

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NIKE, INC.,

Petitioner,

v.

SHERRYWEAR LLC,

Patent Owner.

IPR2024-01129

Patent 10,869,510

**PATENT OWNER'S PRELIMINARY RESPONSE
TO PETITION FOR *INTER PARTES* REVIEW
UNDER 35 U.S.C. §§ 311-19 AND 37 C.F.R. § 41.100, ET SEQ.**

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<i>J.T. Eaton & Co. v. Atl. Paste & Glue Co.</i> , 106 F.3d 1563, 1571 (Fed. Cir. 1997)	22
<i>Mintz v. Dietz & Watson, Inc.</i> , 679 F.3d 1372, 1378 (Fed. Cir. 2012)	17, 18, 25, 26, 27, 29, 30, 31, 32
<i>PPC Broadband, Inc. v. Corning Optical Commc'ns RF, LLC</i> , 815 F.3d 734, 747 (Fed. Cir. 2016)	 19, 20

Exhibit List

Exhibit No.	Exhibit Description
SW-2001	Affidavit of Sharon Goff
SW-2002	Article: A Comfortable Convenience—Berkshire Eagle
SW-2003	Article: Should YOU Invest in a Brainy Bra—Daily Mail
SW-2004	Urban Savage License
SW-2006	Rabbit License
SW-2007	Senita License
SW-2008	‘036 Senita Sculpt Bra Chart
SW-2009	‘036 Tracksmith Allston Chart
SW-2010	‘036 Crasher Crop Chart
SW-2011	‘510 Senita Flight Bra Chart
SW-2012	‘510 Senita Hustle Bra Chart
SW-2013	‘510 Senita Perfect Pocket Bra Chart
SW-2014	‘510 Senita Sarah Sports Bra Chart
SW-2015	‘510 Urban Savage Stash Bra Chart
SW-2016	‘510 Rabbit Bunny Hop Chart
SW-2017	‘510 Rabbit Crop Hop Support and Pocket Chart
SW-2018	‘510 Rabbit Crop Hop Support and Pocket Tech Chart
SW-2019	‘510 Rabbit Strappy Pocket Bra Chart
SW-2020	‘510 Rabbit UtiliBRA-vo chart
SW-2021	‘550 Senita Sculpt Bra Chart
SW-2022	‘550 Tracksmith Allston Chart
SW-2023	‘550 Tracksmith Allston APA Chart
SW-2024	‘550 Rabbit Crusher Crop Chart
SW-2025	‘800 Senita Flight Bra Chart
SW-2026	‘800 Senita Hustle Bra Chart
SW-2027	‘800 Senita Perfect Pocket Bra Chart
SW-2028	‘800 Senita Sarah Sports Bra Chart
SW-2029	‘800 Urban Savage Stash Bra Chart
SW-2030	‘800 Rabbit Bunny Hop Support and Pocket Chart
SW-2031	‘800 Rabbit Crop Hop Support and Pocket Chart
SW-2032	‘800 Rabbit Crop Hop Support and Pocket Tech Chart.
SW-2033	‘800 Rabbit Strappy Pocket Bra Chart
SW-2034	‘800 Rabbit UtiliBRA-vo Chart
SW-2035	2015 NIKE IDEA Submission

SW-2036	NIKE Correspondence
SW-2037	NIKE Correspondence
SW-2038	Ms. Goff and Mr. Saraceni Correspondence
SW-2039	NIKE Patent Application 15/597,364
SW-2040	2017 NIKE IDEA Submission
SW-2041	Correspondence from NIKE
SW-2042	NIKE Patent Application 15/718,171
SW-2043	‘016 Swoosh Pocket Bra Chart
SW-2044	‘510 Swoosh Pocket Bra Chart
SW-2045	‘550 Swoosh Pocket Bra Chart
SW-2046	‘878 Swoosh Pocket Bra Chart
SW-2047	‘800 Swoosh Pocket Bra Chart
SW-2048	‘016 Swoosh Bra Chart
SW-2049	‘510 Swoosh Bra Chart
SW-2050	‘551 Swoosh Bra Chart
SW-2051	‘878 Swoosh Bra Chart
SW-2052	‘800 Swoosh Bra Chart
SW-2053	‘036 Swoosh on the Run Chart
SW-2054	‘288 Swoosh on the Run Chart
SW-2055	‘510 Swoosh on the Run Chart
SW-2056	‘550 Swoosh on the Run Chart
SW-2057	‘800 Swoosh on the Run Chart
SW-2058	Swoosh Pocket Bra (product images)
SW-2059	Swoosh Pocket Bra (product images)
SW-2060	Swoosh Bra (product images)
SW-2061	Swoosh Bra (product images)
SW-2062	Swoosh on the Run (product images)
SW-2063	Swoosh on the Run (product images)
SW-2064	US 4,699,144 to Sherwood
SW-2065	US 2013/0288569 to Gentry, et al.

I. INTRODUCTION

The Petition fails to show a reasonable likelihood that Petitioner will succeed in invalidating at least one challenged claim of U.S. Patent No. 10,869,510 (“‘510 patent”). The Petition asserts three grounds for invalidity based on obviousness. Petitioner cannot show a reasonable likelihood that it will succeed on *any* of these grounds because the same or substantially similar art was considered during prosecution, the Petitioner has failed to demonstrate that the Examiner made any material error in allowing the patent, and none of the prior art offered in the petition renders the ‘510 patent obvious.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Invention, Patenting and Reception of the Pocket Bra

Sharon Goff invented the Pocket Bra to resolve a long-standing and unfulfilled need in women’s apparel: women’s clothes frequently lack pockets, and Ms. Goff, like many other women, resorted to storing objects in her bra. This was unfashionable, uncomfortable and sometimes resulted in objects getting lost. *See* Goff Affidavit, Exhibit SW-2001 at ¶ 2. In response, Ms. Goff invented several variations of bras with pockets, which are collectively referred to herein as variants of the Pocket Bra. *Id.* at ¶ 3.

When Ms. Goff began selling variants of the Pocket Bra, she discovered that many women had a similar experience to her and welcomed the new invention as a

way to store items and keep their hands free. *Id.* at ¶ 6. At least one woman who spoke to Ms. Goff also reported unexpected benefits, such as the ability to store insulin pumps on their person using the Pocket Bra. *Id.* at ¶ 7. Women showed further interest in the product by requesting it in a greater size range. *Id.*

The Pocket Bra also enjoyed significant positive press. In addition to various interviews with Ms. Goff herself, an expert in lingerie and women's undergarments hailed an early variant of the Pocket Bra as the Pocket Bra as "genius." Exhibit SW-2003. The expert, Chantelle, also echoed the observation of other women, and of Ms. Goff herself, that women frequently stowed items in their bras already, and the pocket bra represented a better solution than the ad hoc methods those women resorted to. [*Id.*].

