

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NIKE, INC.,

Petitioner

v.

SHERRYWEAR LLC,

Patent Owner.

Case No. IPR2024-01123

U.S. Patent No. 9,295,288

PETITION FOR *INTER PARTES* REVIEW

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<i>Apple Inc. v. Fintiv, Inc.</i> , IPR2020-00019 Paper 11, 6 (P.T.A.B. Mar. 20, 2020).....	94, 95
<i>Apple, Inc. v. Evolved Wireless LLC</i> , IPR2016-01177, Paper 27 (P.T.A.B. Dec. 20, 2017)	35
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<i>Minton v. Nat’l Ass’n of Sec. Dealers, Inc.</i> , 336 F.3d 1373 (Fed. Cir. 2003)	26
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<i>Regents of the Univ. of Minnesota v. Gilead Scis., Inc.</i> , 61 F.4th 1350 (Fed. Cir. 2023)	11
<i>Sand Revolution II, LLC v. Cont’l Intermodal Grp. Trucking LLC</i> , IPR2019-01393, Paper 24 (P.T.A.B. Jun. 16, 2020)	95, 97
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37 C.F.R. § 42.10(b)	6
37 C.F.R. § 42.103	6
37 C.F.R. § 42.104	6

EXHIBIT LIST PURSUANT TO 37 C.F.R § 42.63(E)

Exhibit No.	Description¹
NIKE-1001	Declaration of Joyce Baran
NIKE-1002	Resume of Joyce Baran
NIKE-1003	Certified U.S. Patent No. 9,295,288 (filed Nov. 18, 2013)
NIKE-1004	Certified Prosecution File History for U.S. Patent No. 9,295,288
NIKE-1005	RESERVED
NIKE-1006	RESERVED
NIKE-1007	RESERVED
NIKE-1008	RESERVED
NIKE-1009	RESERVED
NIKE-1010	RESERVED
NIKE-1011	RESERVED
NIKE-1012	RESERVED
NIKE-1013	RESERVED
NIKE-1014	RESERVED
NIKE-1015	RESERVED
NIKE-1016	RESERVED

¹ Descriptions are for convenience only and are not admissions or evidence.

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Exhibit No.	Description¹
NIKE-1017	RESERVED
NIKE-1018	RESERVED
NIKE-1019	U.S. Patent No. 3,518,998 (filed Feb. 8, 1968) (“Barg”)
NIKE-1020	U.S. Patent No. 2,920,628 (filed Oct. 7, 1958) (“York”)
NIKE-1021	U.S. Patent Application Publication No. 2014/0051331 (filed Aug. 20, 2012) (“Handras”)
NIKE-1022	U.S. Patent No. 7,753,759 (filed Sept. 29, 2008) (“Pintor”)
NIKE-1023	U.S. Patent Publication No. 2005/0037687(A1) (filed Aug. 12, 2003) (“Newman”)
NIKE-1024	U.S. Design Patent No. D597,279 (filed Oct. 26, 2008) (“Spillman”)
NIKE-1025	U.S. Design Patent No. D529,259 (filed Jan. 13, 2006) (“Faagau”)
NIKE-1026	RESERVED
NIKE-1027	RESERVED
NIKE-1028	RESERVED
NIKE-1029	RESERVED
NIKE-1030	U.S. Patent Application Publication No. 2011/0223832 (filed Mar. 4, 2011) (“Rose”)
NIKE-1031	RESERVED
NIKE-1032	RESERVED

Exhibit No.	Description ¹
NIKE-1033	RESERVED
NIKE-1034	<i>Early Brassiere</i> , Google Arts & Culture, https://artsandculture.google.com/asset/early-brassiere/-gGoCcJIsFqA1g?hl=en .
NIKE-1035	Rebecca Unsworth, <i>Hands Deep in History: Pockets in Men and Women’s Dress in Western Europe, c. 1480-1630</i> , THE COSTUME SOCIETY (Edinburgh Univ. Press 2017), https://www.eupublishing.com/doi/epub/10.3366/cost.2017.0022 .
NIKE-1036	Derek Gentile, <i>A comfortable convenience: County woman creates, patents the ‘pocketbra’</i> , THE BERKSHIRE EAGLE (May 12, 2014), https://www.berkshireeagle.com/business/a-comfortable-convenience-county-woman-creates-patents-the-pocketbra/article_039dd3a3-29d7-58a7-aa5a-fd5dc171479f.html .
NIKE-1037	Kit-lun Yick et al., <i>Study of thermal–mechanical properties of polyurethane foam and the three-dimensional shape of molded bra cups</i> , 210 Journal of Materials Processing Technology at 116–21 (Aug. 2009)
NIKE-1038	U.S. Patent No. 6,997,775 B2 (Feb. 14, 2006) (“Jagaric”)
NIKE-1039	Dimity McDowell, <i>The Top Choices A women’s guide to the best jog bras</i> , RUNNER’S WORLD (Oct. 20, 2010), https://www.runnersworld.com/gear/a20845828/sports-bra-reviews-for-runners/
NIKE-1040	RESERVED
NIKE-1041	RESERVED
NIKE-1042	RESERVED
NIKE-1043	RESERVED
NIKE-1044	RESERVED

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Exhibit No.	Description¹
NIKE-1045	RESERVED
NIKE-1046	MA Litigation Docket No. 31 (Scheduling Order)
NIKE-1047	LegalMetric District Report Massachusetts District Court in Patent Cases January 2019 to January 2024
NIKE-1048	LegalMetric Individual Judge Report on Judge Leo Sorokin in Patent Cases June 2014 to April 2023
NIKE-1049	Appendix A to SherryWear’s Answers and Objections to Nike’s First Set of Interrogatories (Response to Interrogatory No. 5) (Mar. 29, 2024).
NIKE-1050	U.S. Patent No. 8,597,072 (filed Apr. 26, 2011)
NIKE-1051	File History for U.S. Patent No. 8,597,072
NIKE-1052	RESERVED

LISTING OF THE CHALLENGED CLAIMS

The '288 Patent	
Limitation Identifier	Text of Claim
Independent Claim 1	
[1A]	“A bra pocket system combination comprising:”
[1B]	“a strap assembly including a chest strap and shoulder straps,”
[1C]	“left and right cups, each cup having inside and outside surfaces,”
[1D]	“the strap assembly being attached to the cups whereby the strap assembly adheres the cups to a wearer,”
[1E]	“each cup having curved upper, lower, interior body facing and opposite exterior edges;”
[1F]	“a patch forming a pocket operatively associated with each cup,”
[1G]	“each patch having a linear upper edge and curved lower, interior body facing, and opposite exterior edges, each patch having inside and outside surfaces;”
[1H]	“stitching coupling the lower, interior body facing and opposite exterior edges of each patch to the lower, interior body facing, and opposite exterior edges of an associated cup;”
[1I]	“a linear opening formed along the upper edge of each patch;”
[1J]	“at least one of a handheld electronic device, keys, and pills removably positioned within the pocket of at least one of the left and right cups; and”
[1K]	“wherein each patch curved lower interior body facing and opposite exterior edges are aligned with each curved lower interior body facing and opposite exterior edges, and wherein the stitching is along the curved lower interior body facing and opposite exterior

The '288 Patent	
Limitation Identifier	Text of Claim
	edges of the patch, the linear upper edge of each patch crossing over a surface of the cup to form the linear opening.”
Dependent Claim 2	
	“The system set forth in claim 1”
[2A]	“wherein the cups and the patches form pockets, the cups being fabricated of a resilient closed cell polyurethane foam with a thickness of from 2 to 4 millimeters.”
Dependent Claim 3	
	“The system as set forth in claim 1”
[3A]	“wherein the cups and the patches form pockets, the patches being fabricated of an elastic fabric.”
Dependent Claim 4	
	“The system as set forth in claim 1”
[4A]	“and further including an under-wire coupled beneath each cup in a generally horizontal plane.”
Dependent Claim 11	
	“The system as set forth in claim 1”
[11A]	“wherein the linear opening is facing the upper interior edge to allow the at least one of the handheld electronic device, keys, and pills to be removably positioned within the pocket by entry adjacent to a shoulder of the user.”
Dependent Claim 12	
	“The system as set forth in claim 1”
[12A]	“further comprising a closure over the linear opening.”

I. INTRODUCTION

Nike, Inc. (“Petitioner”) respectfully requests *inter partes* review (“IPR”) of claims 1–4 and 11–12 (the “Challenged Claims”) of U.S. Patent No. 9,295,288 (the “’288”) (NIKE-1003).

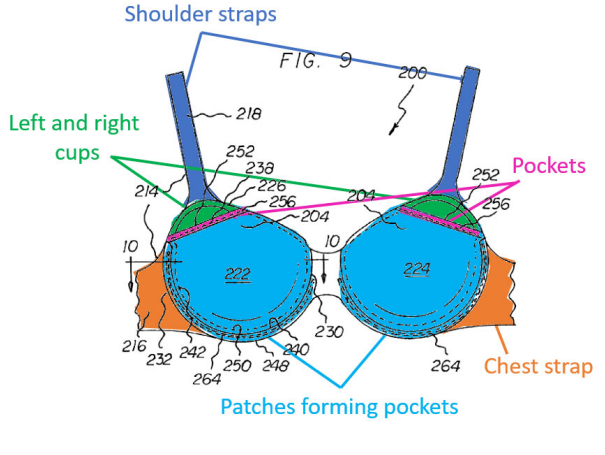
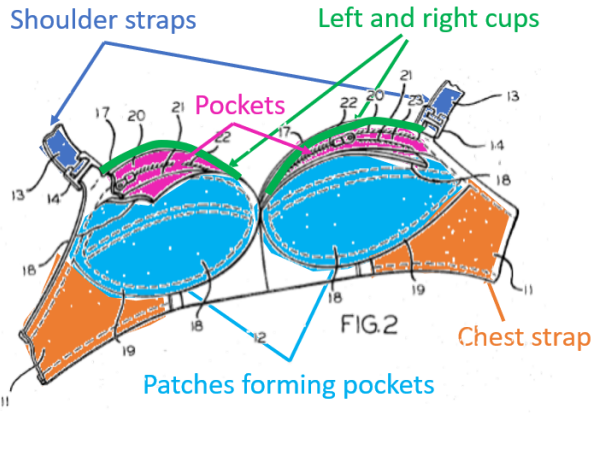
The ’288 claims a bra with pockets on the cups. This is not novel: bras and pockets have been known for *centuries*. For example, a bra excavated from a castle in Austria was estimated to date back to the late 14th to second half of the 15th century:



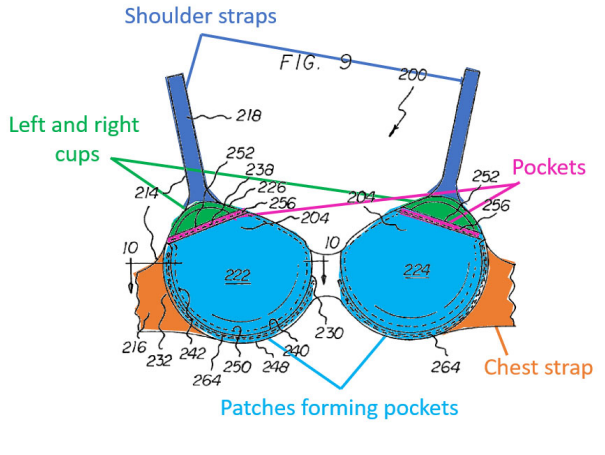
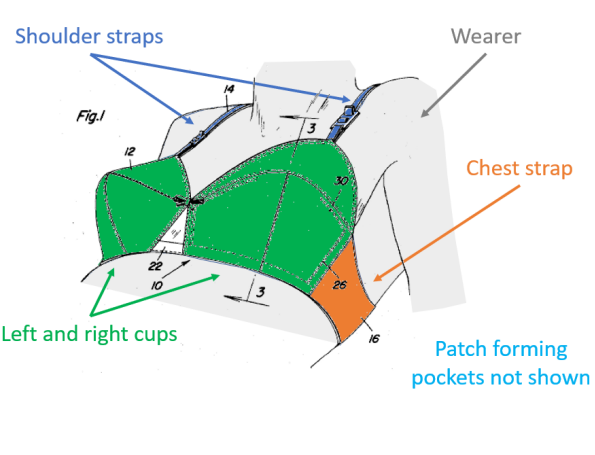
NIKE-1034.

Pockets and their use in clothing have similarly been long understood. Pockets on pants, shirts, jackets, and other clothing have been a universal feature of fashion for over a century. *See* NIKE-1035 at 148; NIKE-1001 ¶¶109–10. This includes the combination of bras with pockets: for decades, companies and individuals worldwide have designed and created bras with pockets so that women may conveniently carry items. NIKE-1001 ¶110. Indeed, U.S. Pat. Nos. 3,518,988 (“Barg”) (filed 1968) and 2,920,628 (“York”) (filed 1958) disclosed bras with pockets for that purpose decades before the ’288. NIKE-1019; NIKE-1020; *see also* NIKE-1022 (Pintor) (filed 2008) (bra with pocket on the breast cup); NIKE-1021 (Handras) (filed 2012) (bra with pockets on breast cups and chest strap); NIKE-1025 (Faagau) (filed 2006) (bra with pockets on the breast cups); NIKE-1023 (Newman) (filed 2003) (same); NIKE-1030 (Rose) (filed 2011) (same); NIKE-1024 (Spillman) (filed 2008) (same). Even PO agreed that bras with pockets were “pretty obvious” at the time of her alleged invention. NIKE-1036.

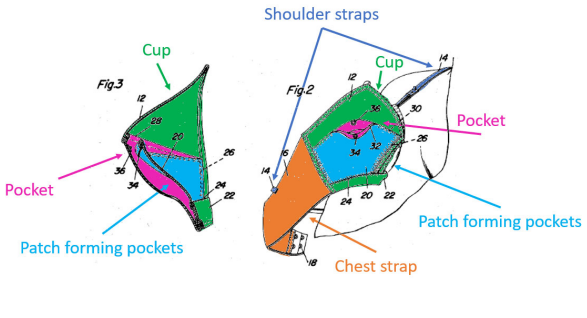
For example, Barg, filed in 1968, discloses a bra with a pocket on each breast cup and renders the ’288 obvious:

'288	Barg
 <p>FIG. 9</p> <p>Shoulder straps</p> <p>Left and right cups</p> <p>Pockets</p> <p>Chest strap</p> <p>Patches forming pockets</p>	 <p>FIG. 2</p> <p>Shoulder straps</p> <p>Left and right cups</p> <p>Pockets</p> <p>Chest strap</p> <p>Patches forming pockets</p>

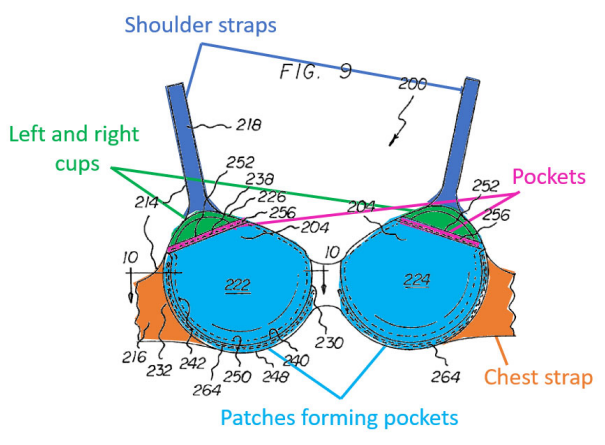
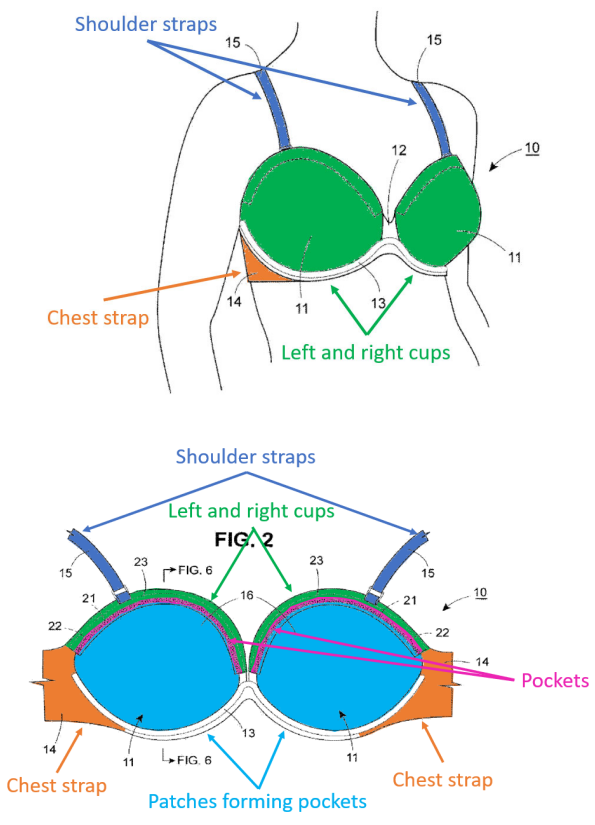
NIKE-1003 at Fig. 9; NIKE-1019 at Fig. 2.² York and Handras similarly render the '288 obvious.

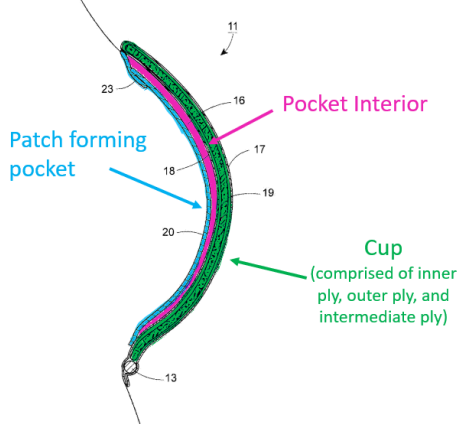
'288	York
 <p>FIG. 9</p> <p>Shoulder straps</p> <p>Left and right cups</p> <p>Pockets</p> <p>Chest strap</p> <p>Patches forming pockets</p>	 <p>Fig. 1</p> <p>Shoulder straps</p> <p>Left and right cups</p> <p>Chest strap</p> <p>Patch forming pockets not shown</p>

² All annotations are added, unless otherwise noted.

'288	York
	 <p>The York design includes two diagrams: Fig 2 and Fig 3. Fig 2 shows a top-down view of a bra with labels for 'Shoulder straps', 'Cup', 'Pocket', 'Patch forming pockets', and 'Chest strap'. Fig 3 shows a side view of a cup with labels for 'Cup', 'Pocket', and 'Patch forming pockets'.</p>

NIKE-1003 at Fig. 9; NIKE-1020 at Figs. 1–3.

'288	Handras
 <p>FIG. 9 shows a top-down view of a bra with labels for 'Shoulder straps', 'Left and right cups', 'Pockets', 'Chest strap', and 'Patches forming pockets'. Various numerical callouts (e.g., 200, 218, 252, 238, 256, 204, 222, 224, 214, 216, 232, 242, 250, 240, 264) are used to identify specific components.</p>	 <p>The Handras design includes two diagrams: FIG. 2 and FIG. 6. FIG. 2 shows a top-down view of a bra with labels for 'Shoulder straps', 'Left and right cups', 'Chest strap', and 'Pockets'. FIG. 6 shows a side view of a cup with labels for 'Shoulder straps', 'Left and right cups', 'Chest strap', and 'Patches forming pockets'. Numerical callouts (e.g., 10, 11, 12, 13, 14, 15, 21, 22, 23, 16, 20) identify components.</p>

'288	Handras
	 <p>The diagram shows a cross-section of a shoe sole. A patch (18) is shown forming a pocket (16) within the sole. The pocket interior (17) is indicated. A cup (19) is shown, comprising an inner ply, outer ply, and intermediate ply. Other labels include 11, 13, 20, and 23.</p>

NIKE-1003 at Fig. 9; NIKE-1021 at Figs. 1–2, 6.

II. MANDATORY NOTICES

Petitioner provides the following mandatory notices under 37 C.F.R. § 42.8.

A. 37 C.F.R. § 42.8(b)(1): Real Parties-in-Interest

The real party-in-interest is Nike, Inc.

B. 37 C.F.R. § 42.8(b)(2): Related Matters

The '288 is at issue in the following case:

- *SherryWear, LLC, v. Nike, Inc.*, No. 1:23-cv-11599 (D. Mass), filed July 17, 2023 (“the MA Litigation”).

C. 37 C.F.R. § 42.8(b)(3) & (4): Lead and Back-Up Counsel and Service Information

Lead Counsel	Back-Up Counsel
W. Todd Baker Reg. No. 45,265 todd.baker@kirkland.com <u>Postal and Hand-Delivery Address:</u> KIRKLAND & ELLIS LLP	Noah S. Frank Reg. No. 67,279 noah.frank@kirkland.com <u>Postal and Hand-Delivery Address:</u> KIRKLAND & ELLIS LLP

1301 Pennsylvania Avenue, N.W. Washington, D.C. 20004 Telephone: (202) 389-5000 Facsimile: (202) 389-5200	200 Clarendon Street Boston, MA 02116 Telephone: (617) 385-7500 Facsimile: (617) 385-7501
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Petitioner concurrently submits a Power of Attorney pursuant to 37 C.F.R. § 42.10(b) and consents to electronic service by email directed to the email address: Nike-SherryWear@kirkland.com.

III. PAYMENT OF FEES PURSUANT TO 37 C.F.R. § 42.103

Petitioner requests IPR of 6 claims. Any fees in connection with this Petition may be charged to Deposit Account No. 506092.

IV. CERTIFICATION OF STANDING UNDER 37 C.F.R. § 42.104

Petitioner certifies that the '288 is available for IPR and that Petitioner is not barred or estopped from requesting IPR of the '288 on the grounds identified herein. This Petition is being filed within one year of service of a complaint against Petitioner in the MA Litigation and more than nine months after the '288's issuance.

V. OVERVIEW OF CHALLENGE AND RELIEF REQUESTED

Petitioner requests that all Challenged Claims be cancelled based on the grounds set forth below (37 C.F.R. §§ 42.104(b)(1)–(2)):

Claims	Basis
1–4, 11–12	Unpatentable pursuant to 35 U.S.C. § 103 over Barg in view of Pintor

Claims	Basis
1–4, 11–12	Unpatentable pursuant to 35 U.S.C. § 103 over York in view of Pintor
1–4, 11–12	Unpatentable pursuant to 35 U.S.C. § 103 over Handras in view of Pintor

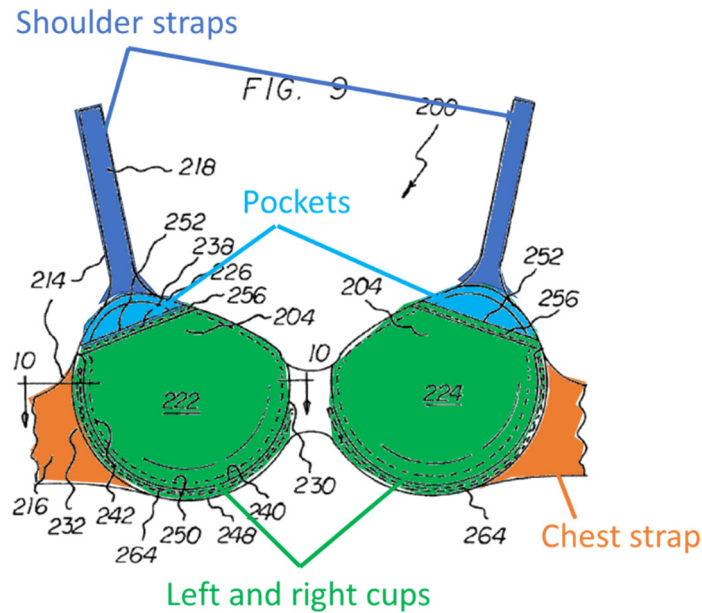
Pursuant to §42.104(b)(4), an explanation of how the claims are unpatentable is provided herein.

VI. SUMMARY OF THE '288

A. Overview of U.S. Patent No. 9,295,288

The '288 issued on March 29, 2016, from U.S. Application No. 14/082,777, filed on November 18, 2013. The '288 purports to be a continuation-in-part of U.S. Patent No. 8,597,072 (the "'072"). The '072 resulted from Application No. 13/066,822, filed April 26, 2011.

The '288 relates generally to a bra with pockets on the cups. Specifically, the '288 claims a bra with "left and right cups" adhered to the wearer via "a chest strap and shoulder straps" and "patch[es]" on each breast cup to form pockets for holding "at least one of a handheld electronic device, keys, and pills." NIKE-1003 at Cl. 1.



NIKE-1003 at Fig. 9, Abstract. The disclosed patches are connected to the bra cups via stitching along the “lower, interior body facing and opposite exterior edges of each patch to the lower, interior body facing, and opposite exterior edges of an associated cup.” *Id.* By only sewing along the lower edges of the patch and bra cups, a pocket with “a linear opening . . . along the upper edge of each patch” is formed. *Id.*

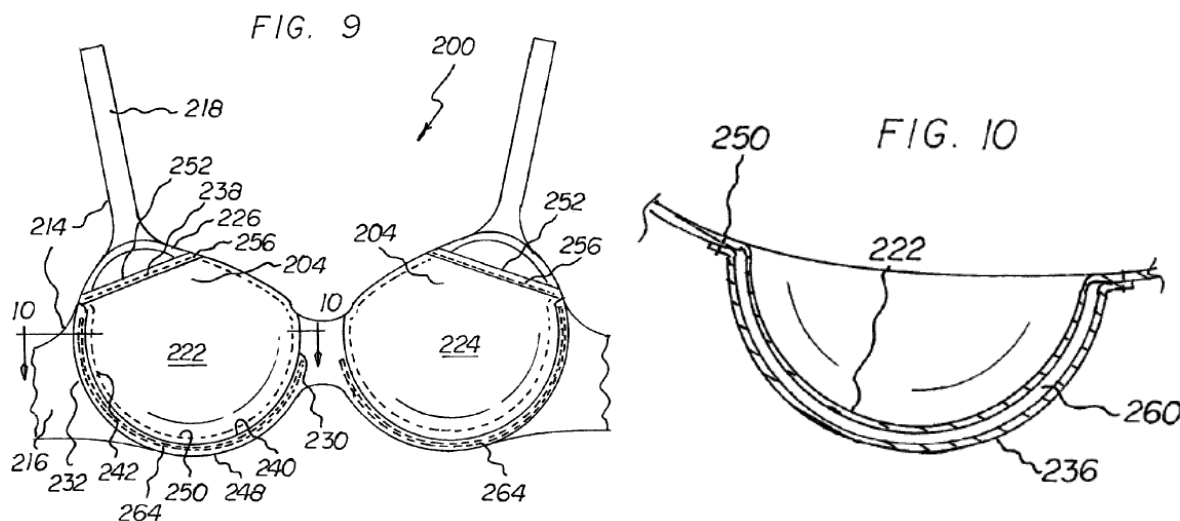
During prosecution of the '288, the applicant distinguished the claimed pockets from other breast-cup pockets in the prior art used for insertion of bra padding. NIKE-1004 at 168 (Jan. 4, 2016 Response to Non-Final Rejection); *see also* NIKE-1023 (Newman). Specifically, the Examiner rejected the then-pending claims over Newman in view of Pintor. *See* NIKE-1004 at 147 (Oct. 2, 2015 Non-Final Rejection); *see also* NIKE-1023; NIKE-1022. The Examiner explained that

Newman discloses a bra with pockets spanning the surface area of the cups for holding bra padding, and that Pintor discloses a bra with pockets on the breast cup for holding objects. *Id.* at 147–48. The Examiner argued that it would have been obvious to store the non-padding items disclosed by Pintor in the bra padding pocket disclosed by Newman. *Id.* In response, the applicant argued that the claimed bra was distinct because “Newman’s focus is singular and its pocket is specifically sized for the bra pad only,” whereas the ’288’s alleged invention is designed to hold the claimed objects—a handheld electronic device, keys, and pills—and not bra padding. *Id.* at 168–69. As discussed *infra* § VI.B., the Examiner overlooked how a POSA would have understood Pintor’s disclosures and what a POSA would have been motivated to do with them, especially in light of references like Barg, York, and Handras. By considering Pintor only in combination with Newman, the Examiner materially erred with respect to the patentability of the subject matter of the ’288.

