

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.

IPR2023-00424
Patent 10,923,225 B2

Record of Oral Hearing
Held: April 16, 2024

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

IPR2023-00424
Patent 10,923,225 B2

APPEARANCES:

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The above-entitled matter came on for hearing on Tuesday,
April 16, 2024, commencing at 10:00 a.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

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JUDGE COCKS: Good morning. Welcome to the Board. Today we're here for oral argument in proceeding IPR2023-00424 involving US Patent No. 10,923,225.

I am Judge Cocks. I am joined in the hearing room by Judge Belisle and joined by Judge Hoskins, who is attending this hearing remotely. The parties in today's hearing, Petitioner is Lululemon Athletica Canada Inc. and Lululemon USA Inc., and Patent Owner is Nike, Inc.

Let's begin with introduction of counsel. Would Counsel for Petitioner please state their appearance?

MR. ARJOMAND: Good morning, Your Honors. Mehran Arjomand of Morrison & Foerster for Petitioner. With me is Jean Nguyen of Morrison & Foerster. Also in the audience are Alex Yap and Kyle Mooney of Morrison & Foerster.

JUDGE COCKS: Thank you, Counsel.

And would Counsel for Patent Owner please state their appearance?

MR. BOWLING: Good morning, Your Honors. Aaron Bowling of Arnold & Porter on behalf of Nike. With me at counsel table is Michael Harris of Arnold & Porter. Also joining us today is Katie Duffy and Jonathan Swisher of Arnold & Porter, and from in-house at Nike, Kim Van Voorhis.

JUDGE COCKS: Thank you, Mr. Bowling.

As we set forth in the trial hearing order, each side has up to 60 minutes to present argument. Petitioner bears the burden of showing unpatentability and will argue their case first and may reserve rebuttal time.

1 Patent Owner will then argue their opposition to Petitioner's case and
2 may reserve sur-rebuttal time. Petitioner will then argue any rebuttal. And
3 we will conclude with Patent Owner arguing any sur-rebuttal.

4 We have the parties' record and the entire record before us, including
5 the parties' demonstratives. For completeness of the record and so that the
6 panel can follow along, when referring to any slide number in the slide deck
7 or exhibits or paper numbers, please identify specifically which document
8 you are referring to.

9 With that said, Petitioner, the podium is yours whenever you're ready
10 to begin.

11 Counsel, do you wish to reserve rebuttal time?

12 MR. BOWLING: Yes, Your Honor. Twenty minutes, please.

13 JUDGE COCKS: You may begin when you are ready.

14 MR. ARJOMAND: Good morning, Your Honors, and may it please
15 the Board. Petitioner respectfully submits that the challenged claims of the
16 '225 Patent are unpatentable.

17 Turning to slide 2, this provides the road map for today's discussion
18 on Petitioner's end. I'll begin with a brief summary of the '225 Patent. Then
19 I'll turn to the claim construction issue in this proceeding with respect to the
20 term data. And then my colleague, Jean Nguyen, will address the prior art
21 grounds beginning with Acres.

22 So the '225 Patent is directed to an athletic activity tracking system
23 that comprises a user's portable equipment and exercise equipment. As
24 shown here on slide 4, in the passage at column 19, lines 41 to 46, the '225
25 Patent discusses that the user's portable equipment can control the exercise
26 equipment.

1 And further, also as shown here on slide 4, the '225 Patent describes
2 that the user's portable equipment can display or can send information to the
3 exercise equipment for display by the exercise equipment.

4 Now turning to slide 5, slide 5 shows Figure 6. It provides a little bit
5 more detail as to the user's portable equipment. For example, the user's
6 portable equipment can comprise a module 502, that's shown in green, an
7 interface device 506, that's shown in orange, and an electronic device 508,
8 that's shown in yellow in slide 6. They can transfer information to the
9 exercise equipment, which is shown -- it's listed as 604 and shown in purple
10 on slide 5.

11 Now turning to slide 6, there are two independent claims in the '225
12 Patent. Slide 6 shows claim 1. And there are three recitations in the method
13 claim. There's an establishing recitation and two transmitting recitations.

14 The transmitting recitations are really the focus of today's hearing.
15 Specifically, there is recitation 1B that provides, quote, transmitting, by the
16 sensor device and to the piece of workout equipment, a first set of data for
17 operating a first function of the piece of workout equipment, unquote.

18 And then limitation 1C provides, quote, transmitting, by the sensor
19 device and to the piece of workout equipment, a first set of activity data
20 corresponding to an activity performed by a user during a first time period,
21 wherein the piece of workout equipment is configured to display the first set
22 of activity data, unquote.

23 Now there is discussion in the '225 Patent that corresponds to these
24 two limitations, 1B and 1C. So turning to slide 7, this passage that's shown
25 here at column 19, lines 41 through 46, provides that the user's portable
26 equipment can control the exercise equipment. And that corresponds to the

1 first set of data for operating a first function. That's in recitation 1B that I
2 just read into the record.

3 And then here on slide 8, there's discussion in the specification -- for
4 example, in columns 4 and 5 -- that talk about outputting physical or
5 physiological data or performance data that's presented on the display
6 system.

7 So with that brief introduction to the '225 Patent, let me turn to the
8 claim construction issue, which is with respect to the term data. Slide 11
9 shows the parties' proposed construction for the term data. Petitioner's
10 construction is information. Patent Owner's construction is factual
11 information that is sensed or collected, and from which decisions or
12 subsequent actions can be made.

13 Now turning to slide 12, the Board has already addressed the meaning
14 of data in its institution decision. And just to step back for a second, in the
15 Patent Owner Preliminary Response, Patent Owner did not provide a
16 construction for data. What Patent Owner did was that they applied -- when
17 they were applying the claim language to the art, they provided a definition
18 for data in that application.

19 And specifically, what they provided was factual information from
20 which decisions and subsequent actions can be taken. And then they argued
21 in the Patent Owner Preliminary Response that data under that meaning was
22 not met by the prior art in the petition because it disclosed commands or
23 instructions.

24 So the Board addressed that argument in its decision on institution.
25 And this is at slide 12.

1 It said that it was difficult -- I should say, quote, it is difficult to
2 objectively conclude, as Patent Owner urges, that the ordinary meaning of
3 data is so restrictive, unquote. And then it went on to say that, quote, it is
4 not immediately clear that such a command or signal is entirely devoid of
5 content recognized as factual information, unquote.

6 So based on that decision, what Patent Owner has done is that they've
7 retooled their construction. And I'm turning back to slide 11. And what
8 they've done is they've added that is sensed or collected following factual
9 information.

10 And they've changed a little bit from which decisions or subsequent
11 actions can be made to -- well, they had it previously from which decisions
12 and subsequent actions can be taken. So they've changed and to or and
13 taken to made. But the real focus, I think, of their change is the addition of
14 that is sensed or collected.

15 And they've argued in their Patent Owner Response that that somehow
16 distinguishes from the prior art. But in our view, Patent Owner's new
17 construction is not consistent with the claim language, it's not consistent
18 with the specification, it's not consistent with the prosecution history, and it's
19 also not consistent with the extrinsic evidence in the record.

20 So let me first turn to the claim language. And I'm going back to slide
21 6, Your Honors. The claim provides data in limitation 1B. It says a first set
22 of data. And data, as we know from testimony from our expert, Dr. Houh, is
23 a very broad term. And in the limitation 1B, there's no adjectives or
24 qualifiers associated with data. It just says a first set of data.

1 Now, Patent Owner knew how to narrow data. So if you take a look
2 at limitation 1C, they added the adjective activity data or activity to activity
3 data. And that was a narrowing that they, I believe, concede in their papers.

4 Both of those terms do not have the words that they now seek to
5 comport via their claim construction. Specifically, that is sensed or collected
6 and from which subsequent actions or decisions can be taken.

7 JUDGE COCKS: So let me ask you a question.

8 MR. ARJOMAND: Yes.

9 JUDGE COCKS: Is there any type of activity data that wouldn't be
10 sensed or collected?

11 MR. ARJOMAND: Is there any type of activity data that wouldn't be
12 sensed or collected?

13 JUDGE COCKS: In the context of the '225 Patent?

14 MR. ARJOMAND: Your Honor, right now, I don't think so just
15 standing here. But I think that there is definitely, in the context of limitation
16 1B, a first set of data. That data is much, much broader than the current
17 construction that they're proposing.

18 JUDGE COCKS: Let me ask you, actually, a follow-up question in
19 terms of Petitioner's construction of information.

20 MR. ARJOMAND: Yes.

21 JUDGE COCKS: What type of transmission would not be
22 information in Petitioner's view? What would not constitute information?

23 MR. ARJOMAND: What would not constitute information? Well, I
24 think, Your Honor, it's a broad term. And I think in the context of the '225
25 Patent, what we believe is that whatever the outer bounds of data is, it
26 certainly encompasses the art that we have.

1 So I can't stand here and say what the outer bounds of the construction
2 would be. What I can say is certainly that if you construe this information, it
3 would capture what's in our prior art grounds.

4 JUDGE COCKS: I understand your answer. If at any time during
5 your presentation or in your rebuttal, if you can come up with an example of
6 something that would not be information, that might be useful.

7 MR. ARJOMAND: Okay, understood. So we think that the claim
8 language is broad, Your Honors. And we think that the construction that
9 they're proposing is not consistent with the plain words of claim 1, but I
10 don't think that argument is just limited to claim 1.

11 If you take a look -- I'm moving back to slide 13 now -- there's a
12 dependent claim that depends off of claim 1. And that provides, quote,
13 wherein the first set of data comprises user identification information,
14 unquote.

15 And in our view, if you accept our construction of data as information,
16 claim 9 is consistent with claim 1. Claim 1 recites a first set of data or, in
17 our view, a first set of information. And claim 9 further recites that that first
18 set of data comprises user identification information. So it narrows
19 information down to user identification information.

20 Now, the problem that Patent Owner has is that when you consider
21 their construction, it's not consistent with claim 9. We have here testimony
22 on slide 14 from our expert, Dr. Houh.

23 He testified that, quote, a POSITA would not understand the user
24 identification information of the '225 Patent to be sensed or collected by a
25 sensor device, unquote. And this is from his declaration, paragraph 13,
26 Exhibit 1015.

1 Dr. Houh's testimony here, in our opinion, is consistent with Patent
2 Owner's expert's testimony, Dr. McLean. So let me just jump forward to
3 slide 41.

