

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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PELOTON INTERACTIVE, INC.,

Petitioner,

v.

JOHNSON HEALTH TECH CO., LTD.,

Patent Owner.

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PTAB Case No. IPR2023-01163

U.S. Patent No. 10,032,227

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**PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY TO  
PATENT OWNER'S RESPONSE TO PETITION FOR *INTER PARTES*  
REVIEW OF U.S. PATENT NO. 10,032,227**

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## **I. INTRODUCTION**

Petitioner's Reply boils down to rehashing the arguments raised in its Petition, injecting new arguments to fill the Petition's acknowledged shortcomings, and mischaracterizing PO's arguments and the evidence to mislead the Board. Underlying the entirety of Petitioner's arguments is its willful blindness to the '227 Patent's express definition of "exercise use data," and the claim language requiring "validated exercise use data," and "non-validated exercise use data" be generated in response to the sensor detecting the user engaged with the operating unit. Petitioner has thus failed to establish any of the Challenged Claim are unpatentable.

## **II. CLAIM CONSTRUCTION**

### **A. "Exercise use data"**

The '227 patent provides an express definition for "exercise use data," and neither Ray's virtual image nor Morris' pace, footfall force, and cadence satisfy that express definition.

#### **1. PO's construction is supported by the intrinsic evidence.**

Petitioner argues that PO's "construction [of "exercise use data"] finds no support in the record" (Reply at 2) but ignores that PO's construction is the express definition of "exercise use data" in the specification. Indeed, the specification defines "exercise use data" as data that "represents an exercise *amount* of the

user,” (Ex.1001 at 1:37-40, emphasis added) and that construction is supported by expert testimony. Ex.2004, ¶¶32-35.

PO also does not limit “exercise use data” to time and distance, as Petitioner contends. Reply at 2. Instead, time and distance are two examples of “exercise use data” recited in the specification and claims. Ex.1001 at 5:59-6:4, claims 2, 3, 12, 15-17; Ex.2004, ¶33. “Exercise use data” also includes any other metric that represents an ***amount*** of exercise by the user, like calories. POR at 23. The exclusion of “pace, heart rate footfall force, cadence and Ray’s virtual image” from “exercise use data” is not “arbitrary” as Petitioner contends. None of those metrics represent an ***amount*** of exercise by the user, and Petitioner has no evidence or argument to the contrary. *See* Ex.2004, ¶¶35, 55-57; Ex.2005 at 16:22-17:7, 59:17-60:11 (Petitioner’s expert admitting that pace, cadence, and gait do not represent an amount of exercise the user has performed).

With no evidence to support its position, Petitioner makes a new argument trying to equate “exercise habit” to “exercise use data.” Reply at 2. For this argument, Petitioner purports to quote “EX-1001, 1:37-40,” but conspicuously omits the express definition of “exercise use data” included in the cited text. The specification makes clear that the two terms are different. *See, e.g.*, Ex.1001 at 1:36-50, 2:6-19, 2:29-36. Rather than equate “exercise habit” and “exercise use data,” the ’227 patent explains that a “user could use this exercise use data to

demonstrate his (or her) exercise habit.” Ex.1001 at 1:47-48. Nonetheless, the ’227 patent never says that “pace, heart rate, footfall force, cadence, and Ray’s virtual image” would constitute “exercise use data.”

In grasping for support, Petitioner argues that a “POSITA would understand that ‘exercise habit,’ as used in the ’227 patent, would correspond to a user’s exercise pattern” and cites “Rawls, ¶¶114-115”. Reply at 3. Rawls, however, does not say this. And whether an “exercise habit” corresponds to “a user’s exercise pattern” has nothing to do with the meaning of the claim term “exercise use data.” Petitioner confirms the weakness of its argument when citing “Rawls, Appendix K, ¶0026” for the proposition that “a POSITA would understand information, such as heart rate, pace, and other metrics disclosed in the prior art, are exercise use data that can show an exercise habit.” Reply at 3. “Rawls, Appendix K” is a patent application without any relationship to PO or the ’227 patent, was not cited in the Petition, and never uses the term “exercise use data.” *Trs. of Columbia Univ. in City of New York v. Symantec Corp.*, 811 F.3d 1359, 1369 (Fed. Cir. 2016) (finding error in affording similar construction of term used in unrelated patents). Therefore, it is irrelevant and does not help Petitioner avoid the express definition of “exercise use data” in the ’227 patent. *See Bell Atl. Network Servs., Inc. v. Covad Commc’ns Grp., Inc.*, 262 F.3d 1258, 1268 (Fed. Cir. 2001) (The

“specification acts as a dictionary when it expressly defines terms used in the claims.”).

