UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NIKE, INC.,

Petitioner

v.

SHERRYWEAR LLC,

Patent Owner.

Case No. IPR2024-01129

U.S. Patent No. 10,869,510

PETITION FOR *INTER PARTES* REVIEW

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c. "the strap assembly joining the chest strap and shoulder straps at a central area adapted to be positioned on a back of a wearer when worn;" l [1C] 48

d. "a bra portion comprising left and right cups, each cup being an area to receive a breast of wearer, the strap assembly attached to the bra portion;" [1D] 48

e. "and a back pocket formed entirely of stretchable fabric positioned on the central area," [1E] 50

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5. Claim 7 57

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b. "wherein the opening is formed adjacent to a top of the patch." [7A] 57

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

Exhibit No.	Description[1]
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	RESERVED
NIKE-1014	Certified Prosecution File History for U.S. Patent No. 10,244,800
NIKE-1015	RESERVED
NIKE-1016	RESERVED

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

Exhibit No.	Description[1]
NIKE-1017	Certified U.S. Patent No. 10,869,510 (filed Jan. 29, 2019)
NIKE-1018	Certified Prosecution File History for U.S. Patent No. 10,869,510
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	RESERVED
NIKE-1022	U.S. Patent No. 7,753,759 (filed Sept. 29, 2008) ("Pintor")
NIKE-1023	RESERVED
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	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	U.S. Patent No. 6,626,733 (filed Mar. 14, 2003) ("Knutson")
NIKE-1032	U.S. Patent Application Publication No. 2010/0000003 (filed May 5, 2009) ("O")
NIKE-1033	U.S. Patent No. 7,396,274 (filed May 16, 2006) ("Wiegmann")

Exhibit No.	Description[1]
NIKE-1034	*Early Brassiere*, Google Arts & Culture, https://artsandculture.google.com/asset/early-brassiere/-gGoCcJIsFqA1g?hl=en.
NIKE-1035	Rebecca Unsworth, *Hands Deep in History: Pockets in Men and Women's Dress in Western Europe, c. 1480-1630*, THE COSTUME SOCIETY (Edinburgh Univ. Press 2017), https://www.euppublishing.com/doi/epub/10.3366/cost.2017.0022.
NIKE-1036	Derek Gentile, *A comfortable convenience: County woman creates, patents the 'pocketbra'*, 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	Dimity McDowell, *The Top Choices A women's guide to the best jog bras*, 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
NIKE-1045	RESERVED

Exhibit No.	Description[1]
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 pocket bra comprising:"
[1B]	"a strap assembly including a chest strap and shoulder straps,"
[1C]	"the strap assembly joining the chest strap and shoulder straps at a central area adapted to be positioned on a back of a wearer when worn;"
[1D]	"a bra portion comprising left and right cups, each cup being an area to receive a breast of wearer, the strap assembly attached to the bra portion;"
[1E]	"and a back pocket formed entirely of stretchable fabric positioned on the central area,"
[1F]	"the back pocket having an opening that is biased in a closed position at rest."
Dependent Claim 2	
	"The pocket bra of claim 1"
[2A]	"wherein the bra is a sports bra."
Dependent Claim 4	
	"The pocketed bra of claim 1"
[4A]	**"**wherein the back pocket is formed by a patch connected to the back portion of the at least one of the chest strap and shoulder straps by stitching about a part of a perimeter of the patch, a gap in the stitching leaving a portion of the perimeter of the patch unattached, thereby forming the opening providing access to a pocket interior portion formed by the patch."
Dependent Claim 5	
	"The pocket bra of claim 4"

Limitation Identifier	Text of Claim
[5A]	"further comprising an internal pocket connected about a perimeter of the opening, the internal pocket defining the pocket interior and formed such that it is positioned between the patch and the one of the back portion of the chest strap and the shoulder straps."
Dependent Claim 7	
	"The pocket bra of claim 1"
[7A]	"wherein the opening is formed adjacent to a top of the patch."
Dependent Claim 9	
	"The pocket bra of claim 1"
[9A]	"further comprising an item removably positioned in the back pocket."
Dependent Claim 11	
	"The pocketed bra of claim 1"
[11A]	"wherein the opening provides access to a pocket interior."

I. INTRODUCTION

Nike, Inc. ("Petitioner") respectfully requests *inter partes* review ("IPR") of claims 1, 2, 4, 5, 7, 9 and 11 (the "Challenged Claims") of U.S. Patent No. 10,869,510 (the "'510"). (NIKE-1017)

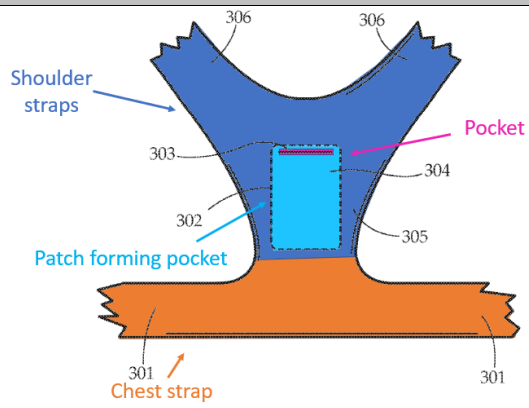
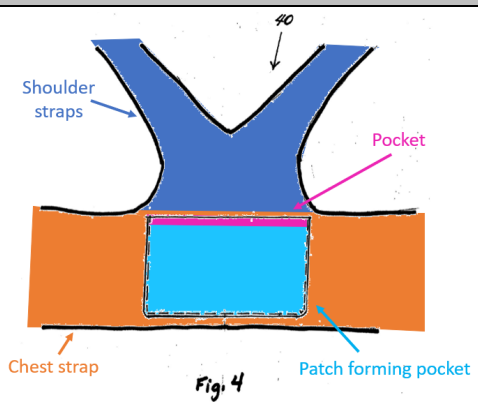
The '510 claims a bra with a pocket on the back. This is not novel: bras and pockets have been known for ***centuries***. For example, a bra excavated from a castle in Austria was estimated to date back to the late 14th to second half of the 15th century:



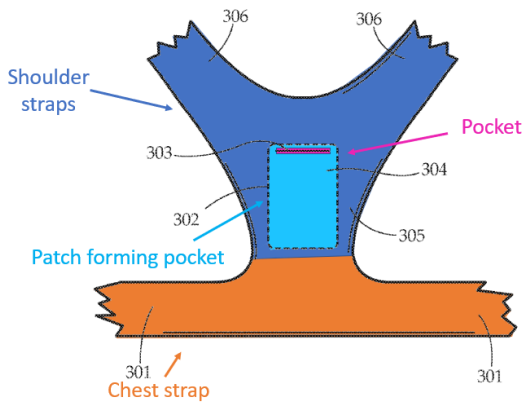
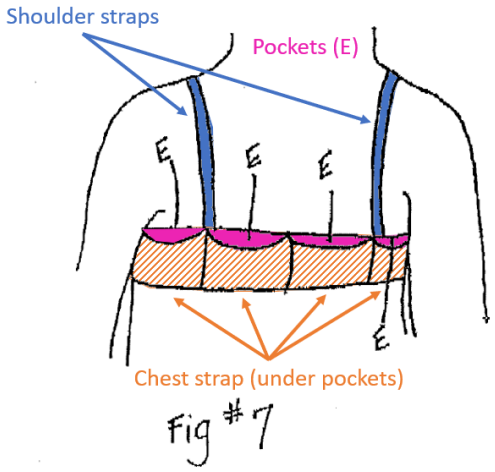
NIKE-1034.

Pockets and their use in combination with clothing, have similarly been long understood—pockets on pants, shirts, jackets, and other accessories 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 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 that purpose decades before the '800. NIKE-1028; NIKE-1030; NIKE-1029; *see also generally* NIKE-1031 (prior art sports bra with back pocket); NIKE-1022 (prior art bra with pockets on the breast cups); NIKE-1020 (same); NIKE-1019 (same); NIKE-1025 (same); 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." NIKE-1036.

For example, Spagna, which was filed in 2006, discloses a bra with a back pocket and discloses the '510:

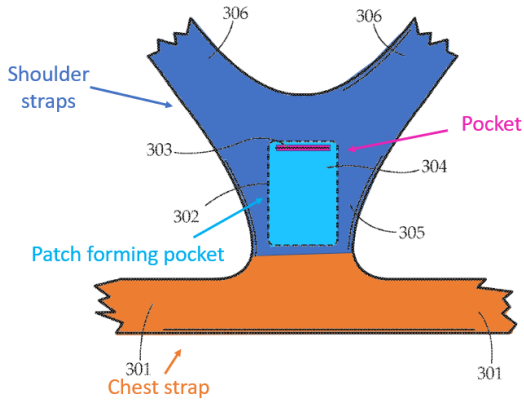
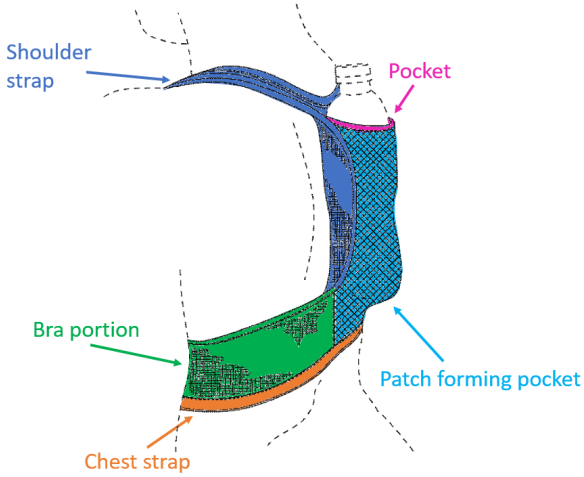
’800	Spagna
	

NIKE-1017 at Fig. 13; NIKE-1028 at Fig. 4.[2] Rose and Glass similarly disclose the ’510:

’800	Rose
	

NIKE-1017 at Fig. 13; NIKE-1030 at Fig. 7.

[2] All annotations are added, unless otherwise noted.

’800	Glass
	

NIKE-1017 at Fig. 13; NIKE-1031 at Fig. 1.

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 ’510 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
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todd.baker@kirkland.com Postal and Hand-Delivery Address: KIRKLAND & ELLIS LLP 1301 Pennsylvania Avenue, N.W. Washington, D.C. 20004 Telephone: (202) 389-5000 Facsimile: (202) 389-5200	noah.frank@kirkland.com Postal and Hand-Delivery Address: KIRKLAND & ELLIS LLP 200 Clarendon Street Boston, MA 02116 Telephone: (617) 385-7500 Facsimile: (617) 385-7501

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 7 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 '510 Patent is available for IPR and that Petitioner is not barred or estopped from requesting IPR of the '510 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 '510 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)):

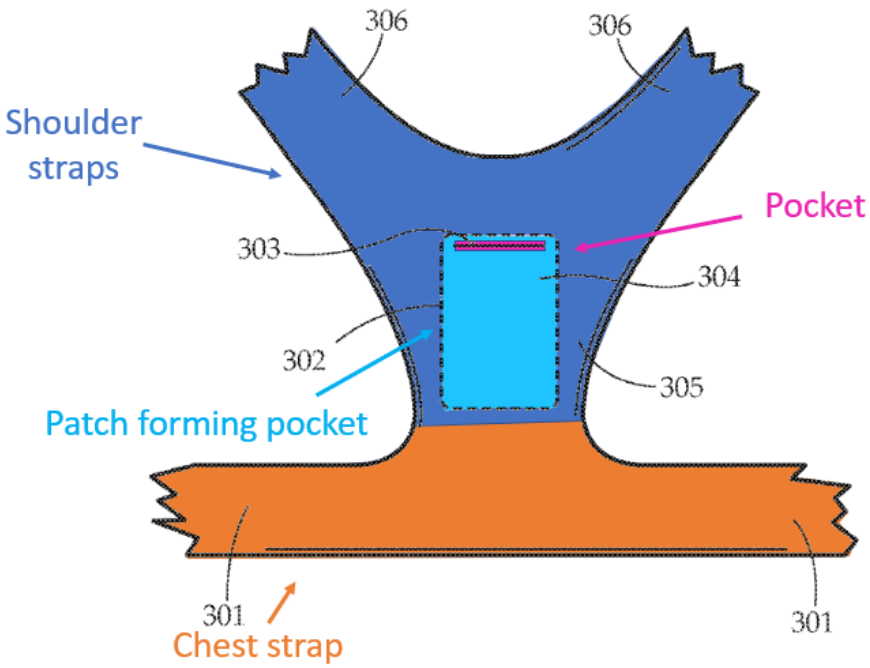
Claims	Basis
1, 2, 4, 5, 7, 9, 11	Unpatentable pursuant to 35 U.S.C. § 103 over Spagna
1, 2, 4, 5, 7, 9 11	Unpatentable pursuant to 35 U.S.C. § 103 over Rose
1, 2, 4, 5, 7, 9 11	Unpatentable pursuant to 35 U.S.C. § 103 over Glass

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

VI. SUMMARY OF THE ’510 PATENT

A. Technical Overview of U.S. Patent No. 10,869,510

The ’510 issued on Dec. 22, 2020, from U.S. Application No. 16/260,246, a continuation filed on Jan. 29, 2019. While the specification and most of the figures of the ’510 disclose pockets on the breast cups and side of the chest strap, the claims are directed towards a bra with a back pocket, as illustrated below:



NIKE-1017 at Fig. 13. Specifically, the '510 discloses the bra as comprising "a strap assembly including a chest strap and shoulder straps." *Id.* at Cl. 1. Further, the strap assembly is connected to a "bra portion comprising left and right cups." *Id.* The claimed back pocket is formed of "stretchable fabric" and is "biased in a closed position at rest." *Id.*

The '510 has 16 claims. Seven of those claims—independent Claim 1 and dependent Claims 2, 4, 5, 7, 9, and 11—are challenged here. As shown below, Spagna, Rose, and Glass all disclose back pockets that are made of "stretchable fabric" and are "biased in the closed position at rest," rendering the Challenged Claims obvious.

