

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

<p>VR OPTICS, LLC, Plaintiff, v. PELOTON INTERACTIVE, INC., Defendant.</p>	<p>Civil No. 1:16-cv-6392 (JPO)</p>
<p>PELOTON INTERACTIVE, INC., Third-Party Plaintiff, v. VILENCY DESIGN GROUP, LLC, ERIC VILENCY, AND JOSEPH COFFEY, Third-Party Defendants.</p>	

STIPULATED PROTECTIVE ORDER

WHEREAS, VR Optics, LLC, Peloton Interactive, Inc., Villency Design Group, LLC, Eric Villency, and Joseph Coffey stipulate and agree that the materials to be produced and exchanged and the testimony to be given during the course of discovery in the above-captioned action (the "Action") may contain confidential, proprietary, or private information that could prove harmful to the parties if disseminated or published;

WHEREAS, the Parties seek a protective order limiting disclosure thereof in accordance with Federal Rule of Civil Procedure 26(c);

NOW, THEREFORE, IT IS HEREBY ORDERED that the following provisions shall govern the conduct of discovery in this proceeding:

1. LIMITATIONS

The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 14.3 below, that this Order does not entitle them to file confidential information under seal; instead paragraph 2.E. of Judge Oetken's Individual Practices in Civil Cases sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the Court to file material under seal.

2. DEFINITIONS

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is generated, stored, or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel, as well as their support staff.

2.4 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY," or "HIGHLY CONFIDENTIAL - SOURCE CODE."

2.5 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), which are produced or generated in disclosures or responses to discovery in the Action.

2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the Action who (a) has been retained by a Party or its counsel to serve as a testifying or non-testifying expert witness or consultant in the Action, (b) is not a past or current employee of a Party or of a Party's competitor, and (c) at the time of retention, is not anticipated to become an employee of a Party or of a Party's competitor.

2.7 "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" Information or Items: extremely sensitive "Confidential Information or Items," disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means.

2.8 "HIGHLY CONFIDENTIAL-SOURCE CODE" Information or Items: extremely sensitive "Confidential Information or Items" representing computer code, scripts, source code, object code, microcode, or other machine language instructions, and associated comments and revision histories, formulas, engineering specifications, or schematics that disclose such computer code, scripts, source code, object code, microcode, or other machine language instructions, disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means.

2.9 House Counsel: attorneys who are employees of a party to this Action and legal department staff to whom it is reasonably necessary to disclose the information. House Counsel does not include Outside Counsel of Record or any other outside counsel.

2.10 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this Action.

2.11 Outside Counsel of Record: attorneys who are not employees of a Party to this Action, but are retained to represent or advise a Party and have appeared in this Action on behalf of that Party or are affiliated with a law firm that has appeared on behalf of that Party.

2.12 Party: any party to this Action, including all of its officers, directors, employees, agents, and retained consultants.

2.13 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this Action.

2.14 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

2.15 Protected Material: any Disclosure or Discovery Material that is designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY,” or as “HIGHLY CONFIDENTIAL–SOURCE CODE.”

2.16 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

3. SCOPE

The protections conferred by this Order cover not only Protected Material (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material.

The protections conferred by this Order do not, however, cover the following information:

(a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; and (b) any information known to the Receiving Party through proper and lawful means, under no obligation of confidentiality, prior to the disclosure, or obtained by the Receiving Party through proper and lawful means, under no obligation of confidentiality, after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party. The Parties agree that they will not seek to de-designate any portion of the other Party's software or source code based on their prior knowledge of such software or source code. Nothing in this paragraph shall be construed as an admission by either Party that such software or source code is or is not a trade secret. Any use of Protected Material at trial shall be governed by a separate agreement or order.

4. DURATION

Even after final disposition of the litigation of this Action, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims and defenses in this Action, with or without prejudice, and (2) final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this Action, including the time limits for filing any motions or applications for extension of time pursuant to applicable law.

5. DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or Non-Party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. To the extent it is practical to do so, the Designating Party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify—so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

If it comes to a Designating Party's attention that information or items that it designated for protection do not qualify for protection at all or do not qualify for the level of protection initially asserted, that Designating Party must promptly notify all other Parties that it is withdrawing the mistaken designation or re-designating the information or items.

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, e.g., sections 5.2(a) and 5.3 below), or as otherwise stipulated or ordered, Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Order requires:

(a) For information in documentary form (excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the legend "CONFIDENTIAL," "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL-SOURCE CODE" to each page that contains protected material. A Party or Non-Party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and

produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order. Then, before producing the specified documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL,” “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL–SOURCE CODE”) to each page that contains Protected Material. Where electronic files and documents are produced in native electronic format, such electronic files and documents shall be designated for protection under this Order by appending to the file names information indicating whether the file contains “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL–SOURCE CODE” Information or Items. When electronic files or documents are printed for use at deposition, in a court proceeding, or for provision in printed form to an expert, the party printing the electronic files or documents shall affix a legend to the printed document corresponding to the designation of the Designating Party and including the production number and designation associated with the native file.

(b) For testimony given in deposition or in other pretrial or trial proceedings that the Designating Party identify on the record, before the close of the deposition, hearing, or other proceeding, all protected testimony and specify the level of protection being asserted. When it is impractical to identify separately each portion of testimony that is entitled to protection and it appears that substantial portions of the testimony may qualify for protection, the Designating Party may invoke on the record (before the deposition, hearing, or other proceeding is concluded) or within five calendar days of the deposition’s conclusion, a right to have up to 21

days from the Designating Party's receipt of the final transcript of the deposition or other pretrial or trial proceeding to identify the specific portions of the testimony as to which protection is sought and to specify the level of protection being asserted. Only those portions of the testimony that are appropriately designated for protection within the 21 days shall be covered by the provisions of this Order. Alternatively, a Designating Party may specify, at the deposition or up to 21 days from the Designating Party's receipt of the final transcript, that the transcript, either in whole or in part, shall be treated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL—ATTORNEYS' EYES ONLY."

A Party shall give the other Party notice if it reasonably expects a deposition, hearing, or other proceeding to include Protected Material so that the other Party can ensure that only authorized individuals who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition shall not in any way affect its designation as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL—ATTORNEYS' EYES ONLY," or "HIGHLY CONFIDENTIAL—SOURCE CODE."

Transcripts containing Protected Material shall have an obvious legend on the title page that the transcript contains Protected Material, and the title page shall be followed by a list of all pages (including line numbers as appropriate) that have been designated as Protected Material and the level of protection being asserted by the Designating Party. The Designating Party shall inform the court reporter or deposition officer of these requirements. Any transcript that is prepared before the expiration of the 21-day period for designation shall be treated during that period as if it had been designated "HIGHLY CONFIDENTIAL—ATTORNEYS' EYES ONLY"

in its entirety unless otherwise agreed. After the expiration of that period, the transcript shall be treated only as actually designated.

(c) For information produced in some form other than documentary and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE.” If only a portion or portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portion(s) and specify the level of protection being asserted.

5.3 Inadvertent Failures to Designate. An inadvertent failure to designate qualified information or items does not, standing alone, waive the confidentiality of that information or the Designating Party’s right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

A Receiving Party will not be responsible to the Producing Party for disclosure of Protected Material under this Order if the Protected Material in question is not labeled or otherwise designated in accordance with this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burden, or a significant disruption or delay of the litigation, a Party does not waive its right to

challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of this Order. The Parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice to voice dialogue, either telephonic or in-person; other forms of communication are not sufficient) within 14 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first or establishes that the Designating Party is unwilling to participate in the meet and confer process in a timely manner.

6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court intervention, the Challenging Party shall file and serve a motion to change confidentiality in compliance with Rule 37.2 of the Local Rules for the Southern District of New York and paragraph 4.B. of Judge Oetken's Individual Practices in Civil Cases, if applicable, within 21 days of the initial notice of challenge or within 14 days of the Parties agreeing that the meet and confer process will not resolve their dispute, whichever is later. Each such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet

and confer requirements imposed in the preceding paragraph and must be filed on the public docket along with a redacted version of the Protected Material whose designation of confidentiality is in dispute. Failure by the Challenging Party to make such a motion including the required declaration within 21 days (or 14 days, if applicable) shall automatically waive the challenge to the confidentiality designation for each challenged designation. The Challenging Party shall serve an unredacted version of the motion, declaration, and accompanying exhibits concurrently with the electronic filing of the redacted versions. Any motion brought pursuant to this provision must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed by the preceding paragraph.

The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Unless the Challenging Party has waived the confidentiality challenge by failing to file a motion to challenge the confidentiality as described above, the Parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the Court rules on the challenge.

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this Action only for prosecuting, defending, or attempting to settle this Action. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the litigation of the Action has been terminated, a Receiving Party must comply with the provisions of section 15 below ("FINAL DISPOSITION").

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

Materials stored electronically must be stored on a system that uses passwords or other access-control mechanisms.

Nothing in this Order will bar Counsel from rendering advice to their respective client with respect to this litigation and, in the course thereof, relying upon any Protected Material designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL–SOURCE CODE,” provided that the contents of the Confidential Information must not be disclosed to those not authorized by this Order to receive it.

7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated “CONFIDENTIAL” only to:

(a) the Receiving Party’s Outside Counsel of Record in this Action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation;

(b) no more than three officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(c) Experts (as defined in this Order) of the Receiving Party (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4(a), below, have been followed;

(d) the Court and its personnel;

(e) court reporters and their staff, professional jury or trial consultants, mock jurors, and Professional Vendors and their staff to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(f) during their depositions, witnesses in the Action to whom disclosure is reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the Court. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be properly designated pursuant to paragraph 5.2(b) above.

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise lawfully possessed or knew the information prior to the commencement of this Action or who previously received the information under circumstances not constituting a violation of this Order.

7.3 Disclosure of “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” and “HIGHLY CONFIDENTIAL-SOURCE CODE” Information or Items. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information¹ or item designated “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL-SOURCE CODE” only to:

(a) the Receiving Party’s Outside Counsel of Record in this Action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation;

¹ Source code will only be disclosed via the inspection and limited copying procedures detailed in paragraph 9.

(b) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4, below, have been followed;

(c) the Court and its personnel;

(d) court reporters and their staff, professional jury or trial consultants mock jurors, and Professional Vendors and their staff to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A); and

(e) the author or recipient of a document containing the information or a custodian or other person who otherwise lawfully possessed or knew the information prior to the commencement of this Action.

7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL–SOURCE CODE” Information or Items to Experts.

(a) Unless otherwise ordered by the Court or agreed to in writing by the Designating Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item that has been designated “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL–SOURCE CODE” pursuant to paragraphs 7.2(c) or 7.3(b) first must make a written request to the Designating Party that (1) identifies the general categories of “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL–SOURCE CODE” information that the Receiving Party seeks permission to disclose to the Expert, (2) sets forth the full name of the Expert and the city and state of his or her primary residence, (3) attaches a copy of the Expert’s current resume,

identifying at least his or her educational background and degrees and a list of his or her published patent applications, a list of all publications authored in the previous 10 years, and issued patents, (4) identifies the Expert's current employer(s), (5) identifies each person or entity from whom the Expert has received compensation or funding for work in his or her areas of expertise or to whom the expert has provided professional services, including in connection with a litigation, at any time during the preceding five years,² (6) identifies (by name and number of the case, filing date, and location of court) any litigation in connection with which the Expert has offered expert testimony, including through a declaration, report, or testimony at a deposition or trial, during the preceding five years, and (7) includes the Expert's signed "Acknowledgment and Agreement to Be Bound" (Exhibit A).

(b) A Party that makes a request and provides the information specified in the preceding respective paragraphs may disclose the subject Protected Material to the identified Expert unless, within 14 days of delivering the information set forth in paragraph 7.4(a), the Party receives a written objection from the Designating Party. Any such objection must set forth in detail the grounds on which it is based. The approval of disclosure to Experts must not be unreasonably withheld.

(c) A Party that receives a timely written objection must meet and confer with the Designating Party (through direct voice to voice dialogue, either telephonic or in-person) to try to resolve the matter by agreement within seven days of the written objection. If no agreement is

² If the Expert believes any of this information is subject to a confidentiality obligation to a non-party, then the Expert should provide whatever information the Expert believes can be disclosed without violating any confidentiality agreements, including an affidavit or declaration from the Expert that such work did not relate to products or services that compete with or relate to any of the products or services that are the subject of discovery in this matter and that the employer is not a party or affiliate of a party to this instant suit. Additionally, the Party seeking to disclose the Expert shall be available to meet and confer with the Designating Party regarding any such engagement by the Expert.

reached, the Party seeking to make the disclosure to the Expert may file a motion in compliance with the Rule 37.2 of the Local Rules for the Southern District of New York and paragraph 4.B. of Judge Oetken's Individual Practices in Civil Cases, if applicable, seeking permission from the Court to do so. Any such motion must describe the circumstances with specificity, set forth in detail the reasons why the disclosure to the Expert is reasonably necessary, assess the risk of harm that the disclosure would entail, and suggest any additional means that could be used to reduce that risk. In addition, any such motion must be accompanied by a competent declaration describing the parties' efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and confer discussions) and setting forth the reasons advanced by the Designating Party for its refusal to approve the disclosure. If a Party files a motion with the Court seeking permission to disclose the objected to material to the Expert, no disclosure shall occur until all such objections are resolved by agreement or Court order.

(d) Experts shall be allowed to disclose material that is designated "CONFIDENTIAL," "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL-SOURCE CODE" to subcontractors, assistants, or employees provided that the subcontractors, assistants, or employees (1) have been retained by the Expert to assist the Expert in completing his work for this Action, (2) are not past or current employees of a Party, and (3) at the time of retention, are not anticipated to become an employee of a Party. The subcontractors, assistants, or employees must comply with all the same requirements and procedures as the Experts. In particular, information that is designated "CONFIDENTIAL," "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL-SOURCE CODE" may not be disclosed to subcontractors, assistants, or employees unless the procedures of sections 7.4(a)-7.4(c) have been complied with in full for each subcontractor, assistant, or employee.

In any such proceeding, the Party opposing disclosure to the Expert shall bear the burden of proving that the risk of harm that the disclosure would entail (under the safeguards proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

8. PROSECUTION BAR

Absent written consent from the Producing Party, any individual who receives access to "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL-SOURCE CODE" information under this Order shall not be involved in the preparation or prosecution of patents or patent applications pertaining to the field of the invention of the asserted patent—*i.e.* interactive fitness equipment, the technology produced or at issue in this case. For purposes of this paragraph, "prosecution" includes directly or indirectly drafting claims, amending claims, or advising regarding claim scope. "Prosecution" as used in this paragraph does not include representing a party challenging the validity of an asserted patent before a domestic or foreign agency (including, but not limited to, a reissue protest, *ex parte* reexamination or *inter partes* reexamination). However, "prosecution" as used in this paragraph prohibits representing a party defending the validity of an asserted patent in any proceeding that permits claim amendments. This Prosecution Bar shall begin when "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL-SOURCE CODE" information is first received by the affected individual and shall end on the one year anniversary following the date of final termination of this action.

The Prosecution Bar set forth in the paragraph above shall be personal to any attorney who receives or reviews materials designated "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL-SOURCE CODE" and shall not be imputed to any other persons or attorneys at the attorney's law firm or company unless information

concerning the materials was communicated to such person by one who reviewed protected materials.

9. SOURCE CODE

(a) For the production of source code in this Action, a Producing Party may designate source code as “HIGHLY CONFIDENTIAL–SOURCE CODE” if it comprises or includes confidential, proprietary, or trade secret source code, object code, microcode, scripts, and/or other machine language instructions.

(b) Protected Material designated as “HIGHLY CONFIDENTIAL–SOURCE CODE” shall be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” information including the Prosecution Bar set forth in Paragraph 8, and may be disclosed only to the individuals to whom “HIGHLY CONFIDENTIAL–SOURCE CODE” information may be disclosed, as set forth in Paragraph 7.3.

(c) Any source code produced in discovery shall be made available for inspection, in the format in which it is kept in the ordinary course of business, thereby allowing it to be reasonably reviewed and searched, during normal business hours or at other mutually agreeable times, at an office of the Producing Party’s Counsel, or another mutually agreed upon location. The source code shall be made available for inspection on a secured computer in a secured room without Internet access or network access to other computers, and the Receiving Party shall not copy, remove, or otherwise transfer any portion of the source code onto any recordable media or recordable device. Nothing in this section shall prevent a Receiving Party’s representative from taking notes during inspection of the source code, but such notes may not contain actual excerpts of the source code. The Producing Party may visually monitor the activities of the Receiving Party’s representatives during any source code review, but only to ensure that there is no

unauthorized recording, copying, removal, or transmission of the source code. No recordable media or recordable devices, including without limitation sound records, computers, cellular telephones, tablets, smartwatches, smartglasses, peripheral equipment, cameras, CDs, DVDs, or drives of any kind, shall be permitted into the secured room.