Petitioner's reliance on U.S. Patent Nos. 8,287,434 and 6,638,198 is misplaced. Reply at 3. As Petitioner admits, neither patent uses the term “exercise use data.” Reply at 3 n.1. However, as noted in the '227 patent, both patents disclose types of “exercise use data,” including time, calories, and distance. Reply 3-4. Other metrics disclosed in the '198 and '434 patents, like pulse rate and velocity, are not “exercise use data” because they do not represent an amount of exercise. Ex.2004, ¶¶35.

Petitioner argues that the '375 patent file history contradicts PO's construction of “exercise use data” because “Applicant did not dispute that Yi disclosed ‘exercise use data.’” Reply at 4. PO did not dispute that Yi discloses “exercise use data” because it discloses “exercise distance, [and] exercise time.”<sup>1</sup> Ex.1009 at 38; Ex.1015 at [0039]. Thus, contrary to Petitioner's argument, PO did not contradict its construction of “exercise use data” during prosecution of the '375 patent.

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<sup>1</sup> To be clear, PO acknowledged during prosecution that Yi discloses “exercise information such as exercise distance, time and speed tracking a user's footsteps.” Ex.1009 at 38. Of those types of “exercise information,” only distance and time are “exercise use data,” and PO never stated otherwise.

Finally, PO's reliance on Petitioner's "Preliminary Infringement Contentions" is misplaced. Reply at 4. Petitioner did not contend that "pace" was "exercise use data" in its contentions. Rather, PO contended that Petitioner's product satisfied the "exercise use data" element of claim 1 because it disclosed "Total Output (kJ), Distance (mi), and Calories (kcal)" which are all amounts of exercise. Ex.1018 at A-8

Petitioner seizes on a mistake in the "communication interface in communication with the controller" element of claim 14. There, PO mistakenly stated "[t]he Accused Products' controller communicates with the current sensor and operating unit to gather exercise use data, including pace, incline, output, and mileage." Ex.1018 at A-23. Clearly, "exercise use data" in that sentence should be "exercise data" because if PO meant to assert "pace" (or "incline") as "exercise use data," it would have said that "pace" satisfies the "exercise use data" element in its contentions. It did not. Ex.1018 at A-8, *see also*, claim 14 at A-25.

Notably, PO "reserve[d] the right to supplement or modify [its Preliminary Infringement Contentions] at any time." Ex.2006 at 1<sup>2</sup>; *Intex Recreation Corp. v. Bestway (USA), Inc.*, IPR2019-00454, Paper 34, 25 (PTAB Jun. 22, 2020) (relying on PO's "reserv[ation of] all rights to amend, supplement, and/or modify its

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<sup>2</sup> This exhibit was authorized by the Board during the July 2, 2024, teleconference under 37 CFR § 42.23(b).

Contentions” in deciding “not [to] regard the infringement contentions in the District Court as a claim construction proposed by Patent Owner in the proceeding before us”). The mistake will be corrected in PO’s “Final Infringement Contentions” when the litigation stay is lifted.

Even if PO’s initial contentions were based on a different claim construction for “exercise use data” (which they were not), the Board has reasoned that there is no “controlling authority that prevents a [party] from advancing one construction in District Court Litigation . . . and a different construction . . . before the Board.” *Frameless Hardware Co., LLC v. C.R. Laurence Co., Inc.*, IPR 2022-00356, Paper 55, 15-16 (PTAB Jul. 5, 2022). The Board’s role is simply to construe the claims under the same standard as the district court. 37 C.F.R. § 42.100. When the district court has not construed the claims and the litigation is stayed, like here, there is no risk of inconsistent claim constructions.