Ms. Goff also pursued patent protection for the Pocket Bra and variants thereof, obtaining several patents in the process. These patents include the patents challenged in this and related IPR proceedings, specifically U.S. Patent No. 9,295,288 ("the '288 patent"); U.S. Patent No. 9,808,036 ("the '036 patent"); U.S. Patent No. 10,219,550 ("the '550 patent"); U.S. Patent No. 9,289,016 ("the '016 patent"); U.S. Patent No. 9,723,878 ("the '878 patent"); U.S. Patent No. 10,244,800 ("the '800 patent"); U.S. Patent No. 10,219,551 ("the '551 patent"); and U.S. Patent No. 10,869,510 ("the '510 patent") (collectively "the Disputed Patents).

B. Licensing of the Pocket Bra Patents to Third Parties.

Patents for the Pocket Bra have already been licensed to several other companies who started producing similar products after Ms. Goff filed her patent applications and began marketing her inventions. These licenses include a license to Urban Savage, LLC, [REDACTED] a license to Rabbit, LLC, and a license to Senita, LLC. SW-2001 at ¶ 9. The licensed products continue to enjoy commercial success, as evidenced by the continued availability of licensed products from each of the companies subject to the above-described licenses. *Id.* at ¶ 10. Each of the four licenses described above is provided herewith in Exhibits 2004-2007. Claim charts illustrating the applicability of Pocket Bra patent claims to products covered by the licenses are provided herewith as Exhibits 2008-2034.

SherryWear also has executed a license to Smooth Landing Inc., the provisions of which remain confidential. SW-2001 at ¶ 10.

C. Interactions with NIKE

On June 18, 2015, Ms. Goff submitted SherryWear's then-issued and pending patents, and photographs of a couple of SherryWear Pocket Bras, to NIKE via "NIKE Idea Submission," an online idea submission platform operated by NIKE. *Id.* at ¶ 11. A copy of the June 18, 2015, NIKE Idea submission is provided herewith as Exhibit 2035. Nike did not respond to the submission. SW-2001 at ¶

12. As illustrated below, the submission contained examples of the SherryWear sports bra products:



In January 2017, Ms. Goff contacted several high-ranking employees at NIKE via LinkedIn messenger including Evan Reynolds, then-Head of Marketplace Strategic Investments; Rick Boyd, then-Patent Footwear specialist; Nathan Plowman, then-Senior Director at NIKE; and Hillary Krane, then-General Counsel for NIKE. *Id.* at ¶¶ 13-14. Copies of the correspondence are provided herewith as Exhibit 2036 and Exhibit 2037. Hillary Krane forwarded Ms. Goff's messages to Paul Saraceni, then the VIP of Global IP Transactions & Licensing at NIKE, on

February 7, 2017. *See* Exhibit SW-2037.

On February 7, 2017, Mr. Saraceni asked Ms. Goff to send a “non-confidential list of IP assets that [SherryWear] had begun to market for sale.” SW-2001 at ¶ 15. In response, Ms. Goff sent Mr. Saraceni a list of SherryWear’s then-issued and pending patents. *Id.* at ¶ 16. The patents then pending included the ‘878 patent, the ‘016 patent, the ‘036 patent, and the ‘288 patent, as a result of which NIKE was given access to all disclosure elements of the challenged patents.

Between February and March of 2017, Mr. Saraceni and Ms. Goff communicated again by email regarding the licensing or purchasing of SherryWear’s intellectual property. *Id.* at ¶ 17. A copy of the February and March 2017 correspondence is provided herewith as exhibit 2038. On March 24, 2017, Ms. Goff received an email from Mr. Saraceni stating, “[w]e will respectfully pass on the opportunity.” SW-2001 at ¶ 18.

On May 17, 2017, only fifty-five days, or less than 8 weeks, after Mr. Saraceni emailed Ms. Goff that NIKE would “pass on the opportunity,” NIKE filed U.S. patent application 15/597,364, entitled “Bra With Storage Pockets.” A copy of the U.S. patent application 15/597,364 is provided herewith as Exhibit 2039.

On September 22, 2017, Ms. Goff submitted SherryWear’s Pocket Bra idea and patents to NIKE via NIKE Idea Submission again. SW-2001 at ¶ 19. A copy of the September 22, 2017, submission is provided herewith as Exhibit 2040. On

October 20, 2017, Barrett Inman of NIKE's legal department responded to Ms. Goff's second NIKE Idea Submission stating, "[t]here is no interest in pursuing your submission." SW-2001 at ¶ 20. A copy of Mr. Inman's October 20, 2017 response is attached hereto as Exhibit 2041.

On September 28, 2017, six days after Ms. Goff submitted SherryWear's second NIKE Idea Submission, NIKE filed U.S. patent application 15/718,171, entitled "Bra With Storage Pockets." A copy of U.S. patent application 15/718,171 is attached hereto as Exhibit 2042. Both patent application 15/597,364 and 15/718,171 have since issued as patents.

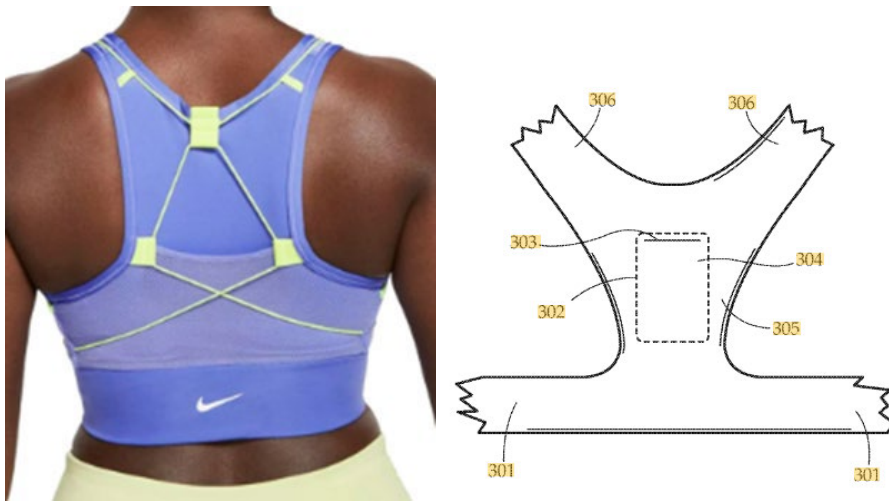
SherryWear filed a complaint in the United States District Court for the District of Massachusetts for patent infringement based on the manufacture, use, sale, offer for sale, and/or import by NIKE of and with regard to several bras with pockets, initiating Case 1:23-cv-11599-LTS, SHERRYWEAR, LLC v. NIKE, INC. (the "Coping Case"). This case advanced to the Markman ruling, after which NIKE filed a total of eight IPR requests against the Disputed Patents and moved to stay the Coping Case. The stay was granted.