(d) The Receiving Party may request paper copies of limited portions of source code that are reasonably necessary for the preparation of court filings, pleadings, expert reports, or other papers, or for deposition or trial, but shall not request paper copies for the purposes of reviewing the source code other than electronically as set forth in paragraph (c) above in the first instance. The Producing Party shall provide all such source code in paper form including bates numbers and the label "HIGHLY CONFIDENTIAL - SOURCE CODE." The Receiving Party's request for paper copies of limited portions of source code is limited to 25 consecutive pages and an aggregate total of 125 pages of printouts of the source code. The parties will be reasonable to determine if these page limitations should be increased in light of the Receiving Party presenting a compelling reason to exceed the page limitations.

(e) The Receiving Party shall maintain a record of any individual who has inspected any portion of the source code in electronic or paper form and the location of the inspection. Upon ten (10) business day's advance notice to the Receiving Party by the Producing Party, the Receiving Party shall provide a copy of this log to the Producing Party. The Receiving Party shall maintain all paper copies of any printed portions of the source code in a secured, locked area in the offices of Outside Counsel of Record. The Receiving Party shall not create any electronic or other images of the paper copies and shall not convert any of the information contained in the paper copies into any electronic format. The Receiving Party may however, make electronic copies of short sections (*i.e.* less than 40 lines of substantive source code,

excluding empty lines and marks such as “<”, “>”, etc.) of code for the preparation of court filings, pleadings, expert reports, or other papers, or for deposition or trial, which shall be prominently stamped and treated as “HIGHLY CONFIDENTIAL - SOURCE CODE.”

Electronic copies of source code or documents incorporating short sections of source code shall be stored on a computer and be password protected so as to limit access to persons described in paragraph 7.4(a) and 7.4(b). Electronic copies of source code shall not be transmitted electronically, unless filed under seal as part of a court filing. Additionally, electronic copies of documents incorporating short sections of source code shall not be transmitted electronically, unless filed under seal as part of a court filing or unless such documents are being saved to an encrypted cloud-based drive that is only accessible from a password protected computer. The persons described in paragraphs 7.4(a) and 7.4(b) may send documents incorporating short sections of source code to other persons described in paragraphs 7.4(a) and 7.4(b) via hand delivery or commercial carrier, such as FedEx or UPS. The Receiving Party shall only make additional paper copies if such additional copies are (1) necessary to prepare court filings, pleadings, or other papers (including a testifying expert’s expert report), (2) necessary for deposition, or (3) otherwise necessary for the preparation of its case. The Receiving Party shall maintain a log of all additional paper copies (whether printed or photocopies) of the source code and maintain all copies of source code in a secured, locked area in the offices of Outside Counsel of Record, and persons described in paragraph 7.4(a) may also temporarily keep the printouts or copies at the Court or deposition venue or any intermediate location reasonably necessary to transport the information (*e.g.*, a hotel before a Court proceeding). Should such additional paper copies be transferred to electronic media, such media shall be labeled “HIGHLY CONFIDENTIAL - SOURCE CODE.” Any paper copies used during a deposition shall be

retrieved by the Producing Party at the end of each day and must not be given to or left with a court reporter or any other unauthorized individual. Any briefs or other filings that include source code must be made under seal.

(f) The Producing Party shall install any code analysis tools or other related software provided by the Receiving Party on the secured computer provided that the Receiving Party provides the Producing Party with all the installation scripts and other tools needed to install the software and evidence of any licenses required to use the software beyond software use trial periods. If there is any expense associated with installations—*i.e.*, licensing fees for code analysis tools or other related software requested by the Receiving Party—required by this paragraph (f), such expense shall be paid by the Receiving Party. Under no circumstances shall the Receiving Party attempt to use any means to copy any source code off the secured computers.

(g) Nothing in this Order shall be construed as a representation or admission that source code is properly discoverable in this action, to obligate any party to produce any source code, or to waive any objection to any request for production of documents or source code.

10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this Action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL–SOURCE CODE” that Party must:

(a) promptly notify in writing or e-mail the Designating Party; such notification shall include a copy of the subpoena or court order;

(b) promptly notify in writing the Non-Party that caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Order. Such notification shall include a copy of this Order; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected.

If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL–SOURCE CODE” before a determination by the Court from which the subpoena or order issued, unless the Party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material, and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this Action to disobey a lawful directive from another court.

11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS LITIGATION

(a) The terms of this Order are applicable to information produced by a Non-Party in this Action and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL–ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL–SOURCE CODE.” Such information produced by a Non-Party in connection with this litigation is protected by the remedies and relief provided by this Order. Nothing in these provisions should be construed as prohibiting a Non-Party from seeking additional protections.

(b) In the event that a Party is required, by a valid discovery request, to produce a Non-Party's confidential information in its possession, and the Party is subject to an agreement with the Non-Party not to produce the Non-Party's confidential information, then the Party shall:

1. promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;
2. promptly provide the Non-Party with a copy of this Order, the relevant discovery request(s), and a reasonably specific description of the information requested; and
3. make the information requested available for inspection by the Non-Party.

(c) If the Non-Party fails to object or seek a protective order from this Court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the Court. Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection, the parties may incorporate their agreement in the stipulated protective order submitted to the court.

14. MISCELLANEOUS

14.1 Right to Further Relief. Nothing in this Order abridges the right of any person or Party to seek its modification by the Court in the future. The Court retains jurisdiction even after termination of this Action to enforce this Order and to make such amendments, modifications, deletions, and additions to this Order as the Court may from time to time deem appropriate.

14.2 Right to Assert Other Objections. By stipulating to the entry of this Order, no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Order.

14.3 Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this Action any Protected Material. A Party that seeks to file under seal any

Protected Material must comply with the Local Rules for the Southern District of New York and paragraph 2.E. of Judge Oetken's Individual Practices in Civil Cases. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. A sealing order will issue only upon a request establishing that the Protected Material is entitled to protection under the law. If a Receiving Party's request to file Protected Material under seal is denied by the Court, then the Receiving Party may file the Protected Material in the public record unless otherwise instructed by the Court.

14.4 Drafts of Expert Reports. The parties agree that the only materials from the Parties' expert witnesses that shall be subject to discovery are the final issued Expert Report and all materials considered or relied upon in connection with forming the expert's opinion and preparing the final issued Expert Report. No other material provided to or created by the expert, including attorney communications with the expert and draft reports, shall be subject to discovery unless there is an independent basis for its discovery

15. FINAL DISPOSITION

Within 60 days after the final disposition of this Action, as defined in paragraph 4 above, each Receiving Party must either return all Protected Material to the Producing Party or destroy such material. As used in this paragraph, "all Protected Material" includes all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of the Protected Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60-day deadline that (1) identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or any other format reproducing or

capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in paragraph 4.

SO ORDERED.

Dated: May 15, 2018

New York, New York

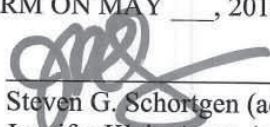


J. PAUL OETKEN
United States District Judge

SO STIPULATED AND APPROVED AS TO FORM ON MAY __, 2018



Paul S. Doherty III, Esq.
Mark A. Berman, Esq.
**HARTMANN DOHERTY ROSA
BERMAN & BULBULIA LLC**
666 Fifth Avenue, 28th Fl.
New York, NY 10103
(212) 344-4619
pdoherty@hdrbb.com
mberman@hdrbb.com



Steven G. Schortgen (admitted *Pro Hac Vice*)
Jennifer Klein Ayers (admitted *Pro Hac Vice*)
**Sheppard Mullin Richter
and Hampton L.L.P.**
2200 Ross Ave., 24th Floor
Dallas, TX 75201
(469) 391-7400
SSchortgen@SheppardMullin.com
JAyers@SheppardMullin.com

**ATTORNEYS FOR PLAINTIFF VR
OPTICS, LLC AND THIRD-PARTY
DEFENDANTS VILLENCY DESIGN
GROUP, LLC, ERIC VILLENCY, AND
JOSEPH COFFEY**

Paul Garrity
**Sheppard Mullin Richter
and Hampton L.L.P.**
30 Rockefeller Plaza, 39th floor
New York, N.Y. 10112
PGarrity@SheppardMullin.com

Leif R. Sigmond, Jr.
E-mail: lsigmond@bakerlaw.com
Michael D. Gannon
(admitted *pro hac vice*)
E-mail: mgannon@bakerlaw.com
Jennifer M. Kurcz
(admitted *pro hac vice*)
E-mail: jkurcz@bakerlaw.com

Jonathan Hangartner
X-PATENTS, APC
5670 La Jolla Blvd.
La Jolla, CA 92037
Tel: 858.454.4313
Fax: 858.454.4314
jon@x-patents.com

BAKER & HOSTETLER LLP
191 North Wacker Drive
Suite 3100
Chicago, IL 60606-1901
T +1.312.416.6200
F +1.312.416.6201

**ATTORNEYS FOR DEFENDANT AND
THIRD-PARTY PLAINTIFF PELOTON
INTERACTIVE, INC.**

**ATTORNEYS FOR PLAINTIFF VR
OPTICS, LLC**

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

<p>VR OPTICS, LLC, Plaintiff, v. PELOTON INTERACTIVE, INC., Defendant.</p>	<p>Civil No. 1:16-cv-6392 (JPO) JURY TRIAL DEMANDED</p>
<p>PELOTON INTERACTIVE, INC., Third-Party Plaintiff, v. VILLENY DESIGN GROUP, LLC, ERIC VILLENY, AND JOSEPH COFFEY, Third-Party Defendants.</p>	

AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

I, _____ [print or type full name], of
 _____ [print or type full address], declare under penalty of perjury
 under the laws of the United States that I have read in its entirety and understand the Stipulated
 Protective Order (“Order”) approved by the parties and issued by the United States District Court
 for the Southern District of New York in the above-captioned action (the “Action”). I agree to
 comply with and to be bound by all the terms of the Order, and I understand and acknowledge
 that failure to so comply could expose me to sanctions and punishment in the nature of contempt.

I solemnly warrant, represent, and promise that I will not disclose in any manner any information or item that is subject to the Order to any person or entity except in strict compliance with the provisions of the Order.

I further agree to submit to the jurisdiction of the United States District Court for the Southern District of New York for the purpose of enforcing the terms of this Order, even if such enforcement proceedings occur after termination of the Action.

Promptly upon termination of the Action, I will return all documents and things subject to this Order that came into my possession, and all documents and things that I have prepared relating thereto, to outside counsel for the party by whom I am employed.

Dated: _____ Signature: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VR OPTICS, LLC,

Plaintiff,

-v-

PELTON INTERACTIVE, INC.,

Defendant.

16-CV-6392 (JPO)

OPINION AND ORDER

PELTON INTERACTIVE, INC.,

Third-Party Plaintiff,

-v-

VILLENCY DESIGN GROUP, LLC, ERIC
VILLENCY, and JOSEPH COFFEY,

Third-Party Defendants.

J. PAUL OETKEN, District Judge:

This is a patent infringement case involving interactive exercise equipment, in which Plaintiff VR Optics, LLC (“VR Optics”) brings claims of patent infringement against Defendant Peloton Interactive, Inc. (“Peloton”). Now pending before the Court are the parties’ memoranda on claim construction. (See Dkt. Nos. 75, 77, 81, 85-1.) The Court held a *Markman* hearing on August 2, 2018. (See Minute Entry, August 2, 2018.) Having considered the parties’ arguments and briefing on claim construction, the Court construes the disputed terms as outlined below.

I. Background

This opinion deals with a subset of the claims in this case: the patent dispute between VR Optics and Peloton. VR Optics owns U.S. Patent No. 6,902,513 (“the ’513 patent”), titled

“Interactive Fitness Equipment.” (Dkt. No. 1 ¶ 12; Dkt. No. 1-1.) VR Optics alleges that Peloton makes and sells interactive exercise equipment that infringes on VR Optics’ patent. (Dkt. No. 1 ¶ 20.)

The parties submitted a Joint Disputed Claim Terms Chart on February 23, 2018. (Dkt. No. 69-1.) Each party submitted an opening claim construction brief on April 13, 2018, followed by a responsive claim construction brief on May 11, 2018. (Dkt. Nos. 75, 77, 79, 81.)¹ The Court held a *Markman* hearing on August 2, 2018. (See Minute Entry, August 2, 2018.) The Court is now prepared to rule on the proper construction of the disputed claim terms in the ’513 patent.

II. Legal Standards

A. Claim Construction

The claim construction analysis is substantially guided by the Federal Circuit’s decisions in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc), and *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (en banc). Claim construction is an issue of law properly decided by the Court. *Markman*, 52 F.3d at 970–71. “It is a ‘bedrock principle’ of patent law that ‘the claims of a patent define the invention to which the patentee is entitled the right to exclude.’” *Phillips*, 415 F.3d at 1312 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)).

In construing the meaning of the claims, the starting point and primary source is the intrinsic evidence. *Phillips*, 415 F.3d at 1313–14. The intrinsic evidence includes the claims themselves, the specification, and the prosecution history. *See id.* at 1314. The general rule—

¹ On May 21, 2018, Plaintiff VR Optics submitted a corrected response brief with a modified table of contents. (Dkt. No. 85.) Subsequent citations to VR Optics’ response brief will refer to the corrected response brief at Docket Number 85-1.

subject to certain exceptions—is that each claim term is construed according to its ordinary and accustomed meaning as understood by one of ordinary skill in the art at the time of the invention in the context of the patent and intrinsic evidence. *See id.* at 1312–13. “There is a heavy presumption that claim terms are to be given their ordinary and customary meaning.” *Mass. Inst. of Tech. v. Shire Pharm., Inc.*, 839 F.3d 1111, 1118 (Fed. Cir. 2016) (quoting *Aventis Pharm. Inc. v. Amino Chems. Ltd.*, 715 F.3d 1363, 1373 (Fed. Cir. 2013)).

The Federal Circuit, in *Phillips*, rejected any claim construction approach that sacrificed the intrinsic record—including the specification—in favor of extrinsic evidence, such as dictionary definitions or expert testimony. The *en banc* court disparaged the suggestion made by *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193 (Fed. Cir. 2002), that a court should discern the ordinary meaning of the claim terms (through dictionaries or otherwise) before turning to the specification. *Phillips*, 415 F.3d at 1319–24. *Phillips* does not, however, preclude all uses of extrinsic evidence in claim construction proceedings. Instead, the court assigned extrinsic evidence a role subordinate to that of the intrinsic record. With respect to dictionaries, the Federal Circuit noted that, “[i]n some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words. In such circumstances, general purpose dictionaries may be helpful.” *Id.* at 1314 (citation omitted).

The Federal Circuit has not imposed any particular sequence of steps for a district court to follow when it considers disputed claim language. *See id.* at 1324. Rather, *Phillips* held that a court must attach the appropriate weight to the intrinsic sources offered in support of a proposed

claim construction, bearing in mind the general rule that the claims measure the scope of the patent grant.

B. Indefiniteness Under 35 U.S.C. § 112, ¶ 2

Section 112 requires that a patent specification “conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.” 35 U.S.C. § 112, ¶ 2.² The Supreme Court has read this provision to require that “a patent’s claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2129 (2014). Indefiniteness must be proven by clear and convincing evidence. *BASF Corp. v. Johnson Matthey Inc.*, 875 F.3d 1360, 1365 (Fed. Cir. 2017).

“[C]laims involving terms of degree are [not] inherently indefinite.” *Sonix Tech. Co. v. Publ’ns Int’l, Ltd.*, 844 F.3d 1370, 1377 (Fed. Cir. 2017). “[A]bsolute precision is unattainable” when drafting patent claims. *Nautilus*, 134 S. Ct. at 2129. “Thus, ‘a patentee need not define his invention with mathematical precision in order to comply with the definiteness requirement.’” *Sonix Tech.*, 844 F.3d at 1377 (quoting *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 424 F.3d 1374, 1384 (Fed. Cir. 2005)). Instead, “the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter.” *Nautilus*, 134 S. Ct. at 2130 (quoting *Minerals Separation, Ltd. v. Hyde*, 242 U.S. 261, 270 (1916)).

² Congress amended Section 112 as part of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 4(c), 125 Stat. 284, 296 (2011). Because the ’513 patent was filed prior to this amendment, the pre-amendment version of Section 112 governs. See *Sonix Tech. Co., Ltd. v. Publ’ns Int’l, Ltd.*, 844 F.3d 1370, 1371 n.1 (Fed. Cir. 2017).