4 JUDGE BELISLE: Counsel, on that last point --

5 MR. ARJOMAND: Yes.

6 JUDGE BELISLE: -- how would user identification information, to
7 say it simply, get into the system or get into the machine if it wasn't
8 collected by a sensor device?

9 MR. ARJOMAND: Yes, it can be collected by a sensor device. Yes,
10 Your Honor, that's correct. But I think, as you'll see from Dr. McLean's
11 testimony, he believes that the claim language as construed by Patent Owner
12 excludes such a collection. That's the testimony that you'll see here. He
13 believes that sensed or collected excludes identification information.

14 JUDGE BELISLE: But why?

15 MR. ARJOMAND: Because in his view, what the claim was directed
16 at, it was directed to performance data. That's what's being sensed or
17 collected.

18 So I'm right here on slide 41. We've asked Patent Owner's expert the
19 following question. This is at page 35, lines 3 to 8, Exhibit 1014.

20 Quote, and when you say the system receives additional types of
21 information that the sensor senses or collects performance data, is it your
22 opinion that performance data is the only data that the sensor device senses
23 or collects?

24 And he answered, yes. So that's a very clear answer to, I believe, a
25 very clear question. He believes that a system or a sensor device that senses
26 or collects only is collecting performance data.

1 So we followed that up with a question about identification
2 information. Here I am on slide 43, Your Honors, again Exhibit 1014. I'm
3 looking at the testimony on the left. This is from page 35, lines 16 to 22.

4 We asked again of Dr. McLean, quote, so in your opinion, does the
5 sensor sense or collect factual information that is identification information,
6 unquote. And what he said was, quote, so the sensor collects or senses
7 factual information related to athletic performance, unquote.

8 Then we asked -- and this is the testimony on the right -- quote, in
9 your opinion, is identification information factual information about
10 performance?

11 No. So clearly in Dr. McLean's view and clearly in our expert's view,
12 Dr. Houh, when you are trying to construe the claim a first set of activity --
13 I'm sorry -- a first set of data as factual information that is sensed or
14 collected, that is directed to performance data, and it excludes identification
15 information. So there is an inconsistency in Patent Owner's construction
16 between claim 1 and claim 9.

17 All right. So that's with respect to the claim language. Let me just
18 point you to the specification. We think that the specification supports our
19 construction as well and undercuts Patent Owner's construction.

20 So turning to slide 16, Your Honors. Actually, maybe it would be
21 helpful to turn back to slide 6 for a second. One thing I think is important to
22 understand with respect to claim 1, and specifically limitation 1B, is that the
23 claim begins with the transmission by the sensor device. Essentially, the
24 claim starts with the output of the sensor device.

1 And now going back to slide 16, what's shown here is Figure 4 of the
2 '225 Patent. This is shown on the left. It's showing sensing system 408. It
3 has sensors A and B, and it has a microprocessor as well.

4 And what the two passages in slide 16 are showing are discussions
5 relating to Figure 4. So specifically at column 14, lines 64 to 67 -- this is the
6 passage on the top -- the '225 Patent says, quote, the microprocessor on
7 board the sensing system 408, if any, may process the sensor data, change its
8 form or format, or otherwise manipulate the data prior to sending it on to
9 other parts of the system 400, unquote.

10 And then it goes on to say in column 15, lines 5 through 9 -- this is
11 the 225 specification, Your Honors -- quote, the sensing system 408 may
12 send at least some portion of its data (for example, raw data directly from
13 one or more sensors, data derived at least in part from the raw data, et cetera)
14 to the electronic device 402, for example, for eventual output to a user via
15 electronic device 404, unquote.

16 So what the specification, I think, makes clear is that the transmission
17 from the sensing system can include raw data, but it can also include data
18 that's processed or derived from the raw data. Under our construction of a
19 first set of data being information, it's perfectly consistent with Figure 4.

20 The information can be raw data. It can be data derived, at least in
21 part, from the raw data. It can be manipulated data or processed data. But
22 under Patent Owner's construction that factual information that's sensed or
23 collected, it has to be purely raw data.

24 And that construction might not seem immediately apparent from just
25 the words factual information that is sensed or collected, but when you see
26 the way they're applying it to Acres and Abbondanza, when my colleague

1 will discuss those grounds, you'll see that they are requiring the claim to be
2 limited just to the transmission of raw data.

3 We believe that that's an arbitrary exclusion of what's disclosed in the
4 specification. And it's inconsistent with their -- basically, it doesn't support
5 their construction.

6 There are other passages, Your Honors, in the specification that I
7 think are consistent with our construction. There's a long paragraph in the
8 '225 Patent beginning around column 19, line 34, all the way to the end of
9 that column. It discusses at length the types of data that may be transferred
10 from the user's portable equipment to the exercise equipment.

11 Here on slide 18, we have one portion of that discussion. This is the
12 portion at column 19, lines 34 to 40. What it discusses repeatedly in this
13 paragraph is that data is information. It's different types of information. For
14 example, on this slide, it's identification information.

15 On slide 19 -- this is another portion of this paragraph -- it talks about
16 workout information. On slide 20, which is the tail end of this paragraph, it
17 talks about workout identification information. And the end, it says other
18 information also may be transmitted from the user's portable equipment.

19 Now, my understanding is that Patent Owner's Counsel might get up
20 here and say that their construction is consistent with all of these different
21 types of information that I've just rattled off. But the reality is that, I think,
22 our construction is truer to this passage because it's more encompassing of
23 the different types of information, such as identification information that Dr.
24 Houh and Dr. McLean thought was excluded based on Patent Owner's
25 construction.

1 JUDGE COCKS: Counsel, one question. Any of the types of
2 information you just discussed, workout information and you had a couple
3 of others --

4 MR. ARJOMAND: Yes.

5 JUDGE COCKS: -- are any of those not factual information?

6 MR. ARJOMAND: Well, Your Honor, I'm not sure about the other
7 information that's at the end of column 19, that sentence that's shown here on
8 slide 20. Quote, other information also may be transmitted from the user's
9 portable equipment.

10 I think there are passages in the '225 Patent that I'm going to get to
11 right now that suggest that data can be more than factual information that
12 sensed or collected. So for example, let me just come here to slide 24. This
13 is showing a passage at column 8, lines 5 through 9.

14 And it says, quote, the data providing or sending forth the workout
15 routine information additionally may include the data for presenting the
16 desired media content or data pointing to memory, unquote. So data
17 pointing to memory, to me, is very different from data that is factual
18 information that is sensed or collected.

19 JUDGE COCKS: Well, let me follow up. I understand the sensed
20 and collected aspect. Would data pointing to memory not be factual
21 information? Forget about sensed or collected at the moment.

22 MR. ARJOMAND: I mean, data pointing to memory location, I guess
23 it sort of depends on what you consider to be factual information.

24 If you go -- I can just jump forward here to the definition that's
25 derived from the Wiley Dictionary. This is on slide 31. They're defining
26 data as factual information, such as data derived from observation,

1 experimentation, or calculation, especially that which is used for processing
2 and/or further analysis.

3 So if you mean by factual information what's derived from
4 observation, experimentation, or calculation, I would posit that data pointing
5 to a memory location is not factual information.

6 Since I'm here, Your Honor, I would just like to highlight that I think
7 this definition that they're relying upon is not the proper definition. What we
8 think is the proper definition is the second definition, which is highlighted
9 here, which is, quote, information which is represented in a manner suitable
10 for digital transmission or computer use, unquote.

11 And there was testimony from Dr. Houh -- and I'm here on slide 32 --
12 where he testified that he thought that the second definition was the more
13 applicable to this case. And the reason he said that is shown here on the
14 testimony on the right.

15 This is Exhibit 2005 at page 163 to page 164. He talked about how
16 the '225 Patent is directed to digital transmission from the sensor device to
17 the piece of workout equipment, and the sensor device and the piece of
18 workout equipment are computers. So in his belief, in his view, that second
19 definition is more on-point than the first definition.

20 Turning to the testimony that's on the left, he explains what he
21 understood the first definition to be. And he drew from his own experience
22 as a physics major that he did an experiment once in neutron scattering. I'm
23 just quoting from his testimony here. He said, I took a bunch of data, and I
24 wrote it in my lab notebook, and I used that data to perform analysis.

25 So in our view, the first definition, that kind of factual information is
26 very different than what's at issue here. And we think the second definition,

1 which is more consistent with our construction, is simply information.
2 That's why we have presented our construction as information without any
3 kind of factual adjective added to it.

4 JUDGE COCKS: Just to be clear, this dictionary definition, you have
5 a motion to exclude seeking to exclude a separate dictionary definition; it's
6 not this dictionary definition?

7 MR. ARJOMAND: That's correct, Your Honor.

8 JUDGE COCKS: I think that's Exhibit 2003 --

9 MR. ARJOMAND: Yes.

10 JUDGE COCKS: -- the subject of the motion.

11 MR. ARJOMAND: Yes.

12 JUDGE COCKS: Thank you.

13 MR. ARJOMAND: And since you asked for that or you've raised
14 that, I should say that -- I will just address that right now. This is slide 34,
15 Your Honor. This is showing the Oxford Dictionary of Computing. The
16 exhibit that was introduced into evidence, Exhibit 2003, was the sixth
17 edition, which was dated 2008, which post-dates their priority date that they
18 are asserting by two years.

19 And going back again, Judge Cocks, to your question about factual
20 information versus information, here the definition that they're relying upon,
21 which is for data, specifically says information in any form on which
22 computer programs operate.

23 So again, we feel very confident based on the way that the
24 specification equates data with information and the way the extrinsic
25 evidence that they've submitted refers to data as information to rest our
26 construction on just information, not factual information, just information.

1 And to address your first question this morning of what are the
2 ultimate bounds of that, I would just again point to the fact that the
3 information, the extrinsic evidence that they've submitted is incredibly broad
4 in what they define as data. Right here, they're saying data is information in
5 any form on which computer programs operate.

6 Now, I think the reason -- I'm just guessing this -- the reason that
7 Patent Owner likes this construction or likes this extrinsic evidence, I should
8 say, is the next sentence. The distinction between program (instructions)
9 and data is a fundamental one in computing (see von Neumann machine).
10 I'm just reading from the Oxford Dictionary at page 4.

11 Our expert, Dr. Houh, discussed this. And I'm here on slide 35. He
12 discussed this at length. He said that the information -- the distinction that
13 he's discussing here really relates to how the computer deals with
14 instructions versus data, but both of them are considered to be within the
15 umbrella of data. One is instruction data, one is non-instruction data.