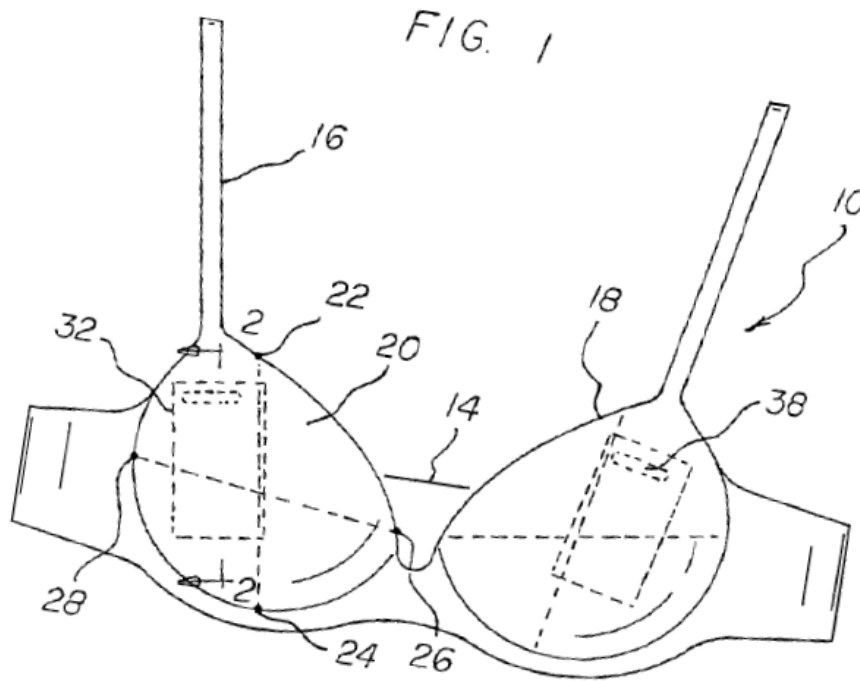
The ’288 has 17 claims. Six of those claims—independent Claim 1 and dependent Claims 2, 3, 4, 11 and 12—are challenged here. Barg, York, Pintor, and Handras are all directed toward storing personal items, such as handheld electronic devices, keys, and pills, and render the Challenged Claims obvious.

B. Effective Priority Date of the '288

Patent Owner (“PO”) admits that November 18, 2013 is the earliest priority date to which the '288's challenged claims are entitled. NIKE-1049; *Nat. Alternatives Int'l, Inc. v. Iancu*, 904 F.3d 1375, 1383 (Fed. Cir. 2018) (explaining that priority is assessed on a claim-by-claim basis for continuation-in-part applications, and that claims reciting new matter are not entitled to the parent application's earlier filing date). Indeed, the claims of the '288 require “each patch [to have] a linear upper edge and curved lower, interior body facing, and opposite exterior edge,” such that the patches are “aligned” with the “lower, interior body facing, and opposite exterior edges of an associated cup.” NIKE-1003 at Cl. 1. The applicant added Figures 9 and 10, which purportedly discloses this, for first time in the '288:



NIKE-1003 at Figs. 9–10. This differs from the parent '072, which discloses rectangular patches sewn to the surface of the cup and spanning a smaller portion of the cup. NIKE-1050 at Cl. 1, Fig. 1; NIKE-1051.



NIKE-1050 at Fig. 1 (showing rectangular patches 32 on the surface of each cup).

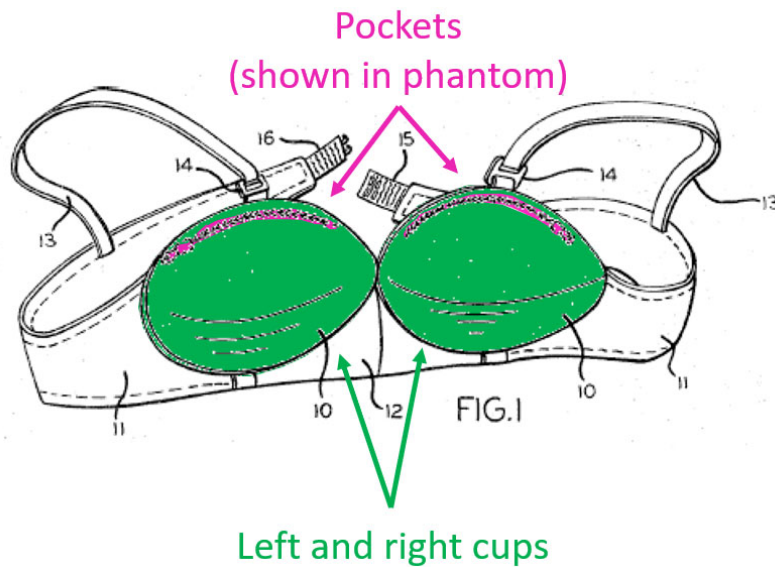
Such disclosure constitutes new matter, and is only entitled to priority of the filing date of the '288—November 18, 2013—as PO concedes. NIKE-1003 at Cover; see also *Regents of the Univ. of Minnesota v. Gilead Scis., Inc.*, 61 F.4th 1350, 1356 (Fed. Cir. 2023) (“each application in the chain ... must comply with the written description requirement” to be entitled to an earlier priority date); MPEP § 211.05; NIKE-1049.

VII. OVERVIEW OF THE PRIOR ART

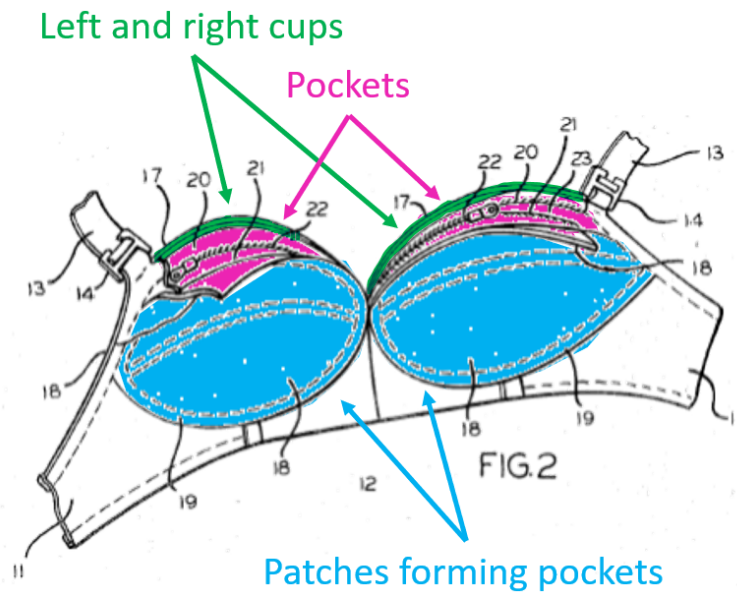
A. Barg

1. Overview of Barg

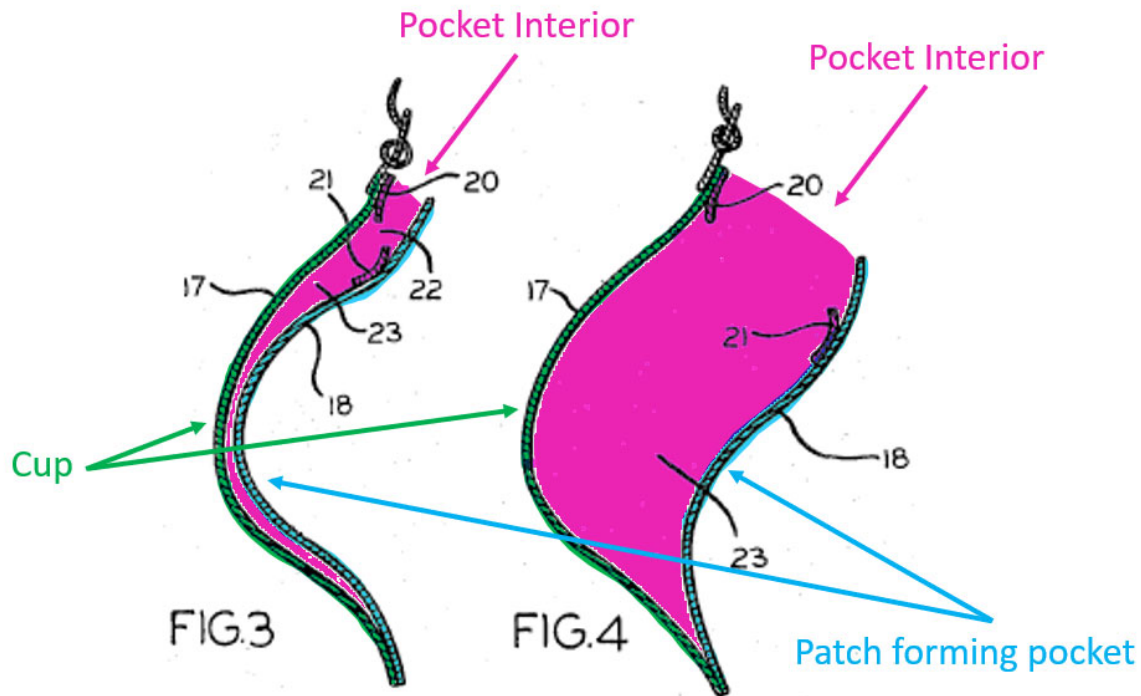
Barg issued on July 7, 1970 from U.S. Application Ser. No. 703,922 (filed on February 8, 1968), which is a continuation-in-part of Application Ser. No. 551,306 originally filed May 19, 1966. NIKE-1019. Barg generally describes a conventional bra with pockets on the inside surfaces of the breast cups. *Id.* In addition to the conventional components of bra—left and right cups, a chest strap, and shoulder straps—Barg discloses “a pocket therein for storing valuables, or the like.” *Id.* at 1:19-20, 1:64–2:4. The pocket is formed by an “outer” and “inner” section of a breast cup pocket which are “attached to one another along the peripheral edge at the side and bottom areas . . . in any convenient and efficient manner.” *Id.* at 2:4-9. The pockets are on the inside surfaces of the breast cups with openings at the top of the cups:



Id. at Fig. 1 (illustrating “a perspective front view of a conventional brassiere”).



Id. at Fig. 2 (illustrating “a fragmentary perspective rear view of a brassiere, showing the hookless fastener closed at one side, and partially open on the other side, to form a pocket”).



Id. at Figs. 3–4 (a “fragmentary cross-sectional view of the brassiere” illustrating the disclosed pocket).

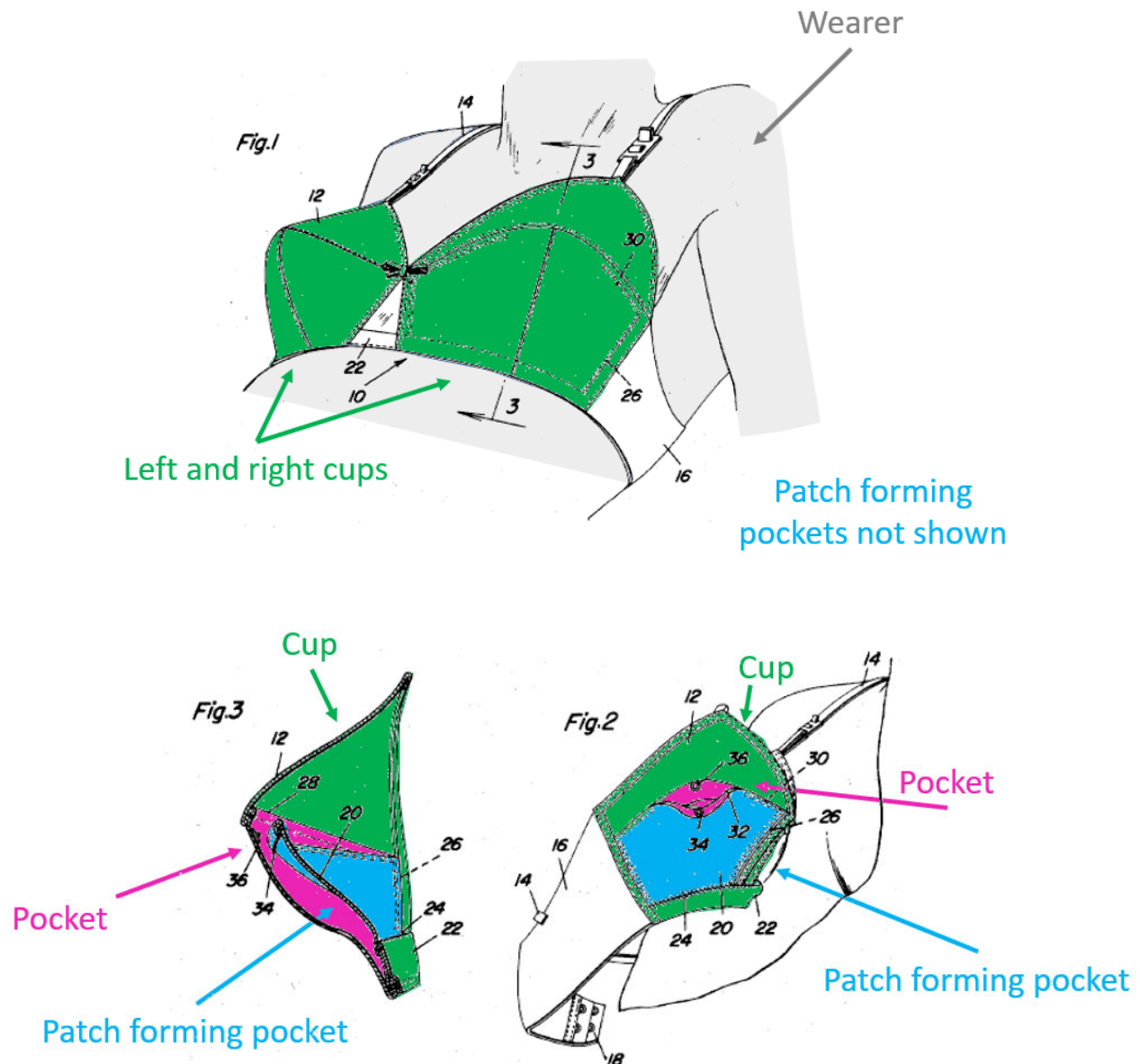
2. Barg Is Prior Art to the '288

Barg is prior art to the '288 under at least pre-AIA 35 U.S.C. §§ 102(b) or (e) and AIA 35 U.S.C. § 102(a). Barg is a U.S. Patent, filed February 8, 1968, and issued July 7, 1970, which is more than one year before the '288's earliest possible priority date. The '288's inventor is not named as an inventor on Barg. Barg was not considered during prosecution of the '288.

B. York

1. Overview of York

York issued on January 12, 1960 from U.S. Patent Application Ser. No. 765,748, filed October 7, 1958. *See* NIKE-1020. York generally describes a conventional bra with a pocket on the inner portion of one of the breast cups. *Id.* Specifically, York describes “a brassiere” with “a pocket on the interior lower surface of the usual breast cup for receiving valuable articles such as jewelry, money or the like.” *Id.* at 1:15–19. The bra comprises the “usual pair of breast cups 12 having shoulder straps 14 attached thereto along the top edge and a body encircling strap 16 extending rearwardly which strap is provided with the usual separable ends.” *Id.* at 1:48–51. As shown below, the pocket is created by “a pocket forming panel 20 having the lower edge thereof connected with the finished hem 22 at the lower edge of the cup 12 by stitching 24.” *Id.* at 2:1–3.



NIKE-1020 at Figs. 1–3.

2. York Is Prior Art to the '288

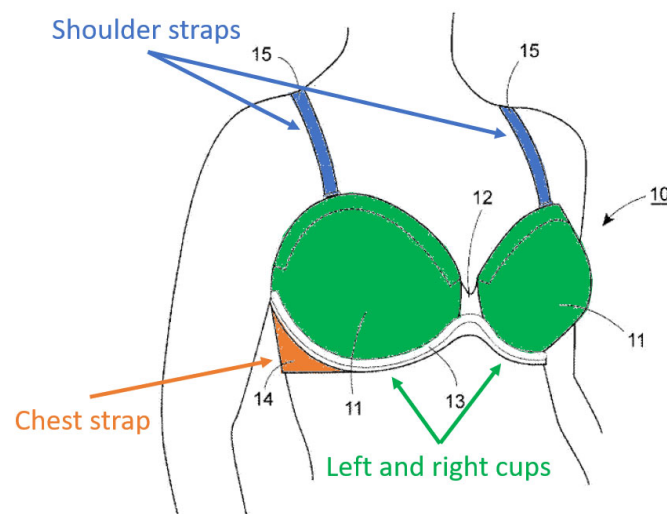
York is prior art to the '288 under at least pre-AIA 35 U.S.C. §§ 102(b) or (e) and AIA 35 U.S.C. § 102(a). York is a U.S. Patent, filed October 7, 1958, and issued January 12, 1960, which is before the '288's earliest possible priority date.

The '288's inventor is not a named inventor on York. York was not considered during prosecution of the '288.

C. Handras

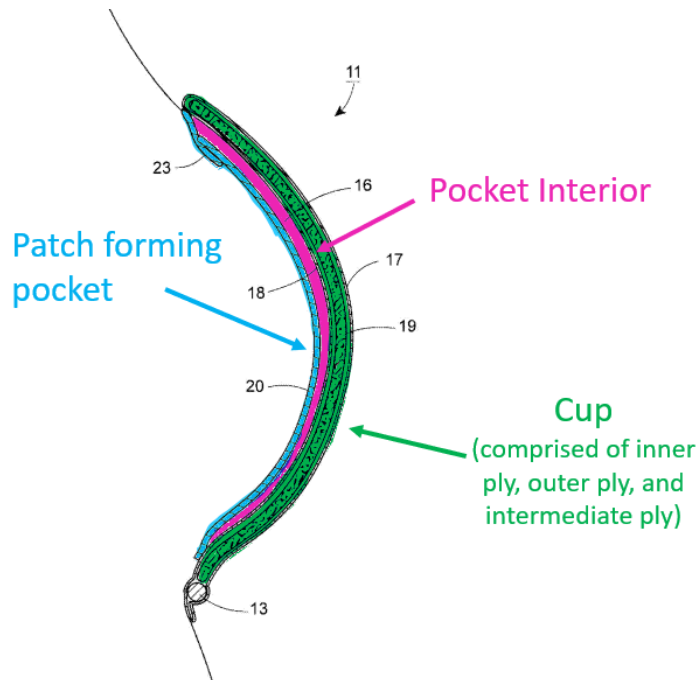
1. Overview of Handras

Handras is a U.S. Patent Application Publication of Application No. 13/589,599, filed originally on August 20, 2012. *See* NIKE-1021. Handras generally relates to a bra with pockets on the surface of the cups for storage of items. *Id.* Specifically, Handras discloses “a bra with one or more storage pockets.” *Id.* at [0001]. As illustrated below, the bra is comprised of “a pair of cups 11. . . a pair of side panels 14 (only one of which is shown) that can be connected together at the back of the bra 10 in any conventional manner and a pair of shoulder straps 15.” *Id.* at [0020].

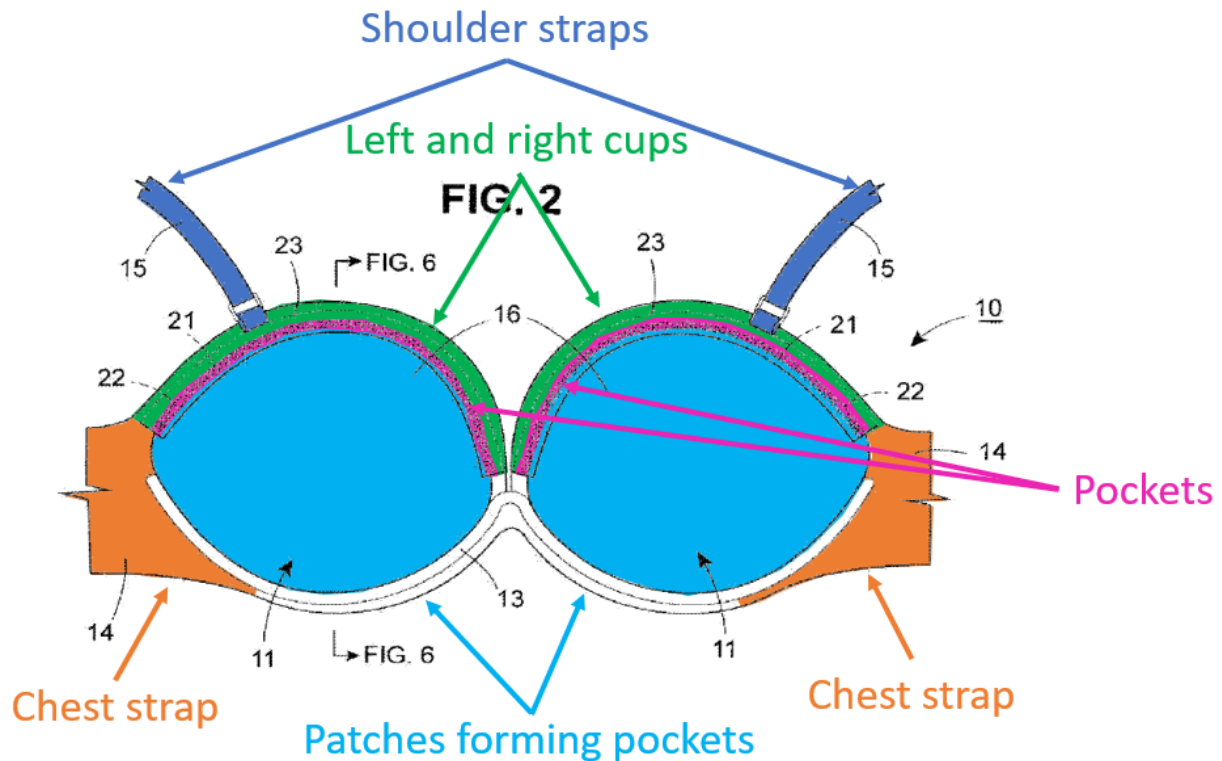


NIKE-1021 at Fig. 1. The cups are formed of three layers of material: an “outer ply” 17, an “inner ply” 18, and an “intermediate ply” 19 comprised of “resilient

foam material.” *See id.* at [0022]. Further, “a fourth ply of material 20 is sewn or otherwise secured to the inner ply 18 in order to form the pocket 16 with an opening extending along the upper section of the cup.” *Id.*



NIKE-1021 at Fig. 6 (cross sectional profile of the cup).



NIKE-1021 at Fig. 2 (interior view of the cups with pockets).

Handras teaches the pocket holds items, including “credit cards, car keys, cell phones and the like.” *Id.* at [0002]. Handras contemplates adjusting the size of the pocket as desired, for example, “to snugly receive a cell phone.” *Id.* at [0025].

2. Handras Is Prior Art to the '288

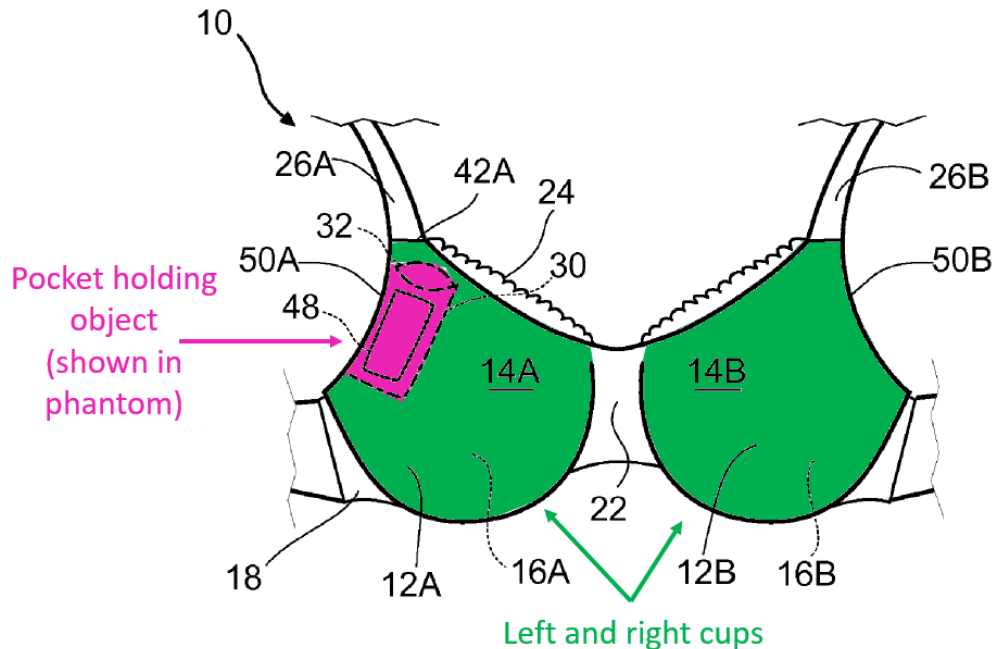
Handras is prior art to the '288 under at least pre-AIA 35 U.S.C. §§ 102(b) or (e) and AIA 35 U.S.C. § 102(a). Handras is a U.S. Patent Application Publication, filed August 20, 2012, which is before the '288's November 18, 2013

earliest possible priority date. The '288's inventor is not named as an inventor on Handras. Handras was not considered during the prosecution of the '288.

D. Pintor

1. Overview of Pintor

Pintor issued on July 13, 2010, from U.S. Patent Application No. 12/240,408, filed September 29, 2008. *See* NIKE-1022. Pintor generally describes a bra with pockets on the inside surface of the breast cups. *Id.* Specifically, Pintor describes “a brassiere containing concealed pockets for concealing objects such as portable electronic devices, keys, toiletries, money and other valuables.” *Id.* at 4:59–61. As shown below, the bra is comprised of two breast cups, a “medial portion” joining the cups, as well as a “torso band” and “shoulder straps.” *Id.* at 5:25–36.