D. Evidence of Copying by NIKE

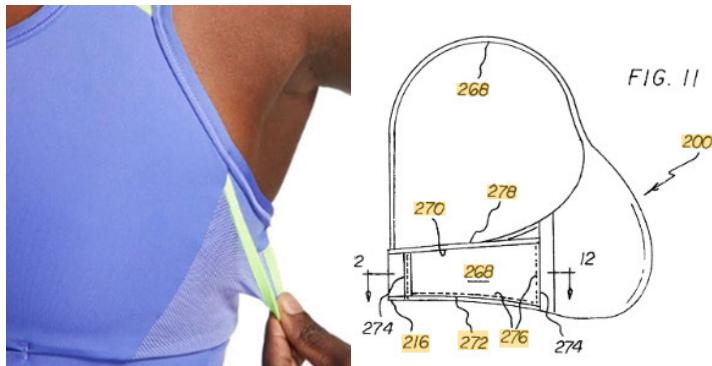
There is significant evidence that NIKE copied the patented inventions of Ms. Goff. As noted above, NIKE drafted and filed a patent application relating to a

bra with pockets shortly after receiving product samples, patents, and patent applications from Ms. Goff. NIKE also began producing and selling bras with pockets after this point.

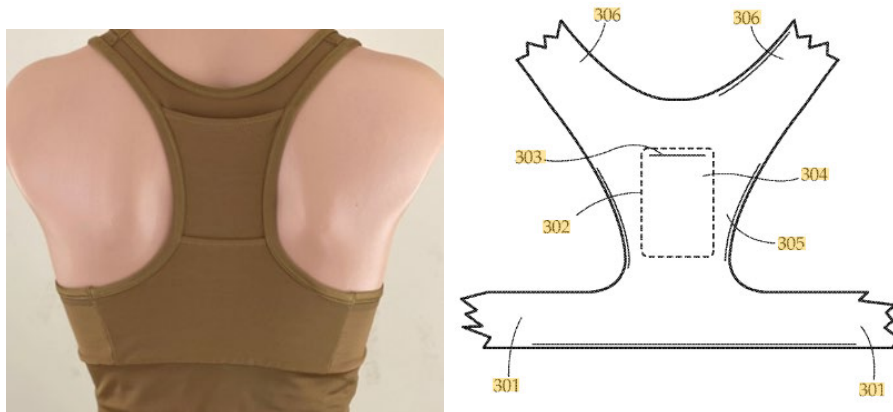
Several of Nike's products have notable similarities to the disclosures of the SherryWear patents. For instance, NIKE makes, uses, offers for sale, sells, and imports a sports bra with pockets titled the "Swoosh Pocket Bra." As shown in the following comparison, the Swoosh Pocket Bra has a back pocket, similarly to the back pocket portrayed in FIG. 13 of the '800 and '510 patents:



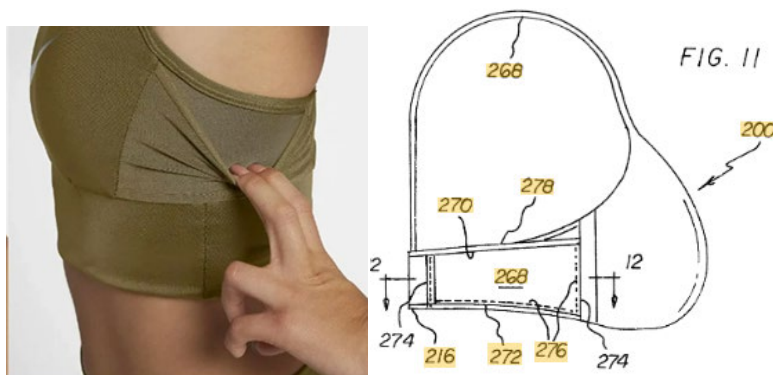
Similarly, the Swoosh Pocket Bra has a side pocket that closely resembles the side pocket portrayed in FIG. 11 of the '016, '551, and '878 patents:



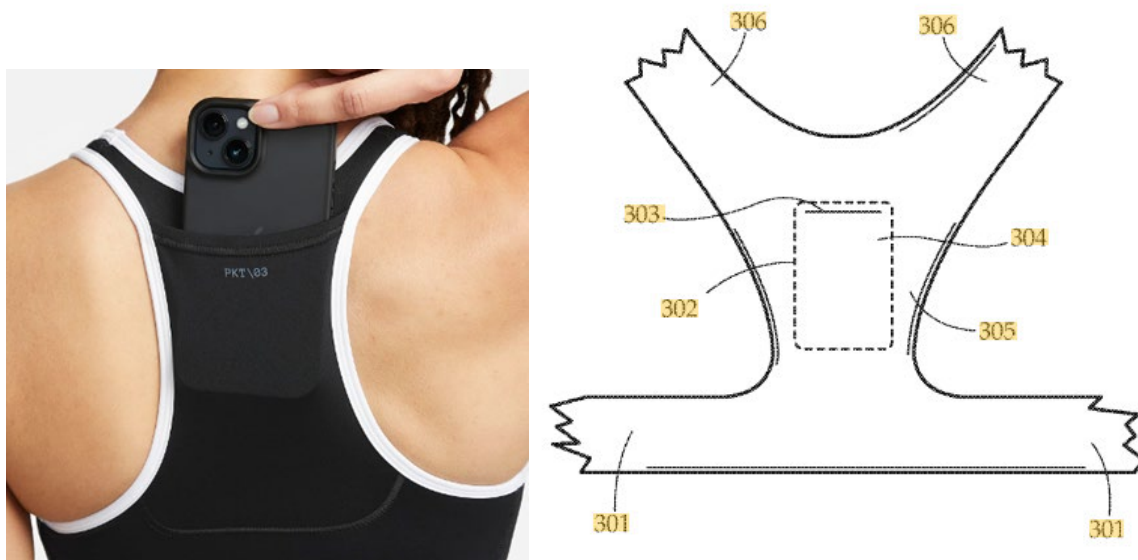
NIKE also makes, uses, offers for sale, sells, and imports a sports bra with pockets titled the “Swoosh Bra.” The Swoosh Bra has a rear pocket that resembles the rear pocket depicted in FIG. 13 of the ‘800 and ‘510 patents:



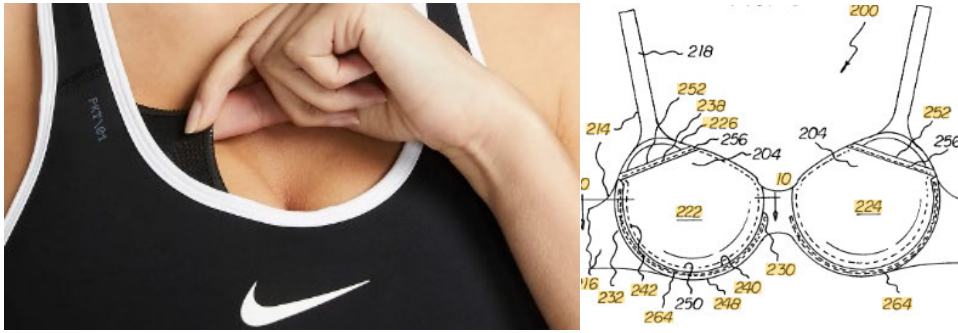
The Swoosh Bra also has a side pocket similar to that depicted in FIG. 11 of the ‘016, ‘551, and ‘878 patents:



NIKE also makes, uses, offers for sale, sells, and imports a sports bra with pockets titled, “Swoosh on the Run.” The Swoosh on the Run has one back pocket and two front pockets. The Swoosh on the Run has some similar features to those depicted in Ms. Goff’s patents. For instance, the back pocket of the Swoosh on the Run is similarly designed and positioned to the back pocket as portrayed in FIG. 13 of the ‘800 and ‘510 patents:



The Swoosh on the Run also has a pocket on the front cup area of the bra similarly to that portrayed in FIG. 9 of the ‘288, ‘036, and ‘550 patents:



There are also significant points of similarity between the above-mentioned NIKE products and the products that Ms. Goff presented to NIKE prior to NIKE's patent filings, as described above. For instance, both the Swoosh Bra and the Swoosh Pocket Bra have back pockets below the shoulder blade region on the respective bras, similarly to one of the sports bras presented by Ms. Goff to NIKE:



Similarly, each of the Swoosh Bra and the Swoosh Pocket Bra has a side pocket similarly positioned to the side pocket in another sports bra example Ms. Goff sent to NIKE:



There are also notable similarities between the products Ms. Goff provided to NIKE and the disclosures of the NIKE patents. For instance, FIG. 6 of patent application 15/597,364 shows a pocket below the shoulder blades on a depicted bra, similarly situated to the back pocket on one of the bras submitted by Ms. Goff:

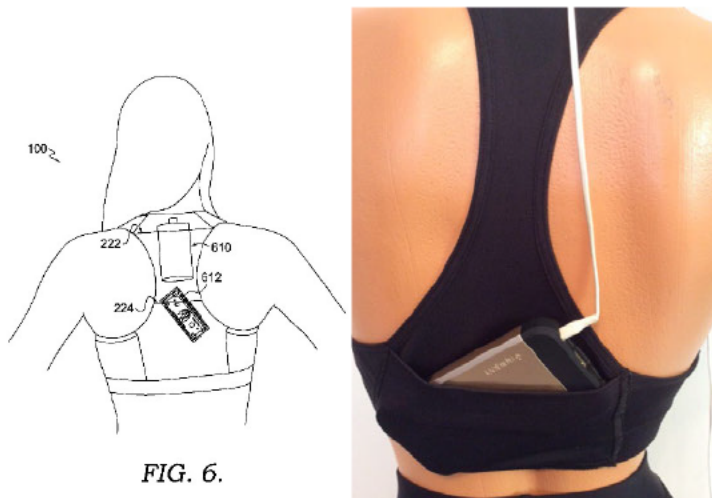


FIG. 5 of the same application depicts a side pocket similar to the side pocket of one of the bras Ms. Goff submitted to NIKE:

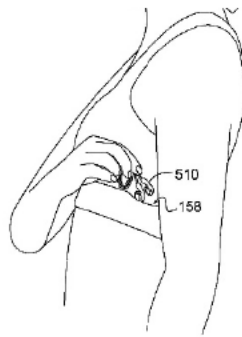
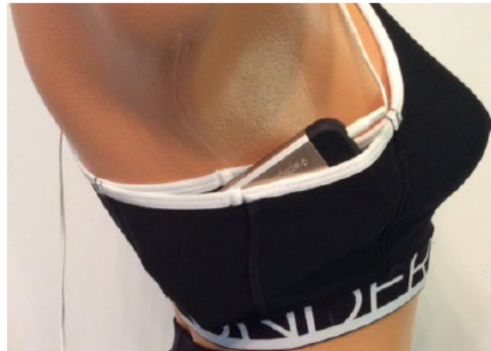


FIG. 5.



In the Copending Case, SherryWear has presented factual allegations indicating that NIKE intentionally copied her designs to produce its product lines and as the basis for its patent applications. NIKE had not yet produced any documentation concerning the initiation of the design process for the above-described products before the Copending Case was stayed. Counsel for SherryWear has also not had the opportunity to depose either Paul Saraceni or the person listed as the inventor on the Nike patents, Nicole Rendon; both depositions had been scheduled before the Copending Case was stayed, but are now on hold pending the outcome of this matter.

In filing the Copending Case, Sherrywear provided claim charts indicating how the claims of the Disputed Patents read on and/or correspond to features of the above-described products. These claim charts are provided herewith as Exhibits SW-2043 through SW-2057. The images provided above of NIKE products are provided herewith as Exhibits SW-2058 through SW-2063.

III. THE PETITION FAILS TO SHOW A REASONABLE LIKELIHOOD OF SUCCESS OF EACH OF ITS GROUNDS FOR INVALIDITY

Even if the Board reaches the merits of Petitioner's asserted grounds for invalidity, each fails because the prior art fails to disclose, teach, or suggest important claim elements of the '510 patent, particularly in light of the evidence of copying by NIKE and other objective indicia.

The question of obviousness is determined according to the *Graham* factors. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). These include (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the pertinent art; and (4) secondary considerations of non-obviousness. *Id.* The Petition fails to show a reasonable likelihood of success on the merits because of the differences between the claims and the asserted art in light of significant objective indicia indicating non-obviousness.