16 And this testimony on page 35, Exhibit 1015, paragraph 21, Your
17 Honors, I would submit is unrebutted. We provided this in a reply
18 declaration to provide our view of the Oxford Dictionary of Computing, and
19 they did not depose Dr. Houh regarding his reply declaration. So any
20 arguments that Patent Owner's Counsel is going to make with respect to this
21 testimony is going to be attorney argument, whereas we have evidence in the
22 record.

23 And just to further support the record, we submitted an exhibit,
24 Exhibit 1016, that was consistent with what Dr. Houh testified in his reply
25 declaration, which Patent Owner did not cross-examine him on. And that
26 exhibit is Exhibit 1016. It says, quote, crucially, there is no distinction

1 between instructions and data in the von Neumann architecture. For all
2 intents and purposes, instructions are data.

3 So whatever distinction that they're trying to make between data and
4 commands or instructions, I think, is undercut by unrebutted evidence in the
5 record.

6 Let me just finally briefly address the prosecution history, Your
7 Honors. I think it's important to take a look at what's happened in the
8 prosecution history because I think that provides edification on the
9 construction issue.

10 So let me turn first to Exhibit 108. If you can take a minute to get
11 there, I think this will help set up our view of the prosecution history.
12 Exhibit 108 at page 2 provides the preliminary amendment, which is the first
13 sort of presentation of what ultimately issued as claim 1 of the '225 Patent.

14 And what you see here and we've highlighted is that the transmitting
15 step that corresponds to limitation 1B at issue in this proceeding initially was
16 transmitting by the computing device and to the piece of workout equipment
17 one or more workout parameters. That was the preliminary amendment.

18 Let me move to the next slide, which is a passage from the non-final
19 office action. This is at pages 3 and 4. This is Exhibit 1009.

20 And what the examiner stated in response to the Patent Owner's claim
21 is that the limitation transmitting by the computing device and to the piece of
22 workout equipment one or more workout parameters he thought was met by
23 the machine control signal in Figure 3 of the Brown reference. Okay, so this
24 is the preliminary amendment. This is the non-final office action.

25 Now let me turn to the next slide. This is from page 2 of Exhibit
26 1010. And this is Patent Owner's response to that non-final office action.

1 What you see here is that they amended the claim, specifically limitation 1B,
2 which is highlighted here, to get around Brown.

3 So they changed computing device to sensor device, and they changed
4 workout parameters to a first set of data for operating a first function of the
5 piece of workout equipment.

6 So they are amending around Brown. And they are not disputing their
7 mapping of limitation 1B, specifically a first set of data to machine control
8 signals.

9 Okay. Now on slide 26 of our presentation, the examiner issues an
10 office action. And once again, the examiner states that the claim language
11 that's been amended is met by Figure 3 of Brown, specifically its machine
12 control signal.

13 And now turning to slide 27, in response to that, once again, Patent
14 Owner does not dispute the mapping. Instead of focusing on that mapping,
15 they move over to limitation 1C, the first set of activity data, and try to
16 basically convince the examiner that that's not met by the Brown reference.

17 Okay. So in our view, what we have here is the examiner is
18 repeatedly mapping a first set of data to a machine control signal, and the
19 Patent Owner is amending and arguing around it. In our view, that's an
20 acquiescence to the examiner's view of the scope of a first set of data, that it
21 can encompass a machine control signal. So we think that the prosecution
22 history is informative of the claim construction issue.

23 I believe my Counsel will argue that prosecution history should only
24 be considered for a disavowal or some kind of disclaimer. That's actually
25 not the case law.

1 If you take a look at Philips and Progeny, there are cases that say that
2 the prosecution history can be informative to the claim construction issue at
3 play. And we think that when you have an examiner repeatedly
4 understanding the breadth of a first set of data to include machine control
5 signals, that should be given weight in your analysis.

6 What's really surprising to us, Your Honors, was that we asked Patent
7 Owner's expert, did you take a look at the prosecution history? Here on
8 slide 30, we pointed him to Exhibit 1011. I believe that's the final office
9 action where there is the mapping.

10 We asked Dr. McLean, do you recognize this exhibit? He said, quote,
11 I don't think so, no. I don't recall if I have.

12 So here we have Dr. McLean providing a construction or supporting a
13 construction made by Patent Owner to narrow the scope of a first set of data
14 when he hasn't even looked at the prosecution history that could be
15 informative of how the Patent Office understood the breadth of that claim.

16 So we think that the construction of a first set of data being
17 information is supported by the claim language, is supported by the
18 specification, by the prosecution history, and by the extrinsic evidence. And
19 we think that Patent Owner's construction is not.

20 Unless there are any further questions, I'll turn it over to --

21 JUDGE BELISLE: Just one, Counsel.

22 MR. ARJOMAND: Yes.

23 JUDGE BELISLE: So if we were to interpret this first set of data to
24 include user identification information, do you have an example of how that
25 information would operate a first function of the piece of workout
26 equipment?

1 MR. ARJOMAND: Well, I think it's provided. I think it's provided in
2 column 19. For example, I'm on slide 18, Your Honors. This is a passage
3 from the '225 Patent at column 19, lines 34 to 40.

4 And it says, quote, for example, user identification information may
5 be transmitted so that the exercise equipment or other workout or athletic
6 performance setting 604 can store workout data associated with the specific
7 user, unquote.

8 So I think it would be workout data associated with a given user.
9 Does that answer your question?

10 JUDGE BELISLE: Yes.

11 MR. ARJOMAND: Okay, great. Thank you. If there are no further
12 questions, I'll --

13 JUDGE COCKS: I don't think we have any. Thank you.

14 Whenever you're ready.

15 MS. NGUYEN: May it please the Board and good morning, Your
16 Honors. It's very nice to see you again today.

17 In the interest of time I will, turning to slide 45, discuss some of the
18 prior art, but only discuss the limitations in dispute between the parties. If
19 Your Honors have any other questions outside of my presentation, please do
20 let me know.

21 With respect to the grounds that you see here on slide 45, if Your
22 Honors agree and adopt Petitioner's construction of data, then Your Honors
23 should also find the challenged claims unpatentable under Grounds 1 and 2
24 because the dispute there really turns on claim construction.

25 You'll also see in the papers that it is Petitioner's position that for
26 Grounds 1 and 2, Acres also meets Patent Owner's construction of data.

1 And then with respect to Grounds 4 and 5, if Your Honors agree with
2 Petitioner's interpretation of the term sensor device, which I do plan on
3 discussing in just a bit, then Your Honors should find Grounds 4 and 5
4 unpatentable because the issues there turn on claim construction of data, and
5 also the interpretation of the term sensor device.

6 Now, one thing I wanted to note is that Patent Owner treats
7 Independent claims 1 and 12 as being similar. So Your Honors will see in
8 the papers that claim 12 was not addressed separately. Claim 12, in our
9 opinion, rises and falls in this proceeding with claim 1.

10 So turning to slide 49 -- sorry -- slide 50, it is Petitioner's position that
11 Acres meets a first set of data and limitation 1B, the only disputed limitation
12 for claim 1, because it includes factual information that is sensed or
13 collected. And that sensed or collected, then as part of the command,
14 decisions or subsequent actions can be made.

15 So as shown on slide 50 and the passages provided here, the
16 informational content would be the exerciser's heart rate. And from that the
17 -- which is sensed, so that would be sensed or collected factual information.

18 And then from that, the subsequent action that is taken would be to
19 increase the speed of the treadmill by a specific amount. For example, 0.3
20 miles per hour, as shown in the bottom passage on this slide.

21 So in our opinion, these passages shown on slide 50 meet Patent
22 Owner's construction because it is factual information that is sensed, and
23 then from which subsequent actions and decisions can be made.

24 Now turning to slide 52.

25 JUDGE COCKS: Counsel, one point of clarification. One, you're in
26 your rebuttal time, which is fine, but just note.

1 So in Acres, the Bug does not transmit the exerciser's heart rate? That
2 content is not transmitted; it's just the signal instructing for the treadmill to
3 do something, speed up or something like that?

4 MS. NGUYEN: Yes. That's correct, Your Honor. We understand
5 Acres to be transmitting the command, as you recognize, and the command
6 reflects the sensed heart rate.

7 And we have expert testimony, as shown here on slide 51, that talks
8 about these commands reflecting the information regarding the exerciser's
9 heart rate. And then from that information, the treadmill then increases or
10 decreases the speed.

11 And then turning to slide 52, it shows another set of passages that
12 meets Patent Owner's construction of factual information that is collected.
13 And we also, looking at slide 53, have expert testimony to support this.

14 Now, one thing is Patent Owner's response to this was that Petitioner
15 did not identify any disclosure in Acres that the sensed or collected data was
16 transmitted to the exercise equipment. And Your Honors, we, as my
17 colleague just discussed, believe that factual information that was sensed or
18 collected is reflected in the command itself.

19 And Patent Owner, having argued that there is no information -- sorry
20 -- there is nothing in the record that shows that the sensed or collected
21 information was transmitted, we disagree with that. Patent Owner had the
22 opportunity to cross-examine Petitioner's expert to gain a better
23 understanding as to what Acres transmits, as to what was part of the
24 command that is transmitted, and Patent Owner chose not to.

1 So if Your Honors have no questions about Acres, Ground 1, or
2 Ground 2, I'd like to now turn over to Pyles. With respect to Pyles, the only
3 issue in dispute there is motivation to combine.

4 Petitioner's expert provided in his declaration why there are reasons to
5 combine Pyles. And just quickly, Pyles is a home version of an exercise
6 equipment that stores the exercise log on the treadmill.

7 And Patent Owner's argument there was that combining would
8 basically defeat Acres' key to its invention. So in other words, in its opinion,
9 the central computer site is important to Acres. But you'll see here in slide
10 58 for paragraph 30, Acres discloses the option of not needing the central
11 computer site. And that's shown in green.

12 So it can't be the case that the central computer site is key because it
13 has the option of communicating through to the exercise equipment via a
14 wired or wireless connection. And the yellow passage shown on the slide
15 here, that's exactly what Pyles is. So we disagree with respect to Patent
16 Owner's argument there.

17 And then turning to the last set of grounds in Abbondanza, I just
18 wanted to touch upon a sensor device shown here in claim 1. The parties
19 dispute whether the sensor device includes the sensor alone, which seems to
20 be Patent Owner's construction. And in our position, sensor device is
21 broader than that, as supported by the specification.