B. Effective Priority Date of the Challenged Claims

The ’510 issued on December 22, 2020, from the ’246 Application filed on Jan. 29, 2019. The ’510 purports to be a continuation-in-part of U.S. Patent No. 10,219,551 (“the ’551”), which purports to be a continuation of U.S. Patent No. 10,244,800 (“the ’800”), which purports to be a continuation 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. The ’072 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 ’510’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 ’510 require “a back pocket formed entirely of stretchable fabric positioned on the central area.” NIKE-1017at Cl. 1. The applicant added Figure 13, purportedly disclosing this, for the first time in the ’016:

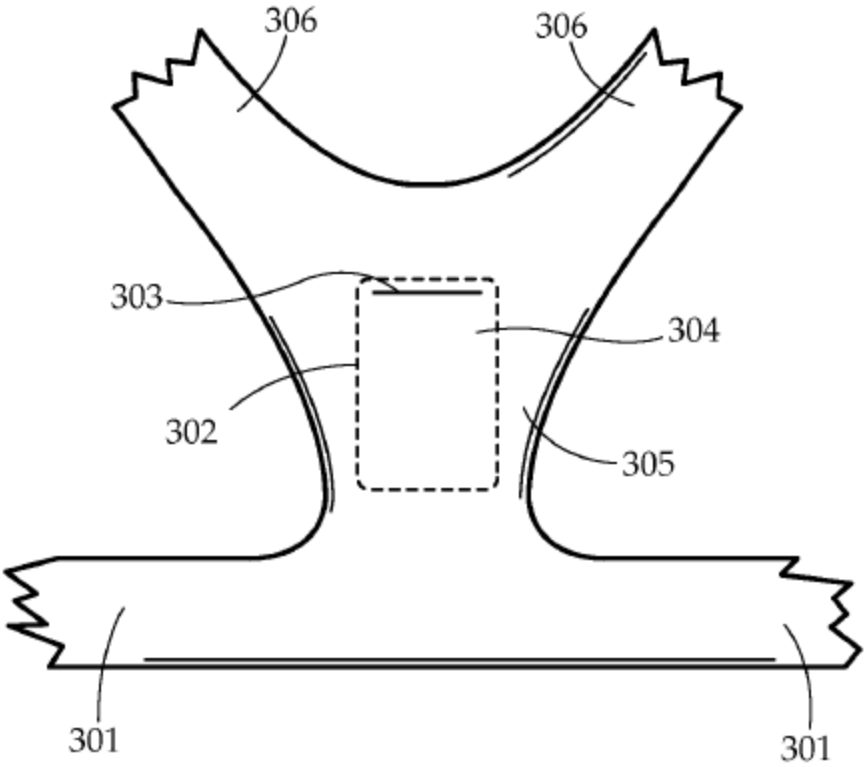


Fig. 13

NIKE-1009 at Fig. 13.

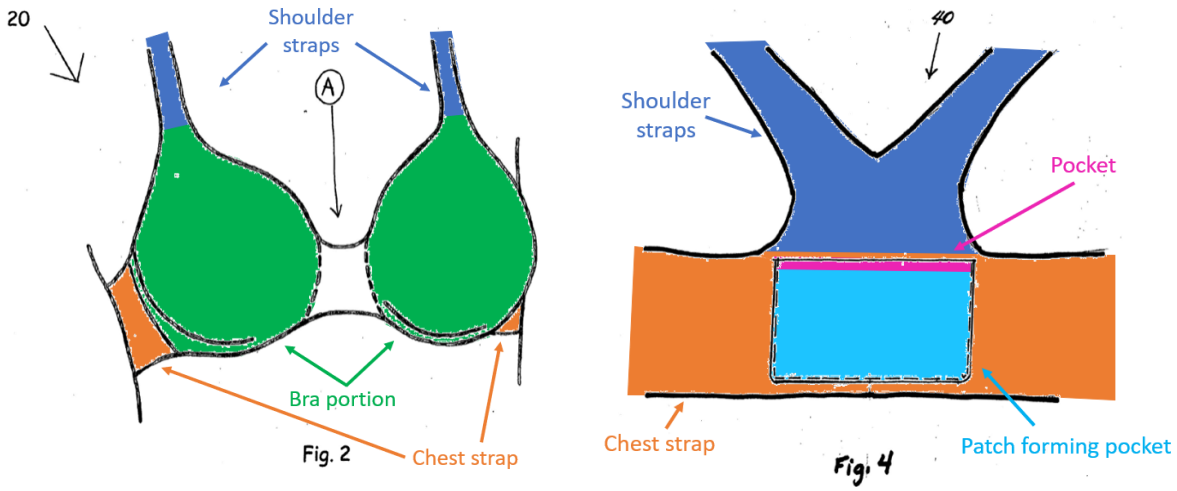
Thus, such disclosure constitutes new matter, and the ’510 is at the earliest only enittled to the priority of the filing date of the ’016—February 5, 2015. NIKE1009at Cover; NIKE-1049; *Regents of the Univ. of Minnesota v. Gilead Scis., Inc.*, 61 F.4th 1350, 1356 (Fed. Cir. 2023) (“each application 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. 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, a woman may utilize an automated medication dispensing device while keeping the device safe from accidental damage and allowing the woman to be extraordinarily active, all the while reducing the outward appearance of the device.").

2. Spagna Is Prior Art to the '510

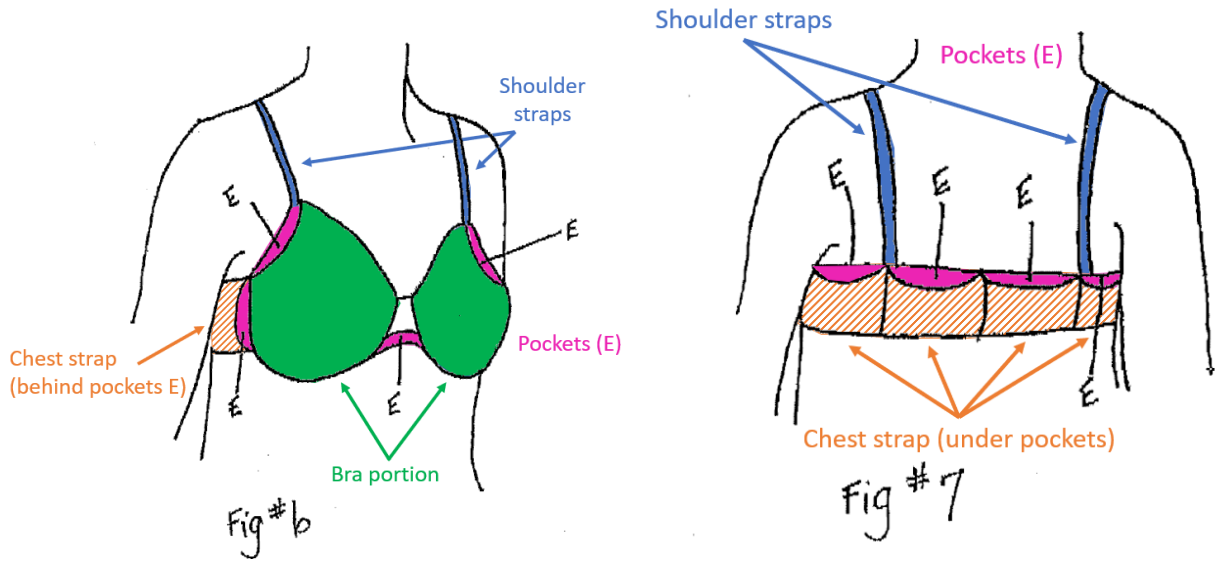
Spagna is prior art to the '510 under pre-AIA 35 U.S.C. §§ 102(b) or (e) and AIA 35 U.S.C. § 102(a). Spagna is a U.S. Patent Application Publication, originally filed June 21, 2006, and published December 27, 2007, which is more than one year before the '510's earliest possible priority date. The '510's named inventor is not named as an inventor on Spagna. Spagna is therefore prior art to the '510 under at least 35 U.S.C. §§ 102(b) and (e). Spagna was not cited or considered during prosecution of the '510.

B. Rose

1. Overview of Rose

Rose published on September 15, 2011 from U.S. Application No. 13/040,620, originally filed March 4, 2011. *See* NIKE-1030. Rose generally

relates to a brassiere with a set of "clear latex pockets on the frontal portions of the breast cups and the back band of the brassiere." *Id.* at [0037].



NIKE-1030 at Figs. 6–7. The pockets E have upper openings, *id.* at [0037], and are designed to hold "inserts made of, but not limited to, plastic [and] fabric" to change the outer appearance of the bra. *Id.*

2. Rose Is Prior Art to the '510

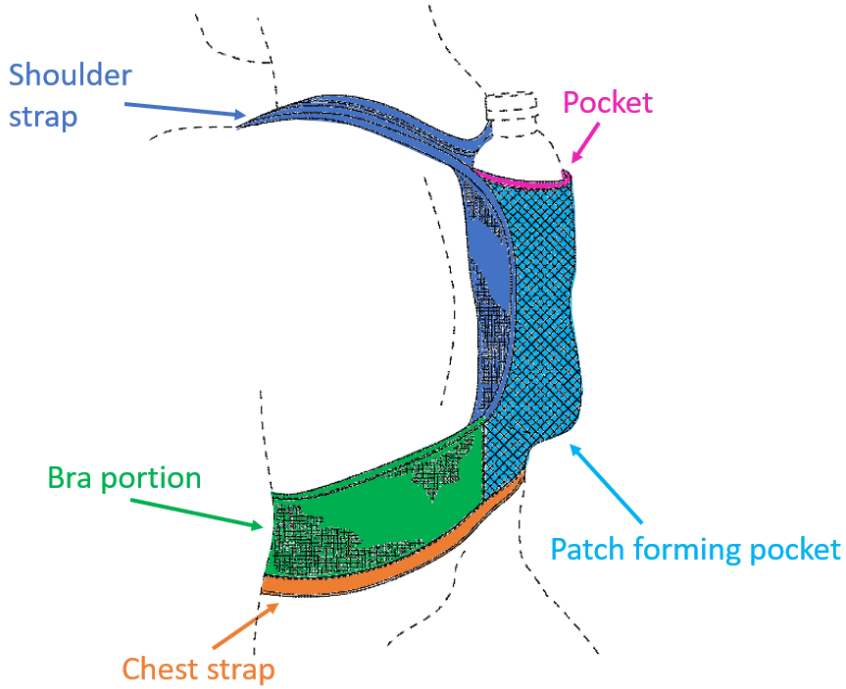
Rose is prior art to the '510 under pre-AIA 35 U.S.C. §§ 102(b) or (e) and AIA 35 U.S.C. § 102(a)(2). Rose is a U.S. Patent Application Publication, originally filed March 4, 2011, and published September 15, 2011, which is before the '510's earliest possible priority date. 35 U.S.C. § 122(b); MPEP § 901.03 (stating a U.S. patent application publication is considered prior art as of its earliest effective U.S. filing date). The '510's named inventor is not named as an inventor

on Rose. Rose is therefore prior art to the '510 under at least 35 U.S.C. § 102(e). Rose was not cited or considered during prosecution of the '510.

C. Glass

3. 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:



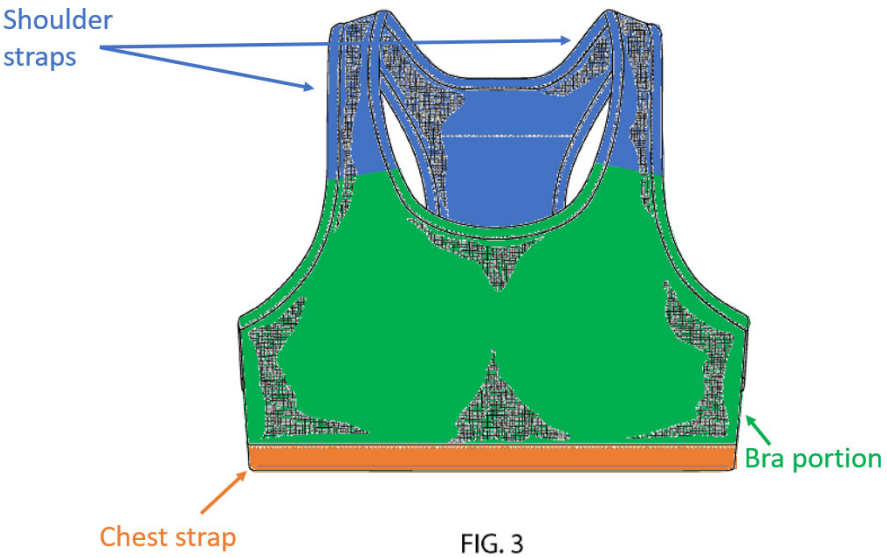


FIG. 3

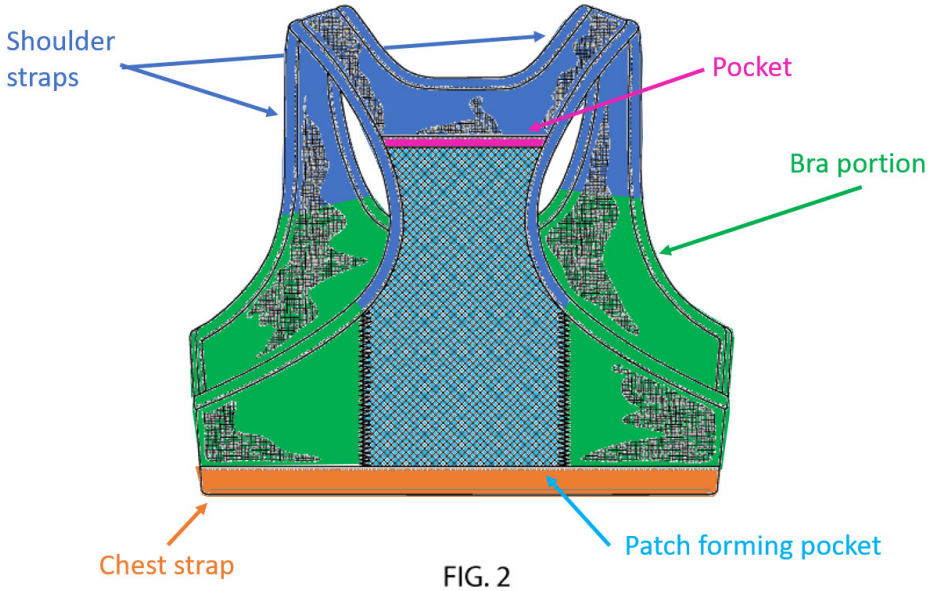


FIG. 2

Id. at Figs. 1–3.

4. Glass Is Prior Art to the '510

Glass is prior art to the '510 under pre-AIA 35 U.S.C. § 102(e)(1) and AIA 35 U.S.C. § 102(a)(2). Glass is a U.S. Design Patent, originally filed August 23, 2010, which is before the '510's earliest possible priority date. 35 U.S.C. § 122(b);

MPEP § 901.03 (stating a U.S. patent application publication is considered prior art as of its earliest effective U.S. filing date). The '510's inventor is not a named inventor on Glass. Glass is therefore prior art to the '510 under at least 35 U.S.C. § 102(e). Glass was not cited or considered during prosecution of the '510.

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.* ¶155. Ms. Baran was a POSA as of the '510's earliest possible priority date. NIKE-1001 ¶156; NIKE-1002.

IX. SPECIFIC GROUNDS FOR THE PETITION

A. Ground 1: Claims 1, 2, 4, 5, 7, 9 and 11 are Unpatentable Over Spagna.

1. Claim 1

a. "A pocket bra comprising:" [1A]

To the extent the preamble is limiting, Spagna discloses this limitation. As illustrated in the figures below, Spagna discloses "an integrated pouch located in a woman's brassiere."

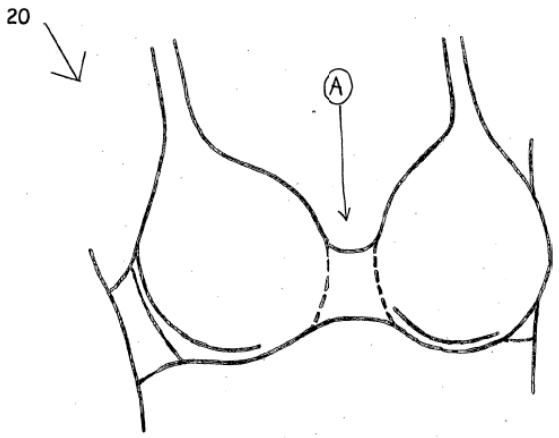


Fig. 2

NIKE-1028 at Abstract, Fig. 2 (showing bra assembly), at [0017]–[0020].