NIKE-1022 at Fig. 3 (showing a conventional bra assembly with a pocket on the right cup). Further, the pocket (30) is “attached to the interior surface of the breast cover by any known means such as stitching.” *Id.* at 3:51–53. Pintor discloses that the cups and pockets may be formed of “elastomeric woven or nonwoven material, including spandex, materials comprising [Lycra], polyurethane, nylon, polyolefins, and the like.” *Id.* at 7:53–58.

2. Pintor Is Prior Art to the '288

Pintor is prior art to the '288 under at least pre-AIA 35 U.S.C. §§ 102(b) or (e) and AIA 35 U.S.C. § 102(a). Pintor is a U.S. Patent, filed September 29, 2008, and issued July 13, 2010, which is before the '288's earliest possible priority date. The '288's inventor is not named as an inventor on Pintor. Though Pintor was

considered during prosecution of the '288, institution should not be denied for at least the reasons explained *infra* § X.B. Namely, because Pintor was not considered in combination with Barg, York, or Handras, and the Examiner materially erred by failing to consider what a POSA would have been motivated to do with Pintor's disclosures of stitching, polyurethane, elastic material, and use of the pocket for holding of non-padding items, especially in combination with Barg, York, or Handras.

VIII. LEVEL OF ORDINARY SKILL IN THE ART

A POSA at the relevant time would have had at least two years of experience working in the design and or/construction of women's exercise apparel, intimate apparel, and/or sports bras and bras, specifically. NIKE-1001 ¶155. Formal education in a relevant field, such as fashion and textile design, may compensate for less experience. *Id.* Ms. Baran was a POSA as of the '288's earliest possible priority date. *Id.* ¶156; NIKE-1002.

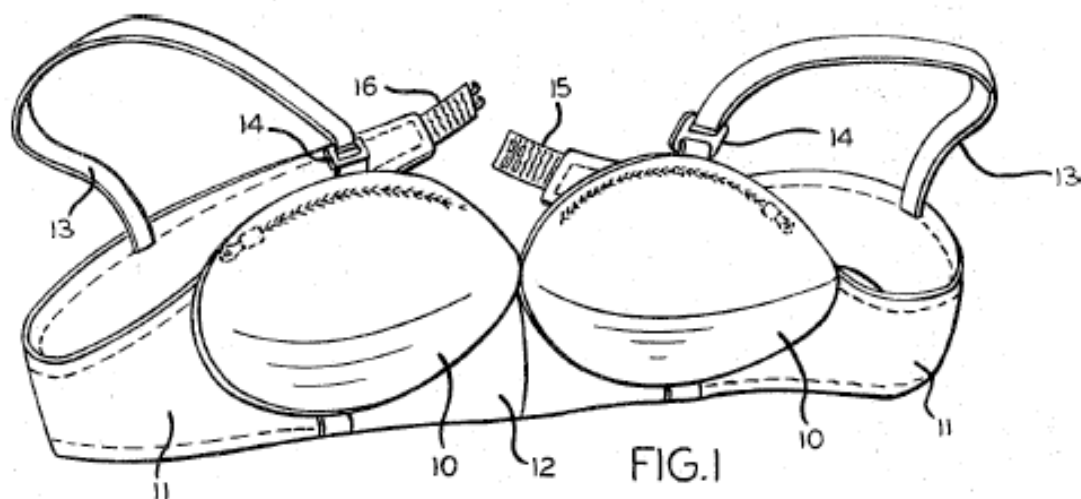
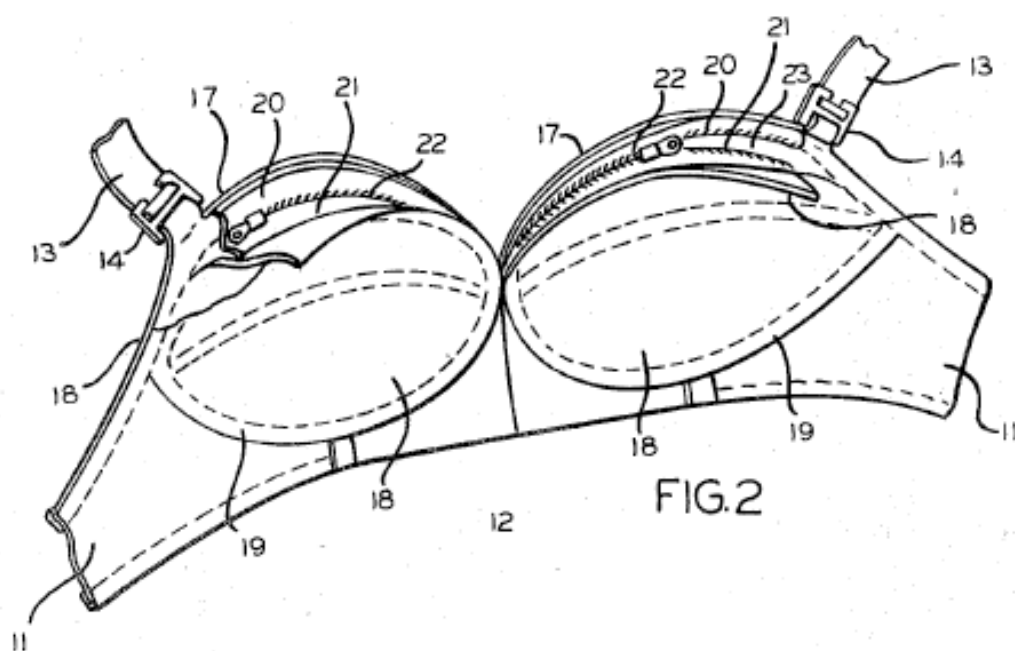
IX. SPECIFIC GROUNDS FOR THE PETITION

A. Ground 1: Claims 1–4 and 11–12 Are Unpatentable Over Barg in View of Pintor

1. Claim 1

a. “A bra pocket system combination comprising:” [1A]

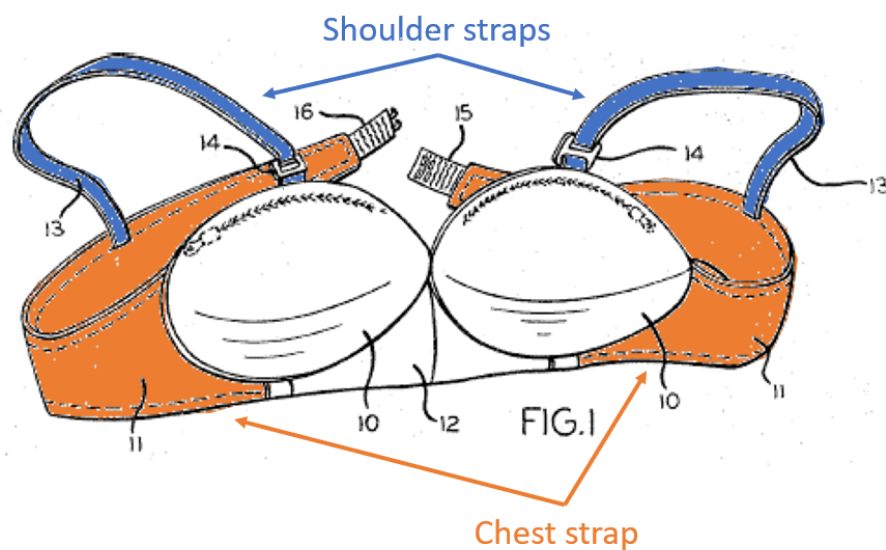
To the extent the preamble is limiting, Barg discloses this limitation. Barg discloses “a brassiere that has a pocket therein for storing valuables”:



NIKE-1019 at Figs. 1-2, 1:19-25.

b. “a strap assembly including a chest strap and shoulder straps;” [1B]

Barg discloses a traditional bra with cups “supported by a *body portion shown as 11*,”³ *i.e.*, “chest strap,” and “by *conventional shoulder straps 13*.” NIKE-1019 at 1:65-2:2. Figure 1 illustrates the “body portion” chest strap and the two conventional shoulder straps:

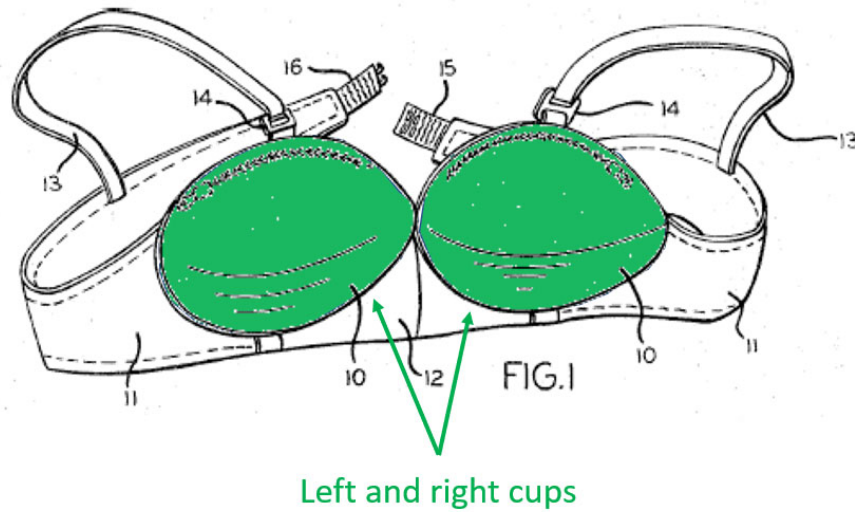


NIKE-1019 at Fig. 1.

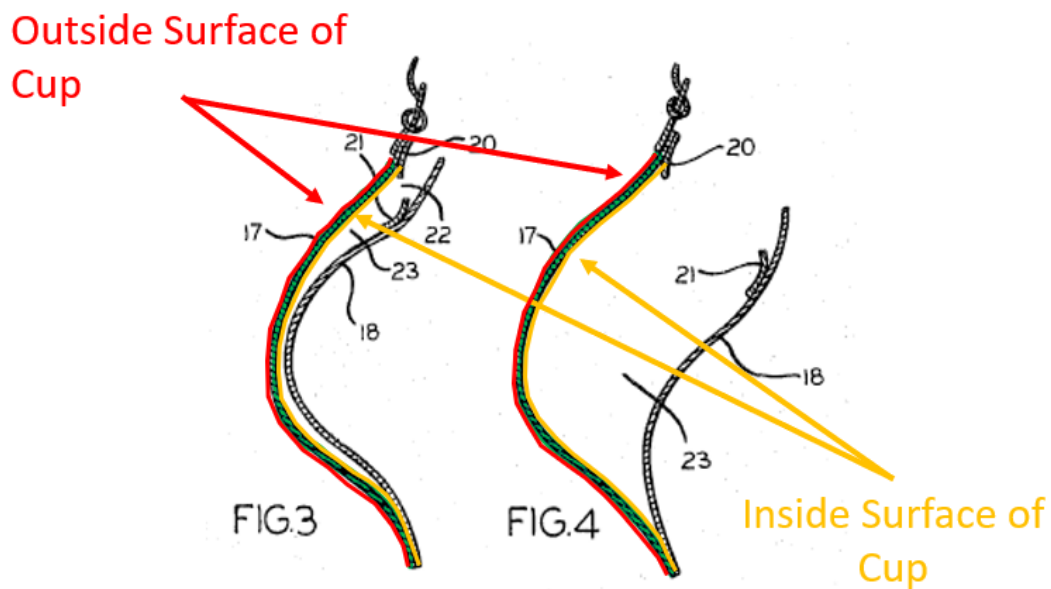
c. “left and right cups, each cup having inside and outside surfaces,” [1C]

Barg discloses a bra with left and right cups:

³ All emphasis is added, unless otherwise noted.



NIKE-1019 at Fig. 1, 1:62-65 (disclosing “conventional breast cups [10]”). A POSA would have understood these cups to necessarily have inside and outside surfaces, as illustrated in Figures 3 and 4:



NIKE-1019 at Figs. 3–4; NIKE-1001 ¶166.

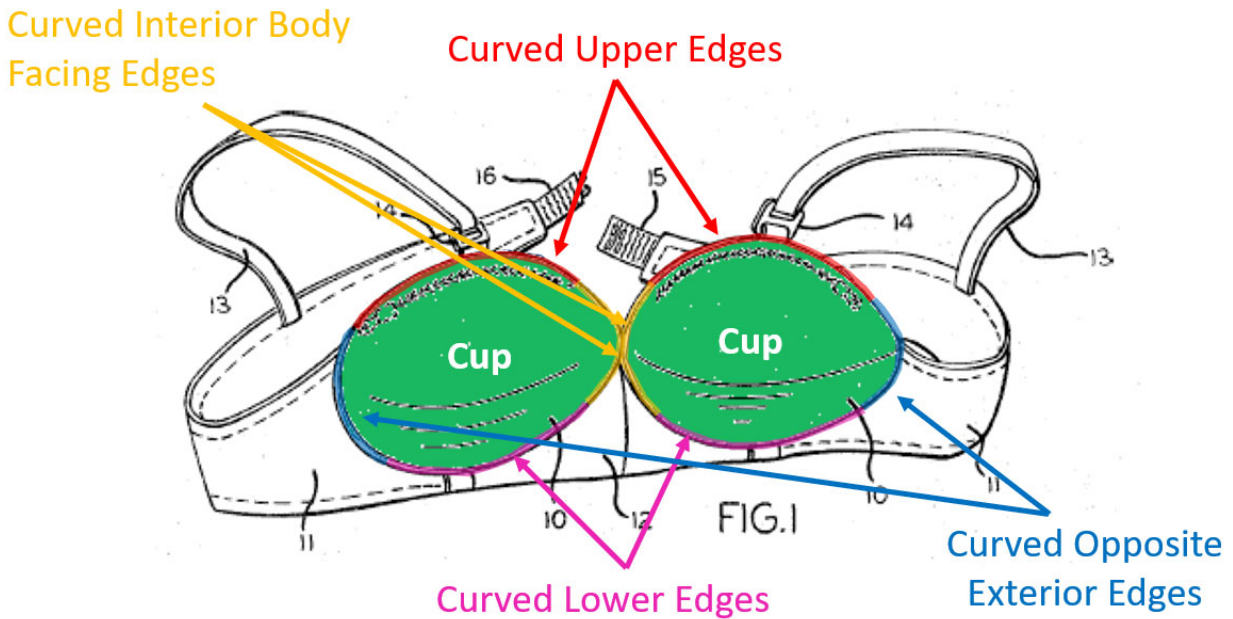
- d. **“the strap assembly being attached to the cups whereby the strap assembly adheres the cups to a wearer,” [1D]**

As explained above, Barg discloses a “strap assembly” and “left and right cups.” *Supra* §§ IX.A.1.b, IX.A.1.c. To the extent the “whereby” clause should be provided patentable weight,⁴ Barg discloses that the strap assembly adheres the cups to a wearer. NIKE-1019 at 1:65–69 (“body portion 11 and the cups 10, may be constructed in any conventional manner, and are substantially conical to *fit the form, shape, and contour of the breast appendages* of the body.”). A POSA would have understood this to be the purpose of Barg’s “strap assembly.” NIKE-1001 ¶169.

- e. **“each cup having curved upper, lower, interior body facing and opposite exterior edges;” [1E]**

Barg discloses cups with curved upper, lower, interior body facing, and opposite exterior edges:

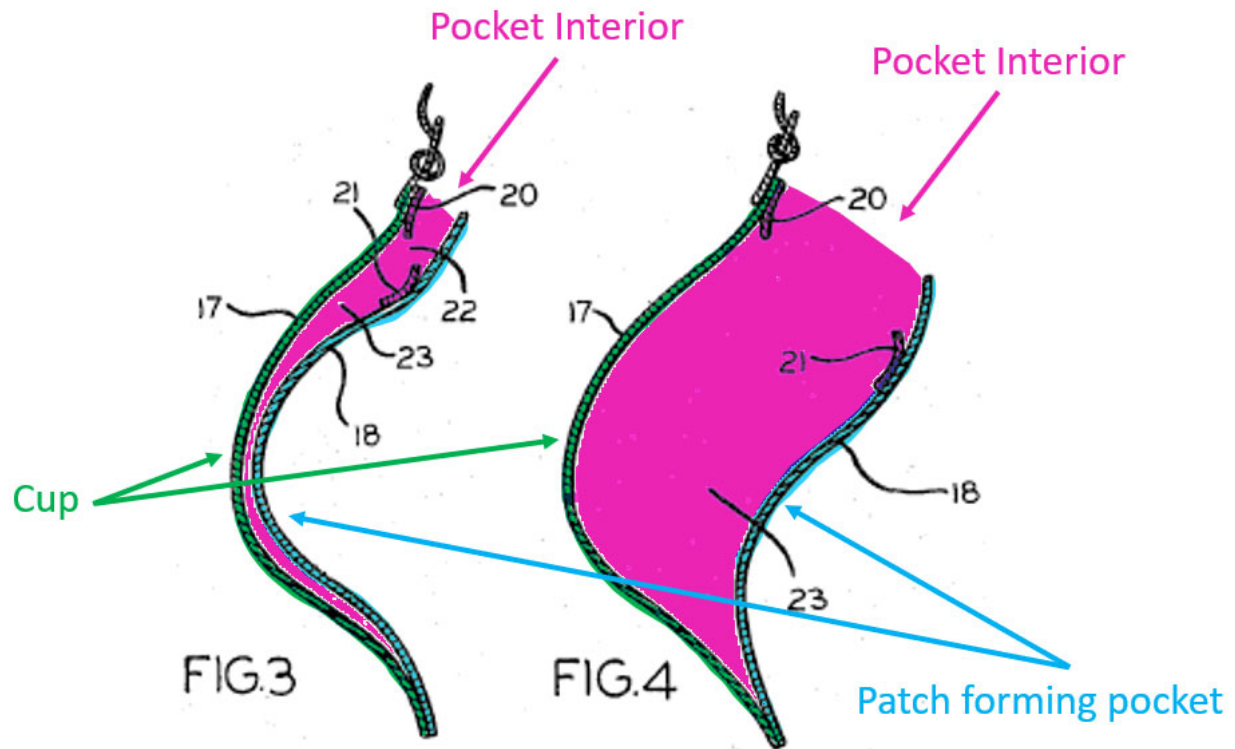
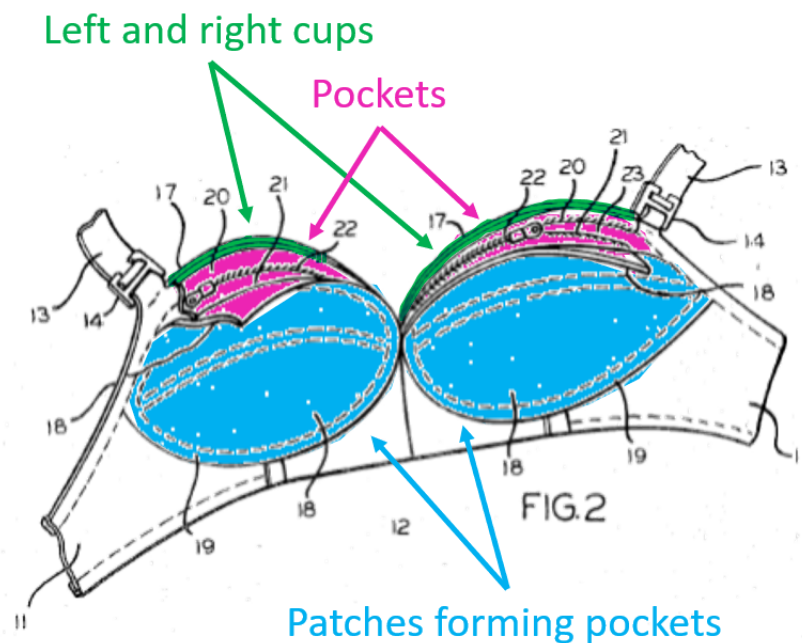
⁴ The Federal Circuit gives no weight to “whereby” clauses that simply express an intended result. *Minton v. Nat’l Ass’n of Sec. Dealers, Inc.*, 336 F.3d 1373, 1381 (Fed. Cir. 2003).



NIKE-1019 at Fig. 1.

- f. “a patch forming a pocket operatively associated with each cup,” [1F]

Barg discloses a “patch” (“inner section 18”) attached to the inner surface of the “outer section 17” of the bra cups (10) to create a pocket (23) associated with each cup:

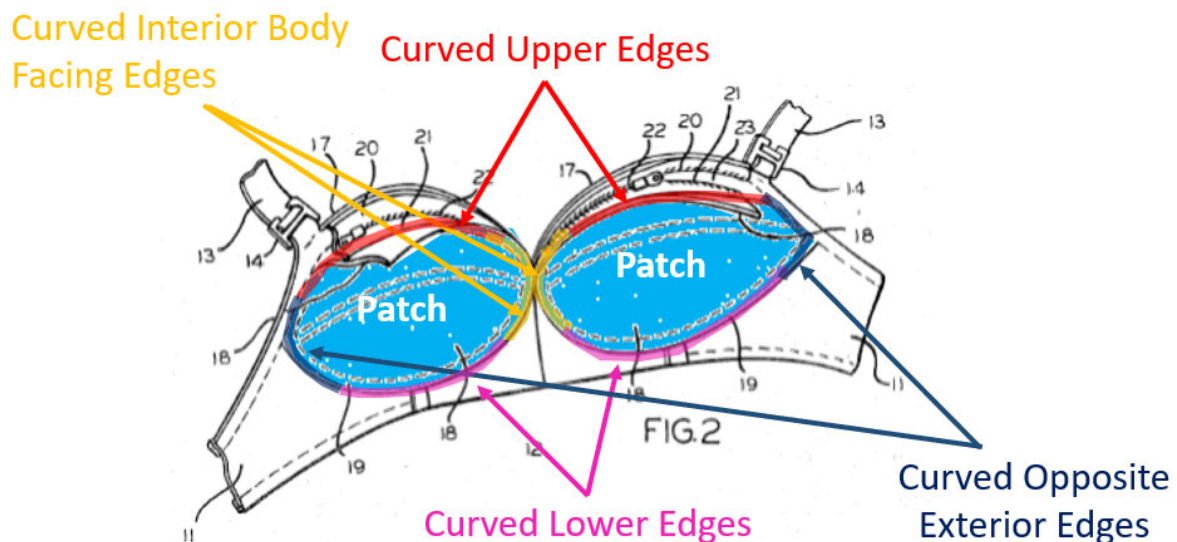


NIKE-1019 at 2:5-25, Figs. 2–4; NIKE-1001 ¶173. Alternatively, a POSA would have understood that “outer section 17” could be understood as the “patch,” while

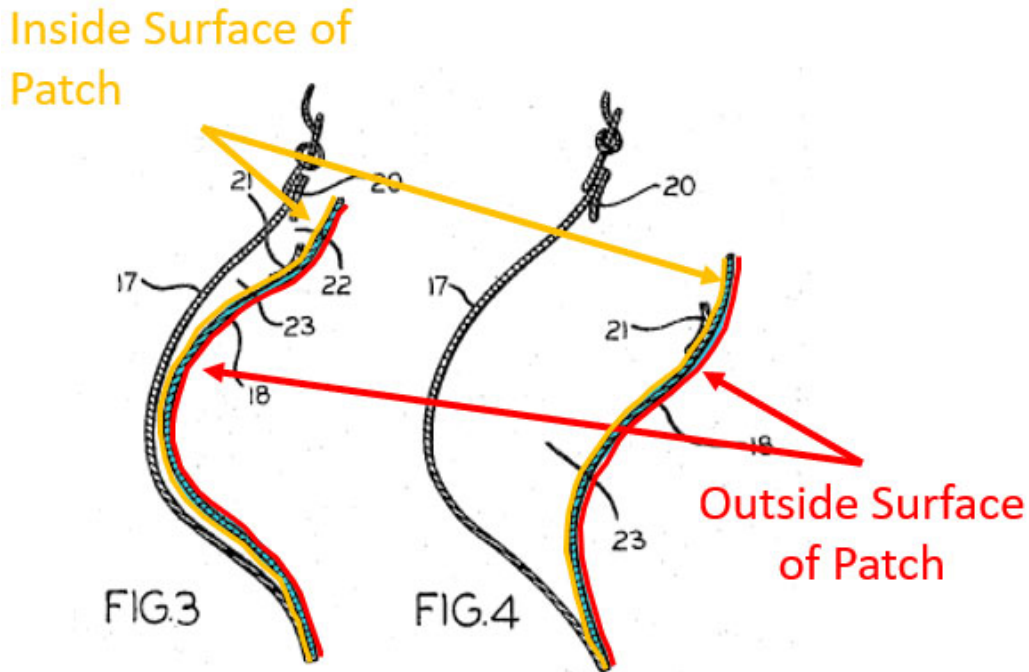
the “inner section 18” could be understood as the “cup,” such that the pockets are on the outside of the breast cups. NIKE-1001 ¶174.

- g. “each patch having a linear upper edge and curved lower, interior body facing, and opposite exterior edges, each patch having inside and outside surfaces;” [1G]

Barg discloses a patch with curved lower, interior body facing, and opposite exterior edges, each patch having inside and outside surfaces:



NIKE-1019 at Fig. 2, 2:5-10.



Id. at Figs. 3–4; NIKE-1001 ¶176.

