

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NIKE, INC.,

Petitioner

v.

SHERRYWEAR LLC,

Patent Owner.

Case No. IPR2024-01127

U.S. Patent No. 10,219,551

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).....	73
<i>Ethicon LLC v. Intuitive Surgical, Inc.</i> , 2022 WL 1613188 (Fed. Cir. 2022)	42, 58, 71
<i>Geo. M. Martin Co. v. Alliance Machine Sys. Int’l LLC</i> , 618 F.3d 1294 (Fed. Cir. 2010)	72
<i>Lockwood v. Am. Airlines, Inc.</i> , 107 F.3d 1565 (Fed. Cir. 1997)	8
<i>Microsoft Corp. v. Parallel Networks Licensing, LLC</i> , IPR2015-00486, Paper 10 (P.T.A.B. July 15, 2015).....	76
<i>Minton v. Nat’l Ass’n of Sec. Dealers, Inc.</i> , 336 F.3d 1373 (Fed. Cir. 2003)	21
<i>NanoCollect Biomedical, Inc. v. Cytonome/ST, LLC</i> , IPR2020-00551, Paper 19 (P.T.A.B. Aug. 27, 2020).....	75
<i>Nat. Alternatives Int’l, Inc. v. Iancu</i> , 904 F.3d 1375 (Fed. Cir. 2018)	8
<i>Oticon Med. AB v. Cochlear Ltd</i> , IPR2019-00975, Paper 15 (P.T.A.B. Oct. 16, 2019).....	74
<i>Regents of the Univ. of Minnesota v. Gilead Scis., Inc.</i> , 61 F.4th 1350 (Fed. Cir. 2023)	10
<i>Sand Revolution II, LLC v. Cont’l Intermodal Grp. Trucking LLC</i> , IPR2019-01393, Paper 24 (P.T.A.B. Jun. 16, 2020)	74, 75

<i>SherryWear, LLC, v. Nike, Inc.,</i> No. 1:23-cv-11599 (D. Mass)	4
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Statutes

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35 U.S.C. § 122(b)	17
35 U.S.C. § 314(a)	73, 75
35 U.S.C. § 315(b)	74
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Other Authorities

37 C.F.R. § 42.8	4, 5
37 C.F.R. § 42.10(b)	5
37 C.F.R. § 42.103	5
37 C.F.R. § 42.104	5, 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	RESERVED
NIKE-1005	RESERVED
NIKE-1006	RESERVED
NIKE-1007	RESERVED
NIKE-1008	RESERVED
NIKE-1009	Certified U.S. Patent No. 9,289,016 (filed Feb. 5, 2015)
NIKE-1010	RESERVED
NIKE-1011	RESERVED
NIKE-1012	RESERVED
NIKE-1013	Certified U.S. Patent No. 10,244,800 (filed Jul. 12, 2017)
NIKE-1014	RESERVED
NIKE-1015	Certified U.S. Patent No. 10,219,551 (filed Dec. 8, 2017)
NIKE-1016	Certified Prosecution File History for U.S. Patent No. 10,219,551

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	RESERVED
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	EP211124(A1) (filed July 22, 1985) (“Vidai”) (Original)
NIKE-1027	EP211124(A1) (filed July 22, 1985) (“Vidai”) (Official Translation)
NIKE-1028	U.S. Patent Application Publication No. 2007/0298684 (filed June 21, 2006) (“Spagna”)
NIKE-1029	U.S. Design Patent No. 641,954 (filed Aug. 23, 2010) (“Glass”)
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	RESERVED
NIKE-1038	RESERVED
NIKE-1039	RESERVED
NIKE-1040	RESERVED
NIKE-1041	RESERVED
NIKE-1042	RESERVED
NIKE-1043	RESERVED
NIKE-1044	MA Litigation, SherryWear's Infringement Contentions, '551 Swoosh Bra Infringement Claim Chart

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Exhibit No.	Description¹
NIKE-1045	MA Litigation, SherryWear’s Infringement Contentions, ’551 Swoosh Pocket Bra Infringement Claim Chart
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	RESERVED
NIKE-1051	RESERVED
NIKE-1052	RESERVED

LISTING OF THE CHALLENGED CLAIMS

Limitation Identifier	Text of Claim
Independent Claim 1	
[1A]	“A pocketed bra assembly comprising:”
[1B]	“a strap assembly including a chest strap;”
[1C]	“a left cup and a right cup, each cup being an area to receive a breast of a wearer and having inside and outside surfaces,”
[1D]	“the strap assembly being attached to the cups whereby the strap assembly holds the cups to a wearer, with the chest strap extending from the left cup towards the wearer's back and extending from the right cup towards the wearer's back;”
[1E]	“a side patch on one of an inside or outside surface of the chest strap adjacent to at least one of the left cup and right cups,”
[1F]	“an upper edge of the side patch lying along the same edge line as at least a portion of a top edge of the chest strap,”
[1G]	“the side patch forming an opening such that the side patch forms a pocket,”
[1H]	“the opening capable of repeated receiving and removal of an item when being worn by the wearer;”
[1I]	“and an item removably positioned in the pocket.”
Dependent Claim 2	
	“The pocketed bra assembly of claim 1”
[2A]	“wherein the side patch comprises upper and lower edges along at least part of a length of the chest strap, and side edges.”
Dependent Claim 3	

Limitation Identifier	Text of Claim
	“The pocketed bra assembly of claim 2”
[3A]	“further comprising stitching along the lower and side edges of the side patch.”
Dependent Claim 4	
	“The pocketed bra assembly of claim 3”
[4A]	“wherein the stitching forms an upper opening to the pocket between the upper edge of the side patch and the top edge of the chest strap.”
Dependent Claim 5	
	“The pocket bra assembly of claim 1”
[5A]	“wherein the opening is an upper opening.”
Dependent Claim 6	
	“The pocketed bra assembly of claim 1”
[6A]	“wherein the item removably positioned within the pocket is a handheld electronic device.”
Dependent Claim 7	
	“The pocketed bra assembly of claim 1”
[7A]	“wherein the strap assembly further comprises two shoulder straps,”
[7B]	“and a central area at a back of the strap assembly opposite to the left and right cups, the two shoulder straps and chest strap joining together at the central area,”
[7C]	“and further comprising a back pocket on the central area.”
Dependent Claim 8	
	“The pocketed bra assembly of claim 1”
[8A]	“wherein the side pocket further comprises a closure.”
Dependent Claim 12	
	“The pocketed bra assembly of claim 1”
[12A]	“wherein each side pocket extends onto the adjacent cup, such that each pocket spans both a part of the chest strap and a part of the adjacent cup.”

Limitation Identifier	Text of Claim
Dependent Claim 13	
	“The pocketed bra assembly of claim 1”
[13A]	“further comprising a second patch positioned on the chest strap, the second patch forming an opening such that the second side patch forms a pocket.”
Dependent Claim 15	
	“The pocketed bra assembly of claim 1”
[15A]	“wherein a front side edge of the patch abuts an edge of the at least one of the left cup and the right cup, the pocket extending to the edge of the at least one of the left cup and right cup.”
Independent Claim 16	
[16A]	“A chest covering comprising:”
[16B]	“a strap assembly including a chest strap;”
[16C]	“a left cup and a right cup, each cup being an area to receive a breast of a wearer and having inside and outside surfaces, the strap assembly being attached to the cups whereby the strap assembly holds the cups to a wearer, with the chest strap extending from the left cup towards the wearer's back and extending from the right cup towards the wearer's back;”
[16D]	“a side patch on one of an inside or outside surface of the chest strap adjacent to at least one of the left cup and right cups, the side patch having upper and lower edges along at least part of a length of the chest strap, and side edges,”
[16E]	“the side patch upper edge lying along a same edge line as at least a portion of a top edge of the chest strap,”
[16F]	“the side patch forming an opening such that the side patch forms a pocket,”
[16G]	“the opening capable of repeated receiving and removal of an item when being worn by the wearer;”
Dependent Claim 17	
	“The chest covering of claim 16”
[17A]	“wherein the opening is an upper opening.”
Dependent Claim 18	
	“The chest covering of claim 16”

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Limitation Identifier	Text of Claim
[18A]	“further comprising stitching along the lower and side edges of the patch.”

I. INTRODUCTION

Nike, Inc. (“Petitioner”) respectfully requests *inter partes* review (“IPR”) of claims 1–8, 12, 13, 15, 16, 17, and 18 of U.S. Patent No. 10,219,551 (the “’551”). NIKE-1009.

The ’551 claims a bra with pockets on the chest strap and back. 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:

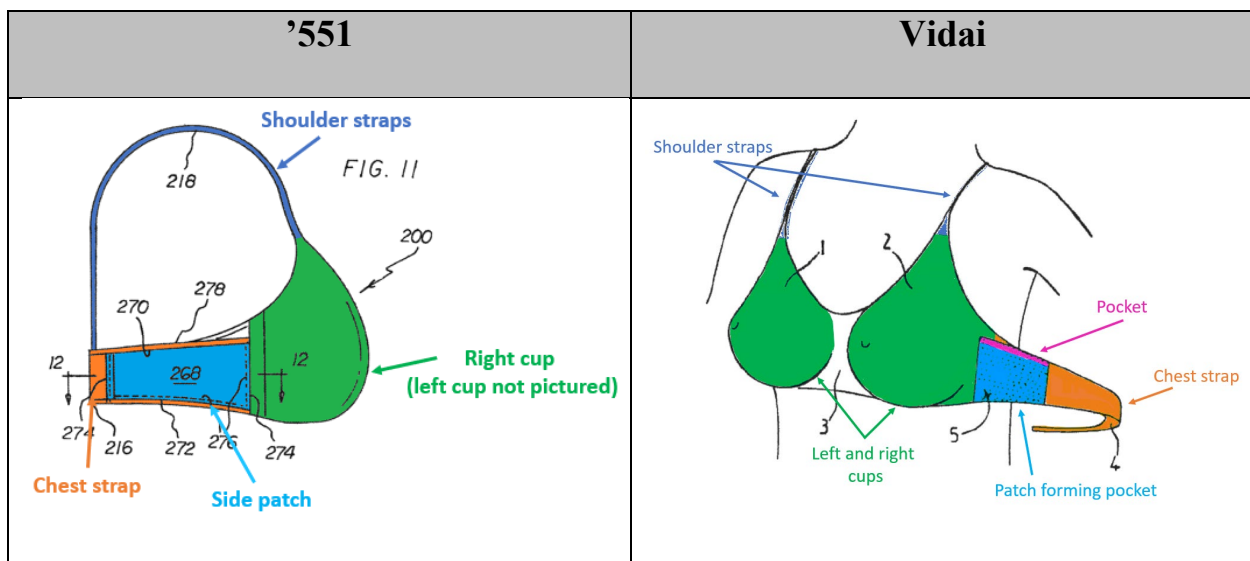


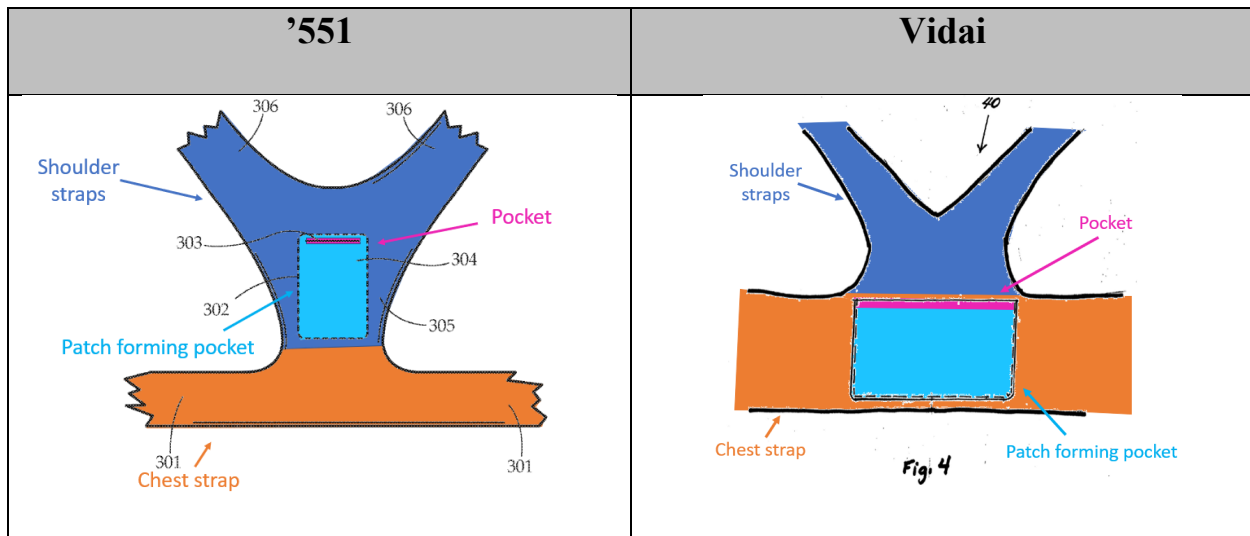
NIKE-1034.

Pockets and their use in combination with clothing have similarly been understood for centuries; pockets on pants, shirts, jackets, and other accessories have

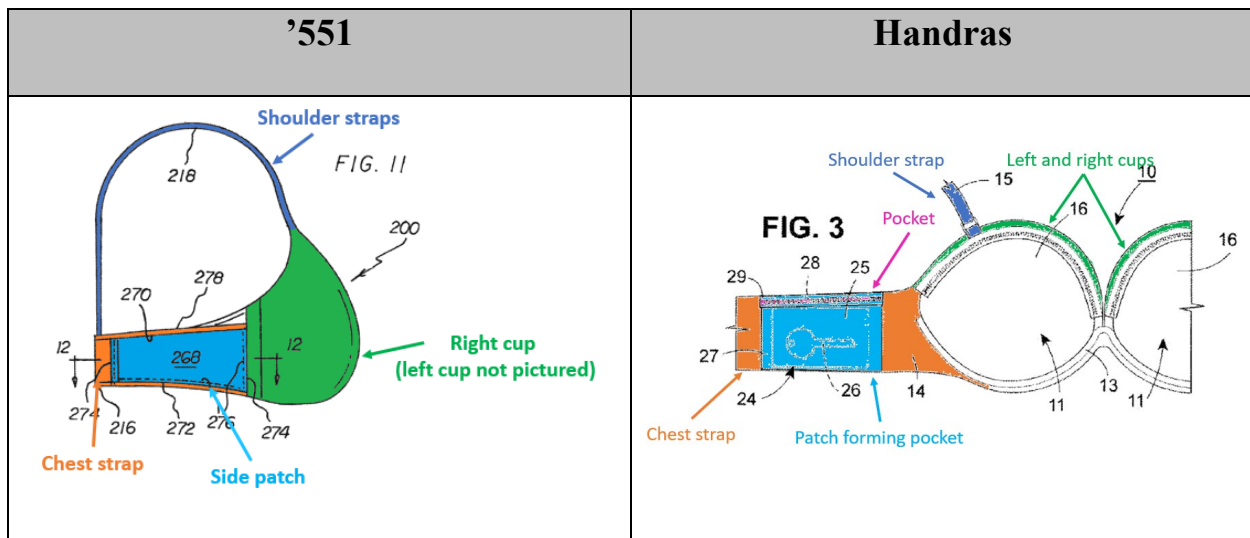
become a universal feature of fashion. *See* NIKE-1035 at 148; NIKE-1001 ¶¶109–10. This includes the combination of bras and pockets. NIKE-1001 ¶110. For decades, companies and individuals worldwide have designed and created bras with pockets so that women may conveniently carry items. *Id.* Indeed, patents have disclosed pockets on bras for more than 50 years, decades before the '551. NIKE-1027; NIKE-1022; NIKE-1021; NIKE-1019 (prior art bra with pockets on the breast cups), NIKE-101 (same), NIKE-1025 (same), NIKE-1023 (same), NIKE-1030 (prior art bra with pockets on the cups and chest strap), NIKE-1024 (prior art bra with pockets on the cups for holding a cell phone). Indeed, even PO agreed that bras with pockets were “pretty obvious” at the time of her alleged invention. NIKE-1036.

For example, Vidai, filed in 1985, almost 30 years prior to the '551, discloses a bra with a pocket on the chest strap and renders the '551 obvious in combination with Spagna (2006):

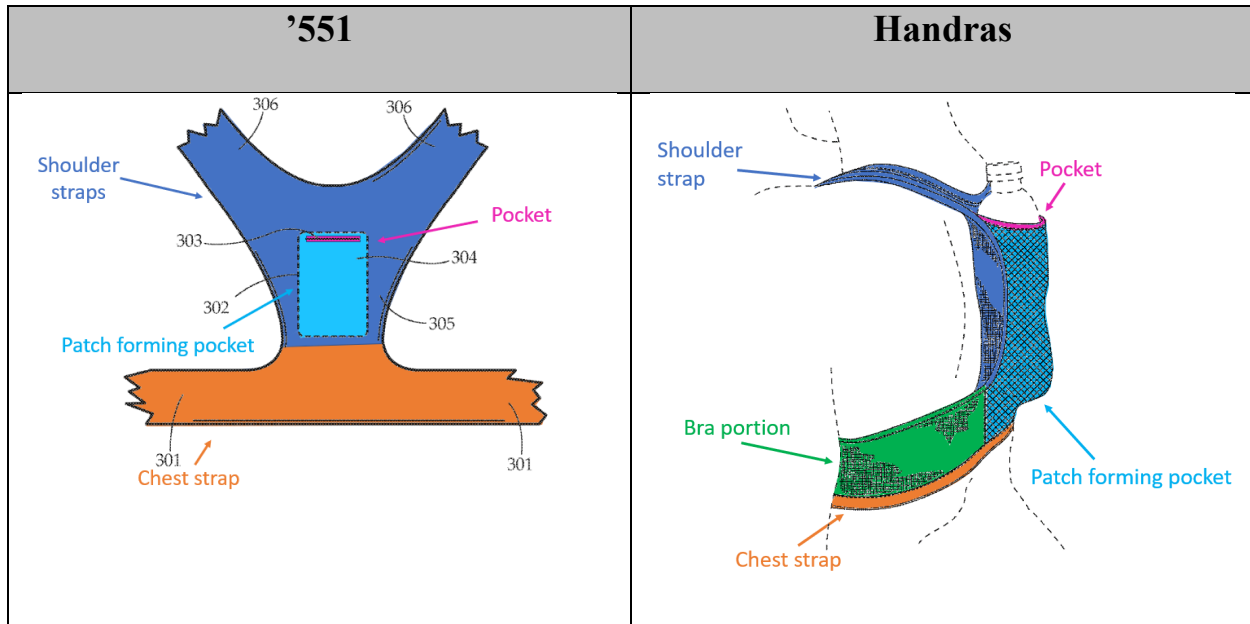




NIKE-1015 at Figs. 11, 14; NIKE-1027 at Fig. 1; NIKE-1028 at Fig. 4.² Handras and Glass similarly renders the '551 obvious:



² All annotations are added, unless otherwise noted.