**2. Ray’s virtual image and Morris’ pace, footfall force, and cadence are not “exercise use data.”**

Petitioner argues that even if PO’s construction were adopted, a “POSITA would understand that Ray’s thinning image represents an amount of exercise,” relying upon “Rawls, ¶¶177-179.” Reply at 5. Rawls does not opine that Ray’s thinning image represents an amount of exercise anywhere in his declaration. Ex.1002. Thus, Petitioner has no evidence that Ray’s virtual image represents an amount of exercise of the user.

With no evidence, Petitioner claims Ray's virtual image is "exercise use data" because it morphs based on "intensity, speed and/or duration of a user's workout." Reply at 5. As previously noted, the virtual image does not represent an *amount* of exercise by the user. Ex.2004, ¶¶61, 64. For example, if Ray's virtual image thinned the user's image by 50% during a workout session, there is no way to know from the thinned image what amount of exercise, such as time, distance, and/or calories, the user performed. *Id.*; see also Ex.2005 at 22:6-7 ("I don't know that the image is going to give me a precise piece of information.").

Petitioner next argues that Morris' disclosure of "pace, footfall force and cadence represent the amount of exercise of the user," but fails to explain how any of these metrics represent an *amount* of exercise. Reply at 5. Petitioner's misleading citation to "Morris [0053]" and "Rawls, ¶¶174-83" provides zero support for the proposition that pace and footfall force represent an amount of exercise. Reply at 5. Indeed, Petitioner's explanation of pace ("the pace run during their exercise"), footfall force ("the amount of force being exerted by the user's footfalls"), and cadence ("steps per minute") confirm that they do not represent an *amount* of exercise. Reply at 5.

Petitioner mischaracterizes PO's position on multimedia content. Reply at 6. PO countered Petitioner's argument that multimedia media content *is* exercise use data by explaining that, according to the '227 patent, "exercise use data" *can be*

*shown* as a multimedia content but multimedia content itself is not “exercise use data.” Petitioner’s mischaracterization is merely an attempt to avoid the real issue, which is whether Ray’s virtual image represents an amount of exercise. The evidence shows it does not.

Petitioner’s next argument that “exercise use data” need not be a precise measurement is beside the point. Reply at 6. Not only is Ray’s thinning image not a precise measurement, it simply does not represent an amount of exercise.

Finally, PO also did not contradict itself with its construction of “exercise use data” in the district court litigation. Reply at 6. PO explained there (and here) that “exercise use data” is an apparent amount of exercise unless it is validated or non-validated by the controller. POR at 5; Ex.2004, ¶34.

**B. “Validated exercise use data”**

Petitioner criticizes PO’s construction of validated exercise use data but does not propose another construction or offer evidence in support of one. Reply at 6-7. Petitioner argues that PO’s construction “merely brings in existing claim limitations.” Reply at 7. The claims require that the “controller . . . generate a validated exercise use data in response to movement of the operating unit relative to the base and the sensor does detect engagement of the user with the operating unit.” *See, e.g.*, Ex.1001 at claim 1. Thus, “validated exercise use data” is “exercise use data that has been determined to have occurred by the controller in response to

the sensor detecting a user engaging the moving operating unit (or endless belt).”

There is nothing improper about PO's construction.

Petitioner also mischaracterizes PO's argument about footfall force and cadence being inherently valid. Reply at 7-8. The evidence shows that cadence and footfall force are not “exercise use data” Ex.2004, ¶¶55-58. Even if they were, Petitioner has not offered evidence showing that Morris discloses that either footfall force or cadence “has been determined to have occurred by the controller in response to the sensor detecting a user engaging the moving operating unit (or endless belt).”<sup>3</sup> Ex.2004, ¶58.