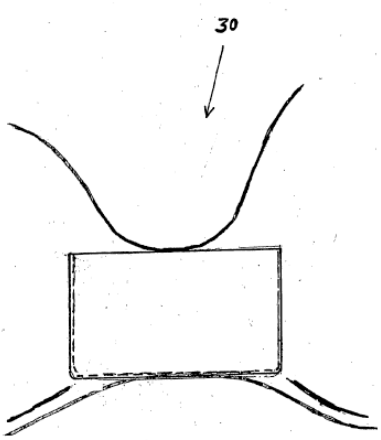


Fig. 3

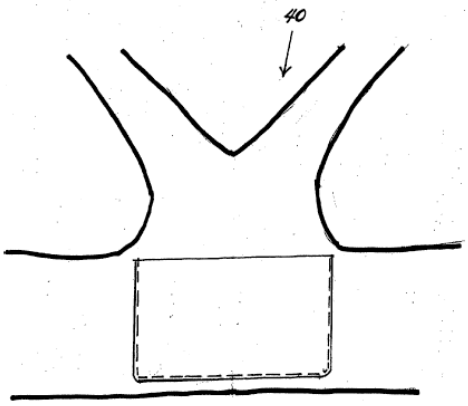


Fig. 4

Id. at Figs. 3-4 (showing an "integrated pouch," or pocket, intermediate of the breast cups (Fig. 3), and on the back of the bra (Fig. 4)).

b. "a strap assembly including a chest strap and shoulder straps," [1B]

As illustrated below, Spagna discloses "a strap assembly" comprised of a chest strap and two shoulder straps:

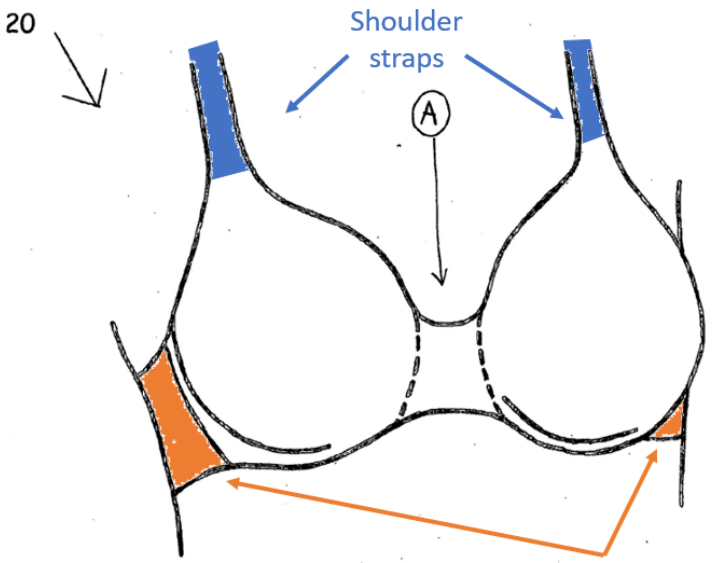


Fig. 2

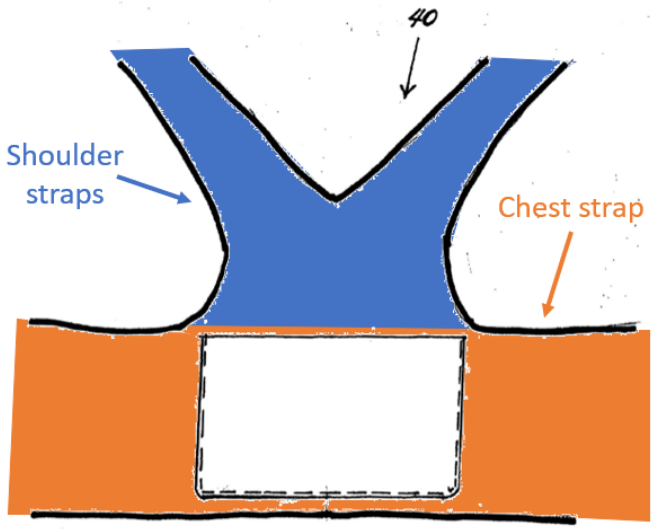
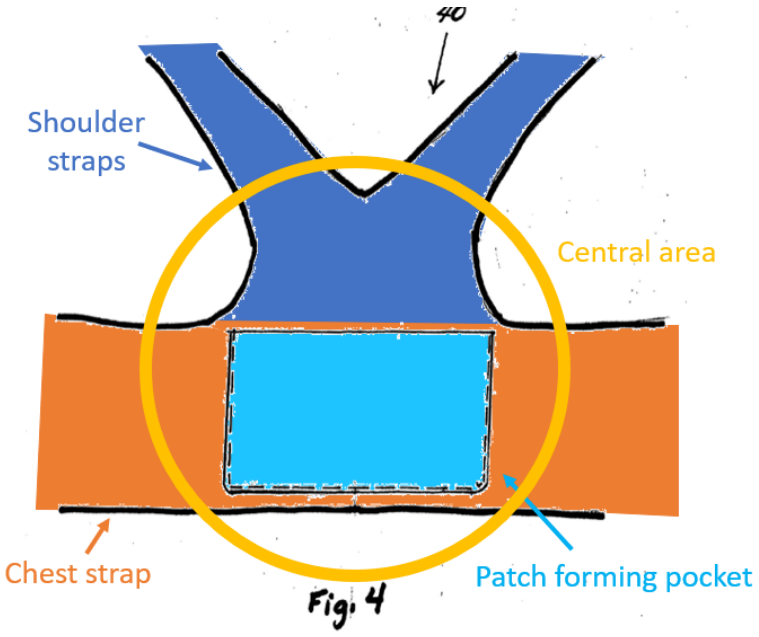


Fig. 4

NIKE-1028 at Figs. 2, 4, at [0017]–[0020] (describing "brassiere 20").

c. "the strap assembly joining the chest strap and shoulder straps at a central area adapted to be positioned on a back of a wearer when worn;" [1C]

As illustrated below, Spagna discloses a "central area" formed where the back portion of the shoulder straps and chest strap join together:



NIKE-1028 at Fig. 4, at [0009] (pocket "located at the ***center back*** of the women's brassiere."), at [0020].

d. "a bra portion comprising left and right cups, each cup being an area to receive a breast of wearer, the strap assembly attached to the bra portion;" [1D]

Spagna discloses "a bra portion comprising left and right cups, each cup being an area to receive a breast of wearer":

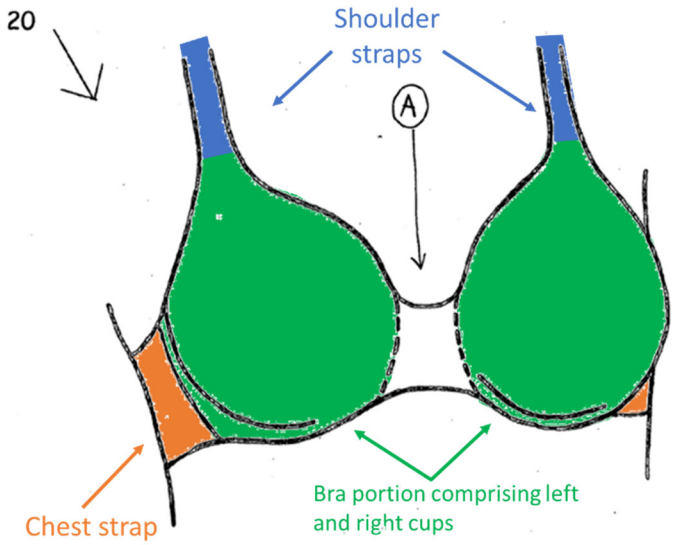
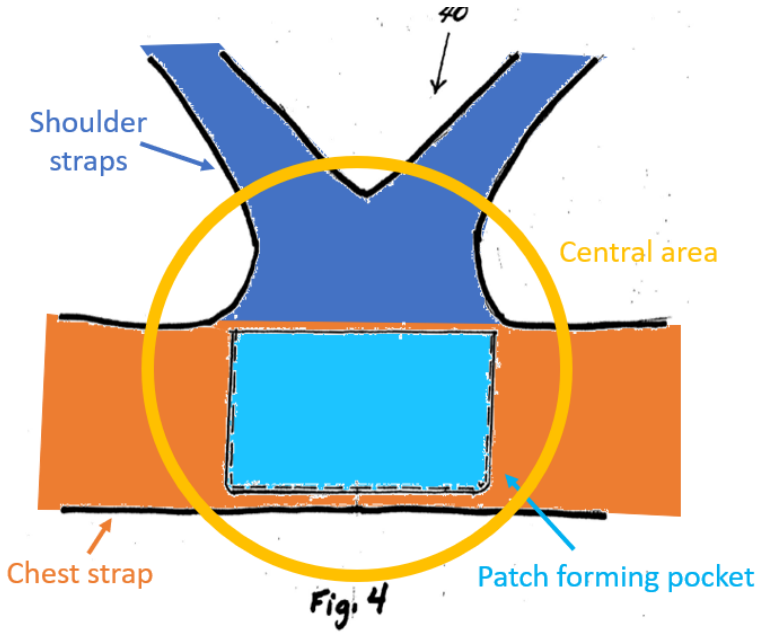


Fig. 2

NIKE-1028 at Fig. 2, [0017]–[0020] (describing "brassiere 20"). As shown above, Spagna's "strap assembly" (chest strap and shoulder straps) are attached to the bra portion.

e. "and a back pocket formed entirely of stretchable fabric positioned on the central area," [1E]

As illustrated in Figure 4 below, Spagna discloses a pocket on the central area:



NIKE-1028 at Fig. 4, at [0009] (pocket "located at the center back of the women's brassiere."), at [0020]. Spagna also discloses that the bra may be constructed of "traditional materials" such as "cotton, polyester, or synthetic and natural fiber blend." A POSA would have understood that the pocket, in addition to the bra itself, could likewise be made out of stretchable material. NIKE-1001 ¶1137. Indeed, a POSA would have understood that polyester and other synthetic fabrics, such as spandex or elastane, can be "stretchable fabric." NIKE-1001 ¶1137.

To the extent PO argues this limitation is not disclosed by Spagna, Spagna in combination with the knowledge of a POSA renders this limitation obvious. Spagna expressly discloses that the purpose of a pocket on a bra or other garment is to hold personal items. NIKE-1001 ¶1138; NIKE-1028 at Abstract ("An apparatus for holding an automated medication dispensing device includes an

integrated pouch located in a woman's brassiere."), at [0002] ("the invention consists of a medication pump inserted into an integrated pouch of a personal undergarment."), at [0009] ("an automated medication dispensing device is adapted to produce a broad, flat profile and is inserted into a relatively large integrated pouch located at the center back of the women's brassiere."). A POSA would have understood that the shape of such objects may not easily conform to the shape of a rigid pocket. NIKE-1001 ¶1138. Thus, a POSA would have found it obvious to manufacture the pocket with "stretchable" material, such that the pocket may stretch or expand to accommodate the placement of objects for storage. NIKE-1001 ¶1138. Indeed, bras comprised of stretchable material were well-known and popular at the time of the alleged invention. *See 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."); *see also* NIKE-1039 (disclosing sports bras comprised of a blend of nylon and Lycra). And Spagna teaches that the "brassiere itself may be constructed of traditional materials such as cotton, polyester, or synthetic and natural fiber blend," which a POSA would have understood would include "stretchable" fabric. NIKE-1028 at [0017]; NIKE-1001 ¶1138. A POSA would have understood that stretchable fabric would similarly be applied to the bra

pocket disclosed in Spagna such that the pocket may stretch or expand to accommodate the placement of objects for storage. NIKE-1001 ¶1138. Thus, if not expressly disclosed, a POSA would have found it obvious to modify Spagna based on their own knowledge to include "a back pocket formed entirely of stretchable fabric." NIKE-1001 ¶1138.

f. "the back pocket having an opening that is biased in a closed position at rest." [1F]

As discussed above, Spagna discloses a back pocket. *See supra* § IX.A.1.e. Spagna discloses that its pocket is "for holding an automated medication dispensing device," indicating that the wearer has access to the pocket's interior in order to place such device in the pocket. NIKE-1028 at Abstract. Indeed, a POSA would have understood the purpose of a pocket to be providing access to the interior for storage of items. NIKE-1001 ¶1139. Further, Spagna discloses that the device "can be safely maintained [in the pocket], even while the wearer is active," NIKE-1028 at Abstract, indicating to a POSA that the pocket is biased in a closed position at rest, to ensure the objects inside the pocket remain there. NIKE-1001 ¶1139. Indeed, the PO asserted during prosecution of the related '800, that the use of a pocket biased in a closed position is ideal for "keep[ing] items held safe within the pocket during exercise." *See* NIKE-1014 at 82, 119–20; *supra* § VII.A.

To the extent PO argues Spagna does not disclose this limitation, Spagna in combination with the knowledge of a POSA renders this limitation obvious. A

POSA would have understood that designing the pocket to be biased in a closed position at rest would increase the likelihood that the device remains "safely maintained" in the pocket during physical activity. NIKE-1001 ¶1140; *supra* § VII.A. Indeed, pockets designed to remain closed at rest were known at the time of the alleged invention. NIKE-1033 at 3:22–23 (describing a pocket on the back side of an exercise shirt as "in a closed position unless stretched by the wearer for access."); *see also* NIKE-1032 at [0020] (Describing the advantage of a fastener mechanism designed for keeping the pocket closed as "prevent[ing] objects stored within [the pocket] from falling out of [the pocket] accidentally"); NIKE-1001 ¶1140; *supra* § VII.A. Thus, a POSA would have found it obvious to modify Spagna based on their own knowledge.

2. Claim 2

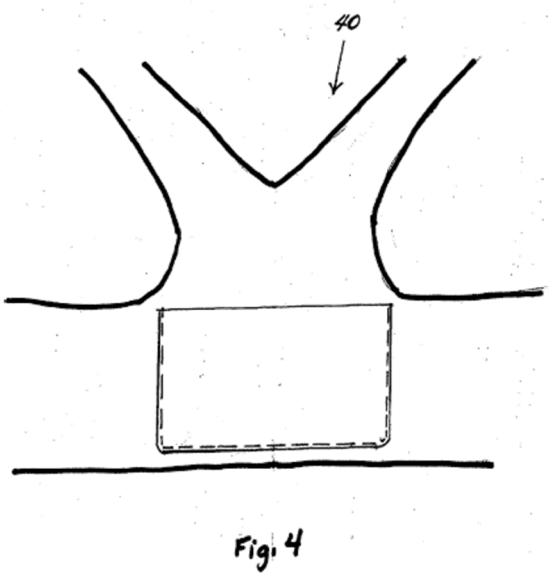
a. "The pocket bra of claim 1" [Preamble]

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

b. "wherein the bra is a sports bra." [2A]

Spagna renders obvious this limitation. Spagna teaches that the item placed in the pocket is held safe "**even while the wearer is active**." NIKE-1028 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, a woman may utilize an automated medication dispensing device while keeping the device safe from accidental damage and ***allowing the woman to be extraordinarily active***, all the while reducing the outward appearance of the device."). A POSA would have understood that the bra is a sports bra to be worn during exercise. NIKE-1001 ¶1142. This understanding is further supported by the racerback construction disclosed by Spagna, which a POSA would have understood to be a popular configuration of sports bras. NIKE-1001 ¶1142.