NIKE-1015 at Figs. 11, 14; NIKE-1021 at Fig. 3.

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 '551 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 14 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 '551 Patent is available for IPR and that Petitioner is not barred or estopped from requesting IPR of the '551 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 '551 Patent'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)):

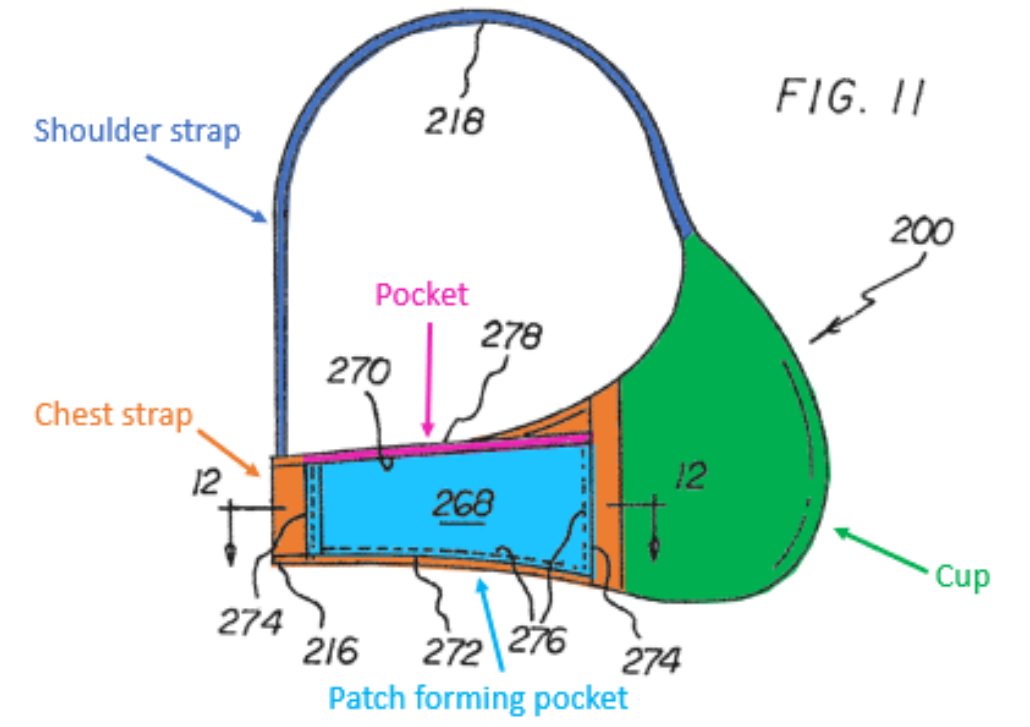
Ground	Claims	Basis
1A	1–6, 8, 12, 13, 15, 16, 17 and 18	Unpatentable pursuant to 35 U.S.C. § 103 over Vidai
1B	7	Unpatentable pursuant to 35 U.S.C. § 103 over Vidai in view of Spagna or Glass
2A	1–6, 8, 12, 13, 15, 16, 17 and 18	Unpatentable pursuant to 35 U.S.C. § 103 over Handras
2B	7	Unpatentable pursuant to 35 U.S.C. § 103 over Handras in view of Spagna or Glass

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

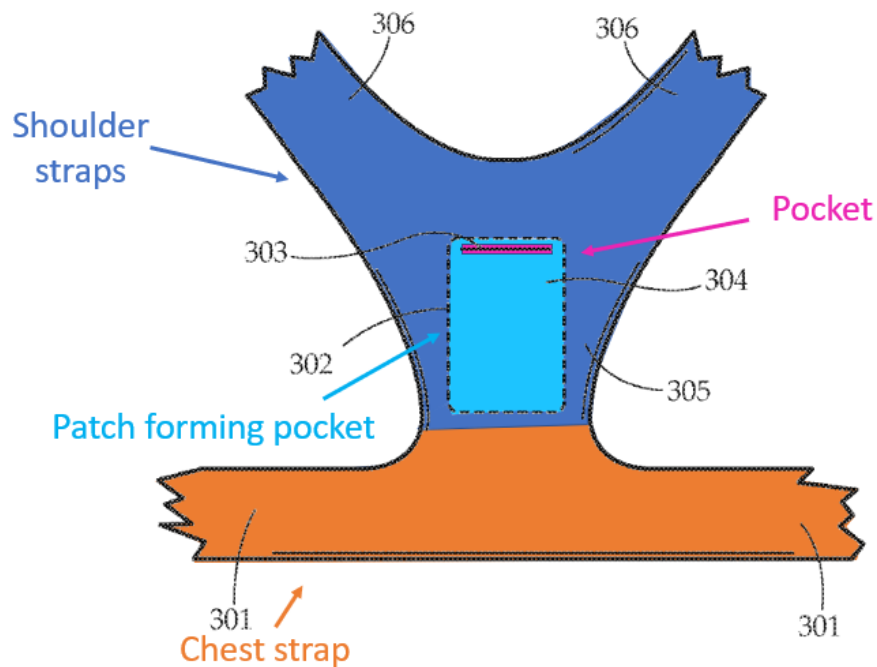
VI. SUMMARY OF THE '551 PATENT

A. Overview of U.S. Patent No. 10,219,551

The '551 issued on March 5, 2019, from U.S. Application No. 15/835,851, a continuation filed on December 8, 2017. The '551 relates generally to a bra with pockets on the chest strap and back. Specifically, the '551 claims a bra with “a left cup and a right cup” adhered to the wearer via “a chest strap” and “shoulder straps” and “side patch[es]” on the chest strap to form pockets for holding “an item.” NIKE-1003 at Cl. 1.:



NIKE-1015 at Fig. 11. The '551's claims are also directed towards a bra with a back pocket, as illustrated below:



NIKE-1015 at Fig. 13.

The '551 has 20 claims. Fourteen of those claims—independent Claims 1 and 16, and dependent Claims 2–8, 12, 13, 15, 17 and 18—are challenged here. As shown below, Vidai and Handras, in view of Spagna and/or Glass, disclose side and back pockets for holding items, rendering the Challenged Claims obvious.

B. Effective Priority Date of the Challenged Claims

The '551 issued on March 5, 2019, from the '851 Application filed on December 8, 2017. The '551 purports to be a continuation of U.S. Patent No. 10,244,800 (“the '800”), which purports to be a continuation-in-part of U.S. Patent No. 8,723,878 (“the '878”), which purports to be a continuation in part of U.S. Patent No. 9,289,016 (“the '016”), which purports to be a continuation-in-part of U.S. Patent No. 9,295,288 (“the '288”), which purports to be a continuation-in-part of grandparent U.S. Patent No. 8,597,072 (“the '072”). Each of the patents claim priority of April 26, 2011, the filing date of the '072 Patent. The '072 Patent resulted from Application No. 13/066,822, filed April 26, 2011.

PO admits that February 5, 2015 is the earliest priority date to which the '551'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); NIKE-1049 (admitting earliest '800 is entitled to is February 5, 2015); *Lockwood v. Am.*

Airlines, Inc., 107 F.3d 1565, 1571 (Fed. Cir. 1997) (patent not entitled to original priority where “two of the three intervening applications failed to maintain the continuity of disclosure.”). Indeed, the claims of the ’800 requires “a back pocket formed entirely of stretchable fabric positioned on the back portion of at least one of the chest strap and shoulder straps.” NIKE-1013 at Cl. 1. The applicant added Figure 13, purportedly disclosing this for the first time in the ’016:

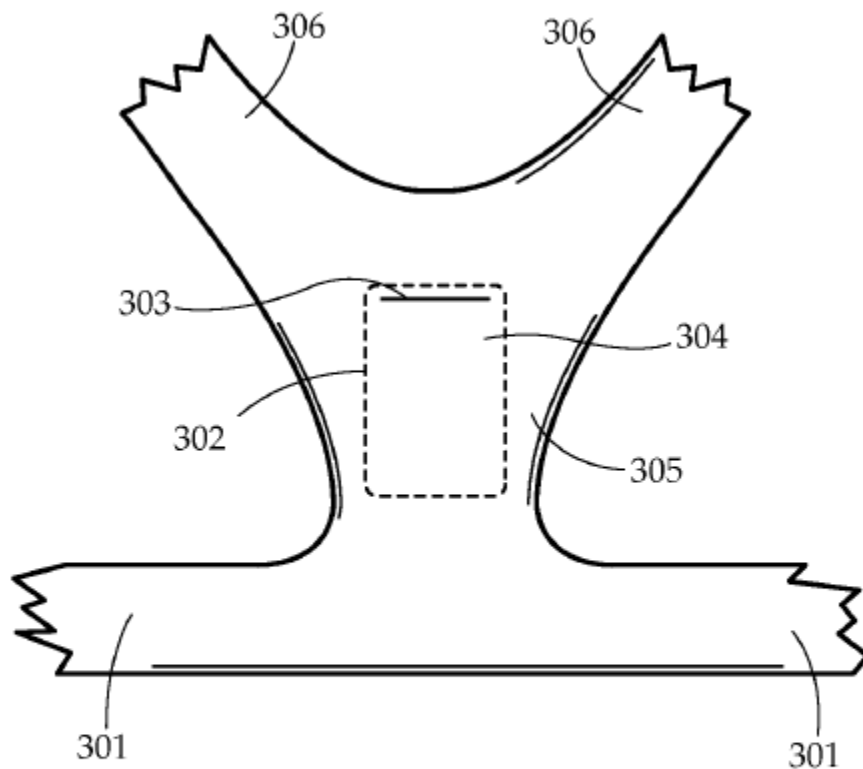


Fig. 13

NIKE-1009 at Fig. 13.

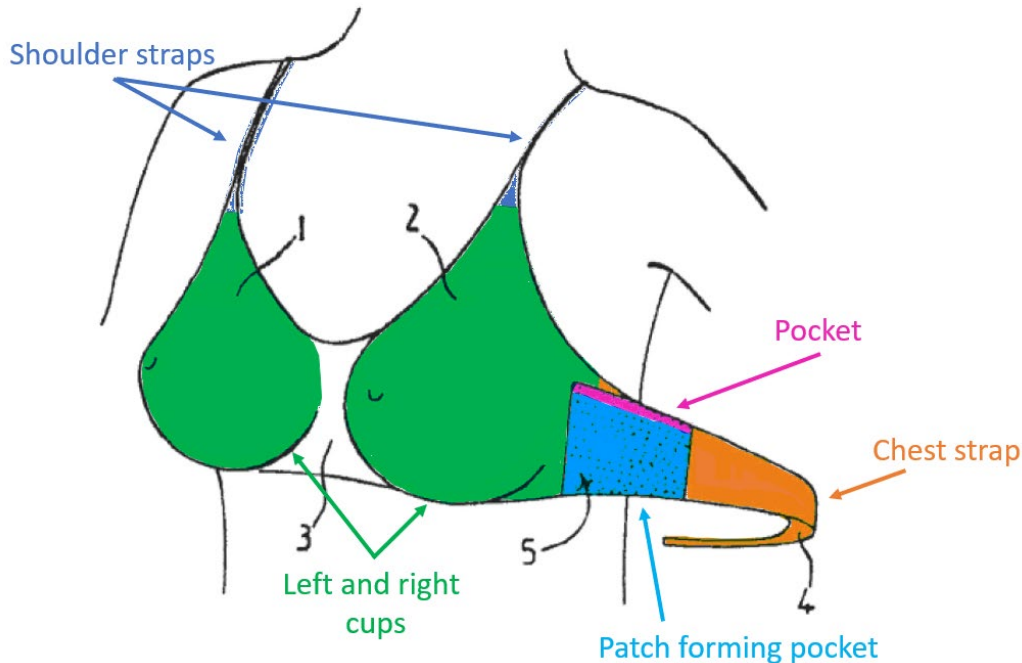
Thus, such disclosure constitutes new matter, and the Challenged Claims are at the earliest only entitled to the filing date of the '016—February 5, 2015. NIKE-1009 at Cover; *Regents of the Univ. of Minnesota v. Gilead Scis., Inc.*, 61 F.4th 1350, 1356 (Fed. Cir. 2023) (“each application in the chain ... must comply with the written description requirement” to be entitled to an earlier priority date); MPEP § 211.05.

VII. OVERVIEW OF THE PRIOR ART

A. Vidai

1. Overview of Vidai

Vidai is a European Patent Application filed July 22, 1985, and published February 25, 1987. NIKE-1027. Vidai generally relates to a bra with side pockets. *See id.* As illustrated below, Vidai discloses a bra with breast cups, shoulder straps, and a chest strap encircling the torso of the wearer:



Id. at Fig. 1 (showing only the left side of the chest strap). Vidai discloses pockets formed on either side of the chest strap. *Id.* at 2:35-42. The pockets are formed “of a piece of fabric of which at least three edges are combined with the side strip by any suitable means, in particular by sewing.” *Id.* at 3:2-5. Vidai discloses the purpose of the pockets is to store “valuable objects.” *Id.* at 1:2-7.

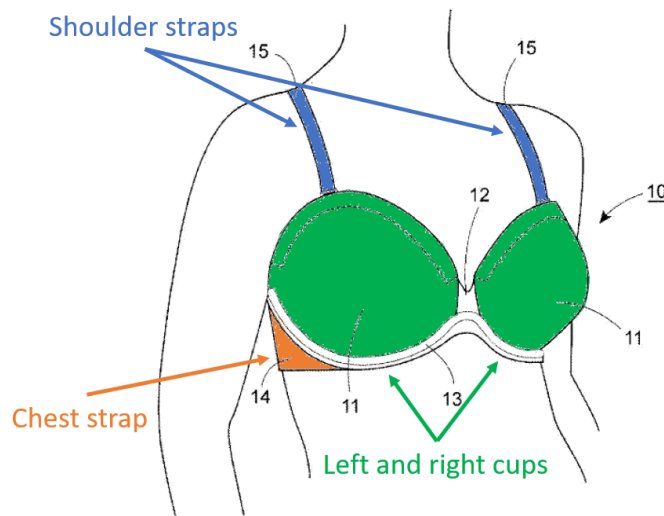
2. Vidai Is Prior Art to the '551

Vidai is prior art to the '551 under at least pre-AIA 35 U.S.C. § 102(b) and AIA 35 U.S.C. § 102(a). Vidai is a European Patent Application, filed July 22, 1985, and published February 25, 1987, which is before the '551's earliest possible priority date. *Infra* § VII.B. The '551's inventor is not named as an inventor on Vidai. Vidai is therefore prior art to the '551 under at least 35 U.S.C. § 102(a)(2). Vidai was not cited or considered during the prosecution of the '551.

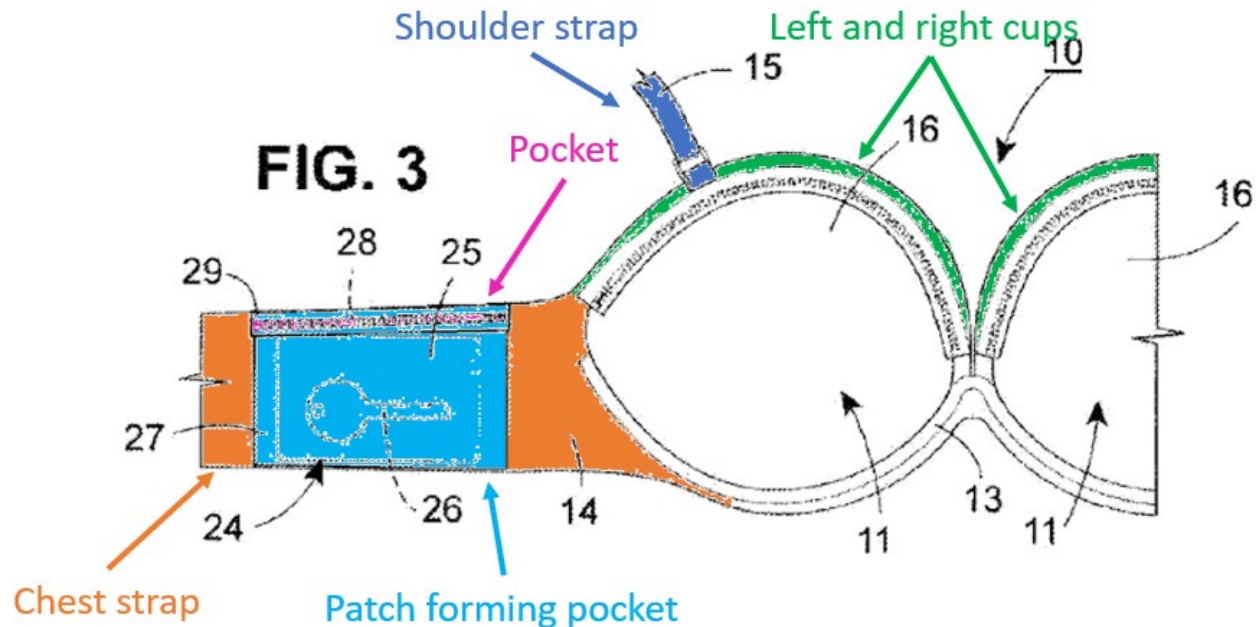
B. Handras

1. Overview of Handras

Handras is a U.S. Patent Publication of Application No. 13/589,599, filed originally on August 20, 2012. *See* NIKE-1021. Handras generally relates to “a bra with one or more storage pockets” on the surface of the cups and on either side of the chest strap. *Id.* at [0001]. Handras’s 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”:



NIKE-1021 at Fig. 1, at [0020]. The cups are partially formed of “resilient foam material.” *Id.* at [0022]. Further, Handras discloses that “each side panel of the bra may also have a zippered pocket on the inside.” *Id.* at Abstract. The pocket is “formed by a panel 27 of fabric sewn or otherwise secured to the side panel 14.” *Id.* at [0028], [0011].



NIKE-1021 at Fig. 3 (showing an interior view of the bra).

Handras discloses the use of bra pockets for holding items, including “credit cards, car keys, cell phones and the like.” *Id.* at [0002]. Handras also discloses the use of the side pocket specifically for “receiving a small item or items, such as a credit card and key.” *Id.* at [0028] (numbers omitted).