Finally, Petitioner contends that PO's arguments here are inconsistent with its preliminary claim construction in the district court because it emphasized “in response to.” Reply at 8. Notwithstanding that PO's district court construction was preliminary and should not be considered here (*see* Section II.A.1, above), PO emphasizes “in response to” because it is explicitly recited in the claims and because Petitioner attempted to read out that claim language. Indeed, Petitioner took the untenable position that, so long as the controller generated “exercise use

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<sup>3</sup> Petitioner's argument that footfall force and cadence can be faked if a person's friend performs the exercise for them misses the point. Reply at 8. The '227 patent does not purport to prevent *all* ways of faking exercise. Instead, the patent is directed to preventing a user from turning on motor-driven exercise equipment and taking credit for “exercise use data” for exercise that was not performed. Ex.2004, ¶¶22-24.

data” *while* a person was exercising, regardless of whether that “exercise use data” was generated by the controller *in response to* sensor detecting user engagement, it was “validated exercise use data.” Pet. at 19. When proposing its district court construction, PO could not anticipate Petitioner would attempt to read “in response to” out of the claims.

**C. “Non-validated exercise use data”**

Like with “validated exercise use data,” Petitioner criticizes PO’s construction of “non-validated exercise use data,” but does not propose another construction or offer evidence in support of a different construction. Reply at 6-7.

Contrary to Petitioner’s argument, “exercise use data” can be neither “validated exercise use data” nor “non-validated exercise use data.” Indeed, that is a problem with the prior art solved by the ’227 patent. Claim 1, for example, requires that “validated exercise use data” and “non-validated exercise use data” be generated by the controller in response to the sensor detecting engagement by the user or not detecting engagement by the user. *See e.g.*, Ex.1001 at Claim 1. PO already explained this with reference to Figure 6 and the associated description. POR at 6-8; Ex.1001 at Figure 6; Ex.2004, ¶¶37-39. Thus, if the controller generates “exercise use data” without basing it on the sensor detecting or not detecting a user (*i.e.*, the prior art), then the “exercise use data” is neither “validated” nor “non-validated.” Ex.2004, ¶34.

Petitioner misleadingly cites “EX-1001 at 4:45-49 and 6:5-9” as support for its position that all “exercise use data” is either “validated exercise use data” or “non-validated exercise use data.” Reply at 9. The cited text says nothing of the sort. Petitioner then cites “EX-1001, 2:15-19” for the proposition that “[i]n prior art motor-driven devices, the validity of the exercise use data when a user could not be detected was questioned.” Reply at 9-10. The cited text does not support this. Rather, it states that with prior art motor-driven exercise equipment “there is a question as to the validity of this exercise use data.” Ex.1001 at 2:15-19. The validity of the “exercise use data” was in “question” because it was not generated by the controller “*in response to*” the user being detected or not detected by the sensor. Thus, the “exercise use data” generated in prior art equipment was neither “validated” nor “non-validated.”

Finally, Petitioner incorrectly argues that PO’s preliminary claim construction in district court is inconsistent with its construction here. Reply at 10. Notwithstanding that PO’s district court construction was preliminary and should not be considered here (*see* Section II.A.1, above), as with “validated exercise use data” above, PO’s arguments here are not inconsistent. *See* Section II.B.

### III. GROUNDS FOR CHALLENGE

#### A. Ground 1

Petitioner has failed to show that Morris and Ray, alone or in combination, teach or suggest elements 1[g] and 1[h] because PO's constructions are proper and the claims are not rendered obvious under the proper constructions. Moreover, Petitioner also fails to show the Morris-Ray combination teaches or suggests element [i].

##### 1. Element 1[h] – Validated Exercise Use Data

As explained above, “validated exercise use data” means “exercise use data that has been determined to have occurred by the controller in response to the sensor detecting a user engaging the moving operating unit (or endless belt).” *See* Section II.B, above; POR 6-11; Ex.2004, ¶¶36-45. Under this construction, Ray's virtual image, footfall force, cadence, and pace are not “exercise use data” because they do not represent an amount of exercise, and the Morris-Ray combination therefore does not teach or suggest “validated exercise use data.”<sup>4</sup>

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<sup>4</sup> Petitioner argues it has not muddled Ray's validation feature and virtual thinning image because “Ray discloses that its thinning image can be broadcast to a display.” Reply at 11 n.7. Petitioner has muddled the two and misses the point. Ray validates a person's identity and method of exercise by transmitting an actual image of the person to a third party. Ex.1004 at 8:27-29; Ex.2004, ¶28. Ray's virtual thinning image is not validated by anyone or anything, let alone a controller in response to a sensor detecting a user. Ex.2004, ¶65. The virtual image in Ray is only for motivating the user. Ex.2004, ¶66; Ex.2005 at 24:3-5.