NIKE-1028 at Fig. 4.

To the extent PO argues Spagna does not disclose this limitation, Spagna in combination with the knowledge of a POSA renders this limitation obvious. A POSA would have found it obvious to apply the invention of Spagna to a sports bra. NIKE-1001 ¶1143. Indeed, as already discussed, Spagna discusses the use of the brassiere to keep the stored item "safe from accidental damage" while

"allowing the woman to be extraordinarily active." NIKE-1028 at [0010]. Further, Spagna discusses activities such as "run[ning], play[ing] sports, and go[ing] to the gym." *Id.* at [0006]. A POSA would have been motivated to combine the invention of Spagna with a sports bra, which is designed for wear during physical activities like those described in Spagna. NIKE-1001 ¶1143.

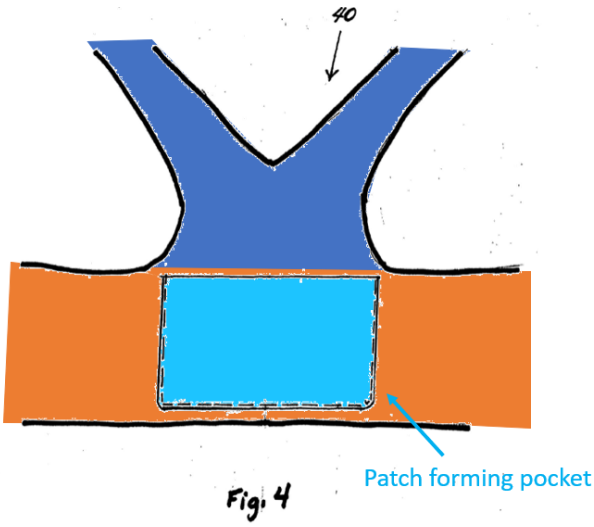
3. Claim 4

a. "The pocket bra of claim 1" [Preamble]

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

b. "wherein the back pocket is formed by a patch connected to the back portion of the at least one of the chest strap and shoulder straps by stitching about a part of a perimeter of the patch, a gap in the stitching leaving a portion of the perimeter of the patch unattached, thereby forming the opening providing access to a pocket interior portion formed by the patch." [3A]

As previously discussed *supra* § IX.A.1.g, Spagna discloses a back pocket formed by a patch of material connected to the back portion of the chest strap. NIKE-1028 at 2:[0020] ("an integrated pouch 40 . . . is placed on the interior surface of the back of the brassiere").



NIKE-1028 at Fig. 4 (showing a pocket on the back portion of the bra where the chest strap and shoulder straps come together). Additionally, as already discussed, Spagna discloses a pocket with access to the pocket's interior. *See supra* § IX.A.1.h.

A POSA would have understood the dashed lines in Figure 4, shown above, to disclose stitching, as dashed lines are used in sewing patterns to denote where stitching should occur. NIKE-1001 ¶1146. Further, a POSA would have understood stitching to be a common, convenient, and effective method of attaching two pieces of fabric together. NIKE-1001 ¶1146. Spagna also discloses that the pocket is stitched "about a part of a perimeter of the patch, a gap in the stitching leaving a portion of the perimeter of the patch unattached" in Figure 4. NIKE-1028 at Fig. 4; NIKE-1001 ¶1146. Thus, a POSA would have understood Spagna to disclose this limitation.

To the extent PO argues Spagna does not disclose this limitation, Spagna in combination with the knowledge of a POSA renders this limitation obvious. In designing a bra with storage pockets, a POSA would have been motivated to look for known solutions in the art, such as methods of adhering the pockets to the bra. NIKE-1001 ¶1147. A POSA would have understood stitching to be a well-known method by which pieces of fabric are attached together for clothing. *See*, *e.g.*, NIKE-1020 at 2:1–4 (disclosing a bra pocket formed 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. The panel is also secured to the side edges of the cup 12 by stitching 26."); NIKE-1022 at 3:52–53 (disclosing a pocket "attached to the interior surface of the breast cover by any known means such as stitching."); NIKE-1001 ¶1147. It would have been obvious to a POSA to try attaching the pocket in Spagna with stitching, and a POSA would have been motivated to do so because stitching is simple, effective, and inexpensive. NIKE-1001 ¶1147. It would have also been obvious to a POSA to form a pocket by sewing only three edges of the rectangular patch to create access to the interior. NIKE-1001 ¶1147. Thus, a POSA would have found it obvious to modify Spagna based on their own knowledge.

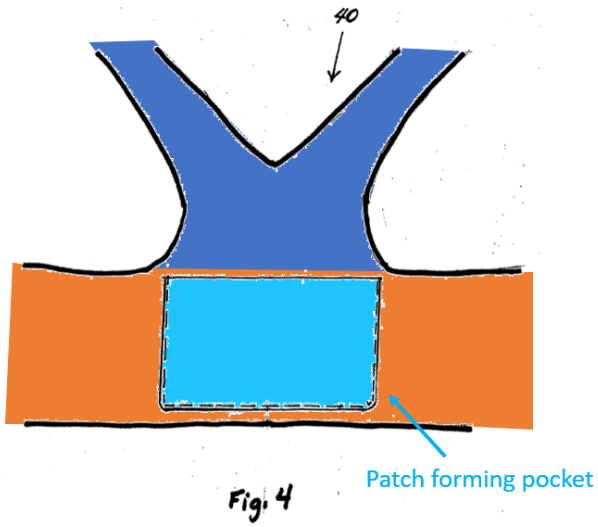
4. Claim 5

a. "The pocket bra of claim 4" [Preamble]

Spagna discloses "[t]he pocket bra of claim 4" for the reasons described above. *Supra* § IX.A.3.

b. "further comprising an internal pocket connected about a perimeter of the opening, the internal pocket defining the pocket interior and formed such that it is positioned between the patch and the one of the back portion of the chest strap and the shoulder straps." [5A]

As previously discussed *supra* § IX.A.1.g, Spagna discloses an "an integrated pouch . . . placed on the interior surface of the back of the" chest strap:



NIKE-1028 at Fig. 4 (showing a pocket on the back portion of the bra where the chest strap and shoulder straps come together), [0008]–[0009], [0020]. This "integrated pouch" includes an internal pocket formed between the patch and the back of the chest strap, as shown above. *Id.*; NIKE-1001 ¶1149. Moreover, the

internal pocket is necessarily connected about the perimeter of the opening. NIKE-1001 ¶1149.

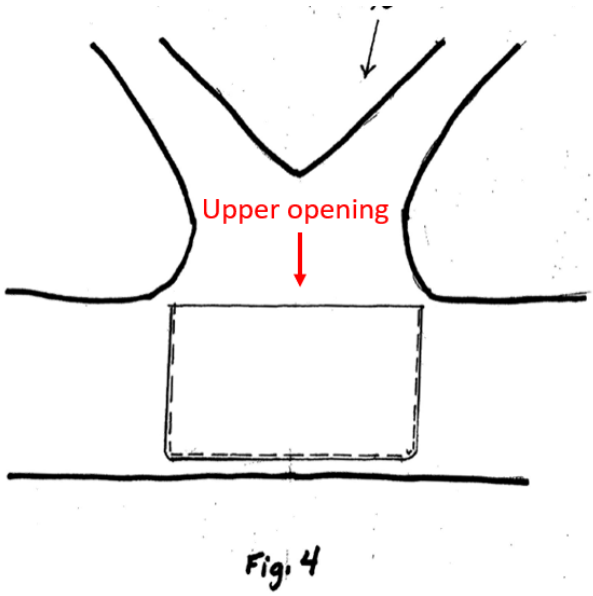
5. Claim 7

a. "The pocket bra of claim 1" [Preamble]

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

b. "wherein the opening is formed adjacent to a top of the patch." [7A]

Spagna discloses a pocket with an upper opening "adjacent to a top of the patch."



NIKE-1028 at Fig. 4, at [0009], at [0020].

6. Claim 9

a. "The pocket bra of claim 1" [Preamble]

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

b. "further comprising an item removably positioned in the back pocket." [9A]

Spagna discloses the purpose of the pocket is "for holding an automated medication dispensing device." NIKE-1028 at Abstract. And Spagna discloses that "the invention consists of a medication pump inserted into an integrated pouch of a personal undergarment. NIKE-1028 at [0002], at [0009] ("an automated medication dispensing device is adapted to produce a broad, flat profile and is inserted into a relatively large integrated pouch located at the center back of the women's brassiere."). A POSA would have understood an "automated medication dispensing device" to comprise an "item." NIKE-1001 ¶1153. Further, Spagna expressly claims the use of the back pocket for holding an item. NIKE-1028 at Claims 7–8.

7. Claim 11

a. "The pocket bra of claim 1" [Preamble]

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

b. "wherein the opening provides access to a pocket interior." [11A]

Spagna discloses a pocket with an upper opening "adjacent to a top of the patch."

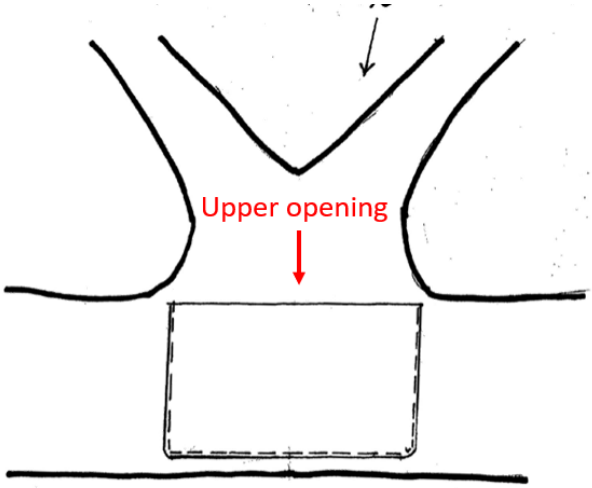


Fig. 4

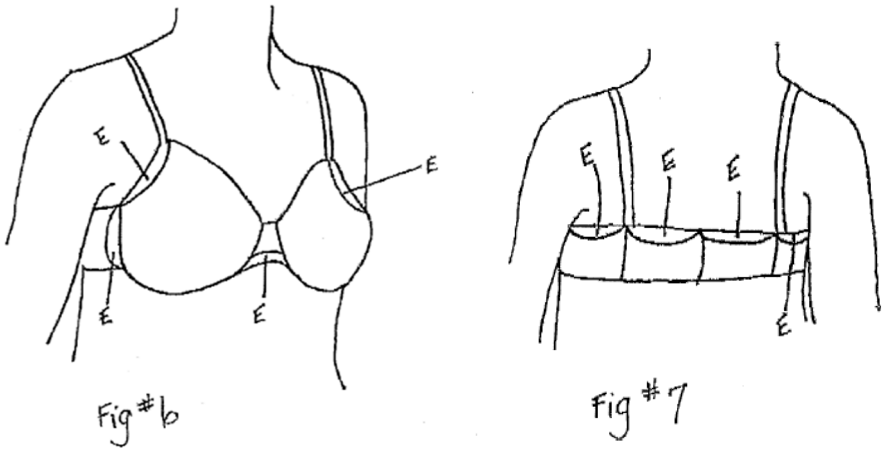
NIKE-1028 at Fig. 4, at [0009], at [0020]. The opening necessarily "provides access to a pocket interior," as Spagna discloses that "the invention consists of a medication pump inserted into an integrated pouch of a personal undergarment." NIKE-1028 at [0002], at [0009] ("an automated medication dispensing device is adapted to produce a broad, flat profile and is inserted into a relatively large integrated pouch located at the center back of the women's brassiere."), Abstract.

B. Ground 2: Claims 1, 2, 4, 5, 7, 9 and 11 are Unpatentable Over Rose.

1. Claim 1

a. "A pocket bra comprising:" [1A]

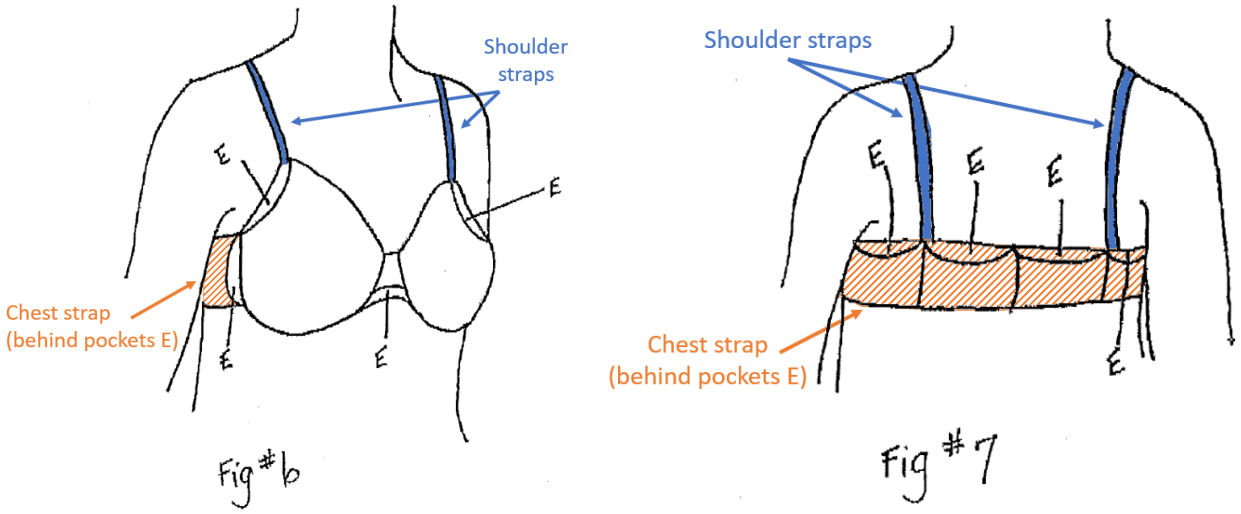
To the extent the preamble is limiting, Rose discloses this limitation. As illustrated below, Rose discloses a bra with a series of pockets E:



NIKE-1030 at Figs. 6–7, at [0012] ("The brassiere may have two breast cups and a back band, the two breast cups and the back band being assembled together in a conventional manner."). In one embodiment, "the bra is provided with clear latex pockets on the frontal portions of the breast cups and the back band of the brassiere." *Id.* at [0037].

b. "a strap assembly including a chest strap and shoulder straps," [1B]