C. Indefiniteness Under 35 U.S.C. § 112, ¶ 6

Section 112, ¶ 6 allows patentees to engage in what is referred to as means-plus-function claiming. The statute provides that “[a]n element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof.” 35 U.S.C. § 112, ¶ 6. However, such claims must “be construed to cover [only] the corresponding structure, material, or acts described in the specification and equivalents thereof.” *Id.*

In accordance with the statute’s plain terms, the Federal Circuit has interpreted this provision to permit patentees to express patent claims in the form of a specific function or functions to be performed without reciting a structure for performing that function as part of the claim term. *See Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1347 (Fed. Cir. 2015). In order to do so, however, the patentee is required to disclose in the specification a corresponding structure for performing each claimed function or functions. *Id.* The scope of the claim is then to be construed as limited to the claimed functions when performed by those corresponding structures described in the specification. *Id.*

Courts construing claims asserted to be subject to Section 112, ¶ 6 must engage in a two-part inquiry. First, courts must make an “assessment of whether the limitation in question is a means-plus-function term subject to the strictures of § 112, [¶] 6.” *Id.* at 1348. Where the claim limitation does not recite the word “means,” there is a rebuttable presumption that Section 112, ¶ 6 does not apply. *Id.* This presumption is not a “strong” one, *id.* at 1349, and can be overcome “if the challenger [asserting indefiniteness] demonstrates that the claim term fails to ‘recite[] sufficiently definite structure’ or else recites ‘function without reciting sufficient structure for performing that function,’” *id.* at 1348 (alteration in original) (quoting *Watts v. XL Sys., Inc.*, 232 F.3d 877, 880 (Fed. Cir. 2000)). Still, the challenger asserting the applicability of Section 112,

¶ 6 to a claim term lacking the word “means” must overcome the contrary presumption by a preponderance of the evidence, in reliance on intrinsic and extrinsic evidence as interpreted through the lens of traditional claim construction principles. *Zeroclick, LLC v. Apple Inc.*, 891 F.3d 1003, 1007 (Fed. Cir. 2018).

Second, once a court concludes that Section 112, ¶ 6 governs a claim limitation, it must “determine whether the specification discloses sufficient structure that corresponds to the claimed function.” *Williamson*, 792 F.3d at 1351. “The party alleging that the specification fails to disclose sufficient corresponding structure must make that showing by clear and convincing evidence.” *TecSec, Inc. v. Int’l Bus. Machs. Corp.*, 731 F.3d 1336, 1349 (Fed. Cir. 2013). A court’s analysis of whether that showing has been made proceeds in two stages: First, the court must identify all of the claimed functions in the relevant limitation; and second, the court looks to see whether the specification discloses adequate corresponding structure for each of the claimed functions. *Williamson*, 792 F.3d at 1351–52. Where the patentee fails to disclose structures in the specification corresponding to each claimed function, the court must construe the relevant claim term as indefinite. *Id.* at 1352.

III. Discussion

As a threshold matter, the Court must decide who would be “a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Phillips*, 415 F.3d at 1313.

VR Optics posits that such a person of ordinary skill in the art (or “POSITA”) would be “an engineer with at least a bachelor’s level degree in engineering and two or more years working as an engineer designing and/or developing computerized fitness or exercising equipment.” (Dkt. No. 75 at 10.)

Peloton does not offer any proposal regarding a POSITA at the time of the '513 patent. When pressed for a position on this question during the *Markman* hearing, counsel for Peloton refused to agree to VR Optics' proposed POSITA, but also declined to offer a competing proposal or to articulate any specific objections or issues with VR Optics' proposal.

As VR Optics' proposed POSITA is consistent with evidence in the record (*see, e.g.*, Dkt. No. 78 ¶ 10), the Court adopts VR Optics' proposal in full. The Court therefore concludes that a POSITA for the '513 patent would be an engineer with at least a bachelor's level degree in engineering and two or more years' experience working as an engineer designing and/or developing computerized fitness or exercising equipment.

A. "Control the Display" and "Drive the Display"

Claim Language	Claim(s)	Plaintiff's Proposed Construction	Defendant's Proposed Construction
"control the display"	6, 18, 19	Plain and ordinary meaning	Indefinite
Claim Language	Claim(s)	Plaintiff's Proposed Construction	Defendant's Proposed Construction
"drive the display"	1	Plain and ordinary meaning	Indefinite

Peloton makes two separate arguments as to why these two claim terms should be construed as indefinite under 35 U.S.C. 112, ¶ 2. First, Peloton argues that the claims in which these terms appear impermissibly claim both an apparatus *and* a method of using that apparatus, running up against Federal Circuit holdings forbidding such dual claiming. (Dkt. No. 77 at 10–11, 14.) Second, Peloton argues that the patent's use of the different words "control" and "drive" in an otherwise identical manner renders both of these terms indefinite, because these separate words are presumed to have different meanings that the '513 patent fails to disclose with reasonable certainty. (Dkt. No. 77 at 12–13.)

VR Optics disputes both of these conclusions. First, VR Optics contends that these terms are both part of pure apparatus claims, and that the Federal Circuit permits the use of functional language to describe a claimed apparatus. (Dkt. No. 85-1 at 11–12.) Second, VR Optics cites

Federal Circuit authority permitting patentees to use different words to describe the same subject matter or similar concepts. (Dkt. No. 75 at 24–25.)

It is Peloton’s burden to establish the indefiniteness of these claim terms, and indefiniteness must be proven by clear and convincing evidence. *BASF Corp. v. Johnson Matthey Inc.*, 875 F.3d 1360, 1365 (Fed. Cir. 2017). Peloton fails to meet that burden here.

The Court first addresses Peloton’s argument that these claim terms impermissibly claim both an apparatus *and* a method of using that apparatus. The Federal Circuit has “held that ‘reciting both an apparatus and a method of using that apparatus renders a claim indefinite under section 112, paragraph 2.’” *Rembrandt Data Techs., LP v. AOL, LLC*, 641 F.3d 1331, 1339 (Fed. Cir. 2011) (quoting *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed. Cir. 2005)). Such dual-claiming is indefinite because a “manufacturer or seller of the claimed apparatus would not know from the claim whether it might also be liable for contributory infringement because a buyer or user of the apparatus later performs the claimed method of using the apparatus.” *IPXL Holdings, L.L.C.*, 430 F.3d at 1384.

In *Rembrandt*, the plaintiff conceded that the relevant claim language as written included both an apparatus and a method for using the apparatus, and acknowledged that the court construing the claim would need to insert additional apparatus language into the claim to mitigate that issue. *Rembrandt Data Techs., LP*, 641 F.3d at 1339 (“Rembrandt requests this court to insert ‘transmitter section for’ into the final element of claim 3, thereby adding an apparatus and rendering the claim valid.”). Similarly, the language of the relevant claim term in *IPXL Holdings* clearly included within its scope both a “system” and different ways a “user uses the [system].” *IPXL Holdings, L.L.C.*, 430 F.3d at 1384 (emphasis omitted).

The claim terms at issue here are unlike those that the Federal Circuit rejected in *Rembrandt* and *IPXL Holdings*. VR Optics correctly disputes Peloton’s contention that the ’513 patent’s references to “[controlling/driving] the display” clearly encompass both apparatus and methods of using that apparatus. Instead, an examination of the relevant claim terms in context reveals that they are limited to a claimed apparatus, an apparatus which itself functions to “[drive/control] the display.”

For example, claim 6 includes the following limitation: “logic configured to control the display in response to both the first and second performance parameters, such that a performance comparison between the fitness equipment and at least one remote fitness equipment is visually displayed.” (Dkt. No. 1-1 col. 24 ll. 2–6.) The claimed invention here is the apparatus itself, which the claim describes as including logic that performs the claimed functions. The claimed invention thus does not call for the user to perform or utilize the apparatus in any specified way. Instead, the invention merely describes how the claimed apparatus itself is capable of functioning. “A patent applicant is free to recite features of an apparatus either structurally or functionally.” *In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997). That is all that the ’513 patent applicant did with the claims at issue here. Accordingly, the claim limitations using the terms “control/drive the display” are not indefinite for including both an apparatus and a method for using that apparatus.

Peloton’s second argument is that the patentee’s varying use of “drive” and “control” to describe identical functions without providing a method for distinguishing the meaning of these two words renders both terms indefinite. But the Federal Circuit has explained that “[d]ifferent terms or phrases in separate claims may be construed to cover the same subject matter where the written description and prosecution history indicate that such a reading of the terms or phrases is

proper.” *Nystrom v. TREX Co.*, 424 F.3d 1136, 1143 (Fed. Cir. 2005). For example, the Federal Circuit has previously declined to mandate separate constructions of a patent’s varying uses of the words “connected” and “associated” to describe identical concepts, instead holding that “the context does not show that ‘connected’ and ‘associated’ should be differentiated . . . , and we must conclude that this is simply a case where the patentee used different words to express similar concepts, even though it may be confusing drafting practice.” *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1120 (Fed. Cir. 2004).

Similarly here, Peloton points to no evidence intrinsic to the patent indicating that these terms were intended to describe different functions. Instead, the consistent manner in which the specification describes the invention’s display functions, and the nearly identical contexts of these terms’ usages in the claim limitations, indicates that the patentee simply chose to use a different word, namely “drive” instead of “control,” to describe the same otherwise clear function. This may have been poor drafting, but that poor drafting does not provide clear and convincing evidence sufficient to render these claim terms indefinite.

Accordingly, the Court affords the claim terms “control the display” and “drive the display” their plain and ordinary meaning.

B. “Course Data” and Related Terms

Claim Language	Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
“course data” / “course”	5, 9, 18, 19	<p>“course data” as “data defining a particular interactive exercise activity (for example, a spin class, a treadmill class, a race, etc.)”</p> <p>“course” as “a particular interactive exercise activity (for example, a spin class, a treadmill class, a race, etc.)”</p>	<p>“course data” as “data defining at least a route and distance”</p> <p>“course” as plain and ordinary meaning</p>

The parties' disputes regarding the construction of the claim terms "course data" and "course" turn on whether the types of "courses" covered by these claims need to be construed in a limiting or broadening manner.

Peloton proposes that "course data" be construed as "data defining at least a route and distance," because, according to Peloton, the specification clearly and consistently uses the word "course" to refer only to virtual race courses that follow a set route and distance. (Dkt. No. 77 at 16–19.) Peloton adds that construing the scope of "course" as covering a broader range of exercise activities would run afoul of the plain terms of certain of the claim limitations, which clearly employ the word "course" in exclusively spatial terms. (Dkt. No. 77 at 20–21; *see, e.g.*, Dkt. No. 1-1 col. 24 ll. 16–17 ("such that a user's relative position on a course is determined and maintained").) At the *Markman* hearing, counsel for Peloton disclaimed the need to construe "course" differently from the phrase "course data," and conceded that its proposed construction of "course data" would be sufficient for purposes of this case. (Dkt. No. 110-5 at 63–64.)

VR Optics proposes that the word "course" as used in the '513 patent's references to "course data" should not be so limited, but rather should be construed to include any "particular interactive exercise activity (for example, a spin class, a treadmill class, a race, etc.)." (Dkt. No. 75 at 15.) VR Optics cites to portions of the patent specification where, it asserts, "course" is used open-endedly to refer to indeterminate types of events or activities. (Dkt. No. 75 at 16.)

The intrinsic evidence of the '513 patent favors Peloton's proposed construction. The Court starts with an examination of the use of the phrases "course" and "course data" in the claim limitations themselves. "Because claim terms are normally used consistently throughout the patent, the usage of a term in one claim can often illuminate the meaning of the same term in other claims." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (en banc). Only

Peloton’s construction of “course” is consistent with the use of the phrase in each of the ’513 patent’s claim limitations. For example, the ’513 patent includes, in relevant part, the following claim limitation: “logic to compare the first performance parameters with course data, such that a user’s relative position on a course is determined and maintained.” (Dkt. No. 1-1 col. 24 ll. 14–17.) Adopting VR Optics’ proposed construction would require construing this claim as referring to a user’s “position on a spin class,” which is nonsensical. Other claim terms refer to a user’s “current position” on a “course” relative to a computer-generated “racer.” (Dkt. No. 1-1 col. 25 l. 54 – col. 26, l. 15.) Again, adopting VR Optics’ proposed construction of “course” as expressly including within its scope spin classes renders these claim terms nonsensical, a strongly disfavored result under the principles of claim construction.

Consistent with the usage of the terms “course” and “course data” in these claim limitations, the specification’s preferred embodiments also exclusively use the word “course” to refer to courses involving route and distance, such as “racing courses.” (*See, e.g.*, Dkt. No. 1-1 col. 6 ll. 60–63; col. 7 ll. 3–9; col. 8 ll. 29–36.) For example, the specification uses the word “courses” in parallel with the phrase “racing circuits,” and it frequently uses spatial and physical descriptors such as “layout, distances, terrain, scenery, etc.” to describe a “course.” (*Id.*) And all of the figures in the ’513 patent displaying what a user would experience or perceive when using the invention represent the user traversing a race course or a physical space. (Dkt. No. 1-1 figs. 2–5B.)

VR Optics’ selective quotations from other portions of the specification do nothing to rebut this conclusion. For example, VR Optics cites a portion of the specification that uses the phrase “course data” to refer to the environmental graphics that competing virtual-bicycle racers might perceive when using the invention. (Dkt. No. 75 at 16 (citing Dkt. No. 1-1 col. 11 l. 61 –

col. 12 l. 21.) This usage of “course data” in a portion of the specification describing racers and their physical environment only buttresses the conclusion that the phrase “course data” is intended to convey a physical race course to be traversed by the user. The other portions of the specification cited by VR Optics are similarly unavailing. (See Dkt. No. 75 at 16 (citing Dkt. No. 1-1 col. 15 ll. 10–13 (“[O]ne embodiment of the present invention . . . effectively defines a course over which a competitive race or event is to take place.”); col. 16 ll. 13–18 (describing “courses that a user may select among for competing in a given race”)).)

VR Optics also points to the “Background of the Invention” section of the ’513 patent, which describes the rising popularity of “Spinning Classes” and “Treadmill Classes.” (Dkt. No. 1-1 col. 1 l. 65 – col. 2 l. 9.) But importantly, the patentee refers to these activities using the word “classes” rather than “courses,” indicating that the patentee viewed these classes as distinct from its invention’s “courses.” The consistent usage of the word “course” to refer to racing activities in all of the ’513 patent’s preferred embodiments and claim limitations, contrasted with the patentee’s use of a different word in the background section to describe “Spinning Classes” and “Treadmill Classes,” confirms rather than rebuts the propriety of Peloton’s proposed construction.

Accordingly, the Court construes “course data” as “data defining at least a route and distance,” and concludes that no further construction of “course” is necessary in light of that construction of “course data.”

Claim Language	Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
“selected course”	5	“a particular interactive exercise activity (for example, a spin class, a treadmill class, a race, etc.) selected by a user”	Plain and ordinary meaning

In light of the Court’s construction of “course data” as “data defining at least a route and distance,” the Court concludes that no further construction of “course,” as that word is used in the claim term “selected course,” is necessary. It remains only for the Court to consider the parties’ dispute with respect to whether “selected course” must be construed to clarify the identity of the course’s selector. (Dkt. No. 75 at 18; Dkt. No. 77 at 29–30.)

With respect to VR Optics’ proposed introduction of the phrase “selected by a user” to the construction of this claim term, the Court finds this proposed addition to the limitation without support. The Federal Circuit has cautioned that “it is important not to import into a claim limitations that are not a part of the claim.” *SuperGuide Corp. v. DirecTV Enters., Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004). While at times the specification describes the user as the selector of a course, “a particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment.” *Id.* Here, VR Optics does not point to any evidence, either intrinsic or extrinsic, justifying this substantive modification of the scope of a claim limitation. (Dkt. No. 75 at 18.) The Court therefore rejects VR Optics’ proposed construction of the claim term “selected course” and concludes that no further construction of that phrase is necessary.

