

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON ATHLETICA CANADA INC. and
LULULEMON USA INC.,
Petitioner,

v.

NIKE, INC.,
Patent Owner.

IPR2023-00189
Patent 9,278,256 B2

Record of Oral Hearing
Held: February 14, 2024

Before MITCHELL G. WEATHERLY, CARL M. DEFRANCO, and
STEPHEN E. BELISLE, *Administrative Patent Judges*.

APPEARANCES:

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ALSO PRESENT:

KIMBERLY VAN VOORHIS
Senior Counsel, Nike, Inc.

The above-entitled matter came on for hearing on Wednesday, February 14, 2024, commencing at 1:28 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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3 JUDGE BELISLE: Okay, we're on the record. Good afternoon. This
4 is the oral hearing in IPR2023-00189 involving U.S. Patent No. 9,278,256
5 B2. Our court reporter will prepare the official transcript for this hearing.
6 Petitioner is Lululemon Athletica Canada, Inc. and Lululemon USA, Inc.
7 Patent Owner is Nike, Inc. I am Judge Belisle. I'm joined by Judges
8 Weatherly and DeFranco. Judge DeFranco is appearing remotely by video.
9 Counsel, please introduce yourselves, beginning with counsel for Petitioner.

10 MR. ARJOMAND: Good afternoon, Your Honors. Mehran
11 Arjomand of Morrison and Foerster for Lululemon Athletica Canada and
12 Lululemon USA. With me is Forrest McClellan of Morrison Foerster, as
13 well.

14 JUDGE BELISLE: Thank you. Patent Owner?

15 MR. BOWLING: Good afternoon, Your Honors. Aaron Bowling of
16 Arnold & Porter on behalf of Nike. And with me is Lindsey Staubach, also
17 of Arnold & Porter. And also here is Michael Harris, our colleague who
18 argued this morning; and, Kim Van Voorhis, in house at Nike. Thank you.

19 JUDGE BELISLE: Thank you. While everybody here was here this
20 morning for an earlier hearing, for purposes of our record and the transcript,
21 you're going to hear a bit of repetition here on some of the guidance. We do
22 have the entire record available to us, including the party's demonstratives.
23 Unlike this morning, yesterday afternoon, February 13, Patent Owner filed
24 objections to certain of Petitioner's demonstratives. So, Counsel for Patent
25 Owner, do those objections still stand?

1 MR. BOWLING: Yes, Your Honor, we objected to, as you know,
2 slides 16, 17, 27, 28, and 48, because, as we understood the order setting
3 oral argument, citations that were not in the party's papers should not be
4 included in the demonstratives. And then slides 46 and 47 as providing new
5 annotated images that were also not provided in the party's papers.

6 JUDGE BELISLE: Okay. You can sit down. In this proceeding, as
7 you know, the demonstratives are not evidence and are used only as visual
8 aids. Any arguments and evidence that are not in the record will not be
9 considered by the Panel in rendering its final decision. That said, we decline
10 at this time to strike the demonstratives at issue. We can discern for
11 ourselves the appropriateness of the evidence and argument referred to in the
12 demonstratives. However, if, after reviewing them more thoroughly, we
13 have an issue with the demonstratives, we will inform the parties.

14 So, turning back to today's guidance when referring to demonstratives,
15 papers, or exhibits, please do so clearly and explicitly by slide or page
16 number. Please pause a few seconds after identifying the page you want us
17 to go to, to provide us time to find it. Particularly if you're going to refer to
18 things that are not in your demonstratives, if you're switching to exhibits or
19 other papers, just slow down a bit to give us time to pull those up.

20 Please do not interrupt the other party while that party is presenting its
21 arguments. And if you have an objection, please raise it during your
22 argument. Pursuant to our hearing order, each party has 60 minutes to
23 present argument. I believe again, in this case, that Petitioner's Counsel has
24 -- at least one of Petitioner's Counsel is participating as a LEAP practitioner,
25 and so we have granted Petitioner an additional 15 minutes of argument time

1 for a total of 75 minutes. Petitioner, is it the case that you still have a LEAP
2 practitioner for today?

3 MR. ARJOMAND: Yes, Your Honor.

4 JUDGE BELISLE: Okay. So, each party may reserve time solely to
5 rebut the opposing party's arguments, and you may not use rebuttal to
6 address an issue for the first time during a hearing. Petitioner will proceed
7 first. It bears the burden of proving unpatentability. Petitioner, how much
8 time, if any, do you wish to reserve for rebuttal?

9 MR. ARJOMAND: 25 minutes.

10 JUDGE BELISLE: 25 minutes. You may begin when you're ready.
11 Do you want five minutes? Okay. Ready?

12 MR. ARJOMAND: Yes. May it please the Board, Petitioner
13 respectfully submits that the grounds of the petition render the claims of the
14 '256 Patent unpatentable. Let me turn to slide 1. Slide 1 shows claim 1,
15 which is directed to a system. The system comprises an athletic
16 performance module. For example, as shown in figure 5, to the right, there
17 is athletic data configuration module 505. The recited athletic performance
18 module is configured to receive athletic activity data from a wirelessly
19 connected sensor worn on an appendage of a first user. For example, as
20 shown in figure 3, there's an athletic parameter measurement device 207 that
21 provides support for a wirelessly connected sensor, according to Patent
22 Owner, I believe.

23 Now turning to slide 2. Slide 2 shows the next recitation of claim 1, a
24 challenge module. On the right, it shows athletic data display configuration
25 device 601. That challenge module is configured to perform a number of
26 actions. Now turning to slide 3, those actions include receiving information

1 specifying a challenge. For example, as shown in figure 13A of the '256
2 Patent. And then if you continue down to the last recitation in claim 1, the
3 challenge module is configured to continuously generate and simultaneously
4 communicate in real-time to the first user at the first location and the second
5 user at the second location, an interface indicating whether the challenge has
6 been met. It's our understanding that Patent Owner believes that figure 36
7 on the right is an interface that reflects that last limitation of claim 1, which
8 the parties have labeled as limitation 1[G].

9 Now turning to slide 4, Your Honors, there is another independent
10 claim in the '256 Patent. It's claim 11. It's a corresponding method claim.
11 Nike has not argued for the patentability of claim 11 separately from claim
12 1.

13 With that introduction to the claims, specifically the independent
14 claims, I will discuss the roadmap for today. I will be addressing the claim
15 construction issues in this proceeding as well as the Arrasvuori grounds,
16 grounds 2 through 4. My colleague will be addressing the Tagliabue ground
17 and the Watterson and Arrasvuori ground. Those are grounds 1 and 5,
18 respectively.

19 I'm now at slide 7. Your Honors, there are two claim construction
20 issues in this proceeding. The first claim construction issue relates to
21 limitation 1[G], which I just previously or I previously mentioned. And then
22 the second claim construction issue relates to the term common unit. That's
23 in claims 7 and 15 of the '256 Patent. Let me turn to the claim construction
24 issue for limitation 1[G] first.

25 So here shown on slide 8 in the Board's DI, it raised a number of
26 questions directed as to the limitation 1[G]'s meaning and scope. I won't

1 read these questions into the record because they're set forth clearly in the
2 DI, but what I can say is that, and I'm now on slide 9, the parties provided
3 responses to those questions in their Patent Owner response and in their
4 reply, respectively. And with regard to Petitioner, we did not dispute Patent
5 Owner's responses to those questions because in our view, the Patent Owner
6 had taken a broad position as to those responses and there was no impact on
7 patentability. And I'd like to just take a moment here to say, Your Honors,
8 that I don't think it's necessary for the Board to answer these questions in its
9 final written decision because we don't believe patentability turns on these
10 questions. And in fact, we don't think patentability even turns on the
11 construction of 1[G], because Patent Owner's construction of 1[G],
12 specifically, continuously generate meaning without interruption does not
13 impact patentability. The claims are still unpatentable under their
14 construction.

15 So let me turn to slide 10. This provides the Patent Owner response,
16 page 28. This is from paper 18. And as I just mentioned, the Patent Owner
17 has construed limitation 1[G]. And while I had mentioned the continuously
18 generate construction specifically without interruption, there are additional
19 terms in limitation 1[G], simultaneously communicate, which Patent Owner
20 has construed as at the same time; and, in real-time, which Patent Owner has
21 construed as without perceived delay.

22 That said, turning to slide 11, the focus of the briefing by the parties
23 has been on the construction of continuously generate, specifically, the
24 without interruption construction that Patent Owner has provided. Now,
25 when we saw Patent Owner's construction and its Patent Owner response,
26 we took their word for it and applied that construction to the art. And we

1 showed in our reply that the art met the continuously generate term as
2 construed as without interruption, and we explained how all the references
3 still render the claims unpatentable.

4 What has happened since our reply was filed is that we believe Patent
5 Owner has adopted a new modification, a new elaboration, however you
6 want to phrase it, a new construction of continuously generate. And what
7 we have here on slide 12 is a page from the Patent Owner's sur-reply paper
8 26 and it provides that without interruption is, i.e., at intervals occurring so
9 frequently that they're imperceivable. So, in our view, initially the Patent
10 Owner had taken a position that continuously generate means without
11 interruption, but now they seem to require some type of high frequency
12 constant interval that is not perceptible to the human eye. And we don't
13 believe that this new gloss is proper. But more importantly, we also don't
14 think it's supported by the claim language, by the specification, and by the
15 extrinsic evidence in this record.

16 So, turning to slide 13, this shows limitation 1[G] of claim 1, and
17 there is no recitation in 1[G] that requires some kind of high frequency
18 constant interval that's not perceptible to the human eye. There is no such
19 language like that in limitation 1[G]. Now, turning to slide 14, this shows
20 two portions from the '256 Patent. On the left is a passage from column 31,
21 lines 44 to 46 of the '256 Patent. It says that constant updates can be
22 provided from the athletic performance tracking site to the athletic
23 equipment and portable device 203. We believe that Patent Owner has cited
24 this passage as providing support for its gloss on without interruption. But
25 we think that when you take a look at this passage, it's in the context of a
26 discussion of interface 1700, which is shown here on the right. Interface

1 1700 has a message portion, that's 1730 at the bottom, and what it provides
2 is that it's indicating in the message portion that the cardio miles are being
3 updated per cardio mile. So, depending on how fast a user is running, I do
4 not believe that the updates would be at such a high frequency interval that it
5 would not be perceptible to user's eyes or a person's eyes. So, we think that
6 the specification doesn't support their new gloss on without interruption.

7 Now let --

8 JUDGE BELISLE: Counsel.

9 MR. ARJOMAND: Yes.

10 JUDGE BELISLE: On this term, continuously generate, if a system
11 were to generate data to be shown on a display every five minutes, what is
12 your view on whether that's being continuously generated?

13 MR. ARJOMAND: So, the generation of the interfaces every five
14 minutes?

15 JUDGE BELISLE: Every five minutes it updates.

16 MR. ARJOMAND: In our view, that would meet the claim language
17 as construed as without interruption, because at every five minutes there's a
18 generation of the interface. And this was exactly what Dr. Lynch testified in
19 his reply declaration and also in his deposition. So, let me just give you an
20 example here on slide 15, Your Honor. So, he says here on paragraph 44, he
21 says, and this is Exhibit 1017, I should say, and I'm on slide 15. He says an
22 interface generated once per mile. We could just insert or strike that out and
23 say once every five minutes would be generated continuously or without
24 interruption, according to Nike's construction, provided it was designed to
25 update that way.

1 So, our position is that without interruption, whether it's a high
2 frequency constant intervals, a low frequency constant intervals, as long as it
3 was designed to generate interface at that interval, that's without
4 interruption. And this is why I think, Your Honors, that Patent Owner has
5 tried to put a gloss on their construction, because without interruption is a
6 broad construction with respect to the art. I think the art meets it. And so,
7 what they're trying to do is like an accordion, they're trying to shrink without
8 interruption to now be somewhere with a specific frequency such that it's not
9 perceptible to the human eye. And there's no justification in the claim
10 language or in the specification for such a narrowing construction of
11 continuously generating.

12 JUDGE BELISLE: Is there any discussion at all in the specification
13 on frequency of updates?

14 MR. ARJOMAND: No, there isn't, Your Honor, with respect to this
15 limitation, no. I think the best citations for support, and we can discuss this
16 when we get to the Arrasvuori grounds, it's the constant updates language
17 that I showed you on slide 14. And --

18 JUDGE BELISLE: So that slide 14, the constant updates language,
19 would it be your same view that a disclosure of constant updates applies
20 equally to updating every five minutes?