2. Handras Is Prior Art to the '551

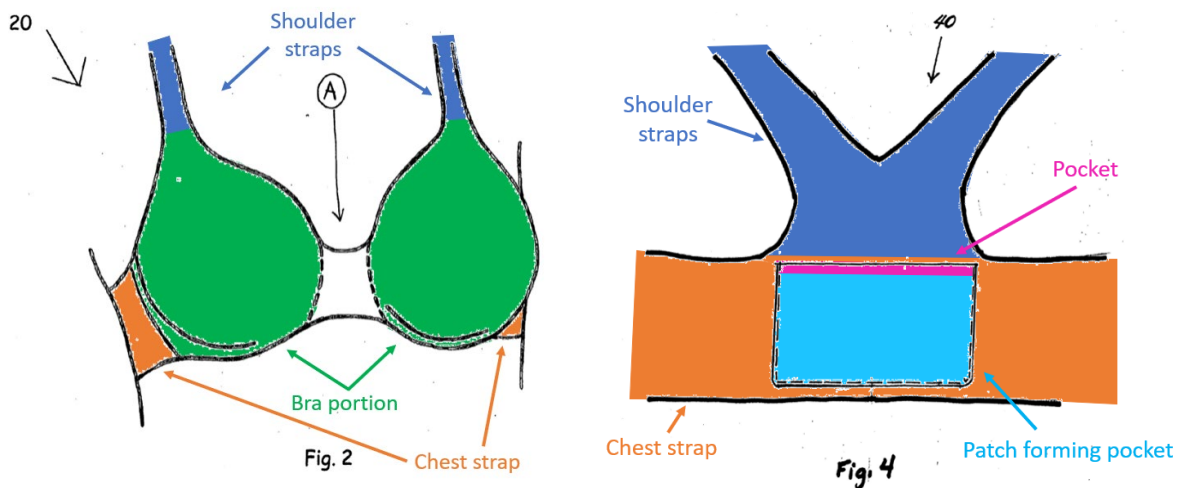
Handras is prior art to the '551 under under at least pre-AIA 35 U.S.C. §§ 102(b) or (e) and AIA 35 U.S.C. § 102(a). Handras is a U.S. Patent Application Publication, filed August 20, 2012, which is before the '551's earliest possible priority date. *Supra* § VI.B. The '551's inventor is not named as an inventor on Handras. While Handras was cited during prosecution of the '551, it was not the

basis of a rejection and was not considered in combination with either Spagna or Glass. *Infra* § X.B.

C. Spagna

1. Overview of Spagna

Spagna published on December 27, 2007 from U.S. Application No. 11/473,007, originally filed June 21, 2006. *See* NIKE-1028. Spagna generally relates to a bra with integrated pockets for the purpose of holding “an automated medication dispensing device.” *Id.* at Abstract. The brassiere illustrated in Spagna discloses a racerback bra with left and right cups, a chest strap, and two shoulder straps that converge together where they meet the back portion of the chest strap:



NIKE-1028 at Figs. 2, 4 (showing a bra with a pocket on the back surface between the shoulder blades of the wearer (Fig. 4)). Spagna further discloses a pocket on the backside of the bra for holding an automated medication dispensing device. *Id.* at [0020] (“an integrated pouch . . . is placed on the interior surface of the back of the

brassiere”). Finally, Spagna discloses the importance of keeping the stored item “safely maintained, even while the wearer is active.” *Id.* at Abstract, at [0006] (“modern women want and deserve to have it all. They want to run, play sports, and go to the gym.”), at [0010] (“Using these embodiments of the invention ... allow[s] the woman to be extraordinarily active, all the while reducing the outward appearance of the device.”).

2. Spagna Is Prior Art to the ’551

Spagna is prior art to the ’551 under at least pre-AIA 35 U.S.C. §§ 102(b) or (e) and AIA 35 U.S.C. § 102(a). Spagna is a U.S. Patent Application Publication, originally filed June 21, 2006, and published December 27, 2007, which is more than one year before the ’551’s earliest possible priority date. The ’551’s named inventor is not named as an inventor on Spagna. Spagna is therefore prior art to the ’551 under at least 35 U.S.C. §§ 102(b) and (e). Spagna was not cited or considered during prosecution of the ’551.

D. Glass

1. Overview of Glass

Glass issued July 26, 2011 from U.S. Application No. 29/368,364, originally filed August 23, 2010. *See* NIKE-1029. Glass generally relates to a sports bra with a pocket on the back for holding a water bottle. *Id.* As illustrated below, the bra disclosed by Glass is a traditional sports bra with a bra portion for receiving the

breasts of the wearer, two shoulder straps that join together in a racerback assembly, and a chest strap encircling the torso of the wearer:

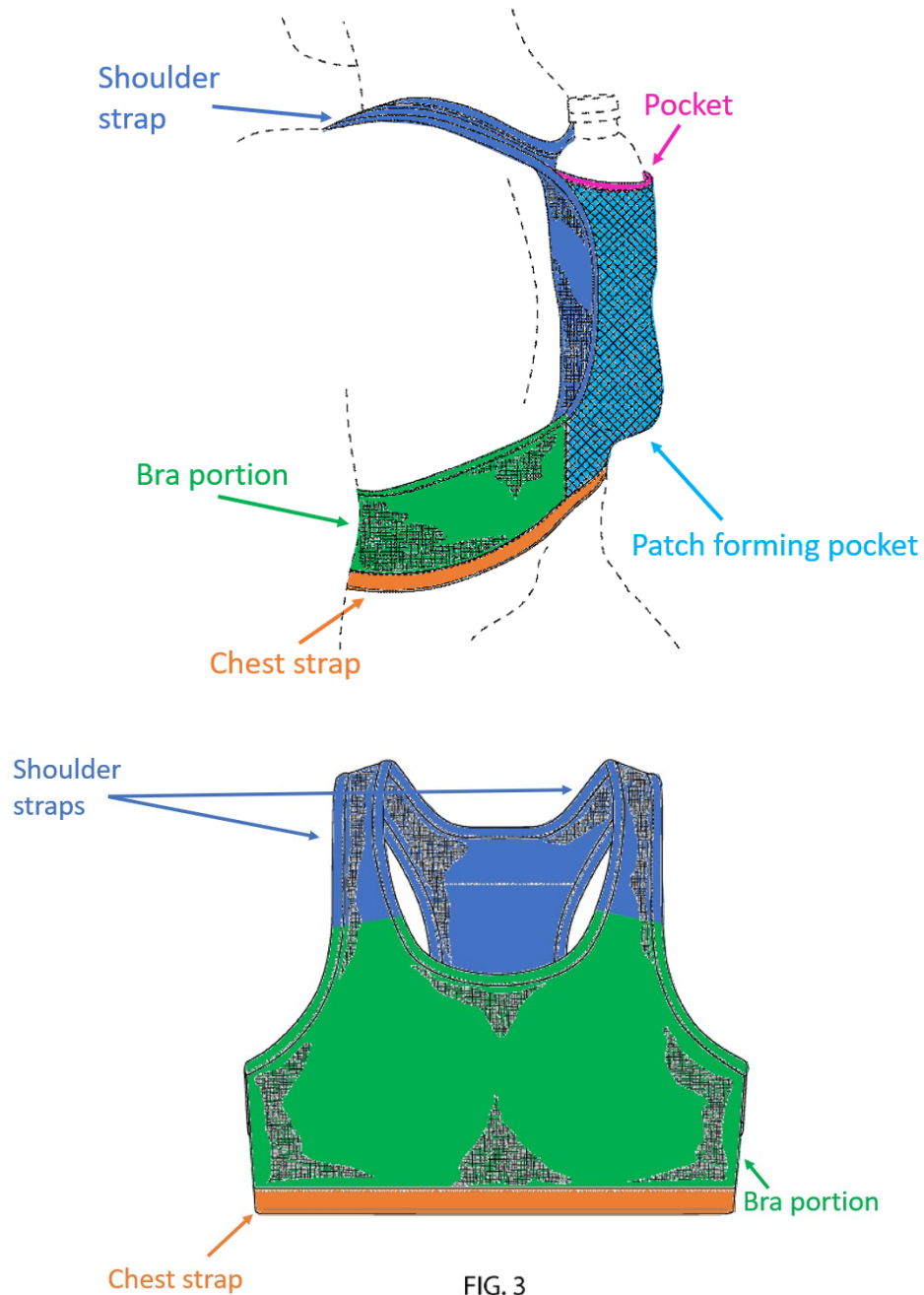
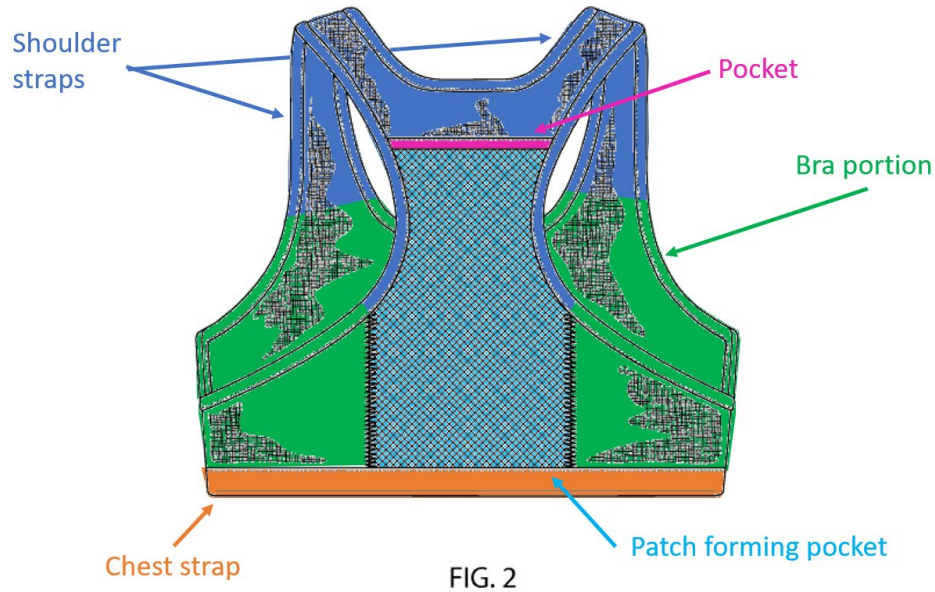


FIG. 3



Id. at Figs. 1–3.

2. Glass Is Prior Art to the '551

Glass is prior art to the '551 under at least pre-AIA 35 U.S.C. §§ 102(b) or (e) and AIA 35 U.S.C. § 102(a). Glass is a U.S. Design Patent, originally filed August 23, 2010, which is before the '551's earliest possible priority date. 35 U.S.C. § 122(b); MPEP § 901.03 (U.S. patent application publication is prior art as of its earliest effective U.S. filing date). The '551's inventor is not a named inventor on Glass. Glass is therefore prior art to the '551 under at least 35 U.S.C. § 102(e). Glass was not cited or considered during prosecution of the '551.

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 '800's earliest possible priority date. NIKE-1001 ¶156.

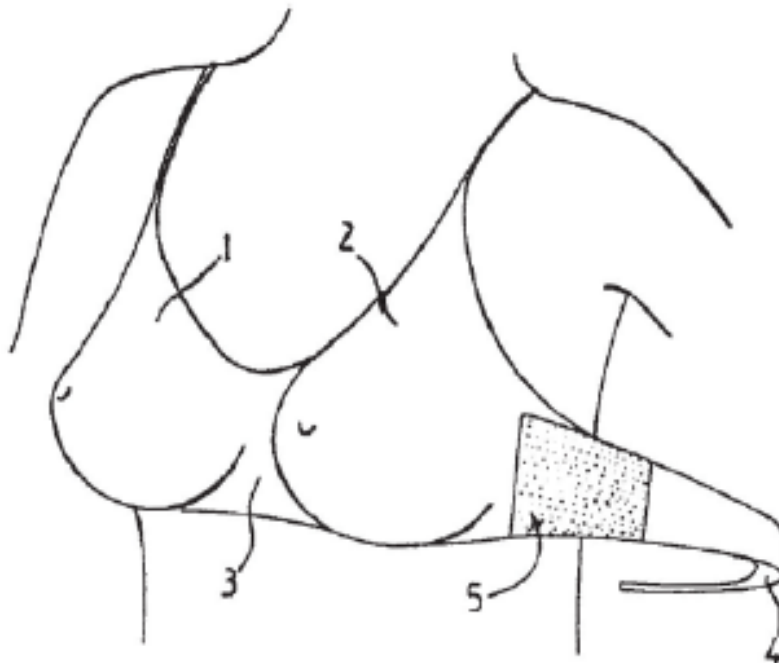
IX. SPECIFIC GROUNDS FOR THE PETITION

A. Ground 1A: Claims 1–6, 8, 12, 13, 15, 16, 17 and 18 are Unpatentable Over Vidai.

1. Claim 1

a. “A pocketed bra assembly comprising:” [1A]

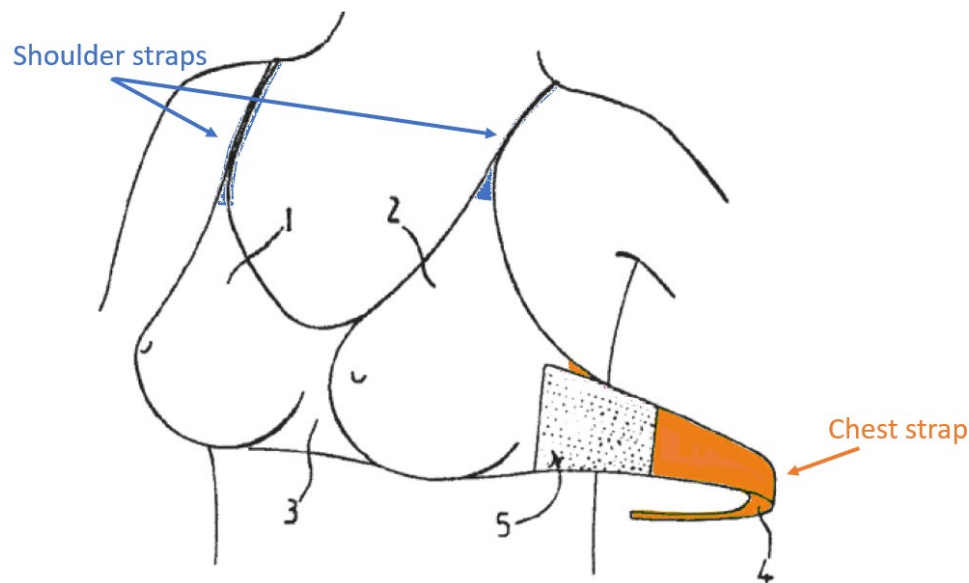
To the extent the preamble is limiting, Vidai discloses this limitation. Vidai discloses a bra designed to “hide valuables,” having “at least one pocket placed on one of the side straps.” NIKE-1027 at Abstract.



Id. at Fig. 1.

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

Vidai discloses “[a] bra comprised of two cups, 1 and 2, connected together by a piece of fabric 3 of a varied same, and *two side strips 4 that extend each cup laterally and that are provided at their ends with means allowing them to be hooked. It may also have straps,*”³ i.e., “shoulder straps”:

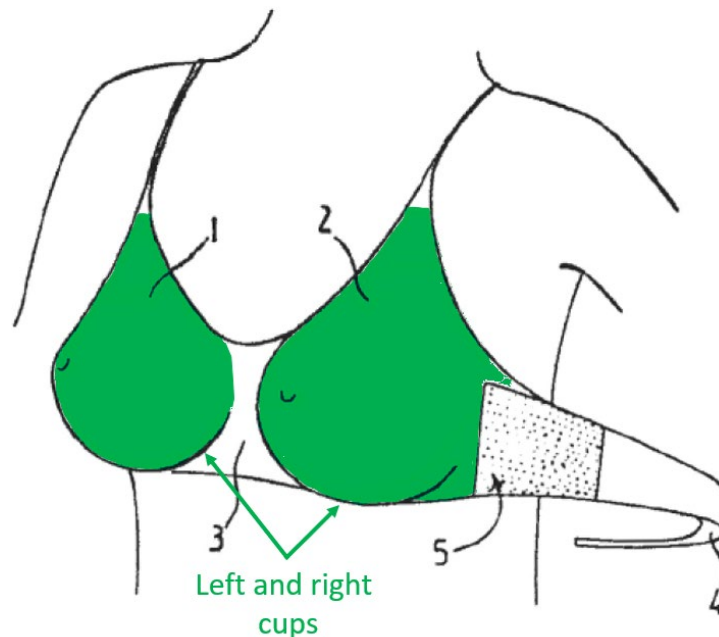


NIKE-1027 at Fig. 1, 2:28-32; NIKE-1001 ¶1029.

³ All emphasis is added, unless otherwise noted.

- c. **“a left cup and a right cup, each cup being an area to receive a breast of a wearer and having inside and outside surfaces,” [1C]**

Vidai discloses “[a] bra comprised of *two cups, 1 and 2*,” each cup being an area to receive a breast of a wearer:

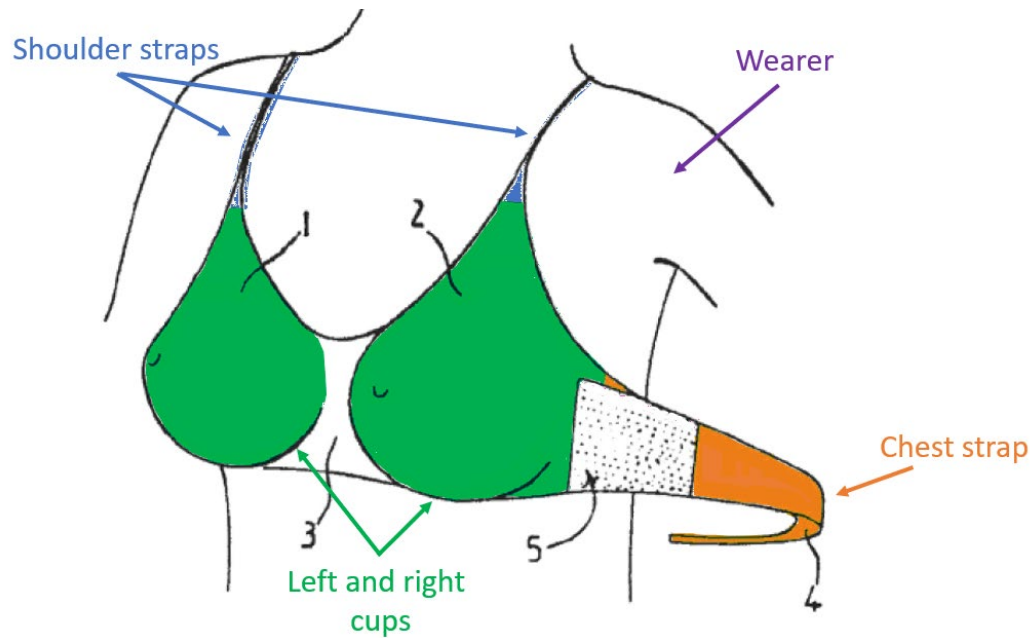


NIKE-1027 at Fig. 1, 2:28-32. A POSA would have understood these cups to necessarily have inside and outside surfaces. NIKE-1001 ¶1030.