22 Turning to slide 62, you'll see passages in the '225 that talk about the
23 sensor device performing functions aside from sensing. It includes a sensor,
24 a data transfer system, and processing capabilities. So in other words, not
25 only does it sense; it transfers data and it also processes the data.

1 Also, you'll see in the figure here that the sensor device includes more
2 than just the sensor. It includes the sensor, the microprocessor, the data
3 transfer system, and the power supply.

4 Turning to slide 63, there's a side-by-side showing Abbondanza and
5 the similarities to Figure 4. Patent Owner seems to argue that the sensor
6 device in Abbondanza -- sorry -- the pulse rate sensor in the base unit cannot
7 be a sensor device because they're in separate housings.

8 But if you take a look at the '225 Patent Exhibit 1001 and turn to
9 column 16, line 46, you'll see it says, when provided as a module or
10 otherwise provided as separate elements, these portions of athletic
11 performance sensing systems, e.g. 408, may be provided at any desired
12 location without departing from the invention, e.g. assuming their data
13 sensing, processing, and/or transmitting capabilities are not compromised by
14 the positioning.

15 So in other words, Your Honors, the '225 Patent specification
16 discloses exactly what Abbondanza shows, which is the sensor device,
17 sensor module 408, as having its elements being located in separate housing.

18 JUDGE HOSKINS: Ms. Nguyen?

19 MS. NGUYEN: Yes.

20 JUDGE HOSKINS: On this point, is your position that any
21 component that receives sensor device information can be considered to be
22 part of the sensor device? Isn't that what you're clearly telling us?

23 MS. NGUYEN: Your Honors, we believe that the sensor device, as
24 long as it performs the data sensing/processing without compromising its
25 functionality, as discussed in the '225, would be within the meaning of a
26 sensor device for the '225 Patent.

1 JUDGE HOSKINS: So again, any device that receives sensor
2 information to process the sensor information would be a sensor device, in
3 your view?

4 MS. NGUYEN: Yes, provided that that sensor device also meets the
5 limitations of claim 1. So that sensor device would be transmitting to the
6 piece of workout equipment.

7 JUDGE HOSKINS: Okay. Thank you.

8 MS. NGUYEN: Thank you.

9 JUDGE COCKS: Since we asked a few questions, you'll have 13
10 minutes of rebuttal time.

11 Whenever you're ready, Mr. Bowling. And any rebuttal time?

12 MR. BOWLING: Yes. Ten minutes, please, Your Honor.

13 JUDGE COCKS: I'm sorry?

14 MR. BOWLING: Ten minutes, please.

15 JUDGE COCKS: Okay.

16 MR. BOWLING: Good morning, Your Honors. We wanted to start
17 off with kind of a fly-over of the invention. We feel like some of the
18 comments we just heard take the invention out of context.

19 And we thought it would be helpful to just look back at the patent and
20 see what we're talking about here because, as we know, the claims must be
21 viewed in the context of the specification. And this patent has a number of
22 very distinct embodiments, so we think it's helpful to look at the
23 specification quickly.

24 Okay. So we'd like to start with the claims. If we could direct your
25 attention, please, to claims 1 and 12. This is on page 45 of Exhibit 1001.

1 And what we see here right off the bat is that there's data
2 communication established between two things: a sensor device and a piece
3 of workout equipment. That data communication means that those two
4 things are talking with one another.

5 And then the next two elements, we see two transmitting steps. Each
6 step corresponds with a different set of data, and that data has a different
7 downstream component to it.

8 So first, the sensor device. Data from the sensor device is transmitted
9 to the piece of workout equipment. And what data is it? It's a first set of
10 data, and it has a specific purpose. It's for operating a first function of the
11 piece of workout equipment.

12 So from that, right away, we know that this first set of data is
13 somehow coming from the sensor. We think it has to be either sensed or
14 collected by the sensor device.

15 And Judge Belisle, I think you may have noted that earlier. Where
16 else could that data come from? It sounded like opposing Counsel didn't
17 have any response to that. So it comes from the sensor device, that first set
18 of data, and it's going to operate a first function of the workout equipment.

19 The next element, we transmit again from the sensor device to the
20 piece of workout equipment. This time it's a first set of activity data. This
21 data is ultimately displayed on the workout equipment, and that data must
22 correspond to an activity performed by a user.

23 So that's what we know. It's data that's from the sensor device to the
24 workout equipment, two different types of data, two different purposes.

1 JUDGE BELISLE: Counsel, before you move on, what's an example
2 of the first set of data for operating the first function? What type of data
3 would be used to operate this first function of the workout equipment?

4 MR. BOWLING: Sure, Your Honor. So the specification gives a
5 number of examples. And if I can direct you now to column 9 of the '225
6 Patent, you'll see here the term actually is sensor device, which is in claim 1.

7 And quickly, we should point out claim 1 and 12 have a slight
8 difference to them. Claim 1 refers to a sensor device. Claim 12 refers to a
9 first sensor.

10 The parties seem to agree that there's no substantive difference there.
11 They're both sensors. They're both communicating directly with the
12 workout equipment, but the reason that's significant is because sensor device
13 only appears in the specification one instance.

14 And if we look at column 12 on page 28 of Exhibit 1001, there's three
15 paragraphs in column 12. The second paragraph, if you go all the way to the
16 bottom, the third line up says sensor devices 102A through 102D. And that's
17 significant because sensor device there is clearly pointing to, and the only
18 time it's mentioned in the specification, 102A through 102D.

19 And then, Judge Belisle, to get back to your question, if we go now to
20 column 9, we'll see Figure 1 here. This is in the second paragraph
21 underneath the header of column 9. It's describing Figure 1. This paragraph
22 has the title Description of Various Components of Example Sensing
23 Systems According to This Invention.

24 You'll see here it introduces Figure 1. And it says a person 100
25 involved in an athletic performance or workout activity may have one or

1 more sensing devices: 102A, 102B, 102C, 102D. And these may be
2 attached to their clothes. It could be adhesives. It could be in their shoe.

3 I can put up quickly Figure 8 or Figure 1 here on the projector. You
4 can see where these can be located. These are the four examples: 102A and
5 102B are in the shoes, 102C is a wrist-worn device, 102D looks like a heart
6 monitor on the user's chest. So a couple different kinds of sensors there.

7 JUDGE BELISLE: Let's just pause right there. What is your view on
8 this language in the spec about sensing devices plural, 102A, B, C, and D, as
9 applied to Petitioner's position that sensor device has this umbrella-like
10 effect, when here in the spec it's talking about individual sensors being a
11 sensor device?

12 MR. BOWLING: Yes, Your Honor. So we disagree that it's this
13 umbrella term. We think the specification is very specific about what these
14 devices are.

15 It refers to them as sensors sometimes, sensor device, or a sensing
16 device. There's three variations in the specification. There doesn't seem to
17 be any substantive difference because they all point to 102A through D, and
18 those are examples.

19 We can see that these sensors collect -- and now we're getting to your
20 question, Judge Belisle -- a lot of different types of data. They can be speed,
21 distance, GPS data, altitude, time, temperature, pulse rate, blood pressure,
22 hydration. They can even capture things going on around the athlete, so the
23 ambient temperature, ambient humidity.

24 All of those sensors can then control the workout equipment. If the
25 user's heart rate goes up, workout equipment slows down. If it's especially
26 humid, maybe it drops down the incline a little bit.

1 So all of these different sensors are pulling information. And
2 importantly, they're communicating directly with the workout equipment.
3 And the claims are very clear that that data is transmitted through an
4 established connection between the sensor device, or the sensor in claim 12,
5 and the workout equipment.

6 JUDGE COCKS: Counselor, you touched on this briefly when you
7 started. Maybe this is a fill-in-the-blank, but user ID information is
8 information that's sensed or collected. And fill in that blank. Because what,
9 because why?

10 MR. BOWLING: Well, the claims require it in our view, Your
11 Honor. The claim requires that the data come from the sensor device, and
12 the only way it can come from the sensor device is if it's sensed or collected.
13 And we think that lines up, as we'll get to, with a lot of the extrinsic
14 evidence.

15 One example of user ID information that would come from a sensor
16 would be a fingerprint scan. You may have ridden those bikes in the gym
17 where you put your hands on them and it gets your pulse rate.

18 There could be user identification information that's scanned during
19 that process that associates it with you. It could be a retina scan. It could be
20 a particular shoe SKU that you've plugged into your device that's recognized
21 that identifies you.

22 So these are ways of sensing that information. And the sensor can
23 pull that, and that's what the user identification could be in our view. And
24 that's entirely consistent with our construction, which is the data has to be
25 sensed or collected by the sensor device.

1 And so looking at the claims and looking at the specification in that
2 context, we think the ordinary meaning of that term has to be factual
3 information that's sensed or collected and from which subsequent decisions
4 or subsequent actions are made.

5 Now, Lululemon has conceded this last part of that construction about
6 subsequent actions or decisions can be made. They said in their reply brief
7 at page 8 -- I can pull that up quickly. This is page 8 at the top of their brief.

8 They said that this last part of our construction is redundant, that
9 adding from which decisions or subsequent actions can be made doesn't add
10 anything. They say specifically here, for instance, limitation 1B already
11 requires a decision or subsequent action. So that aspect of our construction
12 doesn't seem to be in dispute. They agree the claims require that.

13 If we want to call that part of our claim construction and part of the
14 ordinary meaning, we can. We think it's helpful to have that in there when
15 we're talking about the prior art. But the parties seem to be in agreement
16 that no matter what, that portion of the claim limitation is present.

17 Then really, the only thing that's in dispute -- we didn't realize that
18 factual information was in dispute. We don't see any type of data that would
19 not be factual information. We didn't hear anything from Lululemon.

20 JUDGE BELISLE: So let's just stop there, though, Counsel. Why do
21 we need the word factual?

22 MR. BOWLING: We think it's helpful in the dictionary definitions.
23 It comes from those definitions, but the same thing here. If you want to just
24 construe it to be information, we think the way that the specification reads,
25 it's all data.

1 It's heart rate. It's altitude. It's GPS. We don't think there's a single
2 instance in the specification where it's not factual information, where it's
3 some kind of hypothetical information or opinion information or something
4 like that.

5 JUDGE BELISLE: I guess that's where I'm going. How is the
6 electronics creating something other than factual information?