21 MR. ARJOMAND: That's right, Your Honor.

22 JUDGE BELISLE: That goes with constant updates?

23 MR. ARJOMAND: That's right. And just to make this discussion
24 productive, let me just jump to the Arrasvuori ground and I'll come back to
25 the common unit claim construction issue. In our opinion, there's absolutely
26 no daylight between the specification of Arrasvuori and the specification of

1 the '256 Patent. Both are directed to athletic activity. Both are directed to
2 interfaces that show a user performing that athletic activity. Both show that
3 user's performance during that athletic activity relative to other users
4 performing that athletic activity. And both say real-time, real-time feedback.

5 So, in our opinion, Arrasvuori is dead on in terms of its disclosure,
6 vis-à-vis the '256 Patent. So, if continuously generate is being supported by
7 the passages that they're citing, those are exactly what's disclosed in
8 Arrasvuori, in our opinion. So, I think that's why we feel that the claims
9 even under, well, the claims are unpatentable under their construction or
10 without interruption.

11 So, turning back to the common unit claim construction issue, but let
12 me pause here before I do. Are there any other questions regarding the
13 claim construction issue for 1[G]? Okay.

14 JUDGE DEFRANCO: Not from me.

15 MR. ARJOMAND: Oh, yes. Okay, thank you, Judge DeFranco. So,
16 with regard to common unit, the parties have two constructions that they've
17 proposed. One, Petitioner has proposed a unit used for multiple types of
18 athletic activities. And the Patent Owner has provided a construction for a
19 representation of athletic performance data, including types of data not
20 normally expressed in that particular unit. And I think what's difficult for us
21 to understand with respect to Patent Owner's construction is that that
22 construction that they've offered here, as shown here on slide 18, is nowhere
23 to be found in the actual claim language of 7 and 15.

24 So, here on slide 19, that slide provides a common unit -- strike that.
25 It says wherein the challenges defined in terms of a common unit used for
26 multiple types of athletic activities. There's nothing in this claim language

1 in claim 7, and claim 15 has the same language, that indicates that a
2 common unit is a representation of athletic performance data, including
3 types of data not normally expressed in that particular unit. Instead, our
4 construction is tied right to the claim language because we tie it to used for
5 multiple types of athletic activities. So, that's exactly what's written here on
6 slide 18, used for multiple types of athletic activities.

7 And so, in our viewpoint, shifting back to slide 18, miles are a
8 common unit because they can be used to measure running, swimming and
9 other activities. In contrast, Patent Owner has this vision of common unit as
10 being, as requiring some kind of conversion, where the athletic activity is the
11 activity that's not typically performed in that unit, it's converted to this
12 common unit. So, for example, weightlifting repetitions would somehow be
13 converted into miles and so that you would compare multiple different
14 activities together. But as you can see from slide 18, there's nothing in claim
15 7 and 15 that has that conversion. That has that conversion. So, one could
16 argue, perhaps if it was Patent Owner to say that there's been lexicography
17 or disclaimer. But I'm jumping to slide 21 here, Patent Owner, in their sur-
18 reply paper 26 at 7, made it clear that Nike does not argue lexicography or
19 disclaimer for this term. So, they're simply arguing ordinary and customary
20 meaning of common unit, but their ordinary and customary meaning of
21 common unit, I'm back on slide 18, is far from what one would expect a
22 definition of common unit to be.

23 So, we think that our construction is the proper construction, and as
24 we will discuss with the art, we think the art discloses the claim 7 and 15 as
25 properly construed. Let me just --

1 JUDGE BELISLE: Counsel, is there an example in the specification
2 where the term common unit is used in a context other than requiring
3 conversion to get to that unit?

4 MR. ARJOMAND: The example that we cited, Your Honor, is on
5 slide 20, and that, as you can see, it talks about that once the athletic
6 performance of the user athlete has been converted to a common unit, for
7 example, miles run, and so forth. So, that was, I think, what we cited in our
8 reply at pages 4 to 5. There might be additional cites that we've made to the
9 specification. But I think the point is that whether common unit is discussed
10 in the context of conversion, it's always clear that common unit can be miles.
11 So, under our construction, back to slide 18, miles is a common unit
12 regardless, common unit, as long as multiple activities are performed in that
13 unit. So, like running, swimming, riding, bicycle riding.

14 In their construction, the problem with what they're going to have with
15 the conversion issue is that miles is sometimes a common unit and
16 sometimes it's not. And so, here on slide 18, it says that Nike contends that
17 miles is a common unit only when used to represent at least one activity not
18 normally expressed in that particular unit. So, if we had art, which we do,
19 that shows running, bicycling, and swimming, in their view, that's not a
20 common, those being expressed in miles, that's not a common unit. But in
21 other art, that might be a common unit. And that, to us, that doesn't make
22 sense.

23 Now, the discussion of common unit is in the context of conversion in
24 those specification cites. But when you take a look at the claim language
25 itself, the conversion is not reflected there, and there's no lexicography or

1 disavowal that they can use to bring in common unit definition into the
2 claims.

3 JUDGE BELISLE: My understanding of Patent Owner's argument is
4 that, for example, on slide 19, where you have claim 7 --

5 MR. ARJOMAND: Yeah?

6 JUDGE BELISLE: -- that there would be no purpose of putting
7 common in there if in fact it was just meant to be a unit, a unit used for
8 multiple types of athletic activities, well, that unit could be miles, and you
9 could use miles for purposes of running, how far you swim, how far you
10 bike. But they didn't stop with just unit. They have this term common unit,
11 which in the specification is, at least in my searching, is in the context of
12 converting when they're talking about a common unit. And the example in
13 the spec is a cardiovascular mile. So, I could convert running, swimming,
14 and biking through calculation into a cardiovascular mile and then compare
15 that and call that my common unit is the cardiovascular mile. So, what I'm
16 looking for from Petitioner is why is that not the right understanding in view
17 of the specification as a whole and in view of the claims specifically reciting
18 common unit and not unit?

19 MR. ARJOMAND: Well, I mean, I think what it does when you look
20 at the language that's underlined on slide 19, used for multiple types of
21 athletic activities, that gives meaning to the word common. That's all that's
22 required in the claims, Your Honor, is that it's used for multiple types of
23 athletic activities. That's what's common. It's used for multiple types of
24 activities.

25 JUDGE WEATHERLY: So, common in the sense of shared?

1 MR. ARJOMAND: Exactly. Exactly. We understand Patent
2 Owner's position. We understand that their specification has this discussion
3 of conversion. It's just not reflected in the claim language.

4 JUDGE WEATHERLY: There appears to be an example in column
5 32 of the spec that describes comparing a runner's performance with a
6 resistance trainer's performance in which the runner's performance is, quote,
7 unquote, the runner's data already represents miles run. That's at line 29, 28,
8 and 29 in column 32.

9 MR. ARJOMAND: Mm-hmm.

10 JUDGE WEATHERLY: However, the resistance trainer's data
11 represents total weight lifted, maximum weight lifted, lifting rate, pace,
12 delay between sets, and the like. The user interface 1700 may convert the
13 resistance trainer's data to distance run in a variety of manners. And then it
14 goes on to describe those ways of converting it. I bring this up, because I
15 want to get at the concept. This concept that Patent Owner is trying to inject
16 of the unit can't be a unit that's typically used for measuring the athletic
17 performance. It seems to me that that's too restrictive. Sometimes it is, like
18 in this example, you want to compare a runner's performance to a resistance
19 trainer's performance. You need a shared unit, a kind of currency, if you
20 will. One of them is easy, doesn't require conversion, the runner, because
21 you've settled on miles.

22 MR. ARJOMAND: Right.

23 JUDGE WEATHERLY: The other one, you've got to do some
24 conversion. It's kind of know talking about buying something here in the
25 United States and someone wants to use money that's not dollars. You need

1 a common unit. You settle on dollars. So, only one party's money needs to
2 be converted.

3 MR. ARJOMAND: Right. It's an odd --

4 JUDGE WEATHERLY: But the other party's unit could be a
5 common unit also. I mean, we could decide that the transaction is going to
6 happen in British pound sterling and I'm going to convert my dollars into
7 that money too. In other words, maybe there's a total pounds lifted in the
8 resistance trainers that is often used to calculate their performance. And you
9 want to convert the runner's activity into the same kind of activity.

10 MR. ARJOMAND: Mm-hmm.

11 JUDGE WEATHERLY: Are there any other examples that talk about
12 -- I mean, this seems to indicate that conversion can be permitted for a
13 common unit, but isn't necessary. Your position seems to be that your
14 example of like running, biking, and swimming can all be measured in units,
15 as is typical to measure them in those units.

16 MR. ARJOMAND: Exactly, Your Honor.

17 JUDGE WEATHERLY: And yet there's also still a common unit.

18 MR. ARJOMAND: Exactly. It's used for --

19 JUDGE WEATHERLY: It's shared.

20 MR. ARJOMAND: Yeah, used for multiple types of athletic
21 activities. As Judge Rich (phonetic) said, the claim is the name of the game.
22 This is what the claim says. The claim does not say, but I'm pointing to slide
23 19 --

24 JUDGE WEATHERLY: You don't mean the word common, though,
25 in sense of typical? Like a typical unit used for multiple types of athletic
26 activities? Like it's not typical to measure resistance training in miles?

1 MR. ARJOMAND: No, just used for multiple types of activities,
2 Your Honor, that's what we're saying. And it cannot mean, it cannot mean
3 that claim 7 works only for a situation where you have a weightlifting
4 activity, swimming and bicycling, but it works for that situation, but it won't
5 work for a situation where you have running, bicycling, and swimming all
6 measured in miles. In that situation, miles is a common unit used for
7 multiple types of athletic activities. But that's exactly the nonsensical
8 conclusion that Patent Owner's construction is directing you to reach. This
9 is on slide 18. This language that we have on slide 18 is from their sur-reply
10 paper 26, page 6. Nike contends that miles is a common unit only when
11 used to represent at least one activity not normally expressed in that
12 particular unit. To us, that's a nonsensical construction. Or a nonsensical
13 result flowing from their construction is probably the better way of phrasing
14 it.

15 JUDGE WEATHERLY: I'm sure Nike will have more to say about
16 what they mean here. I --

17 MR. ARJOMAND: Okay.

18 JUDGE WEATHERLY: I suspect that what they will -- their
19 argument will be that when you have three different activities like
20 swimming, biking, and running that are subject to comparison without
21 conversion, then a common unit is not necessary. But I don't know.

22 MR. ARJOMAND: I think this is a classic example of trying to
23 import the specification into the claims to get around the art. And it's not a
24 situation, Judge Weatherly, of lexicography or disclaimer. They've made
25 that clear.

1 JUDGE WEATHERLY: Well, they're trying to import a kind of a
2 negative limitation that, frankly, would be indefinite if you were to try to
3 write it into a claim. Because to use the word normally in a definition is
4 evoking a frame of reference without providing the frame of reference.

5 MR. ARJOMAND: Just look at their construction. It's a
6 representation of athletic performance data, including types of data not
7 normally expressed in that particular unit. That's a mouthful. Whereas ours
8 is tied exactly to the claim language. It's a unit used for multiple types of
9 athletic activities. I would venture to say that our position is truer to the
10 claim language than their position. And I think the claim is the name of the
11 game on slide 18.

12 JUDGE WEATHERLY: Well, except that yours is subject to the
13 criticism that it seems to ignore the word common. Seems to just drop the
14 word common from the definition. I mean, common is one of those words
15 that can have so many different kinds of meanings. And that's why I'm
16 trying to get at is common used here as meaning kind of a shared sense --

17 MR. ARJOMAND: Exactly, Judge Weatherly.

18 JUDGE WEATHERLY: But not a typical sense?

19 MR. ARJOMAND: Exactly, Judge Weatherly. It is a word that has
20 different meanings, and that's why used for multiple types of athletic
21 activities gives it the meaning.

22 JUDGE WEATHERLY: Okay.

23 MR. ARJOMAND: That's why it's tied to our construction.

24 JUDGE WEATHERLY: All right.

25 MR. ARJOMAND: Okay, so let me quickly turn to the Arrasvuori
26 and Ellis grounds, grounds 2 through 4, and there are five limitations in

1 dispute. I'm on slide 23. The first is limitation 1[G]. Then there's a dispute
2 as to limitation 1[A], which relates to the wirelessly connected sensor worn
3 on an appendage of a first user. Then there are disputes relating to claims 12
4 and 13 that further define the wirelessly connected sensor as a location
5 determining sensor and accelerometer. And finally, there's a dispute as to
6 claim 2 and related claims, wherein the challenge is received from the
7 second user.