Petitioner argues that the Morris-Ray combination discloses time and distance. Reply at 13. PO does not dispute this. Petitioner, however, still fails to address element 1[h]'s requirement that exercise use data, such as distance and time, be determined by the controller to have occurred in response to the sensor detecting a user engaging the moving operating unit. Thus, PO has failed to show “validated exercise use data” in either Morris, Ray, or the combination of the two. *See* POR at 17-25.

Petitioner argues that PO ignored the *combination* of Morris and Ray, but that is not true. Reply at 13-17. In its Response, PO explained that neither Ray nor Morris taught or suggested “validated exercise use data.” POR at 17-25. Petitioner did not articulate a combination of Morris and Ray different from Morris or Ray alone to satisfy the “validated exercise use data” element. Pet. at 32-39.

Although Petitioner asserted that Morris' controller “communicated with the user detect sensor” (Pet. at 28), Petitioner never argued in the Petition, let alone provided evidence, that Morris' controller determines “exercise use data” to have occurred in response to the sensor detecting a user engaging the moving operating unit. To the extent Petitioner is making that argument now (Reply 14-17), it is for the first time, unsupported, based on hindsight, and incorrect. *See* POR at 17-19. Arguments made for the first time in Reply that could have been made in the Petition are improper. *See* Consolidated Trial Practice Guide (Nov. 2019), at 73

(“Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g. to make out a prima facie case of unpatentability.”); *see also In re NuVasive*, 842 F.3d 1376, 1380-81 (Fed. Cir. 2016).

Petitioner further argues that Ray “teaches that its camera detects a user on the moving belt and that the thinning image is generated and displayed only if a user is detected.” Reply at 14. On this basis, Petitioner claims that “a POSITA would have found it obvious that Ray’s other exercise use data, e.g., distance and time, would be transmitted along with Ray’s thinning image only when a user is detected.” Reply at 14 (citing Ex.1002 (Rawls), ¶179). But the cited paragraph actually states: “it would have been obvious to a POSITA that Ray’s other types of exercise data (such as time and distance) would be generated *while the belt was moving* because that information would be computed *based on the movement of the belt*.” Ex.1002, ¶179 (emphasis added). Thus, Rawls does not support Petitioner’s argument that Ray’s other types of exercise data would only be transmitted when the user is detected. Rather, Rawls description of Ray illustrates the problem in the prior art that the ’227 patent addressed. Ray, like other prior art, generates time and distance based on the movement of the belt without validation by the controller in response to the sensor detecting engagement by the user.

Although Ray “explained that the movement of the treadmill could trigger the camera’s operation” (*id.*), it says nothing about the operation of the controller

determining the validity of time, distance, or calories in response to a sensor detecting a user engaged with the moving operating unit. Ex.2004, ¶67. Indeed, Ray teaches that, as long as the treadmill belt is moving and regardless of whether the user is on the treadmill, exercise data accumulates with no determination by the controller whether or what portion of the exercise data is validated. Ex.2004, ¶67; Ex.2005 32:4-7, 38:19-39:2. This is exactly what the claimed invention solves – the prior art's accumulation of exercise use data without a determination by the controller whether the user engaged (or not engaged) with the treadmill.

Petitioner relies on Figure 9 in Morris to argue that it “demonstrates that its controller generates validated exercise use data ‘in response to’ detection of the user by the sensor and movement of the tread.” Reply at 16. For this proposition, Petitioner provides another misleading citation to “Morris [0021]; Pet. 8; Rawls, ¶¶121-23.” “Morris [0021]” is a “Brief Description” of Figure 9; “Pet. 8” describes how Morris initiates a controlled slowdown when the user was not detected; and Rawls ¶¶121-23 describes Morris' detection mechanism for enabling the treadmill's “kill function.” None of Petitioner's cited evidence provides any disclosure even remotely close to a “controller [that] generates validated exercise use data ‘in response to’ detection of the user by the sensor and movement of the tread.”