A. Ground 1 Fails to Demonstrate Obviousness over Spagna.

1. Petitioner Does Not Demonstrate that Spagna Teaches, Suggests, or Motivates Each Element of the Challenged Claims

The Petitioner asserts that Spagna (US 2007/0298684) alone renders each element of claims 1 and 12 of the '510 patent obvious. However, there are elements of claims 1 and 12 as claimed that Spagna does not teach, suggest, or

motivate. Furthermore, the objective indicia of non-obviousness weigh strongly against the conclusion that a person skilled in the art would consider claims 1-16 obvious over Spagna.

Spagna does not teach or render obvious a pocket made from stretchable material. Petitioner suggests that this feature is taught by Spagna because “Spagna indicates 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.” And “Indeed, a POSA would have understood that polyester and other synthetic fabrics, such as Spandex or elastane, can be ‘stretchable fabric.’” This implies that the POSA would also be aware of options for polyester and other synthetic fabrics that are not “stretchable fabric,” and requires the POSA to be motivated by their general knowledge both to assume that the pocket is made from the same material as the bra and that the material is “stretchable,” neither of which is actually taught by Spagna. The Petitioner further argues that “[a] POSA would have understood that the shape of such objects may not easily conform to the shape of a rigid pocket,” however, this also suggests that a POSA might understand that the shape of such objects could conform to a “rigid pocket,” assuming rigidity is meant here as the opposite of stretchability.

Both of the above arguments for obviousness amount to stating that a POSA *could* choose a pocket of stretchable material from the various fabric types potentially available, without suggesting that Spagna motivates such a choice. This is an exercise in reasoning through hindsight: a POSA would not necessarily be motivated to make the pocket recited in the ‘510 claims if their goal was not to replicate that design; given the crowded nature of this inventive field and the relatively simple technology, any assumptions about the motivations of a POSA must be rigorously set against objective criteria to avoid the danger of hindsight. *See Cont’l Can Co. USA v. Monsanto Co.*, 948 F.2d 1264, 1273 (Fed. Cir. 1991) (“[D]ifferences that may appear technologically minor,” are often better assessed using objective indicia, especially in a crowded field); *Mintz v. Dietz & Watson, Inc.*, 679 F.3d 1372, 1379 (Fed. Cir. 2012) (“Where the invention is less technologically complex, the need for *Graham* findings can be important to ward against falling into the forbidden use of hindsight.”).

Spagna also does not teach or render obvious a pocket that is biased in a closed position. There is no explicit teaching regarding this feature in Spagna. Spagna does express that a purpose for the pocket is to keep devices set therein secure during physical activity. Petitioner’s expert suggests that 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 at ¶ 913. This implies that there are other ways to maintain items in a pocket during physical activity aside from such a bias, and the expert goes on to mention at least one other in the same paragraph. *Id.* Once again, Petitioner and Petitioner’s expert are calling on the Board to find that a particular design choice recited in claims 1 and 12 of the ‘510 patent is obvious because a POSA might identify it as one potential solution out of many. As noted above, this reasoning greatly increases the risk of hindsight bias in evaluating the ‘510 claims, especially in light of the technologically simple nature of innovations in this crowded field. As set forth in detail below, the objective indicia of obviousness are crucial for evaluation of obviousness in this context, and those objective indicia militate against the Petitioner’s contentions.

Therefore, and for at least this reason, Petitioner has failed to demonstrate that Spagna teaches, suggests, or motivates each element of claims 1 and 12. Claim 2-11 and 13-16 depend, directly or indirectly, from claims 1 and 12. Accordingly, because the Petition cannot demonstrate that claims 1 and 12 is obvious over Spagna, Ground 1 fails on claim 2-11 and 13-16 as well.

2. The Objective Indicia Demonstrate that the Claims of the ‘510 Patent are Not Obvious over Spagna

The non-obviousness of the ‘510 claims is additionally and separately supported by evidence for various objective indicia of non-obviousness. “Objective indicia, or secondary considerations, of non-obviousness can be the “most probative and cogent evidence of non-obviousness.” *Mintz*, 679 F.3d at 1378, quoting *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983). “[O]bjective indicia constitute “independent evidence of nonobviousness.” *Id.*, quoting *Pressure Prods. Med. Supplies, Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1319 (Fed.Cir.2010). Such evidence “may often establish that an invention appearing to have been obvious in light of the prior art was not.” *Id.*, quoting *Simmons Fastener Corp. v. Illinois Tool Works, Inc.*, 739 F.2d 1573, 1575 (Fed.Cir.1984).

Objective indicia of obviousness are especially crucial where the nature of the technology and the state of the art give rise to a heightened risk of impermissible hindsight. For example, “differences that may appear technologically minor,” such as a “simple variation on known themes,” are often better assessed using “[s]uch objective indicia as commercial success, or filling an existing need,” especially in a crowded field. *Cont’l Can Co. USA*, 948 F.2d at

1273. Likewise, “[w]here the invention is less technologically complex, the need for *Graham* findings can be important to ward against falling into the forbidden use of hindsight.” *Mintz*, 679 F.3d at 1379.

NIKE argues at length that bras, pockets, and even bras with pockets have existed for decades. They also refer to the inventive landscape of bras with pockets as “saturated.” They also emphasize the relative simplicity of innovations in this space by quoting Ms. Goff as saying the idea for her invention “seemed pretty obvious” after she had conceived of it. *See* Exhibit SW-2002. This is precisely why objective indicia are so important in this case. NIKE, and Ms. Goff in her offhand comment to a local newspaper, are applying impermissible hindsight to the question of obviousness with regard to a technically simple invention in an old field. “These objective criteria help inoculate the obviousness analysis against hindsight. The objective indicia “guard against slipping into use of hindsight and to resist the temptation to read into the prior art the teachings of the invention in issue.” *Graham v. John Deere Co.*, 383 U.S. 1, 36, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966).” *Mintz*, 679 F.3d at 1378. The pocket bra was not obvious to Ms. Goff prior to her conception of it, and it was not obvious to NIKE before Ms. Goff revealed her designs to NIKE’s representatives. That innovations in pocket bras can be patentable is further demonstrated by the fact that NIKE filed and later

obtained at least two patents on pocket bras following their interactions with Ms. Goff.