8 So, let me first address the dispute relating to limitation 1[G]. So, as I
9 mentioned earlier in my presentation, our view is that Arrasvuori discloses a
10 continuously generated interface in view of its disclosures, particularly at
11 paragraphs 49 through 53. Those paragraphs disclose two embodiments, a
12 leaderboard embodiment and a graphical representation embodiment. And
13 we think that those paragraphs basically are identical to the disclosure of the
14 '256 specification, because what's shown in those paragraphs is athletic
15 activity interfaces showing the user's progression of that athletic activity
16 relative to other users with real-time feedback.

17 So, here on slide 24 is one of those paragraphs that I mentioned. This
18 is the leaderboard embodiment it talks about that the leaderboard might
19 show the performance of users with respect to other users. That's the
20 relative performance discussion that I referenced. And if you go to
21 paragraph 52 of Arrasvuori, it talks about graphical indicators, for example,
22 leaderboards being used during performance while the users are performing
23 an activity relative to each user in that athletic activity, and that there's real-
24 time feedback in paragraph 49 of Arrasvuori. And this to us, these
25 paragraphs make it clear how the interface in Arrasvuori is being generated.

1 And in our view, it meets the continuously generated interface limitation of
2 claim 1 as construed as without interruption.

3 Turning to slide 25, the Board agreed in its DI with us on the
4 Arrasvuori ground, and this is a passage from the DI decision at page 28.
5 And turning to slide 26, we have testimony from Dr. Lynch on this point,
6 where he also indicated that in his view, as a professor from Northwestern
7 University, that the disclosures in Arrasvuori show a continuously generated
8 interface.

9 Let me skip through these. There is, as I mentioned, another
10 embodiment in Arrasvuori. There's the graphical representation
11 embodiment here is slide 31. It's showing paragraph 53 of Arrasvuori.
12 Again, it's discussing the graphical representations of users performing
13 athletic activity. That activity is done by a user and relative to other users.
14 So, a user, for example, is highlighted here, can be able to determine how
15 close each participating user was to the goal or how well each such user was
16 competing relative to such other users. And again, paragraph 49 of
17 Arrasvuori talks about real-time feedback.

18 Now, turning to the second limitation in dispute, this relates to the
19 wirelessly connected sensor limitation. And the issue here is that Patent
20 Owner claims that Arrasvuori doesn't disclose a computerized watch. But
21 when you look at the paragraphs of Arrasvuori, it definitely discloses a
22 computerized watch. So, paragraph 40 in the center of slide 33 shows that
23 monitoring equipment might include one or more sensors. In the paragraph
24 above that, paragraph 39, it talks about the monitoring equipment being
25 integrated within wireless nodes and or other computers. And then in
26 paragraph 90, it says that computers can be a computerized watch. So, when

1 you take these three passages together, Your Honors, we think that
2 Arrasvuori discloses a computerized watch.

3 Now, turning to slide 34, the third issue is whether Arrasvuori
4 discloses a location determining sensor. It does, Your Honor. This is in
5 paragraph 40 of Arrasvuori. The only dispute here is whether Arrasvuori
6 discloses wirelessly connected sensor, which, as I just explained to you, it
7 does in limitation, it does disclose that in the previous slide, as I've shown
8 you.

9 And then, turning to slide 35, there's a dispute about whether
10 Arrasvuori discloses an accelerometer. We have another ground, ground 4,
11 that combines Arrasvuori with Ellis, and Ellis discloses an accelerometer.
12 Again, I don't think Patent Owner is really disputing Ellis's disclosure
13 accelerometer or the combination, just that Arrasvuori doesn't have a
14 wirelessly connected sensor. And then finally, on slide 36, we have a
15 dispute about whether the challenge is received from the second user. As
16 shown here, Arrasvuori in paragraph 17 discloses a user indicating a desire
17 to play a game. At paragraph 20, it discusses a selection of a game. In our
18 view, a game is a challenge. So, that's the challenges received from the
19 second user. And then, turning to slide 37, it also discusses, it discusses, in
20 the context of activity. One of the challenges you can select, for example, a
21 swimming task over a cycling task. That we also believe meets when the
22 challenge is received from the second user. So, we believe that Arrasvuori is
23 on all fours with respect to the challenge claims for grounds 2 through 4.

24 And if there are no further questions, I will turn over the podium to
25 my colleague.

1 JUDGE BELISLE: Counsel, so you have both a 102 and a 103
2 ground based on Arrasvuori?

3 MR. ARJOMAND: That's right.

4 JUDGE BELISLE: For what specific limitation are you turning to
5 obviousness for over anticipation, based on the Arrasvuori reference?

6 MR. ARJOMAND: Yes, Your Honor. So, if you take a look at our
7 petition, we framed it as an anticipation and obviousness ground. And for
8 the obviousness ground, in that section, we highlighted where we thought
9 that potentially Arrasvuori might not disclose certain claim features and
10 what those features were, were related to the server generating an interface.
11 So, that would be limitation 1[G]. And it related to whether a challenge is
12 received from a second user, such as claim two, or the prompting claim of,
13 or the prompting limitation of claim 11.

14 JUDGE BELISLE: So, you're not relying on obviousness for the
15 continuously generate feature?

16 MR. ARJOMAND: Well, the way it's structured, Your Honor, in the
17 petition is that the petition discusses that, whether it would be obvious or
18 not, in view of Arrasvuori, to have the server in Arrasvuori generate the
19 interface. So, in that context, we presented a 103 challenge. I can point you
20 to the language in the petition if you'd like.

21 JUDGE BELISLE: Sure. Let's do that.

22 MR. ARJOMAND: So, Your Honor --

23 JUDGE BELISLE: I just want to make sure we have a clear line
24 between the anticipation arguments and the obviousness arguments.

25 MR. ARJOMAND: Your Honor, I believe it's on pages 56 and 57 of
26 paper 2.

1 JUDGE BELISLE: Pages 56 and 57?

2 MR. ARJOMAND: Yes.

3 JUDGE BELISLE: Okay. So, walk me through that.

4 MR. ARJOMAND: So, 56 talks about generating the interface. And
5 then on page 57, the first full paragraph says, alternatively, it would have
6 been obvious to configure the server to generate the claimed interface.
7 That's what I was referring to, Your Honor.

8 JUDGE BELISLE: Okay, and so while we're on this section, element
9 1[G] in the petition, you have a section on page 56 that says generating the
10 interface. Where, in this discussion, is there an explanation for how the art
11 shows the continuously generating of the interface? We have generating the
12 interface, but I don't see that word continually anywhere in that discussion.

13 MR. ARJOMAND: Yes, Your Honor, I think it continues on page 57
14 up to 58. So, it talks about communicating the interface, and then it says, a
15 POSITA would have understood from -- this is, I'm reading from page 58,
16 right before remote competitors. It says, a POSITA would have understood
17 from these disclosures that the server communicates the interfaces to the
18 user as it generates them. That's the continuously generating, Your Honor.
19 And we cite paragraph 72 of Dr. Lynch's opening declaration, Exhibit 1003.
20 This is all, I should say, in the context of page 55, where we highlight in the
21 subheading element 1[G], and provide the language for the limitation.

22 JUDGE BELISLE: So, short of my looking it up right here, does your
23 expert make any statements as to whether the Arrasvuori reference teaches
24 continuously generating the interface?

1 MR. ARJOMAND: I think the language that he provides, Your
2 Honor, is what's being cited here in paragraph 72 of Exhibit 1003, and it's a
3 very similar language. I can read it into the record if you'd like me to.

4 JUDGE BELISLE: No, what I'm trying to get at is it seems a bit odd
5 that a term of the claim, like continuously, is not actually recited in the
6 petition or by the expert in explaining how the art discloses, whether
7 explicitly or inherently or teaches that feature.

8 MR. ARJOMAND: Your Honor, I believe we do that in two ways,
9 like I said. If you take a look at page 55 of the petition, we quote the entire
10 language of the limitation, and then we break it down into generating the
11 interface and into communicating the interface. This is pages 56 through 58.
12 And then at the end of this communicating, the interface section, we say the
13 POSITA would have understood from these disclosures that the server
14 communicates the interfaces to users as it generates them. I don't know how
15 else to say continuously generating the interface. That language, combined
16 with the fact that we have the limitation at the start of the section, is the
17 disclosure that meets the claim language.

18 Any further questions?

19 JUDGE WEATHERLY: None for me.

20 MR. ARJOMAND: Okay, let me turn it over to my colleague.

21 MR. MCCLELLAN: Good afternoon, Your Honor. My name is
22 Forrest McClellan for Petitioners Lululemon, and I want to also thank the
23 Board for allowing me to participate through the LEAP program. As my
24 colleague mentioned, I'll discuss the Tagliabue and Watterson grounds.
25 Those are grounds 1 and 5. I'm turning ahead to slide 39. For Tagliabue,

1 there are two limitations that are in dispute. One is limitation 1[G], which
2 we have been discussing, and the second is the common unit limitation.

3 Turning to slide 40, Your Honor, I want to take a step back and frame
4 the issue here. Patent Owner's rebuttal to our assertion that Tagliabue
5 anticipates these claims has been to try to distinguish Tagliabue by
6 identifying disclosure in the '256 Patent, which provides written description
7 support for its claims, that is not also in Tagliabue. Because, as we've laid
8 now in our papers, Tagliabue and the '256 Patent share much of the same
9 disclosure.

10 So, I have three examples on the slides here. I'm going to move
11 through them quickly in the interest of time, but I want to point out that the
12 three examples I'm going to give each of these is independently sufficient to
13 confirm anticipation. Moving to slide 41. What slide 41 shows on the left
14 hand side is deposition testimony by Patent Owner's expert. On the right
15 hand side, we have an excerpt from the reference Tagliabue. And Patent
16 Owner's expert here is paraphrasing from the patent specification or excuse
17 me, the question shown on the screen is paraphrasing from the patent
18 specification.

19 And here's what Patent Owner's expert testified to. The question
20 states, is an interface in a group or challenge setting -- is an interface
21 displaying in a group or challenge setting multiple avatars to illustrate the
22 progress of each user in the group or challenge an example of an interface
23 that is continuously generated and simultaneously communicated in real-
24 time? Patent Owner's expert testified yes. And analogous language, as the
25 Board can see, is present in Tagliabue.

26 Turning to slide 42, the second example I'll give is --

1 JUDGE BELISLE: Counsel, before you go there.

2 MR. MCCLELLAN: Yes, sir.

3 JUDGE BELISLE: Back up to the one example you just had on slide
4 41. And before I reread the transcript on the front and back of that question,
5 is there any other context to that question that's being asked on slide 41?
6 That seems like a very broad question. Is an interface displaying in a group
7 or challenge setting multiple avatars to illustrate the progress of each user in
8 the group or challenge an example of an interface? There's a lot of words in
9 there for someone to just say yes to.

10 MR. MCCLELLAN: Yes, Your Honor, let me get out the transcript,
11 but my recollection is that I was paraphrasing from a paragraph of her expert
12 report, which was paraphrasing from the patent itself, and so.

13 JUDGE BELISLE: On slide 41, that's from a deposition, is it not?

14 MR. MCCLELLAN: Yes, Your Honor. Yes, Your Honor. One
15 moment, Your Honor.

16 JUDGE BELISLE: You can move on.

17 MR. MCCLELLAN: Okay.

18 JUDGE BELISLE: I'll read it for myself.

19 MR. MCCLELLAN: Well, I'll --

20 JUDGE BELISLE: Your clock is ticking here.

21 MR. MCCLELLAN: I'll tell you the answer very briefly, Your
22 Honor. So, in Exhibit 1016, which is the deposition transcript from this
23 expert witness, if you roll back to page 18 of that deposition transcript, what
24 you'll see is that I had asked the witness to testify about paragraph 42 of her
25 declaration. And I believe in that paragraph we had referenced lines 48
26 through 63 of column 39 of the '256 Patent. Lines 48 through 63 of column

1 39 of the '256 Patent are substantially the same as that highlighted block of
2 text there. They read, in a group or challenge setting, multiple avatars may
3 be displayed in an interface to illustrate the progress of each user in the
4 group or challenge. So, the expert was agreeing that a paraphrase from the
5 specification was an example of this kind of interface. So, that was what
6 was going on, on pages 18 to 19 of the deposition transcript.