- d. **“the strap assembly being attached to the cups whereby the strap assembly holds the cups to a wearer, with the chest strap extending from the left cup towards the wearer’s back and extending from the right cup towards the wearer’s back;” [1D]**

As explained above, Vidai discloses a “strap assembly” comprising a chest strap and shoulder straps that attaches to the “cups.” *Supra* §§ IX.A.1.b, IX.A.1.c.

Further, to the extent the “whereby” clause should be provided patentable weight,⁴ Vidai expressly discloses the strap assembly attached to the cups, adhering the cups to a wearer, and with the chest strap extending from the cups to the wearer’s back:



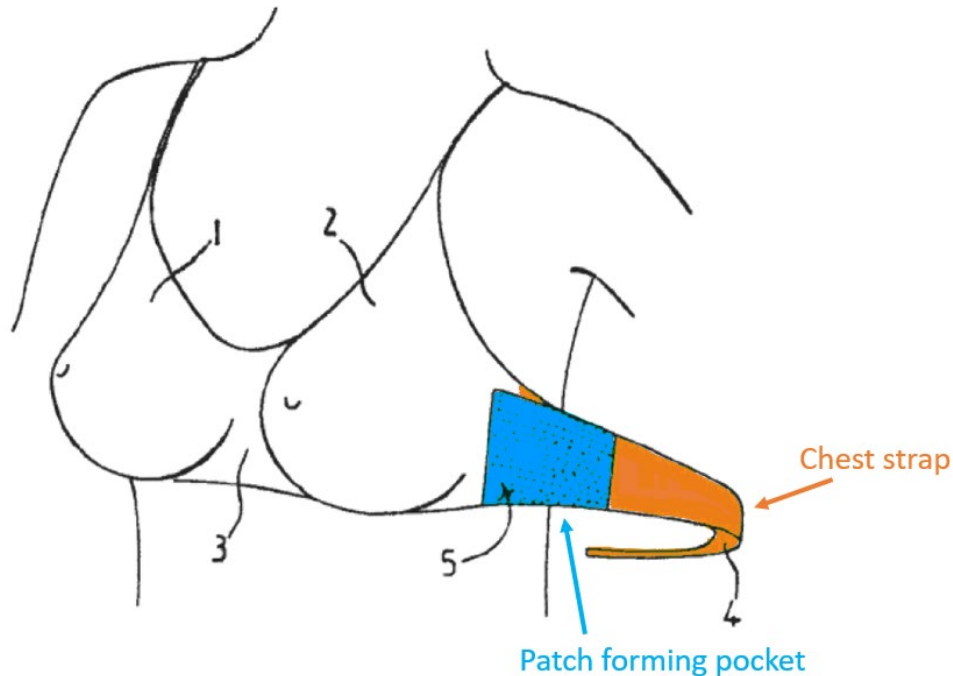
Id. at Fig. 1, 2:28-32 (“[a] bra comprised of two cups, 1 and 2, connected together by a piece of fabric 3 of a varied same, and two side strips 4 that extend each cup laterally and that are provided at their ends with means allowing them to be hooked. It may also have straps.”).

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

- e. “a side patch on one of an inside or outside surface of the chest strap adjacent to at least one of the left cup and right cups,” [1E]

Vidai discloses “*at least one pocket 5 that is arranged on a side strip 4.*

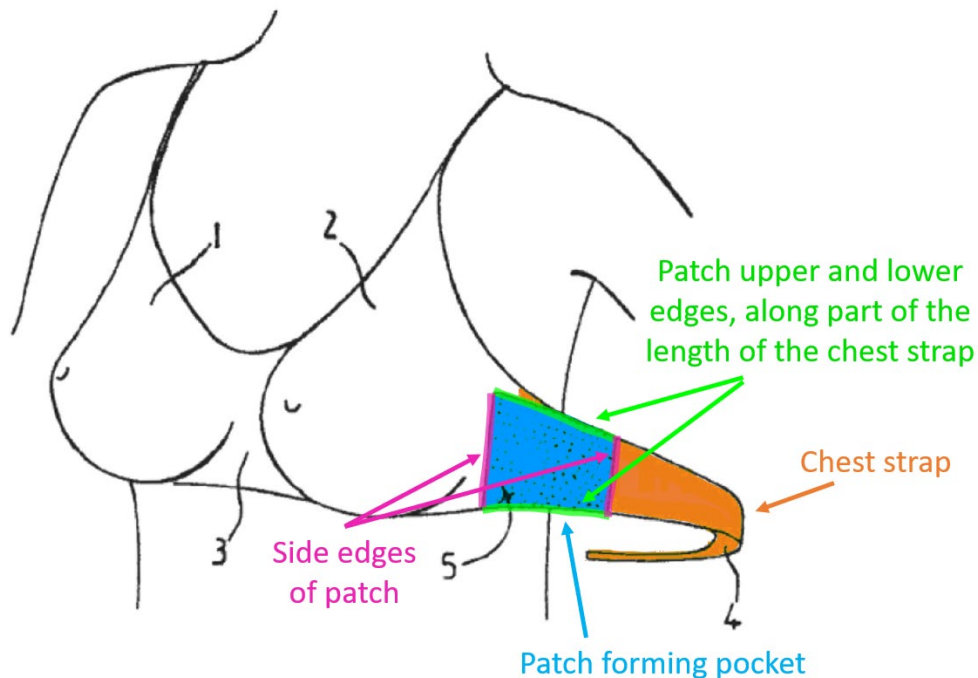
Optionally, *each side strip 4 may include a pocket*”:



NIKE-1027 at Fig. 1, 2:37-39. The pockets can be made of “piece[s] of fabric” sewn to the chest strap, *id.* at 3:2-3, and are “advantageously arranged on the part of the side strip 4 that is located substantially under the corresponding arm of the user.” *Id.* at 2:40–42. A POSA would have understood the portion “located substantially under the corresponding arm of the user” to be “adjacent” to the right or left cup of the bra assembly. NIKE-1001 ¶1032. Further, Vidai illustrates a pocket formed on the outside of the chest strap, as shown above.

- f. “an upper edge of the side patch lying along the same edge line as at least a portion of a top edge of the chest strap,” [1F]

As illustrated below, the pocket is formed by a piece of fabric with upper and lower edges along the length of the strap, and side edges:



NIKE-1027 at Fig. 1. Vidai discloses a pocket formed “of the side strip and of a piece of fabric of which at least three edges are combined with the side strip by any suitable means, in particular by sewing.” *Id.* 3:2-5 (numbers omitted). Thus, a POSA would understand each patch to have edges along the length of the chest strap. NIKE-1001 ¶1033.

g. “the side patch forming an opening such that the side patch forms a pocket,” [1G]

Vidai discloses the pocket formed “of the side strip and of a piece of fabric of which at least three edges are combined with the side strip by any suitable means, in particular by sewing.” NIKE-1027 at 3:2-5 (numbers omitted). Further, Vidai discloses that the pocket “can be opened either laterally *or on its upper part.*” *Id.* 3:14-15.

h. “the opening capable of repeated receiving and removal of an item when being worn by the wearer;” [1H]

Vidai discloses the use of the bra pocket for temporarily storing “valuable objects,” such as “bank notes, credit cards, or jewelry” while traveling. NIKE-1027 at 1:2-7. Moreover, a POSA would have understood that such a pocket is necessarily designed for temporarily holding items. NIKE-1001 ¶1035. Thus, a POSA would have understood that Vidai’s pockets—expressly designed to hold “valuables”—necessarily had openings “capable of repeated receiving and removal of an item” when worn. *Id.*

i. “and an item removably positioned in the pocket.” [1I]

As described above, Vidai discloses “a device for hiding valuable objects consisting of at least one pocket.” NIKE-1027 at 2:5-8; *supra* §§ IX.A.1.e, IX.A.1.h. Vidai also discloses that its pocket is for storing “valuable objects,” such as “bank

notes, credit cards, or jewelry,” that would normally be stored in a woman’s handbag while traveling. NIKE-1027 at 1:2-7.

To the extent this limitation is not expressly or inherently disclosed, Vidai 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. NIKE-1001 ¶1037. Thus, it would have been obvious to a POSA to place an item in Vidai’s pockets, which are expressly designed to hold “valuables.” *Id.*

2. Claim 2

a. “The pocketed bra assembly of claim 1” [Preamble]

Vidai discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.A.1.

b. “wherein the side patch comprises upper and lower edges along at least part of a length of the chest strap, and side edges.” [2A]

Vidai discloses this limitation for the reasons described above for limitation 1F. *Supra* § IX.A.1.f.

3. Claim 3

a. “The pocketed bra assembly of claim 2” [Preamble]

Vidai discloses “[t]he pocketed bra assembly of claim 2” for the reasons described above. *Supra* § IX.A.2.

b. “further comprising stitching along the lower and side edges of the side patch.” [3A]

Vidai discloses a pocket formed “of the side strip and of a piece of fabric of which at least three edges are combined with the side strip by any suitable means, *in particular by sewing.*” NIKE-1027 3:2-5 (numbers omitted). Further, Vidai discloses that the pocket “can be opened either laterally or on its upper part.” *Id.* 3:14-15. Finally, Vidai states “[t]he shape of this pocket is preferably rectangular.” *Id.* 3:19. A POSA would have understood a rectangular pocket with an upper opening to be sewn along its lower and side edges. NIKE-1001 ¶1041.

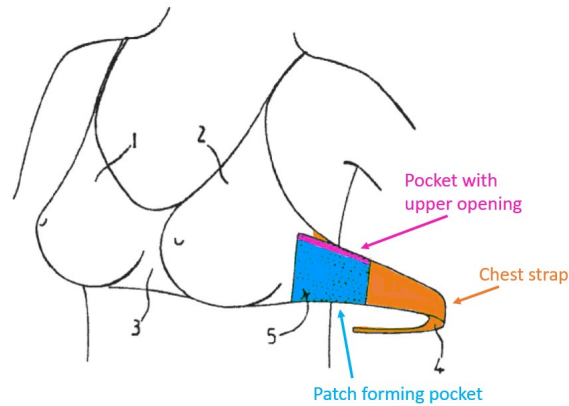
4. Claim 4

a. “The pocketed bra assembly of claim 3” [Preamble]

Vidai discloses “[t]he pocketed bra assembly of claim 3” for the reasons described above. *Supra* § IX.A.3.

b. “wherein the stitching forms an upper opening to the pocket between the upper edge of the side patch and the top edge of the chest strap.” [4A]

As described above, Vidai discloses a pocket with an upper opening formed by stitching between the upper edge of the side patch and the top edge of the chest strap:



NIKE-1027 Fig. 1, 3:2-5 (“pocket of the side strip and of a piece of fabric of which at least three edges are combined with the side strip by any suitable means, in particular by sewing.”), 3:14-15 (“pocket ... can be opened either laterally or on its upper part.”), (“[t]he shape of this pocket is preferably rectangular.”). *Id.* 3:19; *supra* § IX.A.1–3.

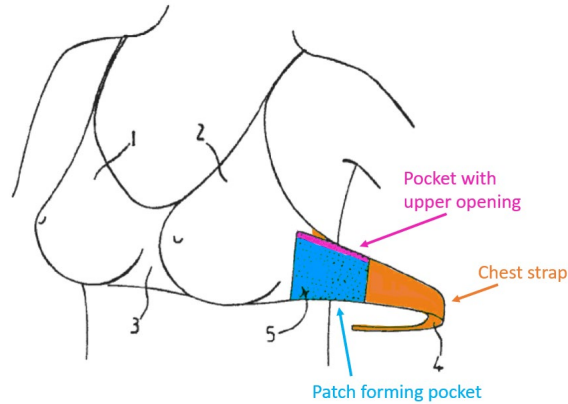
5. Claim 5

a. “The pocketed bra assembly of claim 1” [Preamble]

Vidai discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.A.1.

b. “wherein the opening is an upper opening.” [5A]

As described above, Vidai discloses a pocket with an upper opening:



NIKE-1027 Fig. 1, 3:2-5, 3:14-15 (“pocket ... can be opened either laterally or on its upper part.”), *Id.* 3:19; *supra* § IX.A.4.

6. Claim 6

a. “The pocketed bra assembly of claim 1” [Preamble]

Vidai discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.A.1.

b. “wherein the item removably positioned within the pocket is a handheld electronic device.” [6A]

As described above, Vidai discloses “a device for hiding valuable objects consisting of at least one pocket.” NIKE-1027 at 2:5-8; *supra* §§ IX.A.1.e, IX.A.1.h. Vidai also discloses that its pocket is for storing “valuable objects,” such as “bank notes, credit cards, or jewelry,” that would normally be stored in a woman’s handbag while traveling. NIKE-1027 at 1:2-7. Vidai further describes the use of the storage pocket to prevent theft of items that would normally be stored in a woman’s handbag. *See id.* at 1:3-7. A POSA reading Vidai in 2013 would have understood “valuable

objects” to include a wearer’s personal belongings, including a handheld electronic device, such as a cell phone at the time of the ’551’s alleged invention. NIKE-1001 ¶1047. A POSA would further understand a wearer’s desire to prevent theft of any valuable object, including a personal, handheld electronic device. *Id.*

To the extent this limitation is not expressly or inherently disclosed, Vidai 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 a handheld electronic device. NIKE-1001 ¶1048. A POSA would also know that the use of handheld electronic devices was pervasive at the time of the alleged invention (2013 at the earliest) and would know that a user would use the pockets to hold handheld electronic devices. *See* NIKE-1022 at 1:23–24 (“Cell phones, personal listening devices, and other mobile electronic devices have become popular in recent years.”); NIKE-1001 ¶1048. Thus, it would have been obvious to a POSA that Vidai’s pockets—expressly designed to hold “valuables”—could hold a “handheld electronic device.” NIKE-1001 ¶1048.

7. Claim 8

a. “The pocketed bra assembly of claim 1” [Preamble]

Vidai discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.A.1.

**b. “wherein the side pocket further comprises a closure.”
[8A]**

Vidai discloses a closure for the pocket “done either by the natural tension created by the attachment of the side strips, or by any other means, such as a zipper or adhesive strips, for example.” NIKE-1027 at 3:15–18, 2:12-13.

8. Claim 12

a. “The pocketed bra assembly of claim 1” [Preamble]

Vidai discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.A.1.

b. “wherein each side pocket extends onto the adjacent cup, such that each pocket spans both a part of the chest strap and a part of the adjacent cup.” [12A]

In the MA Litigation, PO took the position that this limitation was met by the following bras:



See NIKE-1044 at 7 (left); NIKE-1045 at 7 (right). Though Petitioner does not agree that the products above meet this limitation, to the extent PO contends they do, so too does Vidai:



NIKE-1027 at Fig. 1.

Alternatively, should PO contend that this limitation requires greater extension onto the cups (and therefore the products accused in the MA Litigation do not meet this limitation), Vidai renders this limitation obvious. 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 bra designs and pocket placements. NIKE-1001 ¶1060. Moreover, a POSA would have known that different pocket shapes, sizes, and placements have known benefits and drawbacks. *Id.* Given this knowledge, it would have been obvious to a POSA in light of Vidai to slightly extend the length of the pocket onto the bra cup to increase the amount of storage in the pocket. *Id.* Additionally, a

POSA would have found it obvious to extend the pocket towards the front of the bra onto the cups, rather than backwards towards the wearer's back, for ease of access to the pocket. *Id.* Such a design would increase comfort for the wearer because extension of the pocket onto the cup, as opposed to the wearer's back, enables the wearer to access the pocket without twisting the wearer's core. *Id.*

Though Vidai acknowledges that placement of pockets on the "external wall of one of the cups" is "not very aesthetic because it inevitably leads to the asymmetry of the cups," NIKE-1027 at 1:29-31, the extension of side pockets onto the side of the breast cup does not implicate the same concerns. A POSA would have known that designing a storage pocket extending onto the adjacent cup would not lead to asymmetry, as storage would occur on the periphery of the breast cup, and not on the outermost surface of the breast where storage of items may disrupt the breast's natural curvature. NIKE-1001 ¶1061. Moreover, Vidai discloses pockets on both sides of the bra, thus mitigating the asymmetry concern of having a pocket on only "one of the cups." *Id.*

9. Claim 13

a. "The pocketed bra assembly of claim 1" [Preamble]

Vidai discloses "[t]he pocketed bra assembly of claim 1" for the reasons described above. *Supra* § IX.A.1.

- b. “further comprising a second patch positioned on the chest strap, the second patch forming an opening such that the second side patch forms a pocket.” [13A]**

As described above for limitation 1E, Vidai discloses a second patch on the chest strap forming an opening such that the second side patch forms a pocket. *Supra* § IX.A.1.e.

10. Claim 15

- a. “The pocketed bra assembly of claim 1” [Preamble]**

Vidai discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.A.1.

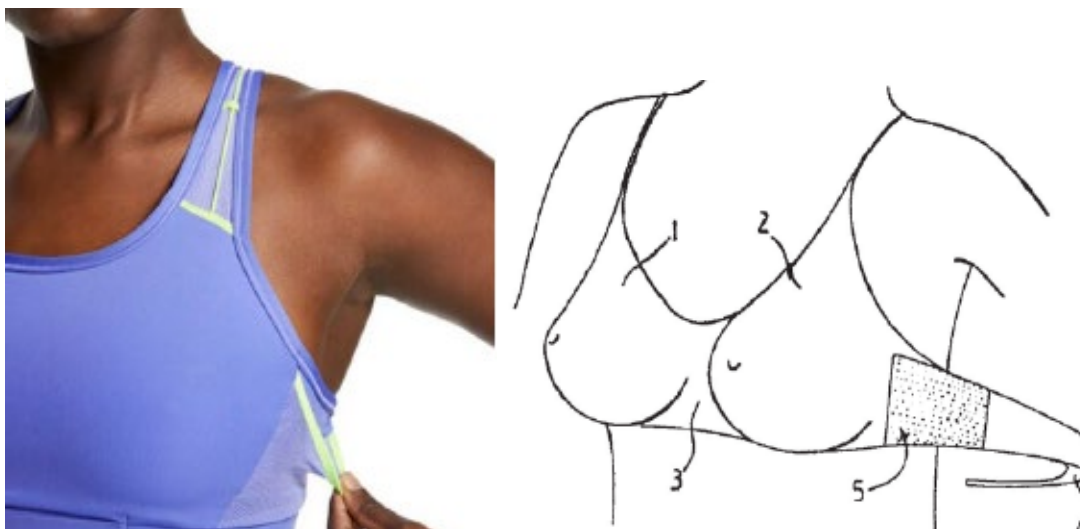
- b. “wherein a front side edge of the patch abuts an edge of the at least one of the left cup and the right cup, the pocket extending to the edge of the at least one of the left cup and right cup.” [15A]**

As described above for limitation 12B, Vidai discloses side pockets that extend onto the adjacent cup, such that each pocket spans both a part of the chest strap and a part of the adjacent cup, under PO’s apparent understanding. *Supra* § IX.A.12. Under PO’s apparent understanding, those same products also disclose this limitation. In the MA Litigation, PO also took the position that this limitation was met by the following bras:



See NIKE-1044 at 7–8 (left); NIKE-1045 at 7–8 (right).