Objective criteria of non-obviousness can include such factors as evidence of copying of the subject invention, existence of licenses for the patents at issue, evidence of commercial success of the inventions, independent praise of the subject invention, and evidence of long-felt, unresolved need resolved by the subject invention. *Id.* at 1379. Each factor must have some nexus to the patent in question. *Fox Factory Inc. v. SRAM LLC*, 944 F.3d 1366, 1373 (Fed. Cir. 2019). “The patentee is entitled to a presumption of nexus if evidence of secondary considerations is “tied to a specific product” that embodies and is “coextensive” with the claimed invention. *Id.* “This is true even when the product has additional, unclaimed features.” *PPC Broadband, Inc. v. Corning Optical Commc'ns RF, LLC*, 815 F.3d 734, 747 (Fed. Cir. 2016). Here, the factual record includes substantial evidence for objective indicia, including evidence of copying, licenses to third parties, commercial success, long-felt unresolved need, and industry praise.

a) Copying

“Evidence of copying may include internal documents, direct evidence such as photos of patented features or disassembly of products, or access and similarity to a patented product.” *Institut Pasteur & Universite Pierre Et Marie Curie v. Focarino*, 738 F.3d 1337, 1347-48 (Fed. Cir. 2013). Here there is significant

evidence that NIKE copied the patented application in the ‘510 patent. NIKE received copies of patents and sample products from Ms. Goff prior to filing its patents or marketing any of the allegedly infringing products. *See* Exhibit SW-2001 at ¶¶ 11-17. Thus, NIKE had access to the patented products. *See Institut Pasteur*, 738 F.3d at 1347-48. As noted above, each of the Swoosh Pocket Bra, the Swoosh Bra, and the Swoosh on the Run has several points of similarity both to the product depicted and described in Ms. Goff’s patents as supplied to NIKE and to the product samples Ms. Goff sent to NIKE. There is also a claim chart showing a high degree of correspondence between features of the Swoosh Pocket Bra and the claims of the ‘510 patent, and another chart demonstrating a high degree of correspondence between the claims of the ‘510 patent and the Swoosh Bra. *See* Exhibits SW-2044 and SW-2049. This, combined with the evidence above, indicates a nexus between the copying and the patented invention. *See Fox Factory Inc.*, 944 F.3d at 1373; *PPC Broadband, Inc.*, 815 F.3d at 747.

There is further evidence of a nexus between NIKE products and patents and the other patents being challenged in the related IPR cases. There are claim charts indicating that the claims of the ‘036 patent read on or are highly coextensive with the Swoosh on the Run, that the claims of the ‘510 patent read on or are highly coextensive with the Swoosh Pocket Bra, the Swoosh Bra, and the Swoosh on the Run, that the claims of the ‘551 patent read on or are highly coextensive with read

on or are highly coextensive with the Swoosh Pocket Bra and the Swoosh Bra, that the claims of the ‘800 patent read on or are highly coextensive with the Swoosh Pocket Bra and the Swoosh Bra, that the claims of the ‘800 patent read on or are highly coextensive with the Swoosh Pocket Bra, the Swoosh Bra, and the Swoosh on the Run, that the claims of the ‘288 patent read on or are highly coextensive with the Swoosh on the Run, and that that the claims of the ‘550 patent read on or are highly coextensive with the Swoosh on the Run. *See* Exhibits SW-2043 through SW-2052 through SW-2057. Therefore, there is extensive evidence of copying with regard to the ‘510 patent and related patents.

b) Licenses

Further support for the nonobviousness of the ‘510 patent is found in the licenses to competitors of the other patents in its family. “Licenses taken under a patent in suit may constitute evidence of nonobviousness,” provided the patentee demonstrates “‘a nexus between the merits of the invention and the licenses of record.’” *In re GPAC Inc.*, 57 F.3d 1573, 1580 (Fed. Cir. 1995). A nexus may be presumed, as before, where the product in question is coextensive with the claims of the patent in question. *Fox Factory Inc.*, 944 F.3d at 1373. Here, the ‘510 patent has been licensed to Urban Savage, LLC, Rabbit LLC, and Senita. *See* Exhibits SW-2004, SW-2006, and SW-2007. There are several charts illustrating that the

‘510 patent claims are coextensive with each of the three licenses. *See* Exhibits SW-2011 through SW-2020. Each license further contains a provision whereby the licensee agrees to mark licensed products with the licensed patents. Each of these facts indicates a nexus between the licenses and the licensed patents, both for the purposes of this factor and for the purposes of commercial success.

c) Commercial Success

As further support for the non-obviousness of the ‘510 patent, there is some evidence of commercial success of products linked to the ‘510 patent and the other Disputed Patents. Where there is evidence of commercial success, and the “successful product is the invention disclosed and claimed in the patent, it is presumed that the commercial success is due to the patented invention.” *J.T. Eaton & Co. v. Atl. Paste & Glue Co.*, 106 F.3d 1563, 1571 (Fed. Cir. 1997). Here, and as noted above, multiple products licensed under the Disputed Patents remain available for sale, suggesting that those products have been profitable. As noted above, the licensees acknowledged in each license that the licensed products practiced the invention described and claimed in the licensed patents. There is also evidence that some licensed products described above have generated significant sales revenue. For instance Rabbit, LLC paid a lump sum of \$22,549.22, which amounted to 1% of gross revenues from the licensed products up to that point;

Rabbit, LLC thus earned gross revenue in sales, as of the signing of the license, of at least 2.25 million dollars with respect to licensed products. SW-2006 at Terms 4.2 and 5.1.

d) Other Objective Indicia

As further support for the non-obviousness of the ‘510 patent, there is evidence of industry praise for products linked to the ‘510 patent and the other Disputed Patents. As noted above, at least one industry expert described the Pocket Bra as described and claimed in the Disputed Patents as “genius.” *See* SW-2003. Multiple women also informed Ms. Goff that the Pocket Bra as described and claimed in the Disputed Patents fulfilled a long-standing, unresolved need for improved storage about their person and other uses. *See* SW-2001 at ¶¶ 6 and 7.

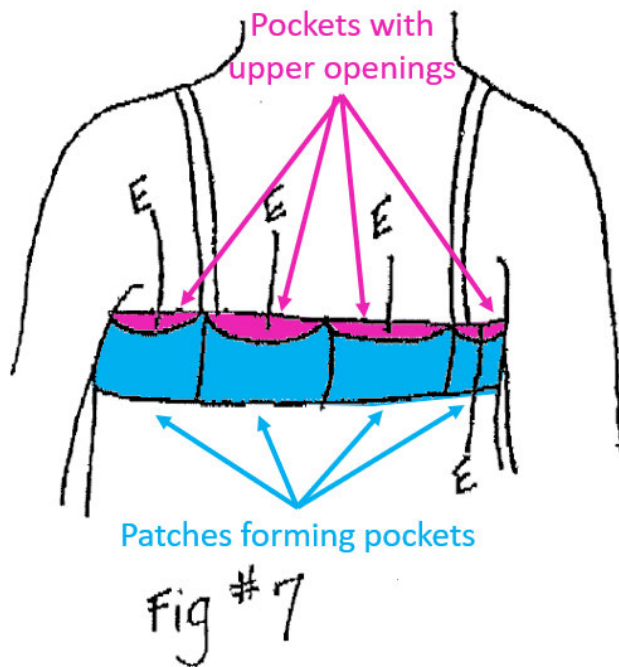
Therefore, and for at least the reasons set forth above, the Petitioner cannot succeed in demonstrating that the claims of the ‘510 patent are obvious in Ground 1 of the Petition.