7 Now, I want to be very clear. I asked the expert about other examples
8 of language. Most of the time she said, yes, this is an example limitation.
9 One time she said, no, you need additional context. But in this particular
10 example, it was a yes.

11 In the interest of time, Your Honor, I'll move through this one quickly.
12 Is figure 36 an example of an interface that is continuously generated and
13 simultaneously communicated in real-time? The answer was yes. So, let's
14 look at figure 36. Excuse me, I was on slide 42. Turning now to slide 43.
15 On slide 43, we've got figure 36 on the left and the same excerpt from
16 Tagliabue that we previously saw on the right hand side of the screen. And
17 what Tagliabue reference discloses is a user interface showing each
18 participant's progress towards the goal of the challenge using, e.g., bar
19 graphs. And if we roll forward to slide 44, we have an example of the bar
20 graphs from Tagliabue. These are shown in figure 12. It's the orange
21 oblong shape. And as you can see, there is corresponding disclosure in
22 figure 36. The appearance is similar to the prose (phonetic).

23 Turning to slide 45, Your Honor. My last example is this question
24 and answer. Is user interface 1700 an example of an interface that is
25 continuously generated and simultaneously communicated in real-time?

1 Answer is yes. And interface 1700, by the way, Your Honor, is the interface
2 to which the specification connects the constant updates language.

3 Turning to slide 46. On the right hand side, again, we have
4 Tagliabue's disclosure. On the left hand side, we have an image of interface
5 1700. It's figure 17 of the '256 Patent, which is Exhibit 1001. And in the
6 excerpt from Tagliabue, you can see it's talking about a user interface
7 showing each participant's progress towards the goal of the challenge. It
8 gives an example of the goal of the challenge as who can run the most miles
9 in a given period of time. So, if you think through that, what the interface is
10 going to show you is your relative position versus the person in first or
11 second place in miles.

12 So, then if we turn to slide 47, we've just zoomed in here, and you can
13 see the interface 1700 is reciting that it says you are twelve cardio miles
14 behind the leader in your challenge. So, again, we contend the overlap
15 between the prose of Tagliabue and the depictions in these interfaces
16 confirms anticipation.

17 Turning now to slide 48, I'm going to skip this one. Turning to slide
18 49. Your Honor, we've also offered expert testimony supporting our
19 anticipation ground here in response to Patent Owner's construction that it
20 offered in its POR. I'll move quickly through this, in the interest of time, to
21 slide 51.

22 On Slide 51, Your Honor, we see that Tagliabue discloses defining its
23 challenges in terms of a common unit. And so, if Your Honors agree with us
24 on our construction of common unit, then Tagliabue would anticipate this
25 claim, which is claim 7.

1 I'm now on Slide 52, and I'm going to discuss just very briefly the
2 Watterson ground. Your Honor, and this is an obviousness combination
3 between Watterson and Arrasvuori. Turning to slide 53. There are
4 essentially five limitations in dispute in Watterson, and there is one
5 overarching dispute, which is whether a person of ordinary skill, excuse me,
6 whether it would have been obvious to make the combination that we have
7 proposed in terms of modifying how Watterson processes its data. So,
8 before I jump into that, just a little bit of background. What we proposed in
9 our petition was identifying as the wirelessly connected sensor, Watterson's
10 pulse watch. That's option one. Or two, we proposed a simple substitution
11 with Arrasvuori's computerized watch. And so, that sensor then would
12 monitor the heart rate of a user. And as you roll through the claim, once you
13 get to the first limitation that begins with determined from the received
14 athletic activity data, there the athletic activity data is the heart rate.

15 And so, our proposal, our modification, is that at this point, this is
16 limitation 1[D], which I'm about to talk about, the system would use both the
17 pulse rate data and the velocity from the treadmill to compute an amount of
18 athletic activity performed by the first user. And that computed amount of
19 athletic activity performed by the first user is then used in the remainder of
20 the claim, including at the highlighted determining step. It's highlighted
21 because this, as I understand it, is where Patent Owner says the combination
22 fails because the pulse rate data is never used absent the combination with
23 velocity data to perform the step.

24 Turning to slide 54, I'm going to start with motivation to combine.
25 Now, what Watterson's disclosures tell us is that competitions can motivate
26 people to exercise. But Watterson also reveals that sometimes people cannot

1 perform the same exercise programs as others. That's what's shown as just
2 one example on Slide 54 here. Turning to slide 55. Arrasvuori provides a
3 solution to that problem. It enables people of different athletic abilities to
4 compete with one another through its compensatory operations.
5 Compensatory, meaning you're compensating for the level of physical
6 fitness.

7 And so, there's a large block of text on the left hand side of slide 55.
8 But essentially what it's saying is it's proposing that when you have two
9 individuals competing in a race on the display that is reflecting the status of
10 the race, you can adjust the relative progress of the individuals to their level
11 of physical fitness. So, if somebody has a low level of physical fitness and
12 they're competing against someone with a higher level of physical fitness,
13 then if they're running at the same speed, the person with the lower level will
14 appear to go further because they're making more of an effort.

15 What will be required to implement this solution from Arrasvuori and
16 Watterson? Well, turning back to slide 54, we know that Watterson already
17 reveals that for the purposes of this proceeding, Your Honor, that heart rate
18 can be a proxy for physical fitness. Turning back to slide 55, again,
19 Watterson has a pulse watch. Arrasvuori's computerized watch also had a
20 heart rate monitor. And then Watterson also, as shown in the lower right
21 hand box on slide 55, includes a display that depicts each person's relative
22 progress. So, really, what's required to make the modification work is a
23 tweak to Watterson's software to scale the velocity on the screen off the
24 heart rate.

25 Turning to slide 56. We've provided evidence, Your Honor, that this
26 combination, that a person, ordinary skill, would have had a reasonable

1 expectation of success in making this combination. Dr. Lynch, our expert
2 witness, has testified that at the relevant dates, modifying a virtual object's
3 apparent velocity by scaling a variable was trivial. He's provided some
4 example algebra in paragraph 116, to corroborate his opinion. Nike has
5 disputed reasonable expectation of success because he did not say what the
6 magnitude of h_c is in his example formula. But we're only required to prove
7 a reasonable expectation of success, not to a certainty, Your Honor. So, this
8 meets our burden of proof.

9 Turning to slide 57.

10 JUDGE BELISLE: Counsel, just to be clear, that clock is going the
11 other direction.

12 MR. MCCLELLAN: I understand, Your Honor.

13 JUDGE BELISLE: Okay.

14 MR. MCCLELLAN: I'm going to wrap soon.

15 JUDGE BELISLE: Okay.

16 MR. MCCLELLAN: I understand.

17 JUDGE BELISLE: Just comes out of your rebuttal.

18 MR. MCCLELLAN: Yes, I understand. Thank you, Your Honor.

19 Turning to slide 57, Your Honor. Common unit and a unit in which athletic
20 activities measured. Your Honor, in our papers, we laid out why it would
21 have been obvious to use miles for the personalized race. It's one of a finite
22 number of predictable solutions, and Watterson was already using it for
23 another race. And then, last two limitations, Your Honor, we've got the
24 location determining sensor. It was well known to add GPS sensors to
25 watches. Around this time, it was trivial. We know that Watterson needed

1 location data. And then in addition, in the alternative combination where
2 we're using Watterson's watch, the watch has a GPS sensor already.

3 Last limitation I'll discuss, Your Honor, an accelerometer. Using an
4 accelerometer was obvious as well. Again, well known in the art to integrate
5 this kind of sensor into this kind of device. And alternatively, if we have the
6 combination with Arrasvuori's computerized watch rather than the pulse
7 watch, Arrasvuori's computerized watch disclosed the pedometer which our
8 expert witnesses testified, at the relevant time, a person of ordinary skill
9 would have recognized that that could be an accelerometer.

10 So, unless there are any questions, Your Honor, I'll sit down. Thank
11 you.

12 JUDGE WEATHERLY: So, we have 17 minutes remaining for
13 rebuttal.

14 MR. MCCLELLAN: Thank you.

15 JUDGE BELISLE: Patent Owner, do you want to reserve any time?

16 MR. BOWLING: Yes, five minutes, Your Honor.

17 JUDGE BELISLE: Five minutes.

18 MR. BOWLING: Thank you.

19 JUDGE BELISLE: It's 5 minutes out of your 60, right?

20 MR. BOWLING: Yes, please.

21 JUDGE BELISLE: Five.

22 MR. BOWLING: Thank you, Your Honor. Okay. May it please the
23 Board. Again, Aaron Bowling on behalf of Nike. We wanted to start off
24 here with one of Lululemon's slides. Slide 10 of Lululemon's demonstrative,
25 because it highlights that there are three distinct requirements to limitation
26 1[G] that we've been discussing. One is that the interface is simultaneously

1 communicated. One is that it's continuously generated. And then it's
2 generated in real-time. And it's --

3 JUDGE BELISLE: So, this is going to be the bulk of our discussion.
4 Let's just stop right there. An interface? What is that? How do you
5 communicate an interface?

6 MR. BOWLING: The interface, Your Honor, at least the way that it's
7 shown in the '256 Patent, is often a visual representation of data that the user
8 is looking at, a graphical user interface.

9 JUDGE BELISLE: So, interface is the data being sent to some type
10 of display?

11 MR. BOWLING: That's correct, Your Honor. Generally speaking.

12 JUDGE BELISLE: Right, right. We're talking the data. We're not
13 talking

14 -- it's not a thing like a visual display. It's the data that's going to be
15 populated onto that display to be able to be communicated. And I believe
16 Petitioner agrees that that's what is meant here.

17 MR. BOWLING: Correct, Your Honor. And as Lululemon noted,
18 there's no dispute about claim construction, for purposes of this proceeding.
19 The parties have essentially agreed to Nike's construction. There may be
20 some differences, but I think we agree that those differences don't affect
21 today's proceeding. So, we're on all fours with the construction. We're also
22 in agreement about the four questions posed by the Board. No dispute there.

23 Our position is that Lululemon is misapplying that construction and
24 that there's a failure of proof with respect to 1[G] across the board. And as
25 Your Honor noted, Judge Belisle, if we look at their petition, specifically
26 page 56 and 57, about generating the interface, there's no mention of

1 continuous. They point to their expert declaration. No mention of
2 continuous in the declaration at all. They never mention continuously
3 generated interfaces. Not once in the petition. Not once in that declaration.

4 And when we read the petition, these paragraphs, they're directed to
5 whether or not the server generates the interface. There's nothing about how
6 frequently it's updated, whether it's continuous or whether it's every 10
7 minutes, 5 minutes in the prior art. There's nothing there.

8 So, we think that Lululemon's construction is essentially reading this
9 limitation out of the claims, and it seemed to have done so in its petition. It's
10 nowhere to be found. So, if we look at slide 24 of Nike's demonstrative, we
11 can see that their expert, and they echo this, Lululemon does, in their
12 briefing. They're taking the position that all interfaces, as long as they're
13 showing progress, are continuously generated interfaces. It could be every
14 five minutes, as Your Honor noted, it could be every two years, their expert
15 agreed to. And that somehow is a continuously generated interface.

16 JUDGE BELISLE: So, let's stop. If I'm generating and
17 communicating this interface, the data that populates onto a display every
18 five minutes, why is that not being continuously generated?

19 MR. BOWLING: Well, Your Honor, there is some gray area we
20 would admit around, depending on the application, right. If we're looking at
21 a space telescope and seeing how often that's generated reflecting some
22 distant objects. Maybe five minutes is sufficient there. In this application,
23 we don't think that would be continuously generated. But the main point is
24 that Arrasvuori, there's no dispute, is completely silent as to the frequency
25 with which the interface is updated. Silent, just like their petition and like
26 their expert declaration. There's just no evidence of how frequently that

1 interface is updated. And so, they're taking the position that it doesn't
2 matter. They're reading continuously out of the claim.

3 And they argue, for example, in their reply brief, that all interfaces
4 that show user progress are continuously generated. I was flying down to
5 Florida with my kids a couple of days ago. We were looking at the flight
6 map on the United, you know, you pull it up, you can see where the plane is.
7 My son's six years old, very intrigued by it. When you click on that flight
8 map, you have to hit refresh in order for that interface to show you where the
9 plane is currently located. If you just leave it, it doesn't update. That
10 interface is showing the progress of the plane once you hit refresh, it's
11 showing you in real-time where that plane is, at least as far as we know. But
12 it doesn't generate continuously. It's only generated when the user hits
13 refresh. And that's not too dissimilar from what we see in Tagliabue.