Petitioner also relies on Figure 9 in Morris to argue that Morris' controller "calculates various parameters (i.e., exercise use data), manages the motor driver, and outputs parameters to the display"; "adjusts the display in response to the user detection sensor's signal"; and "may also affect a workout program (including information on duration, distance, incline, intensity; Morris, [0035]) in response to detection of the absence of a user." Reply at 16-17. Petitioner's arguments are again misleading. Morris discloses that, when a user steps off the treadmill while the belt is running, the display "alert[s] the user to reengage" and the "workout program" is affected only by entering a slowdown period. Ex.1006 (Morris) at [0036]. Nothing in Petitioner's argument or evidence demonstrates that the controller of Morris makes any determination or does any analysis about the validity of the exercise use data generated during the slowdown period. In fact, Petitioner's expert admits that during the slowdown period when the user is not on the machine, the exercise use data continues to accumulate. Ex.2005 at 56:1-5.

## **2. Element 1[g] – Non-validated Exercise Use Data**

Petitioner argues that PO's construction requires "three types of exercise use data." Reply at 18. As explained above, not all "exercise use data" is either "validated" or "non-validated." "Exercise use data," such as time or the distance, can exist without a controller determining that the "exercise use data" is validated or non-validated in response to a user being detected or not detected.

With reference to Morris, Petitioner argues that a POSITA “would have found it obvious that exercise use data not dependent on the user’s presence, e.g., time, would continue to generate in the absence of the user.” Reply at 18. In Morris, this data is simply “exercise use data” that is neither “validated” nor “non-validated.” POR at 19; Ex.2004, ¶¶58-59. Petitioner’s argument proves PO’s position that the combination of Morris and Ray does not teach or suggest “non-validated exercise use data.”

Nothing in Petitioner’s argument or evidence demonstrates that the controller of Morris makes any determination or does any analysis about the validity or non-validity of the distance or time data generated during the slowdown period or when the user is alerted to reengage. Ex.2004, ¶73. Instead, according to Morris, time data would continue to be generated and accumulate without the user being detected by the sensor – just as it did when the user was detected by the sensor. *Id.* There is no indication in Morris that distance or time generated during the slowdown period is “non-validated exercise use data,” and thus Petitioner’s argument fails.

### **3. Element 1[i] - The Controller Transmits the Validated Exercise Use Data to the Communication Interface**

Petitioner makes entirely new arguments for element 1[i]. Reply at 19-20. In the Petition, Petitioner argued that “Ray disclosed this limitation by explaining that the virtual image was sent out as a live feed to third parties such as insurance

programs, trainers, and physicians.” Pet. at 41. Thus, it was **Petitioner’s** position that element 1[i] was satisfied by transmission of the virtual image to third parties.

In response, PO pointed out that Petitioner relied exclusively on the **Morris’s** “controller” for Ground 1 but that “Petitioner fails to argue or submit evidence that **Morris’s controller** would transmit Ray’s virtual image third parties,” and thus failed to satisfy element 1[i]. POR at 26-27.

Now, with a problem of its own making, Petitioner falsely claims that PO is improperly arguing that element 1[i] requires the transmission of data to a third party. *See* Reply at 19. Petitioner highlights that its arguments are new by citing to pages 29-32 of the Petition to suggest that it is merely repeating its Petition arguments. Reply at 19. But pages 29-32 of the Petition relate to element 1[f], not element 1[i].

In reply, Petitioner argues that “Morris and Ray each disclose a variety of communications interfaces, including those that allowed the user’s motivational image and other data to be transmitted over the internet.” Reply at 19. Petitioner’s new argument is misleading because it cites “Morris [0035]-[0036]” as support, but those paragraphs say nothing about transmitting data over the Internet. Ex.1006 [0035]-[0036]. And Petitioner’s problem is not fixed because there is still no evidence that Morris’s controller in combination with Ray’s virtual image would satisfy element 1[i] as argued it in the Petition.