Though Petitioner does not agree that the products above meet this limitation, to the extent PO contends they do, so too does Vidai:



NIKE-1027 at Fig. 1.

Alternatively, should PO contend that this limitation is not disclosed by Vidai (and therefore the products accused in the MA Litigation do not meet this limitation), Vidai renders this limitation obvious. Both bras and pockets have been long known

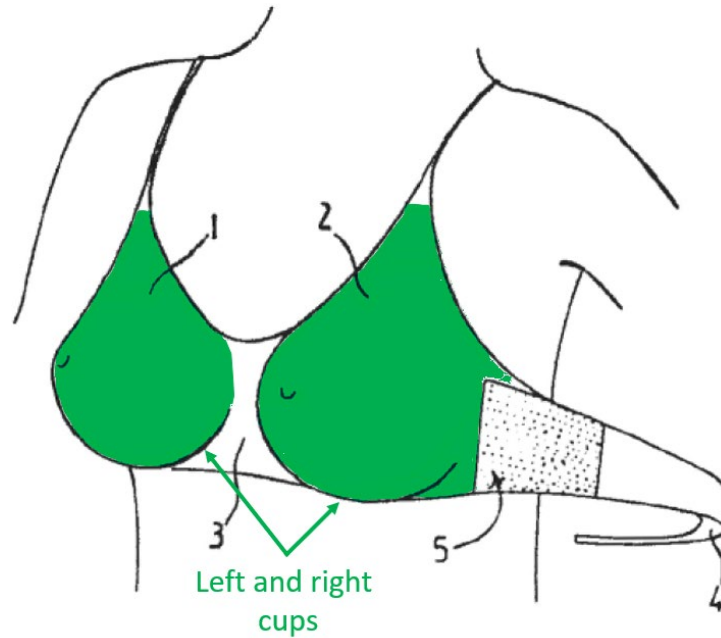
in the art and in designing a bra with storage pockets, a POSA would have been motivated to look for known solutions in the art, such as the variety of types of bras and their designs, pocket placements, methods of forming a pocket, and methods of adhering the pockets to the bra. NIKE-1001 ¶1066. Moreover, a POSA would have known that different pocket shapes, sizes, and placements have known benefits and drawbacks. *Id.* Given this knowledge, it would have been obvious to a POSA in light of Vidai to slightly extend the length of the pocket to abut the edge of a bra cup (or beyond the edge of the bra cup) to increase the amount of storage in the pocket. *Id.* Additionally, a POSA would have found it obvious to extend the pocket towards the front of the bra onto the cups, rather than backwards towards the wearer's back, for ease of access to the pocket. *Id.* Such a design would increase comfort for the wearer, because extension of the pocket toward the cup, as opposed to the wearer's back, enables the wearer to access the pocket without twisting the wearer's core. *Id.*

Though Vidai acknowledges that placement of pockets on the "external wall of one of the cups" is "not very aesthetic because it inevitably leads to the asymmetry of the cups," NIKE-1027 at 1:29-31, the extension of side pockets to the edge of the breast cup does not implicate the same concerns because it will not be on the "external wall" of the cups. Moreover, Vidai discloses pockets on both sides of the bra, thus mitigating the asymmetry concerns.

11. Claim 16

a. “A chest covering comprising:” [16A]

To the extent the preamble is limiting, Vidai discloses this limitation. Vidai discloses “[a] *bra* comprised of two cups, 1 and 2”:



NIKE-1027 at Fig. 1, 2:28-32.

b. “a strap assembly including a chest strap;” [16B]

Vidai discloses this limitation for the reasons described above for limitation 1B. *Supra* § IX.A.1.b.

- c. **“a left cup and a right cup, each cup being an area to receive a breast of a wearer and having inside and outside surfaces,” [16C]**

Vidai discloses this limitation for the reasons described above for limitation

1C. *Supra* § IX.A.1.c.

- d. **the strap assembly being attached to the cups whereby the strap assembly holds the cups to a wearer, with the chest strap extending from the left cup towards the wearer's back and extending from the right cup towards the wearer's back;” [16D]**

Vidai discloses this limitation for the reasons described above for limitation

1D. *Supra* § IX.A.1.d.

- e. **“a side patch on one of an inside or outside surface of the chest strap adjacent to at least one of the left cup and right cups, the side patch having upper and lower edges along at least part of a length of the chest strap, and side edges,” [16E]**

Vidai discloses this limitation for the reasons described above for limitation

1E and 1F. *Supra* §§ IX.A.1.e, IX.A.1.f.

- f. **“the side patch upper edge lying along a same edge line as at least a portion of a top edge of the chest strap,” [16F]**

Vidai discloses this limitation for the reasons described above for limitation

1F. *Supra* § IX.A.1.f.

g. “the side patch forming an opening such that the side patch forms a pocket,” [16G]

Vidai discloses this limitation for the reasons described above for limitation 1G. *Supra* § IX.A.1.g.

h. “the opening capable of repeated receiving and removal of an item when being worn by the wearer.” [16H]

Vidai discloses this limitation for the reasons described above for limitation 1H. *Supra* § IX.A.1.i.

12. Claim 17

a. “The chest covering of claim 16” [Preamble]

Vidai discloses “[t]he chest covering of claim 16” for the reasons described above. *Supra* § IX.A.12.

b. “wherein the opening is an upper opening.” [17A]

Vidai discloses this limitation for the reasons described above for claim 5. *Supra* § IX.A.5.b.

13. Claim 18

a. “The chest covering of claim 16” [Preamble]

Vidai discloses “[t]he chest covering of claim 16” for the reasons described above. *Supra* § IX.A.12.

b. “further comprising stitching along the lower and side edges of the patch.” [18A]

Vidai discloses this limitation for the reasons described above for claim 3.

Supra § IX.A.3.b.

B. Ground 1B: Claim 7 is Unpatentable Over Vidai in view of Spagna or Glass.

1. Claim 7

a. “The pocketed bra assembly of claim 1” [Preamble]

Vidai discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.A.1.

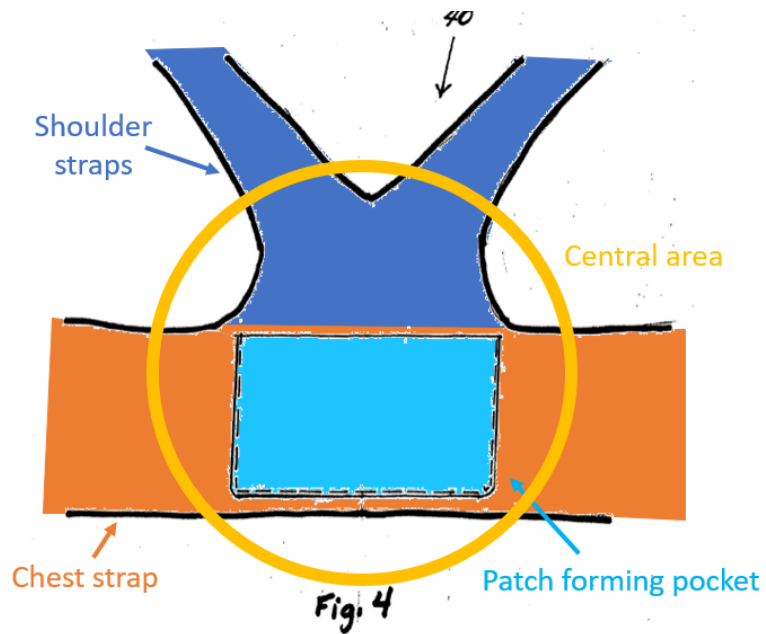
b. “wherein the strap assembly further comprises two shoulder straps,” [7A]

Vidai discloses this limitation for the reasons described above for limitation

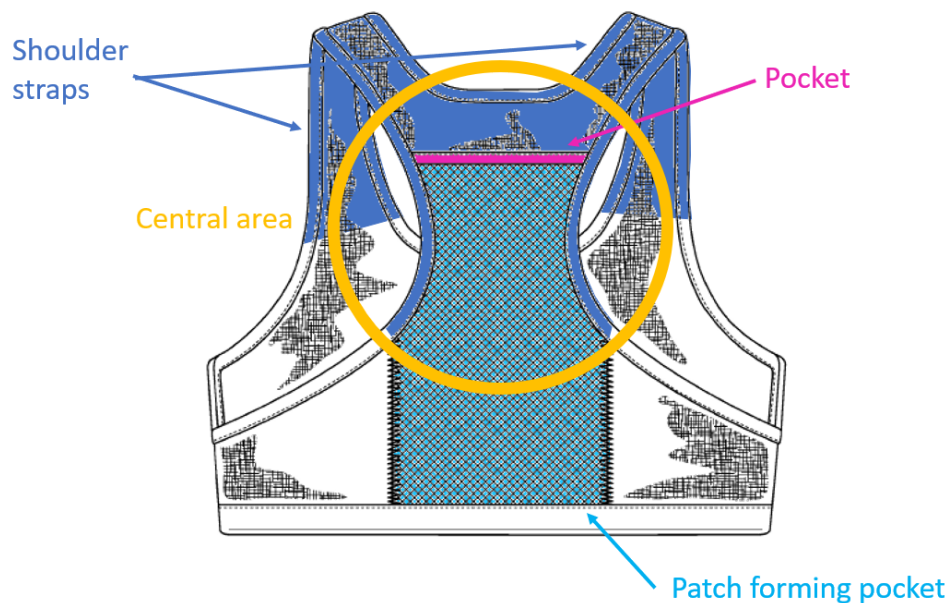
1B. *Supra* § IX.A.1.b.

c. “and a central area at a back of the strap assembly opposite to the left and right cups, the two shoulder straps and chest strap joining together at the central area,” [7B]

Vidai in combination with either Spagna or Glass renders this limitation obvious. Vidai discloses a strap assembly comprising a chest strap and two shoulder straps, as described above. *Supra* § IX.A.1.b. Spagna discloses a “central area” formed where the back portion of the shoulder straps join together:



NIKE-1028 at Fig. 4, [0009] (pocket “located at the center back of the women’s brassiere.”), [0020]. Glass likewise discloses a “central area” on the back with a pocket:



NIKE-1029 at Fig. 2.

A POSA would have found it obvious to modify the invention of Vidai to include straps that come together on the back, as taught by Spagna or Glass. NIKE-1001 ¶1052. A POSA would have understood this configuration of shoulder straps, sometimes known as a “racerback” configuration, to be popular in sports bras. *Id.* In designing a bra with pockets, a POSA would have been motivated to look to the prior art references disclosing bras with pockets—including Vidai, Spagna, and Glass specifically—and select preferable elements from each disclosure to construct their desired pocketed bra. *Id.* One advantage of Vidai’s bra is that it has pockets on the side of the bra that are easily accessible to the wearer. NIKE-1027 at Fig. 1, 2:9–11. At the same time, Spagna and Glass’s bras have an additional pocket on the back and appeal to customers interested in sports bras. NIKE-1001 ¶1052; NIKE-1029 at Title (“Sports Bra with Water Bottle Pocket on Back”), Description (“sports bra with water bottle pocket”), Figs. 1–5; NIKE-1028 at Abstract, [0006], [0010]. As a result, a POSA would have been motivated to design a bra that took advantage of the benefits provided by each of Vidai’s and either Spagna or Glass’s bras. NIKE-1001 ¶1052.

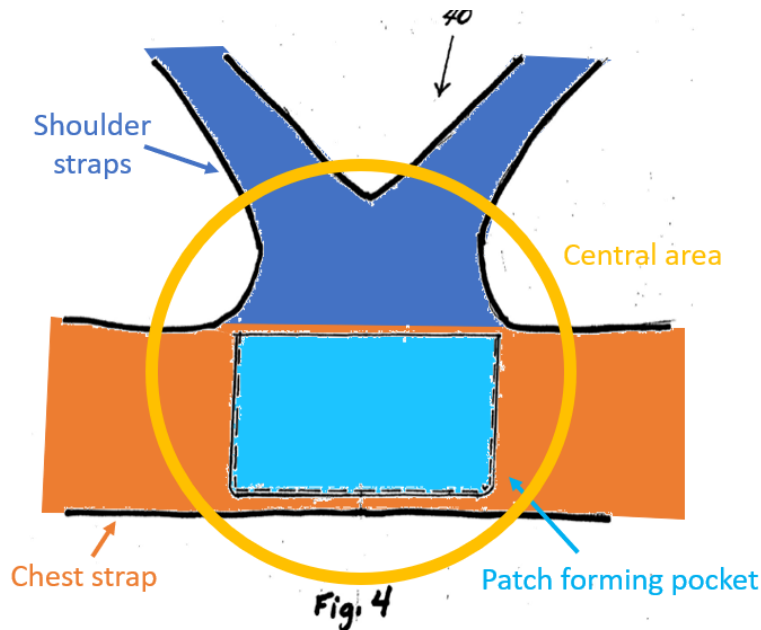
Additionally, a POSA would have understood that bras are meant to serve a diverse population with differing preferences, and that it would be commercially

beneficial to provide consumers with a variety of options to meet those different preferences. *Id.* ¶1053. Indeed, the prior art expressly states that having “an aesthetically pleasing design” is an important consideration. NIKE-1021 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. NIKE-1001 ¶1053.

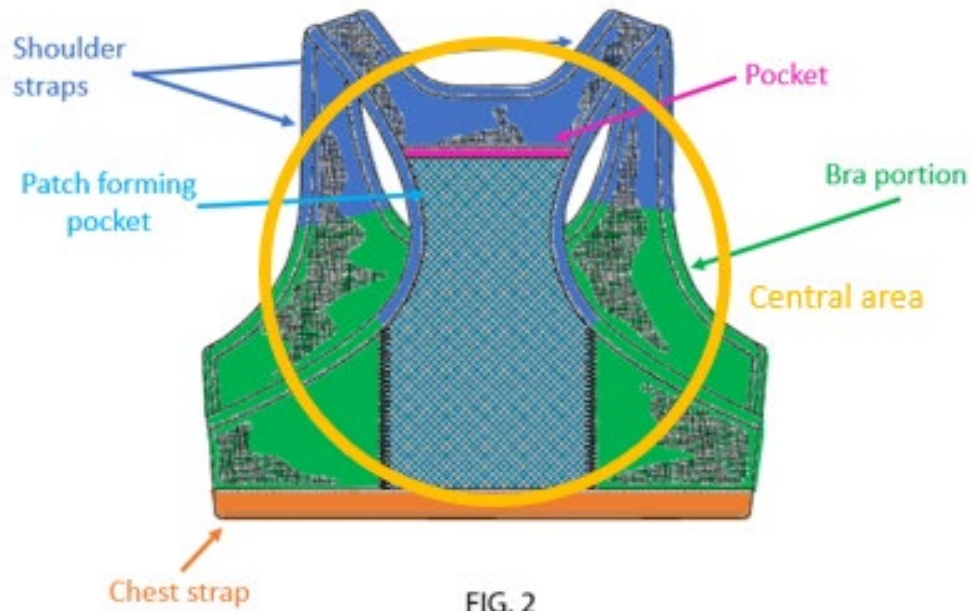
A POSA would have expected to have a high likelihood of success with this combination. *Id.* ¶1054. Vidai, Spagna, and Glass are all bras with pockets for storing valuables. *See* NIKE-1027 at Fig., 1:1–3, 2:1–11; 2:33–39; NIKE-1028 at Abstract, [0002], [0009]; NIKE-1029 at Fig. 1, Description; NIKE-1001 ¶113. And each of the elements—*e.g.*, straps and pockets—would perform the same predictable function disclosed in the prior art. NIKE-1001 ¶1054. Any work needed to combine the elements taught by Vidai, Spagna, and Glass would therefore be nothing more than routine modifications well within the abilities of a POSA. *Id.*; *Ethicon LLC v. Intuitive Surgical, Inc.*, 2022 WL 1613188 at *4 (Fed. Cir. 2022) (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).

d. “and further comprising a back pocket on the central area.” [7C]

As described above, Spagna discloses a “central area” formed where the back portion of the shoulder straps join together, with a pocket “located at the center back of the women’s brassiere”:



NIKE-1028 at Fig. 4, [0009], [0020]. Glass likewise discloses a “central area” on the back with a pocket:



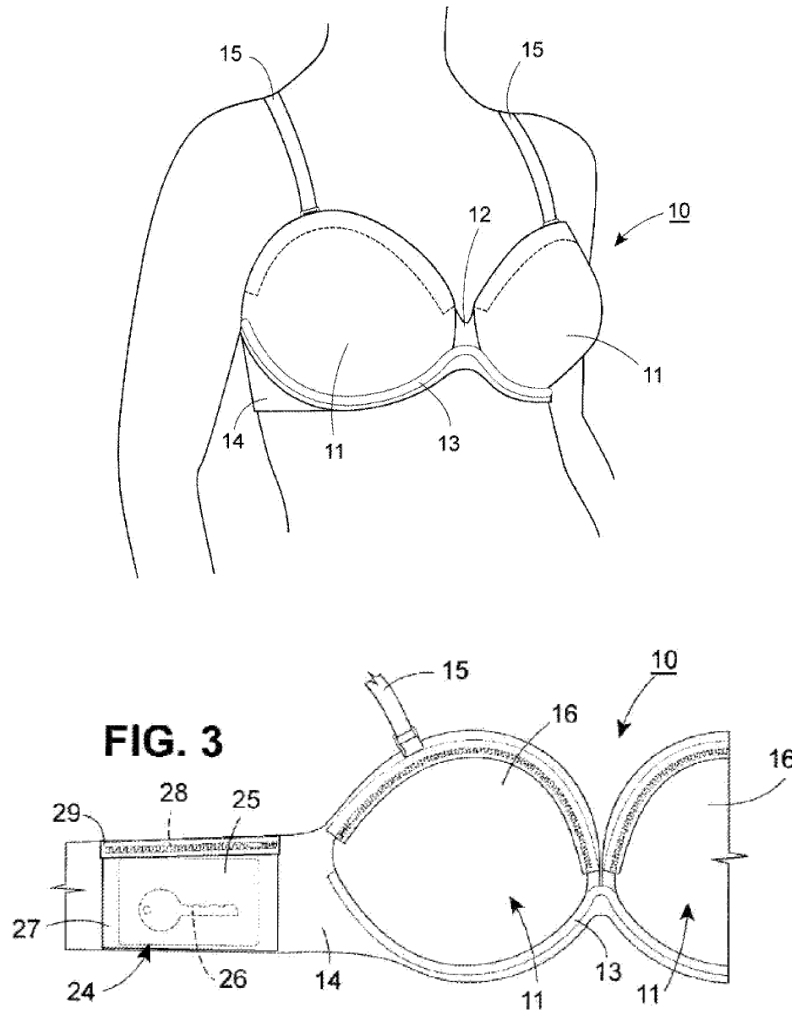
NIKE-1029 at Fig. 2. And as described above, a POSA would have been motivated to modify Vidai to include the central area and back pocket taught by Spagna and Glass and would have had a high expectation of success in making the modification. *Supra* § IX.B.1.c.