Claim Language	Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
“data defining course data for a selected course”	5	Plain and ordinary meaning	Indefinite

Peloton proposes that the phrase “data defining course data for a selected course” in claim 5 be construed as indefinite. (Dkt. No. 77 at 15.) It bases this proposed construction on the use of different phraseology to describe seemingly similar concepts in other claims, such as claim 8, which speaks of “data defining a selected course,” and claims 9, 18, and 19, which speak simply of “course data.” (*Id.*) According to Peloton, because “the patentee used three

irreconcilably different phrases in claims 5, 8, 9, 18 and 19, they must be given distinct meanings. Here, the specification provides no such disclosure and the phrase is, accordingly, indefinite.” (*Id.*)

VR Optics counters that the phrases used in claims 5, 8, 9, 18, and 19 are not irreconcilably different, but rather each is independently clear, despite their different usages of the underlying phrases “selected course” and “course data.” (Dkt. No. 85-1 at 15–16.) VR Optics asserts that the additional preface “data defining,” which is unique to claim 5, serves a purpose specific to that claim, namely limiting the types of “data” described in claim 1, on which claim 5 is dependent, as specifically “defining course data for a selected course.” (*Id.*)

Peloton fails to present clear and convincing evidence sufficient to render the disputed claim term indefinite. *BASF Corp. v. Johnson Matthey Inc.*, 875 F.3d 1360, 1365 (Fed. Cir. 2017). Claim 5 reads in full as follows: “The system as defined in claim 1, where each fitness equipment further includes logic to download data defining course data for a selected course through the communication interface.” (Dkt. No. 1-1 col. 23 ll. 54–57.) In turn, claim 1, on which claim 5 is dependent, references data in the following claim limitation: “a communication interface through which data may be communicated to and from the fitness equipment.” (Dkt. No. 1-1 col. 23 ll. 27–28.) Standing alone, the meaning of these phrases is perfectly clear. Claim 1 lays claim to an apparatus capable of communicating data to and from fitness equipment, and claim 5 further provides that the data to be downloaded through that interface defines course data for a selected course. These “claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus*, 134 S. Ct. at 2129. The extrinsic evidence in the record also supports this conclusion. (Dkt. No. 78 ¶ 46.)

The other claims highlighted by Peloton, each of which describe slightly different but similar functions to those claimed by claim 5, use the phrases “data defining a selected course” or simply “course data” rather than the disputed term “data defining course data for a selected course.” But Peloton does not assert that any of the varying subcomponents of each of these phrases (*e.g.*, “course data” and “selected course”) are themselves indefinite. (Dkt. No. 69-1 at 1, 3.) Furthermore, Peloton also does not dispute that each of the claims it points to contributes a substantively different feature to the claimed invention. Accordingly, the Court finds that the syntactical differences highlighted by Peloton in the wording of these various claims are indicative at most of “confusing drafting practice,” but the patentee’s consistent and clear use of the same underlying substantive component phrases in these claims supports the conclusion that “this is simply a case where the patentee used different words to express similar concepts.”

Innova/Pure Water, Inc., 381 F.3d at 1120.

In short, Peloton fails to identify clear and convincing evidence of the indefiniteness of the phrase “data defining course data for a selected course” in claim 5. The Court thus affords this phrase its plain and ordinary meaning, subject to the construction of “course data” the Court has adopted above.

C. “Interactive Exercise Events” and “Interactive Fitness Equipment”

Claim Language	Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
“interactive exercise events”	1	“exercise activity involving a plurality of participants (for example, spinning classes, treadmill classes, races, etc.)”	Plain and ordinary meaning

VR Optics asks the Court to construe the term “interactive exercise events” as “exercise activity involving a plurality of participants (for example, spinning classes, treadmill classes, races, etc.)” (Dkt. No. 75 at 11–13.) To support its proposed construction, VR Optics

emphasizes the context of this term's use in claim 1 of the '513 patent. According to VR Optics, this context indicates that the "interactive" nature of the relevant events clearly encompasses interaction among a plurality of users. (*Id.*) Similarly, with respect to the scope of the claimed "exercise events," VR Optics argues that the specification's description of both races and classes supports its proposed construction, which would make the inclusion of those types of activities within the scope of claim 1 explicit. (*Id.*)

Peloton argues that "interactive exercise events" should be afforded its plain and ordinary meaning. (Dkt. No. 77 at 22.) Peloton relies on the Federal Circuit rule mandating that claim terms be given their plain and ordinary meaning rather than a limiting construction absent "any express disclaimer or independent lexicography in the written description that would justify adding that negative limitation." *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323 (Fed. Cir. 2003). Peloton urges the Court to apply that rule here, because the term "interactive exercise events" is found nowhere in the specification, is used only once in claim 1 of the '513 patent, and is sufficiently clear on its own to render an additional limiting construction unnecessary. (Dkt. No. 77 at 22–23.)

VR Optics' proposed construction would improperly add limitations to claim 1 beyond the scope of the '513 patent's otherwise allowed-for claims. For example, VR Optics' introduction of the requirement that an "interactive exercise event" involve a "plurality of participants" would substantively alter the plain and ordinary meaning of the claim term in violation of the '513 patent's clear indication that some "interactive" activities involve only one participant. (*See, e.g.*, Dkt. No. 1-1 col. 8 ll. 4–28 (describing a method of using the invention in which single users can race against themselves).) Consistent with this preferred embodiment, claim 1 as actually written would include within its scope a single user engaging in "interactive

exercise events” involving himself interacting with the invention alone. VR Optics’ construction mandating that “interactive exercise events” necessarily involve a plurality of users would exclude this preferred embodiment from the scope of claim 1, a strongly disfavored result. *See Broadcom Corp. v. Emulex Corp.*, 732 F.3d 1325, 1333 (Fed. Cir. 2013) (“[A]n interpretation which ‘excludes a [disclosed] embodiment from the scope of the claim is rarely, if ever, correct.’”) (second alteration in original) (quoting *Accent Packaging, Inc. v. Leggett & Platt, Inc.*, 707 F.3d 1318, 1326 (Fed. Cir. 2013))).

VR Optics also fails to identify an “express disclaimer or independent lexicography in the written description that would justify adding that negative limitation.” *Omega Eng’g*, 334 F.3d at 1323. The sole mention of the phrase “interactive exercise events” in the entire ’513 patent is its use in the final claim limitation of claim 1. Still, VR Optics urges that its limiting construction is supported by the specific context of its use in claim 1, which reads in full as follows:

a computer program executed by the server to configure the server for coordinating the communication among the plurality of fitness equipment, such that a plurality of the geographically-separated fitness equipment may simulate interactive exercise events.

(Dkt. No. 1-1 col. 23 ll. 35–39.) Contrary to VR Optics’ contentions, this context does not foreclose the possibility that the plurality of linked fitness equipment could simulate for each individual user his or her own individual interactive exercise event. As such, context alone fails to “reveal[] . . . express intent to confer on the claim language the novel meaning imparted by [VR Optics’ proposed] negative limitation. Accordingly, [this Court] must conclude that there is no basis in the patent specification for adding the negative limitation.” *Omega Eng’g*, 334 F.3d at 1323.

The same conclusion is warranted with respect to VR Optics’ proposal that the term “interactive exercise events” be construed to expressly include as examples “spinning classes, treadmill classes, races, etc.” Though the specification describes a range of exercise activities, its mention of some of these activities does not necessarily warrant explicitly importing them into the language of the claim limitations themselves. *See SuperGuide Corp. v. DirectTV Enters., Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004) (“[A] particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment.”). Moreover, the patent’s mention of spinning and treadmill classes is limited to a brief discussion in the background section. (Dkt. No. 1-1 col. 1 l. 67 – col. 2 l. 9.) This one mention also fails to “reveal[] . . . express intent to confer on the claim language the novel meaning imparted by [VR Optics’ proposed] negative limitation. Accordingly, [this Court] must conclude that there is no basis in the patent specification for adding the negative limitation.” *Omega Eng’g*, 334 F.3d at 1323.

The phrase “interactive exercise events” will thus be afforded its plain and ordinary meaning.³

Claim Language	Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
“interactive fitness equipment”	6, 9, 12, 13, 15, 16, 17, 18, 19	“exercise equipment such as treadmills, rowing machines, bicycles, stair or stepping machines, skiing machines, etc., communicatively coupled, directly or indirectly, with other exercise equipment”	“single piece of interactive fitness equipment”

³ In so holding, the Court recognizes, as it did at the *Markman* hearing, that the plain and ordinary meaning of the phrase “interactive exercise events” does not on its face necessarily exclude any particular exercise event by virtue of its having a plurality of participants or because that event is a spin class, treadmill class, or otherwise. (Dkt. No. 110-5 at 89–90, 96–98.)

VR Optics proposes that the claim term “interactive fitness equipment” be construed as “exercise equipment such as treadmills, rowing machines, bicycles, stair or stepping machines, skiing machines, etc., communicatively coupled, directly or indirectly, with other exercise equipment.” (Dkt. No. 75 at 13–15.) VR Optics argues that the phrase’s plain meaning fails to account for the manner in which any single piece of the claimed equipment is intended to be coupled with other pieces of similar equipment for cooperative interactions. (*Id.*)

Peloton argues that the claim term “interactive fitness equipment” does not require any construction, but urges that if the term is to be construed it should be construed as a “single piece of interactive fitness equipment.” (Dkt. No. 77 at 24.) In support of its proposed addition of the words “single piece of,” Peloton notes that the two independent claims to use the term do so with the singular article “*an*” prefacing the phrase, and that subsequent dependent claims and the specification use the phrase in singular form. (Dkt. No. 77 at 24–25.)

The Court agrees with Peloton to the extent that it asserts that the phrase “interactive fitness equipment” requires no additional construction. VR Optics’ proposed construction inserting the requirement that “interactive fitness equipment” be “coupled, directly or indirectly, with other exercise equipment” would render subsequent dependent claim terms redundant. For example, dependent claim 12 provides: “[t]he interactive fitness equipment as defined in claim 6, further including a communication interface.” (Dkt. No. 1-1 col. 24 ll. 28–29.) But if the core term “interactive fitness equipment” is construed as inherently “communicatively coupled” with other equipment, the entirety of claim 12—which serves only to add to the “interactive exercise equipment” described in claim 6 an interface capable of communicating—becomes superfluous. This is a disfavored result under the principles of claim construction. *Phillips*, 415 F.3d at 1315

(“[T]he presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim.”).

The specification further indicates that the patentee’s use the word of “interactive” does not necessarily indicate communicative coupling with other fitness equipment. For example, the specification uses “interactive” in the following manner in describing one preferred embodiment of the invention: “It will be appreciated that the embodiment . . . may allow a user to compete against his or her own skill sets from day to day, and effectively provide an interactive and real-time racing environment.” (Dkt. No. 1-1 col. 19 ll. 50–53.) This description makes clear that the patentee conceived that its invention’s “interactive” functions could be employed by a single user engaging with the invention alone, undermining VR Optics’ assertion that based on the “intrinsic evidence ‘interactive fitness equipment’ is understood to refer to exercise equipment that is coupled . . . to other exercise equipment.” (Dkt. No. 75 at 14.) Instead, the intrinsic evidence of the patent indicates that “interactive fitness equipment” is capable of functioning both independently *and* in communication with other coupled equipment.

By the same token, Peloton’s proposed addition of the qualification “single piece of” to the construction of “interactive fitness equipment” would serve only to confuse in the jury in that it may appear to foreclose the otherwise clear and consistent use of the phrase “interactive fitness equipment” in the ’513 patent to refer to such equipment both when coupled with other equipment and when used independently. This phrase as a whole is consistently and clearly used in accordance with its plain and ordinary meaning throughout the ’513 patent, and the Court sees no need to construe the claim otherwise for the benefit of the fact-finder.

Finally, the Court sees no need to supplement the plain and ordinary meaning of the phrase “interactive fitness equipment” with VR Optics’ potentially confusing list referencing

specific types of covered “interactive fitness equipment.” Instead, construing the phrase in accordance with its plain and ordinary meaning is independently and sufficiently clear for the fact-finder with respect to the specific types of “interactive fitness equipment” claimed by the ’513 patent.

Accordingly, the Court will afford the phrase “interactive fitness equipment” its plain and ordinary meaning.

D. “Logic configured to” / “Logic” and Related Terms

Claim Language	Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
“logic configured to” / “logic”	1, 5, 6, 9, 13, 16, 17, 18, 19	Plain and ordinary meaning; not a “means plus function” term under 35 U.S.C. § 112(6) or 35 U.S.C. § 112(f).	Subject to 35 U.S.C. § 112(f) (formerly 35 U.S.C. § 112, ¶ 6) and indefinite

Peloton argues that the ’513 patent’s claim terms using the phrases “logic” or “logic configured to” are means-plus-function terms subject to Section 112, ¶ 6. (Dkt. No. 77 at 4–6.) According to Peloton, this is because the word “logic” does not connote structure but is instead merely a placeholder word that describes only functions to be performed by the patent. (*Id.*) Peloton then surveys and fails to identify in the specification sufficient structures corresponding to each of the claimed functions for “logic.” (Dkt. No. 77 at 5–10.) Accordingly, Peloton would have all of the patent’s claims referencing “logic” be construed as invalid for indefiniteness. (Dkt. No. 77 at 10.)

VR Optics argues that the terms “logic configured to” and “logic” are not means-plus-function terms, and accordingly urges that the terms be given their plain and ordinary meaning. (Dkt. No. 75 at 27–30.) VR Optics emphasizes the presumption against applying Section 112, ¶ 6 to claims not using the word “means,” as well as the evidentiary burden required for Peloton to overcome that presumption. (Dkt. No. 75 at 27–28.) VR Optics asserts that the presumption

should govern here because a POSITA would understand “logic” as used in the ’513 patent to connote a reasonably definite structure. (Dkt. No. 75 at 28–30.)

References to “logic” and “logic configured to” are ubiquitous throughout the ’513 patent’s claim limitations. The following examples, drawn from claim 1, are typical of the ’513 patent’s use of the word:

- Logic configured to obtain first performance parameters from the at least one [sic] operating component;
- Logic configured to communicate the first performance parameters to a remote fitness equipment via the wide-area network and the server;
- Logic configured to receive second performance parameters communicated from at least one remote fitness equipment;
- Logic configured to drive the display in response to both the first and second performance parameters, such that a performance comparison between the fitness equipment and at least one remote fitness equipment is visually displayed.

(Dkt. No. 1-1 col. 23 ll. 19–35.)

Because none of these claim terms uses the word “means,” there is a presumption that Section 112, ¶ 6 does not apply and that these are not means-plus-function terms. *Williamson*, 792 F.3d at 1348. Though not a “strong” presumption, *see id.* at 1349, to overcome it Peloton must affirmatively demonstrate that the claim terms fail to “recite[] sufficiently definite structure” or else recite “function without reciting sufficient structure for performing that function,” *id.* at 1348 (alteration in original) (quoting *Watts v. XL Sys., Inc.*, 232 F.3d 877, 880 (Fed. Cir. 2000)). Peloton must make such a showing by a preponderance of the evidence, in reliance on intrinsic and extrinsic evidence as interpreted through traditional claim construction principles. *Zeroclick, LLC v. Apple Inc.*, 891 F.3d 1003, 1007 (Fed. Cir. 2018).

Peloton has not met that evidentiary burden here. Most of Peloton’s arguments with respect to why the ’513 patent’s claims involving “logic configured to” constitute means-plus-function terms are “couched in conclusory language.” *Id.* at 1008. For example, in describing

the claim limitations from claim 1 quoted above, Peloton asserts simply that “[n]one of these claim limitations disclose *any* structure to accomplish [the claimed] functions.” (Dkt. No. 77 at 5.) After again quoting another portion of a disputed claim limitation, Peloton adds the conclusion that “‘logic’ is not a structure.” (*Id.*) But for purposes of claim construction, “[a]ttorney argument is not evidence.” *Elcommerce.com, Inc. v. SAP AG*, 745 F.3d 490, 506 (Fed. Cir. 2014), *vacated on other grounds*, 564 F. App’x 599 (Fed. Cir. 2014). The Federal Circuit has explicitly rejected such conclusory legal assertions as a substitute for the evidentiary support required to overcome the presumption against the application of Section 112, ¶ 6. *Zeroclick, LLC*, 891 F.3d at 1008. Peloton’s naked assertions that logic is not structure do not supplant its burden to point to “record evidence that supports its ultimate conclusion regarding whether § 112, ¶ 6 applies to the asserted claims.” *Id.*

Turning to that evidence here, the Court finds that it supports a conclusion that the use of the term “logic” in the ’513 patent’s claim limitations would be readily understood by a POSITA to connote a sufficiently definite structure. Starting with the claim limitations themselves, the patentee’s choice to use the word “logic” rather than a “nonce” word such as “means,” “mechanism,” or “element” indicates that the word “logic” serves as more than a mere placeholder but actually refers to a specific structure. *See Williamson*, 792 F.3d at 1350; *see also Smartflash LLC v. Apple Inc.*, 77 F. Supp. 3d 535, 540 (E.D. Tex. 2014) (“Even if a term covers a broad class of structures and identifies structures by their function, it is sufficient to avoid means-plus-function treatment. What is important is whether the term is understood to describe structure and is not simply a substitute for ‘means for.’” (internal citation omitted)). Here, bypassing the word “logic” and construing the claim limitations as disclosing only function would essentially delete a word expressly included in the claim terms, which the Federal Circuit

has warned is legal error. *See Zeroclick, LLC*, 891 F.3d at 1009 (“The district court thus erred by effectively treating ‘program’ and ‘user interface code’ as nonce words and concluding in turn that the claims recited means-plus-function limitations.”). Instead, the placement and use of the term “logic” in the claim limitations indicates that the term connotes some specific and definite structure.