7 MR. BOWLING: Exactly, Your Honor. So this would fall under the
8 same kind of thought process, in our view. If we want to call that part of the
9 construction, we can.

10 We think it's helpful because it lends itself to looking at the prior art,
11 but we think it's kind of inherent in the claim as is. So when you take all
12 that together, the real dispute is --

13 JUDGE HOSKINS: Mr. Bowling, before we move on, please, are
14 you arguing factual to distinguish what's going on in Acres, the commands
15 that are being sent?

16 MR. BOWLING: Well, we don't think Acres is data at all. So I guess
17 it's hard to know whether a command is factual information.

18 I think our response would just be that what's going on in Acres is
19 some kind of processed instruction. It's not really a type of data that's sensed
20 or collected. So I guess maybe that would be --

21 JUDGE HOSKINS: I get the sensed or collected part, but we're
22 talking about factual.

23 MR. BOWLING: Yes.

24 JUDGE HOSKINS: So I'm trying to understand if factual is
25 something that lends itself, in your view, to something that would
26 distinguish the prior art.

1 MR. BOWLING: Yes. We don't think it's necessary to distinguish
2 the prior art, to answer your question. I guess it's a little tricky as to whether
3 a command is a fact or not, but we don't think it's necessary in order to
4 distinguish Abbondanza and Acres.

5 JUDGE HOSKINS: Thank you.

6 JUDGE COCKS: Counsel, let me borrow my colleague's question.
7 Maybe I'm belaboring this, but in your view, information that is sensed or
8 collected or factual information that is sensed or collected, that's effectively
9 the same thing; and this case does not distinguish between factual
10 information in that context and just information?

11 MR. BOWLING: Yes. That's correct, Your Honor.

12 JUDGE COCKS: Thank you.

13 MR. BOWLING: Okay. So then the question really boils down to,
14 does this have to be sensed or collected? And we think the claims couldn't
15 be more clear that that's the case. It's coming from a sensor device. And the
16 reason we think that's important is because what's going on in the prior art is
17 far different.

18 As you pointed out during Lululemon's argument, there's a middle
19 step in those references. Data is collected, but that data isn't what's sent to
20 the workout equipment. Something different is sent. It's processed, and it's
21 turned into a command or an instruction. That's not data, in our view, in the
22 way that data is used in the claims because the way data is used in the claims
23 is something that's sensed or collected by the sensor.

24 So if you look at our demonstrative, Nike's demonstrative slide 21, we
25 just have some examples that really drive home this point. Everything in the
26 specification, when we're talking about what is being collected by the

1 sensor, it's sensed, it's measured, it's collected. The sensor is what's pulling
2 this information in in the first instance. The specification consistently points
3 that out.

4 Okay, the dependent claims. We talked about this. We don't think
5 they're inconsistent with our construction. User identification information
6 can be something that's sensed or collected.

7 It's not discussed in the specification very much, but we do see it in
8 column 19 in one instance, column 19, lines 37 through 40. And all the
9 specification says is that user ID information may be transmitted so that the
10 exercise equipment or other workout or athletic performance setting 604 can
11 store workout data associated with the specific user.

12 So all we know is it's taking the athletic data and pairing it with the
13 user. That can come in a variety of ways. There's no reason why that's
14 inconsistent with Nike's construction. And it's consistent with everything
15 else in the specification about it being sensed or collected.

16 JUDGE COCKS: So Counsel, there is user ID information that can
17 be sensed or collected. That's what you've expressed to us. So there also is
18 user ID information that is not sensed or collected?

19 MR. BOWLING: We think there could be, certainly, but it's not
20 discussed in the specification.

21 JUDGE COCKS: But there could be?

22 MR. BOWLING: Sure. Yes. You could type in your name with a
23 keyboard or something, but that's not discussed in this embodiment of the
24 specification where you have the sensor communicating directly with the
25 workout equipment.

1 And there are other embodiments. We hinted at this earlier. We want
2 to look quickly at Lululemon's slide 16. Their view is that the transmitted
3 data includes processed information.

4 And this is an embodiment that they focus on throughout their
5 briefing and in their demonstratives as well. And it does talk about
6 processing data, but what they didn't tell you is that this has nothing to do
7 with an embodiment where you have a sensor device communicating with a
8 piece of workout equipment.

9 And if we can direct your attention to column 14, line 37, as you can
10 see here on the screen, this is the same portion of the spec that they cite in
11 their demonstratives. They cite a later part of this column, but we want to go
12 up a little bit so you can see the context of where it's coming from. So
13 column 14, line 37.

14 And it says, Figure 4 illustrates a schematic diagram of an overall
15 athletic performance sensing or tracking system 400 in accordance with at
16 least some examples of this invention. In this system 400, an electronic
17 interface device 402 -- electronic interface device, something we haven't
18 seen in the claims -- 402 is physically plugged into a portable electronic
19 device, something also not in the claims, via a mechanical connection
20 system 406 that holds the two devices together.

21 So that's what Figure 4 is about. And the next three paragraphs are all
22 describing what's going on in this embodiment, but that's not the claimed
23 embodiment. It's completely unrelated to claims 1 and 12.

24 JUDGE HOSKINS: Can you help me understand why that is? I look
25 at claim 1 and I see a sensor device. And I see a sensor device transmitting
26 information to a piece of workout equipment.

1 Structurally, what is it in claim 1 that says Figure 4 is not covered?

2 MR. BOWLING: Well, Your Honor, you don't see those words that
3 you just listed off. There's a number of embodiments, and we covered them
4 earlier, that talk specifically about sensing devices, sensor devices. And
5 they talk about those sensor devices in the context of a different
6 embodiment.

7 This embodiment doesn't mention those at all. It's talking about an
8 electronic interface device 402 and a portable electronic device 404. And
9 what you don't see anywhere in this column is a piece of workout
10 equipment.

11 This is just simply not an embodiment where the sensor is
12 communicating with a piece of workout equipment. It's unrelated, and
13 they're cherry-picking portions of this embodiment and trying to convince
14 you that the sensor device can involve processing.

15 But all we have to do is look at the claim language. The claims are
16 abundantly clear. You have a sensor device communicating directly with a
17 piece of workout equipment. And it's sending that data from the sensor
18 device straight through without any sort of conversion, without any interface
19 device, without a portable electronic device. None of that is mentioned in
20 the claims.

21 JUDGE HOSKINS: So is your view then that everything in Figure 4
22 is a sensor device as opposed to workout equipment?

23 MR. BOWLING: Well, Your Honor, it looks like there's a number of
24 things in Figure 4. There is a portable electronic device 404. There's an
25 electronic interface device 402. So there's other things there, but there's no
26 piece of workout equipment mentioned in that figure.

1 JUDGE HOSKINS: Thank you.

2 JUDGE COCKS: Counsel, I've heard at least twice now the word
3 “directly” for purposes of the sensor and the workout equipment. Where in
4 claim 1 does it require this direct connection without any intermediary
5 devices or readers or any other electronic component?

6 MR. BOWLING: So there are certain embodiments where there's an
7 interface described. And we can point you to --

8 JUDGE BELISLE: I'm talking about claim 1, not individual
9 embodiments --

10 MR. BOWLING: Sure.

11 JUDGE BELISLE: -- in the spec.

12 MR. BOWLING: We don't think -- we think if claim 1 wanted an
13 interface device, if they wanted to talk about a system where the sensor
14 device goes through some other sort of device and then goes to the workout
15 equipment, that would have been in there, but it's not.

16 What we see in the claim is just a sensor device establishing
17 communication with a workout device. And whether it's connected through
18 wire or something like that, the key point here is that the data that's being
19 sensed or collected by the sensor device is going to the piece of workout
20 equipment without being converted into something else.

21 That's what we mean when we say directly. It's not being converted
22 into commands or instructions or something like that.

23 JUDGE BELISLE: So there's some black box inside the workout
24 equipment that's receiving that communication, correct?

1 MR. BOWLING: Yes. And the workout equipment, as we
2 understand it, is capable of receiving that raw sensed or collected data
3 without it being converted into a command.

4 And that workout equipment is taking subsequent actions. It's
5 displaying that information, as we see in 1C, or it's using that information to
6 control the workout equipment. So that's happening directly to the workout
7 equipment without any sort of intermediate conversion.

8 JUDGE BELISLE: So in your view, though, this black box I'm
9 talking about in claim 1 must be part of the workout equipment? It can't be
10 next to the workout equipment?

11 MR. BOWLING: Correct.

12 JUDGE BELISLE: And your interpretation of claim 1 requires it be
13 in the workout equipment?

14 MR. BOWLING: Yes. We think claim 1 is clear that there's
15 communication established between the sensor device and the piece of
16 workout equipment, and that that device is transmitted from A to B; A being
17 the sensor device, B being the piece of workout equipment.

18 Okay, a couple other points we wanted to hit on. The prosecution
19 history, we're a little puzzled by this argument. We're not arguing
20 prosecution history estoppel. They're not arguing prosecution history
21 estoppel.

22 The law is very clear that if we're looking at the prosecution history,
23 there has to be some sort of clear disavowal. Of course, it can be
24 informative, but what we see here just doesn't have anything to do with
25 limitation 1B.

1 We think Lululemon is mischaracterizing what happened before the
2 PTO. In our view, what happened is that there was one office action. The
3 examiner says, we think Brown meets all the limitations.

4 And then Nike says, we don't think Brown teaches 1C; different
5 limitation. And then the claims are allowed. Nike didn't say anything about
6 1B. It didn't take a position on what data is. All it said was Brown doesn't
7 teach this.

8 Nike isn't obligated. There's no law that stands for the proposition
9 that Nike has to walk through every single element and distinguish all the
10 elements of Brown that the examiner relied on. That's just simply not the
11 law. That's not what Philips says, and that's not what Malvern says either.

12 If we look at Malvern, it's quite a different situation. And I'm pulling
13 up Lululemon slide 29 here. What happened here was that we have the
14 applicant making arguments. So the applicant says, here's what this
15 discloses. And it did it over and over and over again. It said that the '968
16 application discloses only a manual guiding mechanism.

17 And the case says, quote, the examiner clearly stated its rejection of
18 this argument several times. The applicant's making an argument several
19 times. The examiner's clearly rejecting that specific argument, and then the
20 applicant moves on.

21 And all that happened in Malvern is the Federal Circuit said, no
22 prosecution history estoppel. That was the holding, which isn't at issue here.
23 We're not arguing prosecution history estoppel. They aren't either.