C. Ground 2A: Claims 1–6, 8, 12, 13, 15, 16, 17 and 18 are Unpatentable Over Handras.

1. Claim 1

a. “A pocketed bra assembly comprising:” [1A]

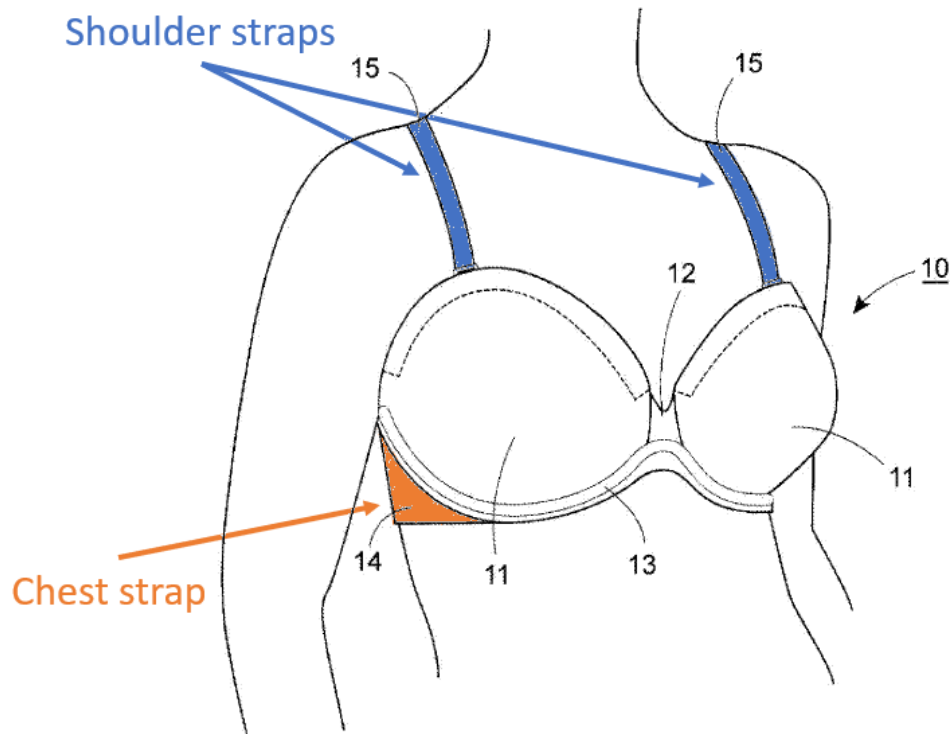
To the extent the preamble is limiting, Handras discloses this limitation. Handras discloses “a bra with one or more storage pockets”:



Id. at Figs 1, 3, [0001], [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] (“a concealed pocket in a bra for receiving one of [sic] more items.”), Abstract (“Each side panel of the bra may also have a zippered pocket on the inside.”), [0011] (“the bra is fabricated with at least one side panel that extends laterally of the pair of cups and that is provided with a pouch for receiving a small item, such as a credit card.”).

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

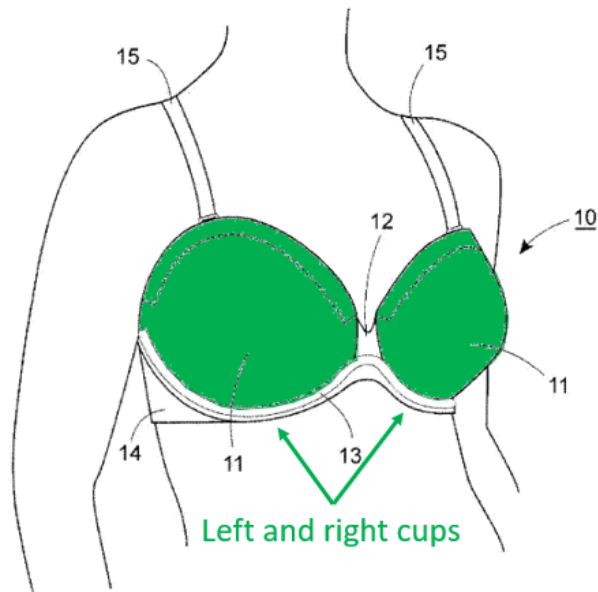
Handras describes a bra comprising of “a pair of cups 11 ... a pair of side panels 14 (only one of which is shown) that can be connected together at the back of the bra 10 in any conventional manner and a pair of shoulder straps 15”:



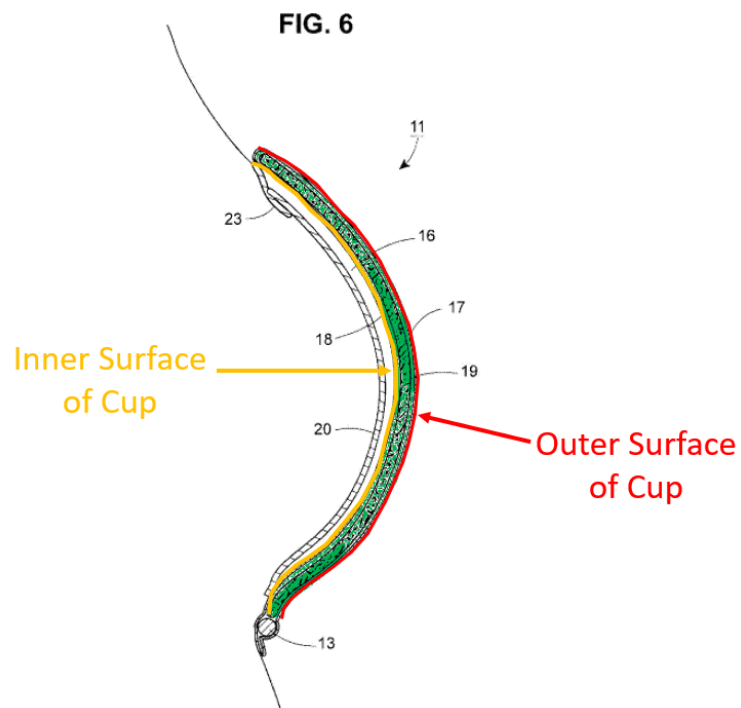
NIKE-1021 at Fig. 1, [0020].

c. “a left cup and a right cup, each cup being an area to receive a breast of a wearer and having inside and outside surfaces,” 1[C]

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



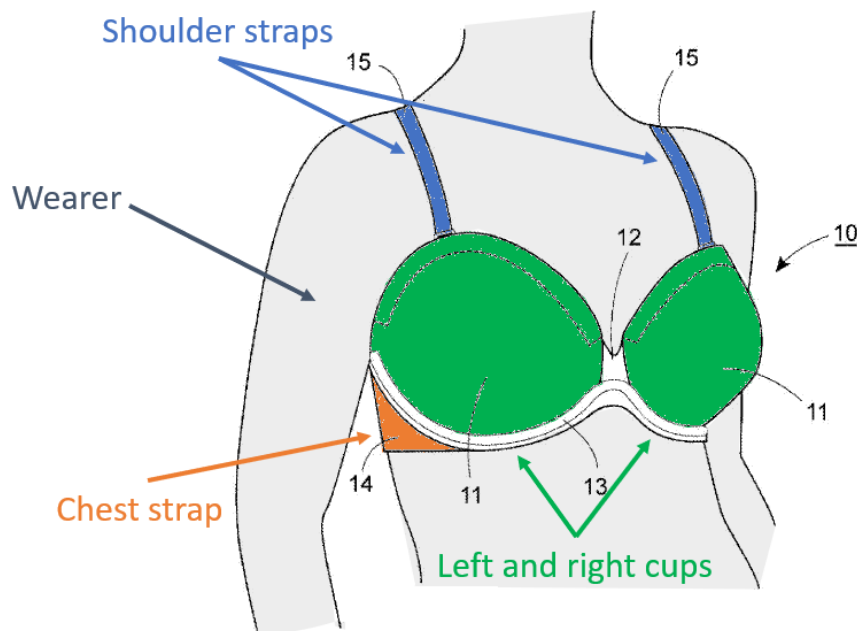
Id. at Fig. 1, [0006], [0011], [0020], [0029], Cl. 1, 6. A POSA would have understood these cups to necessarily have inside and outside surfaces, as illustrated in Figure 6:



NIKE-1021 at Fig. 6, [0022] (“each cup 11 has an outer ply of material 17, an inner ply of material 18”); NIKE-1001 at ¶1083.

- d. **“the strap assembly being attached to the cups whereby the strap assembly holds the cups to a wearer, with the chest strap extending from the left cup towards the wearer’s back and extending from the right cup towards the wearer’s back;” [1D]**

As explained above, Handras discloses a “strap assembly” and “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,⁵ Figure 1 illustrates the disclosed chest strap extending from the cups towards the wearer’s back:

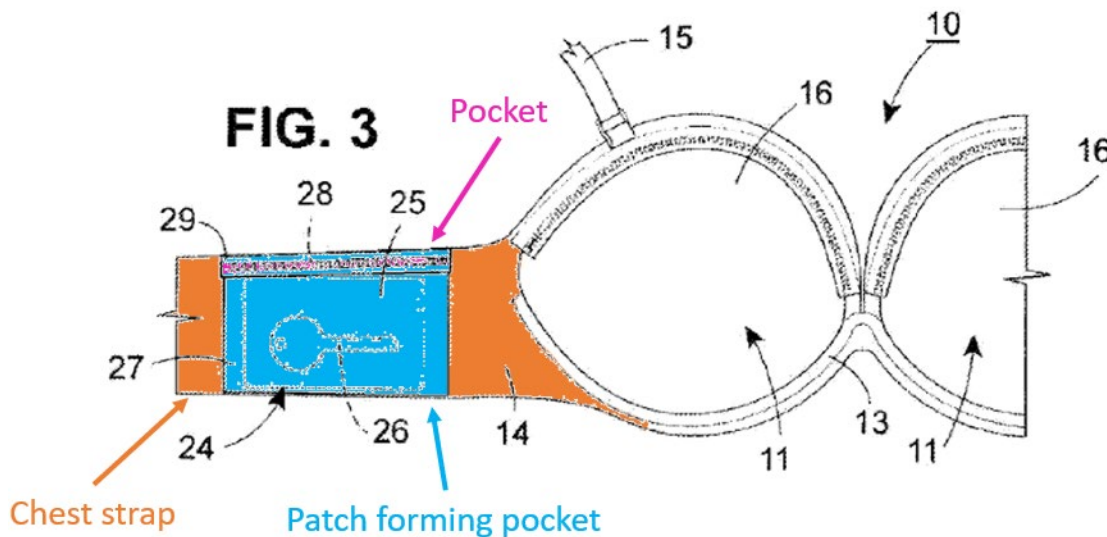


⁵ *Supra* note 4.

NIKE-1021 at Fig. 1.

- e. “a side patch on one of an inside or outside surface of the chest strap adjacent to at least one of the left cup and right cups,” [1E]

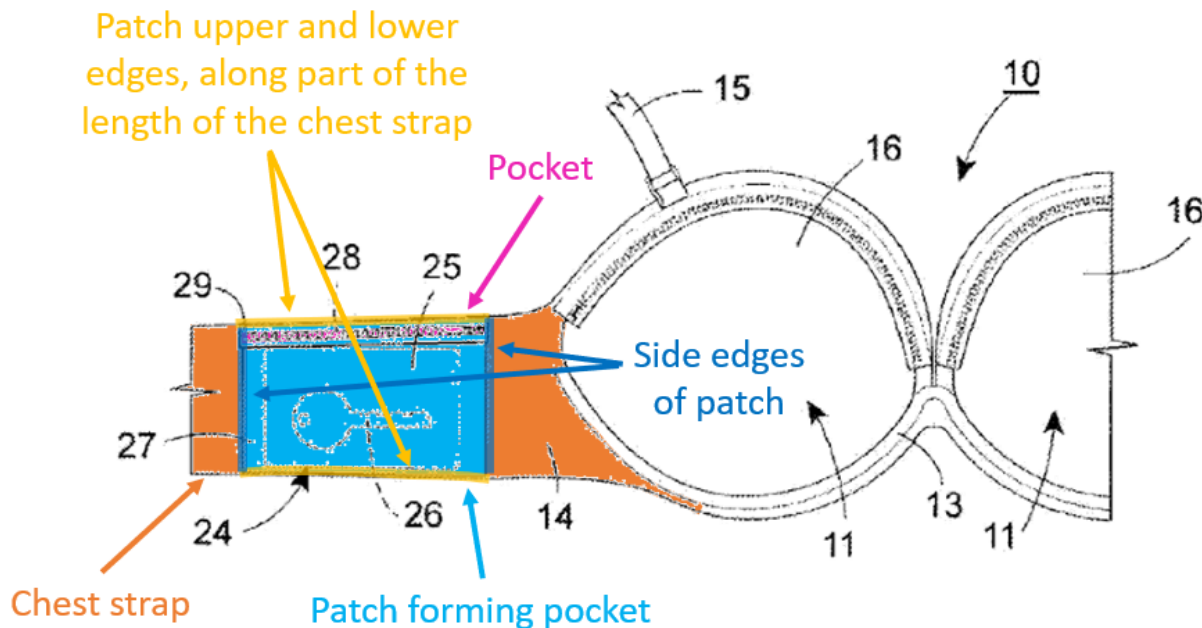
Handras discloses “each side panel 14 (only one of which is shown) of the bra 10 is provided with a pouch 24 for receiving a small item or items.” NIKE-1021 at [0028]. Handras further discloses the pocket is formed by a patch. *Id.* (the pouch 24 is formed by a panel 27 of fabric sewn or otherwise secured to the side panel.”)



NIKE-1021 at Fig 3. The patch is located on the inside of each side of the chest strap, adjacent to each of the left and right cups. *Id.* at Abstract (“Each side panel of the bra may also have a zippered pocket on the *inside*.”), [0011] (“the bra is fabricated with at least one side panel that *extends laterally of the pair of cups* and that is provided with a pouch for receiving a small item.”).

- f. “an upper edge of the side patch lying along the same edge line as at least a portion of a top edge of the chest strap,” [1F]**

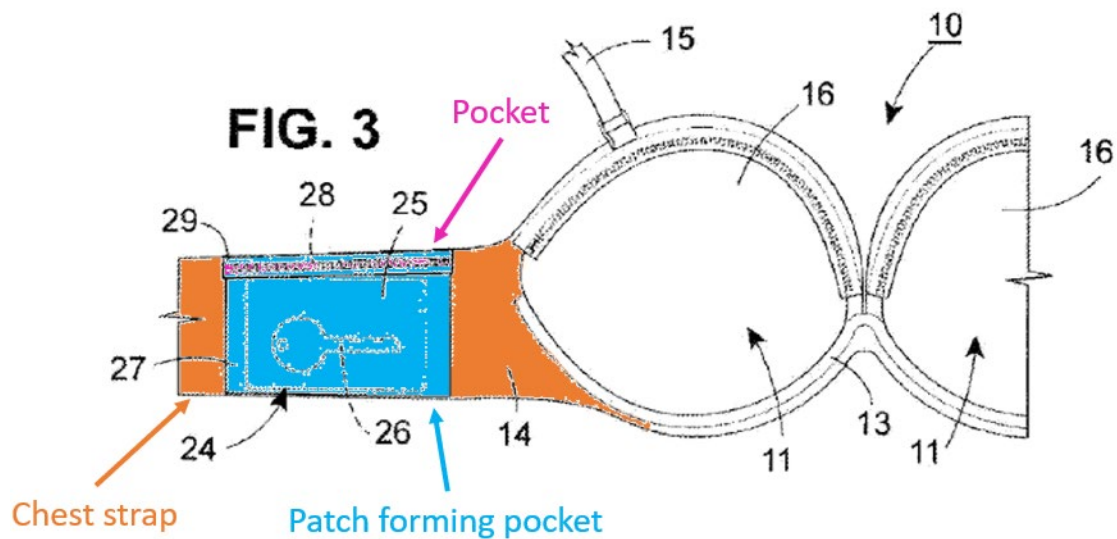
As illustrated below, the upper and lower edges of the patch are along part of the length of the chest strap, and the patch has side edges:



NIKE-1021 at Fig 3. Handras discloses the patches “sewn or otherwise secured to the side panel,” *i.e.*, “chest strap.” *Id.* at [0028]. Thus, a POSA would have understood each patch to have edges along the length of the chest strap. NIKE-1001 ¶1086.

- g. “the side patch forming an opening such that the side patch forms a pocket,” [1G]**

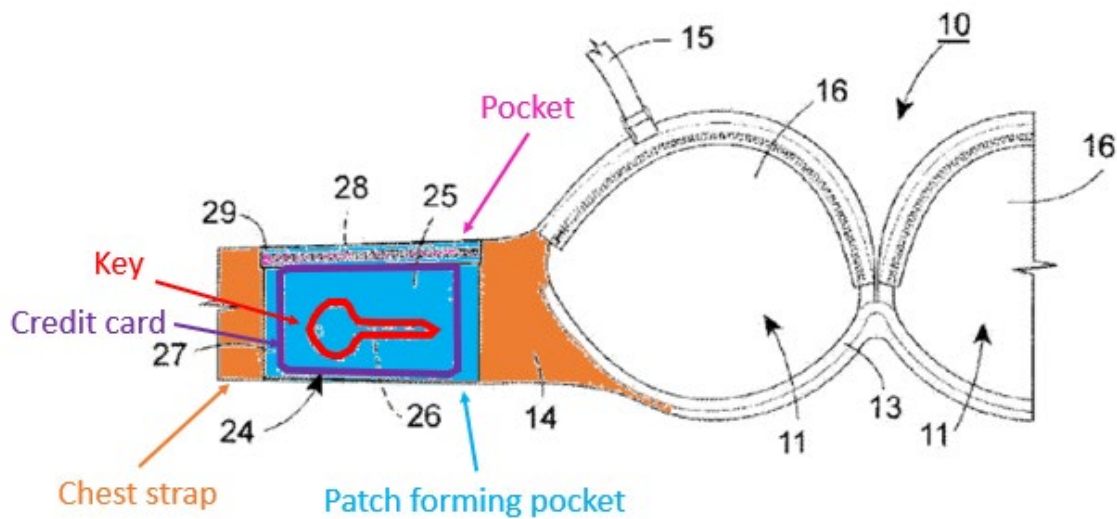
Handras discloses the pocket opening with a zipper along the upper edge of the rectangular patch:



NIKE-1021 at Fig. 3, [0028] (the pocket formed “by a panel 27 of fabric sewn or otherwise secured to the side panel 14, a zipper 28, and a flap 29 for covering over the zipper.”). A POSA would have understood a rectangular pocket with an upper opening to be sewn along its lower and side edges. NIKE-1001 ¶1087.