14 JUDGE BELISLE: What if that system automatically refreshed every
15 five minutes without pushing the button?

16 MR. BOWLING: We don't think that would be continuously. If we
17 want to zoom in and see that plane moving and it's only updating when it
18 goes 200 miles, that doesn't seem to be continuously generated. Again, it
19 may depend a little bit on the application. But the point is that their position
20 that all interfaces are somehow continuously generated, as long as it's
21 showing progress, doesn't make sense to us.

22 So, if we look at Tagliabue, here's an example of how in the prior art
23 there were interfaces that were not continuously generated. And we can
24 look, as you're seeing here, this is Exhibit 1004, Tagliabue. We're going to
25 look at columns 13 beginning at line 63, and actually we can go up a little bit
26 higher. Line 58 says, as will be discussed in more detail below, when a user

1 activates the athletic data display module 509, he or she is provided with a
2 user interface, prompting the user to select what collected athletic data he or
3 she wishes to view, the format in which the user wishes to view, the
4 collected athletic data, et cetera.

5 Here's the point we want to focus on. The user interface may be
6 generated by the athletic data display module 509, the athletic data display
7 configuration module 605, or some combination thereof, when a user
8 employs the provided user interface to submit a request to view the athletic
9 data, the athletic data display module 509. Now we're going to the top of
10 column 14, the request to the athletic data display configuration model 605.
11 In response, the athletic data display configuration module 605 configures
12 the requested athletic data for display by the athletic data display module
13 509. For example, as we'll be discussing more detail below, a user may
14 request to view the total distance run by a user for each day in the one-week
15 period.

16 This is an example of an interface showing progress in the context of
17 a running type situation that is only generated upon a user prompt. This is
18 right in Tagliabue. This is one of the reasons why Tagliabue does not
19 anticipate the continuously generated element of the '256 Patent. It's
20 different. Tagliabue doesn't have the disclosure that discusses continuous
21 generation. But the assumption that Lululemon is making that all user
22 interfaces that show progress or that show relative progress of users, or that
23 show how close you're getting to a goal, that does not mean it's a
24 continuously generated interface. And there's a complete failure of proof on
25 that element. Okay.

1 JUDGE BELISLE: So, Counsel, Petitioner raised, on their slide 41,
2 maybe you can go there.

3 MR. BOWLING: Sure.

4 JUDGE BELISLE: Petitioner, slide 41. This is where they have,
5 well, it says Patent Owner's expert. It has a question and answer, and then it
6 has Tagliabue disclosure. And Petitioner is telling us that when they asked
7 Patent Owner's expert the question posed on that slide, it was unequivocal
8 yes. Talk me through why that doesn't provide support for Petitioner's
9 position that Tagliabue is good enough to anticipate.

10 MR. BOWLING: Yeah, sure, Your Honor. I think your senses were
11 ringing correctly on this one, because this is an unfair characterization of
12 what happened. Counsel was basically going paragraph by paragraph
13 through the expert's declaration and saying, is it your opinion that, and then
14 quoting, and then of course the expert said yes. What isn't in that is all the
15 citations and all the evidence that are also in that declaration. So, in that
16 declaration, in paragraph 42, our expert, Dr. Toney-Bolger, was pointing to
17 other evidence in the '256 Patent that supports this interface. Evidence that
18 shows the spontaneous speed of the runners being demonstrated, that shows
19 the interface with updates and messages. She was pointing to all that, and
20 they were asking her about that paragraph. So, of course she said yes.
21 Despite the colorful highlighting here, Tagliabue doesn't have those same
22 disclosures. Everything that Dr. Toney-Bolger pointed to in that paragraph
23 is from the portions of the '256 Patent that are not in Tagliabue.

24 Okay. And so, Your Honor asked for a couple of examples in the
25 '256 specification of where is this continuously generated element shown.
26 Of course, this isn't a 112 issue, but we wanted to point out a few examples.

1 This is the type of interface that's shown in the '256 Patent. This is figure 24
2 of the '256 Patent. You can see here there's some verbiage in the bottom left
3 that shows the spontaneous speed. This is one of the things that we pointed
4 to. This is showing speed at that moment, how fast they're running. It's
5 continuously generating.

6 If we look at paragraph, or column 30, lines 31 through 35 of the '256
7 Patent, it talks about the current athletic performance data. What's
8 happening right at that moment. It's being updated so continuously that it's
9 showing the current data. That type of description is not found in Tagliabue
10 or in Arrasvuori for that matter. We see the same thing at column 31, lines
11 39 through 46 of the '256 Patent. It talks about the constant updates. Data
12 being immediately transferred. There's a bi-directional component to this.
13 It's going back and forth. This is the disclosure, none of which is in
14 Tagliabue, that tells us this is a continuously generated interface.

15 Okay, so sticking with claim construction for a moment, we wanted to
16 quickly talk about the common unit. There seems to be some
17 misunderstanding of what Nike's position is on this. Our position is simply
18 that, as Your Honor noted, for there to be a common unit, there needs to be
19 some significance to the word common. Dependent claim 8, for example,
20 uses the word unit alone, not common unit. So, we have to give some
21 significance to common. Our position isn't that you can't use miles at all.
22 It's that if you look at the specification, the ordinary and customary meaning
23 of this term, in view of the whole patent, has a specific meaning. So, we're
24 not arguing lexicography. They're right. We're not trying to depart from the
25 ordinary meaning. Our position is that the ordinary meaning means that
26 there needs to be some kind of conversion.

1 So, in a circumstance where I'm competing with a friend and let's say
2 they go out and run 6 miles, I might only swim 2 miles, but swimming 2
3 miles is a lot harder than running 2 miles. So, the common unit discussion is
4 all about somehow bringing those together so that they can be compared,
5 which is the whole purpose of this patent; competition, comparing results,
6 that sort of thing. So, you can use miles. It doesn't have to be weight
7 training converted to miles run, but there needs to be some conversion. You
8 can't compare, as they try and do with the prior art, miles run to miles run
9 and say, okay, we have a common unit, miles and miles. There has to be
10 some conversion. And every single instance of common unit, as you pointed
11 out, Judge Belisle, in the specification always talks about conversion. The
12 examples we point to talk about conversion and the examples that
13 Lululemon points to. And we can look at a few of those.

14 So, this is the first example. This is the weight-training example we
15 discussed. You can see at the very top of this disclosure. And we're on now
16 slide 36 of Nike's demonstrative, looking at column 32, lines 28 through 36
17 of the '256 Patent. It says, in the above example, the runners data already
18 represents miles run. So, we have miles run. That's on one side of the
19 equation. However, the resistance trainers data represents total weight lifted,
20 maximum weight lifted, lifting rate, pace, delay between sets, and the like.
21 The user interface may convert, keyword convert, the resistance training
22 data to distance run in a variety of manners. So, that makes sense. We're
23 taking weightlifting, we're converting it to running. Now we can compare
24 the way that those two athletes perform that day.

25 Let's look at the example that Lululemon highlights. In this example,
26 there's miles for both. But the key part is that the miles that are being

1 converted are on an elliptical machine. The realization being that, well,
2 maybe it's a little more difficult to run 6 miles than it is to do 6 miles on an
3 elliptical. So, here on slide 37, if we're looking at column 36, lines 2
4 through 8, it says, figure 25 in particular illustrates that the 30-minute
5 elliptical workout has been converted to an equivalent miles run. Once a
6 workout has been converted to its equivalent miles run, it may be displayed
7 alongside actual miles run as part of the interactive comparison.

8 So, there may be miles run, quote, unquote, on the elliptical. It's
9 elliptical miles run. But in order to compare those two things, as the claims
10 require multiple types of athletic activity, we need to convert at least one of
11 those units so that we can now compare them.

12 JUDGE BELISLE: So, Counsel, you've talked about claim 7 here.
13 And claim 7 recites a common unit used for multiple types of athletic
14 activities. I note that claim 8, right below it, says, wherein the challenge,
15 both of which are coming off from independent claim 1 says wherein the
16 challenge is specified in terms of a unit in which the athletic activity is
17 measured. So, you have dependent claim 7 referring to a common unit, and
18 you have dependent claim 8 referring only to a unit. Presumably that plays
19 into what you're arguing that there are two different things, a unit versus a
20 common unit.

21 MR. BOWLING: Yes.

22 JUDGE BELISLE: Would you agree with that?

23 MR. BOWLING: Yes, that's correct. The common unit being
24 something different, we need to give meaning to that portion of the claim,
25 common being different than just saying a unit. If the inventors had meant

1 to say, it can just be any old unit, it doesn't matter, then they would have just
2 said unit. But they didn't. They said common unit.

3 JUDGE WEATHERLY: This notion of conversion that you're talking
4 about, does it mean, or do you mean to be saying that if you have multiple
5 types of activity, that the original measurement of activity and at least one of
6 those activities has to be converted into the common unit, but it's permissible
7 for one of the activities to be, sort of, natively performed, if you'll forgive
8 me?

9 MR. BOWLING: Yes. Yes, Your Honor. It can remain --

10 JUDGE WEATHERLY: A common unit?

11 MR. BOWLING: Yes, Your Honor. It can remain in its native unit,
12 as you've pointed out. The point of this, as we know from the claim, is to
13 compare. You're in a challenge. Maybe I broke my foot and I can't run. I
14 still want to compete with my friend who's running. So, I'm going to go
15 swim. And we're trying to bridge those two so that we can keep the
16 challenge going. So, that's the point of the common unit, is to bring these up
17 to an equal so we can compare them in a way that makes sense for the
18 challenge. If it was just miles run and miles run, there would be no need for
19 a common unit. It would just be miles run. And that's the type of common
20 unit that --

21 JUDGE WEATHERLY: But does the claim cover the case in which
22 all of the multiple activities can be measured, they just share the same native
23 unit? So, no conversions necessary, or is there always a conversion
24 necessary?

25 MR. BOWLING: So, our understanding --

1 JUDGE WEATHERLY: I mean, it's easy to read, to understand
2 specific examples. What I'm trying to tease out is, what's the scope of the
3 limitation? What does it cover and what does it not cover?

4 MR. BOWLING: So, our position, Your Honor, is that the common
5 unit requires at least one conversion. That's what brings it to be a common
6 unit.

7 JUDGE WEATHERLY: So, if you're comparing one person who's
8 running to another person who's running, there is no common unit involved?

9 MR. BOWLING: Correct.

10 JUDGE WEATHERLY: And you're doing the comparison in the
11 nominative number of miles that they've run?

12 MR. BOWLING: Correct.

13 JUDGE WEATHERLY: The actual number of miles that each person
14 has run, then that is not a common unit?

15 MR. BOWLING: Correct.

16 JUDGE WEATHERLY: Okay. But if you were to convert both of
17 them to calories, for example?

18 MR. BOWLING: Yeah, that may be a --

19 JUDGE WEATHERLY: Would that be a common unit?

20 MR. BOWLING: -- possible common unit. Yes.

21 JUDGE WEATHERLY: Is that a common unit because it's not
22 typically used to measure running? Or normally, I think is the word you
23 used, which you can tell I really dislike.

24 MR. BOWLING: Yes, Your Honor. Yeah, calories could be a
25 permissible common unit. The point being here that it can't just be
26 comparing apples to apples. It doesn't make sense in terms of the claim.

1 There has to be one conversion of one of the units in order for there to be a
2 common unit.

3 JUDGE WEATHERLY: Hmm.

4 MR. BOWLING: And that's really showing --

5 JUDGE WEATHERLY: I mean, you can see the difficulty that we
6 have in trying to write a decision based on the concept that you're trying to
7 flesh out here. Right? I mean, we can't write a decision that talks about it
8 doesn't mean an apples to apples comparison, but it means apples to oranges.
9 It might mean strawberries to strawberries, though, because strawberries
10 aren't typically used to measure running.

11 MR. BOWLING: Well, and we think, Your Honor --

12 JUDGE WEATHERLY: Obviously, I like to think out loud during
13 these hearings, sometimes. And I'm not afraid to be wrong either.

14 MR. BOWLING: Well, we'll look at the prior art in a minute, and we
15 think that that helps show exactly what's going on here, which is that --

16 JUDGE WEATHERLY: Well --

17 MR. BOWLING: -- the prior art is comparing miles run to miles run -
18 -

19 JUDGE WEATHERLY: Yeah.

20 MR. BOWLING: -- and there's no common unit in that circumstance.

21 JUDGE WEATHERLY: One of the difficulties, frankly, in sitting in
22 this seat that is common from case to case is that Patent Owner's rarely will
23 tell you what a claim means. They will tell you that it doesn't mean, what
24 the prior art shows, and that's all they'll say about it.