The specification further buttresses this understanding of the claim terms. The specification provides numerous diagrams depicting how “logic” is intended to be incorporated into the proposed invention. (*See, e.g.*, Dkt. No. 1-1 figs. 14–19.) Each of these diagrams depicts “logic” in a manner identical to the depiction of other structural components employed by the invention, such as microphones, speakers, fitness equipment, communication interfaces, operating components, and heart rate sensors. (*Id.*) The placement of “logic” alongside and in the same format as these other clearly structural terms highlights that the ’513 patent is using the term logic to connote a known structure rather than as a nonce substitute for the word “means.”

Finally, the extrinsic evidence in the record further supports the conclusion that “logic” as used in the ’513 patent connotes a specific and definite structure. VR Optics submitted the declaration of a POSITA who reviewed the ’513 patent and determined that “the structure of the ‘logic configured to’ is readily apparent from the claim language itself” and that “the structure recited in the claim is sufficient for a POS[IT]A to carry out the desired function.” (Dkt. No. 78 ¶ 48.) Though of course of less value than the intrinsic evidence contained in the patent, this extrinsic evidence confirms the Court’s construction of “logic” as connoting structure.

Even if all of this evidence were ambiguous or weighed slightly in Peloton’s favor, which it does not, the Court would still be constrained from construing these claims as means-plus-function terms because of the presumption against doing so in the absence of the word “means.”

See *Williamson*, 792 F.3d at 1348. Peloton produces no evidence to rebut this presumption, let alone a preponderance of such evidence. As such, Peloton has not “*demonstrate[d]* that [each] claim term [referencing ‘logic’] fails to recite sufficiently definite structure or else recites function without reciting sufficient structure for performing that function,” which bars this Court from adopting its proposed construction of the relevant claim terms as means-plus-function claims. *Zeroclick, LLC*, 891 F.3d at 1007 (quoting *Williamson*, 792 F.3d at 1348). Accordingly, the terms “logic” and “logic configured to” in the disputed claim limitations will be afforded their plain and ordinary meaning.

Claim Language	Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
“logic configured to drive the display in response to both the first and second performance parameters, such that a performance comparison between the fitness equipment and at least one remote fitness equipment is visually displayed”	1	“logic configured to drive the display to visually display a difference in performance between the fitness equipment and at least one remote fitness equipment based on a difference between the first and second performance parameters”	Plain and ordinary meaning (subject to the proposed constructions for terms within this limitation)
Claim Language	Claim(s)	Plaintiff’s Proposed Construction	Defendant’s Proposed Construction
“logic configured to control the display in response to both the first and second performance parameters, such that a performance comparison between the fitness equipment and at least one remote fitness equipment is visually displayed”	6	“logic configured to control the display to visually display a difference in performance between the fitness equipment and at least one remote fitness equipment based on a difference between the first and second performance parameters”	Plain and ordinary meaning (subject to the proposed constructions for terms within this limitation)

These two claim terms are restated in nearly identical forms in claims 1 and 6, with the only difference between them being that claim 6 replaces claim 1’s use of “drive” with “control.” (Dkt. No. 1-1 col. 23 ll. 30–35; col. 24 ll. 2–6.) Peloton’s proposed construction for these terms is their plain and ordinary meaning, while VR Optics’ proposed construction for these terms is derived from statements made in the patent specification. (Dkt. No. 75 at 20–23; Dkt. No. 77 at 26–28.)

The Court finds VR Optics’ proposed construction to be fully consistent with the plain and ordinary meaning of the claim terms. The only substantive phrase added by VR Optics’ proposed construction is the phrase “a *difference* in performance” (emphasis added). This addition does not alter the scope of the patent’s already-claimed functions. As used in the ’513 patent, the display of a “comparison” between the performances of two users would look identical to the display of a “difference” between the performances of those two users. VR Optics’ proposal is also consistent with all of the numerous descriptions of the “comparison” displays provided in the specification. (*See, e.g.* Dkt. No. 1-1 col. 5 ll. 29–33 (“The displays, however, on the various fitness equipment may provide a visual read indication [that] show[s] where the particular user is in relation to the user or users that are operating the coupled fitness equipment.”); fig. 2.).

Peloton counters that the addition of the phrase “difference” materially alters the scope of the claim because the “comparison” of two identically-performing users, which the plain and ordinary language of the ’513 patent would otherwise permit, would be foreclosed by VR Optics’ proposed introduction of the word “difference.” But the display of a “difference in performance” does not foreclose the display of a difference of zero. Both the plain language of the ’513 claim and VR Optics’ proposed construction would equally permit this sort of display. VR Optics clarified this point in its reply brief. (Dkt. No. 85-1 at 11 (“[I]f both users had the same speed . . . , the difference in performance could be shown in the text as ‘lead by 0.00 miles’ and ‘lead 0.0 seconds.’ This could also be reflected in a ranking where the users are shown as sharing the same position (i.e., having no difference in position).”.) Peloton thus identifies no way in which VR Optics’ proposed construction fails to align with its own understanding of the plain and ordinary meaning of the relevant claim limitations.

A restatement of these disputed claim terms in plainer language may be helpful for the fact-finder, and VR Optics' proposed constructions are consistent with the claim terms' plain and ordinary meaning as well as with the '513 patent specification. As such, the Court adopts VR Optics' proposed constructions:

- Claim 1: "logic configured to drive the display in response to both the first and second performance parameters, such that a performance comparison between the fitness equipment and at least one remote fitness equipment is visually displayed" will be construed as "logic configured to drive the display to visually display a difference in performance between the fitness equipment and at least one remote fitness equipment based on a difference between the first and second performance parameters."
- Claim 6: "logic configured to control the display in response to both the first and second performance parameters, such that a performance comparison between the fitness equipment and at least one remote fitness equipment is visually displayed" will be construed as "logic configured to control the display to visually display a difference in performance between the fitness equipment and at least one remote fitness equipment based on a difference between the first and second performance parameters."

E. "One [element] selected from the group consisting of"

Term	Claim(s)	Plaintiff's and Defendant's Proposed Constructions
"one [element] selected from the group consisting of"	2, 3, 4, 13, 18, 19	Interpreted as Markush Group

The parties both propose that the claim term "one [element] selected from the group consisting of" be interpreted as a Markush group. The Court therefore adopts the parties' consented-to construction.

IV. Conclusion

For the foregoing reasons, the Court adopts the constructions set forth in this Opinion.

SO ORDERED.

Dated: November 5, 2018
New York, New York



J. PAUL OETKEN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VR OPTICS, LLC, a Delaware Corporation,

Plaintiff,

-v-

PELOTON INTERACTIVE, INC.,

Defendant.

16-CV-6392 (JPO)

OPINION AND ORDER

PELOTON INTERACTIVE, INC.,

Third-Party Plaintiff,

-v-

VILLENCY DESIGN GROUP, LLC, ERIC
VILLENCY, and JOSEPH COFFEY,

Third-Party Defendants.

J. PAUL OETKEN, District Judge:

In 2012, fitness company Peloton Interactive, Inc. (“Peloton”) recruited Villency Design Group LLC (“VDG”) to design, develop, and manufacture an interactive stationary bike with an integrated tablet computer. Before their agreement expired, VDG learned of a patent that might be infringed by the contemplated bike and one of Peloton’s other products. The sole owners and members of VDG formed a new LLC, VR Optics (“VRO”), and VRO acquired the patent. VRO brought this action against Peloton for infringing the patent. Peloton counter-sued and brought contract and tort claims against VDG and its two members.

Before the Court now are Peloton’s motion for summary judgment of patent noninfringement and invalidity, cross-motions for summary judgment on Peloton’s claims against VDG and its members, and a smattering of evidentiary motions and motions to seal

related to the dispositive motions. The Court concludes that there is no genuine dispute of fact that the asserted patent is invalid because it is anticipated by prior art. Peloton's motion for summary judgment of invalidity is therefore granted, and the Court has no occasion to reach the issues regarding noninfringement or the admissibility of the parties' related expert opinions, except to the extent necessary to decide invalidity. As to the claims against VDG and its members, the Court grants in part and denies in part each cross-motion for summary judgment.

I. Background

The following facts are taken from the parties' statements of undisputed material facts. The Court eschews recitation of facts not directly pertinent to the Court's disposition of the pending motions.

VDG is a limited liability company of which Defendants Joseph Coffey ("Coffey") and Eric Villency ("Villency") are the owners and sole members. (Dkt. No. 209 ("VRO/VDG SOF") ¶¶ 1–2, 5, 8.) Villency serves as Chief Executive Officer. (*Id.* ¶ 5.) Peloton is a hardware, software, and media company that brings fitness class experiences to users in their homes through live and on-demand content. (Dkt. No. 197 ("Peloton Contract SOF") ¶ 3.)

A. The 2012 and 2014 Agreements

In 2012, Peloton contracted with VDG to design and produce at least some portion of Peloton's first product, an interactive stationary bike equipped with an integrated computerized touchscreen console and streaming technology (the "Peloton Bike"). (VRO/VDG SOF ¶¶ 52–55; Peloton Contract SOF ¶ 5.) The exact scope of VDG's work under that agreement (the "2012 Agreement") is disputed by the parties, but they agree it included at least designing the bike's physical frame. (*See* Dkt. No. 286 ¶ 5.) Pursuant to the 2012 Agreement's terms, VDG guaranteed that "[a]ll Bike Intellectual Property provided by [VDG] . . . [would] be originally

created exclusively by” VDG and would “not infringe upon the rights of any third party.” (Dkt. No. 262, Ex. 17 (“2012 Agmt.”) at § 2.7(c).)

On June 24, 2014, Peloton and VDG executed a second, more comprehensive written agreement, entitled “Bike Development and Services Agreement” (the “2014 Agreement”). (*See* Peloton Contract SOF ¶ 50.) This agreement provided, among other things, that “All Bike Intellectual Property provided by [VDG] is, has been and will be originally created exclusively by [VDG] and that the Bike Intellectual Property does not and will not infringe upon the rights of any third party[.]” (Dkt. No. 262, Ex. 45 (“2014 Agmt.”) § 8.2(a)(3).) It further provided that VDG would “indemnify, defend and hold harmless Peloton” against claims “arising out of, or relating to, any violation or alleged violation of any intellectual property rights regarding any of the Bike Intellectual Property.” (*Id.* ¶ 7.1(b).)

B. The ’513 Patent

In January 2016, before the expiration of the 2014 Agreement, VDG’s representative began discussions to acquire U.S. Patent 6,902,513 (the “’513 Patent”), titled “Interactive Fitness Equipment,” from the patent’s then-owner. (*See* Dkt. No. 286 ¶¶ 82–87.) On June 20, 2016, articles of organization of a new limited liability company, VR Optics (“VRO”), were filed with the State of New York. (*See* VRO/VDG SOF ¶ 99.) Coffey and Villency — the owners and sole members of VDG — are also the owners and sole members of VRO. (*Id.* ¶ 16.) Shortly after the expiration of the 2014 Agreement in July 2016, VRO and the seller executed an agreement transferring ownership of the ’513 Patent to VRO. (*Id.* ¶ 18.)

The ’513 patent is “generally directed to computerized fitness equipment,” such as a stationary bike, ski machine, or treadmill, that “simulate[s] . . . actual race conditions with other users.” *See* U.S. Patent No. 6,902,513 col. 2 ll. 57–59 (filed June 7, 2005). For example, in one embodiment of the claimed invention, a “system having a plurality of exercise bikes” is

“configured to exchange operational and performance information over a communication link.” *Id.* col. 10 ll. 52–55. The “bikes . . . may include displays to . . . provide visual, audible, or other information to the users.” *Id.* col. 10 ll. 55–57. VRO has produced a report from its expert, Steven Lenz, opining that Peloton infringes claims 1, 2, 3, 4, 5, 6, 12, 13, 15, 16, and 17 of the ’513 patent, of which claims 1 and 6 are independent.¹ (*See* Dkt. No. 218, Ex. E (“Lenz Opening Rpt.”) ¶ 17.)

C. Procedural History

On August 11, 2016, VRO initiated this patent action, alleging that Peloton had infringed the ’513 Patent. (*See* Dkt. No. 1.) On December 30, 2016, Peloton filed an answer to the operative complaint, alleging counterclaims against VRO (Dkt. No. 41), as well as a third-party complaint against VDG, Eric Villency, and Joseph Coffey (Dkt. No. 42). VRO, VDG, and the individual third-party defendants moved to dismiss claims against them, but this Court issued an opinion and order denying the motions on August 18, 2017. *See VR Optics, LLC v. Peloton Interactive, Inc.*, No. 16-CV-6392, 2017 WL 3600427 (S.D.N.Y. Aug. 18, 2017) (Dkt. No. 57). On August 2, 2018, the Court held a *Markman* hearing to construe the ’513 patent’s disputed terms, and an opinion and order on claim construction followed on November 4, 2018. *See VR Optics, LLC v. Peloton Interactive, Inc.*, 345 F. Supp. 3d 394, 397 (S.D.N.Y. 2018) (Dkt. No. 112).

Pending now are Peloton’s motion for summary judgment on the patent claims (Dkt. No. 199), cross-motions for summary judgment on Peloton’s claims against VDG, Coffey, and Villency (Dkt. Nos. 196, 207), several evidentiary motions (Dkt. Nos. 172, 173, 180, 187, 190),

¹ Lenz’s report also opined that Peloton infringed claims 18 and 19 of the ’513 patent, but VRO has not pursued those claims. (*See* Dkt. No. 218, Ex. A (“Lenz Rebuttal Rpt.”) ¶ 18 & n.2.)

and numerous motions to seal. (See Dkt. Nos. 178, 185, 189, 195, 203, 219, 223, 229, 230, 234, 241, 254, 255, 256.) These motions are fully briefed and ripe for the Court's consideration.

II. Legal Standard

Under Federal Rule of Civil Procedure 56, a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). While “[s]ummary judgment must be granted against a party who has failed to introduce evidence sufficient to establish the existence of an essential element of that party's case, on which the party will bear the burden of proof at trial,” it is the party moving for summary judgment that “has the initial responsibility of identifying the legal basis of its motion, and of pointing to those portions of the record that it believes demonstrate the absence of a genuine issue of material fact.” *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001).

In the context of a patent infringement suit, “the ultimate burden of proving infringement rests with the patentee,” so “an accused infringer seeking summary judgment of noninfringement may meet its initial responsibility either by providing evidence that would preclude a finding of infringement, or by showing that the evidence on file fails to establish a material issue of fact essential to the patentee's case.” *Id.*; see also *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1369 (Fed. Cir. 2002). But “[b]ecause patents are presumed valid, ‘a moving party seeking to invalidate a patent at summary judgment must submit such clear and convincing evidence of facts underlying invalidity that no reasonable jury could find otherwise.’” *TriMed, Inc. v. Stryker Corp.*, 608 F.3d 1333, 1340 (Fed. Cir. 2010) (quoting *SRAM Corp. v. AD-II Eng'g, Inc.*, 465 F.3d 1351, 1357 (Fed. Cir. 2006)).

III. Discussion

A. VRO's Patent Claims

The Court first addresses Peloton's motion for summary judgment of noninfringement and invalidity, because the disposition of VRO's patent claims bears on the outcome of Peloton's claims against VDG and the Individual Defendants. The Court concludes that the '513 patent is invalid because it is anticipated by prior art.

Anticipation requires "that a single prior art reference disclose each and every limitation of the claimed invention, either expressly or inherently." *SRI Int'l, Inc. v. Cisco Sys., Inc.*, 930 F.3d 1295, 1306 (Fed. Cir. 2019). Anticipation is a question of fact, but it nonetheless may be decided on summary judgment if there are no genuine issues of material fact to be decided. *See Hazani v. U.S. Int'l Trade Comm'n*, 126 F.3d 1473, 1477 (Fed. Cir. 1997).

U.S. Patent No. 6,997,852 (the "Watterson Patent"), an allegedly anticipatory reference identified by Peloton, discloses a system intended to recreate the motivational and instructional benefits of group exercise in a home setting using a remote communication system. *See* U.S. Patent No. 6,997,852, at [57] (filed Feb. 14, 2006). As to the Watterson Patent, several basic matters are undisputed. First, there is no dispute that the Watterson patent is a single reference that describes prior art. And there is also no dispute that the Watterson patent discloses all of the independent claims' limitations, save one. The validity of the patent at the heart of this sprawling, years-long litigation rests, then, on the thin reed of this single element.