- h. “the opening capable of repeated receiving and removal of an item when being worn by the wearer;”
[1H]**

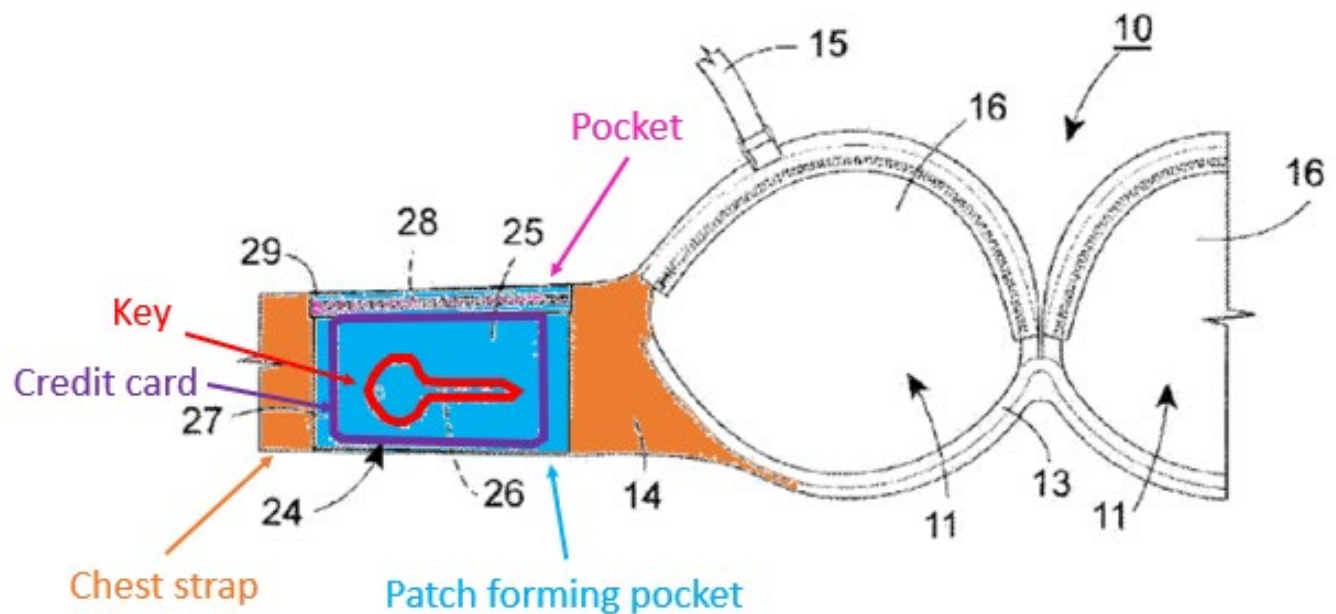
Handras contemplates the use of bra pockets “to hold items, such as, credit cards, car keys, cell phones and the like”:



NIKE-1021 at Fig. 3, [0002], [0028]. Moreover, a POSA would have understood that such a pocket is necessarily designed for temporarily holding items. NIKE-1001 ¶1088. Thus, a POSA would have understood that Vidai’s pockets—designed with a “zipper”—necessarily had openings “capable of repeated receiving and removal of an item” when worn. *Id.*

**i. “and an item removably positioned in the pocket.”
[11]**

Handras discloses “a small item or items, such as a credit card 25 and key 26” removably positioned in the pocket:



NIKE-1021 at Fig. 3, [0002], [0028]; *supra* § IX.C.1.h; NIKE-1001 ¶1089.

2. Claim 2

a. “The pocketed bra assembly of claim 1” [Preamble]

Handras discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.C.1.

b. “wherein the side patch comprises upper and lower edges along at least part of a length of the chest strap, and side edges.” [2A]

Handras discloses this limitation for the reasons described above for limitation 1F. *Supra* § IX.C.1.f.

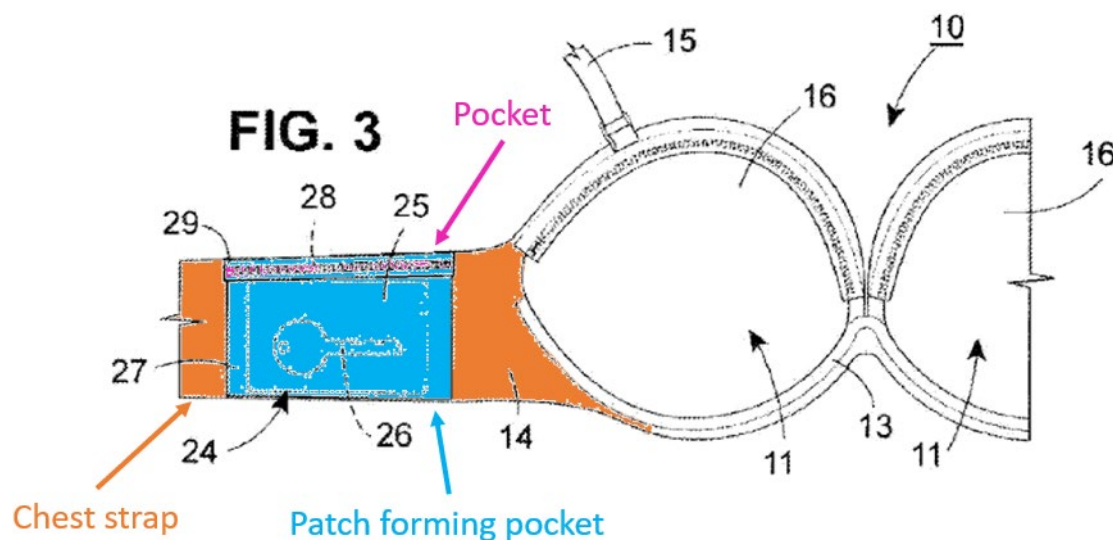
3. Claim 3

a. “The pocketed bra assembly of claim 2” [Preamble]

Handras discloses “[t]he pocketed bra assembly of claim 2” for the reasons described above. *Supra* § IX.C.2.

b. “further comprising stitching along the lower and side edges of the side patch.” [3A]

Handras discloses the pocket formed “by a panel 27 of fabric *sewn* or otherwise secured to the side panel 14, a zipper 28, and a flap 29 for covering over the zipper.” NIKE-1021 at [0028]. As illustrated below, Handras discloses the pocket opening with a zipper along the upper edge of the rectangular patch:



NIKE-1021 at Fig. 3. A POSA would have understood a rectangular pocket with an upper opening to be sewn along its lower and side edges. NIKE-1001 ¶1094.

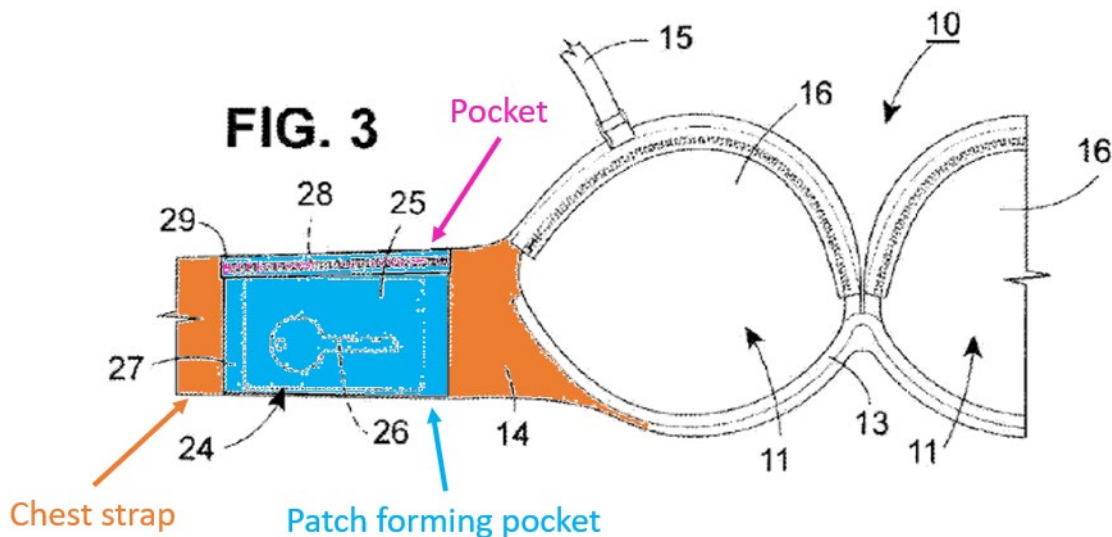
4. Claim 4

a. “The pocketed bra assembly of claim 3” [Preamble]

Handras discloses “[t]he pocketed bra assembly of claim 3” for the reasons described above. *Supra* § IX.C.3.

b. “wherein the stitching forms an upper opening to the pocket between the upper edge of the side patch and the top edge of the chest strap.” [4A]

As described above, Handras discloses a pocket with an upper opening formed by stitching between the upper edge of the side patch and the top edge of the chest strap:



NIKE-1021 at Fig. 3, [0028]; *supra* §§ IX.C.1.f, IX.C.2, IX.C.3; NIKE-1001 ¶1095.

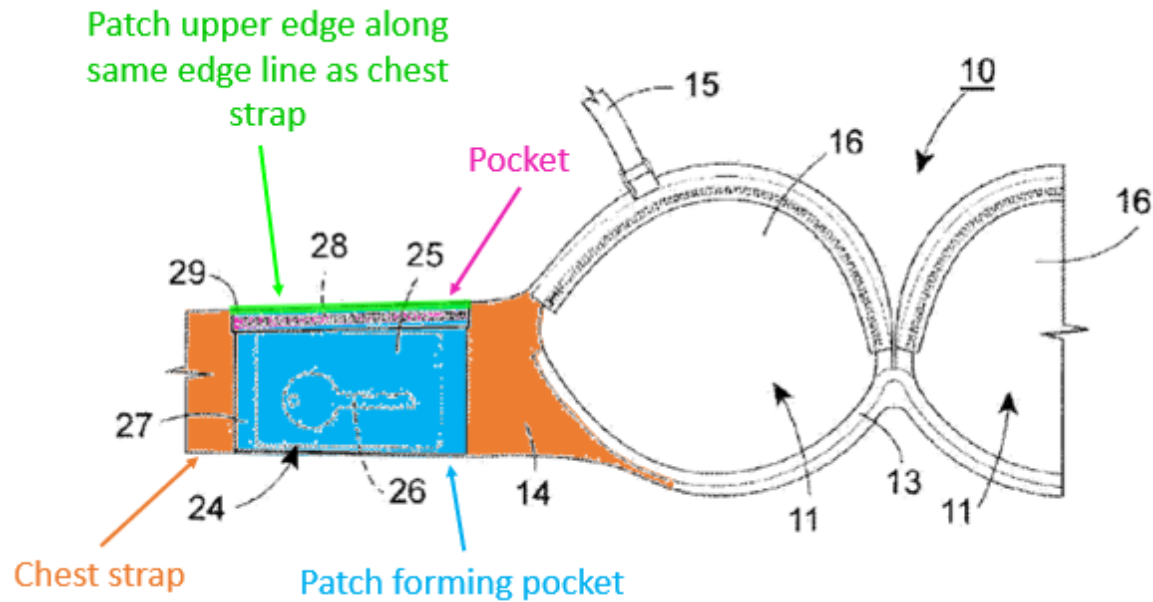
5. Claim 5

a. “The pocketed bra assembly of claim 1” [Preamble]

Handras discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.C.1.

b. “wherein the opening is an upper opening.” [5A]

As described above, Handras discloses a pocket with an upper opening:



NIKE-1021 at Fig. 3, [0028]; *supra* §§ IX.C.1.f, IX.C.2, IX.C.3; NIKE-1001 ¶1097.

6. Claim 6

a. “The pocketed bra assembly of claim 1” [Preamble]

Handras discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.C.1.

b. “wherein the item removably positioned within the pocket is a handheld electronic device.” [6A]

Handras explicitly contemplates the use of bra pockets “to hold items, such as, credit cards, car keys, cell phones and the like.” NIKE-1021 at [0002]. A cell phone is a “handheld electronic device.” Further, Handras contemplates the storage of a “small item or items, such as a credit card and key” in the side pockets. NIKE-1021 at [0028] (numbers omitted). A POSA would have understood “small items” to include *handheld* electronic devices. NIKE-1001 ¶1099.

To the extent this limitation is not expressly or inherently disclosed, Handras renders it obvious. A POSA would have understood that the presence of a pocket necessarily implies the use of the pocket for removably holding items, such as a handheld electronic device. NIKE-1001 ¶1100. A POSA would also have known that the use of handheld electronic devices was pervasive at the time of the alleged invention (2013 at the earliest) and would know that a user would use the pockets to hold handheld electronic devices. NIKE-1022 at 1:23–24 (“Cell phones, personal listening devices, and other mobile electronic devices have become popular in recent years.”); NIKE-1001 ¶1100. Further, a POSA would have understood the size of the patch to be a simple choice of design. NIKE-1001 ¶1100. Thus, a POSA would have been motivated to increase or decrease the size of the patch on Handras to accommodate any valuable, including a handheld electronic device for its storage. *Id.* It would have been well within the abilities of a POSA to make such a routine

modification changing the size of the patch, and a POSA would have had a high expectation of success in doing so. *Id.*; *Ethicon*, 2022 WL 1613188 at *4. This is simple technology and bras with pockets of various sizes and shapes were well known in the art. Indeed, Handras itself contemplates modifying the size of the bra’s pockets to meet different storage needs. NIKE-1021 at [0025]. Thus, it would be obvious to a POSA that Handras’s pockets—expressly designed to hold “small item[s]”—could hold, or be modified to hold, a “handheld electronic device.” NIKE-1001 ¶1100.

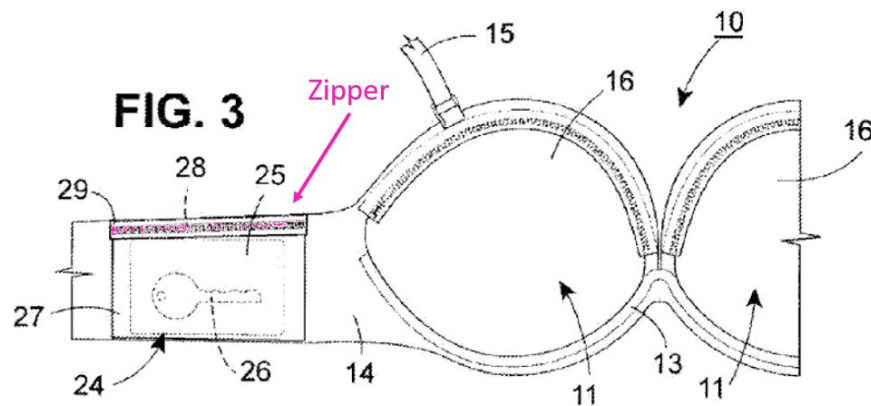
7. Claim 8

a. “The pocketed bra assembly of claim 1” [Preamble]

Handras discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.C.1.

**b. “wherein the side pocket further comprises a closure.”
[8A]**

Handras discloses pockets “utilizing zippers for quick and easy access and closure.” NIKE-1021 at [0031], [0011], [0028]. As illustrated below, the zipper 28 comprises a closure for the side pocket:



NIKE-1021 at Fig. 2, [0028] (“the pouch 24 is formed by a panel 27 of fabric sewn or otherwise secured to the side panel 14, a zipper 28 and a flag 29 for covering over the zipper 28.”); NIKE-1001 ¶1110.

8. Claim 12

a. “The pocketed bra assembly of claim 1” [Preamble]

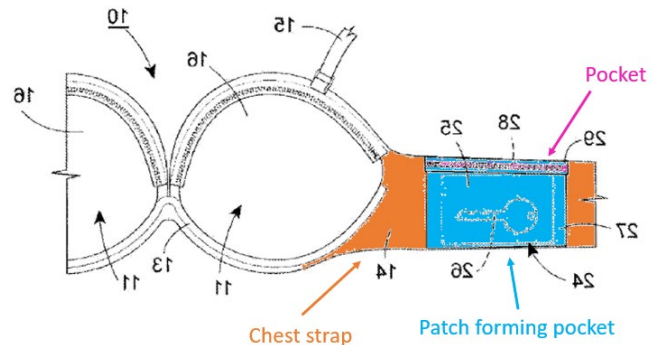
Handras discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.C.1.

b. “wherein each side pocket extends onto the adjacent cup, such that each pocket spans both a part of the chest strap and a part of the adjacent cup.” [12A]

In the MA Litigation, PO took the position that this limitation was met by the following bras:



See NIKE-1044 at 7 (left); NIKE-1045 at 7 (right). Though Petitioner does not agree that the products above meet this limitation, to the extent PO contends they do, so too does Handras:



NIKE-1021 at Fig 5 (flipped horizontally).

Alternatively, should PO contend that this limitation requires greater extension onto the cups (and therefore the products accused in the MA Litigation do not meet this limitation), Handras renders this limitation obvious. 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 bras and their designs, placements of the pockets, methods of forming a pocket, and methods of adhering the pockets to the bra. NIKE-1001 ¶1112. Moreover, a POSA would have known that different pocket shapes, sizes, and placements have known benefits and drawbacks. *Id.* ¶138. Given this knowledge, it would have been obvious to a POSA in light of Handras to extend the length of the pocket onto some portion of the bra cup to increase the amount of storage in the pocket. *Id.* Additionally, a POSA would have found it obvious to extend the pocket towards the front of the bra onto the cups, rather than backwards towards the wearer's back, for the wearer's ease of access to the pocket. *Id.* Such a design would increase comfort for the wearer, because extension of the pocket onto the cup enables the wearer to access the pocket without twisting the wearer's core. *Id.*

9. Claim 13

a. “The pocketed bra assembly of claim 1” [Preamble]

Handras discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.C.1.

- b. “further comprising a second patch positioned on the chest strap, the second patch forming an opening such that the second side patch forms a pocket.” [13A]**

As described above for limitation 1E, Handras discloses a second patch on the chest strap forming an opening such that the second side patch forms a pocket. *Supra* § IX.C.1.e.

10. Claim 15

- a. “The pocketed bra assembly of claim 1” [Preamble]**

Handras discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.C.1.