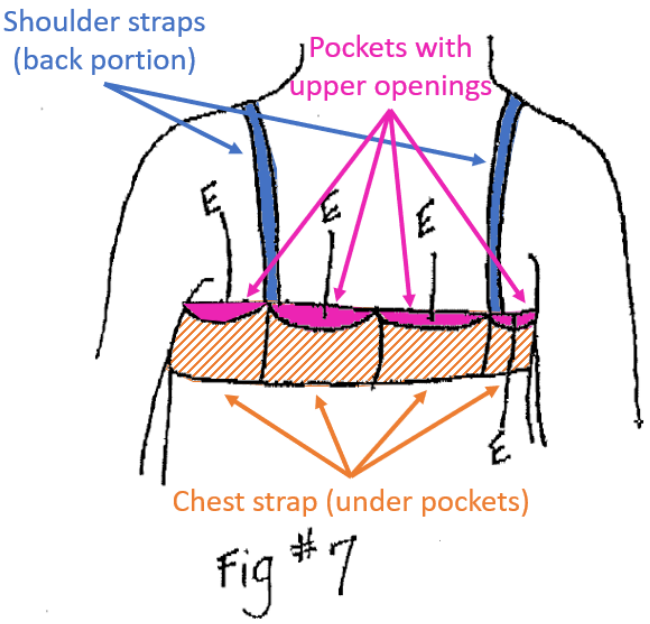
As illustrated below, Rose discloses a bra with shoulder straps and "a back band," i.e., chest strap:



NIKE-1030 at Figs. 6–7 (showing bra with strap assembly shoulder straps and a back band which is covered with pockets E), at [0012] ("The brassiere may have two breast cups and a back band, the two breast cups and the ***back band being assembled together in a conventional manner***."), at [0016] ("the brassiere set can be provided with shoulder straps that may be permanently or detachably connected to the brassiere by any known practical attachment means.").

c. "the strap assembly joining the chest strap and shoulder straps at a central area adapted to be positioned on a back of a wearer when worn;" [1C]

Rose in combination with the knowledge of a POSA renders this limitation obvious. Rose discloses a bra with chest and shoulder straps, and a series of pockets formed on the back of the chest strap:

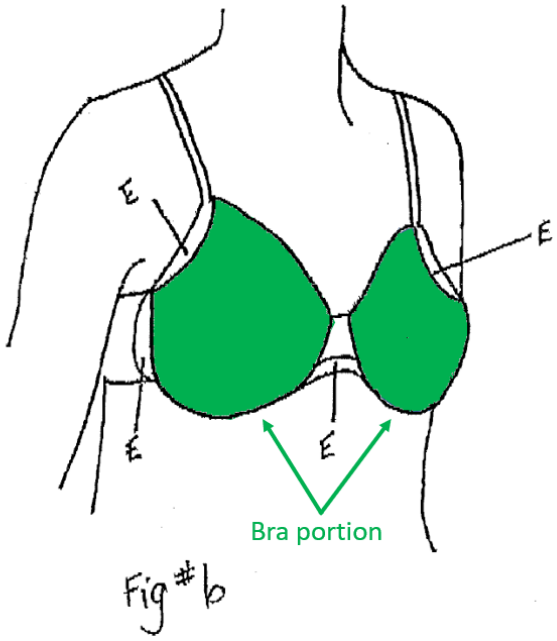


NIKE-1030 at Fig. 7, at [0012] ("The brassiere may have two breast cups and a back band, the two breast cups and the back band being ***assembled together in a conventional manner***."), at [0016] ("the brassiere set can be provided with shoulder straps that may be permanently or detachably connected to the brassiere by any known practical attachment means."). At the time of invention, a POSA would have been familiar with bras with shoulder straps configured to come together on the back of the user. *Supra* Ground 1; NIKE-1001 ¶1159; NIKE-1028 at Fig. 4. A POSA would have understood this configuration of shoulder straps, sometimes known as a "racerback" configuration, to be popular in sports bras and bras with clasps in the front. NIKE-1001 ¶1159. A POSA would have also understood that bras of such configuration to include a back pocket was a known design option. *Supra* Ground 1; NIKE-1001 ¶1159; NIKE-1028 at Fig. 4. Thus, a

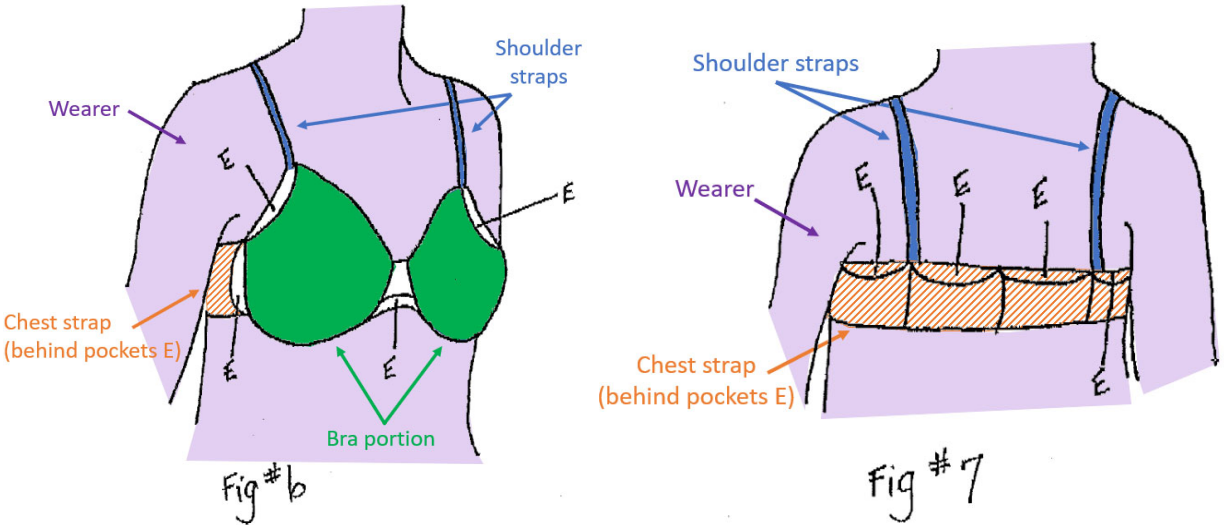
POSA would have found it obvious to modify the invention of Rose to include straps that come together on the back. NIKE-1001 ¶1159. A POSA would have been motivated to try Rose on bras with this configuration to meet the perceived desire by consumers to customize their bras and/or to have storage pockets in their bras. NIKE-1001 ¶1159.

d. "a bra portion comprising left and right cups, each cup being an area to receive a breast of wearer, the strap assembly attached to the bra portion;" [1D]

Rose discloses "a bra portion comprising left and right cups":



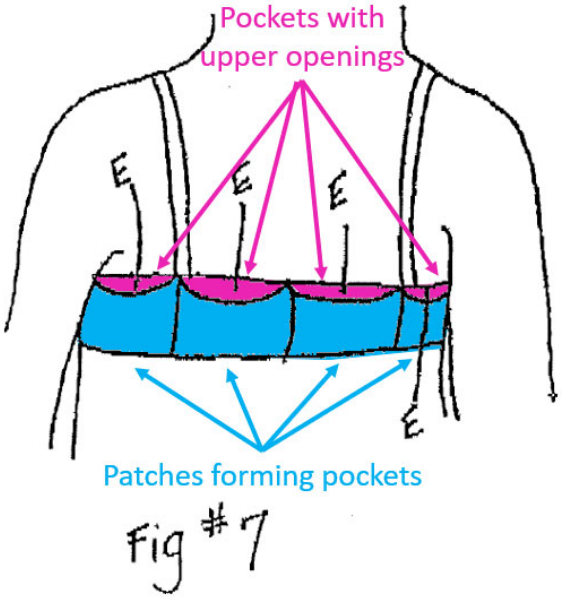
NIKE-1030 at Fig. 6, at [0012] ("The brassiere may have ***two breast cups*** and a back band, the two breast cups and the back band being assembled together in a conventional manner."); NIKE-1001 ¶1160. Rose further discloses that the strap assembly is attached to the bra portion:



NIKE-1030 at Figs. 6–7 (showing front (Fig. 6) and back (Fig. 7) of the bra assembly), at [0012] ("The brassiere may have two breast cups and a back band, the two breast cups and the back band being ***assembled together in a conventional manner***."), at [0016] ("the brassiere set can be provided with shoulder straps that may be permanently or detachably connected to the brassiere by any known practical attachment means."); NIKE-1001 ¶1160.

e. "and a back pocket formed entirely of stretchable fabric positioned on the central area," [1E]

Rose discloses a bra "provided with ***clear latex pockets*** on . . . ***the back band of the brassiere***":



NIKE-1030 at Fig. 7, [0037]. A POSA would have understood latex to be a "stretchable" fabric. NIKE-1001 ¶1161. And as explained above, a POSA would have found it obvious to modify the invention of Rose to include straps that come together on the back to form a central area such that the back pocket is on the central area. NIKE-1001 ¶1161; *supra* § IX.B.**Error! Reference source not found.**.

f. "the back pocket having an opening that is biased in a closed position at rest." [1F]

Rose in combination with the knowledge of a POSA renders this limitation obvious. First, Rose discloses pockets with openings E to provide access to a pocket interior. NIKE-1030 at [0037] ("The pockets have slits E on the upper side as shown in FIG. 6 and FIG. 7. Various inserts made of, but not limited to, plastic, fabric, ***can be inserted into the pockets through the openings E***."). Indeed, a

POSA would have understood the purpose of a pocket is to provide access to the interior for storage of items. NIKE-1001 ¶1162.

Further, in designing a bra with storage pockets, a POSA would have been motivated to look for known solutions in the art, such as methods of keeping items stored in the pocket secure. NIKE-1001 ¶1163; *supra* § VII.A. Indeed, pockets designed to remain closed at rest were known long before the alleged invention. NIKE-10033 at 3:22–23 (describing a pocket on the back side of an exercise shirt as "in a closed position unless stretched by the wearer for access."); *see also* NIKE-1032 at [0020] (Describing the advantage of a fastener mechanism designed for keeping the pocket closed as "prevent[ing] objects stored within [the pocket] from falling out of [the pocket] accidentally"); *supra* § VII.A. Thus, a POSA would have found it obvious to modify Rose to make the pockets biased in a closed position at rest based on their own knowledge and been motivated to do so to keep items stored in the pocket more secure.

2. Claim 2

a. "The pocket bra of claim 1" [Preamble]

Rose discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.B.1.

b. "wherein the bra is a sports bra." [2A]

Rose in combination with the knowledge of a POSA renders this limitation obvious. The purpose of the pockets disclosed in Rose is to provide means to "change the visual appearance of the brassiere." NIKE-1030 at [0012]. A POSA would have understood sports bras to have been popular at the time of invention. *See* NIKE-1039 (discussing "[t]op [c]hoices" of sports bras available on the market in 2010). In designing a bra with a customizable appearance, a POSA would have been motivated to try the invention of Rose on a sports bra, due to the popularity of sports bras and the perceived desire by consumers to customize their bras. NIKE-1001 ¶1165. Further, a POSA would have understood that the pockets disclosed by Rose could be used to hold items for storage, rather than to change the outer appearance of the bra. *Id*. Thus, a POSA would have been further motivated to try the invention of Rose on a sports bra in order to meet consumer demand for sports bras with pockets, allowing users to carry items like keys, pills, handheld electronic devices, credit cards, money, or other items while exercising. *Id*.

3. Claim 4

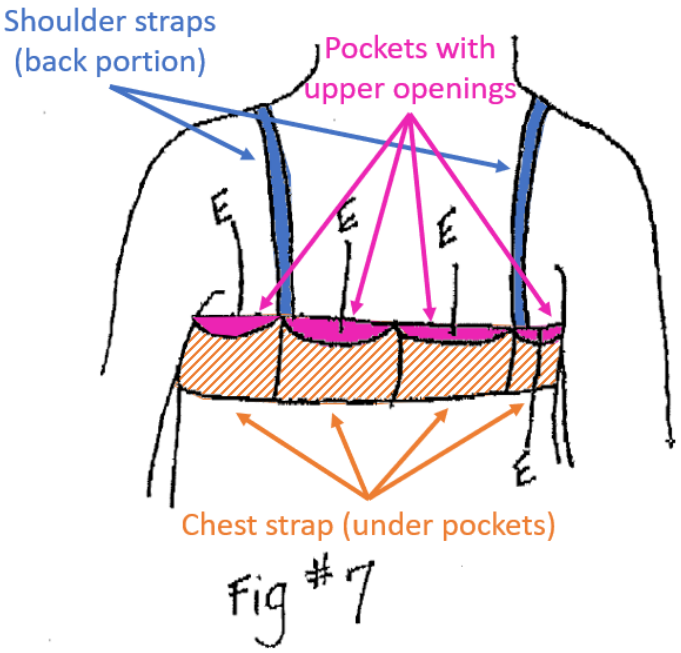
a. "The pocket bra of claim 1" [Preamble]

Rose discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.B.1.

b. "wherein the back pocket is formed by a patch connected to the back portion of the at least one of the

chest strap and shoulder straps by stitching about a part of a perimeter of the patch, a gap in the stitching leaving a portion of the perimeter of the patch unattached, thereby forming the opening providing access to a pocket interior portion formed by the patch." [3A]

As discussed *supra* § IX.B.1.e, Rose discloses "clear latex pockets on … the back band of the brassiere":



NIKE-1030 at Fig. 7, [0037]. Rose also discloses a pocket having three closed sides and one open side on the top, allowing access to the pocket's interior. *Id.*; *supra* § IX.B.1.f. Further, a POSA would have understood stitching to be a common, convenient, and effective method of attaching two pieces of fabric together, as has been done for centuries. NIKE-1001 ¶1167. It would have also been obvious to a POSA to form a pocket by sewing only three edges of the

rectangular patch to create access to the interior. NIKE-1001 ¶1167. Thus, a POSA would have understood Rose to disclose this limitation. *Id.* ¶1167.

To the extent PO argues Rose does not implicitly disclose this limitation, Rose in combination with the knowledge of a POSA renders this limitation obvious. NIKE-1001 ¶1168. In designing a bra with storage pockets, a POSA would have been motivated to look for known solutions in the art, such as methods of adhering the pockets to the bra. NIKE-1001 ¶.1168. A POSA would have understood stitching to be a well-known method by which pieces of fabric are attached together for clothing. *E.g.*, NIKE-1020 at 2:1–4; NIKE-1022 at 3:52–53; NIKE-1001 ¶1168. It would have been obvious to a POSA to try attaching the pocket in Rose with stitching, and a POSA would have been motivated to do so because stitching is simple, effective, and inexpensive. Thus, a POSA would have found it obvious to modify Rose based on their own knowledge.

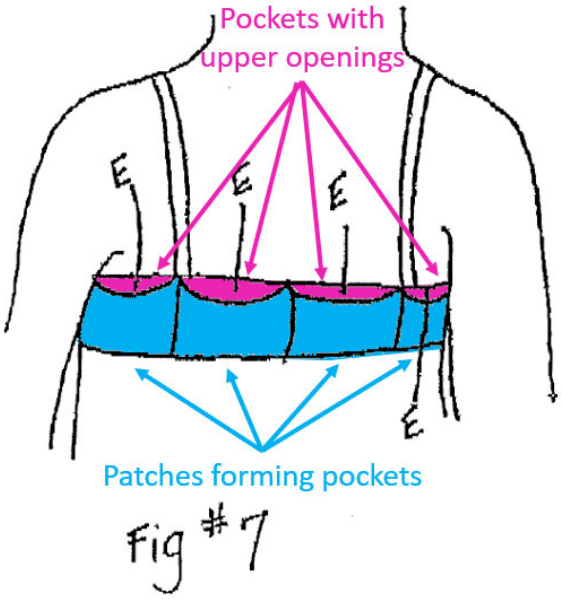
4. Claim 5

a. "The pocket bra of claim 4" [Preamble]

Rose discloses "[t]he pocket bra of claim 4" for the reasons described above. *Supra* § IX.B.3.

b. "further comprising an internal pocket connected about a perimeter of the opening, the internal pocket defining the pocket interior and formed such that it is positioned between the patch and the one of the back portion of the chest strap and the shoulder straps." [5A]

As previously discussed *supra* § IX.B.1.e, Rose discloses a bra "provided with ***clear latex pockets*** on . . . ***the back band of the brassiere***":



NIKE-1030 at Fig. 7, [0037]. Each of these "clear latex pockets" includes an internal pocket formed between the patch and the back of the chest strap, as shown above. *Id.*; NIKE-1001 ¶1170. Moreover, the internal pocket is necessarily connected about the perimeter of the opening. NIKE-1001 ¶1170.