B. Ground 2 Fails to Demonstrate Obviousness over Rose in Light of the Objective Indicia

1. Petitioner Does Not Demonstrate that Rose Teaches, Suggests, or Motivates Each Element of the Challenged Claims

The Petitioner asserts that Rose alone renders each element of claims 1 and 12 of the '510 patent obvious. However, there are elements of claims 1 and 12 as claimed that Rose does not teach, suggest, or motivate. Furthermore, the objective indicia of non-obviousness weigh strongly against the conclusion that a person skilled in the art would consider claims 1-16 obvious over Rose.

Rose does not teach, motivate, or otherwise render obvious a back pocket that is “biased in a closed position at rest.” Petitioner suggests that this is obvious because “a POSA would have been motivated to look for known solutions in the art, such as methods of keeping items stored in the pocket store.” However, Petitioner does not propose any motivation specifically to design a pocket according to one of those methods, let alone a motivation to choose biasing in a closed position specifically. As noted above, a POSA would have other options to consider besides biasing, such as a fastener. As for Rose itself, in addition to being silent on the desire to keep objects secure, the pockets are depicted in Rose hanging open loosely:



It is difficult to see any motivation in Rose for a pocket that is biased in a closed position. As before, a POSA would not necessarily be motivated to make the pocket recited in the '510 claims if their goal was not to replicate that design; given the crowded nature of this inventive field and the relatively simple technology, any assumptions about the motivations of a POSA must be rigorously set against objective criteria to avoid the danger of hindsight. *See Cont'l Can Co. USA*, 948 F.2d at 1273; *Mintz*, 679 F.3d at 1379.

Therefore, and for at least this reason, Petitioner has failed to demonstrate that Rose teaches, suggests, or motivates each element of claims 1 and 12. Claim 2-11 and 13-16 depend, directly or indirectly, from claims 1 and 12. Accordingly,

because the Petition cannot demonstrate that claims 1 and 12 is obvious over Rose, Ground 2 fails on claims Claim 2-11 and 13-16 as well.

2. The Objective Indicia Demonstrate that the Claims of the ‘510 Patent are Not Obvious over Rose

The non-obviousness of the ‘510 claims is additionally and separately supported by evidence for various objective indicia of non-obviousness. As noted above, “Objective indicia, or secondary considerations, of non-obviousness can be the “most probative and cogent evidence of non-obviousness.” *Mintz*, 679 F.3d at 1379, quoting *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983). “[O]bjective indicia constitute “independent evidence of nonobviousness.” *Id.*, quoting *Pressure Prods. Med. Supplies, Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1319 (Fed.Cir.2010). Such evidence “may often establish that an invention appearing to have been obvious in light of the prior art was not.” *Id.*, quoting *Simmons Fastener Corp. v. Illinois Tool Works, Inc.*, 739 F.2d 1573, 1575 (Fed.Cir.1984). Furthermore “differences that may appear technologically minor,” such as a “simple variation on known themes,” are often better assessed using “[s]uch objective indicia as commercial success, or filling an existing need,” especially in a crowded field. *Cont’l Can Co. USA*, 948 F.2d at 1273.

Likewise, “[w]here the invention is less technologically complex, the need for *Graham* findings can be important to ward against falling into the forbidden use of hindsight.” *Mintz*, 679 F.3d at 1379.

Here, and as set forth above for Ground 1, the factual record includes substantial evidence for objective indicia, including evidence of copying, licenses to third parties, commercial success, long-felt unresolved need, and industry praise.

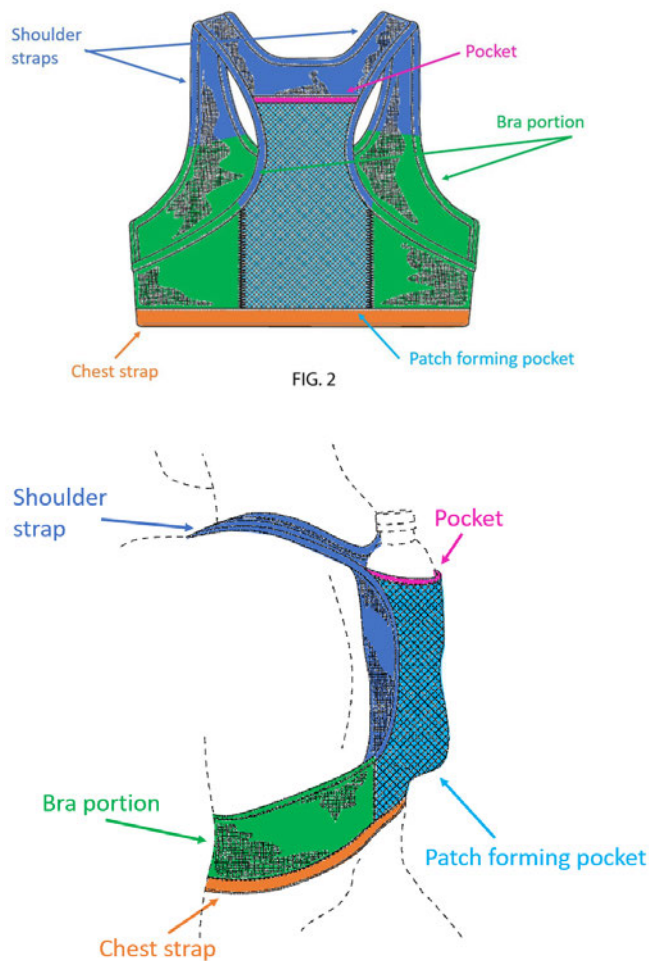
Therefore, and for at least the reasons set forth above, the Petitioner cannot succeed in demonstrating that the claims of the ‘510 patent are obvious in Ground 2 of the Petition.