24 The facts are just way different. Nike didn't make an argument
25 multiple times that the examiner rejected and then Nike walked away from.

1 It's just not what happened. The examiner issued a rejection, Nike overcame
2 the reference on an unrelated limitation, and everyone moved on.

3 On the dictionary point, we think the first definition here is the most
4 helpful. And we think it lines up with the specification. We're looking at
5 Lululemon slide 31.

6 It talks about factual information derived from observation,
7 experimentation, calculation. That's the language of the '225 Patent. The
8 '225 Patent is talking about monitoring, measuring, sensing information.

9 JUDGE HOSKINS: Mr. Bowling?

10 MR. BOWLING: Yes.

11 JUDGE HOSKINS: In quoting from the dictionary definition, you
12 skipped over a phrase, which is "such as."

13 MR. BOWLING: Sure.

14 JUDGE HOSKINS: And I'm wondering, doesn't that tell us that even
15 if we apply this definition that you have picked, this definition number one,
16 that it's broader than those things that you just walked us through?

17 MR. BOWLING: Yes, Your Honor. So we're not saying that this
18 dictionary definition should apply wholesale. We think it's the most
19 informative of the dictionary definitions, and we think it supports our
20 position. We think this shows that there is a definition of data that hinges on
21 something being collected or sensed.

22 We don't necessarily think the Board should apply this definition. We
23 think our construction is more in line with the '225 Patent.

24 What's really going on here is we think Lululemon is asking you to
25 construe data in a vacuum. And they said during their oral argument that
26 there would be no bounds on data whatsoever.

1 So the way they read the claims, the sensor could be sending emails,
2 video files, audio books, Excel spreadsheets, any kind of data, banking
3 information. All of that, in their view, would be something that the sensor is
4 sending to a piece of workout equipment.

5 And looking at the plain language of the claims, we think that just
6 simply doesn't make sense. There's no way that the sensor would get that
7 information unless it was collected or sensed. And for a lot of those
8 examples, we're not even sure how that would work.

9 So we think it's clear that their definition is way too broad and that
10 this first definition in the Wiley Dictionary is closer and helps support Nike's
11 proposed construction.

12 JUDGE COCKS: Counsel, I asked your opposing Counsel the same
13 question, so I'll ask it of you too. Can you give me an example of something
14 that would not be information in the context of the '225 Patent -- I'm sorry --
15 the '255 Patent.

16 MR. BOWLING: That would not be data, Your Honor?

17 JUDGE COCKS: Data or information, assuming that data is taking
18 their definition. What would not fit within the contours of that?

19 MR. BOWLING: Yes. We're not sure, Your Honor. We think their
20 definition is way too broad, and it would sweep in all sorts of data and
21 information that doesn't make sense. Our opinion, as you know, would be
22 that anything that's not sensed or collected by a sensor would fall outside the
23 scope of the claims.

24 And so this next dictionary -- now we're on Lululemon slide 34 -- is
25 important because we think it distinguishes instructions from data. And this
26 is a technical dictionary. It's in Oxford Dictionary of Computing, and we

1 know from Philips that technical dictionaries are especially helpful. It says
2 that there's a fundamental difference between instructions and data.

3 And we don't think the fact that it post-dates the filing date by two
4 years diminishes its relevance at all. We think within two years is pretty
5 close. And there's been no showing whatsoever that the definition of data
6 somehow changed between 2006 and 2008.

7 Lululemon pointed to a textbook, Exhibit 1016. And now we're on
8 slide 38 of Lululemon's demonstrative. They said that we didn't rebut this
9 dictionary definition.

10 And one reason for that, as you can see, is that it's not a dictionary.
11 It's a textbook. And the textbook is copyrighted 2020. You can see this at
12 page 6 of Exhibit 1016.

13 So if they think a 2008 dictionary should be excluded, subject to their
14 motion to exclude, it's unclear to us why a textbook, which isn't one of the
15 things that Philips mentions is especially relevant, from 2020 would be any
16 sort of relevant evidence whatsoever.

17 But even if we do look at that exhibit, we see that there is a significant
18 difference in how it talks about instructions and data. And we're looking
19 now at page 1 of Exhibit 1016. It says here that von Neumann architecture,
20 in the second paragraph, consists of five main components, a processing
21 unit, memory unit, input unit.

22 And you can see here that it's talking about instructions much
23 differently. The processing unit, in numeral one, executes instructions. That
24 makes sense. It's processing. It's performing instructions.

1 We see data when we're talking about the memory unit in numeral
2 three and the input unit in numeral four. And it throughout this reference
3 repeatedly mentions data and instructions as two different things.

4 So we think even if we look at this reference, it supports Nike's
5 proposed construction that data and instructions are just fundamentally
6 different as the term data is used in the claims of the '225 Patent.

7 JUDGE BELISLE: Counsel, your use in your proposed construction
8 of the sensed or collected, is that trying to tie the data and the activity data in
9 claim 1 to being sensed by the sensor device?

10 I only ask because when I keep reading claim 1, I don't actually see
11 where the sensor device is what's required to obtain that first set of data or
12 the first set of activity data. The sensor device does the data communication,
13 but then it just leaves it at that. There's no explicit requirement that the
14 sensor device sense or collect the data.

15 MR. BOWLING: Yes, Your Honor. So we do think that under our
16 construction, the sensing device has to collect or sense that data in the first
17 instance, and we think that's the only way it makes sense. It's a sensing
18 device. And unless it collects it or senses it, we don't know how the device
19 would acquire that information in any other way.

20 If we look at the examples in the specification, GPS data, heart rate
21 data, all those different types of data we discussed at the outset in sensors
22 102 through 102D, which we know is the sensor device, all of those are the
23 types of data that is collected or sensed by the sensing device. So we think if
24 you look at that claim in the context of the '225 specification, that's the only
25 reasonable way to interpret the claim.

1 Okay. So we want to turn next to some of the deposition testimony
2 that Lululemon pointed to. And we're looking at slide 43. Actually, let's
3 start at slide 41 of Lululemon's demonstrative.

4 Here they put up some excerpts from Nike's expert, Dr. McLean. And
5 you can see here on slide 41 of Lululemon's demonstrative, there's three
6 dots. There's an ellipses there in that bottom box. And then if we go to slide
7 43, the same thing here, two sets of ellipses.

8 And what they're not showing you, we think, is important. There
9 were objections there, and there was intervening testimony. And the
10 objections were because the questions were not clear. The questions were
11 formulated in a confusing way, and they got really inconsistent answers.
12 And we'd like to walk through it.

13 So according to Lululemon, Dr. McLean testified that the sensor only
14 collects information, only collects athletic performance information. And so
15 they say this on slide 41, that the sensor only captures athletic performance
16 data.

17 And they show a question and answer, with some things excluded
18 there, where the witness answers yes. But if we look at the full testimony,
19 that's just not what happened.

20 So if we can direct your attention to Exhibit 1014 on page 33. The
21 question is, in the '225 Patent, what type of data does the sensor collect?

22 And Dr. McLean says, the types of data may include components for
23 measuring or sensing athletic performance data, or data related to athletic
24 performance. So that right there contradicts what they told you.

1 And then if we scroll down to page 34, at the top we see that Counsel
2 asked Dr. McLean, so in your opinion, is athletic performance data the only
3 data sensed or collected by a sensor device in the '225 Patent?

4 And he says, no, directly contrary to what they just told you. There's
5 testimony that contradicts that, but the witness was back and forth, confused
6 by these questions. And interspersed throughout all of this questioning were
7 objections because they were formulated in a confusing way with double
8 negatives.

9 If we look now to page 35 on the next page and we scroll down to line
10 9, Counsel asked him, so you would agree that the sensor device in the '225
11 Patent does not sense or collect identification information?

12 He says, the sensor collects or senses factual information, any kind of
13 factual information. That's what the sensor's collecting or sensing, directly
14 consistent with our construction.

15 And then they said, so in your opinion, does the sensor sense or
16 collect factual information that is identification information? And the
17 witness says, so the sensor collects or senses factual information related to
18 athletic performance.

19 That's what we saw. Everything in this patent is related to athletic
20 performance. If it's GPS data, if it's user identification information, it's all
21 related to that user's athletic performance. So we think the excerpts that
22 they're pointing you to in Dr. McLean's testimony are just not clear.

23 And then they said they asked him about the prosecution history and
24 he had never looked at it. There as well, if we look at page 105 of his
25 deposition transcript and we go down to line 15 of page 105, you can see
26 they said, let me hand you Exhibit 1001. Do you recognize this exhibit?

1 Recognize it; this is months after he wrote his declaration. He says, I
2 don't think so. No, I don't recall if I have.

3 They don't clarify. They don't point him to anything. They don't say,
4 well, let me direct you to the page that's important here. They just say, okay,
5 can we take a break? That's it. It was a game of gotcha, and it doesn't
6 suggest that Dr. McLean performed some sort of inadequate review of the
7 record.

8 Okay, moving on to the grounds. As you know, Grounds 1 and 2 --

9 JUDGE COCKS: Actually, Counsel, before you do so, they had
10 discussed a description in the '225 Patent of data that's manipulated or
11 processed such that it's not the raw data that's ultimately transmitted.

12 And I think their point was, well, that's not data that's been sensed or
13 collected, so it's inconsistent with that characterization. Can you comment
14 on that?

15 MR. BOWLING: Yes, Your Honor. So all of those quotations -- and
16 you can see on slide 16 where they made that argument, slide 16 of their
17 demonstrative -- those came from that passage we referred you to of Figure
18 4. That was the embodiment that's just completely unrelated.

19 And what a lot of those discussions are about is manipulating the data
20 to show certain media or movies or music. It just has nothing to do with the
21 sensor. It's a totally unrelated aspect of the specification. It's cherry-picked,
22 and we think it's disingenuous.

23 Okay. So moving on to the grounds, Grounds 1 and 2. We think that
24 Acres fails for one simple reason. And that is that it doesn't disclose a
25 sensor that transmits data to a piece of workout equipment.

1 What it does, we can see this in paragraph 89. And we're on slide 35
2 now of Nike's demonstrative. Slide 35 of Nike's demonstrative shows
3 paragraph 89 of Acres.

4 And we can see really clearly here in the highlighted portion that
5 begins with if the Bug, the Bug does two things. First, it senses the heart
6 rate. Then it processes and it generates new information, a command. And
7 then the Bug sends that command -- not the data, the command -- to the
8 treadmill.