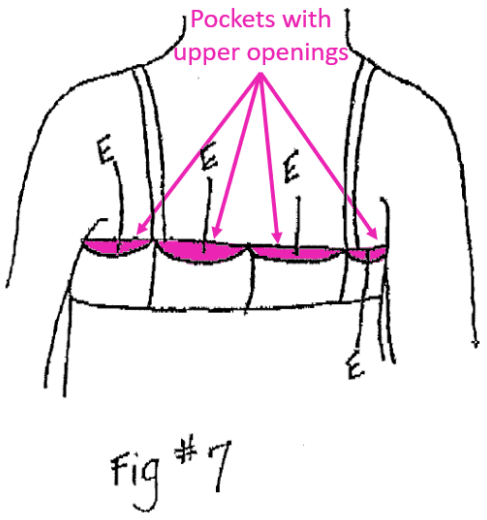
5. Claim 7

a. "The pocket bra of claim 1" [Preamble]

Rose discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.B.1.

b. "wherein the opening is formed adjacent to a top of the patch." l [7A]

Rose discloses pockets with openings adjacent to the top of each pocket-forming patch:



NIKE-1030 at Fig. 7, at [0037] ("The pockets have ***slits E on the upper side*** as shown in FIG. 6 and FIG. 7.").

6. Claim 9

a. "The pocket bra of claim 1" [Preamble]

Rose discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.B.1.

b. "further comprising an item removably positioned in the back pocket." [9A]

Rose expressly teaches the use of the pockets to temporarily store "various inserts" made of plastic, fabric, or other materials, of various colors and patterns to change the outer appearance of the bra. NIKE-1030 at [0037] ("Various inserts made of, but not limited to, plastic, fabric, can be inserted into the pockets through the openings E. The inserts can be of different colours or patterns so as to change the appearance of the bra."). Further, a POSA would have understood that a user could place an item other than the claimed inserts in the pocket. NIKE-1001 ¶1174. Indeed, a POSA would have understood that the presence of a pocket necessarily implies access to the pocket interior for the temporary storage of items. NIKE-1001 ¶1174.

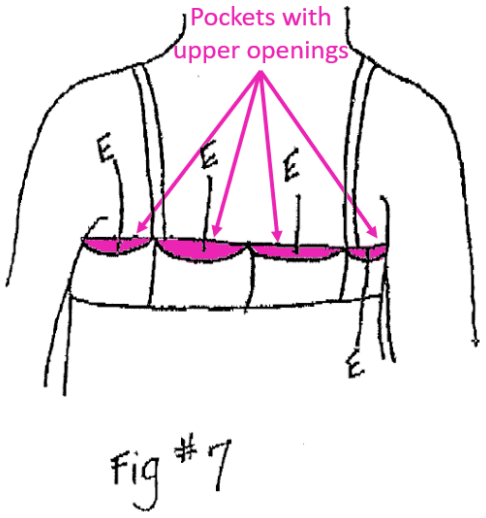
7. Claim 11

a. "The pocket bra of claim 1" [Preamble]

Rose discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.B.1.

b. "wherein the opening provides access to a pocket interior." [11A]

Rose discloses pockets with openings adjacent to the top of each pocket-forming patch:



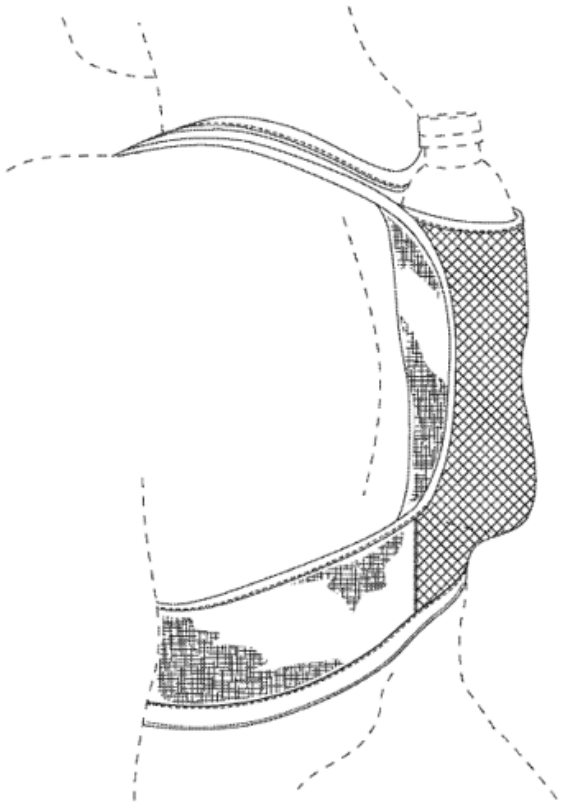
NIKE-1030 at Fig. 7, at [0037] ("The pockets have ***slits E on the upper side*** as shown in FIG. 6 and FIG. 7."). The opening necessarily "provides access to a pocket interior," as Rose discloses that "Various inserts made of, but not limited to, plastic, fabric, can be inserted into the pockets through the openings E." NIKE-1030 at [0037].

C. Ground 3: Claims 1, 2, 4, 5, 7, 9 and 11 are Unpatentable Over Glass.

1. Claim 1

a. "A pocket bra comprising:" [1A]

To the extent the preamble is limiting, Glass discloses this limitation. As illustrated below, Glass discloses a sports bra with a back pocket for storage of a water bottle:



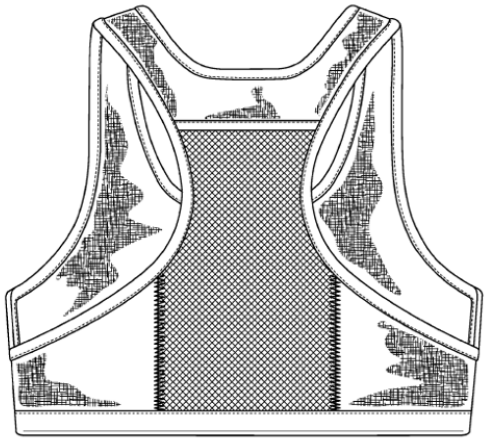


FIG. 2

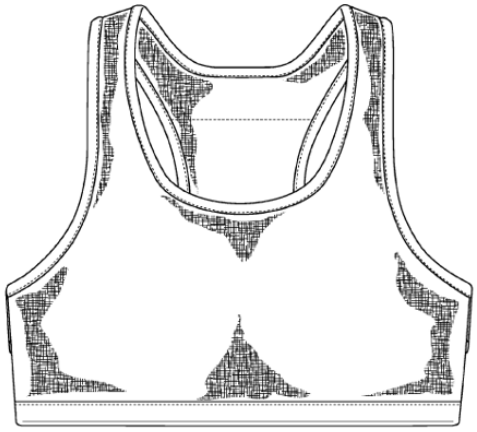
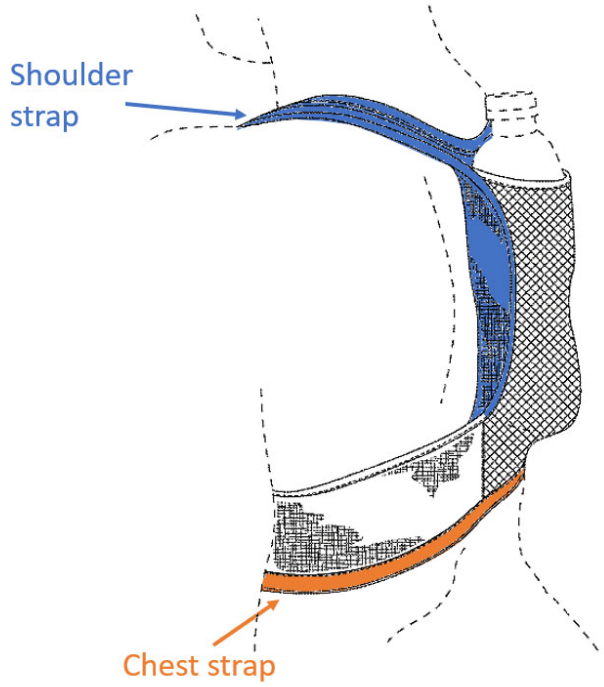


FIG. 3

NIKE-1029 at Figs. 1–3, at Title ("Sports Bra with Water Bottle Pocket on Back"), at Description ("FIG. 1 is a rear and left-side perspective view of the sports bra with water bottle pocket.").

b. "a strap assembly including a chest strap and shoulder straps," [1B]

As illustrated below, Glass discloses a sports bra comprised of two shoulder straps and a chest strap:



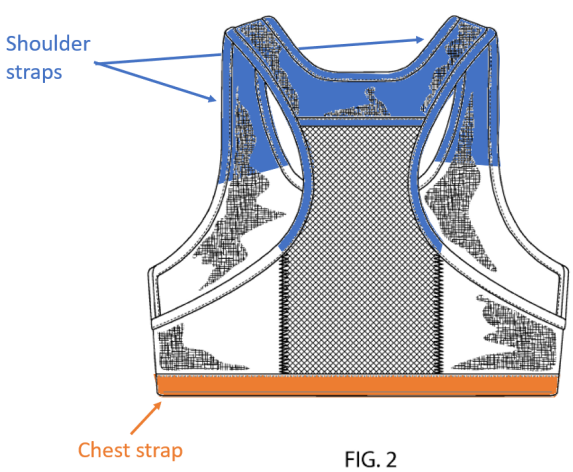


FIG. 2

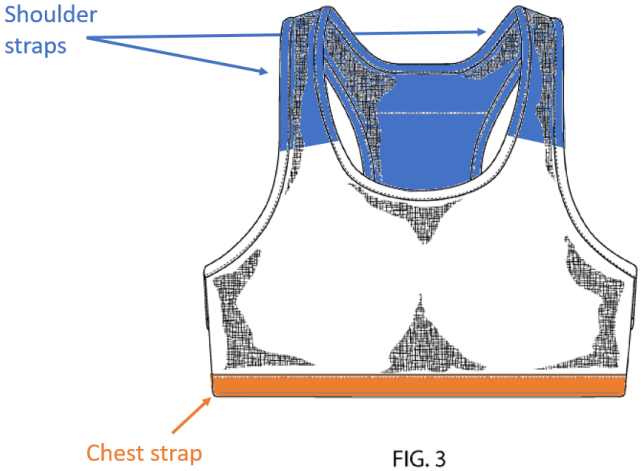


FIG. 3

NIKE-1029 at Figs. 1–3.

c. "the strap assembly joining the chest strap and shoulder straps at a central area adapted to be positioned on a back of a wearer when worn;" l [1C]

Glass discloses a sports bra with a strap assembly comprised of a chest strap and shoulder straps, and a pocket on the back of the strap assembly:

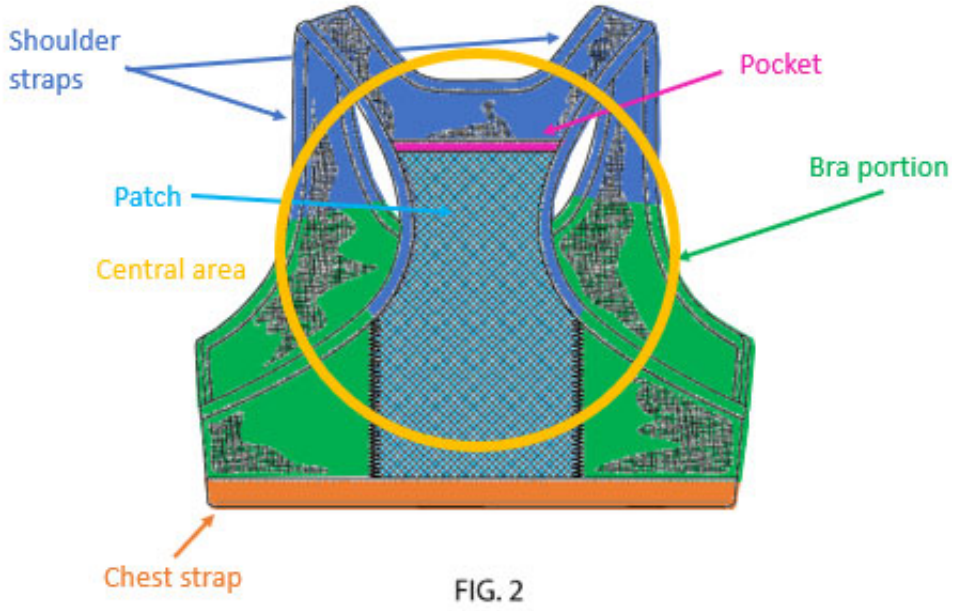


FIG. 2

NIKE-1029 at Fig. 2. As shown above, the back portion of the shoulder straps come together in a racerback configuration, forming a "central area" where the pocket and pocket opening are located. *Id.*

d. "a bra portion comprising left and right cups, each cup being an area to receive a breast of wearer, the strap assembly attached to the bra portion;" [1D]

Glass discloses a sports bra with a "bra portion" configured to receive the breasts of the wearer:

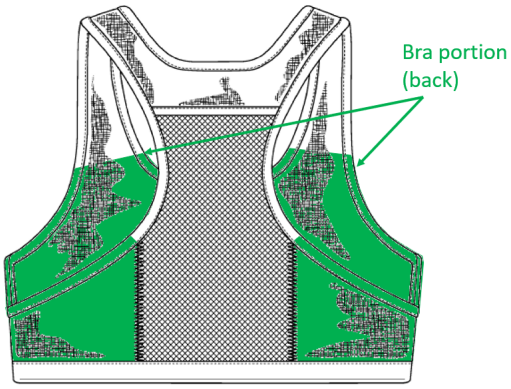


FIG. 2

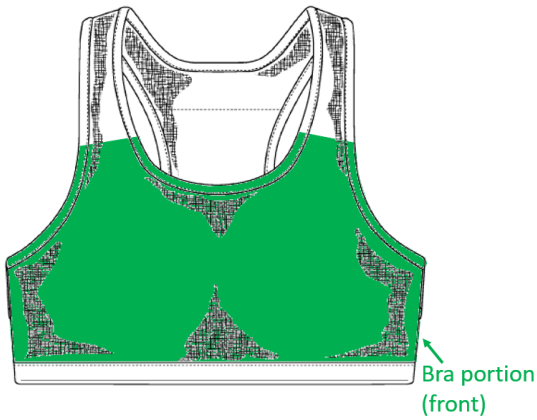
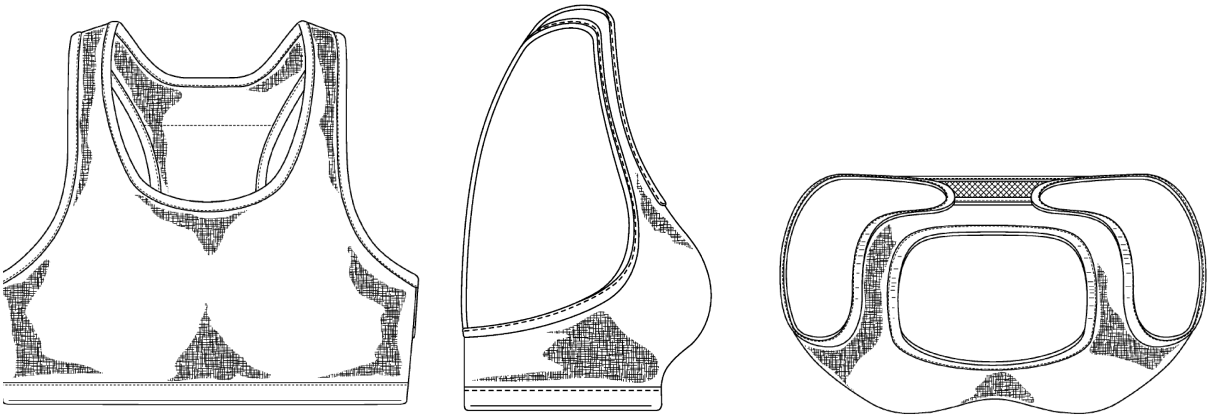


FIG. 3

NIKE-1029 at Figs. 2–3. Moreover, as can be seen in Figures 3–5 below, Glass's bra portion comprises distinct left and right cups:



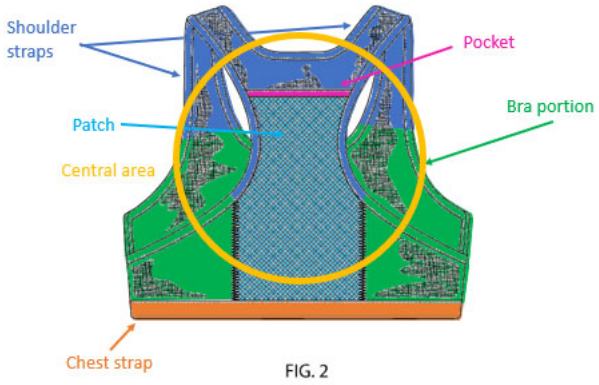
Id. at Figs. 3–5; NIKE-1001 ¶1181.

Alternatively, it would have been obvious to a POSA to modify Glass to include left and right cups. Glass discloses a sports bra and sports bras with left and right cups were well known at the time of the alleged invention. NIKE-1028 at Fig. 2, [0017]–[0020]; NIKE-1001 ¶1182. A POSA would have been motivated to modify Glass to include left and right cups to increase the support and comfort of the bra. NIKE-1001 ¶1182. Moreover, including left and right cups can help

give a more natural appearance and shape, which some consumers prefer. NIKE-1001 ¶1182. A POSA would have had a high expectation of success in such a modification because this is simple technology, left and right cups were known in sports bras, and they would be performing their known function.

e. "and a back pocket formed entirely of stretchable fabric positioned on the central area," [1E]

Glass discloses a pocket on the central area for holding a water bottle:



NIKE-1029 at Fig. 2. Further, Glass illustrates the pocket in both an open and closed configuration:

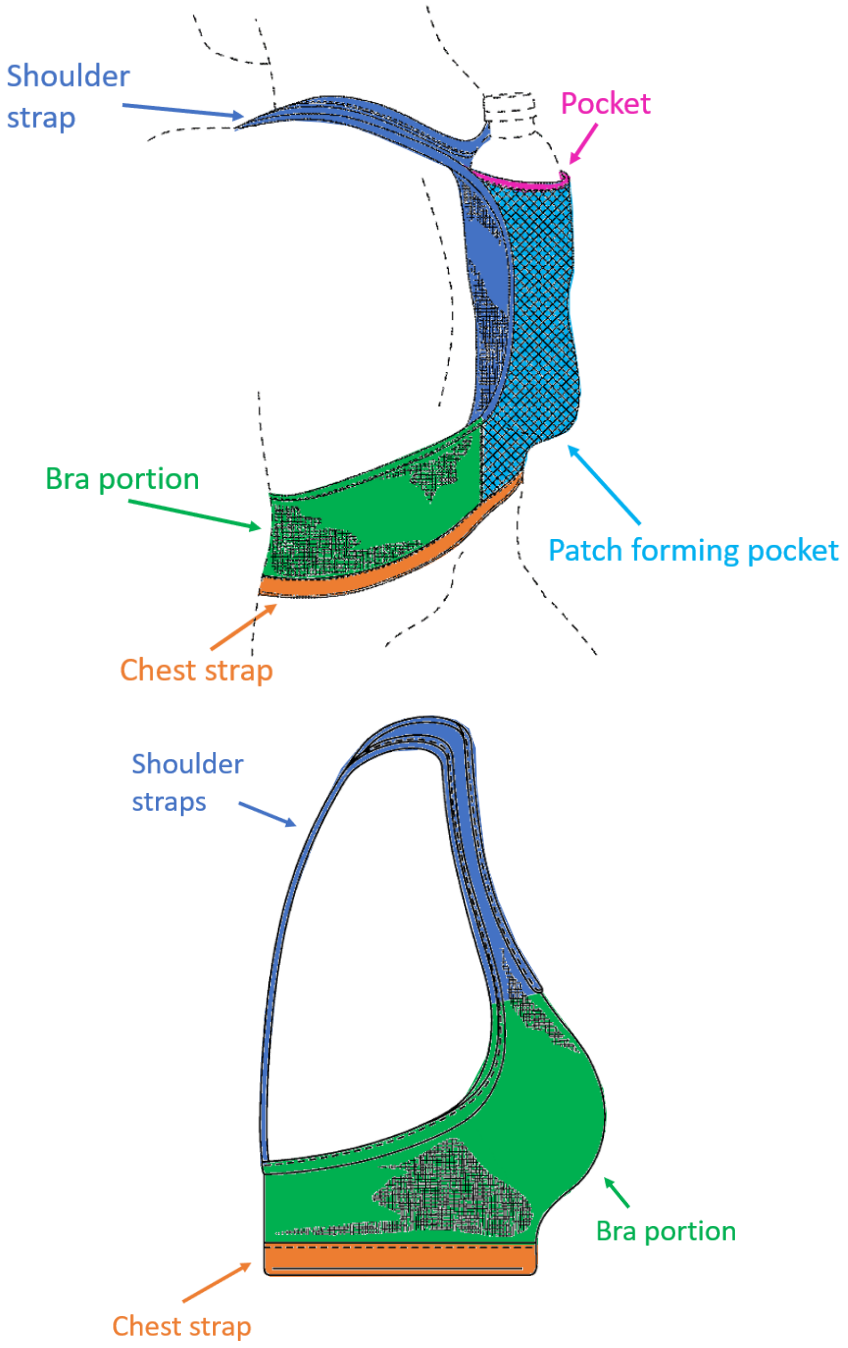


FIG. 4

NIKE-1029 at Figs. 1, 4 (Fig. 4 showing a side profile view of the claimed bra in a closed configuration). As shown above, in the closed configuration, the pocket opening lies flat against the back surface of the bra. *Id.* A POSA would have

understood this to indicate the pocket is formed of "stretchable material" so the pocket opening can stretch to accommodate the storage of a water bottle. NIKE-1001 ¶1183.

To the extent PO argues this limitation is not expressly or implicitly disclosed by Glass, Glass in combination with the knowledge of a POSA renders this limitation obvious. A POSA would have understood the purpose of a pocket on a bra or other garment is to hold items, as Glass expressly discloses. NIKE-1001 ¶1184; NIKE-1029 at Title, at Fig. 1. A POSA would have understood that the shape of such objects may not easily conform to the shape of a rigid bra. NIKE-1001 ¶1184. Thus, a POSA would have found it obvious to manufacture the pocket with "stretchable" material, such that the pocket may stretch or expand to accommodate the placement of objects for storage. NIKE-1001 ¶1184. Indeed, sports bras comprised of stretchable material were well-known and popular at the time of the alleged invention. *See e.g.*, NIKE-1022 at 3:5–14; *see also* NIKE-1039. A POSA would have understood that stretchable fabric was a design choice available to be applied to the bra pocket disclosed in Glass. NIKE-1001 ¶1184. Thus, if not expressly disclosed, a POSA would have found it obvious to modify Glass based on their own knowledge to include "a back pocket formed entirely of stretchable fabric." NIKE-1001 ¶1184.

f. "the back pocket having an opening that is biased in a closed position at rest." [1F]

Glass illustrates the back pocket in both an open and closed configuration:

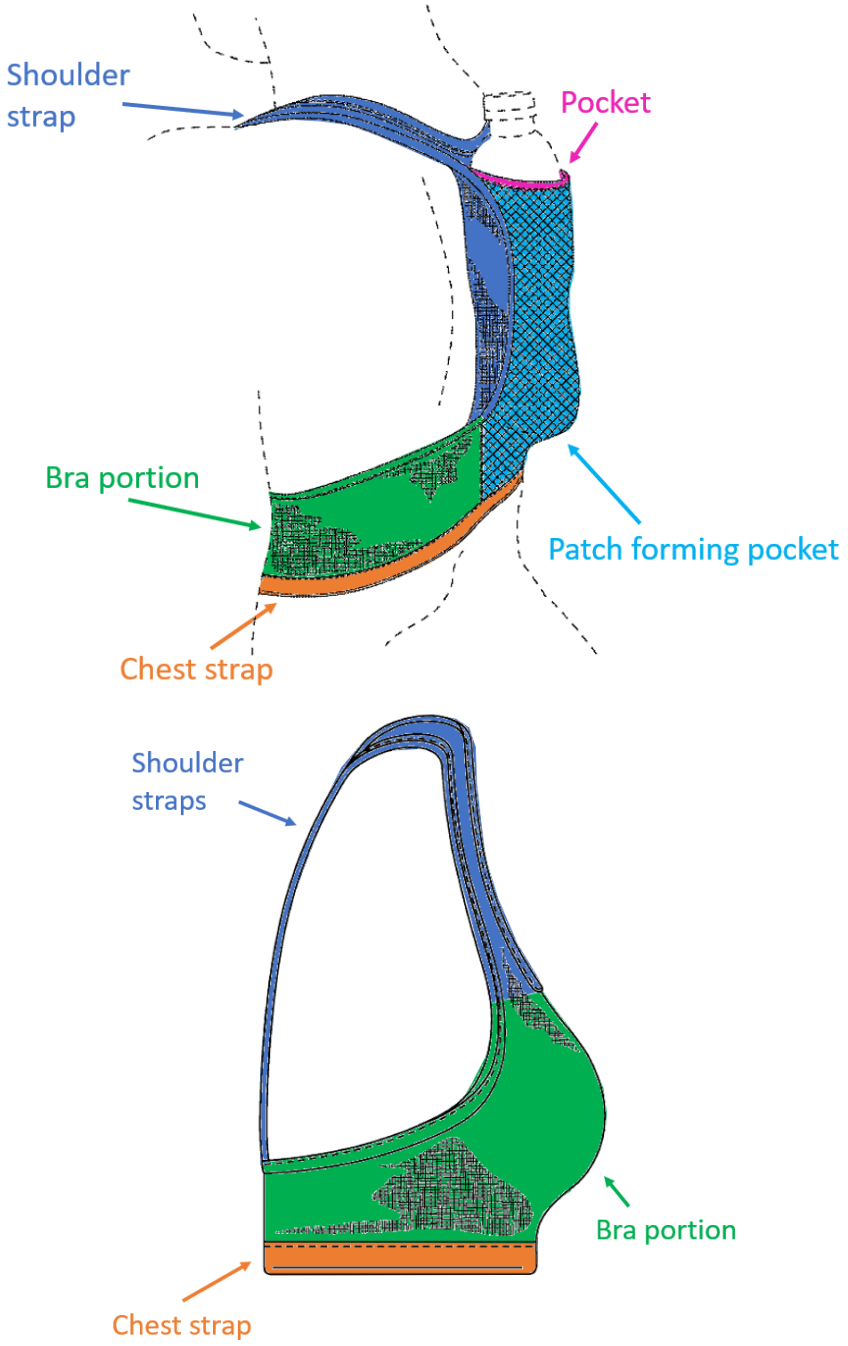


FIG. 4

NIKE-1029 at Figs. 1, 4 (Fig. 4 showing a side profile view of the claimed bra in a closed configuration). As shown above, in the closed configuration, the pocket opening lies flat against the back surface of the bra. *Id.* A POSA would have understood this to indicate the pocket is "biased in a closed position at rest." NIKE-1001 ¶1185.

2. Claim 2

a. "The pocket bra of claim 1" [Preamble]

Glass discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.C.1.

b. "wherein the bra is a sports bra." [2A]

Glass discloses that it is a "sports bra." NIKE-1029 at Title ("Sports Bra with Water Bottle Pocket on Back"), Description ("sports bra with water bottle pocket"), Figs. 1–5.

3. Claim 4

a. "The pocket bra of claim 1" [Preamble]

Glass discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.C.1.

b. "wherein the back pocket is formed by a patch connected to the back portion of the at least one of the chest strap and shoulder straps by stitching about a part of a perimeter of the patch, a gap in the stitching leaving a portion of the perimeter of the patch unattached, thereby forming the opening providing

access to a pocket interior portion formed by the patch." [3A]

Glass discloses the pocket formed by a patch of material connected to the back portion of the at least one of the chest strap and shoulder straps by stitching around the patch's perimeter, with a gap in the stitching leaving an upper opening with access to the pocket's interior:

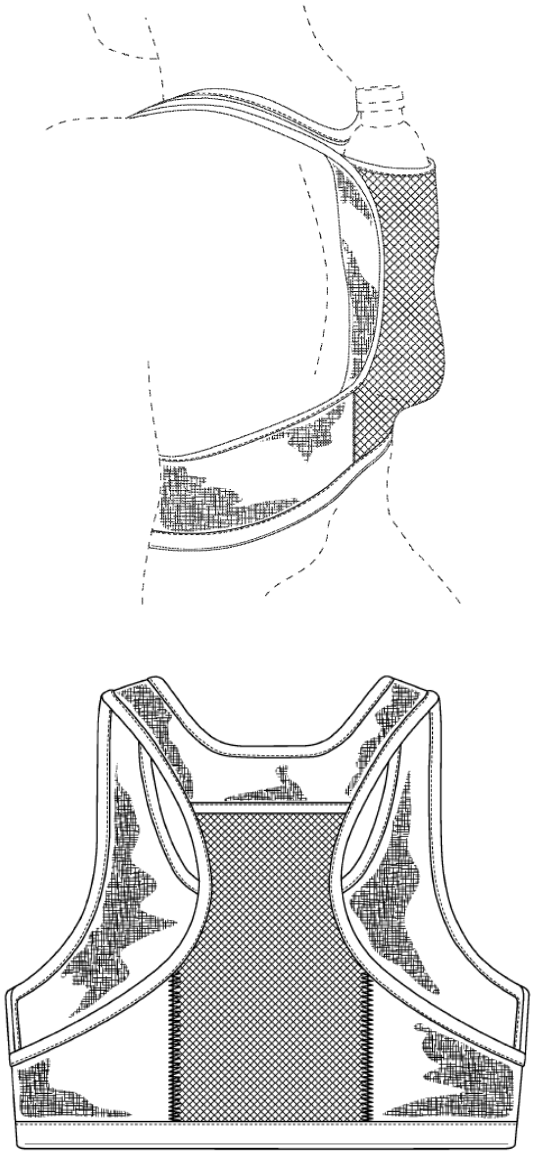


FIG. 2

NIKE-1029 at Figs. 1, 2; at Description ("The short-segmented broken lines represent stitching."). A POSA would have understood the purpose of a pocket is to provide access to the interior for storage of items, as Glass illustrates with the water bottle. NIKE-1001 ¶1189.