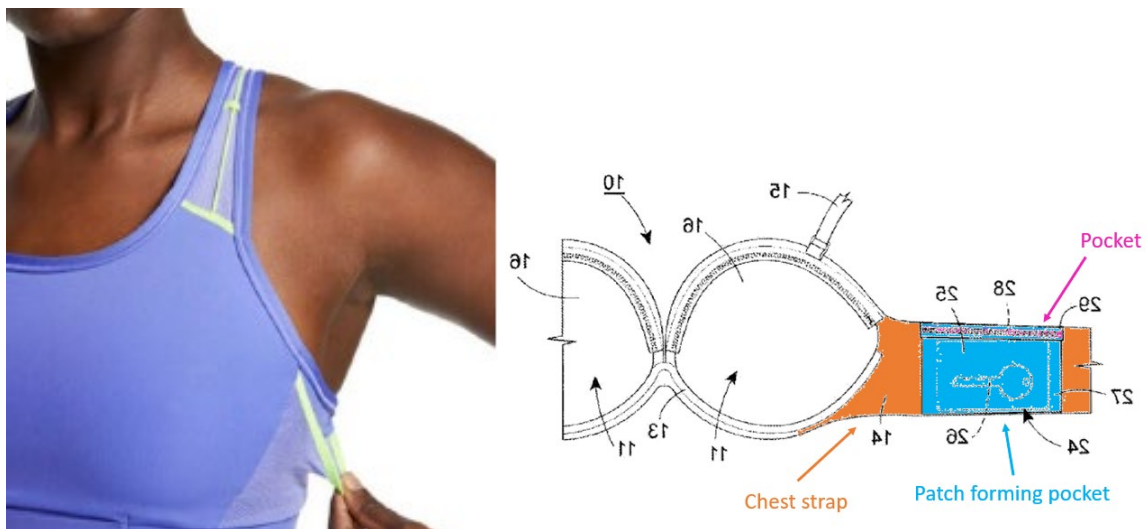
- b. “wherein a front side edge of the patch abuts an edge of the at least one of the left cup and the right cup, the pocket extending to the edge of the at least one of the left cup and right cup.” [15A]**

As described above for limitation 12B, Vidai discloses side pockets that extend onto the adjacent cup, such that each pocket spans both a part of the chest strap and a part of the adjacent cup, under PO’s apparent understanding. *Supra* § IX.A.12. Under PO’s apparent understanding, those same products also disclose this limitation. In the MA Litigation, PO also took the position that this limitation was met by the following bras:



See NIKE-1044 at 7–8 (left); NIKE-1045 at 7–8 (right).

Though Petitioner does not agree that the products above meet this limitation, to the extent PO contends they do, so too does Handras:



NIKE-1021 at Fig. 5 (flipped horizontally).

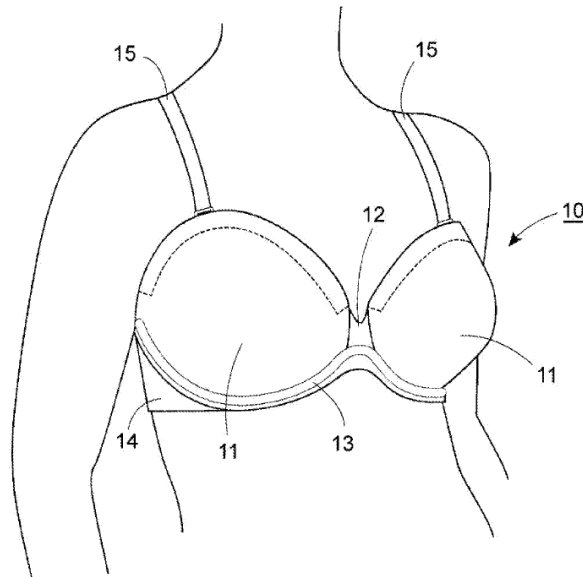
Alternatively, should PO contend that this limitation is not disclosed by Handras (and therefore the products accused in the MA Litigation do not meet this limitation), Handras renders this limitation obvious. Both bras and pockets have

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 bras and their designs, pocket placements, methods of forming a pocket, and methods of adhering the pockets to the bra. NIKE-1001 ¶1118. Moreover, a POSA would have known that different pocket shapes, sizes, and placements have known benefits and drawbacks. *Id.* Given this knowledge, it would have been obvious to a POSA in light of Handras to slightly extend the length of the pocket to abut the edge of a bra cup (or beyond the edge of the bra cup) to increase the amount of storage in the pocket. *Id.* Additionally, a POSA would have found it obvious to extend the pocket towards the front of the bra onto the cups, rather than backwards towards the wearer's back, for ease of access to the pocket. *Id.* Such a design would increase comfort for the wearer, because extension of the pocket toward the cup, as opposed to the wearer's back, enables the wearer to access the pocket without twisting the wearer's core. *Id.*

11. Claim 16

a. “A chest covering comprising:” [16A]

To the extent the preamble is limiting, Handras discloses this limitation. Handras discloses “a bra with one or more storage pockets”:



NIKE-1021 at Fig. 1, [0001].

b. “a strap assembly including a chest strap;” [16B]

Handras discloses this limitation for the reasons described above for limitation

1B. *Supra* § IX.C.1.b.

c. “a left cup and a right cup, each cup being an area to receive a breast of a wearer and having inside and outside surfaces,” [16C]

Handras discloses this limitation for the reasons described above for limitation

1C. *Supra* § IX.C.1.c.

d. the strap assembly being attached to the cups whereby the strap assembly holds the cups to a wearer, with the chest strap extending from the left cup towards the wearer's back and extending from the right cup towards the wearer's back;” [16D]

Handras discloses this limitation for the reasons described above for limitation

1D. *Supra* § IX.C.1.d.

- e. **“a side patch on one of an inside or outside surface of the chest strap adjacent to at least one of the left cup and right cups, the side patch having upper and lower edges along at least part of a length of the chest strap, and side edges,” [16E]**

Handras discloses this limitation for the reasons described above for limitation 1E and 1F. *Supra* §§ IX.C.1.e, IX.C.1.f.

- f. **“the side patch upper edge lying along a same edge line as at least a portion of a top edge of the chest strap,” [16F]**

Handras discloses this limitation for the reasons described above for limitation 1F. *Supra* § IX.C.1.f.

- g. **“the side patch forming an opening such that the side patch forms a pocket,” [16G]**

Handras discloses this limitation for the reasons described above for limitation 1G. *Supra* § IX.C.1.g.

- h. **“the opening capable of repeated receiving and removal of an item when being worn by the wearer.” [16H]**

Handras discloses this limitation for the reasons described above for limitation 1H. *Supra* § IX.C.1.i.

12. Claim 17

- a. **“The chest covering of claim 16” [Preamble]**

Handras discloses “[t]he chest covering of claim 16” for the reasons described above. *Supra* § IX.C.12.

b. “wherein the opening is an upper opening.” [17A]

Handras discloses this limitation for the reasons described above for claim 5.

Supra § IX.C.5.b.

13. Claim 18

a. “The chest covering of claim 16” [Preamble]

Handras discloses “[t]he chest covering of claim 16” for the reasons described above. *Supra* § IX.C.12.

b. “further comprising stitching along the lower and side edges of the patch.” [18A]

Handras discloses this limitation for the reasons described above for claim 3. *Supra* § IX.C.3.b.

D. Ground 2B: Claim 7 is Unpatentable Over Handras in view of Spagna or Glass.

1. Claim 7

a. “The pocketed bra assembly of claim 1” [Preamble]

Handras discloses “[t]he pocketed bra assembly of claim 1” for the reasons described above. *Supra* § IX.C.1.

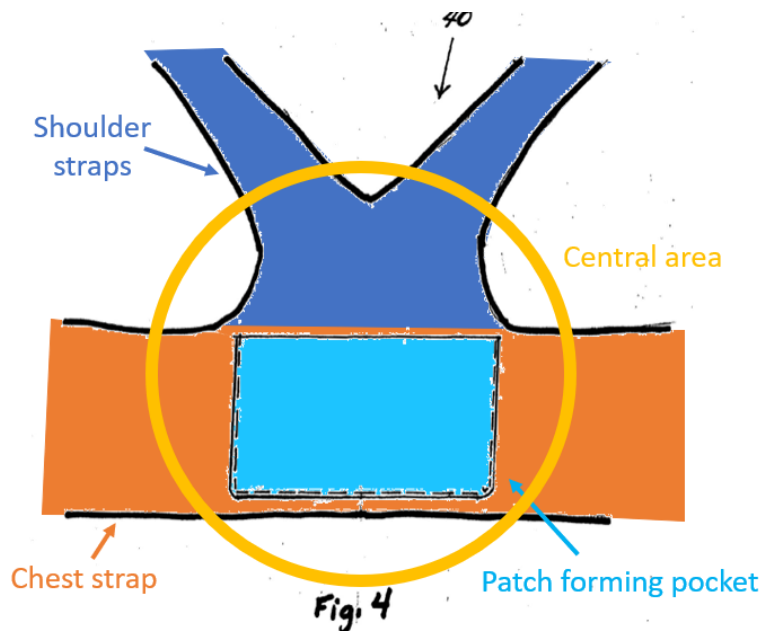
b. “wherein the strap assembly further comprises two shoulder straps,” [7A]

Handras discloses this limitation for the reasons described above for limitation 1B. *Supra* § IX.C.1.b.

c. “and a central area at a back of the strap assembly opposite to the left and right cups, the two shoulder

straps and chest strap joining together at the central area,” [7B]

Handras in combination with either Spagna or Glass renders this limitation obvious. Handras discloses a strap assembly comprising a chest strap and two shoulder straps, as described above. *Supra* § IX.C.1.b. Spagna discloses a “central area” formed where the back portion of the shoulder straps join together:



NIKE-1028 at Fig. 4, [0009] (pocket “located at the center back of the women’s brassiere.”), [0020]. Glass likewise discloses a “central area” on the back with a pocket:

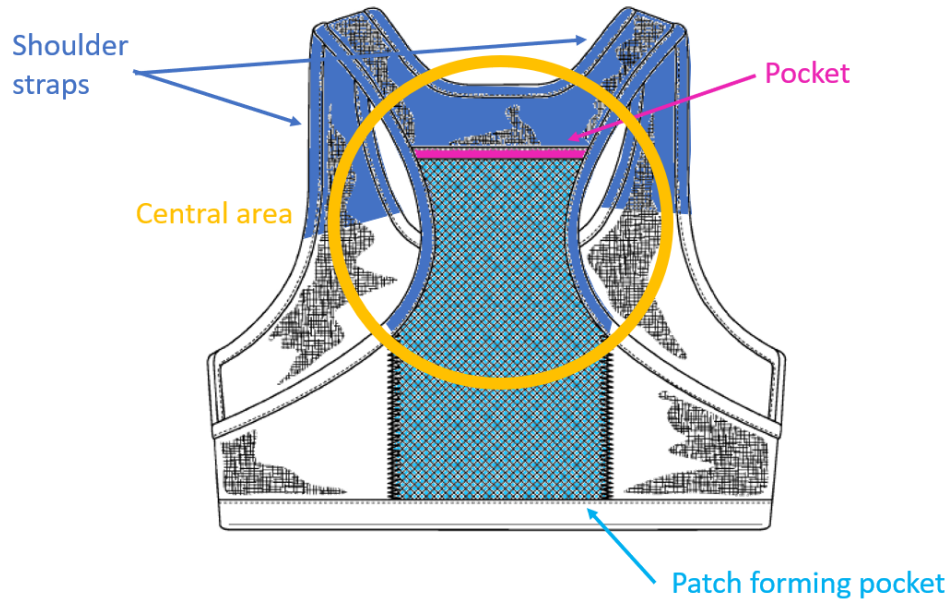


FIG. 2

NIKE-1029 at Fig. 2.

A POSA would have found it obvious to modify the invention of Handras to include straps that come together on the back, as taught by Spagna or Glass. NIKE-1001 ¶1104. A POSA would have understood this configuration of shoulder straps, sometimes known as a “racerback” configuration, to be popular in sports bras. *Id.* In designing a bra with pockets, a POSA would have been motivated to look to the prior art references disclosing bras with pockets—including Handras, Spagna, and Glass specifically—and select preferable elements from each disclosure to construct their desired pocketed bra. *Id.* One advantage of Handras’s bra is that it has pockets on the side of the bra that are easily accessible to the wearer. NIKE-1021 at Fig. 3, Abstract, [0002], [0011], [0028]. At the same time, Spagna and Glass’s bras have

an additional pocket on the back and appeal to customers interested in sports bras. NIKE-1001 ¶1104; NIKE-1029 at Title (“Sports Bra with Water Bottle Pocket on Back”), Description (“sports bra with water bottle pocket”), Figs. 1–5; NIKE-1028 at Abstract, [0006], [0010]. As a result, a POSA would have been motivated to design a bra that took advantage of the benefits provided by each of Hnadrás’s and either Spagna or Glass’s bras. NIKE-1001 ¶1104.

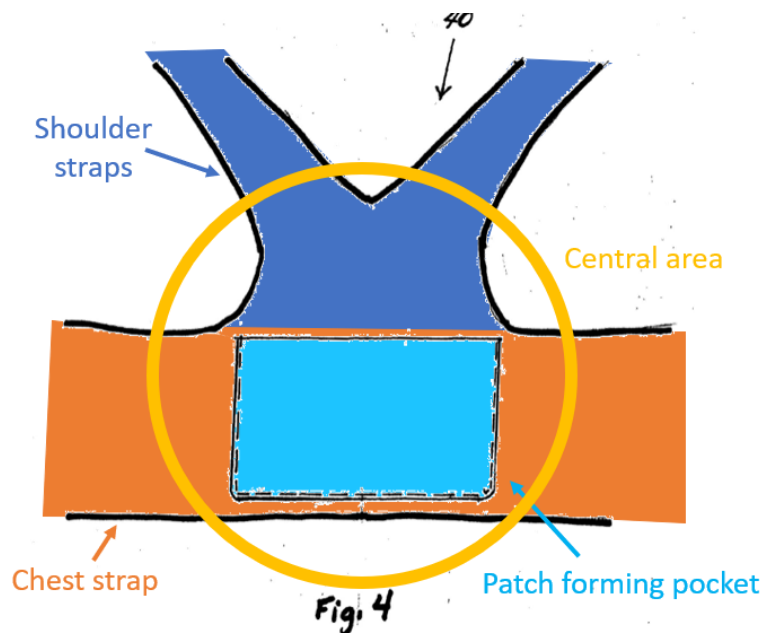
Additionally, a POSA would have understood that bras are meant to serve a diverse population with differing preferences, and that it would be commercially beneficial to provide consumers with a variety of options to meet those different preferences. *Id.* ¶1105. Indeed, Handrás expressly states that having “an aesthetically pleasing design” is an important consideration. NIKE-1021 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. NIKE-1001 ¶1105.

A POSA would have expected to have a high likelihood of success with this combination. *Id.* ¶1106. Handrás, Spagna, and Glass are all bras with pockets for storing valuables. *See* NIKE-1021 at Fig. 3, Abstract, [0002], [0011], [0028]; NIKE-1028 at Abstract, [0002], [0009]; NIKE-1029 at Fig. 1, Description; NIKE-1001 ¶1106. And each of the elements—*e.g.*, straps and pockets—would perform the same predictable function disclosed in the prior art. NIKE-1001 ¶1106. Any work

needed to combine the elements taught by Handras, Spagna, and Glass would therefore be nothing more than routine modifications well within the abilities of a POSA. *Id.*; *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).

d. “and further comprising a back pocket on the central area.” [7C]

As described above, Spagna discloses a “central area” formed where the back portion of the shoulder straps join together, with a pocket “located at the center back of the women’s brassiere”:



NIKE-1028 at Fig. 4, [0009], [0020]. Glass likewise discloses a “central area” on the back with a pocket:

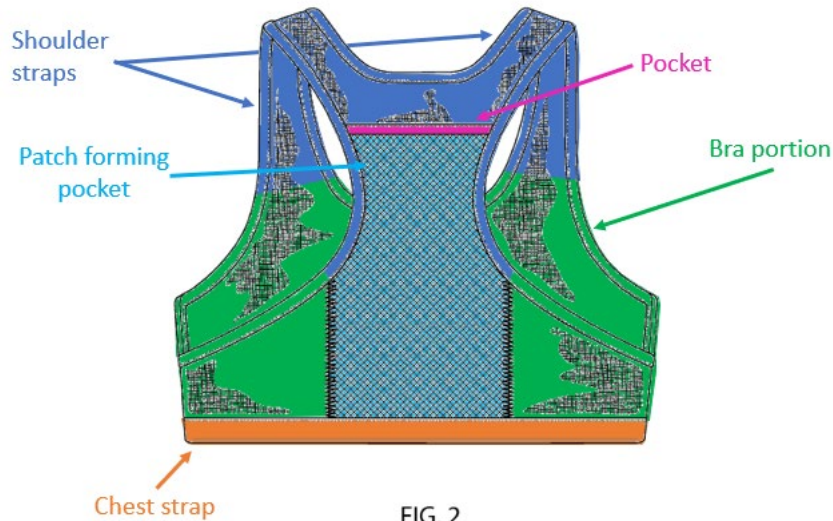


FIG. 2

NIKE-1029 at Fig. 2. And as described above, a POSA would have been motivated to modify Handras to include the central area and back pocket taught by Spagna and Glass and would have had a high expectation of success in making the modification. *Supra* § IX.C.1.c.

E. 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, the prior art is saturated with bras with pockets, making the alleged invention of the '551 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 ’551, 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 ’551 and would relieve the District Court of the need to continue with the ’551 in the MA Litigation. Petitioner will likely move to stay the MA Litigation at least insofar as it relates to the ’551 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 21–23 (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 very 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. *See, e.g., NanoCollect 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

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. The primary references Vidai, Spagna, and Glass were not cited or considered during prosecution of the '551. *See* NIKE-1016. While *Handras* was 1 of 41 references cited by the Examiner during prosecution (NIKE-1016, at 66), 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). The only rejection on the merits was an obviousness type double patenting rejection (NIKE-1016 at 62) and the examiner did not provide any reasons for allowance (NIKE-1016 at 97). Under the *Advanced Bionics* step 2 and *Becton, Dickinson* factors (c), (e), and (f), Sections IX.C–IX.D shows that the Office made a material error by not using *Handras* in a rejection of any claims. The Examiner's silence with respect to *Handras* before allowing the '551 claims reflects error and oversight. Further, the grounds presented herein are not cumulative of any prior art rejection made during prosecution of the '551.

XI. CONCLUSION

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

Date: July 17, 2024

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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 10,924 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).

/s/ W. Todd Baker

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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 was sent on July 17, 2024, via Federal Express® directed to the Patent Owner at the correspondence address of record:

CALDWELL INTELLECTUAL PROPERTY LAW
20 Clarendon St 59th Floor
Boston, MA 02116

A courtesy copy was also served by electronic mail on PO's counsel of record in the following related matter:

SherryWear, LLC v. Nike, Inc., Case No. 1:23-cv-11599 (D. Mass.)

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