9 And Dr. Houh in his deposition -- again looking at slide 35 in Nike's
10 demonstrative -- reiterated that. He said that the input into the Bug is pulses.
11 That's the data that's being sensed or collected. It's pulses from a heart rate
12 sensor. And then the Bug processes that, and it sends a command to the
13 treadmill.

14 And all he's doing is just reading right from their Acres reference
15 itself. The Bug senses, processes, converts it into something different, and
16 then sends that something different, a command, to the treadmill.

17 It never once discloses sending from a sensor device data that was
18 sensed or collected to a piece of workout equipment. And we don't think
19 there's any dispute about that.

20 And so that applies for Grounds 1 and 2. We think that's a
21 fundamental difference between the two references that can't be overcome
22 by obviousness. And if we look at their petition, their obviousness grounds
23 is just bare bones. It doesn't add anything to it. There's no additional
24 arguments. So we think that's a failure of proof on both Grounds 1 and 2.

25 JUDGE BELISLE: Counsel, if this Bug 140 were part of the exercise
26 equipment, how would that affect your argument that you just made?

1 MR. BOWLING: Yes. So if the Bug was the workout equipment, it
2 wouldn't really make sense because the Bug is the sensor. In that case, it
3 would just be workout equipment with a sensor attached to it. So we think
4 that would still be different from the invention.

5 If you had a separate sensor and then something on the workout
6 equipment that was communicating directly with the sensor, we think that
7 may be closer to what we're talking about. But just saying that the Bug is on
8 the workout equipment would be different because, as we saw in Figure 1
9 and throughout the specification, that sensor device is in the user's shoes.
10 It's on their chest. It's something that is communicating with the workout
11 equipment.

12 JUDGE BELISLE: So if the heart rate monitor strap is wired to the
13 treadmill, is that part of the treadmill or is that a sensor? Or is it all a
14 sensor?

15 MR. BOWLING: Yes. We think that that would be -- I guess it
16 depends on how it's wired, but that would be --

17 JUDGE BELISLE: It's got a wire.

18 MR. BOWLING: -- a sensor device that's communicating directly
19 with a piece of workout equipment.

20 JUDGE BELISLE: So the sensor is not just part of the workout
21 equipment if it's hardwired to it?

22 MR. BOWLING: I think if it's hardwired to it, I don't know how it
23 would not be considered part of it. If it's not removable, if it's attached and
24 you can't take it off, I think that would be part of the workout equipment. If
25 it's something that you had to maybe separately plug in, maybe that's a
26 different circumstance.

1 JUDGE BELISLE: My questions may sound silly, but I'm trying to
2 piece together how I put a circle around what the workout equipment is in
3 the claim. Not what you and I may understand these as walking into a gym.

4 MR. BOWLING: Sure.

5 JUDGE BELISLE: -- but under patent law, looking at claim 1, where
6 it just says a piece of workout equipment or it just says a sensor device. And
7 so we're here today to figure out where we draw boxes around what workout
8 equipment is, what a sensor device is.

9 And so as you continue to articulate your arguments distinguishing the
10 art, in my head that's what I'm trying to do, to figure out why is it that if I
11 have a receiver that's attached to my treadmill that's receiving signals from a
12 sensor and that receiver is communicating with the treadmill, why is that not
13 all part of the sensor device or part of the workout equipment?

14 MR. BOWLING: Sure.

15 JUDGE BELISLE: It's not really a question. It's just a statement that
16 it would be helpful in your argument if we could keep that in mind.

17 MR. BOWLING: Yes. And Your Honor, we don't think you have to
18 decide exactly where that line is. All we have to do is look at their petition
19 and what they've alleged in the art that they've put forward. We don't think
20 there's any way to view the prior art references that they've put forward in
21 their petition as meeting those claim limitations.

22 So there may be some ambiguity if there's a type of treadmill or
23 sensor that isn't presented in the petition or isn't part of the grounds for
24 invalidity, but we don't have to make that determination today because what
25 we do know is that Acres and Abbondanza, neither of them show a sensor

1 device that is collecting information and communicating with a piece of
2 workout equipment.

3 Okay. So next is Ground 3. This goes to dependent claims 9 and 18.
4 As you heard earlier, the main dispute here is a motivation to combine.

5 And what we see here, if we look at the Acres reference -- and we're
6 looking at page 16 of Exhibit 1002. We're looking at paragraph 25, the last
7 sentence specifically. So paragraph 25 on page 16 of Acres, Exhibit 1002.

8 It describes that the exerciser carries the Bug. And for as long as the
9 exerciser carries the Bug and it's enabled, her physical activity, including
10 heart rate data for each time period, is monitored and logged. So what this is
11 describing in all of these highlighted portions shown here is that the
12 exerciser is wearing the Bug.

13 And here in paragraph 27, we see that they're wearing the Bug outside
14 of exercise sessions. So they're wearing this thing all day long and when
15 they sleep. It's getting resting heart rate data. It's collecting all this
16 information. That's what Acres is teaching. That's its advancement.

17 The Bug is the focal point of Acres. And the Bug, by definition, is
18 this portable piece of equipment. It can bounce around to different pieces of
19 exercise equipment and communicate with them.

20 In paragraph 28, we see that the Bug is capable of configuring and
21 monitoring performance with compatible exercise equipment, including
22 treadmills, ellipticals, stair machines, free weights, all these things. So you
23 have this mobile Bug. The user is wearing it all day. And it's
24 communicating with all these different pieces of exercise equipment.

25 When Lululemon is arguing a motivation to combine, they're saying
26 that a skilled artisan would look at Pyles and combine it with Acres, but

1 Pyles teaches something totally different. Pyles is talking about a storage
2 unit that's fixed to a treadmill. It can't move. It can't be used on other pieces
3 of workout equipment. It's just there on the treadmill.

4 There's no way that a skilled artisan would look at the Bug, which is
5 based on being portable and working with all these different pieces of
6 exercise equipment, and say, you know what I'm going to do? I'm going to
7 combine this with a stationary storage system on one treadmill. It just
8 doesn't make sense, and there's no motivation for a skilled artisan to
9 combine those things.

10 And the supposed benefits that Lululemon highlights, like not having
11 to use the internet and not having to connect to the cloud, don't make a lot of
12 sense in view of the Bug, which repeatedly discusses wireless
13 communication with all of these different pieces of workout equipment.

14 In addition to all of that, we think there's downsides that would come
15 from associating Acres with Pyles and merging those two together. Instead
16 of having your data up in the cloud, if that treadmill goes out of order or
17 something like that, you lose all your data. You'd be locked into that one
18 treadmill. You couldn't use different machines.

19 So all those benefits of the Bug are completely eviscerated by
20 combination with Pyles. And we don't think a skilled artisan would be
21 motivated to combine those two.

22 Okay, last reference, Abbondanza. And this is Grounds 4 and 5. We
23 have the same problem here. Abbondanza does not teach data that's sent
24 from a sensor device to a piece of workout equipment.

25 And Abbondanza has another defect, which is that it doesn't teach a
26 sensor device within the context of the claims as it's discussed there.

1 Lululemon says that it needs to combine a pulse rate sensor and this base
2 unit sensor together to create a sensor device. And now we're looking at
3 slide 55 of Nike's demonstrative.

4 So Abbondanza fares even worse than Acres. Now we have this
5 separate base unit, which doesn't have a sensor unit to it. So now the user
6 has a pulse rate sensor. It's not communicating directly with the workout
7 equipment. It's going to this separate base unit.

8 And then that base unit is doing what we saw in Acres. It's converting
9 the data into something different. Here they call it instructions. And then
10 the base unit, not the sensor, is sending instructions, not the data, to a piece
11 of workout equipment. So we have two issues here with Abbondanza.

12 Okay. It looks like we're out of time. We'll reserve the rest of our
13 time for rebuttal. Thank you.

14 JUDGE COCKS: You'll have your ten minutes.

15 MR. BOWLING: Thank you.

16 JUDGE COCKS: Whenever you're ready.

17 MR. ARJOMAND: Thank you, Your Honor. So Your Honor, I
18 wanted to first address your question, Judge Cocks, about what would be
19 excluded from data information based on Petitioner's construction.

20 And what I'd like to explain to you is that, in our view, our
21 construction does not have any specific exclusion for the purposes of this
22 proceeding. And that's consistent, here on slide 34, with the Oxford
23 Dictionary of Computing.

24 It says information in any form on which a computer program
25 operates, or to more accurately quote it, on which computer programs

1 operate. So we think that data being construed as information should be
2 information in any form.

3 Now, I believe I heard my colleague say that that seems to be
4 unlimited. And what I would like to point you to is that the claim does limit
5 the first set of data.

6 Going back to slide 6, this shows claim 1 and limitation 1B. And it
7 says a first set of data for operating a first function of the piece of workout
8 equipment.

9 Data is a broad term, as we saw in the dictionary definition;
10 information in any form. But the claim then further narrows the data for
11 operating the first function of the piece of workout equipment. So I'd like to
12 --

13 JUDGE COCKS: Counsel, one point. I can't help but notice that in
14 answering my question -- and thank you for offering the answer -- you're
15 relying on the dictionary definition that you're seeking to exclude. Are you
16 still seeking to exclude that definition from this proceeding?

17 MR. ARJOMAND: Well, Your Honor, I think that if you take a look
18 at the Wiley Dictionary -- I can point that to you -- the definition that we're
19 relying upon on slide 31, definition number two, is also unbounded.
20 Information which is represented in a manner suitable for digital
21 transmission or computing.

22 So maybe unbounded is not the right word, but it's a very broad term.
23 And what bounds that broad term, at least with respect to limitation 1B, is
24 the further limitation in claim 1, in limitation 1B of claim 1.

25 JUDGE BELISLE: Counsel, if I may, I really need you to speak
26 louder.

1 MR. ARJOMAND: Sorry.

2 JUDGE BELISLE: Just as an example, when we get the transcript,
3 often we saw inserts where it just said inaudible.

4 MR. ARJOMAND: Yes.

5 JUDGE BELISLE: So if you could speak up, it would be helpful.

6 MR. ARJOMAND: Yes, of course, Your Honor.

7 So yes, we're still maintaining our motion to exclude, Your Honor.

8 JUDGE COCKS: And along those lines, not to get too much into it,
9 but the other side noted that the basis for excluding the Oxford Dictionary is
10 because it's two years, 2008, versus the critical date of 2006. And they've
11 noted that content that you are relying on for your own case is dated 2020, I
12 think.