While Barg discloses a patch with a curved “upper edge,” it would have been obvious to a POSA, based on their own knowledge and/or in combination with Pintor, that they could modify Barg’s patch so that it would have a “linear upper edge.” NIKE-1001 ¶177. In designing a bra with storage pockets, a POSA would have been motivated to look for known solutions in the art, such as the variety of bra designs and pocket shapes. *Id.* ¶178. A POSA would have understood there to be a finite number of edge designs for the patches. *Id.* A POSA would have further understood the degree of curvature of the edge of the patch to be a simple choice of design, as the prior art makes clear. *Id.*; NIKE-1022 at 6:6–10 (“The shape of the [pocket opening] 32 is typically determined by the shape of the side 34D, which may be concave, as shown in FIG. 2, *or may be*

substantially straight, convex, or have any combination of curved or linear components defining an aesthetically pleasing design.”); NIKE-1025 at Fig. 2 (pockets with linear upper edges). Indeed, neither the ’288, nor the prosecution history, describes the “upper edge” being “linear” as an allegedly novel or advantageous aspect of the purported invention. *See generally* NIKE-1003; NIKE-1004. Nor could they, as “straight” or “linear” pocket edges were well known. NIKE-1022 at 6:6–10; NIKE-1025 at Fig. 2; NIKE-1001 ¶179. And even if this limitation would not have been obvious to a POSA based on their own knowledge, *Barg* in combination with *Pintor* renders this limitation obvious. *Id.* ¶180. *Pintor* expressly discloses a patch on the breast cups with a “substantially straight” opening. NIKE-1022 at 6:6–10, Figs. 1–2, 4, 7. A POSA would have been motivated to make the top edge of the patch linear for secure holding of a rectangular item, such as an electronic device or rectangular key, ensuring the item is held snugly within. NIKE-1001 ¶180. A linear upper edge would also help ensure the pocket’s visibility is obscured by the cup. *Id.*

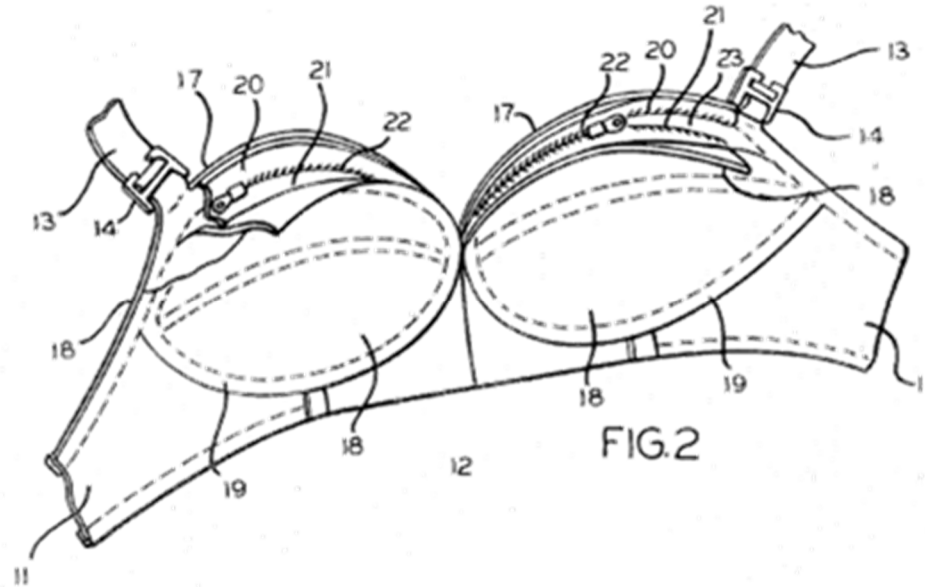
It therefore would have been well within the abilities of a POSA to make such a routine modification, and a POSA would have had a high expectation of success in doing so. *Id.* ¶181; *Ethicon*, 2022 WL 1613188 at *4 (affirming Board’s finding that patent was obvious where combination “would require some modifications” but “a POSA would know how to account for” such modifications).

This is simple technology and bras with pockets with linear openings were well known in the art. *Id.*; NIKE-1022 at 6:6–10; NIKE-1025 at Fig. 2.

Barg, alone or in combination with Pintor, therefore renders this limitation obvious. *Uber Techs., Inc. v. X One, Inc.*, 957 F.3d 1334, 1338–40 (Fed. Cir. 2020) (citing *KSR Intern. Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007)) (where a POSA has “a finite number of identified, predictable solutions,” those amount to a “simple design choice” and “§ 103 bars the patentability of such obvious variations.”).

- h. “stitching coupling the lower, interior body facing and opposite exterior edges of each patch to the lower, interior body facing, and opposite exterior edges of an associated cup;” [1H]**

Barg discloses cups and patches “*attached to one another along the peripheral edge at the side and bottom areas ... in any convenient and efficient manner.*” NIKE-1019 at 2:7–9. A POSA would have understood stitching to be a common, convenient, and efficient method of attaching two pieces of fabric together. NIKE-1001 ¶184. Moreover, a POSA would understand the dashed lines in Figure 2, shown below, to disclose stitching, as dashed lines are used in sewing patterns to denote where stitching should occur. *Id.* ¶185.



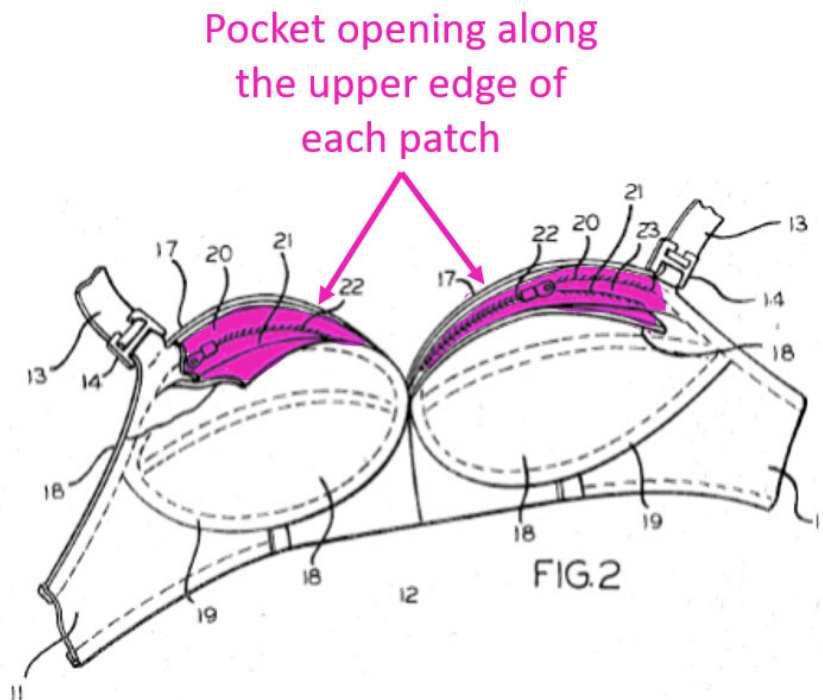
NIKE-1019 at Fig. 2. Thus, Barg discloses pockets formed by stitching the lower interior and exterior edges of a patch to the lower and exterior edges of a corresponding cup. NIKE-1001 ¶186.

Even if not expressly disclosed by Barg, it would have been obvious to a POSA to modify Barg to include stitching either based on their own knowledge and/or in light of Pintor. *Id.* ¶187. First, stitching was a well-known method by which pieces of fabric are attached together for clothing. *Id.* Moreover, Pintor expressly discloses a pocket “attached to the interior surface of the breast cover by any known means such as **stitching**.” NIKE-1022 at 3:52–53. Second, it would have been obvious to try stitching on Barg, and a POSA would have been motivated to do so, because stitching is a simple, effective, well-known, and economical means of attaching pieces of fabric together. NIKE-1001 ¶189. A POSA would have had a high expectation of success in doing so because Pintor

expressly discloses stitching a pocket on a bra cup, both Pintor and Barg are bras, and this is simple, well-known technology. NIKE-1001 ¶189; *Ethicon*, 2022 WL 1613188 at *4.

i. “a linear opening formed along the upper edge of each patch;” [1I]

Barg expressly discloses that the openings are at the “upper edges” of each patch:



NIKE-1019 at Fig. 2, 2:22–25.

And Barg renders obvious a patch with a linear upper edge for the reasons explained *supra* § IX.A.1.g. A POSA would have understood the shape of the pocket opening to be determined by the shape of the patch edge and thus Barg

renders obvious a “linear” opening for the same reasons. NIKE-1001 ¶192; *supra* § IX.A.1.g.

- j. **“at least one of a handheld electronic device, keys, and pills removably positioned within the pocket of at least one of the left and right cups; and”[1J]**

Barg discloses “a pocket therein for storing valuables, or the like.” NIKE-1019 at 1:19–20. Handheld electronic devices, keys, and pills were certainly known “valuables, or the like” at the time of the ’288’s alleged invention. A POSA would therefore have understood “valuables” to include a wearer’s personal belongings, including one of handheld electronic devices, keys, or pills, which is all that is required by the claims. NIKE-1001 ¶194; *Apple, Inc. v. Evolved Wireless LLC*, IPR2016-01177, Paper 27 at 12-13 (P.T.A.B. Dec. 20, 2017) (holding “at least one of” was disjunctive). A POSA would have understood the necessity of making these items “removably accessible” to the wearer while stored in the bra’s pockets, so that the wearer is able to access, remove, and replace the stored valuable items from and into the pocket throughout the day. *Id.* ¶195. Indeed, Barg expressly teaches that a “prime object of [its] invention” is to “produc[e] a pocket for valuables ... that is easily accessible.” NIKE-1019 at 1:36-44.

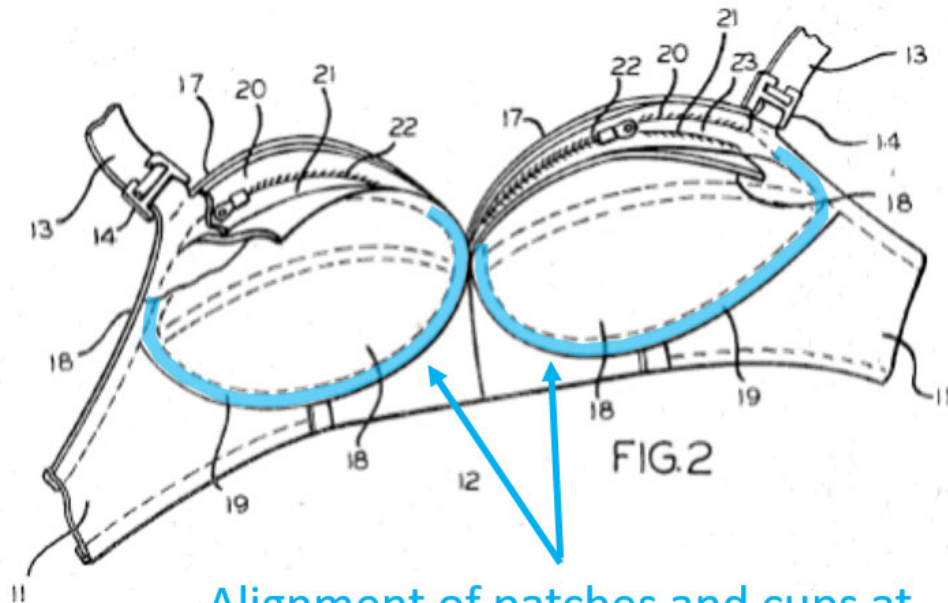
To the extent this limitation is not expressly or inherently disclosed, Barg in combination with a POSA’s knowledge and/or Pintor renders it obvious. A POSA

would have understood that the presence of a pocket necessarily implies the use of the pocket for temporarily holding items, such as one of a handheld electronic device, keys, and pills. NIKE-1001 ¶196. Indeed, Pintor discloses a pocket on the cup “containing a concealed object,” including “[c]ell phones, personal listening devices, and other mobile electronic devices,” as well as “money, keys, credit cards, or other objects.” NIKE-1022 at 1:20-28, 6:44-53, Fig. 3. Thus, it would have been obvious to a POSA that Barg’s pockets—expressly designed to hold “valuables”—would hold one of a “handheld electronic device,” keys, or pills. NIKE-1001 ¶196.

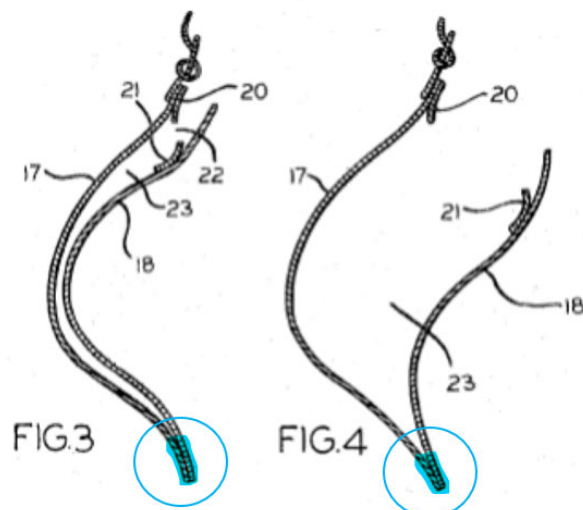
- k. **“wherein each patch curved lower interior body facing and opposite exterior edges are aligned with each curved lower interior body facing and opposite exterior edges, and wherein the stitching is along the curved lower interior body facing and opposite exterior edges of the patch, the linear upper edge of each patch crossing over a surface of the cup to form the linear opening” [1K]**

Barg, alone or in combination with Pintor, renders obvious this limitation. As previously discussed, Barg discloses cups and patches with curved lower interior body facing and opposite exterior edges, and “stitching coupling the lower, interior body facing and opposite exterior edges of each patch to the lower, interior body facing, and opposite exterior edges of an associated cup.” *See supra* §§ IX.A.1.e, IX.A.1.g, IX.A.1.h. Barg further discloses cups and patches “*attached to*

one another along the peripheral edge at the side and bottom areas ... in any convenient and efficient manner”:



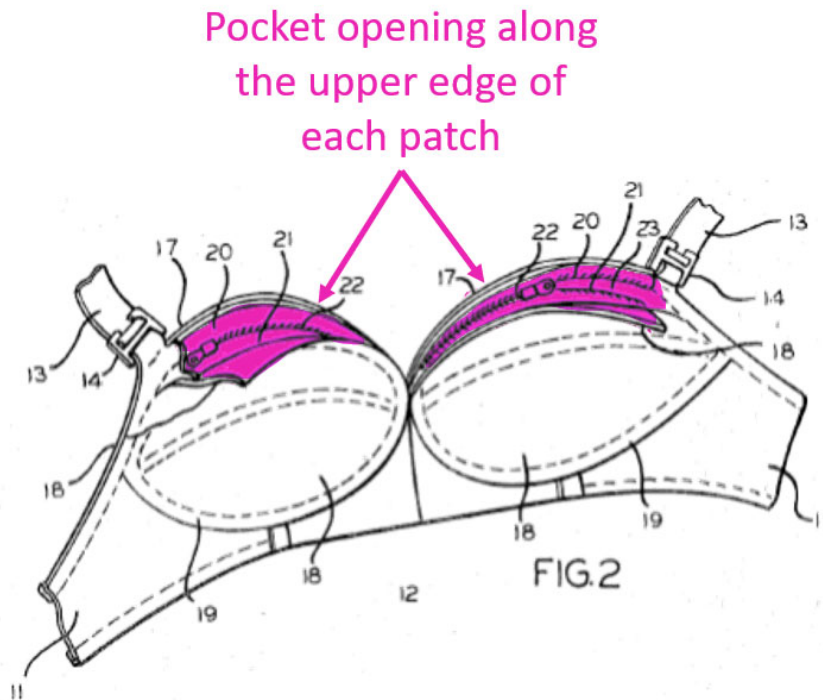
Alignment of patches and cups at
lower, interior, and opposite
exterior edges



Alignment of patches and cups at
lower edges

NIKE-1019 at 2:7–9, Figs. 2-4; NIKE-1001 ¶200.

Additionally, Barg discloses that the “upper edges of the [breast cup] sections 17 and 18 form a pocket 23,” with the opening at the upper edge of each pocket:



NIKE-1019 at Fig. 2, 2:15-17. As illustrated above, the upper edges of each pocket-forming patch also “cross[] over” a surface of each bra cup. Finally, Barg alone or in combination with Pintor also renders obvious a linear upper edge of each patch and pocket opening as previously discussed. *Supra* §§ IX.A.1.g, IX.A.1.i.

2. Claim 2

a. “The system set forth in claim 1” [Preamble]

Barg discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.A.1.

b. “wherein the cups and the patches form pockets, the cups being fabricated of a resilient closed cell polyurethane foam with a thickness of from 2 to 4 millimeters” [2A]

Barg in combination with the knowledge of a POSA renders this limitation obvious. As previously discussed, Barg discloses cups and patches forming pockets. *See supra* § IX.A.1.f. While Barg does not specify the material used for the cups, the use of resilient polyurethane, including closed cell polyurethane, of the claimed thickness in the construction of bra cups was well-known in the art by the time of the alleged invention. *See* NIKE-1037 (2009) at 117 (molding of closed- and open-cell polyurethane foam for bra padding); NIKE-1038 (2006) at 7:3 (polyurethane for use in bra padding), at 6:4–5 (foam thickness of 3 mm), at 3:13, 4:59–64, 5:5 (using “resilient” thermoplastic foam material, including polyurethane foam, for use in bra cup manufacturing); NIKE-1001 ¶206. It would have been obvious to a POSA to try using such material on Barg, and a POSA would have been motivated to do so to increase comfort of the bra. *Id.* Indeed, a POSA would have understood resilient polyurethane foam to be a conventional component of bra cups because of its cost, availability, softness, and other tactile

characteristics that make it ideal for bra manufacturing. *Id.*; NIKE-1037 at 117; NIKE-1038 at 7:3. A POSA in 2013 would therefore have been motivated to modify Barg to use resilient closed cell polyurethane for the cups. NIKE-1001 ¶206.

A POSA would further have understood the thickness of the foam to be a result-effective variable, because users desire bra cups that are thick enough to provide the desired support and shape to the breasts, but not so thick as to create discomfort or bulk. NIKE-1001 ¶207. Thicknesses of 2 to 4 millimeters were known to be desirable in 2013. *Id.*; NIKE-1038 (2006) at 6:4–5 (disclosing a bra cup made of polyurethane with foam thickness ranging from 1–3 mm). A POSA therefore would have had a high expectation of success in modifying Barg to include polyurethane cups with a thickness of 2 to 4 millimeters because such cups were known and, in any event, a POSA would have known how to adjust the thickness to the desired level. NIKE-1001 ¶207; *see also* NIKE-1037 at 117; NIKE-1038 at 6:4–5, 7:3, 1:48–57 (adjusting the thickness of the bra cup), 3:31–37 (bra cup formed of “flexible foam material” of “varying thickness”). Thus, a POSA would have found it obvious to modify Barg based on their own knowledge and would have had a high expectation of success in doing so. NIKE-1001 ¶207.

Barg in combination with Pintor also renders this limitation obvious. *Id.* ¶208. Pintor expressly teaches “the breast covers or other portions of the article of

apparel may comprise an elastomeric woven or nonwoven material, including . . . polyurethane.” *See* NIKE-1022 at 7:53–60, 3:5-16. Pintor further teaches the cup formed of polyurethane “having a *resilient* shape.” *Id.* at 4:28–30. A POSA would have known the polyurethane cups taught by Pintor would include closed cell polyurethane cups of the claimed thickness, because such bra cups were known in the art. *See* NIKE-1037 at 117; NIKE-1038 at 6:4–5; NIKE-1001 ¶¶117, 209. And as explained above, a POSA would have been motivated to use the polyurethane cups taught by Pintor in the bra disclosed by Barg and have a reasonable expectation of success in doing so, for the same reasons discussed below. *Infra* § IX.A.7.

3. Claim 3

a. “The system as set forth in claim 1” [Preamble]

Barg discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.A.1.

b. “wherein the cups and the patches form pockets, the patches being fabricated of an elastic fabric” [3A]

Barg in combination with the knowledge of a POSA and/or Pintor renders this limitation obvious. As previously discussed, Barg discloses cups and patches forming pockets. *Supra* § IX.A.1.f. A POSA would have understood the purpose of a pocket in a bra or other garment is to hold personal items. NIKE-1019 at 1:18-20; NIKE-1022 at 2:9-13; NIKE-1001 ¶213. A POSA would have

understood that the shape of such items may not easily conform to the shape of a rigid pocket. NIKE-1001 ¶213. Thus, a POSA would have found it obvious to manufacture the patch with an elastic material, such that the pocket may stretch to accommodate the placement of items. *Id.* Indeed, pockets comprised of elastic material were well-known and popular at the time of the alleged invention, as Pintor makes clear. *E.g.*, NIKE-1022 at 3:5–14 (“The pocket can be formed of an extensible material that can, for example, elastically deform Such materials can include woven or nonwoven fabrics comprising Spandex®, Lycra®, nylon, neoprene, polyurethanes, polyolefins, polyesters, wool, rayon, etc.”); NIKE-1039 (nylon and Lycra blended sports bras). And Barg teaches that elastic material is used in other parts of its bra. NIKE-1019 at 2:2–4. Thus, a POSA would have found it obvious to modify Barg based on their own knowledge or as expressly taught by Pintor. *Id.*; *infra* § IX.A.7.

A POSA would also have had a high expectation of success in using elastic materials for the patches taught by Barg because Pintor expressly teaches the use of elastic material for patches on bra cups. NIKE-1022 at, *e.g.*, Figs. 1–8 (disclosing bras with patches forming a pocket on the cups), 3:5–39 (teaching that the pocket may be formed by a patch attached to the bra cup and made of elastic material); NIKE-1001 ¶219; *infra* § IX.A.7; *In re Couvaras*, 70 F.4th 1374 at 1378–79 (Fed. Cir. 2023) (affirming the Board’s finding of *prima facie*

obviousness where the prior art taught the claimed element to be useful for the same purpose).

4. Claim 4

a. “The system as set forth in claim 1” [Preamble]

Barg discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.A.1.

b. “and further including an under-wire coupled beneath each cup in a generally horizontal plane” [4A]

Barg in combination with the knowledge of a POSA and/or Pintor renders this limitation obvious. Though Barg does not expressly disclose the use of an underwire, a POSA would have understood that bras with underwire were known and popular decades prior to 2013. NIKE-1001 ¶222; NIKE-1022 at 6:57–60, 7:63–66; NIKE-1021 at [0020]. Indeed, Pintor expressly discloses “many varieties of bras that may be used with the present invention,” including “underwire bras.” NIKE-1022 at 7:63–66, 6:57–58. Therefore, it would have been obvious to a POSA to add an underwire to Barg, based on their own knowledge or in combination with Pintor, and a POSA would have been motivated to do so, because underwire bras tend to provide better lift, separation, shape, and support of the breasts than bras without such structure. *Id.* ¶223. A POSA would have had a high expectation of success in modifying Barg, as the prior art expressly teaches

the use of underwires in bras with a breast cup pocket. NIKE-1022 at 6:57–60, 7:63–66; NIKE-1021 at [0020]; *infra* § IX.A.7.

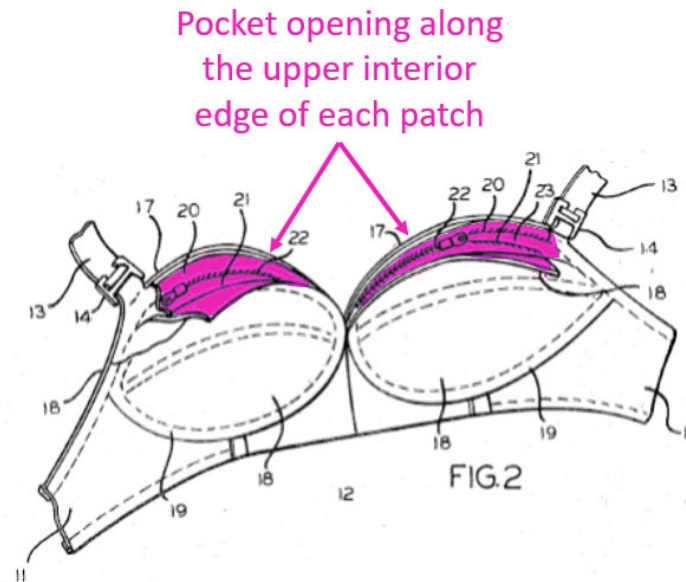
5. Claim 11

a. “The system as set forth in claim 1” [Preamble]

Barg discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.A.1.

b. “wherein the linear opening is facing the upper interior edge to allow the at least one of the handheld electronic device, keys, and pills to be removably positioned within the pocket by entry adjacent to a shoulder of the user” [11A]

Barg, alone or in combination with Pintor, renders obvious this limitation. As previously discussed, Barg discloses and/or renders obvious (alone or in combination with Pintor) a “linear opening,” *supra* § IX.A.1.i, and “at least one of the handheld electronic device, keys, and pills to be removably positioned within the pocket,” *supra* § IX.A.1.j. Barg further discloses pockets whose upper openings face the upper interior edge and allow for item entry adjacent to the user’s shoulders:



NIKE-1019 at Fig. 2.

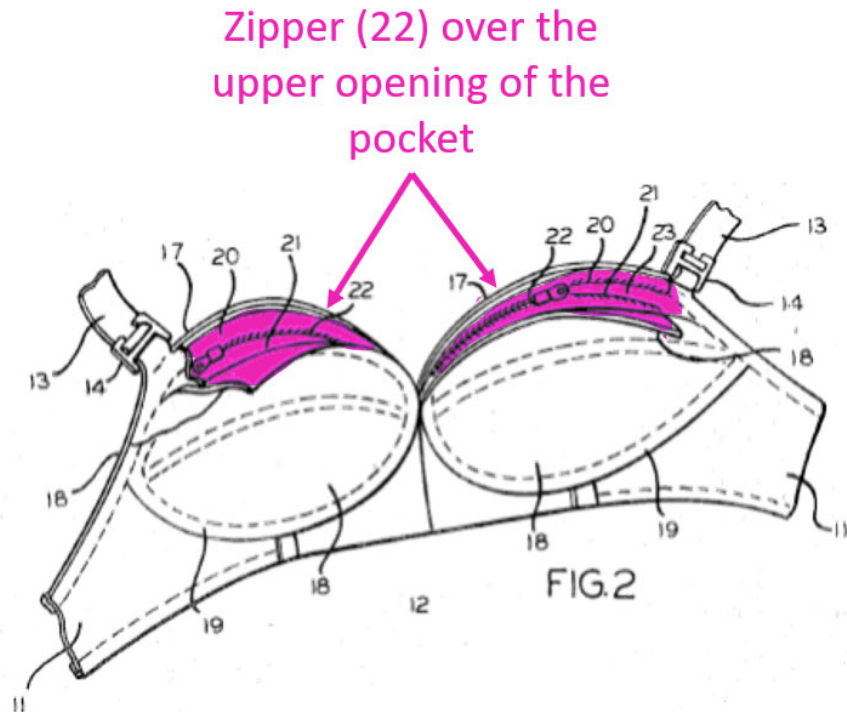
6. Claim 12

a. “The system as set forth in claim 1” [Preamble]

Barg discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.A.1.

b. “further comprising a closure over the linear opening” [12A]

Barg discloses a “hookless fastener or zipper 22” for “means of fastening” the pocket closed. NIKE-1019 at 2:12–21; 1:26–28, 1:41–44, 1:45–59, Cl. 1–3. As discussed *supra* § IX.A.1.i, Barg in combination with a POSA’s knowledge renders a linear opening obvious. As illustrated below, the zipper (22) closure is over the pocket opening:



NIKE-1019 at Fig. 2, 2:24–25.

7. Reasons to Combine Barg and Pintor

As demonstrated above, Barg and Pintor disclose all the limitations of the claimed “bra pocket system.” The only remaining question is whether combining Pintor’s teachings with Barg was obvious. It was.