The limitation on which VRO rests its case discloses "logic configured to drive the display in response to both the first and second performance parameters, such that a performance comparison between the fitness equipment and at least one remote fitness equipment is visually displayed." '513 Patent col. 23 ll. 30–35. (In claim 6, the word "drive" is replaced by "control," but the difference is immaterial. *See id.* col. 24 l. 2; *VR Optics*, 345 F. Supp. 3d at 401.) This

Court previously construed the limitation, consistent with its plain and ordinary meaning, to disclose “logic configured to drive the display to visually display a difference in performance between the fitness equipment and at least one remote fitness equipment based on a difference between the first and second performance parameters.” *Id.* at 411. In reaching that conclusion, this Court noted that such a construction is “consistent with all of the numerous descriptions of the ‘comparison’ displays provided in the [’513] specification,” which include, among other things, “a visual read indication [that] *show[s] where the particular user is in relation to the user or users that are operating the coupled fitness equipment.*” *Id.* at 411 (second quoting ’513 Patent col. 5 ll. 29–33 (alterations in original) (emphasis added)).

Peloton argues that the Watterson Patent discloses the “difference in performance” display element because it contemplates a “personalized race” between “two or more individuals . . . where they may race one against the other, *while viewing graphical representations of the distan[ce], time, and speed of the other competitors,*” and a “display [that] may include a racing track that *shows a relative position of each competitor one with another,* or a trail that each competitor races along.” (’852 Patent col. 44 ll. 32–37, 60–62.) The Court agrees. Indeed, in its claim construction opinion, this Court previously cited as an exemplar of the “performance difference” limitation an embodiment from the ’513 specification — “a visual read indication [that] *show[s] where the particular user is in relation to the user or users that are operating the coupled fitness equipment*” — that is materially indistinguishable from that described in the Watterson Patent. *See VR Optics*, 345 F. Supp. 3d at 411 (quoting ’513 Patent col. 5 ll. 29–33 (alterations in original) (emphasis added)).

The report of VRO’s expert, Steven Lenz, fails to create a genuine factual dispute on this issue. In Lenz’s view, Watterson does not disclose the “difference in performance” element

because each of the embodiments described in the Watterson specification requires “users to make their own comparisons.” (Lenz Rebuttal Rpt. ¶¶ 40–41.) Because the prior art shunts the mental burden of the comparison onto a user, Lenz opines, the track display falls outside the ambit of the ’513 limitation as construed by the Court, which requires the display of a difference in performance, not merely the display of raw, noncomparative data. (*See id.*)

“[E]xpert witnesses,” however, may not “offer testimony that conflicts with the Court’s construction of the claim.” *Plew v. Ltd. Brands, Inc.*, No. 08-CV-3741, 2012 WL 379933, at *3 (S.D.N.Y. Feb. 6, 2012). Lenz’s opinion rests on an unduly cramped reading of this Court’s prior construction. A display of the relative position of each competitor on a simulated track is a spatial representation of the competitors’ relative performance; it is, in short, a performance comparison, just as an ordinal ranking is a numerical representation of the competitors’ relative performance. The embodiment described in the Watterson Patent no more requires a user to manually execute the comparison than any other conceivable display of relative performance. Lenz’s opinion is therefore inconsistent with the plain and ordinary meaning of the claim’s terms as set out in the Court’s prior construction. It is thus excluded, and in the absence of Lenz’s opinion, VRO has introduced no evidence to controvert Peloton’s evidence of anticipation.

Next, VRO contends that, invalidity of the *independent* claims notwithstanding, the *dependent* claims of the ’513 patent survive summary judgment. (Dkt. No. 231 at 15 n.12.) That is because, according to VRO, Peloton did not argue that the dependent claims were anticipated by the Watterson Patent in its opening brief. (*See id.*) Not so. Though Peloton directed the bulk of its briefing to the limitations with respect to which VRO’s expert disputed anticipation, Peloton’s opening brief unambiguously asserted that “Watterson explicitly discloses *each* limitation of the ’513 patent’s *asserted claims* and therefore anticipates and renders these claims

invalid.” (Dkt. No. 278 at 16–17 (emphases added).) In response, VRO did not lodge any substantive defense of the validity of the dependent claims, instead focusing its briefing on the independent claims.

Moreover, Peloton’s Local Rule 56.1 Statement of Material Facts methodically cataloged, with citations to admissible evidence, where Watterson disclosed each limitation of the dependent claims. (See Peloton Patent SOF ¶¶ 111–120.) VRO marked each of these statements as disputed in its counterstatement of material facts, but did not identify any contrary evidence. Instead, it repeated a rote complaint that each statement was conclusory and implausibly claimed the statements were ambiguous.² (See Dkt. No. 232 at 85–86.) Contrary to VRO’s protestations, each of the paragraphs at issue stated a factual proposition respecting the content of the Watterson patent and supported that proposition by citing the relevant portion of the patent and record. Though these statements bear legal consequence, they were factual statements validly included in the Rule 56.1 statement. Anticipation is, after all, a question of fact. See *Hazani*, 126 F.3d at 1477. When a party opposing summary judgment fails to controvert a fact set forth in the moving party’s Rule 56.1 statement with its own admissible evidence, that fact is deemed admitted. *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d

² By way of illustration, paragraph 111 states: “Watterson discloses that the fitness equipment can be a treadmill, a skiing machine, an exercise bike, a rowing machine, a stepping machine, and an orbital stepping machine.” (See Peloton Patent SOF ¶ 111 (citing ’852 Patent, col. 6, ll. 39-44 & fig. 1.)). VRO’s counterstatement asserts that this is a “conclusory argument that the cited portions of Watterson discloses a claim element,” and that the statement is ambiguous insofar as it does not identify to what “fitness equipment” it refers. (See Dkt. No. 232 at 86.) But it is obvious from the context that “the fitness equipment” as used in that paragraph refers to the fitness equipment described in the preceding paragraphs of the same section (see, e.g., *id.* at ¶ 77), and the statement is not conclusory insofar as it states a factual proposition about the content of the Watterson patent and supports that proposition with admissible evidence.

Cir. 2003). Accordingly, these facts are deemed admitted, and summary judgment as to the dependent claims too is warranted.

Because the conclusion that the asserted claims of the '513 patent are invalid is fatal to VRO's patent claims, the Court does not reach Peloton's remaining arguments for invalidity and noninfringement.³

B. Peloton's Common Law Claims

Peloton and the VDG Defendants both move for summary judgment on Peloton's claims as Third-Party Plaintiff. Those claims include alleged breaches of the 2012 Agreement, the 2014 Agreement, and the covenant of good faith and fair dealing; fraudulent inducement; and, as against Coffey and Villency individually, tortious interference with Peloton's contractual relationship with VDG. The Court addresses each claim in turn.

1. Breach of the Warranties in the 2012 and 2014 Agreements

The success of Peloton's argument for invalidity dooms its claim for breach of the warranties in the 2012 and 2014 Agreements. Those agreements obligated VDG to furnish a product that would not infringe the intellectual property rights of third parties. (*See* 2012 Agmt. § 2.7(c); 2014 Agmt. § 8.2(a)(3).) The alleged violation of those provisions is therefore

³ For the same reason, the parties' motions to preclude the testimony and reports of various experts are denied as moot. These motions include Peloton's motion to exclude the testimony and report of Mark Peterson regarding patent damages (Dkt. No. 172); VRO's motion to exclude the expert testimony and report of Christopher Bakewell regarding patent damages (Dkt. No. 173); VRO's motion to exclude the expert testimony and report of Richard Goodin regarding UltraCoach VR, an allegedly anticipatory prior art reference (Dkt. No. 180); Peloton's motion to exclude Lenz's report and testimony (Dkt. No. 187), except to the extent that Lenz's opinion on anticipation by the Watterson Patent is precluded as explained above; and VRO's motion to exclude the testimony of Peloton's expert Lee Rawls regarding invalidity and noninfringement (Dkt. No. 190).

premised on the infringement of a valid patent, a premise which the Court has now rejected.

Summary judgment to VDG on this claim is therefore granted.

2. Breach of the Covenant of Good Faith and Fair Dealing

For similar reasons, summary judgment in VDG's favor is also appropriate on Peloton's claim that VDG violated the covenant of good faith and fair dealing. "The covenant is violated when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other of the right to receive the benefits under their agreement." *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 741, 767 (S.D.N.Y. 1990). VRO's conduct, sharp as it may have been, has not deprived Peloton of the fruits of the 2012 and 2014 Agreements: in Peloton's words, "a non-infringing, proprietary indoor bike." (Dkt. No. 225 at 22.)

C. Fraudulent Concealment

The parties each have moved for summary judgment on Peloton's claim for fraudulent concealment. "The elements of a fraudulent concealment claim under New York law are: (1) a duty to disclose material facts; (2) knowledge of material facts by a party bound to make such disclosures; (3) failure to discharge a duty to disclose; (4) scienter; (5) reliance; and (6) damages." *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 314 (S.D.N.Y. 2013) (citations and internal quotation marks omitted). "Under New York law, each element of a fraud claim must be shown by clear and convincing evidence." *Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank*, 57 F.3d 146, 153 (2d Cir. 1995).

At the motion to dismiss stage, this Court held that Peloton could proceed with its fraudulent concealment claim on the theory alleged, that is, "that VDG fraudulently concealed the imminent likelihood of an infringement claim against the Peloton Bike[,] . . . render[ing] the transaction inherently unfair." *VR Optics*, 2017 WL 3600427, at *5 (citations and internal

quotation marks omitted). VDG now contends that Peloton has not adduced any evidence that VDG knew at the time it entered into the 2014 Agreement that the patent infringement suit was in the offing, let alone enough that a reasonable jury could find knowledge by clear and convincing evidence.

Peloton emphasizes that it has proffered evidence that VDG knew of the *existence* of the '513 patent before entering the 2014 Agreement. But, as the Court noted at the motion to dismiss stage, Peloton must show a failure to disclose not the patent's existence (Peloton undisputedly knew about the patent), but rather the threat of an imminent lawsuit. *See VR Optics*, 2017 WL 3600427, at *5. By the same token, it must show VDG's knowledge of the imminent litigation threat, not merely knowledge of the patent's existence. Even after several years of discovery, Peloton identifies no evidence that *at the time the parties entered the contract*, roughly two years before VRO initiated suit, Villency and Coffey had already hatched their plan. Even drawing all reasonable inferences in Peloton's favor, the Court cannot conclude that evidence of Villency and Coffey's mere knowledge of the contract, without more, creates a genuine dispute on this issue.

In the alternative, Peloton urges that VDG at least knew of the threat of an impending lawsuit by January 2016 — after entering into the 2014 Agreement but before the contract's expiration — when VDG had already initiated negotiations with the patent's then-holder. (*See Peloton Contract SOF ¶¶ 81–91.*) Had Peloton been informed at that time of the looming litigation threat, it theorizes, it could have acquired the '513 patent itself or ceased its ongoing payments under the 2014 Agreement to VDG, depriving VDG (and therefore VRO) of the

capital necessary to acquire the patent.⁴ (*See* Dkt. No. 225 at 23.) But, conjecture notwithstanding, Peloton has identified no evidence — let alone clear and convincing evidence, as New York law requires — that it “actually relied” on VDG’s omission in forgoing these potential routes. Merely hypothesizing a road not taken is not enough at this late stage to show reliance. Thus, Peloton has failed to create a genuine dispute as to VDG’s knowledge during the pre-Agreement period and Peloton’s reliance during the Agreement’s term. Summary judgment to VDG on the fraudulent concealment claim is warranted.

D. Breach of the 2014 Agreement’s Obligation to Defend

Peloton’s claim that VDG breached the 2014 Agreement by failing to defend Peloton against the present action by VRO fares better. The contract’s unambiguous terms, the Court concludes, obligated VDG to defend Peloton against VRO’s patent action.

The contract contains an express provision imposing an obligation to “defend” Peloton against claims “arising out of, or relating to, any violation or alleged violation of any intellectual property rights regarding any of the Bike Intellectual Property.” (2014 Agmt. § 7.1(b).) Notwithstanding that language, VDG contends that outside the insurance context, contractual duties to defend are coextensive with the duty to indemnify, and thus are not triggered absent a finding of liability. (Dkt. No. 227 at 12–13.)

It is true that “[u]nder New York law, the ‘duty to defend’ is *presumed* only in insurance policies[, and] the common law imposes no such duty on contractual indemnitors more generally.” *Dresser-Rand Co. v. Ingersoll Rand Co.*, No. 14-CV-7222, 2015 WL 4254033, at *7 (S.D.N.Y. July 14, 2015) (emphasis added). “Accordingly, an indemnitor’s obligation to defend

⁴ VDG does not contest, and the Court therefore assumes for the purposes of these motions, that VDG owed an ongoing duty to disclose material facts to Peloton while the 2014 Agreement was operative.

must emanate (if at all) from the language of the contract.” *Id.* But “[i]f a contractual defense obligation is, by its own terms, exceedingly broad, a court will not artificially circumscribe it simply because the indemnitor is not an insurer.” *Id.*; *see also McCleary v. City of Glens Falls*, 819 N.Y.S.2d 607, 609 (App. Div. 3d Dep’t 2006) (“Although [Defendant] contends that its duty to defend is no broader than its duty to indemnify because it is not an insurer . . . , that distinction has no significance here, where the [Plaintiff] is due the full benefit of the bargain it reached . . . under the clear and unambiguous terms of the licensing agreement.”). In short, “[o]utside the context of insurance policies, contractual defense obligations are generally treated like any other contractual provision.” *Dresser-Rand Co.*, 2015 WL 4254033, at *7. Here, the defense clause admits of no limiting construction; VDG expressly agreed to “defend . . . Peloton . . . against any claim . . . arising out of, or relating to, any violation or alleged violation” of the relevant rights, and no doctrine of New York law requires the Court to disregard that unambiguous command.

VDG also contends that even if it has an independent contractual obligation to defend, that obligation nonetheless does not extend to this suit, because the alleged violation here does not “regard[] any of the Bike Intellectual Property.” *Id.* VDG understands the “Bike Intellectual Property” to encompass only the intellectual property designed, made, or produced by VDG (according to VDG, solely the bike frame).⁵ (*See* Dkt. No. 227 at 11–12.) On VDG’s

⁵ The provision of the 2014 Agreement defining “Bike Intellectual Property” reads: “Peloton shall be the sole and exclusive owner of all intellectual property relating to the Bikes, including, without limitation, all [intellectual property] conceived, made or produced by Villency . . . [or] as the result of the joint efforts of Peloton and Villency prior to or during the Term of this Agreement (collectively, the ‘Bike Intellectual Property’).” (2014 Agmt. § 1.7(a).) The interpretive dispute therefore hinges on whether the designatum of the term “Bike Intellectual Property” is “all intellectual property relating to the Bikes,” or, instead, only that intellectual property “conceived, made or produced by Villency . . . [or] as the result of the joint efforts of Peloton and Villency.”

understanding, this suit does not “regard” that frame, but rather “regards” Peloton’s interactive technology, which it maintains was designed and supplied by other contractors.

Peloton vigorously contests VDG’s interpretation of the term “Bike Intellectual Property,” but the Court finds it unnecessary to resolve that disagreement. Even if VDG is correct that “Bike Intellectual Property” refers to only those components of the bike undisputedly designed by VDG, the Agreement’s terms unambiguously obligate VDG to defend Peloton against VRO’s suit. The Agreement places upon VDG an obligation to defend Peloton against infringement claims “regarding any of the Bike Intellectual Property.” (2014 Agmt. § 7.1(b).) VRO’s patent claims rest in part on the assertion that the bike frame itself satisfies some limitations of the ’513 Patent. For example, independent claim 1 discloses “geographically-separated fitness equipment” comprising “at least one operating component,” ’513 Patent col. 23 ll. 14, 18, independent claim 2 discloses the system in claim 1 “wherein the fitness equipment is one selected from the group . . . [including] an exercise bike,” *id.* col. 23 ll. 41–43, dependent claim 4 discloses the system defined in claim 1 wherein the operating component “is one selected from the group consisting of[, inter alia] . . . a flywheel,” *id.* col. 23 ll. 52–53, and independent claim 6 discloses “fitness equipment” comprising “at least one operating component configured to provide an aspect of exercise for a user of the fitness equipment,” *id.* col. 23 ll. 59–61. The alleged violation therefore “regard[s] Bike Intellectual Property,” even on VDG’s narrow understanding of that term, because the violation is predicated on the Bike Intellectual Property satisfying certain necessary elements of VDG’s case.