13 Is there a disconnect between the attempt to exclude a definition from
14 2008 yet maintain your own evidence that's dated 2020?

15 MR. ARJOMAND: In our view, Your Honor, their dictionary
16 definition goes straight to the heart of their case, which is try to get around
17 the prior art. So it's the fundamental basis upon which they're arguing that
18 there's a distinction between instructions and data.

19 And so we think that if they're going to make such a strong point in
20 the record, then they have to prove it up with evidence that's consistent with
21 the priority date of the patent.

22 Our reliance on the textbook is really a rebuttal to their argument as to
23 there's a distinction between data and instructions. So it's a rebuttal piece of
24 evidence. They haven't moved to exclude it. They didn't object to it.

25 And as I sort of sensed or expected, Patent Owner's Counsel came up
26 here and started talking about that reference. In the proceeding at Dr.

1 Houh's deposition, he testified or he indicated to Dr. Houh that he's not an
2 expert in computer science or computers, whereas Dr. Houh is.

3 So we think that discussion relating to that Exhibit 1016 from Dr.
4 Houh is the proper way to understand that reference and is unrebutted. And
5 I think the argument that he's made today about that reference is just
6 attorney argument.

7 JUDGE COCKS: Okay, thank you. You can move on.

8 MR. ARJOMAND: So since I am here on slide 31 and it is the Wiley
9 Dictionary, definition number one begins with factual information.

10 I want to be very clear about this. Our understanding from the Patent
11 Owner's arguments was that they were relying on factual information,
12 specifically the word factual, to distinguish over their art. Specifically, in
13 their view, factual information was raw data. It wasn't processed data.

14 And I'll direct you, Your Honors, to the Patent Owner Response,
15 Paper 19, pages 17 to 18, where they rely on factual information that is
16 sensed or collected as their understanding of the patent.

17 I think what's important to understand is that Patent Owner's Counsel
18 has now said that they are not relying on the word factual as an important
19 distinction over the art. I believe both you, Judge Cocks, and you, Judge
20 Belisle, asked them that question straight on, and maybe even Judge
21 Hoskins.

22 He was very clear that they're not relying on factual information, the
23 word factual as a distinction over the art. And if that's the case, then based
24 on their arguments, I think that would include process data because they're
25 relying on factual to sort of exclude process data.

1 Since I just mentioned Judge Belisle, I wanted to just briefly point to a
2 comment that she made, Judge Belisle, which I think is an accurate
3 understanding of claim 1. If you go to slide 6, this is claim 1, limitation 1B.
4 It just provides transmitting by the sensor device and to the piece of workout
5 equipment.

6 I've heard Patent Owner's Counsel several times mention that the
7 claims require a first set of data to come from the sensor. That's not required
8 in limitation 1B.

9 And as we saw here in this slide in Figure 4, the sensing system 408
10 may have a microprocessor. So the microprocessor can generate data that's
11 not sensed or collected, like from a memory location, and it can transmit
12 that.

13 So I think the claim language is very broad with respect to 1B on this
14 issue. And I thought I heard Patent Owner's Counsel trying to narrow it, but
15 it's not consistent with the claim language.

16 I did want to also really briefly address the point regarding distinct
17 embodiments or that Figure 4, here on slide 16, is somehow not part of the --
18 it's not encompassed by the claimed invention. I think that's wrong from
19 reading the specification. If you take a look at the specification, it talks
20 about in Figure 1, sensing devices 102A through 102D.

21 And then in Figure 4 at column 14, at the bottom at line 64, it talks
22 about, if desired, the microprocessor onboard the sensing system 408, if any,
23 may process the sensor data, change its form or format, or otherwise
24 manipulate the data prior to sending it on to other parts of the system 400.
25 The sensing system 408 may constitute a sensor module like modules 102A
26 through 102D, illustrated in Figure 1.

1 So it connects the sensors 102A through 102D that Patent Owner's
2 Counsel pointed to directly to Figure 4. And then if you continue on in
3 column 17, at lines 15 through 20, it connects Figures 1 through 4 to Figure
4 5, which is very similar to Figure 6.

5 And it says on line 15 through line 19 of column 17, quote, in general,
6 any of the various athletic performance sensing systems, electronic interface
7 devices, and/or portable electronic devices of the types described above in
8 conjunction with Figures 1 through 4 may be used without departing from
9 the invention.

10 So we think that the specification is very clear that Figure 4 is within
11 the scope of the claimed invention or supports the claimed invention. And
12 we're a bit surprised at the argument that was made today. We haven't seen
13 it in their papers.

14 To the contrary, we saw in the sur-reply that they were arguing -- I
15 think this is on page -- this is Paper 29, page 6. They say, the data in this
16 embodiment -- this is Figure 4 -- is also collected from sensing devices in
17 the first instance and thus consistent with Nike's construction.

18 So they are also pointing to Figure 4 as it being consistent with their
19 construction. So it seems like they're trying to have it both ways, relying on
20 Figure 4 to support their construction and today arguing that it's not an
21 embodiment that's supporting the claims or that comes within the scope of
22 the claim.

23 I did just want to quickly make two other points. We don't concede
24 any sort of point regarding from which decisions or subsequent actions can
25 be made. We didn't concede that that portion of the construction is correct.

1 We just thought that it was not really consistent with the claim language,
2 which had language that was different.

3 And then we also have never conceded this issue between sensor
4 device and sensor in claims 1 and claim 2. We have never argued that
5 there's a difference in the claims between sensor device and sensor. That's
6 been their position. And I just want to make sure -- that's not been our
7 position. We haven't addressed that issue.

8 So with that, let me just turn over my last minute to my colleague,
9 Jean Nguyen.

10 MS. NGUYEN: So Your Honors, I just wanted to address Patent
11 Owner's argument with respect to Abbondanza -- sorry -- with respect to
12 Pyles and the Bug. Patent Owner argues that the Bug's purpose is
13 portability.

14 And Your Honors, we respectfully disagree. The purpose of the Bug,
15 and you'll see it in the abstract of Acres, is that it's there to automatically
16 control the exercise equipment so that the user doesn't have to.

17 And again, just taking a look at slide 58, if Acres really needed
18 portability, then it wouldn't make sense why Acres would provide an
19 alternative option where you don't need portability. So we respectfully
20 disagree with Patent Owner's arguments.

21 And then with respect to Acres not disclosing a sensor device, I'd like
22 to refer Your Honors to the petition, page 2 -- sorry -- Paper 2, page 9. And
23 also, for Abbondanza, we also do not agree that Abbondanza discloses a
24 sensor device.

25 JUDGE COCKS: Thank you.

1 MR. BOWLING: Okay. Just a couple quick things, Your Honors.
2 Okay. The first point we wanted to touch on was they've again said that, in
3 their view, the definition of data is unbounded; any form of information.
4 And we just don't think that's the law. They're trying to view the term in a
5 vacuum without any regard to the specification whatsoever.

6 It's quite clear that the specification repeatedly discusses athletic
7 performance, monitoring, sensing. There's a very clear, specific type of data
8 that's being discussed. And in the claims, that data is being sent to a piece of
9 workout equipment. There's just no way that all these different types of data
10 could be what's contemplated by the claims.

11 And we wanted to direct Your Honors to some case law, a Federal
12 Circuit decision from 2021, Carrum Techs v. Unified Patents. And that's at
13 2021 Westlaw 3574209, pincite 5 through 6.

14 In that case, the term at issue was vehicle position in the turn. And
15 the Federal Circuit reversed the Board's construction as too broad and,
16 quote, untethered to the specification. And here's what the Federal Circuit
17 said.

18 They said, as noted, the specification, from the abstract through the
19 description of the invention, uniformly discusses reducing vehicle speed
20 based on the position of the vehicle along with the curve of the turn.

21 Non-limiting examples are not sufficient to redefine a term to have
22 something other than its plain and ordinary meaning, but we reject Unified's
23 premise that Carrum seeks to redefine the term at issue. Our construction is
24 the phrase's ordinary and customary meaning understood by a skilled artisan
25 in the context of the specification.

1 What Lululemon is encouraging the Board to do, construing it in a
2 vacuum, is just not the law. It has to be tethered to the specification.

3 Other cases that stand for the same proposition, *Route1 Inc. v.*
4 *AirWatch*. That's at 2020 Westlaw 5943954.

5 There the Federal Circuit said, although the specification does not
6 contain an explicit statement disclaiming remote-initiated connections, this
7 is not an instance where the specification would necessarily have to disavow
8 an embodiment that would otherwise be covered by the plain language.
9 Rather, the plain terms of the instruction limitation are entirely consistent
10 and even support the specification's depiction of host-initiated connections.

11 There's dozens of Federal Circuit cases like this that require
12 construction of a term in view of the specification. And we think the broad,
13 quote, unbounded definition of data that Lululemon suggested just can't be
14 right. We think it's clear that the data must come from a sensor device, must
15 be sensed or collected by the sensor device, and be transmitted to a piece of
16 workout equipment.

17 The next point on Figures 4 and 5 of the '225 Patent, Lululemon's
18 pointing to the fact that they mention sensors. We don't dispute that there's
19 some type of sensor in those, but the embodiments are totally different.
20 They don't involve communication with a piece of workout equipment.

21 Figure 5 concerns displaying videos on a treadmill, TV shows, while
22 you're working out. It's just not an embodiment that's part of the claims.
23 And we don't think that those figures and those embodiments that
24 Lululemon pointed to are informative as to the correct construction of data
25 as it's claimed in the '225 Patent.

1 Lastly, Lululemon pointed to supposedly an embodiment in Acres
2 where the Bug is non-portable. We don't see that anywhere in Acres. What
3 we did see in the section of the specification they pointed to was where the
4 Bug has a wired or wireless connection.

5 We don't think that means it's not portable. That just means you can
6 walk up with your USB cord and plug it into the treadmill, and you can do
7 that with all the other sorts of exercise equipment that is contemplated by
8 Acres with respect to the Bug. And even in that case, it doesn't make sense
9 to combine it with Pyles where everything is stored on one treadmill, which
10 completely eviscerates all the benefits that the Bug is intended to offer.

11 Unless you have any further questions, we don't have anything further.
12 Thank you, Your Honors.

13 JUDGE COCKS: I don't think we have any further questions. Thank
14 you very much.

15 We thank both sides for their informative presentations today. The
16 case is submitted, and we are adjourned.

17 We are off the record.

18 (Whereupon, the proceedings at 12:03 p.m. were concluded.)

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