“[I]n many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *KSR*, 550 U.S. at 420–21. Where, as here, the claimed combination “‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement,” then it is obvious. *Id.* at 417 (quoting *Sakraida*, 425 U.S. at 282 (1976)). For example, in *Sundance, Inc. v.*

DeMonte Fabricating Ltd., 550 F.3d 1356 (Fed. Cir. 2008), the Federal Circuit found that combining prior art elements in a way that a POSA would reasonably expect the elements to maintain their respective properties or functions after they have been combined supported a finding of obviousness. *Id.* at 1367. Here, like in *Sundance*, Barg and Pintor, in combination with a POSA’s knowledge, disclose all claimed features of the “pocket bra system.” *Supra* § IX.A. Also as in *Sundance*, it would have been obvious to simply combine the beneficial features of both bras, with the features taught by Barg and Pintor performing their same intended function. NIKE-1001 ¶232.

A bra with pockets on the cups is not a novel idea, and in designing a bra with pockets, a POSA would have been motivated to look to the prior art references disclosing bras with pockets—including Barg and Pintor specifically—and select preferable elements from each disclosure to construct their desired pocketed bra. NIKE-1001 ¶233. One advantage of Barg’s bra is that it has large “easily accessible” pockets that are “no[t] conspicuous.” *Id.*; NIKE-1019 at 1:24-45. At the same time, Pintor’s bras contain more comfortable polyurethane cups, and have elastic pockets to hold objects more easily. NIKE-1001 ¶143; NIKE-1022 at 3:5-19, 7:53-62. As a result, a POSA would have been motivated to design a bra that took advantage of the benefits provided by each of Barg and Pintor’s bras. NIKE-1001 ¶233.

A POSA also would have understood that bras are meant to serve a diverse population with differing preferences for things such as support, comfort, and pocket size(s), and that it would be commercially beneficial to provide consumers with a variety of options to meet those different preferences. NIKE-1001 ¶234. Indeed, the prior art expressly states that having “an aesthetically pleasing design” is an important consideration. NIKE-1022 at 6:6-10. A POSA therefore would have been motivated to design a variety of combinations of bras, including those with the claimed features, so as to be able to provide options to a wide range of customers. *Id.*

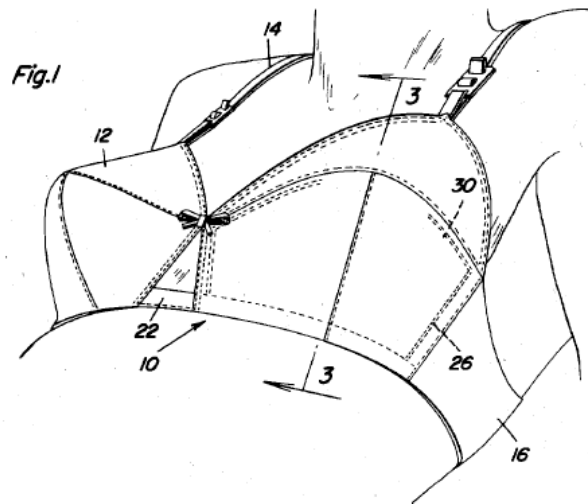
A POSA would have had a high expectation of success with this combination. NIKE-1001 ¶235. Barg and Pintor are both bras with pockets on the cups for storing valuables while remaining “easily accessible.” *E.g.*, NIKE-1019 at 1:34–35, 2:22–25, Figs. 1–4; NIKE-1022 at 2:4–17, 5:37–45, 6:19–30, Figs. 1–8; NIKE-1001 ¶235. And each of the elements disclosed by the combination—*e.g.*, cups, pockets, stitching—would perform the same predictable function disclosed in the prior art. NIKE-1001 ¶235. Any work needed to combine the elements taught by Barg and Pintor would therefore be nothing more than routine modifications well within the abilities of a POSA. *Id.*; *Ethicon LLC*, 2022 WL 1613188 at *4.

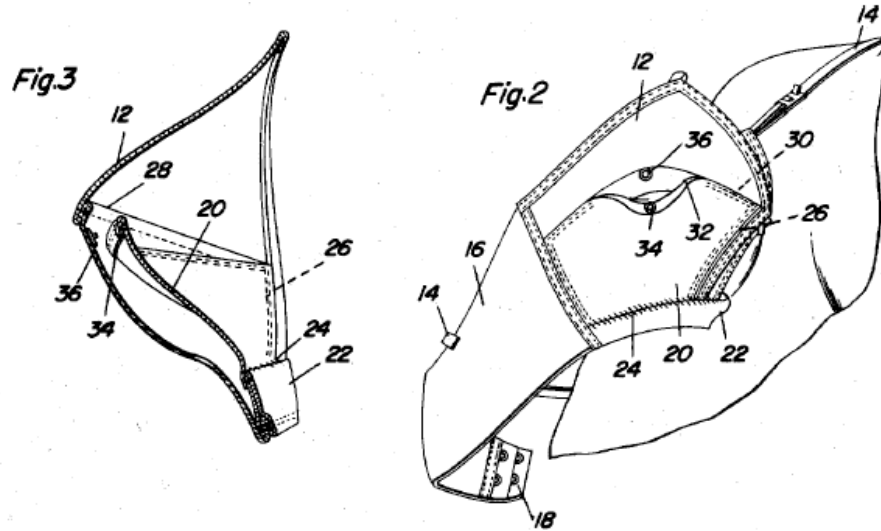
B. Ground 2: 1–4 and 11–12 Are Unpatentable Over York in View of Pintor

1. Claim 1

a. “A bra pocket system combination comprising:” [1A]

To the extent the preamble is limiting, York discloses “a brassiere in which is incorporated a pocket on the interior lower surface of the usual breast cup for receiving valuable articles such as jewelry, money, or the like.” NIKE-1020 at 1:15–19.

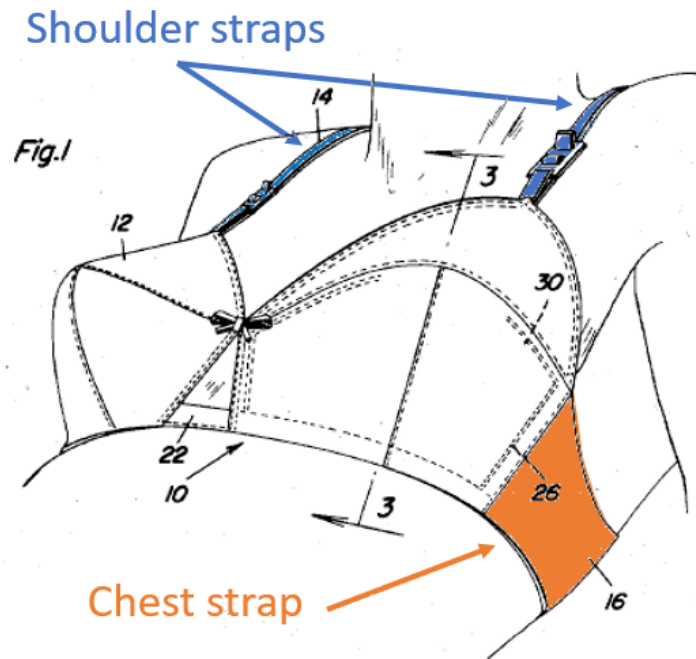




Id. at Figs. 1–3.

- b. “a strap assembly including a chest strap and shoulder straps;” [1B]

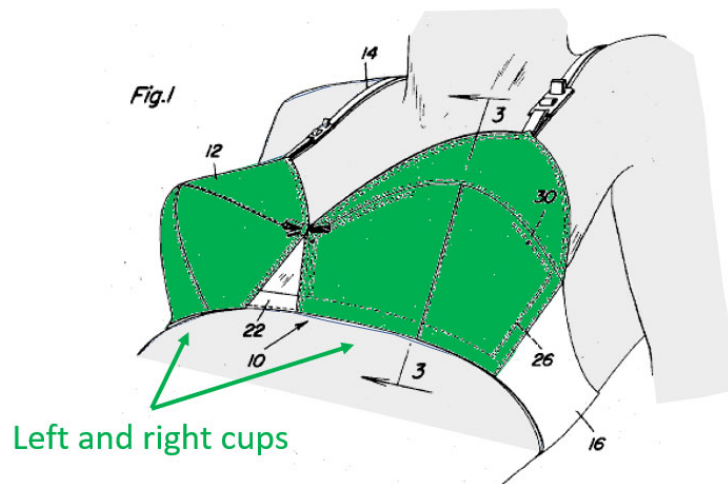
York discloses a “conventional” bra design with “the usual pair of breast cups 12 having *shoulder straps* 14 attached thereto along the top edge and *a body encircling strap* 16 extending rearwardly which strap is provided with the usual *separable ends* such as indicated by the numeral 18”:



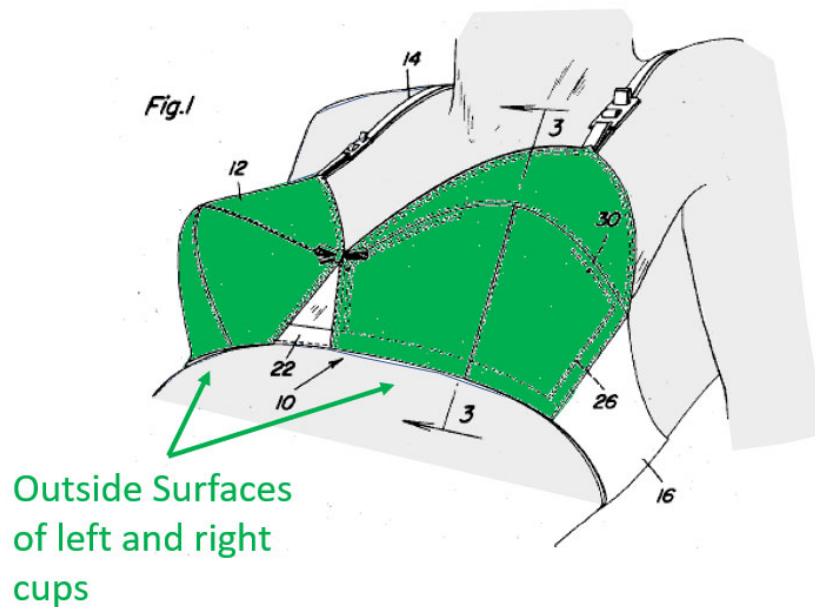
NIKE-1020 at 1:48–52, Fig. 1.

- c. “left and right cups, each cup having inside and outside surfaces,” [1C]

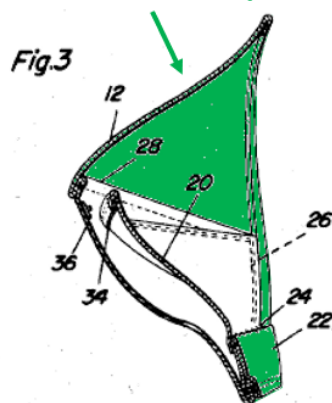
York discloses a bra with left and right cups:



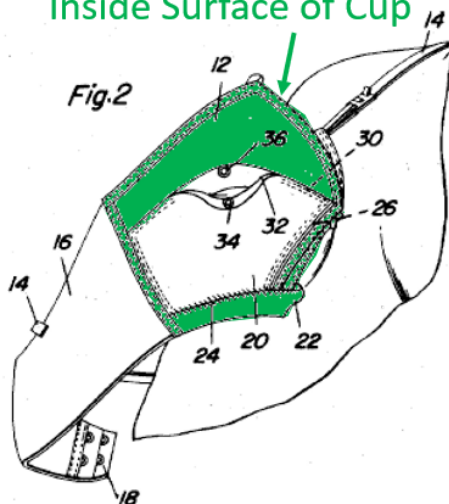
NIKE-1020 at Fig. 1, 1:46-52 (disclosing “a brassiere which includes the usual pair of breast cups 12”). Further, as illustrated in Figures 1 and 3 below, the cups have inside and outside surfaces:



Inside Surface of Cup



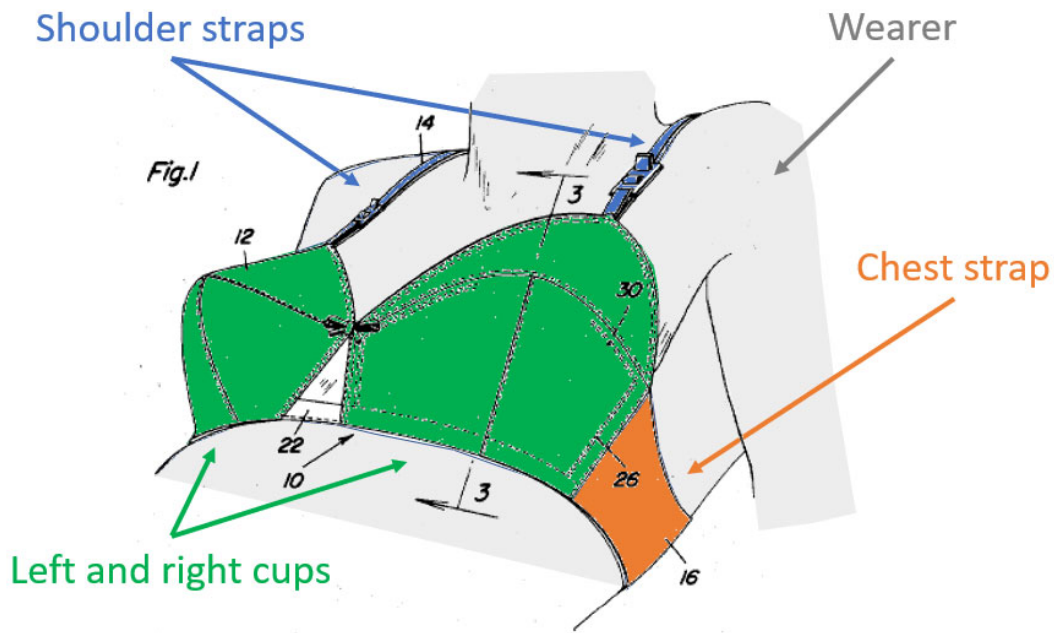
Inside Surface of Cup



Id. at Figs. 1–3, 1:1-2:3 (describing the “interior surface” of the breast cups). A POSA would also have understood York’s cups to necessarily have inside and outside surfaces. NIKE-1001 ¶242.

- d. “the strap assembly being attached to the cups whereby the strap assembly adheres the cups to a wearer,” [1D]

York discloses this limitation. York discloses a “strap assembly” and “left and right cups.” *Supra* §§ IX.B.1.b, IX.B.1.c. Further, to the extent the “whereby” clause should be provided patentable weight,⁵ Figure 1 illustrates the disclosed strap assembly adhering the cups to a wearer:

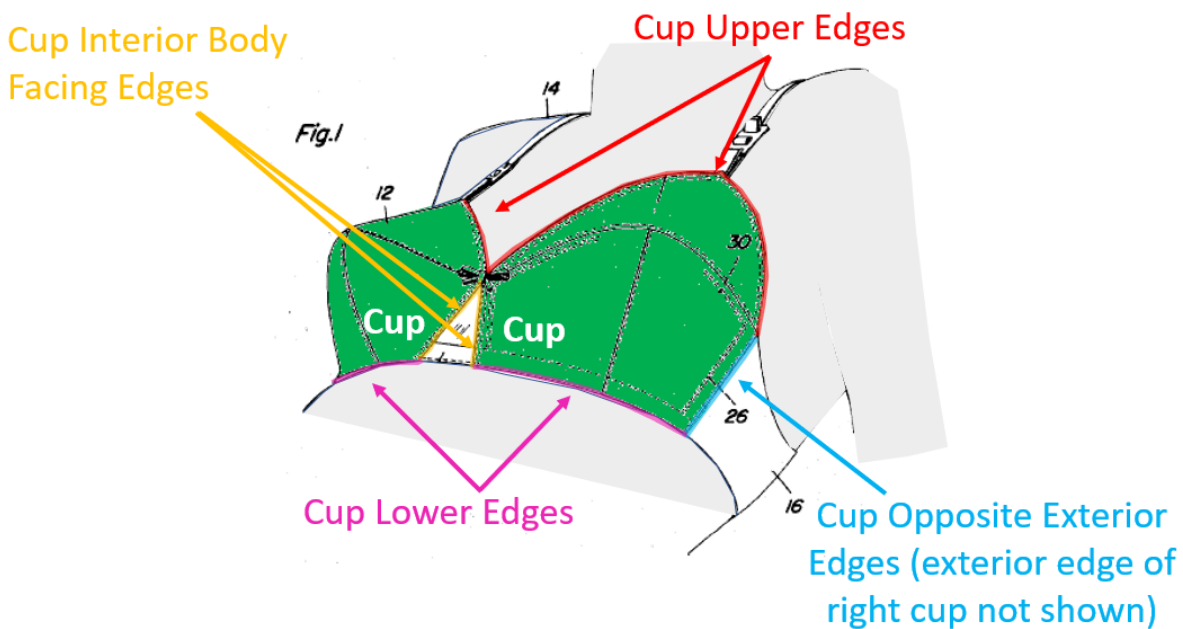


⁵ *Supra* note 4.

NIKE-1020 at Fig. 1, at 1:48–52 (“the usual pair of breast cups having *shoulder straps* attached thereto along the top edge and *a body encircling strap* extending rearwardly which strap is provided with the usual separable ends.”) (numbers omitted).

- e. “each cup having curved upper, lower, interior body facing and opposite exterior edges;” [1E]

York renders obvious this limitation. York discloses upper, lower, interior body facing, and opposite exterior edges of the cup:

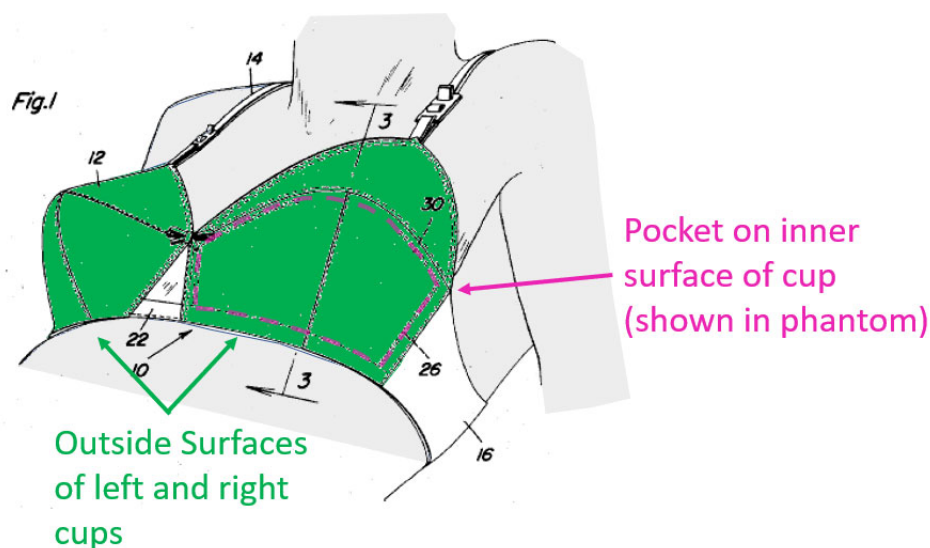


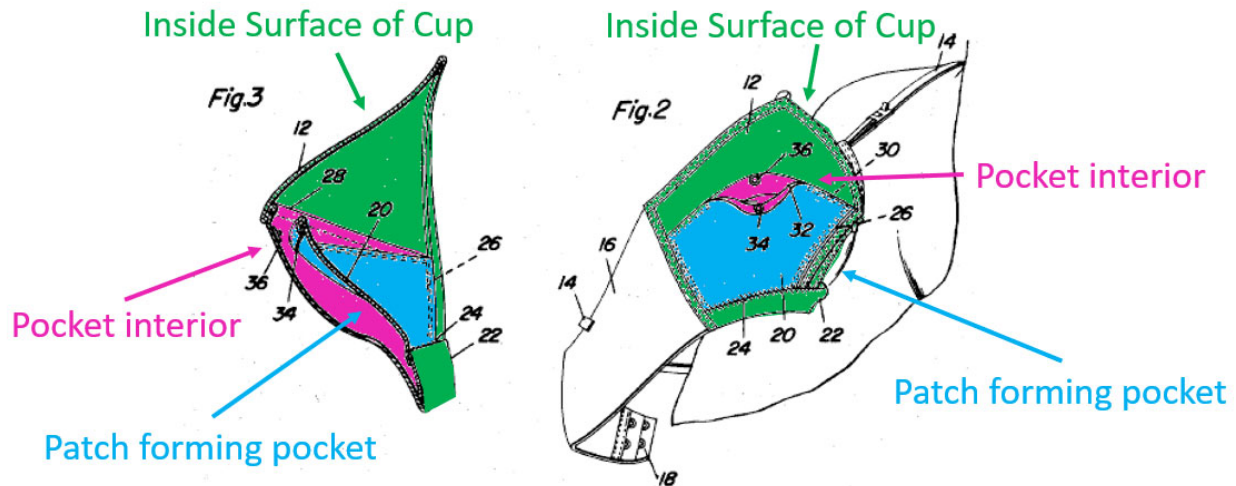
NIKE-1020 at Fig. 1. Further, York renders obvious that the edges of the cup be “curved.” York explains that its “brassiere, which includes the usual pair of breast cups ... is conventional and may be any of several commercially available types,” such as bras with cups with curved edges. *Id.* at 1:46-54. Indeed, cups with curved edges were widely known at the time of the alleged invention and a POSA

would have been motivated to make the edges of a bra cup curved to match the curvature of the breasts. *E.g.*, NIKE-1019; NIKE-1022; NIKE-1021; NIKE-1025; NIKE-1023; NIKE-1038; NIKE-1001 ¶248. Moreover, a POSA would have understood the shape of the bra cup to be a design choice. *See Uber*, 957 F.3d at 1338–40 (citing *KSR*, 550 U.S. at 421); NIKE-1001 ¶248. A POSA would have had a high expectation of success in using curved edge cups because bras with such cups were well known in the art, and York expressly contemplates the use of any known bra, including bras with cups with curved edges. NIKE-1001 ¶249.

f. “a patch forming a pocket operatively associated with each cup,” [1F]

York renders obvious “a patch forming a pocket operatively associated with each cup.” As illustrated below, York discloses “a pocket forming panel 20” attached to the bra cup to form a pocket:



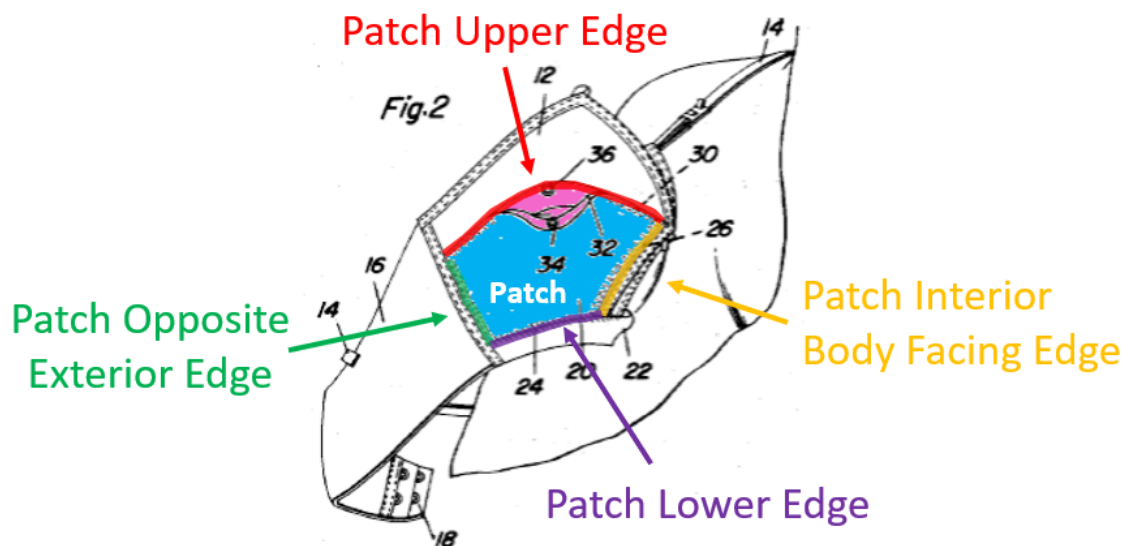
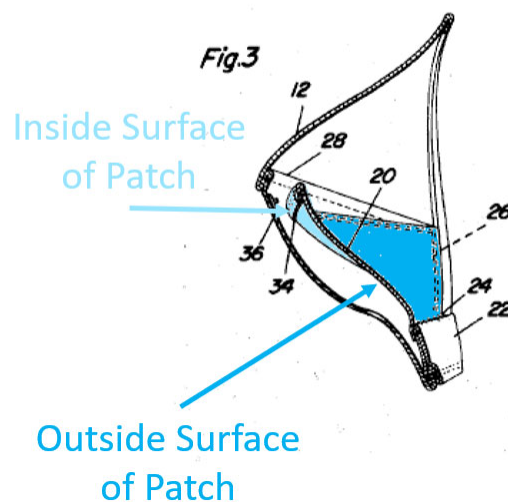


NIKE-1020 at Figs. 1–3, 1:54–2:23.

While York discloses a pocket on the “interior surface of one of the breast cups,” NIKE-1020 at 1:54–2:23, it would have been obvious to include the expressly disclosed pocket on both cups. NIKE-1001 ¶252. Nothing in York teaches away from the placement of a pocket on each of the cups and a POSA would have been motivated to include a pocket on each cup to further its goal of providing a place to store “valuable articles such as jewelry, money, or the like.” NIKE-1020 at 1:18–19; NIKE-1001 ¶252. Thus, it would have been obvious to a POSA to include such a pocket on both cups, including to increase the amount of storage space in the bra. NIKE-1001 ¶252.

- g. “each patch having a linear upper edge and curved lower, interior body facing, and opposite exterior edges, each patch having inside and outside surfaces;” [1G]

York renders this limitation obvious. York discloses a patch with upper, lower, interior body facing, and opposite exterior edges, the patch having both inside and outside surfaces:



NIKE-1020 at Figs. 2–3. A POSA would have understood the patch to necessarily have inside and outside surfaces. NIKE-1001 ¶254.

It would have also been obvious to a POSA, based on their own knowledge and/or in combination with Pintor, to modify York’s patch so that it would have a “linear upper edge.” *Id.* ¶255. In designing a bra with pockets, a POSA would have been motivated to look for known solutions in the art, such as the variety of bra designs and pocket shapes. *Id.* A POSA would have understood there to be a finite number of edge designs for the patches. *Id.* And the prior art makes clear that the degree of curvature of the edge of the patch was a design choice. NIKE-1022 at 6:6–10; NIKE-1025 at Fig. 2; NIKE-1001 ¶255. Indeed, neither the ’288, nor the prosecution history, describes the “upper edge” being “linear” as an allegedly novel or advantageous aspect of its purported invention. *See generally* NIKE-1003; NIKE-1004; *supra* § IX.A.1.g. Nor could they, as “straight” or “linear” pocket edges were well known. NIKE-1022 at 6:6–10; NIKE-1025 at Fig. 2; NIKE-1001 ¶257. And even if this limitation would not have been obvious to a POSA based on their own knowledge, York in combination with Pintor renders this limitation obvious. Pintor expressly discloses a patch on the breast cups with a “substantially straight” opening. NIKE-1001 ¶257; NIKE-1022 at 6:6–10, Figs. 1–2, 4, 7.