**B. Ground 2**

**1. The Petition fails to identify each element in the prior art.**

While Petitioner is not required to “repeat its positions” for the independent claims in Ground 1, *see* Reply at 20, Petitioner as the “master of its complaint” still must identify “with particularity” the evidence that supports the grounds for the challenge to each claim, which it has failed to do. *See* POR at 29-30.

**2. A POSITA would not be motivated to combine Cox with Morris and Ray.**

First, Petitioner still does not explain how adding Cox’s current sensor to Ray’s camera and Morris’s reluctance sensor would improve the motivational image. *See* Reply at 22. To the extent that having additional sensors would improve Ray’s virtual image, Morris already provided an additional sensor to the combined apparatus. These references independently accomplish similar functions, and because each device independently operates, a POSITA would have no reason to redundantly combine the features of the devices into a single device. Ex.2004, ¶¶82-84.

Second, Petitioner’s arguments that Morris “contemplated having multiple sensors” and “[b]oth Morris and Cox described gait analysis techniques using complementary sensors” are not reasons to combine redundant sensors and their associated costs. *See* Reply at 22; Ex.2004, ¶83.

Finally, whether Cox's additional sensor "*could* be integrated into a standard treadmill" is irrelevant. Reply at 23. Petitioner fails to explain why a POSITA *would be motivated* to add a third costly sensor for a third level of redundancy that no reference suggests is needed or even helpful. Ex.2004, ¶84.

### **C. Ground 3**

#### **1. Petitioner's reliance on AAPA as a "basis" for Ground 3 is not permissible.**

"Section 311(b) limits the prior art that may be used as 'the basis' of an IPR proceeding to 'patents or printed publications.'" Ex.1017 at 2. Petitioner improperly uses AAPA as a "basis" for Ground 3 to satisfy many claim elements including 1[pre], 1[a], 1[c], and 1[g]. Pet. at 67, 72; Ex.2004, ¶88. Petitioner's expert confirms this. Ex.2005 at 100:6-15 (AAPA used by Rawls as "part of the basis" for Grounds 3, 4, and 6).

#### **2. AAPA does not teach element 1[g]**

Petitioner acknowledges that Ray fails to disclose whether the controller "continue[s] generating exercise use data, such as time, in response to the sensor not detecting a user." Reply at 25. Petitioner alleges that the portion of the '227 patent discussing the problem in the prior art where a person could turn on the treadmill belt and allow the controller to record large distances without the person exercising on the treadmill constitutes AAPA. Pet. at 72. But this "AAPA" does not disclose element 1[g]. Ex.2004, ¶90. Instead, it defines the problem in the prior

art that the '227 patent solved. *Id.* A controller's generation of "exercise use data" *while* a user is engaged with the operating member is *not* "validated exercise use data" unless the controller makes that determination in response to the sensor detecting user engagement. *Id.*, ¶91.

### **3. Ray does not teach elements 1[h] or 1[i]**

For the reasons stated in Ground 1, Petitioner fails to establish Ray discloses element 1[h].

With respect to element 1[i], the POR pointed out that Petitioner relies entirely on its argument in Ground 1 for the disclosure of element 1[i] in Ground 3. POR at 36. Petitioner fails to identify with particularity the specific portions of the evidence that support its challenge. Petitioner relies on Morris's controller in Ground 1 for element 1[i], but Morris is not part of Ground 3. Petitioner failed to address this problem in its Reply. *See* Reply at 25.

### **D. Ground 4**

Like in Ground 2, Petitioner fails to specify where each element is found in the prior art. Like in Ground 3, Petitioner's reliance on AAPA as a "basis" for Ground 4 is not permissible. Petitioner also fails to establish that a POSITA would have been motivated to combine Cox with Ray and AAPA. *See* POR at 38-39.