In response, VDG opines that “no one is suing Peloton for selling conventional fitness equipment, like a stationary bike,” because the “innovative aspect of the ’513 Patent is the interactive technology.” (Dkt. No. 250 at 8.) Fair enough, but that observation cannot override

the unambiguous terms of the contract, which require VDG to defend Peloton against actions that “regard” the Bike Intellectual Property — *not* solely against actions wherein the Bike Intellectual Property is alleged to embody the “innovative aspect” of the asserted patent. The Bike Intellectual Property, as VDG defines it, was an essential part of VRO’s patent case. Had VDG preferred a narrower defense obligation, it could have bargained for one.⁶ VDG is bound to the terms of the agreement struck.

VDG also cites this Court’s prior opinion at the motion to dismiss stage in service of its cause. That opinion stated that “if there is no contributory or direct infringement of the product created pursuant to the Agreements, there is no breach of contract.” *VR Optics*, 2017 WL 3600427, at *3. That remark, however, pertained to the Agreements’ guarantee that the Bike Intellectual Property would not infringe any third parties’ rights — *not* to the duty to defend. *See id.* It is thus of no help to VDG here.

It is undisputed that on September 9, 2016, Peloton served notice to VDG invoking the 2014 Agreement’s indemnification and defense clause, and VDG has so far failed to fulfill those putative obligations. (*See* Dkt. No. 286 ¶ 206.) Accordingly, summary judgment in favor of Peloton is warranted on its claim that VDG breached the 2014 Agreement by failing to defend against VRO’s claims.

E. Tortious Interference

Finally, Villency and Coffey seek summary judgment on Peloton’s claim that they tortiously interfered with the contract between Peloton and VDG. Under New York law, a

⁶ Indeed, a comparison of the 2012 Agreement and the 2014 Agreement illustrates that VDG knew how to phrase a narrower defense obligation. The 2012 Agreement’s terms obligate VDG only to defend against alleged violations of VDG’s warranty of noninfringement, which in turn is limited to circumstances where VDG’s contributions themselves infringe a third party’s rights. (*See* 2012 Agmt. §§ 2.7(c), 6.1.)

tortious interference claim requires a showing that (1) a valid contract exists; (2) a third party had knowledge of the contract's existence; (3) that third party intentionally and improperly procured the breach of the contract; and (4) the breach resulted in harm to the plaintiff. *See TVT Records v. The Island Def Jam Music Grp.*, 412 F.3d 82, 88 (2d Cir. 2005) (citing *Finley v. Giacobbe*, 79 F.3d 1285, 1294 (2d Cir. 1996)); *see also Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120 (1956). An employee or agent of a corporate party to the contract is considered a "third party" if the employee or agent "exceeded the bounds of his or her authority" in procuring the breach. *In re MF Glob. Holdings Ltd. Inv. Litig.*, 998 F. Supp. 2d 157, 186 (S.D.N.Y. 2014), *aff'd sub nom. In re MF Glob. Holdings Ltd. Inv. Litig. (DeAngelis v. Corzine)*, 611 Fed. App'x. 34 (2d Cir. 2015) (quoting *Finley*, 79 F.3d at 1295). Further, a corporate officer is liable for inducing a principal to breach the contract when the officer's actions were motivated by his or her own personal gain, as distinguished from the corporation's interest. *Albert v. Loksen*, 239 F.3d 256, 275 (2d Cir. 2001).

Because the Court has determined that VRO did not breach any warranty, Peloton's claim for tortious interference must be premised on the breach of the duty to defend. But Peloton has produced no evidence that Villency and Coffey were acting outside the bounds of their authority or in their own interest, as distinguished from VDG's, when they induced VDG to refuse to defend Peloton in this action. Summary judgment in Villency and Coffey's favor is warranted.

F. Motions to Seal

Finally, the parties move to seal portions of most of the submissions filed in connection with their substantive motions, including the briefs, exhibits, and Rule 56.1 statements and counterstatements. (*See* Dkt. Nos. 178, 185, 189, 195, 203, 219, 223, 229, 230, 234, 241, 254, 255, 256.) The public has both a common law and a "qualified First Amendment right" of access to "judicial documents" and judicial proceedings. *See Lugosch v. Pyramid Co. of*

Onondaga, 435 F.3d 110, 119–20 (2d Cir. 2006) (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir.2004)). “The presumption of access is based on the need for federal courts, although independent — indeed, particularly because they are independent — to have a measure of accountability and for the public to have confidence in the administration of justice.” *Id.* at 119 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir.1995)).

The three-step process articulated in *Lugosch v. Pyramid Co. of Onondaga* governs whether a document may be placed under seal:

First, a court must determine whether the presumption of access attaches. A presumption of access attaches to any item that constitutes a “judicial document” — i.e., an “item . . . relevant to the performance of the judicial function and useful in the judicial process.” Second, if the court determines that the item to be sealed is a “judicial document,” the court must then determine the weight of the presumption of access. “[T]he weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.” “Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court’s purview solely to insure their irrelevance.” Finally, after determining the weight of the presumption of access, the court must “balance competing considerations against it.” “Such countervailing factors include but are not limited to the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure.”

Mut. Marine Office, Inc. v. Transfercom Ltd., No. 08-CV-10367, 2009 WL 1025965, at *4 (S.D.N.Y. Apr. 15, 2009) (quoting *Lugosch*, 435 F.3d at 119, 120) (internal citations omitted). “[D]ocuments may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to preserve that interest. Broad and general findings by the trial court, however, are not sufficient to justify closure.” *Lugosch*, 435 F.3d at 120 (quoting *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir.1987)) (internal citations omitted). “The party seeking the sealing of judicial documents bears the

burden of showing that higher values overcome the presumption of public access.” *Alexandria Real Estate Equities, Inc. v. Fair*, No. 11-CV-3694, 2011 WL 6015646, at *2 (S.D.N.Y. Nov. 30, 2011) (citing *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir.1997)).

The parties have done little more in support of their present motions than note that relevant portions of the evidentiary record are designated as “Attorney’s Eyes Only” or “Confidential” under the governing protective order. But at the motion to dismiss stage, this Court admonished the parties for their failure to heed *Lugosch*’s teaching, noting that the mere existence of a protective order does not perforce justify sealing documents under *Lugosch*. *VR Optics*, 2019 WL 2121690, at *8.⁷

Admittedly, the presumption’s force is at its nadir with respect to filings in support of the motions that have now been denied as moot, given that those documents have come within the Court’s “purview solely to [e]nsure their irrelevance.” *Lugosch*, 435 F.3d at 119 (citation omitted). Nonetheless, even a weak presumption of access governs in the absence of countervailing interests, and the parties have made little effort to demonstrate or explain why specific filings implicate their countervailing interests or how the proposed redactions are tailored to protecting those interests.

Accordingly, on or before April 27, 2020, the parties are directed to file on the public docket unredacted versions of all documents previously filed under seal in connection with the substantive motions. Alternatively, on or before April 27, 2020, the parties may move for leave

⁷ Peloton argues that the presumption of access does not attach to deposition testimony and other pretrial discovery because such material has not “historically been open to the press and general public.” *Lugosch*, 435 F.3d at 120 (citation omitted). But as *Lugosch* makes abundantly clear, “documents submitted to a court for its consideration in a summary judgment motion are — as a matter of law — judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.” *Id.* at 121.

to file under seal revised redacted versions of these documents, provided that any proposed redactions are limited to those portions of the documents that independently satisfy the standards set forth in *Lugosch* and provided that the party proposing the redaction supply a specific explanation of how those standards are met.

IV. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment of noninfringement and invalidity is GRANTED. Defendant's motion to exclude the testimony of Steven Lenz is GRANTED in part and DENIED in part as moot. Third-Party Plaintiff's motion for summary judgment is GRANTED in part and DENIED in part. Third-Party Defendants' motion for summary judgment is GRANTED in part and DENIED in part. The remaining evidentiary motions are DENIED as moot. The motions to seal are DENIED without prejudice to renewal.

The Clerk of Court is directed to close the motions at Docket Numbers 172, 173, 178, 180, 185, 187, 189, 190, 195, 196, 199, 203, 207, 219, 223, 229, 230, 234, 241, 254, 255, and 256.

SO ORDERED.

Dated: April 2, 2020
New York, New York



J. PAUL OETKEN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VR OPTICS, LLC,

Plaintiff,

-v-

PELOTON INTERACTIVE, INC., a Delaware
Corporation,

Defendant.

16-CV-6392 (JPO)

OPINION AND ORDER

PELOTON INTERACTIVE, INC.,

Third-Party Plaintiff,

-v-

VILLENCY DESIGN GROUP, LLC, ERIC
VILLENCY and JOSEPH COFFEY,

Third-Party Defendants.

J. PAUL OETKEN, District Judge:

On April 2, 2020, this Court issued an Opinion and Order granting summary judgment in favor of Peloton on its claim that Villency Design Group, L.L.C. (“VDG”) breached its contractual duty to defend Peloton against certain intellectual property claims. (Dkt. No. 308.) *See VR Optics, LLC v. Peloton Interactive, Inc.*, No. 16-cv-6392, 2020 WL 1644204 (S.D.N.Y. Apr. 2, 2020). The Opinion and Order resolved all questions of liability in this case, but it did not decide the quantum of damages that VDG owes to Peloton in light of the breach. (*Id.*) On June 16, 2020, Peloton moved for \$5,152,503.62 in attorney’s fees (Dkt. No. 315), which it claims as damages for the breach (Dkt. No. 42 ¶ 88). For the reasons that follow, the motion is granted.

I. Discussion

In opposition to Peloton's motion, VDG argues that: (1) the motion is procedurally improper because the quantum of damages should have been raised in Peloton's motion for summary judgment or should be determined at trial; (2) Peloton is not entitled to attorney's fees insofar as those fees relate to Peloton's advancement of its affirmative claims in this case; and (3) Peloton's claimed fees are unreasonably high, given the invoices and information submitted in support of the present motion. These arguments are considered in turn.

A. The Propriety of a Motion for Attorney's Fees

To prevail on a breach of contract claim under New York law, a party must show, *inter alia*, "damages resulting from the breach." *Dee v. Rakower*, 112 A.D.3d 204, 208–09 (2d Dep't 2013). VDG contends that Peloton is precluded from proving damages now, in a motion for attorney's fees, because Peloton failed to provide evidence regarding its damages in discovery or in support of its motion for summary judgment. VDG is correct that, for a typical breach of contract claim, a party's failure to disclose damages pursuant to Federal Rule of Civil Procedure 26 can limit recovery. *See, e.g., Gould Paper Corp. v. Madisen Corp.*, 614 F. Supp. 2d 485, 490 (S.D.N.Y. 2009). This, however, is not a typical breach of contract claim.

Here, the only damages Peloton claims are the legal fees it incurred as a result of VDG's default on its duty to defend. Exempting this class of claims from the general rule that damages must be established on a motion for summary judgment or at trial, the Second Circuit has held that, "when a contract provides for an award of attorneys' fees, the jury is to decide at trial whether a party may recover such fees," and "then the judge is to determine a reasonable amount of fees." *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1313 (2d Cir. 1993). Consistent with this exemption, courts in the Second Circuit regularly assess damages for violations of indemnification or defense provisions on a motion for attorney's fees, not on a motion for

summary judgment or at trial. *See id.*; *Smart Style Indus., Inc. v. Pennsylvania Gen. Ins. Co.*, 930 F. Supp. 159, 165 (S.D.N.Y. 1996) (granting summary judgment on the plaintiff's duty-to-defend claim and directing the plaintiff to submit "supporting documentation detailing the attorneys' fees and costs incurred").

Nevertheless, VDG maintains that Peloton's motion is procedurally improper. VDG suggests that the exemption should apply only in insurance cases, citing *Dresser-Rand Co. v. Ingersol Rand Co.*, No. 14-cv-7222, 2015 WL 4254033, at *7 (S.D.N.Y. July 14, 2015), for the proposition that, "[o]utside the context of insurance policies, contractual defense obligations are generally treated like any other contractual provision" (Dkt. No. 322 at 1). *Dresser-Rand Co.* is of no assistance to VDG. First, the language that VDG quotes is taken out of context. *Dresser-Rand Co.* did not address the procedure for seeking attorney's fees but instead the interpretive principles applicable to insurance contracts vis-à-vis regular contracts. 2015 WL 4254033, at *7. Second, the language from *Dresser-Rand Co.* is not absolute; it states that defense obligations are *generally* treated like other contractual obligations, allowing the possibility that, in some circumstances, defense obligations may be treated differently. *Id.* Third and most important, VDG provides no explanation for why limiting the exemption to the insurance context makes sense or is otherwise required by the case law. *See McGuire*, 1 F.3d 1306, 1313 (grounding the exemption in "common sense"). Trial courts are regularly responsible for, are expert at, and have a procedural mechanism for assessing attorney's fees. This is true irrespective of whether the party seeking to enforce an indemnification or defense obligation is an insured.

VDG has not shown any procedural impropriety in Peloton's decision to move for attorney's fees instead of proving damages through a summary judgment motion or at trial.

B. The Duty to Defend Affirmative Claims

VDG also problematizes Peloton's decision to seek full reimbursement for its attorney's fees, including those fees associated with Peloton's affirmative claims against VDG, VR Optics LLC ("VRO"), Eric Villency, and Joseph Coffey. There is some merit to this challenge. In addition to its defense against VRO's patent claim, Peloton brought the following affirmative claims: (1) counterclaims against VRO seeking declaratory judgments of non-infringement or the invalidity of the patent at issue; (2) counterclaims and third-party claims against VRO, Villency, and Coffey regarding their supposed intentional interference with the contract between Peloton and VDG; (3) third-party claims against VDG regarding its supposed breach of the contract's non-infringement warranties, breach of the covenant of good faith and fair dealing, and fraudulent concealment of the potential infringement claim that was ultimately brought by VRO; and (4) a third-party claim against VDG seeking damages for VDG's default on its duty to defend. In general, a party "cannot recover its legal expenses for prosecuting [a] counterclaim" or third-party claim. *Commercial Union Ins. Co. v. Int'l Flaors & Fragrances, Inc.*, 639 F. Supp. 1401, 1402 (S.D.N.Y. 1986); *see also Johnson v. Gen. Mut. Ins. Co.*, 24 N.Y.2d 42, 50 (1969).

Despite the general rule, Peloton can again avail itself of an exception to claim some amount of attorney's fees. Courts in this district have held that, when "two cases are mirror images of each other," as when an insurer and insured file competing claims for declaratory relief, the party owed a defense may claim attorney's fees for its responsive affirmative claim. *Am. Motorist Ins. Co. v. GTE Corp.*, No. 99-cv-512, 2000 WL 1459813, at *6 (S.D.N.Y. Sept. 29, 2000). In other words, the party "is entitled to recover costs incurred in connection with its [affirmative] claims . . . that were or would have been incurred in any event in connection with its defense." *Smart Style Indus., Inc.*, 930 F. Supp. at 165. Without question, Peloton's

counterclaims against VRO seeking declaratory judgment of non-infringement or the invalidity of the patent at issue mirrored VRO's infringement claim. Peloton can seek attorney's fees arising from the prosecution of these counterclaims.

Relying on *Quarantino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir. 1997), Peloton argues that it can additionally recover for any affirmative claim "inextricably intertwined" with VRO's infringement claim, such that the claim and Peloton's defense "involved a common core of facts" or "related legal theories." (Dkt. No. 331 at 5.) Although the inextricably-intertwined standard applies to the allocation of attorney's fees under federal fee-shifting provisions, *see Quarantino*, 166 F.3d at 424 & n.4 (interpreting Title VII's fee-shifting provision), the Court is not aware of any New York case employing this standard to identify the bounds of a defense obligation, *St. Paul Fire & Marine Ins. Co. v. Scopia Windmill Fund, LP*, No. 14-cv-8002, 2015 WL 5440694, at *11 & n.15 (S.D.N.Y. Sept. 9, 2015) (acknowledging that "other jurisdictions" use the inextricably-intertwined standard to identify covered affirmative claims but that "[t]he Court has not come across any case applying New York law that has considered this standard"). Instead, New York courts have hewed to the relatively restrictive mirror-image standard, which requires more than "common" facts and "related" legal theories. To implicate the duty to defend, a party's affirmative claims cannot be "separable from the main action on any coherent grounds" and cannot go "further than merely seeking the opposite of the relief demanded" of the party. *Commercial Union Ins. Co.*, 639 F. Supp. at 1402–03. Aside from the claims for declaratory judgment, Peloton's counterclaims and third-party claims address facts and law not directly pertinent to VRO's infringement claim.