25 JUDGE BELISLE: So, Counsel --

1 JUDGE WEATHERLY: We have to write decisions based on what
2 claims mean, so.

3 MR. BOWLING: Understood, Your Honor.

4 JUDGE BELISLE: You've heard Petitioner say that, I guess, based
5 on statements that Patent Owner has made, that they're not, with respect to
6 common unit, Patent Owner is not acting as a lexicographer and they're not
7 disavowing any scope of that term. So, given that, what is your claim
8 construction method for getting common unit to mean what you say it
9 means?

10 MR. BOWLING: Sure, Your Honor, it's straight Phillips standard.
11 We're looking at the ordinary and customary meaning in view of the entire
12 patent, in view of the specification, in view of the claims. That's what that
13 term means in this patent. Common may have other dictionary definitions
14 out there, but in this patent, we think that common unit has a very specific
15 meaning. And that's where you're trying to show how two individuals
16 competing against one another in an athletic challenge and doing different
17 types of athletic activities, as claim 7 points out, there needs to be some
18 conversion so that there's a commonality for comparison.

19 Okay, quickly now turning to the prior art and the grounds of
20 invalidity, we'll start off with ground 1, Tagliabue. Here really what we see
21 is just a very bare bones argument in totality for this element 1[G]. There
22 was four total sentences in the petition. They only cited two paragraphs of
23 Tagliabue. They've argued that there's a lot of overlap between Tagliabue
24 and in the '256 Patent. We disagree. There's all figures from 17 through 42
25 in the '256 Patent are not in Tagliabue, as is the disclosure from column 29,
26 lines 26 through column 40, line 29. Pages and pages and pages and pages.

1 Many figures, all different, in the '256 Patent, all new. And a lot of those
2 are what discuss and depict the continuous generation. So, what we have
3 here, again, for Tagliabue is just a complete failure of proof.

4 Okay. And then also on the common unit, this applies to claim seven
5 or 15. And now we're on slide 48 of Nike's demonstrative. Tagliabue again,
6 or Lululemon, rather, in arguing Tagliabue's anticipation includes only two
7 sentences here. And basically, what they say is miles are a common unit,
8 period. That's their argument. There's no disclosure of conversion in
9 Tagliabue. There's no disclosure of multiple different types of activities
10 being compared. All they argue is just miles run. So, they fail there. And
11 here's portions of Tagliabue. This is what they're pointing to. This is miles
12 run, miles run. Tagliabue never even mentions the word common unit, not
13 once.

14 Okay, Arrasvuori, we talked about this briefly. As Your Honor noted,
15 there's both anticipation and obviousness grounds. As you hinted at, it's
16 really unclear where they're leveraging this obviousness ground within the
17 context of the petition. And if we flip back to that quickly, they pointed to
18 one sentence about obviousness, and it's here on page 57 of the petition.
19 And it says, alternatively, it would have been obvious to configure the server
20 to generate the claimed interface. That's it. That's the extent of their
21 obviousness argument for the continuously generated limitation. And now
22 they point to other aspects of the petition, namely the bottom of page 57 and
23 the top of page 58. But as their own header highlights, that's a different
24 limitation. When we started off our presentation today, we looked at the
25 three separate components, simultaneously communicated, continuously

1 generate. This paragraph at the bottom of page 57 is about communicating.
2 It's not about the continuously generating limitation.

3 So, there's really no obviousness argument here, it's only anticipation.
4 And as we noted, there's a significant failure of proof there. So, really, what
5 their argument is -- so, there's no dispute. We talked about this briefly.
6 Arrasvuori is completely silent as to the frequency with which the interface
7 is generated. Says nothing about it.

8 JUDGE BELISLE: Okay, so let's take that issue right there.
9 Leaderboards is all over the reference. Even if the disclosure of, let me
10 pronounce it here, Arrasvuori does not have a specific frequency discussed
11 of how often it may update the data, that would perhaps affect anticipation.
12 But in the context of obviousness, why would it not have been obvious to
13 somebody in this time frame skilled in this art, an engineer with a
14 leaderboard, and their own understanding of what a leaderboard is to -- I
15 don't want to say simply, but to render it continuously generated, instead of
16 generated every 1 minute, every 2 minutes, every 5 minutes, every 10
17 seconds. Why is it not obvious to speed it up and just do a continuous
18 display?

19 MR. BOWLING: It's a great question, Your Honor. And their
20 answer to that question is that, well, all leaderboards must be continuously
21 generated. That's what they said. That's what their experts said. Similar to
22 the assumptions they made about interfaces showing progress. And we don't
23 agree with that, especially in 2007 and '08. But even today, not all
24 leaderboards are continuously generated.

25 JUDGE WEATHERLY: Well, to be fair, though, you have implied
26 that if a leaderboard is updated often enough, then it could be continuous.

1 MR. BOWLING: Yeah, if there is --

2 JUDGE WEATHERLY: But there's no standard for how to judge
3 whether the frequency is often enough. Is five minutes often enough? Is
4 one minute often enough, is one second often enough? Is one day often
5 enough? And you can probably tell from the DI, we're struggling with the
6 concept of -- not struggling, that's the wrong word. Where leaderboards
7 have an inherent characteristic in the sense that people, when they look at
8 them, they presume that they reflect a meaningful status of a competition, or
9 they wouldn't be called a leaderboard.

10 MR. BOWLING: Sure.

11 JUDGE WEATHERLY: Is there a line to draw? Is there a functional
12 line to draw between something that is continuous versus something that
13 isn't?

14 MR. BOWLING: There is a line drawing issue here, Your Honor, but
15 we don't --

16 JUDGE WEATHERLY: Well, what is the line?

17 MR. BOWLING: For purposes of today's proceeding, we don't think
18 we have to draw the line, because there's just nothing in Arrasvuori that talks
19 about this at all. And they're --

20 JUDGE WEATHERLY: Other than saying that it's a leaderboard?

21 MR. BOWLING: A leaderboard. Right. Our law firm --

22 JUDGE WEATHERLY: Which is not nothing, by the way.

23 MR. BOWLING: Yes, yes, it's not nothing, but we don't think it goes
24 far enough. Our law firm has a fitness challenge to help everybody work off
25 their holiday calories. And people can go in and they can post how many
26 miles they've run over the course of a given month. That gets posted

1 periodically so that everybody can see where they rank, how they're doing,
2 who's on the leaderboard. That may be updated every couple of days. It
3 could be inaccurate if somebody hasn't gone in and entered their data.

4 JUDGE WEATHERLY: Inaccurate meaning at any one moment, not
5 reflect the actual status of who's ahead?

6 MR. BOWLING: Correct. It could be --

7 JUDGE WEATHERLY: Because I ran 8 miles this morning, but I
8 haven't yet posted.

9 MR. BOWLING: Exactly, Your Honor. So, if you ran 8 miles in the
10 morning and that interface call, an interface was generated every three days,
11 still a leaderboard, but it's not being continuously generated. So, just
12 pointing to the mere disclosure of leaderboard does not go far enough to
13 show that Arrasvuori discloses, or even suggested or taught under the
14 obviousness standard, a continuously generated interface, constant updates,
15 all the things that are disclosed in the specification. There's no discussion of
16 that in Arrasvuori at all. And merely pointing to the existence of a
17 leaderboard is not enough, under anticipation or obviousness.

18 JUDGE WEATHERLY: Does your specification provide disclosure
19 about what constitutes continuous in terms of the frequency?
20

21 MR. BOWLING: Yes, Your Honor. So, we looked at a few of those
22 examples a couple of moments ago where it shows the runner's current
23 speed, different updates and metrics that show that the interface is being
24 generated very quickly. You couldn't show a runner's current speed if it
25 wasn't being generated continuously. So, there's discussion in the '256
26 Patent at a much greater level of detail, both in the figures and in the text.

1 That's much different from Arrasvuori. Arrasvuori doesn't have any figures
2 that show the interface at all. We just have a couple of boxes with some
3 arrows between them and then some disclosure that really doesn't get us all
4 the way there. We can look at their --

5 JUDGE BELISLE: Before we get too far afield. Actually, from your
6 example of your law firm having people post their progress every so often,
7 what I'm hearing is that that may not be enough to anticipate a claim, this
8 claim that's before us. But why would it not have been obvious to a whole
9 group of patent lawyers, who I understand are not the skilled artisan in this
10 case, but to not have updated it more frequently. In fact, every time you
11 have done something, you must post, so that it is continuous. This is my
12 difficulty here, is getting from -- if I accept it's not anticipated, how is that
13 what I'll call a small bridge from not continuous to continuous? Why is that
14 not a bridge a skilled artisan can cross without issue?

15 MR. BOWLING: It's a great question, Your Honor, and we think this
16 is something that their expert glazed over as well. And when we talked to
17 their expert about why this was obvious, we said, when you look at this
18 reference, why would it have been obvious to just have a continuously
19 generated interface? And he said, because there were video games in 2007,
20 shooting video games. We asked him which one. He said, Call of Duty.
21 Now, he admitted he's not an expert in video games. But more importantly,
22 there's a big difference between these video games. And it highlights just
23 how non-obvious it would be in this application to go to a continuously
24 generated interface. And Nike's expert, Dr. Toney-Bolger talked about this,
25 and she said it would be no trivial feat in this context to get to a continuously
26 generated interface because you have to have enough computing power,

1 software, you have to construct this system in a certain way so that you're
2 sensing data, you're collecting the raw data, you're processing it, maybe
3 you're converting it to a common unit, and then you're communicating the
4 result, and generating an interface continuously. There's a lot that goes on
5 between those steps. So, in this particular application, it would not have
6 been obvious to simply say, let's just make it faster. Let's just do it
7 continuously.

8 JUDGE BELISLE: A bit of difficulty I have with that argument right
9 there and reliance on that statement, that it's not trivial, is that we have
10 deposition testimony that a statement about whether something was trivial in
11 computer networking and sensors and signals that the expert in testimony
12 said they have no experience in any of that, in computer networking. So, for
13 somebody without experience in computer networking to tell me that it's not
14 trivial, I don't know how much weight to put to that compared to somebody
15 that has a solid or sort of more hefty set of experiences with computer
16 networking that says it is easy to do.

17 MR. BOWLING: Okay.

18 JUDGE BELISLE: So, how do I get over this, no, I don't have any
19 experience in designing, modifying, repairing or researching computer
20 networks?

21 MR. BOWLING: Sure, Your Honor. So, we don't think that her
22 opinion necessarily, in that specific instance about what was needed at that
23 time, involves expertise in computer networks. Dr. Toney-Bolger is an
24 expert in, and this is from paragraphs 8 and 9 of her declaration, Exhibit
25 2005. She's an expert in measuring, visualizing and evaluating human
26 movement. And her work involved accelerometers, high speed cameras,

1 things like that. This is her wheelhouse. She may not know how the
2 backend computers are source code communicating with one another. But
3 she is an expert in those areas, and she knew that back in 2007 you couldn't
4 just take an athletic performance monitoring system and speed it up so that it
5 was continuous. That wouldn't have been obvious.

6 JUDGE DEFRANCO: Counsel, it seems like you're talking about the
7 sensing aspect of it. So, it's like your expert is drawing a distinction or
8 juxtaposing "periodically sensing" something and "continuously sensing"
9 something, periodically generating data as opposed to continuously
10 generating data. In that there is some leap to go from one to the other.
11 That's your argument, correct?

12 MR. BOWLING: I think, Your Honor, if we understand your
13 question right. There is certainly a sensing step that needs to happen before
14 the interface can be continuously generated. So, if we're --

15 JUDGE DEFRANCO: Well --

16 MR. BOWLING: -- continuously generating interface, that would in
17 turn mean that we also have to continuously be sensing. So, those initial
18 steps have to be continuous as well in order for a continuously generated
19 interface to be plausible.

20 JUDGE DEFRANCO: It seems like the claim drafter or the applicant
21 would have chosen the word "periodically generating," if that's what they
22 meant, as opposed to "continuously generating."

23 MR. BOWLING: It's a great point, Your Honor. We agree.

24 JUDGE DEFRANCO: (inaudible).

25 MR. BOWLING: Okay, so again here with Arrasvuori, just like
26 Tagliabue, what we have are unsupported conclusory testimony, a bare

1 bones petition, barely any discussion of a continuously generated interface.
2 And importantly, although we've talked a lot about obviousness, no mention
3 of how/why it would have been obvious, what would have been obvious.
4 Continuously generated, there's no argument about that being obvious,
5 because that term doesn't appear anywhere in the petition. So, again with
6 Arrasvuori bare bones, they just haven't met their evidentiary burden.

