

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

NIKE, INC.
Patent Owner.

Patent No. 9,278,256

Inter Partes Review No. IPR2023-00189

**PETITIONER'S OBJECTIONS TO EVIDENCE
SUBMITTED WITH PATENT OWNER RESPONSE**

lululemon athletica canada inc. and lululemon usa inc. (“lululemon”) objects to the following evidence submitted by Nike, Inc. (“Nike”) with its Patent Owner Response (Paper 18) in the above-captioned proceeding. In accordance with 37 C.F.R. § 42.64(b)(1), lululemon is filing and serving these objections within five (5) business days of service of evidence to which these objections are directed.

A. Exhibit 2005 (Declaration of Dr. Megan Toney-Bolger)

lululemon objects to Exhibit 2005 as lacking foundation, assuming facts not in evidence, containing legal conclusions, and mischaracterizing the evidence. lululemon further objects to Exhibit 2005 to the extent that it includes expert opinions for which the factual bases have not been disclosed, for which Dr. Toney-Bolger does not have personal knowledge (Fed. R. Evid. (FRE) 602), and to the extent that Dr. Toney-Bolger’s opinions constitute unreliable and prejudicial expert testimony under FRE 702 and 703. For example, paragraphs 34-51 of Dr. Toney-Bolger’s report include legal conclusions regarding the proper construction and scope of a disputed claim term, which Dr. Toney-Bolger is not qualified to offer. Similarly, paragraphs 73-76 and 107-109 of Dr. Toney-Bolger’s report depend on her construction of “common unit,” which is another legal conclusion.

lululemon also objects to the portions of Exhibit 2005 not discussed or cited in the Patent Owner Response (POPR) as irrelevant. In particular, Nike did not

cite or discuss at least paragraphs 1-34, 39, 52-54, 56-57, 59-67, 77-78, 85, 89, 93, and 106 of Dr. Toney-Bolger's declaration in its POR.

B. Exhibit 2006 (Deposition Transcript of Dr. Kevin Lynch)

lululemon objects to Exhibit 2006 for each of the reasons noted in the objections made during the underlying deposition.

C. Exhibit 2007 (Printout of Website)

Exhibit 2007 purports to be a dictionary definition of "continuous." lululemon objects to Exhibit 2007 as hearsay because Patent Owner and its declarant rely on it for its truth, *i.e.*, to prove the meaning of "continuous." (*See* Paper 18 at 35; Ex. 2005, ¶ 49.) lululemon also objects that Nike has not authenticated Exhibit 2007 under FRE 901. Exhibit 2007 is not self-authenticating: the text stating the definition originates from the 1989 version of the Oxford English Dictionary is itself hearsay, meaning Nike cannot rely upon it to prove the document's age, and Nike has not shown that the document "was in a place where, if authentic, it would likely be[.]" Fed. R. Evid. 901(b)(8). lululemon further objects to Exhibit 2007 as irrelevant under FRE 401-403 because Nike has not shown that a person of ordinary skill would have relied on a generic definition of "continuous" when interpreting the meaning of that word in the context of the '256 patent's claims.

D. Exhibit 2008 (Annotated Copy of USP 9,278,256)

lululemon objects to Exhibit 2008 as irrelevant and not authentic to the extent it does not accurately reflect the differences between Exhibits 1001 and 1004. *See* Fed. R. Evid. 401-403, 901. Patent Owner's declarant states that Exhibit 2008 is "[a] redline comparing the figures and detailed description of the '256 Patent against Tagliabue [that] shows the differences between these two documents, and highlights the disclosures in the '256 Patent that are not present in Tagliabue." (Ex. 2005, ¶ 55.) Exhibit 2008 is not, however, a classic redline comparison in that it does not show in strikethrough content in Exhibit 1004 that does not also appear in Exhibit 1001.

E. Exhibit 2009 (Scientific Article)

lululemon objects to Exhibit 2009 as irrelevant. Fed. R. Evid. 401-403. Nike has not established that a person of ordinary skill would have understood "continuously" in terms of "the visual perception speed of a normal observer." (Ex. 2009, 125; *see also* Ex. 2005, ¶ 70.) lululemon further objects to portions of Exhibit 2009 that Nike and its declarant do not cite as irrelevant, at least including everything on pages 126-128 of that exhibit. *See* Fed. R. Evid. 401-403. lululemon also objects that Nike has not authenticated Exhibit 2009 under FRE 901.

F. Exhibit 2010 (Scientific Article)

lululemon objects to Exhibit 2010 as hearsay because Nike's declarant relies on it for the truth of its contents. *See* Fed. R. Evid. 802. (Ex. 2005, ¶ 86.)

lululemon also objects that Nike has not authenticated Exhibit 2010 under FRE 901.

G. Exhibit 2011 (Scientific Article)

lululemon objects to Exhibit 2011 as hearsay because Nike's declarant relies on it for the truth of its contents. *See* Fed. R. Evid. 802. (Ex. 2005, ¶ 86.)

lululemon also objects that Nike has not authenticated Exhibit 2011 under FRE 901.

H. Exhibit 2012 (Scientific Article)

lululemon objects to Exhibit 2012 as hearsay because Nike's declarant relies on it for the truth of its contents. *See* Fed. R. Evid. 802. (Ex. 2005, ¶ 86.)

lululemon also objects that Nike has not authenticated Exhibit 2012 under FRE 901.

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Dated: August 14, 2023

Respectfully submitted,

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Certificate of Service (37 C.F.R. § 42.6(e)(4))

I hereby certify that the attached PETITIONER’S OBJECTIONS TO EVIDENCE SUBMITTED WITH PATENT OWNER RESPONSE was served as of the below date on the Patent Owner via e-mail (by agreement) to the following counsel of record:

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Dated: August 14, 2023

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