Furthermore, and contrary to Peloton's suggestion, New York law does not provide, as an absolute rule, that "a party owed a duty to defend may recover its fees [] for . . . bringing the

action to enforce the duty to defend.” (Dkt. No. 331 at 5.) To be sure, an insured may recover attorney’s fees for a claim to enforce the duty to defend when that claim is the inverse of an insurer’s initial action to disclaim liability. In such cases, the party’s affirmative claim to enforce is the mirror image of an earlier claim against which the party is defending. *See, e.g., Lancer Ins. Co. v. Saravia*, 967 N.Y.S.2d 593, 599 (Sup. Ct. Kings Cnty. 2013) (permitting an insured to recover attorney’s fees for its declaratory judgment action filed in response to an insurer’s earlier action disclaiming liability); *Admiral Ins. Co. v. Weitz & Luxenberg, P.C.*, No. 02-cv-2195, 2002 WL 31409450, at *5 (S.D.N.Y. Oct. 24, 2002) (accord). By contrast, when an affirmative claim to enforce is not a mirror-image claim, “[t]here is nothing in the nature of [the] suit . . . that should cause [courts] to add to the exceptions to” “the universal rule in this country not to allow a litigant to recover damages for the amounts expended in the successful prosecution . . . of its rights.” *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21–22 (1979). New York courts have held “that [an] insurer is not liable for attorneys’ fees and disbursements necessarily incurred in the policyholder’s successful prosecution of the action it brought to compel the insurer to comply with its policy obligations.” *Id.* at 561; *AFA Protective Sys., Inc. v. Atlantic Mut. Ins. Co.*, 549 N.Y.S.2d 783, 786 (2d Dep’t 1990) (“[The plaintiff] is entitled to recover its legal fees thus far expended by it for its defense. . . . However, [it] is not entitled to reimbursement for legal fees incurred in connection with the prosecution of this declaratory judgment action [to enforce the duty to defend].” (citation omitted)). VDG never initiated an action to free itself from its defense obligations. It follows that Peloton is not entitled to attorney’s fees in relation to the third-party claim seeking damages for VDG’s default on those obligations.

Having concluded that Peloton can claim attorney's fees for just two its affirmative claims, the Court must determine what portion of its claimed \$5,152,503.62 Peloton may actually seek. VDG contends that many of the invoices submitted by Peloton in support of its motion are "so hopelessly vague" or otherwise deficient "that it is impossible to apportion the time" between reimbursable and non-reimbursable claims. (Dkt. No. 329 at 9.) VDG therefore concludes that "Peloton is not entitled to any of these fees." (*Id.*) VDG misapprehends the role of the Court in assessing attorney's fees. As the Supreme Court explained in *Fox v. Vice*, "the determination of fees should not result in a second major litigation," and "trial courts need not, and indeed should not, become green-eyeshade accountants." 563 U.S. 826, 838 (2011) (internal quotation marks and citation omitted). The Court may achieve "rough justice" by taking into account the documentation submitted, as well as its "overall sense of the suit," and then estimating the allocation of attorneys' time. *Id.*

VDG has helpfully provided an accounting of the invoices. In a declaration appended to its opposition to Peloton's motion, VDG states that around 900 of the hours billed by Peloton's attorneys were "clearly identified as reflecting work that was performed in defending the patent" claim or as "solely related to the prosecution of the third-party claims." (Dkt. No. 330 ¶¶ 10–11.) Eighty-one percent of those roughly 900 hours were spent on the former. (*Id.*) From this sizeable sample of billing information, which the Court assumes to be representative given the case's heavy focus on the patent issue, it can reasonably be extrapolated that 81% of the hours billed by Peloton's attorneys were spent defending against VRO's infringement claim. *See Firstland Int'l, Inc. v. I.N.S.*, No. 02-cv-4043, 2008 WL 11504220, at *1 (E.D.N.Y. Oct. 1, 2008) (approving of mathematical extrapolation as a means of estimating an appropriate fee award). Because of the near-total overlap between Peloton's defense against the infringement claim and

Peloton's affirmative claims for declaratory judgment, the Court determines that the covered affirmative claims warrant reimbursement of an additional 2% of the hours billed — for a total of 83% for all covered claims. VDG does not contend that any of the experts retained by Peloton worked on issues other than those bearing on the content and validity of the contested patent. Accordingly, the Court determines that Peloton is entitled to full reimbursement of its experts' fees.

C. The Reasonableness of the Fees Sought

Finally, VDG challenges that the fees sought are simply too high for the work reflected on Peloton's invoices. Specifically, VDG argues that the fees should be reduced based on (1) the "presence of significant redactions" in the invoices, (2) the attorneys' use of block-billing, (3) the inefficiency of Peloton's attorneys, (4) the lack of information provided by Peloton on the prevailing rates for comparable attorneys, and (5) the overly high rates charged for paralegals and support staff. (Dkt. No. 330 at 18–20.) VDG is correct that "[a]n award of an attorney's fee pursuant to a contract provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered." *Citicorp Trust Bank, FSB v. Vidaurre*, 155 A.D.3d 934, 935 (2d Dep't 2017). Still, VDG, in presenting its arguments, fails to recognize that the "reasonable" compensation of an attorney depends on the factors of the case at bar, including the nature of the case and the difficulty of the questions presented. *See id.* This dampens the persuasive power of VDG's challenge, which is largely meritless.

VDG's complaint about Peloton's use of redactions, for instance, reads as disingenuous given the nature of this case: a hotly contested patent dispute in which briefing was often redacted and nearly all deposition transcripts and expert reports were filed under seal. (*See, e.g.*, Dkt. No. 210; Dkt. No. 237.) Peloton's heaviest redactions (*see, e.g.*, Dkt. No. 317-8; Dkt. No. 317-11 at 14; Dkt. No. 319-8 at 4–8) appear to correspond with its attorneys' preparation for

depositions, management of the privilege log, and client communications. *See Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 970 F. Supp. 333, 342 (S.D.N.Y. 1997) (“[C]ourts may attempt to decipher [time entries] by reference to the context in which these entries occur to determine what work was involved.” (internal quotation marks and citation omitted)). This is to be expected and does not, as VDG suggests, “prevent any meaningful review by this Court.” *John Wiley & Sons, Inc. v. Book Dog Books, LLC*, 327 F. Supp. 3d 606, 645 (S.D.N.Y. 2018).

Nor does Peloton’s block-billing trouble the Court. Block-billing is not inherently objectionable and warrants the kind of across-the-board reduction that VDG seeks only in “situations where there is evidence that the hours billed are independently unreasonable or that the block-billing was mixing together tasks that were not all compensable, or not all compensable at the same rate.” *Danaher Corp. v. Travelers Indem. Co.*, No. 10-cv-121, 2015 WL 409525, at *14 (S.D.N.Y. Jan. 16, 2015) (internal quotation marks and citation omitted). VDG does not suggest that this is one such situation. Indeed, the block-billed entries that VDG highlights as “particularly egregious” reflect entirely compensable work. (Dkt. No. 13–15.) The Court’s own review of the invoices turned up just one instance of questionable block-billing: an entry from December 5, 2018, that grouped travel time with time spent on deposition preparation. (Dkt. No. 318-16 at 2.) This is not a circumstance in which the invoices are so deficient, by virtue of their structure or redactions, as to warrant a fee reduction. *See Ragin v. Harry Macklowe Real Estate Co.*, 870 F. Supp. 510, 521 (S.D.N.Y. 1994) (“[C]ourts in this Circuit intermittently have seen fit to adopt roughly a 30% fee reduction rule for an attorney’s *failure to keep* contemporaneous time records of their services.” (emphasis added)).

VDG is no more persuasive in urging that Peloton’s fees should be reduced because its attorneys performed duplicative work. This argument appears to be rooted in Peloton’s retention

of two law firms, rather than one, as well as a partner's numerous time entries dedicated to reviewing others' work product and conferring with other attorneys. (Dkt. No. 329 at 10.) In a complex patent dispute, this is a thin reed on which to rest argument. This case is unlike *Martinez v. Paramount Country Club, LLC*, No. 18-cv-4668, 2019 WL 2450856 (S.D.N.Y. Apr. 1, 2019), the case VDG relies on to cast doubt on the attorneys' efficiency. (Dkt. No. 329 at 10.) *Martinez* "did not enter discovery or involve significant or complex motion practice," and the plaintiff's "retained counsel worked on [the] matter for about five months after the initial complaint had already been filed." 2019 WL 2450856, at *5. There was no explanation in *Martinez* for why the plaintiff there "retained two law firms instead of one." *Id.* Here, by contrast, the litigation has carried on for over four years, involved numerous dispositive motions and discovery disputes, and produced 331 docket entries. Moreover, based on the issues in this case, Peloton's decision to retain both a firm specializing in patent disputes and a more traditional "big law" firm like K&L Gates LLP (and subsequently Sheppard, Mullin, Richter & Hampton LLP, after Peloton's lead counsel from K&L Gates joined that practice) is unspectacular. Given the stakes of a patent infringement lawsuit targeting the core of Peloton's business, it is hardly surprising that the company took it seriously.

So too are the rates billed by Peloton's attorneys unspectacular, notwithstanding VDG's argument that they were unsupported and unsupportable. It is, as VDG argues, incumbent on the movant to make "a showing of . . . the prevailing hourly rate for similar legal work in the community." *Gamache v. Steinhaus*, 776 N.Y.S.2d 310, 311–12 (2d Dep't 2004). Peloton has attempted to make this showing by offering that Peloton's attorneys charged their standard rate and their invoices reflect what Peloton was actually charged and agreed to pay. This suffices, when considered alongside the "rates awarded in prior cases" and the Court's "own knowledge

of hourly rates charged in the district.” *Suk Joon Ryu v. Hope Bancorp, Inc.*, No. 18-cv-1236, 2018 WL 4278353, at *5 (S.D.N.Y. Aug. 29, 2018). With respect to Peloton’s showing, “[c]ourts in this district . . . have recognized that an attorney’s customary billing rate for fee-paying clients is ordinarily the best evidence of a reasonable hourly rate.” *Id.* (internal quotation mark and citation omitted). And with respect to the rates awarded in prior cases, the highest-billed partner in this case, lead counsel, had an hourly billing rate of \$845, which falls well within the permissible range for experienced big law partners litigating in the district. *Vista Outdoor Inc. v. Reeves Family Trust*, a case regarding rates from 2018, assessed that hourly billing rates as high as \$1,260 “are not excessive in the New York City ‘big firm’ market.” No. 16-cv-5766, 2018 WL 3104631, at *6 (S.D.N.Y. May 24, 2018) (collecting cases). Peloton’s hourly billing rates for associates, the highest of which is \$690, similarly fall within the rates awarded in prior cases. *See, e.g., id.* (approving an hourly billing rate of \$693.75 for associates).

Altogether, VDG’s reasonableness arguments succeed on one front: The hourly billing rates for Peloton’s paralegals and support staff were too high. Courts in this district have been loath to approve hourly billing rates in excess of \$200 for paralegals and support staff. *See id.*; *Beastie Boys v. Monster Energy Co.*, 112 F. Supp. 3d 31, 56–57 (S.D.N.Y. 2015). The hourly billing rates claimed here range from \$250 to \$345. Following the example set in *Beastie Boys v. Monster Energy Co.*, which also involved Sheppard Mullin’s paralegals and support staff, the Court “finds that a fee reduction to a \$200 per hour rate for such personnel, but no greater reduction, is merited.” 112 F. Supp. 3d at 57.

In total, the value of the legal work performed on behalf of Peloton, as adjusted, comes to \$4,568,444.47.¹ As discussed, the Court awards Peloton 83% of this figure, or \$3,791,808.91, in relation to the work performed by Peloton's lawyers, paralegals, and support staff on the patent infringement and invalidity claims. The Court additionally awards Peloton the full cost of its expert services, or \$507,354.65.² Combined, this results in an award of \$4,299,163.56.

D. Prejudgment Interest

Peloton requests prejudgment interest on its award, and VDG does not address the point. Neither party addresses how interest should be calculated.

Under New York law, “[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract. . . .” N.Y. C.P.L.R. § 5001(a). The statutory interest rate is nine percent. *Id.* § 5004. Prejudgment interest is calculated “from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred.” *Id.* § 5001(b). In a duty-to-defend case, damages are “incurred” when a party pays legal fees and expenses that the breaching party has refused to cover. Thus, courts in such cases ordinarily calculate prejudgment interest as running from the date each legal bill was invoiced to or paid by the party. *See, e.g., United Parcel Serv. v. Lexington Ins. Grp.*, 983 F. Supp. 2d 258, 268 (S.D.N.Y. 2013); *Harleysville Worcester Ins. Co. v. Wesco Ins. Co., Inc.*, 314 F. Supp. 3d 534, 552 (S.D.N.Y. 2018). That calculation can be quite

¹ To reach this figure, the Court totaled the legal fees calculated by Peloton, subtracted the amount billed to paralegals and support staff, and added back the number of hours billed by paralegals and support staff, multiplied by \$200: [(\$417,512.19 + \$401,900.44 + \$3,825,736.84) – (\$33,955.00 + \$1,884.00 + \$261,245.00 + \$4,275.00 + \$5,917.50 + \$2,247.00 + \$1,885.00 + \$224.00 + \$472.50) + \$200*(118.5 + 5.6 + 1.7 + 996.4 + 15 + 23.1 + 7.9 + 6.5 + 0.8 + 1.5)].

² To reach this figure, the Court totaled the cost of the expert services performed by Duff & Phelps, Goodin & Associates, and IMS Expert Services: (\$252,132.00 + \$72,215.28 + \$183,007.37).

complicated, especially where, as here, the Court has applied reductions to certain categories of legal fees. Fortunately, New York law also provides that where damages were incurred at “various times,” interest may be calculated “upon all of the damages from a single reasonable intermediate date.” N.Y. C.P.L.R. § 5001(b).

Peloton served notice on VDG invoking the latter’s duty to defend on September 9, 2016. VDG’s initial breach of contract was shortly thereafter — the Court deems it October 9, 2016 — when VDG declined to undertake its duty to defend against the patent claim asserted by VRO. *See Peloton*, 2020 WL 1644204, at *8. Peloton was incurring significant expenses in connection with this case relatively consistently through August 15, 2019, when the parties’ dispositive motions were fully briefed. The Court finds that a “reasonable intermediate date” for Peloton’s damages is March 15, 2018. Therefore, prejudgment interest will be calculated from that date.³

II. Conclusion

For the foregoing reasons, Peloton’s motion for attorney’s fees is GRANTED. VDG must pay Peloton \$4,299,163.56, plus interest, for the reasonable attorney’s fees, costs, and expenses Peloton incurred in defending against VRO’s patent infringement claim and bringing its claims seeking declaratory judgment.

The pending motions to seal are also GRANTED.

The Clerk of Court is directed to enter final judgment in favor of Peloton Interactive, Inc. against Villency Design Group, L.L.C. in the amount of \$4,299,163.56, plus nine percent interest calculated from March 15, 2018. All other claims in this case are dismissed.

³ Peloton also requests postjudgment interest on its award of damages. Postjudgment interest, which is also nine percent, runs automatically from the date the judgment is entered. *See* N.Y. C.P.L.R. §§ 5003, 5004.

The Clerk of Court is directed to close the motions at Docket Numbers 309, 311, 312, and 315, and to close this case.

SO ORDERED.

Dated: March 30, 2021
New York, New York



J. PAUL OETKEN
United States District Judge

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
VR OPTICS, LLC,

Plaintiff,

v.

PELTON INTERACTIVE, INC., a Delaware
Corporation,

Defendant.

-----X
PELTON INTERACTIVE, INC.,

Third-Party Plaintiff,

16 CIVIL 6392 (JPO)

v.

**JUDGMENT for
Attorney's fees and Costs**

VILLENY DESIGN GROUP, LLC, ERIC
VILLENY and JOSEPH COFFEY,

Third-Party Defendants.

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It is, **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated March 30, 2021, Peloton's motion for attorney's fees is GRANTED. VDG must pay Peloton \$4,299,163.56, plus nine percent interest calculated from March 15, 2018, in the amount of \$1,177,735.24, for the reasonable attorney's fees, costs, and expenses Peloton incurred in defending against VRO's patent infringement claim and bringing its claims seeking declaratory judgment. The pending motions to seal are also GRANTED. All other claims in this case are dismissed; accordingly, the case is closed.

Dated: New York, New York
March 30, 2021

RUBY J. KRAJICK

Clerk of Court

BY:

K. mango

Deputy Clerk