7 Lastly, we'd like to turn to ground 5, and now we're on Slide 75 of
8 Nike's presentation talking quickly about Watterson, we can skip ahead to
9 slide 78. The issue here, and this is something that the Board called out in
10 its institution decision, is that Lululemon is kind of mixing and matching
11 different things. So, they point to Watterson's pulse watch as the wirelessly
12 connected sensor. And a pulse watch, not surprisingly, collects heart rate
13 data. But then when they're talking about comparing the activity of the
14 users, they compare something totally different, which is the distance
15 traveled. And the claims require that what is being compared, the athletic
16 activity data, be from a wirelessly connected sensor. So, you have to sense it
17 using the wirelessly connected sensor, and then that data is what is
18 compared. And that's not what Lululemon alleges with Watterson. They're
19 pointing to the pulse watch and then later on pointing to distance traveled.

20 They try and tweak that a little bit by saying, you could modify
21 Watterson with Arrasvuori, they say that you could take the heart rate data
22 and convert that to distance traveled. And the problem here is that there's
23 really no motivation for a skilled inventor at this time to make that
24 combination. They say that a skilled artisan would have normalized, they
25 would have been motivated to normalize the performance between two
26 users. So, the idea here is that if Judge Weatherly is in excellent shape and

1 I'm in bad shape, it may normalize our two performances by making it more
2 difficult or kind of minimizing my results. So, if I did slightly better than
3 my normal and Judge Weatherly also did slightly better than his normal, our
4 performance could be equated in that way. So, it's normalizing the two.

5 And so Lululemon is saying a skilled artisan would be motivated to
6 combine Watterson and Arrasvuori, because Arrasvuori talks about
7 normalizing, and that would be an attractive option for someone who's
8 reading Watterson. The problem is that Watterson already teaches
9 normalizing performance. So, Watterson does it in a slightly different way,
10 but it scales the workout difficulty. So, you can see here on slide 80, this is
11 from our sur-reply pages 23, 22 to 23. Watterson scales the workout
12 difficulty in the context of a competition. And what Watterson talks about
13 now, turning to slide 81, is the user can select various options, like a head
14 start. They can scale the difficulty level. This is how Watterson is
15 normalizing the two users' performance. It already does what they're saying
16 would be the motivation to combine. So, there would be no need for a
17 skilled artisan reviewing Watterson to then turn to Arrasvuori and say, I'm
18 going to combine this because I want normalization. It's already in
19 Watterson. There's no motivation. The only way they get here is with
20 improper hindsight.

21 And then lastly on Watterson, again, same thing here, we have the
22 common unit problem. Watterson only talks about a race in miles. Again,
23 their entire argument is two sentences. They talk about miles being a
24 common unit, period. That's not enough under the proper understanding of
25 common unit.

1 Okay. And then lastly, claims 12 and 13. Again, they point to a
2 combination of Arrasvuori and Watterson. Namely, they would add
3 Arrasvuori's GPS hardware and accelerometer to Watterson, to the pulse
4 watch. The problem here is that Watterson is done on a treadmill, and
5 there's no need for an accelerometer or a GPS device on a treadmill. A
6 skilled artisan reviewing Watterson would never think, okay, I'm running on
7 a treadmill, I need a GPS device to know where I am. Nor would they need
8 an accelerometer. It's already built into the treadmill. So, same problem
9 there. No motivation to do that.

10 And unless the Board has any further questions.

11 JUDGE BELISLE: Yeah, I have at least one. Let me find you the
12 slide. It's where we break out the three terms in claim 1 that are being
13 discussed. Looks like it's Petitioner slide 10.

14 MR. BOWLING: Yes, Your Honor, we've got it pulled up.

15 JUDGE BELISLE: Actually, let's go to slide 7, which has claim 1 on
16 it. So, coming back to the language at the end of claim 1, continuously
17 generate and simultaneously communicate in real-time to the first user, and
18 then the rest of the language. Walk me through, again, what in real-time is
19 modifying there. What is happening in real-time in this claim?

20 MR. BOWLING: Sure. So, our understanding of that language is
21 that the real-time just suggests that when it's generated, when the interface is
22 shown, that that's the actual position of that person or that's in real-time,
23 that's what their actual miles run is, their speed, that's happening in real-
24 time. So, an example of what would not be real-time is if there's some
25 delay.

1 So, you could have a continuously generating interface. But if for
2 some reason, the backend processing is taking five minutes, it might not
3 reflect my current location, even though it's continuously generating,
4 because it's not in real-time. There's a delay between the processing, some
5 earlier step that's slowing it down. So, that would be the difference between
6 those two. And that's why we think it's important that all three of those
7 portions of the claim be given meaning, because as we see it, Lululemon is
8 reading out the continuously generated piece of it.

9 JUDGE BELISLE: So, the in real-time reflects the indication I'm
10 seeing on the interface that, which is based off from that data that's being
11 continuously generated via the interface. And I guess, I've seen a
12 characterization of this in the record, where the continuously generate is
13 occurring and I, as a user in this system, and just speaking in lay terms,
14 perhaps have my device off, but the system is still generating that signal that,
15 just like on a television, if I turned it on, there's my display, and there's my
16 data. And I can look at it and go, oh, I'm still in fifth place, because it's
17 current. It's in real-time. Those are the real-time pieces of data from the
18 various first user, second user, whatever users. And so, I'm getting a
19 continuously generated stream of data based off from this athletic activity
20 that is simultaneously communicated to both users or the users.

21 MR. BOWLING: Correct.

22 JUDGE BELISLE: I know that wasn't a question, but is that
23 discussion, does that align with what you're arguing this limitation means?

24 MR. BOWLING: Yes, Your Honor. So, in that hypothetical, a non-
25 real-time, if you're watching a baseball game, would be if there's a five-
26 minute tape delay, or they sometimes delay the game so that the athletes are

1 cursing, they can bleep it out. So, there's no delay. What you're seeing is
2 real-time, which is a separate issue from whether the interface is being
3 continuously generated.

4 JUDGE BELISLE: Okay, so simultaneously communicate goes to
5 feeding it to the users, is that correct?

6 MR. BOWLING: To two users, in separate --

7 JUDGE BELISLE: So, the users are all getting it at --

8 MR. BOWLING: Yeah.

9 JUDGE BELISLE: -- relatively, at the same time.

10 MR. BOWLING: Yes, Your Honor.

11 JUDGE BELISLE: Continuously generate is the generation,
12 ultimately, of the data going that populates that interface, and it's being done
13 in real-time. As far as the data that it's sending is real-time data, it's not from
14 20 minutes ago. It's --

15 MR. BOWLING: Exactly.

16 JUDGE BELISLE: -- what just happened.

17 MR. BOWLING: Exactly.

18 JUDGE BELISLE: Okay. Thank you.

19 MR. BOWLING: Thank you, Your Honors.

20 JUDGE BELISLE: We can add your seven and a half minutes to --

21 JUDGE WEATHERLY: You have twelve minutes remaining for
22 that.

23 MR. BOWLING: Thank you.

24 JUDGE BELISLE: So, we'll put that at twelve minutes. Petitioner,
25 when you're ready, you have 17 minutes.

26 MR. ARJOMAND: Thank you, Your Honors.

1 JUDGE BELISLE: Ready?

2 MR. ARJOMAND: Yes. So, Your Honors, I appreciated Judge
3 Weatherly's comment about the difficulty in drafting final written decisions,
4 and I think there are a number of suggestions that I can make on rebuttal to
5 make your task easier. I think the first is with regard to the claim
6 construction issue for 1[G]. As you heard from my colleague here, there's a
7 lot of difficulty for him in line drawing exactly what continuously generating
8 an interface means. Is it five minutes? Is it one minute? Is it one second?
9 Is it one millisecond? On sur-reply, they seem to suggest that it's something
10 that's not perceptible to the human eye. I don't know where that's coming
11 from. In their specification, there's no citation for support. And the figure
12 that they were citing today, figure 24, hasn't been cited, as far as I know, in
13 their POR or sur-reply for that point. So, I'm not sure where they're getting
14 that frequency.

15 And I think the better way to address this issue is to hold them to their
16 construction. So, what we provided here on slide 15 of our slides is an
17 example that I think illustrates the point. They have construed continuously
18 generating to be without interruption. So, what Dr. Lynch said in his reply
19 declaration, he said that as an example, and this is paragraph 10 of his reply
20 declaration, Exhibit 1017. He said, as an example, if an interface displays
21 the distance run by a runner in 0.1 mile increments, the display would
22 remain unchanged for 36 seconds if the runner runs at a six-minute mile
23 pace. For this example, the appearance of the interface is identical whether
24 it's generated and commuted at a high constant frequency, or whether it's
25 updated only when the runner has traveled 0.1 mile since the last update. In

1 either case, there would be no interruption, and no interruption would be
2 perceived by the user.

3 So, again, their construction is without interruption, there is nothing --

4 JUDGE WEATHERLY: Well, in a sense, though, this argument is
5 that there's no interruption perceived by the user if the user recognizes that
6 there are going to be interruptions. I mean, the premise that, at the front end
7 here, if an interface displays the distance run by a runner in 0.1 mile
8 increments, it embeds an interruption.

9 MR. ARJOMAND: Well --

10 JUDGE WEATHERLY: I mean, that means that the interface is
11 interrupted.

12 MR. ARJOMAND: Well, at --

13 JUDGE WEATHERLY: Runners don't go from point A to 0.1 mile
14 down the road instantaneously. There's progress in between. I understand
15 the point that if you update the display at the same refresh rate that is the
16 resolution of the data reported, then from a user viewing the interface's
17 perspective, there's no difference between that and one that's refreshed more
18 often.

19 MR. ARJOMAND: Right.

20 JUDGE BELISLE: But --

21 MR. ARJOMAND: But if I may point you to the paragraph right
22 above on slide 15, it says an interface generated once per mile would be
23 generated continuously or without interruption according to Nike's
24 construction, provided it was designed to update that way. So, whatever
25 system that you have, whether it's based on a clock-based event, it could be a
26 millisecond, it could be a second, it could be a minute, it could be 10

1 minutes. At each event, it's going to generate the interface that's without
2 interruption. That's the way that that system was designed.

3 Under their view, we have a spectrum here of events in which the
4 interface is continuously generated. And under their view, the claim is only
5 some undefined frequency that's associated with human vision. And even
6 that would have some interruption, right? If it's 20 milliseconds, you're still
7 having interruptions every 20 seconds until it generates the interface, 20
8 milliseconds, I should say.

9 So, if you hold them to their construction, you don't need to get
10 involved in this kind of line drawing. That I think is very clear. And that's
11 why we, as Petitioner, were open to accepting their construction for this
12 proceeding, because it makes no impact on patentability.

13 So, let me just address one other point, Your Honors, regarding the
14 claim construction issue. I heard my colleague mention that we're reading
15 out continuously generating an interface from limitation 1[G], but that's not
16 true. So, here on slide 17, Dr. Lynch was asked, what's an example of an
17 interface that's working properly and is not being continuously generated?
18 And he said, he testified, I can imagine an interface that displays buttons that
19 I push, and it never changes its display, in other words, it's generated once,
20 but the key strokes that I apply are recorded.

21 So, again, continuously generate is a broad term in Patent Owner's
22 view. They've construed it broadly without interruption. And as a result, it
23 encompasses all manners of continuous generation of interfaces, whether it's
24 through clock events or other types of events that can happen. For example,
25 there's a door example that was in the papers that were discussed. So, I
26 think that would be the right way to address the claim construction issue,

1 and that would mean that you don't have to make some kind of arbitrary line
2 drawing.

3 Let me briefly address claim 8 and -- I'm sorry. Let me briefly
4 address common unit. So, I think I heard my colleague mention that
5 common unit may have multiple meanings, and we say, yes. And I think
6 that's why, if you're -- I'm now on slide 19. That's why our construction
7 gives meaning to common with the rest of the recitation used for multiple
8 types of athletic activities. Now, I heard my colleague mention a claim
9 differentiation point, or agreeing to a claim differentiation point, perhaps
10 raised with respect to claim 8. I can say that from my review of the record
11 Patent Owner in its Patent Owner response and its sur-reply never brought
12 up claim 8 as a basis for construing claim 7 and 15. So, that claim
13 differentiation argument has not been made by Patent Owner.