A POSA would have been motivated to make the top edge of the patch linear to securely hold a rectangular item, such as an electronic device or rectangular key, ensuring the item is held snugly within. NIKE-1001 ¶258. A linear upper edge would also help ensure the pocket's visibility is obscured by the cup. *Id.*; *see also supra* § IX.A.1.g. It also would have been well within the abilities of a POSA to make the top of York's patch linear, and a POSA would have had a high expectation of success in doing so. NIKE-1001 ¶259; *Ethicon*, 2022 WL 1613188 at *4. This is simple technology and bras with pockets with linear openings were well known in the art. NIKE-1001 ¶259; NIKE-1022 at 6:6–10; NIKE-1025 at Fig. 2.

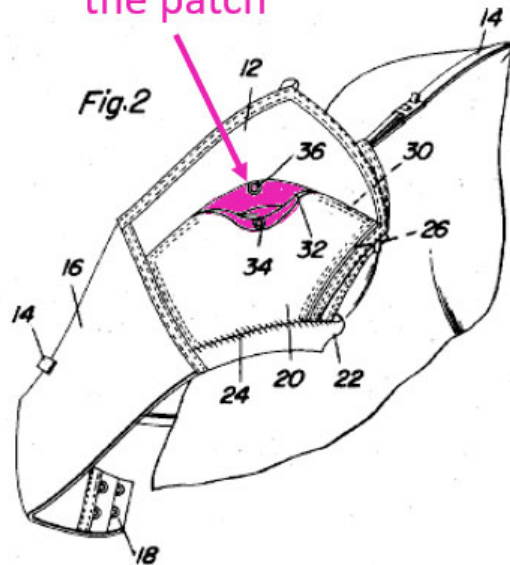
h. “stitching coupling the lower, interior body facing and opposite exterior edges of each patch to the lower, interior body facing, and opposite exterior edges of an associated cup;” [1H]

York discloses a “pocket forming panel 20 having the lower edge thereof connected with the finished hem 22 at the lower edge of the cup 12 by stitching 24. The panel is also secured to the side edges of the cup 12 by stitching 26.” NIKE-1020 at 2:1–4, Figs. 2–3. Thus, York discloses stitching coupling the lower interior and exterior edges of the patch to the lower interior and exterior edges of an associated cup.

i. “a linear opening formed along the upper edge of each patch;” [11]

York renders this limitation obvious. As previously discussed, York discloses upper edges of the patch. *Supra* § IX.B.1.g. York discloses an opening along this upper edge:

Pocket opening along
the upper edge of
the patch



NIKE-1020 at Fig. 2, 2:3-23.

And York renders obvious a patch with a linear upper edge for the reasons explained *supra* § IX.B.1.g. A POSA would have understood the shape of the pocket opening to be determined by the shape of the patch edge and therefore York renders obvious a “linear” opening for the same reasons. NIKE-1001 ¶264, 175; *supra* § IX.B.1.g.

- j. “at least one of a handheld electronic device, keys, and pills removably positioned within the pocket of at least one of the left and right cups; and” [1J]**

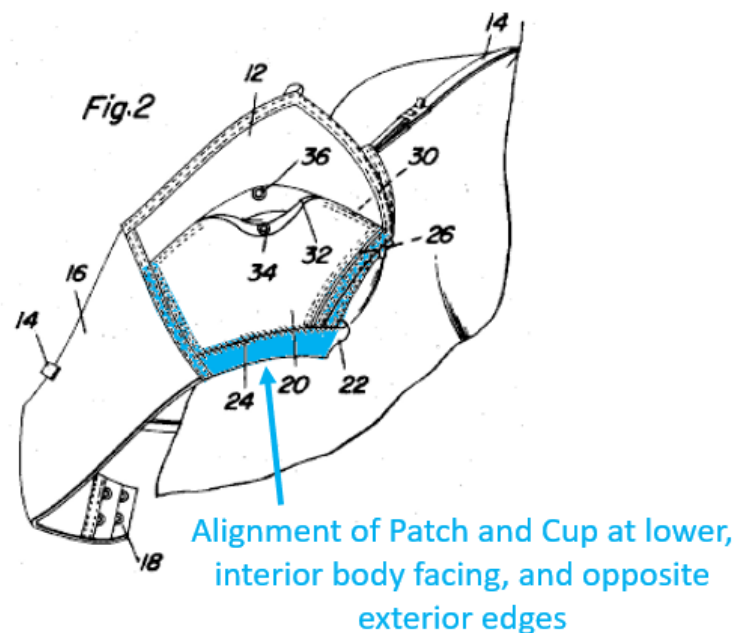
York discloses a pocket “for receiving valuable articles such as jewelry, money or the like.” NIKE-1020 at 1:18–19, 2:17–20. A POSA in 2013 would have understood “valuables” to include one of handheld electronic devices, keys, or pills, which is all that is required by the claims. NIKE-1001 ¶266.

To the extent this limitation is not expressly or inherently disclosed, York in combination with a POSA’s knowledge and/or Pintor renders it obvious. A POSA would have understood that the presence of a pocket necessarily implies the use of the pocket for holding items, and those items could include one of a handheld electronic device, keys, and pills. *Id.* ¶267. Indeed, Pintor expressly discloses a pocket on the cup “containing a concealed object,” including “[c]ell phones, personal listening devices, and other mobile electronic devices,” as well as “money, keys, credit cards, or other objects that women may wish to keep concealed.” NIKE-1022 at 1:20-29, 6:44-53, Fig. 3. Thus, it would have been obvious to a POSA that York’s pockets—expressly designed to hold “valuables”—would hold one of a “handheld electronic device,” keys, or pills. NIKE-1001 ¶267.

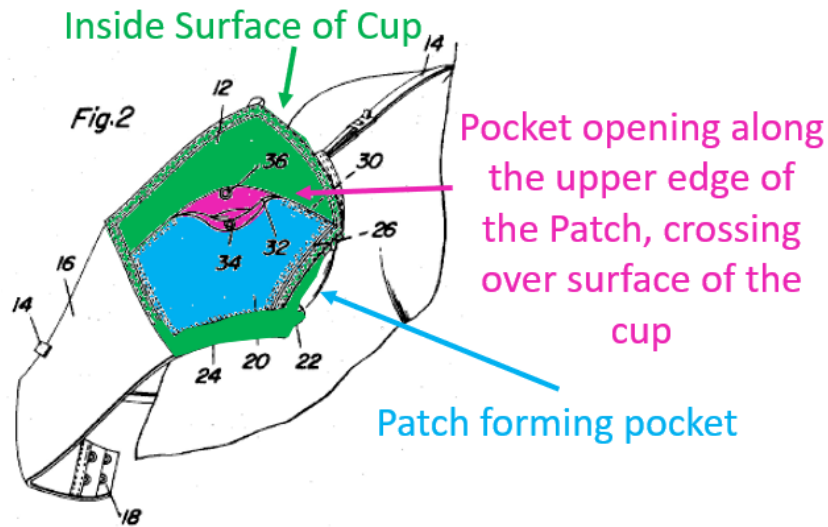
- k. “wherein each patch curved lower interior body facing and opposite exterior edges are aligned with each curved lower interior body facing and opposite exterior edges, and wherein the stitching is along the curved lower interior body facing and opposite exterior edges of the patch, the linear upper edge of**

each patch crossing over a surface of the cup to form the linear opening” [1K]

York renders obvious this limitation. As shown below, York discloses a “pocket forming panel 20 having the lower edge thereof connected with the finish hem 22 at the lower edge of the cup 12 by stitching 24. The panel is also secured to the side edges of the cup 12 by stitching 26.” NIKE-1020 at 2:1–4.



Id. at Fig. 2. Thus, York discloses the edges of each patch aligned and stitched to the edges of each corresponding cup. NIKE-1001 ¶272. Additionally, York discloses that the opening is along the “uppermost portion” of “the panel 20,” “crossing over” a surface of the bra cup:



Id. at Fig. 2, 2:3-23; NIKE-1001 ¶272.

Finally, York renders obvious including a patch on both pockets and a “linear upper edge,” for the reasons previously discussed. *Supra* §§ IX.B.1.g, IX.B.1.i.

2. Claim 2

a. “The system set forth in claim 1” [Preamble]

York discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.B.1.

b. “wherein the cups and the patches form pockets, the cups being fabricated of a resilient closed cell polyurethane foam with a thickness of from 2 to 4 millimeters” [2A]

York in combination with the knowledge of a POSA renders this limitation obvious for the same reasons Barg in combination with the knowledge of a POSA renders this limitation obvious. *Supra* § IX.A.2.b; NIKE-1001 ¶276. Namely,

York discloses cups and patches forming pockets, *supra* § IX.B.1.f., and the use of resilient closed cell polyurethane with a thickness of 2 to 4 millimeters was well known in the art by the time of the alleged invention. NIKE-1001 ¶¶277–78; *supra* § IX.A.2.b. And for the same reasons a POSA would have been motivated to try using such material on York and would have had a high expectation of success doing so. NIKE-1001 ¶¶277–78.

York in combination with Pintor also renders this limitation obvious for the same reason Barg in combination with Pintor renders this limitation obvious. *Id.* ¶279; *see supra* § IX.A.2.b. Namely, because Pintor teaches the use of resilient polyurethanes in cups for bras with pockets. NIKE-1022 at 7:53–60, 3:5-16, 4:28–30; NIKE-1001 ¶¶190–91. And that such disclosure would include closed-cell polyurethane of the claimed thickness because it was known in the art for such use. *See* NIKE-1037 at 117; NIKE-1038 at 6:4–5; NIKE-1001 ¶280. For the same reasons explained *supra* § IX.A.2.b. for Barg, a POSA would have been motivated to use the polyurethane cups taught by Pintor in the bra disclosed by York and would have had a high expectation of success in doing so. NIKE-1001 ¶281; *see also infra* § IX.B.7.

3. Claim 3

a. “The system as set forth in claim 1” [Preamble]

York discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.B.1.

b. “wherein the cups and the patches form pockets, the patches being fabricated of an elastic fabric” [3A]

York in combination with the knowledge of a POSA and/or Pintor renders this limitation obvious for the same reasons described above for Barg. *Supra* § IX.A.3.b. Namely, because a POSA would have understood the purpose of a pocket in a bra is to hold items. NIKE-1020 at 1:17–19 (“a pocket ... for receiving valuable articles such as jewelry, money or the like.”), at 29–30 (“a pocket incorporated into a brassiere which is simple, easy to install, well adapted for its intended purposes”); NIKE-1022 at 2:9-13; NIKE-1001 ¶¶283–84. And that a POSA would have been motivated to use elastic material in forming the pocket to ensure proper accommodation of stored items, and because pockets comprised of elastic material were well-known at the time of the ’288’s alleged invention, as Pintor makes clear. *Supra* § IX.A.3.b.; NIKE-1001 ¶¶ 285–86; NIKE-1022 at 3:5-14 (“The pocket can be formed of an extensible material that can, for example, elastically deform”); NIKE-1039. And York discloses the patch “may be constructed of any suitable material normally used in brassieres.” NIKE-1001 ¶289; NIKE-1020 at 2:20–23. Thus, a POSA would have found it obvious to

modify York based on their own knowledge or as expressly taught by Pintor, and they would have had a high expectation of success in doing so. NIKE-1001 ¶290; *Supra* § IX.A.3.b.

4. Claim 4

a. “The system as set forth in claim 1” [Preamble]

York discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.B.1.

b. “and further including an under-wire coupled beneath each cup in a generally horizontal plane” [4A]

York in combination with the knowledge of a POSA and/or in combination with Pintor renders this limitation obvious. A POSA would have understood that bras with underwire were known and popular decades prior to 2013. NIKE-1001 ¶293; NIKE-1021 at [0020]. Indeed, Pintor expressly discloses a pocketed bra with an underwire. NIKE-1022 at 7:63–66 (“Among the many varieties of bras that may be used with the present invention, underwire bras may be of any known kind and may included underwires comprising metal, plastic, or other materials.”), 6:57–58 (“further having an underwire frame member beneath the breast”). Therefore, a POSA would have been motivated to try adding an underwire to York, based on their own knowledge or as taught by Pintor, because underwire bras tend to provide better lift, separation, shape, and support of the breasts than bras without

such structure. NIKE-1001 ¶294. A POSA would have had a high expectation of success in combining Pintor and York, as Pintor expressly teaches the use of underwires in bras with a breast cup pocket. *Id.*; *infra* § IX.A.7.

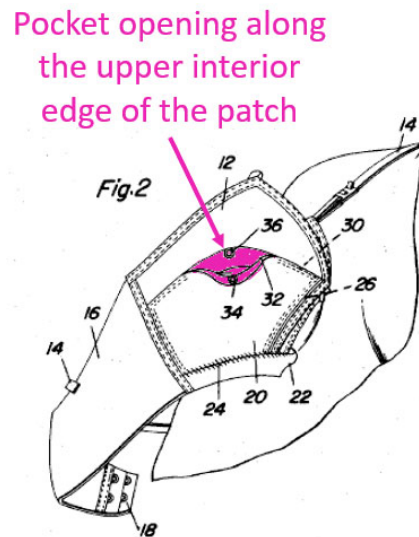
5. Claim 11

a. “The system as set forth in claim 1” [Preamble]

York discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.B.1.

b. “wherein the linear opening is facing the upper interior edge to allow the at least one of the handheld electronic device, keys, and pills to be removably positioned within the pocket by entry adjacent to a shoulder of the user” [11A]

York, alone or in combination with Pintor, renders obvious this limitation. As previously discussed, York renders discloses and/or renders obvious (alone or in combination with Pintor) a pocket on the cup with a linear opening, *supra* §§ IX.B.1.f, IX.B.1.i, and “at least one of the handheld electronic device, keys, and pills to be removably positioned within the pocket,” *supra* § IX.B.1.j. Further, York discloses pockets whose upper opening faces the upper interior edge and allows for item entry adjacent to the user’s shoulders:



NIKE-1020 at Fig. 2, 1:20-27, 1:54-2:23.

6. Claim 12

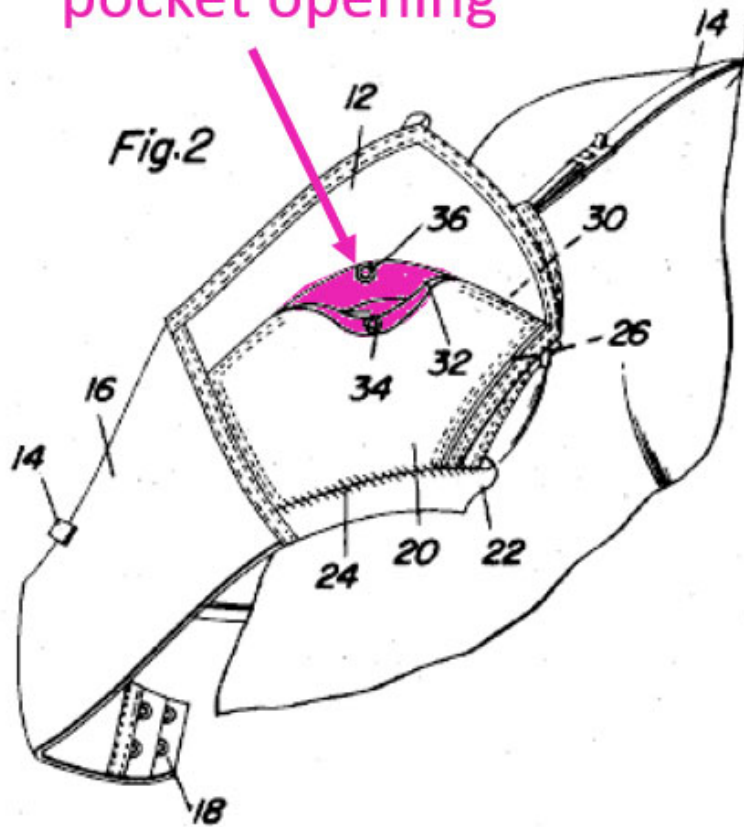
a. “The system as set forth in claim 1” [Preamble]

York discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.B.1.

b. “further comprising a closure over the linear opening” [12A]

York discloses “a snap fastener element . . . in the breast cup 12 thereby forming a closure for the pocket.” NIKE-1020 at 2:11–15; Cl. 2. The snap fastener elements 34 and 36 are over the opening of the pocket:

Snap fastener elements
(34, 36) over upper
pocket opening



NIKE-1020 at Fig. 2. As discussed *supra* § IX.B.1.i, York renders a linear opening obvious.

7. Reasons to Combine York and Pintor

A POSA would have been motivated to combine York and Pintor and had a reasonable expectation of success in doing so, for the same reasons they would have been motivated to combine Barg and Pintor. *See supra* § IX.A.5. Namely, York and Pintor each disclose inventions generally relating to bras with pockets for

storage on the cups and in designing their desired pocketed bra a POSA would have been motivated to select preferable elements from each. NIKE-1001 ¶ 304. As explained above, a POSA would also have been commercially motivated to provide consumers with a variety of bra options to meet different preferences. *Id.*

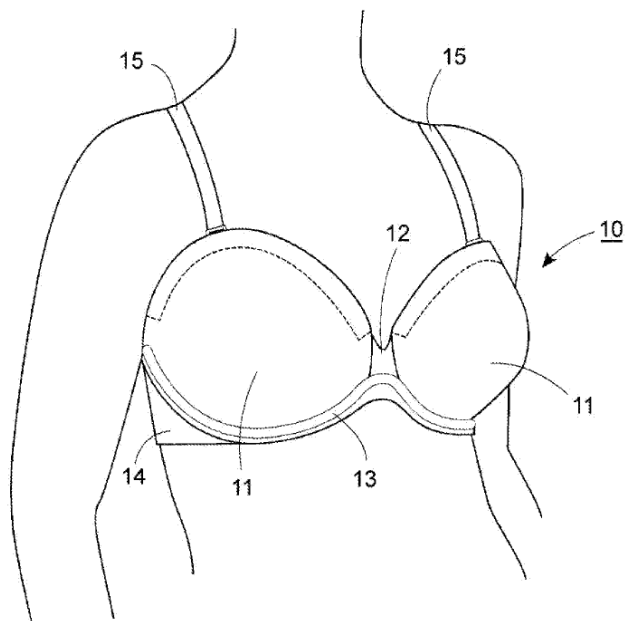
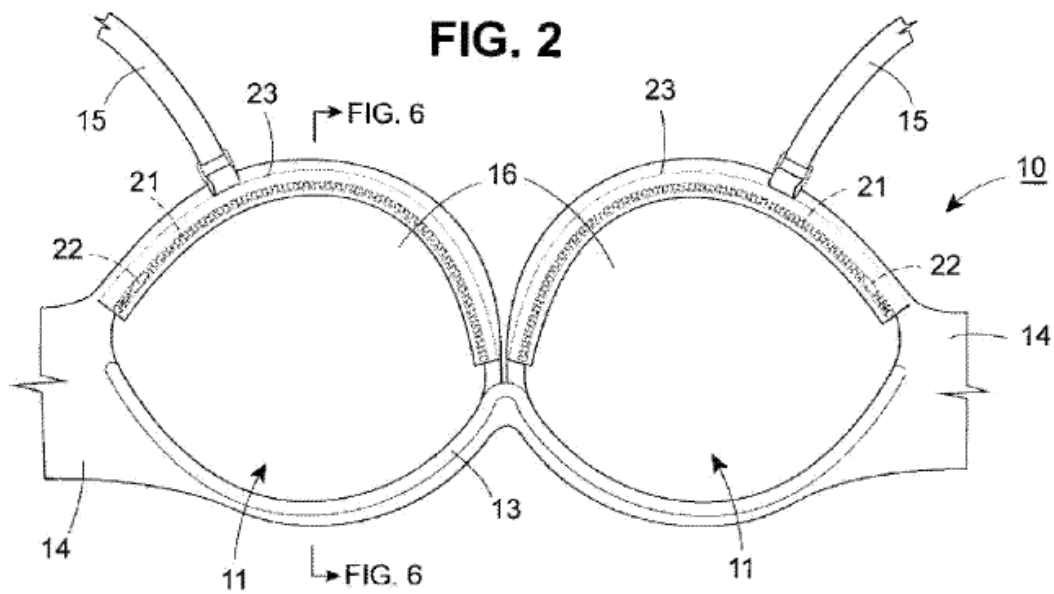
Further, as with the combination of Barg and Pintor, a POSA would have had a high expectation of success combining the teachings of York and Pintor in designing a bra with a pocket. *Id.* ¶306; *see supra* § IX.A.5. York and Pintor are both bras with pockets on the cups for storing valuables while those items remain easily accessible. *E.g.*, NIKE-1020 at 1:14–19, 1:28–31, 2:11–23, Figs. 1–3; NIKE-1022 at 2:4–17, 5:37–45, 6:19–30, Figs. 1–8; NIKE-1001 ¶306. And each of the elements—*e.g.*, cups, pockets, stitching—would perform the same predictable function disclosed in the prior art. Any work needed to combine the elements taught by York and Pintor would therefore be nothing more than routine modifications well within the abilities of a POSA. NIKE-1001 ¶306; *Ethicon LLC*, 2022 WL 1613188 at *4.

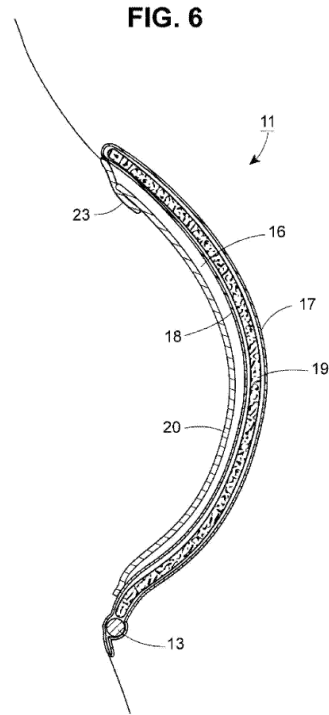
C. Ground 3: Claims 1–4 and 11–12 Are Unpatentable Over Handras in View of Pintor

1. Claim 1

a. “A bra pocket system combination comprising:” [1A]

To the extent the preamble is limiting, Handras discloses “a bra with one or more storage pockets.” NIKE-1021 at [0001].

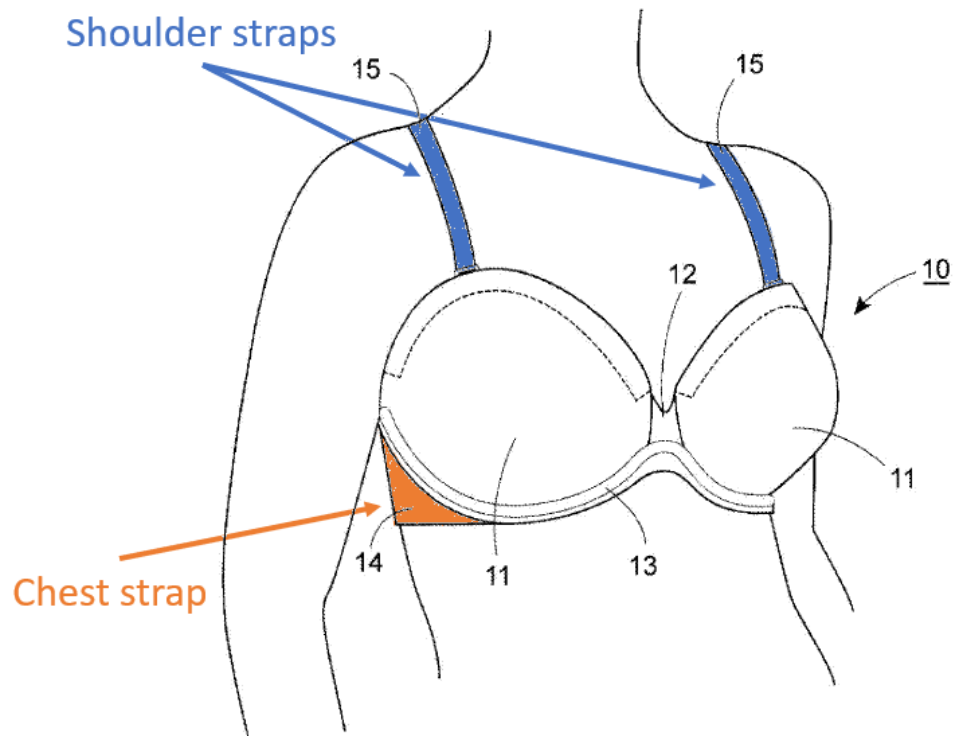




NIKE-1021 at Figs. 1–2, 6; at [0003] (“[i]t is an object of the invention to provide a pocket in a bra for receiving one or more items that is conveniently located for the wearer.”), at [0004] (“a concealed pocket in a bra for receiving one of [sic] more items.”).

b. “a strap assembly including a chest strap and shoulder straps;” [1B]

Handras discloses a traditional bra comprising of “a pair of cups 11 ... a pair of side panels 14 (only one of which is shown) that can be connected together at the back of the bra 10 in any conventional manner and a pair of shoulder straps 15.” NIKE-1021 at [0020].

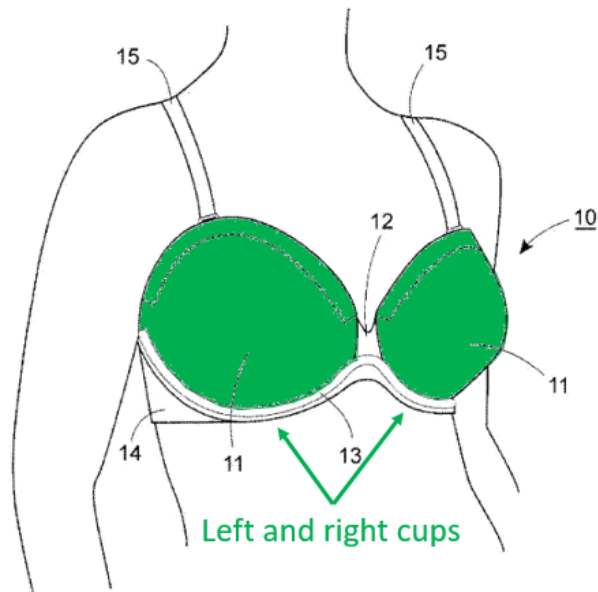


NIKE-1021 at Fig. 1.