C. Ground 3 Fails to Demonstrate Obviousness over Glass in Light of the Objective Indicia

1. Petitioner Does Not Demonstrate that Glass Teaches, Suggests, or Motivates Each Element of the Challenged Claims

The Petitioner asserts that Glass alone renders each element of claims 1 and 12 of the ‘510 patent obvious. However, there are elements of claims 1 and 12 as claimed that Glass does not teach, suggest, or motivate. Furthermore, the objective indicia of non-obviousness weigh strongly against the conclusion that a person skilled in the art would consider claims 1-16 obvious over Glass.

Glass does not teach or suggest a pocket made of “stretchable material.” As a design patent Glass is of course silent on the materials used to make the garment depicted. Petitioner argues, nonetheless, that a POSA would see the pocket material as naturally stretchable, given the fact that it is shown as flat in the first drawing provided below, and rounded with a bottle inserted in the second drawing:



However, viewing the second drawing, it is possible to see that the formerly flat material of the back of the garment (shown as dark blue in the Petitioner’s rendering), has bent into a rough half-cylinder around the bottle, implying that the

back of the garment bent to accommodate the new volume, while the pocket bent in approximately equal measure. Neither Petitioner nor Petitioner's expert explains or even acknowledges this depiction, but it is possible to see an alternative to elastic deformation in the distortion of the back of the garment as shown. The Petitioner goes on to note that "[a] POSA would have understood that the shape of such objects may not easily conform to the shape of a rigid bra," but neglects to discuss the possibility, visible in the above-displayed drawing, of a bra and/or pocket made of flexible inelastic material. As Glass is necessarily silent on the nature of the materials used, Petitioner once again is essentially arguing that a POSA would be motivated to design the pocket of Glass with a stretchable material because that would be one possible option for a pocket that could accommodate a water bottle as depicted. This by itself does not indicate any motivation to choose this particular design option. As noted previously, this is a crowded field of invention which is technologically simple, and thus the objective indicia of nonobviousness are essential to avoid hindsight bias in imputing motivations to a POSA. *See Cont'l Can Co. USA*, 948 F.2d at 1273; *Mintz*, 679 F.3d at 1379. As discussed above, the objective indicia in this case favor a finding that claims 1 and 12 of the '510 patent are not obvious.

Glass also does not teach or render obvious that the pocket is "biased in a closed position." First, of course Glass contains no explicit teachings at all, given

that it is a design patent, aside from what you can see in the static images. The Petitioner argues that the fact the pocket is shown lying flat in one drawing, and bulging to admit a bottle in another, indicates that it must be biased in a closed position. However, nothing in these two drawings of Glass actually demonstrates how or why the pocket is flat in the latter picture, and although the Petitioner's expert avers that a POSA would assume the flattening to have been caused by a bias, the expert neglects to say why. *See Nike-1001* at 431. Nothing tells the story of those two drawings, and thus nothing precludes the interpretation that a person may have flattened the pocket manually in one of them. As before, we are invited to believe that the POSA is motivated entirely by their own background knowledge to identify the teaching, without any documentation showing where that motivation might originate. Once again, this is a crowded field of invention which is technologically simple, and thus the objective indicia of nonobviousness are essential to avoid hindsight bias in imputing motivations to a POSA. *See Cont'l Can Co. USA*, 948 F.2d at 1273; *Mintz*, 679 F.3d at 1379. As discussed above, the objective indicia in this case favor a finding that claims 1 and 12 of the '510 patent are not obvious.

Therefore, and for at least this reason, Petitioner has failed to demonstrate that Glass teaches, suggests, or motivates each element of claims 1 and 12. Claims 2-11 and 13-16 depend, directly or indirectly, from claims 1 and 12. Accordingly,

because the Petition cannot demonstrate that claims 1 and 12 is obvious over Glass, Ground 3 fails on claims Claim 2-11 and 13-16 as well.

2. The Objective Indicia Demonstrate that the Claims of the ‘510 Patent are Not Obvious over Glass

The non-obviousness of the ‘510 claims is additionally and separately supported by evidence for various objective indicia of non-obviousness. As noted above, “Objective indicia, or secondary considerations, of non-obviousness can be the “most probative and cogent evidence of non-obviousness.”, *Mintz*, 679 F.3d at 1379, quoting *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983). “[O]bjective indicia constitute “independent evidence of nonobviousness.” *Id.*, quoting *Pressure Prods. Med. Supplies, Inc. v. Greatbatch Ltd.*, 599 F.3d 1308, 1319 (Fed.Cir.2010). Such evidence “may often establish that an invention appearing to have been obvious in light of the prior art was not.” *Id.*, quoting *Simmons Fastener Corp. v. Illinois Tool Works, Inc.*, 739 F.2d 1573, 1575 (Fed.Cir.1984). Furthermore “differences that may appear technologically minor,” such as a “simple variation on known themes,” are often better assessed using “[s]uch objective indicia as commercial success, or filling an existing need,” especially in a crowded field. *Cont’l Can Co. USA*, 948 F.2d at 1273. Likewise, “[w]here the invention is less technologically complex, the need for

Graham findings can be important to ward against falling into the forbidden use of hindsight.” *Mintz*, 679 F.3d at 1379.

Here, and as set forth above for Ground 1, the factual record includes substantial evidence for objective indicia, including evidence of copying, licenses to third parties, commercial success, long-felt unresolved need, and industry praise.

Therefore, and for at least the reasons set forth above, the Petitioner cannot succeed in demonstrating that the claims of the ‘510 patent are obvious in Ground 3 of the Petition.

Petitioner has thus failed to make a prima facie case that it has a reasonable likelihood of success on either Ground 1, Ground 2, or Ground 3, and the Board should accord these Grounds no weight in rendering its institution decision.

IV. CONCLUSION

For these reasons, Petitioner has failed to meet its burden to show that it has a reasonable likelihood of success for at least one claim. Patent Owner requests that the Board reject the Petition and deny institution.

Dated: November 14, 2024

Respectfully submitted,
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By its attorneys,

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CERTIFICATION OF COMPLIANCE

This Preliminary Response complies with the word count limitation of 37 C.F.R. § 42.24(b)(1) because, according to the word processing system used to prepare this document, the Petition contains 6,108 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).

Dated: December 1, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 21, 2025, copies of the foregoing PATENT OWNER'S PRELIMINARY RESPONSE TO PETITION FOR INTER PARTES REVIEW UNDER 35 U.S.C. §§ 311-19 AND 37 C.F.R. § 41.100, ET SEQ. were served pursuant to 37 C.F.R. § 42.6 electronically on Petitioner by sending the copies to Nike-SherryWear@kirkland.com.

Dated: January 21, 2025

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