14 And then, even --

15 JUDGE BELISLE: Counsel, does that restrict us, as the Board,
16 construing the term, as a matter of law?

17 MR. ARJOMAND: I think, you know, we, under the APA, Your
18 Honor, we would have, I think, due process rights to be able to address that
19 argument. I mean, we're trying to do it on the fly, but I can tell you right
20 now, Your Honor, that even if you were to consider claim 8, I don't think it
21 supports any kind of claim differentiation argument.

22 So, if you take a look at claim 8, it says when the challenge is
23 specified in terms of a unit in which the athletic activity is measured. So,
24 what that means is that if the challenge is defined in miles, then the
25 challenge must be measured in miles. That's what claim 8 is getting at. So,
26 one, that supports our position that a common unit can be miles. Right?

1 Because that would meet claim 8. And then I think there are different
2 scenarios on how claim 7 could be met and claim 8 could not be met, or the
3 other way around, or that they both could be met. And I could walk you
4 through those scenarios if you wish. Otherwise, I can move on to other
5 issues.

6 JUDGE BELISLE: You can move on.

7 MR. ARJOMAND: Okay. And then I would like to add that again, in
8 the spirit of trying to make this final written decision easy for you. If you
9 were to rule in our favor on the Arrasvuori grounds, claims that are directed
10 to the common unit, claims 7 and 15, would be met because they've never
11 challenged claims 7 and 15 with respect to the Arrasvuori grounds. It's only
12 with the other grounds they've challenged claim 7 and 15.

13 So, with respect to Arrasvuori, a couple of points that I like to make is
14 that my colleague mentioned that all -- and he did this a couple of times, that
15 Arrasvuori just mentions a leaderboard. And I don't think, Your Honor, that
16 that's consistent with the record. Arrasvuori, as I explained in my opening,
17 is a much broader disclosure. From 49 to 53 is the portion that we cited
18 quite a bit in our papers. And it talks about two embodiments. There's a
19 leaderboard embodiment and a graphical representations or representative
20 embodiment. And then there's disclosures about real-time feedback. So, I
21 don't think that it's fair just to say that there is a leaderboard in Arrasvuori.
22 For example, if you look at paragraph 52, it talks about graphical indicators.
23 Your Honors have cited this in your DI decision. The graphical indicators
24 are generated during performance. They are generated when the person is
25 performing an athletic activity relative to other users performing that athletic
26 activity, and in real-time. It's not just the word leaderboard. There's a lot

1 more to Arrasvuori than just the word leaderboard. Let me also direct you to
2 --

3 JUDGE BELISLE: Counsel, one of the obviousness arguments
4 regarding Arrasvuori, what evidence can you point us to that shows the
5 skilled artisan in view of that leaderboard in the reference, that that would
6 have fairly suggested continuously generating an interface?

7 MR. ARJOMAND: I think, Your Honor, the testimony that we cited
8 in our petition, for example, in the section that we were just looking at in the
9 petition in our opening discussion, 55 through 58. So, in that section, in
10 paragraph 72, Dr. Lynch testifies, in paragraph 72, a POSITA would've
11 understood from these disclosures, this is the leaderboard and the graphical
12 representation disclosures that Arrasvuori server can generate and
13 communicate leaderboards and graphics to users, depicting user progress
14 toward goals in real-time as the server generates them, so. And there is
15 testimony beyond this direct testimony in his opening declaration, where
16 he's provided additional discussion of that.

17 I also could point you to Exhibit 1017, paragraphs 35 to 44. This is
18 his reply declaration, where he expands on how Arrasvuori discloses
19 continuously generating. I'd also like to just briefly note, Your Honors, that
20 my colleague mentioned, kind of, in relationship to what it understood
21 continuously generating to be, it cited figure 24. I'm not sure what figure 24
22 of the '256 Patent, how it helps them. From what I can tell, for example, at
23 the top of figure 24, it refers to a mile pace of 9 minutes and 45 seconds. I'm
24 not sure how that is getting to their high frequency constant intervals that
25 they're citing. In any event, I think that the key is what they have discussed.
26 We haven't heard -- I haven't seen the citation to figure 24, as far as I can

1 tell on the Patent Owner response or the reply or the sur-reply. This is the
2 first time I'm hearing this citation. But what I have seen is what's here on
3 slide 14. It shows figure 17 and the message portion in figure 17. The
4 intervals are at whole cardio miles. That is not a high frequency constant
5 interval update based on human perception.

6 Finally --

7 JUDGE BELISLE: Counsel, while you're on that slide. What do you
8 make of the sentence just above there that says, don't forget to sync your
9 storage device with the user interface? I mean, is that suggesting that there
10 requires some sort of manual update in what's shown on that slide?

11 MR. ARJOMAND: I don't think Patent Owner would certainly agree
12 with that, Your Honor. They are relying on figure 17 because they think it
13 supports their position on constant updates. So, I don't believe there has
14 been any testimony exactly on that. And there is some discussion in the
15 '256 Patent relating to the different types of messages that can be in message
16 portion 730. But I think the fact that the updates are occurring at whole
17 cardio mile intervals totally undercuts, again, their arbitrary distinction of
18 what continuously generating interface is.

19 Finally, in my last minute or so, I'd like to just again discuss the
20 qualifications of the two experts. So, our expert Dr. Lynch is a Professor of
21 Northwestern University. He's an expert in computer networks. He's
22 worked on computer networks and is expert in those networks, providing
23 feedback. That was slide 27. Slide 28, he started programming video games
24 when he was 6th, in 6th grade. In contrast, Dr. Toney-Bolger, kind of true to
25 her yes and no answers on slide 29, no research on computer networks,
26 never designed a computer network, never modified a computer network,

1 never repaired a computer network. When was the last time you've worked
2 on? When have you ever coded? She said I used to be fluent in MATLAB,
3 I can't say that I've used it very recently, may be rusty. This is slide 30.

4 So, I think in terms of whose expert you should give weight to, I think
5 Dr. Lynch, by far, is the more experienced and knowledgeable expert in this
6 field. Dr. Toney-Bolger is essentially an expert for accidents and accident
7 injuries. That's what we could tell from her CV.

8 Unless there are any further questions, Your Honors, we will rest.

9 JUDGE WEATHERLY: None from me.

10 JUDGE BELISLE: No further questions.

11 MR. ARJOMAND: Thank you.

12 MR. BOWLING: Okay, we have just a couple of quick points, and
13 then we'll be done. Okay. Counsel for Lululemon mentioned that certain
14 figures and portions of the specification that we pointed out in response to
15 Your Honor's question may not have been in the sur-reply or in the response.
16 Our understanding is that the Board's required to review the entire patent to
17 construe the claims. And if we're looking at claim construction, the parties
18 are required to view the entire patent, the claims, and the specification. So,
19 we don't think there would be any APA issues here with the Board
20 construing the claims in view of the entire specification.

21 Also, our argument with common unit isn't necessarily a claim
22 differentiation argument. We're saying that the ordinary meaning of that
23 term, in view of the whole patent, is something that requires a conversion
24 between multiple types of athletic activities. We pointed out claim 8 as an
25 example because it shows that the inventors, had they wanted to simply use
26 the word unit, knew how to do so. They put the word common in there for a

1 reason, and we think the reason is because they wanted to be able to
2 compare multiple types of activities.

3 JUDGE BELISLE: Counsel, here's where you get to just do my job
4 for me. I have to construe common unit. Let's say I have to construe it.
5 What's my construction? What's it mean? Common unit means what?

6 MR. BOWLING: Common unit means a unit of measurement of
7 athletic activity that requires at least one conversion from a different unit of
8 measuring athletic activity, if we're talking about two activities.

9 JUDGE WEATHERLY: Rolls right off the tongue.

10 JUDGE BELISLE: So, the word "normally" is not in your definition,
11 correct?

12 MR. BOWLING: Correct, Your Honor.

13 JUDGE WEATHERLY: Sarcasm comes across more clearly in
14 person.

15 MR. BOWLING: So, we're actually glad they brought up this back
16 and forth from the deposition of Dr. Lynch on page 17 of Lululemon's slide.
17 So, we asked him if he could think of any interface that's not continuously
18 generated, and what he essentially told us is an interface that's broken. He
19 said he could imagine an interface that displays buttons that I push. So, I
20 push A on my keyboard, it shows A. I press J on my keyboard, it shows J.
21 But the interface he imagined was one that never changed its display. So,
22 despite pushing the keystrokes, the interface was not working. It was a
23 broken interface. And this drives home the point. They are saying that
24 every interface is a continuously generated interface. They're rendering that
25 portion of the claim superfluous. And we think that's inappropriate.

1 JUDGE DEFRANCO: Counsel, is the only embodiment disclosed in
2 the patent a continuously generated interface, or are there other
3 embodiments?

4 MR. BOWLING: There's a --

5 JUDGE DEFRANCO: It's not (inaudible) --

6 MR. BOWLING: Apologies, Your Honor. Yes, there is another
7 embodiment. And in fact, the one we pointed to in Tagliabue earlier,
8 remember, there was an interface that was generated when the user wanted
9 to view their status. That was at Tagliabue column 1358 through 1412.
10 That same disclosure is also in the '256 Patent. So, it does talk about an
11 interface that's not continuously generated. It's only generated when the user
12 prompts it.

13 JUDGE DEFRANCO: A portion of the specification talks about that?
14 The not continuously generated interface?

15 MR. BOWLING: It is, I can pull it up for you here. Just bear with
16 me 1 minute, please, Your Honor.

17 JUDGE DEFRANCO: Yes.

18 MR. BOWLING: It is at column 14, and it begins at line 44. I
19 believe that's the same. Yeah, so, it's column 14 beginning at 31. That
20 paragraph there. It's the same disclosure we, we discussed earlier in
21 Tagliabue. The user decides that they wish to view the statistics, and then it
22 explains, beginning at line 36, the user interface may be generated in
23 response to that user prompting it.

24 And then just one last point. You know --

25 JUDGE DEFRANCO: Counsel, so, once the prompts happen, the
26 user, the data can be generated continuously after the prompts, right?

1 MR. BOWLING: It seems, Your Honor, like the data, I guess the
2 activity is being tracked constantly. And then once, assuming that there's
3 some code or data that needs to be generated to present that visually to the
4 user, the disclosure says that that happens upon the user requesting that. It
5 says in response to the user's prompt, that interface is generated. And here
6 it's talking about the different modules, but it starts there on line 42 of
7 column 14.

8 JUDGE DEFRANCO: Right. I see it. Okay. Thank you.

9 MR. BOWLING: One last point. So, we weren't making up that
10 Lululemon is relying on this idea that the mere mention of a leaderboard
11 means a continuously generated interface. It's on their slide. We can look at
12 slide 26, says the word leaderboard itself refers to a continuously generated
13 interface. And what they've pointed to in Arrasvuori is mention of
14 leaderboard, but also other disclosures, just about user progress. And as we
15 discussed earlier, the mere idea that you're tracking progress of multiple
16 users towards a goal, or that you're showing relatively how close they are to
17 a certain goal or a landmark, that doesn't mean it's continuously generated.
18 And if you put little avatars on there, that doesn't mean it's continuously
19 generated. So, nothing in Arrasvuori discloses, teaches, or suggests that
20 limitation.

21 JUDGE BELISLE: So, Counsel, your expert has said that it's not
22 trivial to do continuous generation. Is there disclosure in the challenge
23 patent that explains how it's done in the challenge patent? How you get
24 continuous generation of that interface, since it's not a trivial thing?

25 MR. BOWLING: Like the mechanical source code, in the --

1 JUDGE BELISLE: Just how, even generally, how it's done if it's not
2 so easy for the skilled artisan to accomplish?

3 MR. BOWLING: So, we know that it's discussed at columns 30, lines
4 31 through 35. Columns 31, lines 39 through 46. Column 35, lines 39
5 through 46. I don't know offhand, standing here today, the depth to which it
6 discusses the mechanics of that continuous generation, but we do think it is
7 discussed somewhat thoroughly, both in those disclosures and in the figures.

8 JUDGE BELISLE: Okay.

9 MR. BOWLING: Thank you, Your Honors.

10 JUDGE BELISLE: Judge Weatherly, any questions?

11 JUDGE WEATHERLY: No questions.

12 JUDGE BELISLE: Judge DeFranco, any questions?

13 JUDGE DEFRANCO: No, nothing further. Thank you.

14 JUDGE BELISLE: Okay, Counsel, your case is submitted, and taken
15 under advisement. We're off the record.

16 (Whereupon, the proceedings at 3:49 p.m. were concluded.)

IPR2023-00189
Patent 9,278,256 B2

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