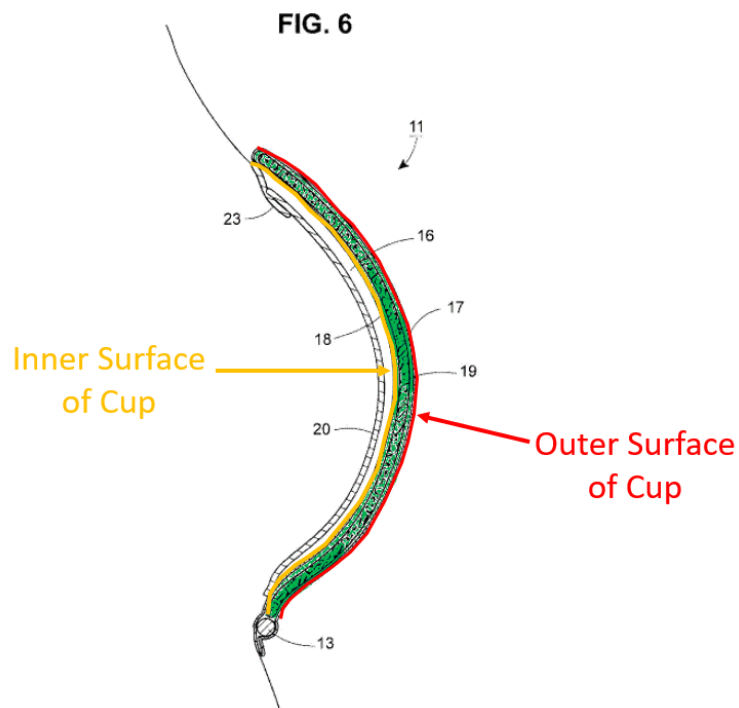
- c. “left and right cups, each cup having inside and outside surfaces,” [1C]

Handras discloses a bra having “a pair of cups” for the left and right breasts.

NIKE-1021 at [0020].



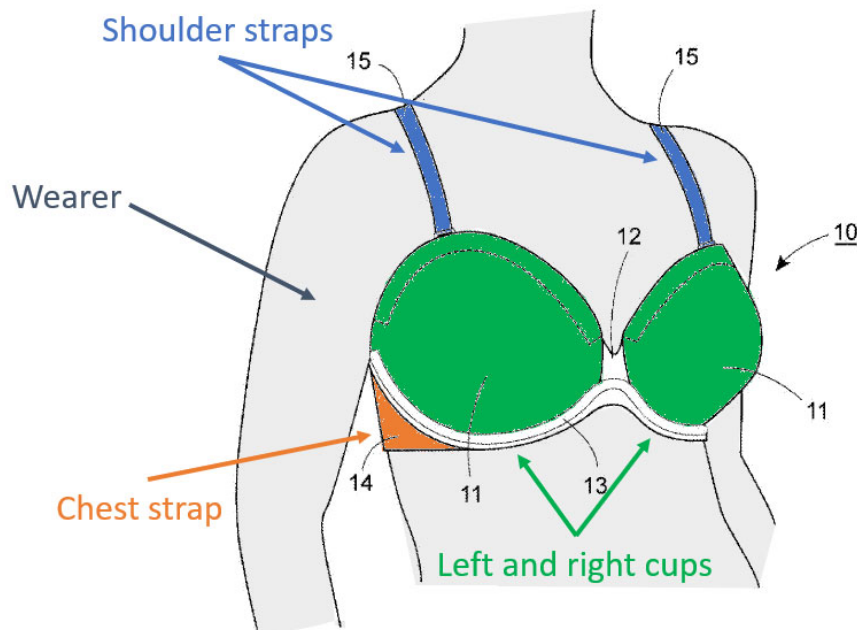
Id. at Fig. 1, [0006], [0011], [0029], Cl. 1, Cl. 6. A POSA would understand these cups to necessarily have inside and outside surfaces. NIKE-1001 at ¶313. Indeed, the inside and outside surfaces are illustrated in Figure 6:



NIKE-1021 at Fig. 6, [0022] (“each cup 11 has an outer ply of material 17, an inner ply of material 18”).

d. “the strap assembly being attached to the cups whereby the strap assembly adheres the cups to a wearer,” [1D]

As explained above, Handras discloses a “strap assembly” attached to the “left and right cups.” *Supra* §§ IX.C.1.b, IX.C.1.c. Further, to the extent the “whereby” clause should be provided patentable weight,⁶ Handras discloses the strap assembly adhering the cups to the wearer:

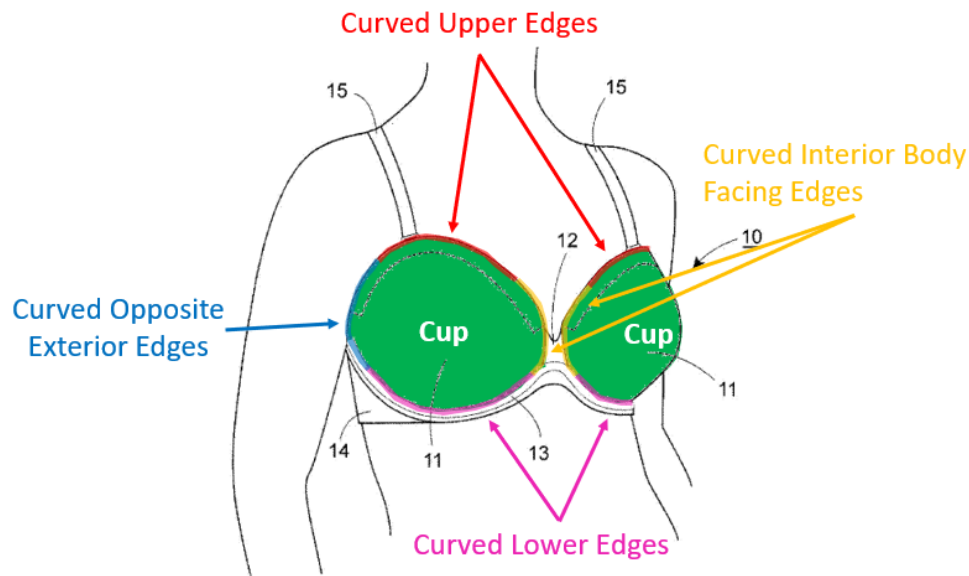


NIKE-1021 at Fig. 1.

⁶ *Supra* note 4.

- e. **“each cup having curved upper, lower, interior body facing and opposite exterior edges;” [1E]**

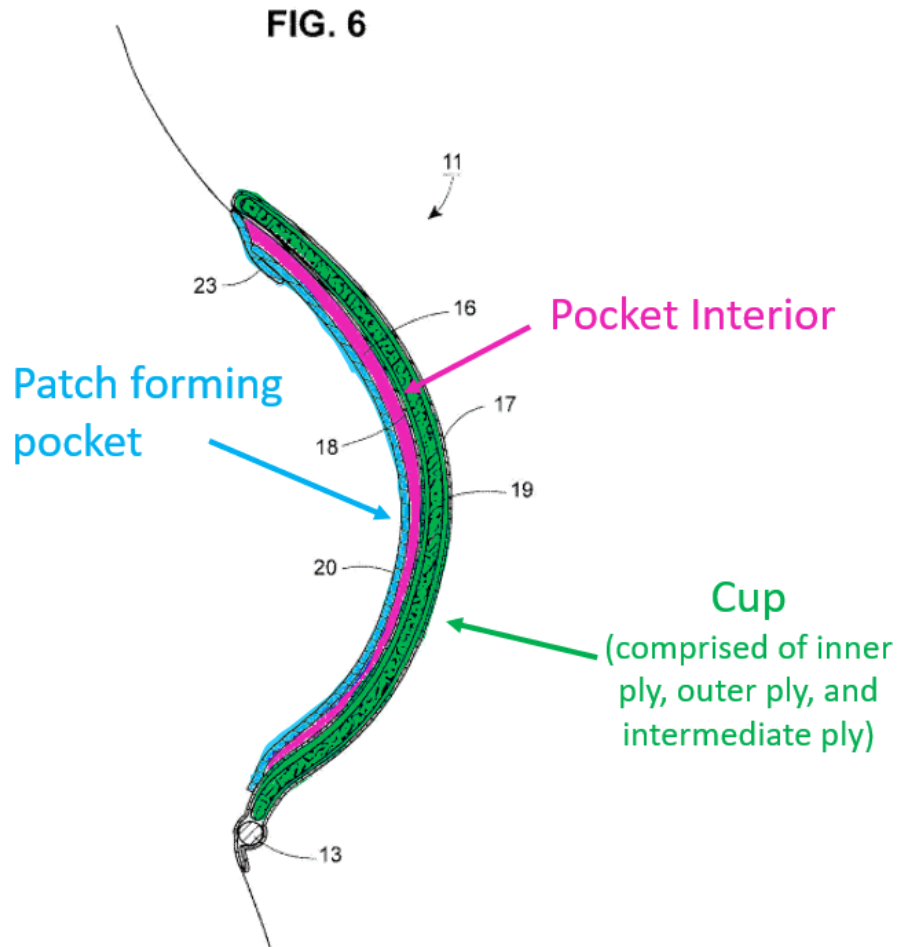
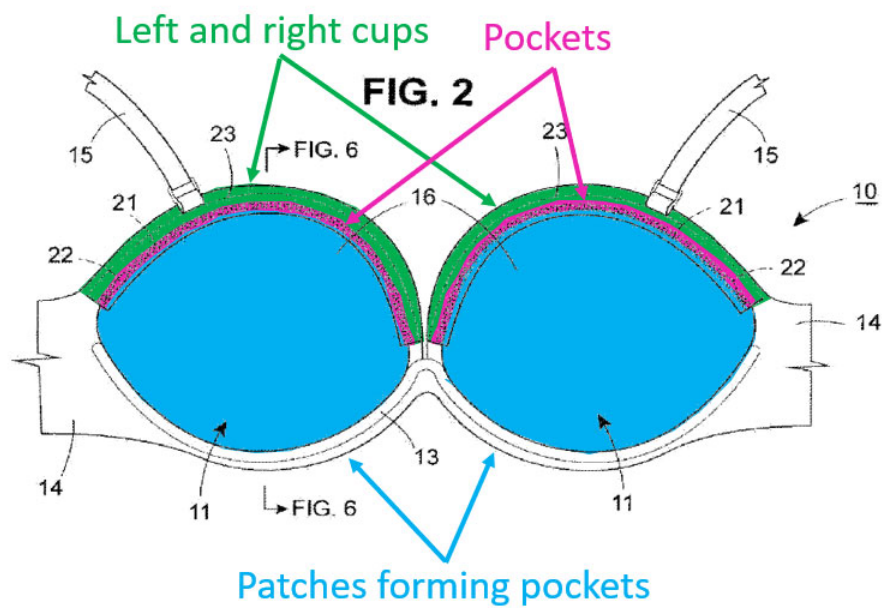
Handras discloses cups with curved upper, lower, interior body facing, and opposite exterior edges, as illustrated below:



NIKE-1021 at Fig. 1.

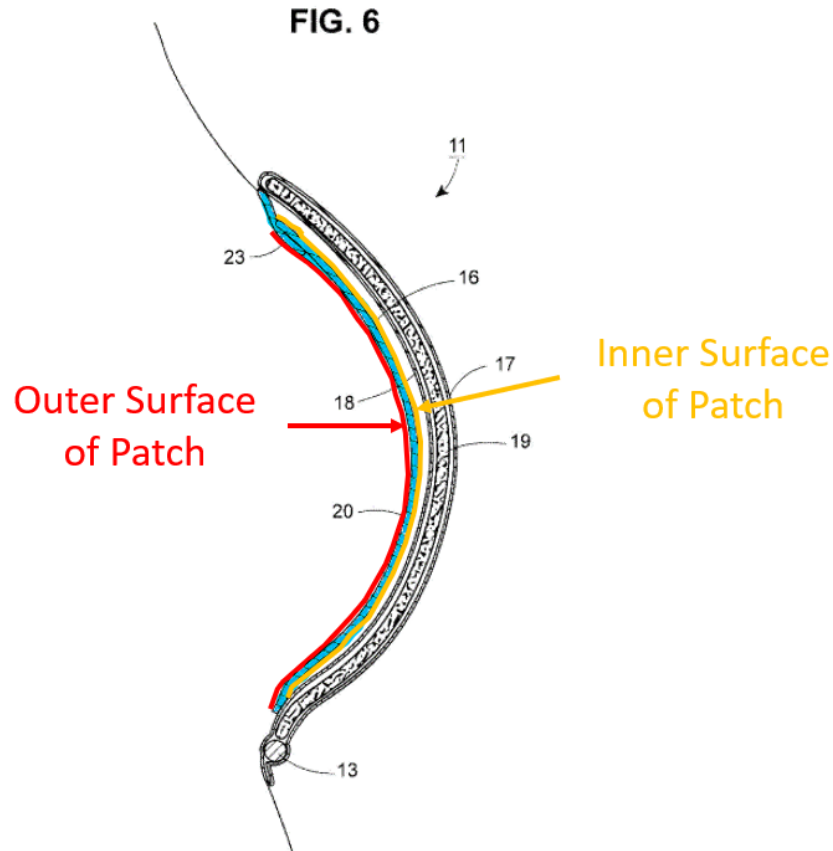
- f. **“a patch forming a pocket operatively associated with each cup,” [1F]**

Handras discloses a “patch” (“fourth ply of material 20”) attached to the inner surface of each cup (“inner ply 18”) to create a pocket. NIKE-1021 at [0022].



- Handras renders this limitation obvious. NIKE-1001 ¶322. Handras discloses a patch with curved lower, interior body facing, and opposite exterior edges, each patch having inside and outside surfaces:





NIKE-1021 at Figs. 2, 6. A POSA would have understood the patches to necessarily have inside and outside surfaces. NIKE-1001 ¶322.

While Handras discloses a patch with a curved “upper edge,” for the same reasons discussed *supra* § IX.A.1.g in Barg, it would have been obvious to a POSA to modify Handras’s patch so that it would have a “linear upper edge.” NIKE-1001 ¶323. Both bras and pockets have been long known in the art and in designing a bra with storage pockets, a POSA would have been motivated to look for known solutions in the art, such as the variety of types of bra designs and pocket shapes. *Id.* ¶324. A POSA would have understood there to be a finite number of edge designs for the patches. *Id.* A POSA would have further

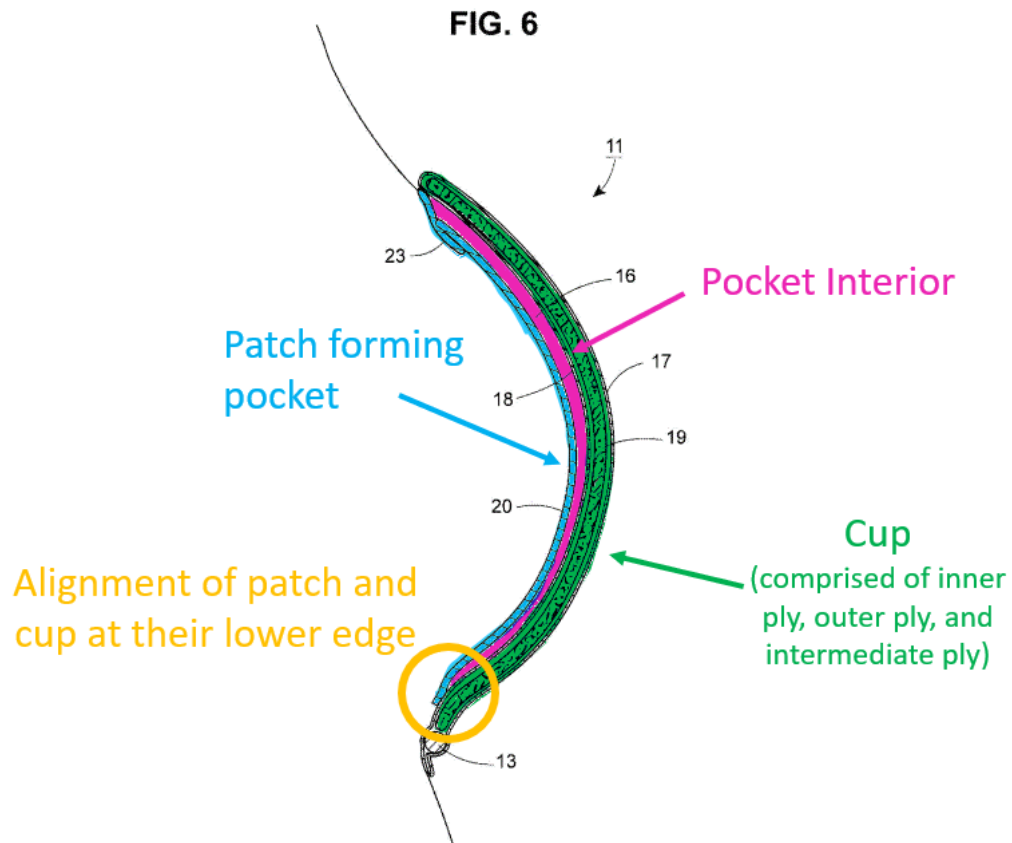
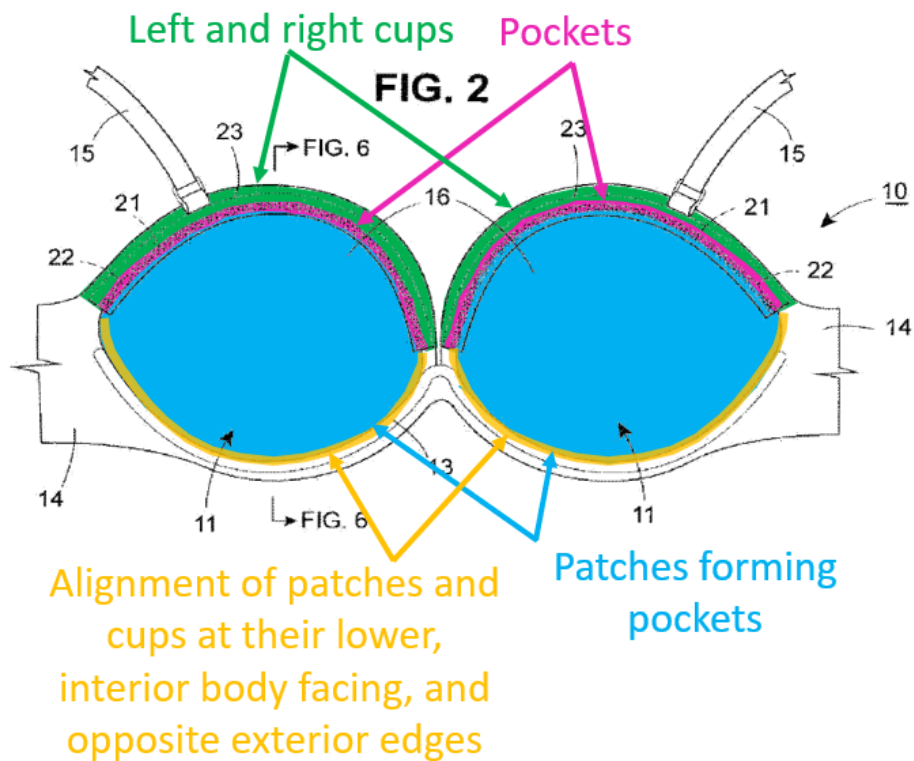
understood the degree of curvature of the edge of the patch to be a simple choice of design, as the prior art makes clear. *Id.*; *see also* NIKE-1022 at 6:6–10; NIKE-1025 at Fig. 2. Indeed, neither the '288, nor the prosecution history, describes the “upper edge” being “linear” as an allegedly novel or advantageous aspect of its purported invention. *See generally* NIKE-1003; NIKE-1004; *supra* § IX.A.1.g. Nor could they, as “straight” or “linear” pocket edges were well known. NIKE-1022 at 6:6–10; NIKE-1025 at Fig. 2; NIKE-1001 ¶325. Handras teaches that the pocket can be modified to accommodate the storage of particular items. NIKE-1021 at [0025]. A POSA would have been motivated to make the top edge of the patch linear for secure holding of a rectangular item, such as an electronic device or rectangular key, ensuring the item is held snugly within. NIKE-1001 ¶326.

Moreover, a POSA would have known that the shape of the upper edge is a design choice and could be designed in a number of known ways, including straight. *Id.* ¶327. It therefore would have been well within the abilities of a POSA to make such a routine modification and a POSA would have had a high expectation of success in doing so. *Id.*; *supra* § IX.A.1.g.; *Ethicon*, 2022 WL 1613188 at *4. This is simple technology and bras with pockets with linear openings were well known in the art. NIKE-1001 ¶327; NIKE-1022 at 6:6–10; NIKE-1025 at Fig. 2.

- h. “stitching coupling the lower, interior body facing and opposite exterior edges of each patch to the**

lower, interior body facing, and opposite exterior edges of an associated cup;” [1H]

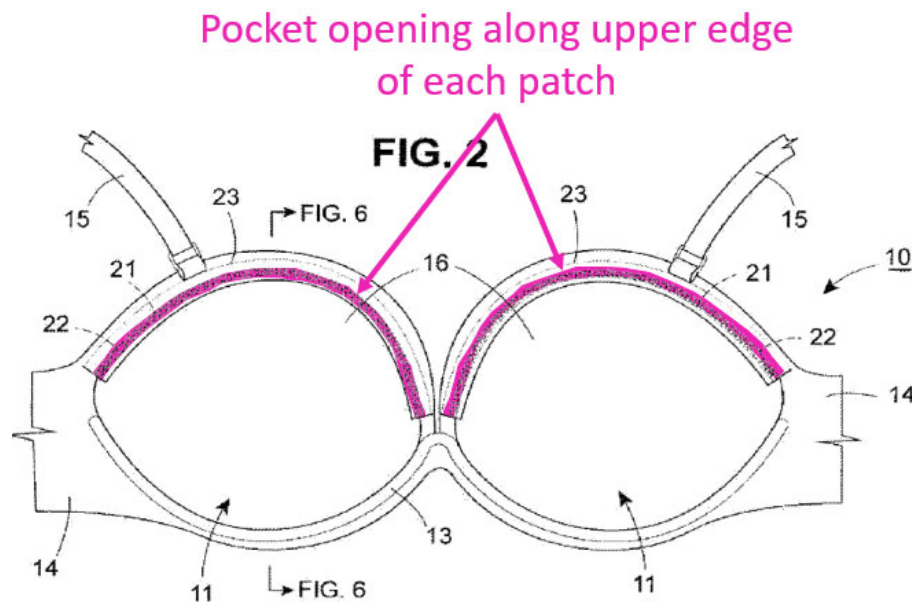
Handras discloses each patch is “sewn” to each cup to form the pocket with an upper opening. *See* NIKE-1021 at [0022] (“a fourth ply of material 20 is sewn or otherwise secured to the inner ply 18 in order to form the pocket 16 with an opening extending along the upper section of the cup.”), [0007]. A POSA would have understood that a pocket with an upper opening would be formed by stitching along the lower and side edges of a patch. NIKE-1001 ¶331. Handras describes the patch as a “fourth ply of material” sewn to the surface of the cup, NIKE-1021 at [0022], which would have indicated to a POSA that the patch and cup are similar in size. NIKE-1001 ¶331. This is confirmed by Handras’s disclosure that “each pocket 16 occupies a major faction of the back of a cup 11.” *Id.*; NIKE-1021 at [0025]. As illustrated below, this “major fraction” spans almost the entire surface area of each cup, indicating that the similarly sized patches and cups are aligned at their respective lower, interior body facing, and opposite exterior edges:



NIKE-1021 at Figs. 2, 6; NIKE-1001 ¶332.

- i. **“a linear opening formed along the upper edge of each patch;” [1I]**

Handras renders this limitation obvious. First, Handras discloses that the openings are at the “upper edges” of each patch:



NIKE-1021 at Fig. 2, [0022] (“the pocket 16 with an opening extending along the upper section of the cup.”).

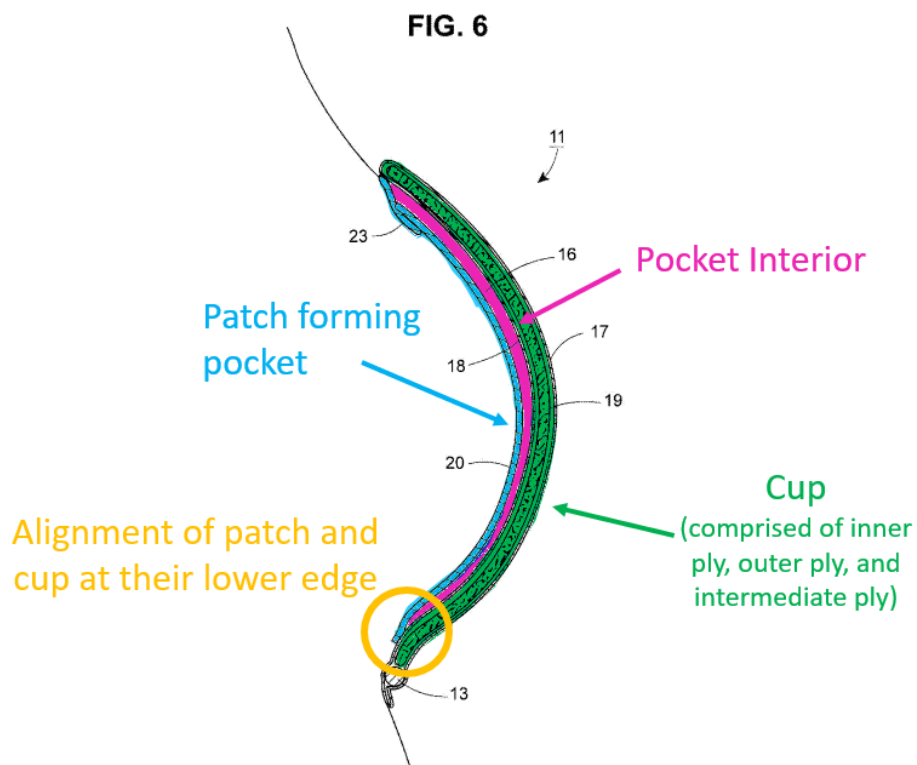
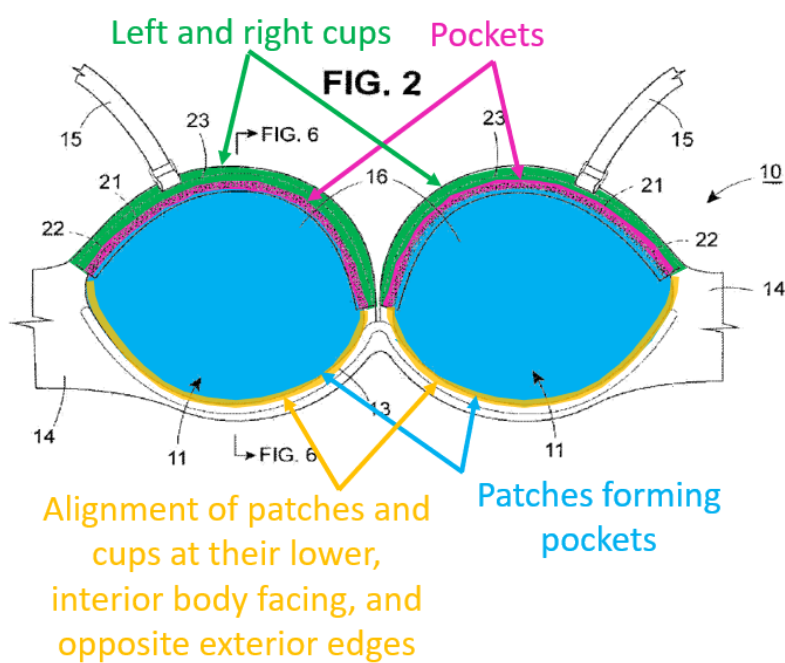
Second, Handras renders obvious the requirement that the pocket opening be “linear.” A POSA would have understood the shape of the pocket opening to be determined by the shape of the patch edge and therefore Handras renders obvious a “linear” opening for the same reasons it renders obvious a “linear upper edge.”
Supra § IX.C.1.g.