4. Claim 5

a. "The pocket bra of claim 4" [Preamble]

Glass discloses "[t]he pocket bra of claim 4" for the reasons described above. *Supra* § IX.C.3.

b. "further comprising an internal pocket connected about a perimeter of the opening, the internal pocket defining the pocket interior and formed such that it is positioned between the patch and the one of the back portion of the chest strap and the shoulder straps." [5A]

As previously discussed *supra* § IX.C.1.e, Glass discloses a bra with a back pocket formed by a patch on the back portion of the chest strap:

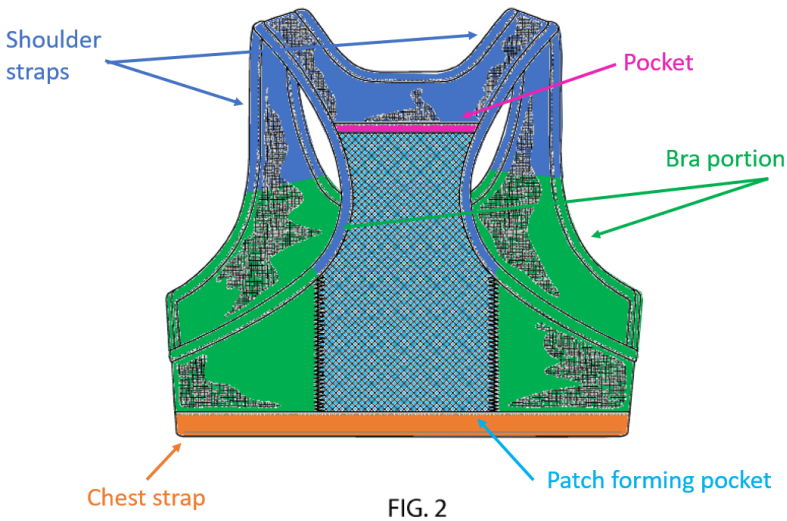


FIG. 2

NIKE-1029 at Fig. 2. The back pocket includes an internal pocket formed between the patch and the back of the chest strap, as shown above. *Id.*; NIKE-1001 ¶1190. Moreover, the internal pocket is necessarily connected about the perimeter of the opening. NIKE-1001 ¶1191.

Alternatively, it would have been obvious to modify Glass such that "the internal pocket … is positioned between the patch and the one of the back portion of the chest strap and the shoulder straps," by extending the patch slightly lower so it extends further onto the chest strap. A POSA would have been motivated to make such a modification to increase the size of the patch, and would have had a high expectation of success in doing so because this would have been a simple modification with a predictable result: a slightly larger pocket. NIKE-1001 ¶1192.

5. Claim 7

a. "The pocket bra of claim 1" [Preamble]

Glass discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.C.1.

b. "wherein the opening is formed adjacent to a top of the patch." [7A]

The pocket disclosed in Glass has an upper opening adjacent to the top of the patch:

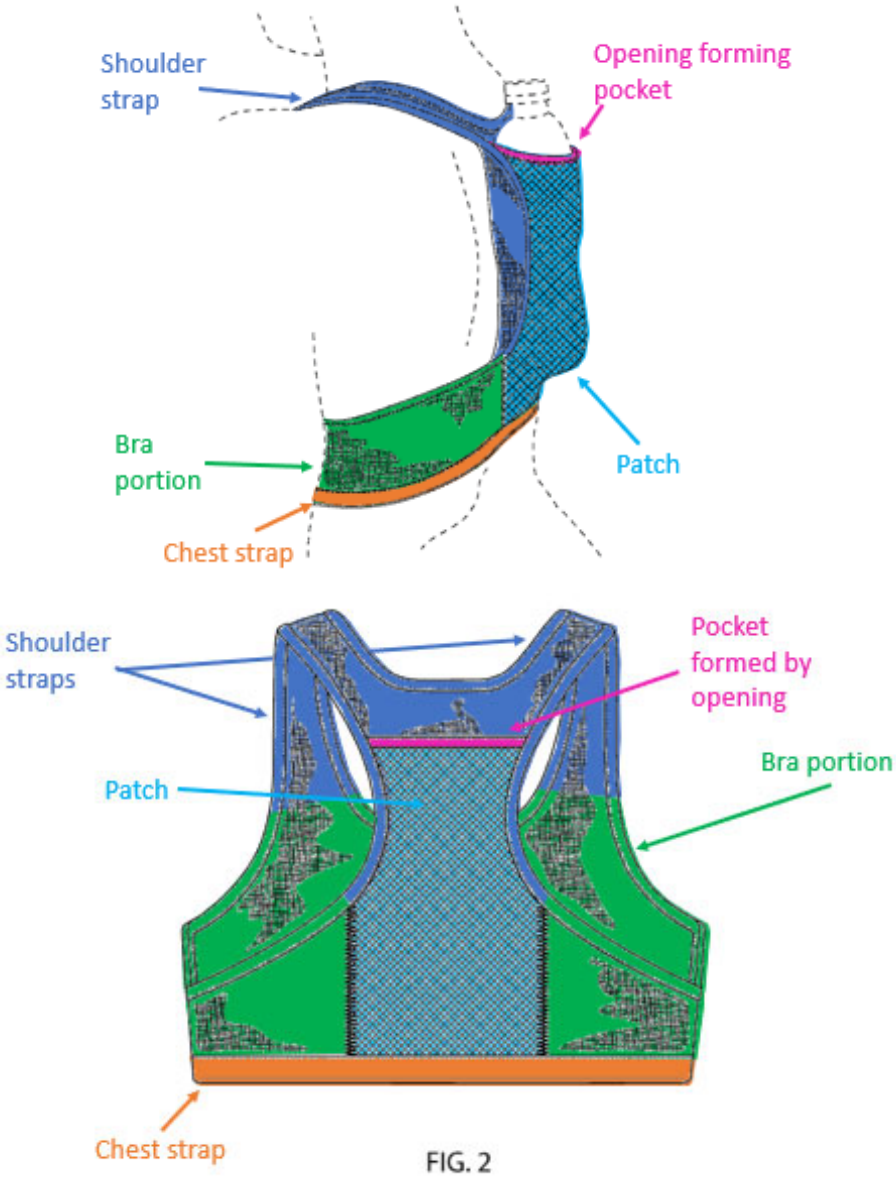


FIG. 2

NIKE-1029 at Figs. 1–2.

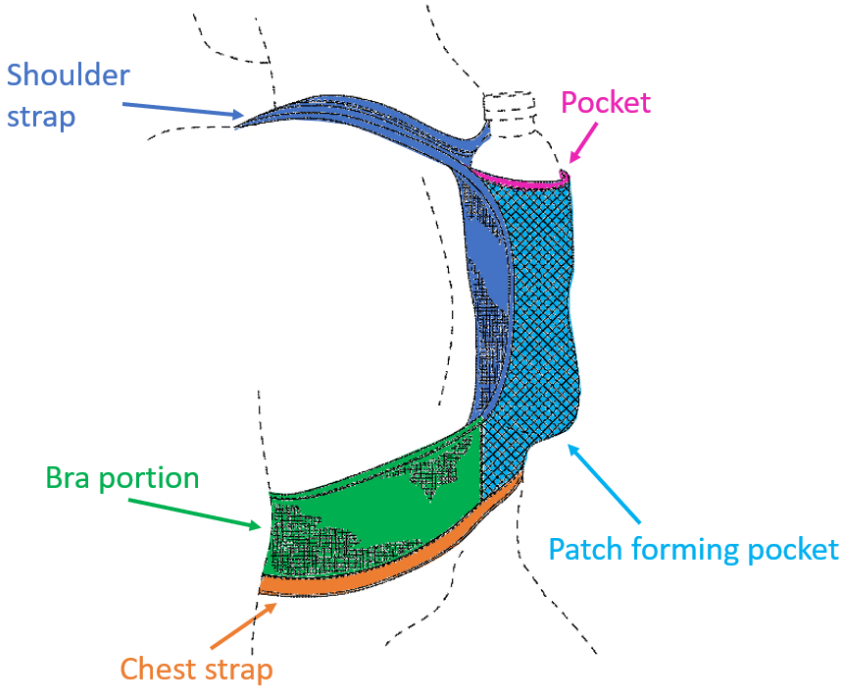
6. Claim 9

a. "The pocket bra of claim 1" [Preamble]

Glass discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.C.1.

b. "further comprising an item removably positioned in the back pocket." [9A]

Glass discloses a water bottle positioned within the back pocket:



NIKE-1029 at Fig. 1, at Description ("The long-segmented broken lines showing . . . the top of a water bottle in FIG. 1.").

7. Claim 11

a. "The pocket bra of claim 1" [Preamble]

Glass discloses "[t]he pocket bra of claim 1" for the reasons described above. *Supra* § IX.C.1.

b. "wherein the opening provides access to a pocket interior." [11A]

Glass discloses a pocket with an opening adjacent to the top of each pocket-forming patch:

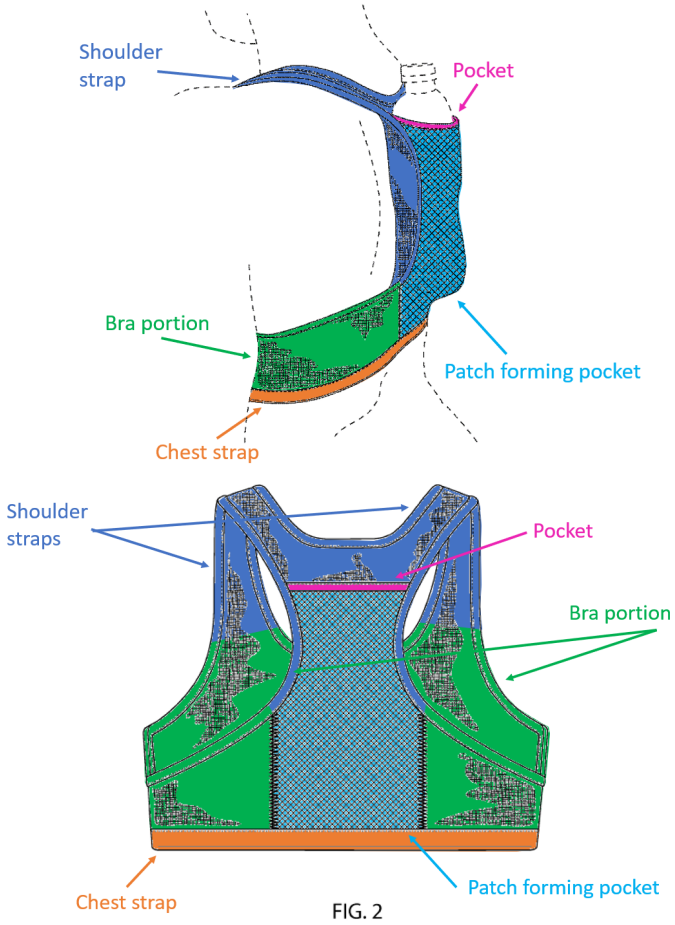


FIG. 2

NIKE-1029 at Figs. 1–2. The opening necessarily "provides access to a pocket interior," as Glass teaches the use of the pocket for the storage and removal of a water bottle. NIKE-1029 at Figs. 1–4, Description.

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. 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). Indeed, as demonstrated *supra* § I, the prior art is saturated with bras with pockets, making the alleged invention of the '510 hardly "born of necessity." NIKE-1036 at 2. If Patent Owner 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 '510, 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 '510 and would relieve the District Court of the need to continue with the '510 in the MA Litigation. Petitioner will likely move to stay the MA Litigation at least insofar as it relates to the '510 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* NIKE1046; *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.*, *NanoCellect 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 Spagna, Rose, and Glass were not cited or considered during prosecution of the '510. *See* NIKE-1018. Further, the grounds presented herein are not cumulative of any prior art rejection made during prosecution of the '510.

The grounds presented herein also are not cumulative of any prior art rejection made during prosecution of the related '800 patent. The PO asserted during prosecution of the related '800 that the use of a pocket biased in a closed position is ideal for "keep[ing] items held safe within the pocket during exercise", distinguishing the '800 claims over U.S. Patent No. 6,626,733 to Knutson. NIKE-1014 at 120 (Oct. 4, 2018 Response to Final Rejection); at 92–100 (Apr. 5, 2018 Final Rejection). In contrast to Spagna, Rose, and Glass, Knutson positioned a

curved shape-retaining insert 40 at a mouth of a back pocket 20 such that a "water bottle 21 is readily inserted into the pocket 20 while running …." NIKE-1031. A POSITA would have understood that the curved shape retaining plastic insert 40 prevents an opening of the back pocket 20 from being biased in a closed position at rest.

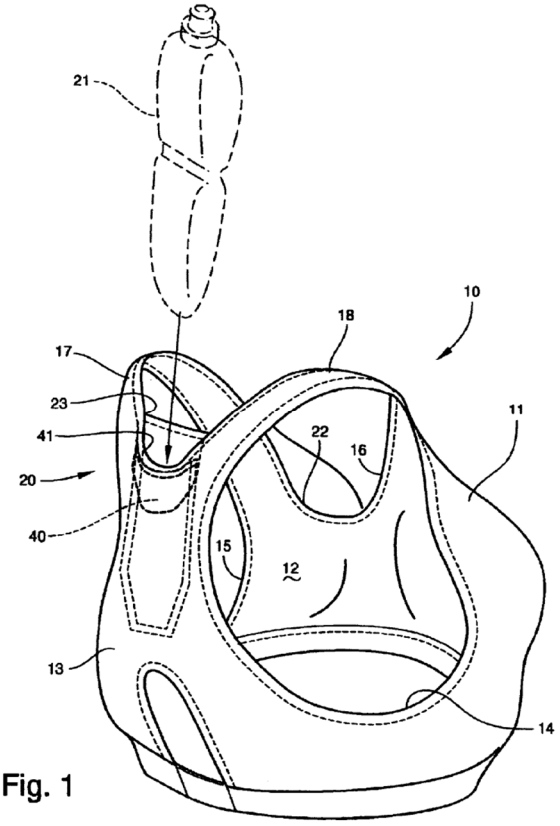


Fig. 1

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 8,922 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 was sent on July 17, 2024, via Federal Express® directed to the Patent Owner at the correspondence address of record:

CALDWELL INTELLECTUAL PROPERTY LAW
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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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