Again, Petitioner fails to identify with particularity the specific portions of the evidence that support its challenge. Petitioner claims that PO "incorrectly

argues that Petitioner's Ground 4 positions rely on the teachings of Morris for independent claim 1." Reply at 26 n.9. Petitioner's argument is false. In Ground 4, Petitioner relied "on the same rationale discussed in **Sections VI.B.2-3 . . . .**" Pet. at 80 (emphasis added). Sections VI.B.2-3 relate to Ground 2. Pet. at 56. Ground 2, however, relies exclusively on Morris to satisfy many of the elements of the independent claim 1, including "a base, an "operating unit," and "a controller." Pet. at 21-40; Ex.2004, ¶103. Because Ground 4 is based only on Ray, AAPA, and Cox, Petitioner's reliance on Morris to satisfy many claim elements is fatally flawed. *See Microsoft Corp. v. FG SRC, LLC*, 860 F. App'x 708, 712 (Fed. Cir. 2021) (Petitioner improperly "relie[d] on an unrelated ground in an unrelated section of its petition to ask us to deduce the existence of an obviousness argument").

#### **E. Ground 5**

Like in Grounds 2 and 4, Petitioner fails to specify where each element is found in the prior art. Like in Grounds 3 and 4, Petitioner's reliance on AAPA as a "basis" for Ground 5 is not permissible. Petitioner also fails to establish that a POSITA would have been motivated to combine Daly with Ray and AAPA. *See* POR at 42.

Petitioner skips PO's fourth argument (*see* POR at Section VI.E.4) when it argues that "PO does not dispute the merits of Petitioner's combination of Ray,

AAPA, and Daly for Ground 5. PO argues that the claims are valid for three reasons.” Reply at 27.

**F. Ground 6**

Like in Grounds 2, 4, and 5, Petitioner fails to specify where each element is found in the prior art. Like in Grounds 3, 4, and 5, Petitioner's reliance on AAPA as a “basis” for Ground 6 is not permissible. Petitioner also fails to establish that a POSITA would have been motivated to combine Daly *and* Cox with Ray and AAPA. *See* POR at 43. Finally, claim 13 is not obvious for the same reason independent claim 12 is not obvious. Ex.2004, ¶111.

**IV. DR. VAN DER WEIDE'S DECLARATION SHOULD BE AFFORDED FULL WEIGHT.**

Petitioner argues that Dr. van der Weide's declaration should be afforded little weight because it tracks the POR and is conclusory. Reply at 28. That the POR tracks Dr. van der Weide's declaration is irrelevant because neither the declaration nor the POR are conclusory or improper.

Petitioner's reliance on *Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9 at 15 (PTAB, Aug. 24, 2022) is misplaced. *Xerox* did not hold that expert declarations that track the POR should be afforded little weight. *Id.* Rather, it held that “conclusory and unsupported” expert declarations should be afforded “little weight.” *Id.* “[T]he weight to be given to an expert's opinions focuses on the degree to which those opinions are supported by technical reasoning and evidence,

rather than focusing on a word-by-word comparison of the declaration with the accompanying brief to determine how many words overlap.” *Roku Inc. v. Universal Electronics, Inc.*, IPR2022-01289, Paper 28, at 77 (PTAB, Mar. 20, 2024). Dr. van der Weide’s opinions are not conclusory and are supported by evidence and technical reasoning.

If closely tracking the brief were the standard for affording an expert declaration little weight, then Rawls’ declaration would be entitled to little weight as illustrated, for example, by the verbatim copying of Rawls declaration into the Petition. See e.g., Pet. at 39 and Ex.1002, ¶183.

## **V. CONCLUSION**

The Board should find that the Petition has failed to demonstrate the unpatentability of any of the Challenged Claims.

Respectfully submitted,

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Dated: July 8, 2024

**CERTIFICATION OF WORD COUNT UNDER 37 CFR § 42.24(d)**

Under 37 C.F.R. § 42.24(d), the undersigned certifies that the word count for this Patent Owner Sur-Reply totals 5,509, excluding the parts exempted by 37 C.F.R. § 42.24(a), (b)(2). The word count was made using the build-in word count function in the Microsoft® Word software used to prepare this document.

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**CERTIFICATION OF SERVICE**

The undersigned hereby certifies that PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE TO PETITION FOR INTER PARTES REVIEW OF U.S. PATENT NO. 10,032,227 for the above-captioned matter(s) was served in its entirety on July 8, 2024, upon the following parties via email at the below email addresses:

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