- j. **“at least one of a handheld electronic device, keys, and pills removably positioned within the pocket of at least one of the left and right cups; and” [1J]**

Handras discloses this limitation because it teaches the use of the pocket “to hold items, such as, credit cards, car keys, cell phones and the like.” NIKE-1021 at [0002].

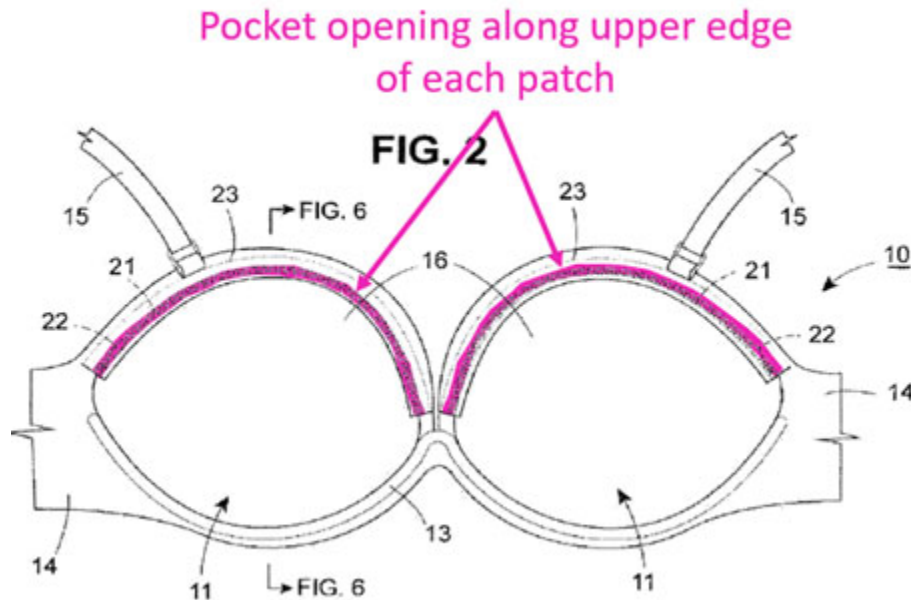
- k. **“wherein each patch curved lower interior body facing and opposite exterior edges are aligned with each curved lower interior body facing and opposite exterior edges, and wherein the stitching is along the curved lower interior body facing and opposite exterior edges of the patch, the linear upper edge of each patch crossing over a surface of the cup to form the linear opening” [1K]**

Handras, alone or in combination with Pintor, renders obvious this limitation. NIKE-1001 ¶339. As previously discussed, Handras discloses cups and patches with curved lower interior body facing and opposite exterior edges. *Supra* §§ IX.C.1.e, IX.C.1.g. Handras also discloses and/or renders obvious “stitching coupling the lower, interior body facing and opposite exterior edges of each patch to the lower, interior body facing, and opposite exterior edges of an associated cup,” as explained above. *Supra* § IX.C.1.h. A POSA would have understood that in such a configuration, the lower interior body facing and opposite exterior edges of the cups and patches are aligned. NIKE-1001 ¶340; *supra* § IX.C.1.h.



NIKE-1021 at Figs. 2, 6.

Additionally, Handras discloses a pocket with an upper opening. *Supra* § IX.C.1.i; NIKE-1001 ¶341.



NIKE-1021 at Fig. 2. As illustrated above, the upper edges of each pocket-forming patch also “cross[] over” a surface of each bra cup. NIKE-1001 ¶341. Finally, Handras, alone or in combination with Pintor, renders obvious a linear upper edge of each patch and pocket opening, as previously discussed. *Supra* §§ IX.C.1.g, IX.C.1.i.

2. Claim 2

a. “The system set forth in claim 1” [Preamble]

Handras discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.C.1.

b. “wherein the cups and the patches form pockets, the cups being fabricated of a resilient closed cell

polyurethane foam with a thickness of from 2 to 4 millimeters” [2A]

Handras in combination with the knowledge of a POSA renders this limitation obvious for the same reasons Barg or York in combination with the knowledge of a POSA renders this limitation obvious. *Supra* §§ IX.A.1.b., IX.A.2.b; NIKE-1001 ¶345. Namely, Handras discloses cups and patches forming pockets, *supra* § IX.C.1.f., and the use of resilient closed cell polyurethane with a thickness of 2 to 4 millimeters was well known in the art by the time of the alleged invention. NIKE-1001 ¶¶346–47; *supra* § IX.A.2.b. And for the same reasons explained *supra* § IX.A.2.b, it would have been obvious to a POSA to try using such material on Handras, and a POSA would have been motivated to combine the references and had a high expectation of success doing so. *Id.* Indeed, Handras itself discloses the use of “resilient foam material” in the formation of the bra cup. *Id.*; NIKE-1021 at [0007], [0022], [0026].

Handras in combination with Pintor also renders this limitation obvious for the same reason Barg or York in combination with Pintor renders this limitation obvious. *Id.* ¶348; *see supra* §§ IX.A.1.b., IX.A.2.b. Namely, because Pintor expressly teaches the use of resilient polyurethanes in cups for bras with pockets. *See* NIKE-1022 at 7:53–60, 3:5-16, 4:28–30; NIKE-1001 ¶348. And that such disclosure would include closed-cell polyurethane of the claimed thickness because it was known in the art for such use. *See* NIKE-1037 at 117; NIKE-1038 at 6:4–5;

NIKE-1001 ¶349. For the same reasons explained *supra* § IX.A.2.b. for Barg, a POSA would have been motivated to use the polyurethane cups taught by Pintor in the bra disclosed by Handras and would have had a high expectation of success in doing so. NIKE-1001 ¶349; *infra* § IX.C.7.

3. Claim 3

a. “The system as set forth in claim 1” [Preamble]

Handras discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.C.1.

b. “wherein the cups and the patches form pockets, the patches being fabricated of an elastic fabric” [3A]

Handras in combination with the knowledge of a POSA and/or Pintor renders this limitation obvious for the same reasons described above for Barg and York. *Supra* §§ IX.A.3.b, IX.B.3.b; NIKE-1001 ¶352. Namely, a POSA would have understood the purpose of a pocket in a bra is to hold personal items, as Handras and Pintor expressly teach. NIKE-1021 at [0003] (“[i]t is an object of the invention to provide a pocket in a bra for receiving one or more items that is conveniently located for the wearer.”), [0004], [0002]; NIKE-1022 at 2:9-13; NIKE-1001 ¶353. And that a POSA would have been motivated to use elastic material in forming the pocket to ensure proper accommodation of stored items, and because pockets comprised of elastic material were well-known at the time of the ’288’s alleged invention, as Pintor makes clear. *Supra* § IX.A.3.b.; NIKE-1001

¶354; NIKE-1022 at 3:5-14 (“The pocket can be formed of an extensible material that can, for example, elastically deform”); NIKE-1039. Thus, a POSA would have found it obvious to modify Handras to include patches made of “elastic fabric” based on their own knowledge or as expressly taught by Pintor, and they would have had a high expectation of success in doing so, for the same reasons discussed above for Barg. NIKE-1001 ¶359; *supra* § IX.A.3.b.

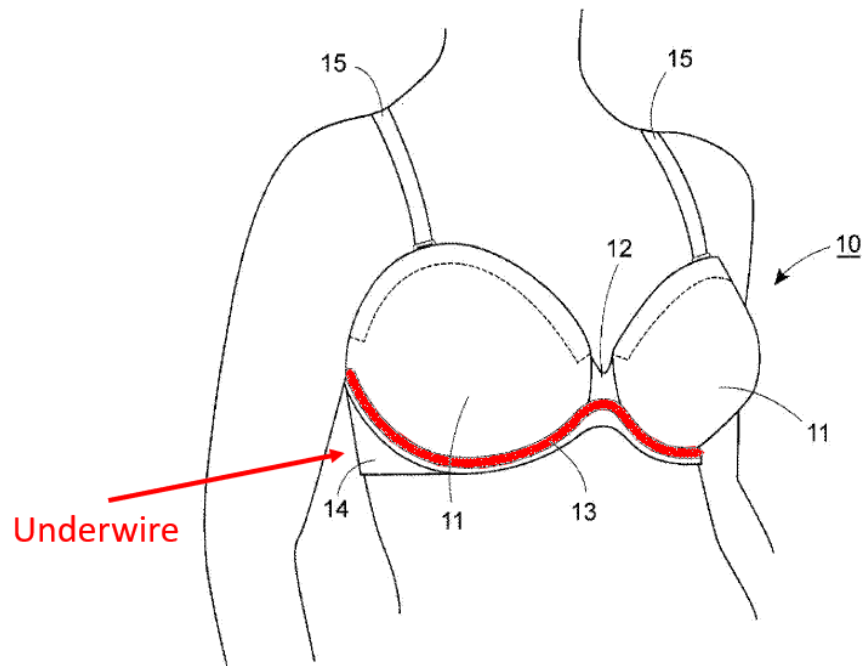
4. Claim 4

a. “The system as set forth in claim 1” [Preamble]

Handras discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.C.1.

b. “and further including an under-wire coupled beneath each cup in a generally horizontal plane” [4A]

Handras discloses “the bra 10 is of generally conventional structure and style for use as an everyday bra having . . . *an underwire* 13.” NIKE-1021 at [0020]. As shown below, the underwire is positioned in a “generally horizontal plane” under the breasts and breast cups across the wearer’s torso.



NIKE-1021 at Fig. 1.

5. Claim 11

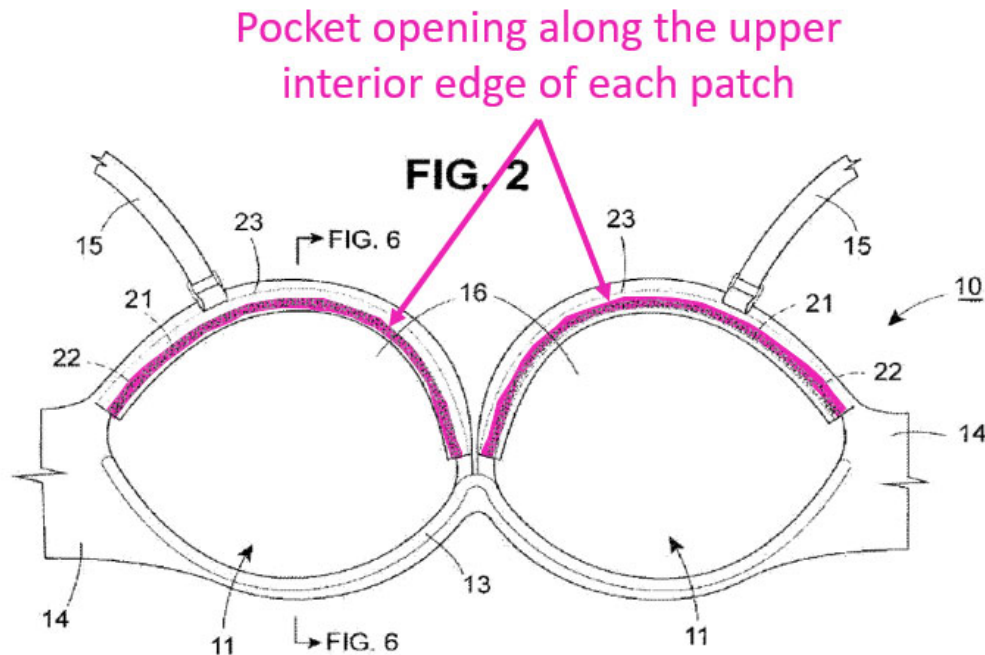
a. “The system as set forth in claim 1” [Preamble]

Handras discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.C.1.

b. “wherein the linear opening is facing the upper interior edge to allow the at least one of the handheld electronic device, keys, and pills to be removably positioned within the pocket by entry adjacent to a shoulder of the user” [11A]

Handras discloses this limitation. NIKE-1001 ¶365. As previously discussed, Handras discloses and/or renders obvious (alone or in combination with Pintor) a pocket on the cup with a linear opening, *supra* §§ IX.C.1.f, IX.C.1.i, and

“at least one of the handheld electronic device, keys, and pills to be removably positioned within the pocket.” *Supra* § IX.C.1.j. Further, as illustrated below, Handras discloses pockets whose upper opening faces the upper interior edge and allow for item entry adjacent to the user’s shoulders:



NIKE-1021 at Fig. 2, [0007], [0010], [0022], [0024]; NIKE-1001 ¶366.

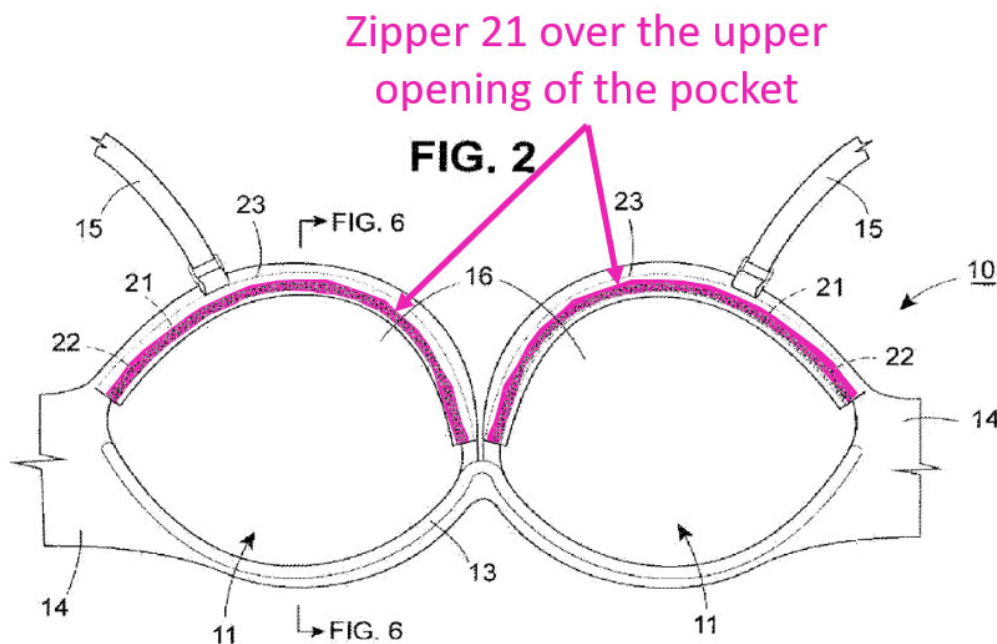
6. Claim 12

a. “The system as set forth in claim 1” [Preamble]

Handras discloses “[t]he system set forth in claim 1” for the reasons described above. *Supra* § IX.C.1.

b. “further comprising a closure over the linear opening” [12A]

Handras discloses “zippers for quick and easy access and closure [of the pocket].” NIKE-1021 at [0031], [0010], [0023]. As discussed *supra* § IX.C.1.i, Handras in combination with a POSA’s knowledge renders a linear opening obvious. The zipper (21) closure is over the pocket opening:



NIKE-1021 at Fig. 2.

7. Reasons to Combine Handras and Pintor

A POSA would have been motivated to combine Handras and Pintor, and had a reasonable expectation of success in doing so, for the same reasons they would have been motivated to combine Barg and Pintor, as well as York and Pintor. *Supra* §§ IX.A.5, IX.B.5. Namely, Handras and Pintor each disclose inventions

generally relating to bras with pockets for storage on the cups and in designing their desired bra, a POSA would have been motivated to select preferable elements from each. NIKE-1001 ¶372. And as explained above, a POSA would also have been commercially motivated to provide consumers with a variety of bra options to meet different preferences. *Id.*

Further, as with the other combinations with Pintor, a POSA would have had a high expectation of success combining the teachings of Handras and Pintor. *Supra* §§ IX.A.5, IX.B.5. Handras and Pintor are both bras with pockets on the cups for storing valuables while those items remain easily accessible. *E.g.*, NIKE-1021 at [0001], [0003], [0004], Figs. 1–6; NIKE-1022 at 2:4–17, 5:37–45, 6:19–30, Figs. 1–8; NIKE-1001 ¶372. And each of the elements—*e.g.*, cups, pockets, stitching—would perform the same predictable function disclosed in the prior art. Any work needed to combine the elements taught by Handras and Pintor would therefore be nothing more than routine modifications well within the abilities of a POSA. NIKE-1001 ¶374; *Ethicon LLC*, 2022 WL 1613188 at *4.

D. Secondary Considerations

Petitioner is unaware of any secondary considerations that have a nexus to the claimed inventions that would overcome the Petition’s showing of obviousness. Indeed, the sheer number of “[i]ndependently made, simultaneous inventions, made within a comparatively short space of time, are persuasive” “indicia of

obviousness.” *Geo. M. Martin Co. v. Alliance Machine Sys. Int’l LLC*, 618 F.3d 1294, 1304–1305 (Fed. Cir. 2010) (quotations omitted). As demonstrated *supra* § I, VII, the prior art is saturated with bras with pockets, making the alleged invention of the ’288 hardly “born of necessity.” NIKE-1036 at 2. If PO identifies any evidence of secondary considerations, Petitioner reserves the right to respond.

X. THERE IS NO SOUND BASIS FOR A DISCRETIONARY DENIAL

A. Board Should Not Decline Institution Pursuant to 35 U.S.C. § 314(a)

The *Fintiv* factors favor institution. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019 Paper 11, 6 (P.T.A.B. Mar. 20, 2020) (precedential).

1. Institution Will Enable at Least a Partial Stay in the MA Litigation

There are eight patents, including the ’288, asserted against Petitioner in the MA Litigation. Petitioner is filing an *inter partes review* petition for each of the asserted patents on every asserted claim, in addition to non-asserted claims. Institution would enable the Board to resolve an issue of patentability with respect to the ’288 and would relieve the District Court of the need to continue with the ’288 in the MA Litigation. Petitioner will likely move to stay the MA Litigation at least insofar as it relates to the ’288, and likely every asserted patent, and the opportunity for such simplification increases the likelihood that the Court will grant a stay in view of IPR institution.

2. The Schedule in the MA Litigation

The Final Written Decision (FWD) here will likely come before the trial in the MA Litigation. As of the filing of this Petition, the Court has not yet set a date for trial. On average, in the District of Massachusetts, from January 2019 to January 2024, there were 42.3 months from the filing of a patent lawsuit to trial. NIKE-1047 at 19. For Judge Sorokin, the Judge presiding over the MA Litigation, the average time is approximately 41.8 months. NIKE-1048 at 11. Estimating 40 months to trial, the MA Litigation would go to trial November 2026.

The time of the institution decision in this proceeding (estimated January 2025) and the FWD (estimated in January 2026) are therefore likely to occur before any trial in the MA Litigation.

3. Investment by the Court and the Parties in the MA Litigation

The Parties and the District Court have invested limited resources in the MA Litigation. Fact discovery is still in the early stages; no depositions have occurred and the Court has only just held a *Markman* Hearing and issued a *Markman* Order on July 15, 2024. See NIKE-1046; *Sand Revolution II, LLC v. Cont'l Intermodal Grp. Trucking LLC*, IPR2019-01393, Paper 24 at 13 (P.T.A.B. Jun. 16, 2020) (informative) (reversing decision to deny institution under *Fintiv* where *Markman* Order had issued but fact discovery was ongoing). Moreover, this Petition is timely and Petitioner has not run afoul of the time bar under 35 U.S.C. §315(b) for

Petitions filed more than one year after the service of a district court complaint. *See* 35 U.S.C. §315(b); *Oticon Med. AB v. Cochlear Ltd*, IPR2019-00975, Paper 15 at 22–24 (P.T.A.B. Oct. 16, 2019) (precedential).

4. Overlap Between Issues Raised in This Petition and in the Parallel Proceeding

While there is overlap between the issues raised in this Petition and in the MA Litigation, the Challenged Claims include claims not asserted in the MA Litigation, and the FWD in this proceeding is likely to issue before trial in the MA Litigation. Thus, Petitioner will be estopped from arguing grounds raised or that could reasonably have been raised in the IPR. 35 U.S.C. § 315(e)(2). Thus, this factor weighs against a discretionary denial.

5. Same Parties

While there is overlap between the parties here and the MA Litigation, this factor alone is not determinative. *E.g.*, *NanoCelect Biomedical, Inc. v. Cytonome/ST, LLC*, IPR2020-00551, Paper 19 at 2–25 (P.T.A.B. Aug. 27, 2020). Institution would provide an efficient alternative to litigation and permit the Board to resolve questions of patentability.

6. Other Circumstances Support Institution

As shown above, the merits of this Petition are strong. Where “Petitioner has set forth a reasonably strong case for the obviousness of most challenged claims,” this factor weighs *against* the Board exercising its discretion under

§314(a). *Sand Revolution II, LLC v. Cont'l Intermodal Grp. Trucking LLC*, IPR2019-01393, Paper 24 at 13 (P.T.A.B. Jun. 16, 2020) (informative).

Thus, the Board should decline to exercise its discretion under §314(a).

B. Board Should Not Decline Institution Pursuant to 35 U.S.C. § 325(d)

Under the two-step test set forth in *Advanced Bionics*, the Board should not deny this Petition under §325(d). *Advanced Bionics, LLC v. Med-El Elektromedizinische Geräte GMBH*, IPR2019-01469, Paper No. 6 at 8 (P.T.A.B. Feb. 13, 2020) (precedential).

Under the first step, none of the grounds here involve the same or substantially the same prior art or arguments previously before the PTO. First, the primary references Barg, York, and Handras were not considered during the prosecution of the '288. *See* NIKE-1004. Barg, York, and Handras alone disclose or render obvious Challenged Claim 1. While *Handras* was later cited by the Examiner during prosecution of the related '551 and '878 patents, it did not form the basis of a rejection. *Microsoft Corp. v. Parallel Networks Licensing, LLC*, IPR2015-00486, Paper 10 at 14–15 (P.T.A.B. July 15, 2015) (instituting review despite reference having been listed on Information Disclosure Statements initialed by the Examiner). Where Petitioner meets its burden with respect to one claim, the Board must institute *inter partes* review as to all challenged claims. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. at 1359–60.

In addition, though Pintor was considered by the Examiner during prosecution of the '288, it was considered only as a secondary reference to Newman. *See* NIKE-1004 at 147 (Oct. 2, 2015 Non-Final Rejection); *see id.* at 168 (Jan. 4, 2016 Response to Non-Final Rejection). Unlike Barg, York, and Handras—which are explicitly directed to bras designed to store personal belongings—Newman is directed to a bra with pockets designed to hold bra padding or prosthesis. *See* NIKE-1023 at [0020]; NIKE-1004 at 147; *id.* at 168. The Examiner did not consider Pintor in combination with prior art as pertinent as Barg, York, and Handras. Thus, the grounds here do not involve the same or substantially the same prior art or arguments. *See Oticon*, IPR2019-00975, Paper No. 15 at 16–18 (grounds did not involve the same or substantially the same prior art or arguments where the petitioner relied on the same primary reference considered in prosecution, but with the addition of a secondary reference not previously considered); *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper No. 8 at 17–18 (Dec. 15, 2017) (precedential as to § III.C.5, first paragraph) (“the extent of the overlap between the arguments made during examination and the manner in which [p]etitioner relies on the prior art” is a non-exclusive factor for determining whether the petition relies on the same or substantially the same art or arguments).

While the Board need not reach the second step, this step too demonstrates that denial is inappropriate. In allowing the '288 over Pintor, the Examiner materially erred with respect to the patentability of the Challenged Claims. *Advanced Bionics*, IPR2019-01469, Paper No. 6 at 7–8. Pintor alone teaches a bra with a pocket on the breast cup for storage of personal items, including “portable electronic devices” and keys. NIKE-1020 at 1:23-29, 4:14-21, 4:57-63. As explained *supra* § VII.A, the Examiner allowed the '288 over Newman in view of Pintor after the applicant distinguished Newman’s invention for holding bra padding from the '288’s alleged invention for holding personal items, including a cell phone, but the applicant failed to distinguish the claimed invention from Pintor. NIKE-1004 at 168–69. And though the Examiner acknowledged Pintor’s disclosure of a handheld electronic device stored in a bra pocket, NIKE-1004 at 148, by only looking at Pintor as a secondary reference to Newman, the Examiner failed to appreciate several other aspects of the '288 disclosed by Pintor. For example, as discussed *supra* § VI.C.1, Pintor discloses a bra with left and right cups, shoulder straps, and a chest strap. NIKE-1022 at Fig. 3. Further, Pintor discloses a pocket attached to the inner surface of one of the bra cups for storage of personal items. *See* NIKE-1022 at 1:23–28. Pintor additionally discloses the bra cups comprised of polyurethane and the pockets made of elastic material, *supra* §§ IX.A.2, IX.A.3, IX.B.2, IX.B.3, IX.C.2, IX.C.3, as well as stitching coupling the

pocket to the bra's interior surface. NIKE-1022 at 3:51–53. The Examiner overlooked how a POSA would have understood Pintor's disclosures of stitching, polyurethane, elastic material, and use of the pocket for holding of non-padding items, and what a POSA would have been motivated to do with them, especially in combination with Barg, York, or Handras. Thus, the Examiner's errors are material to patentability, and there should be no discretionary denial under § 325(d). *Satco Products, Inc. v. Seoul Semiconductor Co., Ltd*, IPR2020-00410, Paper 8 at 26–30 (PTAB Aug. 10, 2020) (finding Office erred where there was no indication the examiner considered Petitioner's arguments with respect to a previously-considered reference); *see also Advanced Bionics*, IPR2019-01469, Paper No. 6 at 8 n. 6.

XI. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Board institute IPR and cancel all Challenged Claims.

Date: January 24, 2025

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CERTIFICATION OF COMPLIANCE

This Petition complies with the word count limitation of 37 C.F.R. § 42.24(a)(1) because, according to the word processing system used to prepare this document, the Petition contains 13,913 words, excluding the cover page, signature block, the exhibit list, and the parts of the Petition exempted by 37 C.F.R. § 42.24(a)(1).

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CERTIFICATE OF SERVICE

In compliance with 37 C.F.R. §§ 42.105, 42.6(e), the undersigned hereby certifies that a copy of the foregoing “PETITION FOR INTER PARTES REVIEW” was sent electronically on January 24, 2025, directed to counsel of the Patent Owner at mdrayton@caldwelllaw.com, jameson@caldwelllaw.com, and tanner@caldwelllaw.com.

Date: January 24, 2025

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