatedly, a user-driven process, the
16 user is the one who's providing the activity time period and providing the
17 goal.

18 Lululemon's Counsel pointed to their expert's statement in the
19 deposition and they're trying to distance themselves from what he said in his
20 opening declaration and in what they said in the Petition. But what he said
21 in the deposition was influenced by the fact that he had seen the Institution
22 Decision. Then he changed his tune based on the context of the litigation.

23 His opinion without any litigation bias, out of the gate, was that the
24 user is the one who is setting the activity time period and setting the goal.
25 And we think that's telling.

1 Lastly, we wanted to direct Your Honors to lululemon's slide 31
2 where we're talking about Stivorik. So, on that slide, lululemon's slide 31,
3 they've said over and over that the user "clicks on a day", clicks on a day.
4 That does not happen in Stivorik. There's no disclosure of that. During the
5 goal setting point, which is the relevant point we're talking about today the
6 user is only able to change the number of calories that they're setting.

7 And they pointed to this statement that says the example shown in
8 Figure 43A shows that a daily goal of 2000 calories consumed was set by
9 the individual. Their argument is that that means the day was set by the
10 individual. It wasn't. The day is preprogramed. The system never receives
11 an activity time period from the user.

12 The only thing that's set by the individual is the daily goal of 2000
13 calories. There's never a time period that's received in Stivorik.

14 JUDGE BELISLE: So, counsel, on that exact sentence of the
15 example shown in Figure 43A shows that a daily goal was set. Could that
16 not have, given that it's just an example from what was set above, could that
17 not have said that it was a weekly goal or a monthly goal?

18 It strikes me that this paragraph is disclosing time periods such as a
19 day, a week, or a month. And that it's just providing an example of arguably
20 the selection of the day as opposed to week or month for a goal of calories.

21 What I'm hearing is we should read this as being limited to a
22 hardwired daily goal that the above sentences suggest that there's other time
23 periods that could have been selected and thus it's not necessarily hard wired
24 to a daily goal.

25 MR. BOWLING: Yes. So, as we read Stivorik, and as our expert has
26 read, and I think Judge Cocks hinted at earlier, is that Stivorik describes that

1 day, week, and month button as a way to look back. There is never a way
2 where you can set a goal for anything other than, looking forward, anything
3 other than a day.

4 You can only look back. There's no disclosure whatsoever. There's
5 never a time where the user can set a weekly goal of -- do some math --
6 14,000 calories consumed as opposed to a daily goal of 2000 calories
7 consumed. It's just not there.

8 And we don't think the system is equipped for that. The way that it
9 describes those buttons is it only looks back historically.

10 JUDGE BELISLE: What limitations in claim 1 preclude looking
11 back, doing a historical count?

12 MR. BOWLING: Yes, Your Honor. We think the way that the
13 specification describes this again, over and over and over again is that the
14 user is in control. The user sets an activity time period at the same time
15 they're setting their goal. That happens in every single instance across a
16 210-page specification. At every point that happens.

17 And it wouldn't make sense to set the goal in any other way. It
18 wouldn't make sense to pick five miles but not set a time period at the same
19 time. So those two things always happen together. And so, looking back
20 just is completely fundamentally different disclosure than what the '615
21 patent is referencing when it talks about an activity time period that's being
22 received by the system. It's received during a goal setting operation as we
23 know from repeated disclosures in the specification.

24 JUDGE BELISLE: I understand that. But if I as the user have been
25 performing my exercises and now I want to know did I exceed my goal for
26 three consecutive days last week, how -- is that -- I don't see that as being

1 precluded in the scope of this method claim. Meaning that I could put in my
2 activity data -- well the activity data has been received, the activity time
3 period has been received. My goal that I want to check on is received. The
4 determination, looking at that data is done and then there can be the
5 presentation of a streak reward.

6 So what I'm just trying to -- my real question here is how does claim 1
7 preclude looking backwards to the data?

8 MR. BOWLING: Yeah, so we read this claim, and we're looking at
9 claim 1 now, as receiving the activity time period happens, then the system
10 receives the first activity goal --

11 JUDGE BELISLE: Okay. So --

12 MR. BOWLING: -- before --

13 JUDGE BELISLE: -- then right there. Are you, is it your position
14 that these limitations in claim 1 are in a particular order?

15 MR. BOWLING: Well at least with respect to these terms, and we'll
16 walk through this. There's some antecedent basis here that we think is
17 important. So, then the next term says receiving a first activity goal for the
18 activity time period, the one that was just referenced.

19 So, the user sets the activity time period, then the system receives a
20 first activity goal for the activity time period. And then it's determined at a
21 processor whether the received athletic activity data, which is the first
22 element of the claim, exceeds the first activity goal for a predetermined
23 number of consecutive time periods.

24 And we think that ordering of things again is supported over and over
25 again by the specification.

1 JUDGE BELISLE: So, prior to right now, has Patent Owner made
2 that ordering argument in the briefs?

3 MR. BOWLING: I think to the extent we're talking about the
4 disputed term, we've said from the get go that this receiving activity time
5 period needs to happen necessarily at the goal setting operation. So, we've
6 certainly made that argument over and over.

7 And in the context of presenting a streak reward based on the data, I'm
8 not sure that there's any other way that the claim would make sense.

9 JUDGE BELISLE: Okay.

10 MR. BOWLING: That's it from us, Your Honor.

11 JUDGE BELISLE: Okay. Is your co-Counsel doing anything more
12 on the rest or no?

13 MR. BOWLING: No.

14 JUDGE BELISLE: All right.

15 MR. BOWLING: Thank you.

16 JUDGE BELISLE: Thank you, Counsel.

17 This case is submitted and taken under advisement. Before we go off
18 the record though I just want to say thank you to both parties for allowing
19 some of your counsel to participate in the LEAP program. It's nice to see
20 that it's being taken advantage of. It's nice to see that it's not just being taken
21 advantage of for time and that you actually get to argue substantively in the
22 cases.

23 So, thank you for doing that and I hope you can spread the word to
24 your firms and your colleagues to take advantage of this. We don't brutalize
25 the LEAP practitioners too much. And as you see first-hand, the LEAP
26 practitioners are allowed to get assistance from other counsel. So please

1 advocate for this program. I think it's a great thing for the younger
2 attorneys, or newer attorneys I should say.

3 Thank you. We're off the record.

4 (Whereupon, the above-entitled matter went off the record at 3:55
5 p.m.)

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