

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. 10,923,225

Inter Partes Review No. IPR2023-00424

PETITIONER'S MOTION TO EXCLUDE

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Under 37 C.F.R. § 42.64(c), Petitioner, lululemon athletica canada inc. and lululemon usa inc. (collectively, “lululemon”) hereby moves to exclude Exhibit 2003, an excerpt from a 2008 Oxford Dictionary of Computing (“Dictionary”) that post-dates the purported priority date of the challenged patent by almost *two* years.

I. LEGAL STANDARD

Except as otherwise provided, the Federal Rules of Evidence (“FRE”) govern the admissibility of evidence before the Board. 37 C.F.R. § 42.62; *see also* 37 C.F.R. § 42.64(c) (providing for motions to exclude evidence).

II. LULULEMON TIMELY OBJECTED

As detailed below, lululemon timely objected to Exhibit 2003 under 37 C.F.R. § 42.64(b).

- **January 3, 2023**: Petitioner filed the Petition (Paper 2) and supporting exhibits. Exhibit 2003 was not included with the Petition.
- **April 20, 2023**: Patent Owner Nike served its Patent Owner Preliminary Response (“POPR,” Paper 10). Exhibit 2003 was not included with the POPR.
- **July 10, 2023**: The Board instituted its Decision on Institution (Paper 11).
- **October 10, 2023**: Patent Owner served its Patent Owner Response (“POR,” Paper 19) and supporting exhibits, including Exhibit 2003. Patent Owner

expressly relied on pages 3 and 4 of Exhibit 2003 in pages 2, 19, and 20 of the POR and in paragraph 42 of Exhibit 2004.

- **October 17, 2023**: Petitioner timely objected to Exhibit 2003. (Paper 20, 1-2.) Petitioner explained that “Exhibit 2003 [is] not [] relevant to any issue in this proceeding because Exhibit 2003 is after the ’225 patent’s provisional filing date and its earliest non-provisional filing date.” (*Id.*, 1.) Petitioner also explained that Patent Owner “Nike has not established that a person of ordinary skill in the art (POSITA) would have looked to Exhibit 2003 to understand the meaning of ‘data’ as of the ’225 patent’s critical date.” (*Id.*) Petitioner cited FRE 401-403 in its objections.
- **October 31, 2023**: Patent Owner served Patent Owner’s Updated Exhibit List and supplemental evidence, including Exhibit 2006 (Declaration of June Ann Munford) seeking to establish that Exhibit 2003 was published in **2008**.

III. EXHIBIT 2003 SHOULD BE EXCLUDED BECAUSE IT WAS PUBLISHED ABOUT TWO YEARS AFTER THE PURPORTED PRIORITY DATE

FRE 401 states: “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” (FRE 401.) FRE 402 explains that “[i]rrelevant evidence is not admissible,” and FRE 403 states “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” (FRE 402, 403.)

The ’225 patent’s purported provisional filing date is September 7, 2006, and its earliest purported non-provisional filing date is August 31, 2007. (Ex. 1001, (60).) Patent Owner has referred to the 2006 provisional filing date in its briefing. (*See, e.g.*, POPR (Paper 10), 4 fn. 1.) And it has not disputed that claim terms should be understood from the vantage point of a POSITA as of 2006. (*See, e.g.*, Ex. 2004, ¶ 35 (Patent Owner’s expert testifying that “[i]n my opinion, a POSITA in 2006 would understand that the ordinary and customary meaning of ‘data,’ as recited in claims 1 and 12”); POR (Paper 19), 15 (citing Ex. 2004, ¶ 35).) Yet Patent Owner relies upon a dictionary dated **2008** to support a POSITA’s understanding of that term in **2006**. Specifically, Patent Owner relies on Exhibit

2003, an excerpt from the 2008 Oxford Dictionary Computing, for the term “data,” in an attempt to show the ordinary and customary meaning of the term in 2006. (POR (Paper 19), 2, 19, 20.) After Petitioner lululemon timely objected under FRE 401-403 to Ex. 2003 as being irrelevant and prejudicial (Paper 20, 1), Patent Owner served Exhibit 2006. That exhibit is a declaration signed by June Ann Munford that alleges that Exhibit 2003 is a document that was publicly available as of July 7, 2008. (Ex. 2006, ¶9.)

Petitioner submits that, even if Ex. 2003 was publicly available on July 7, 2008 (which Petitioner does not concede), it is almost two years after the provisional filing date of the '225 patent, *i.e.*, September 7, 2006. As a result, Ex. 2003 is irrelevant and prejudicial. FRE 401-403. **First**, it is irrelevant, because a POSITA in 2006 would not look to a definition of “data” in 2008. Nor has Patent Owner has provided any explanation sufficient to support a finding that Exhibit 2003’s definition in 2008 is the same definition that would have been understood by a person of ordinary skill art at the time of the invention in 2006. **Second**, Ex. 2003 is unduly prejudicial, because Patent Owner utilizes a post-dated dictionary to seek to overcome the instituted grounds. (*See, e.g.*, POR (Paper 19), 19 (“Under the proper construction of ‘data’ lululemon cannot show that any Challenged Claim of the '225 patent is unpatentable.”); *see also* FRE 403.)

IV. CONCLUSION

For the reasons set forth above, lululemon request the Board to grant this Motion to Exclude Exhibit 2003.

Dated: March 26, 2024

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 MOTION TO EXCLUDE was served as of the below date via e-mail (by agreement) to the following counsel of record for the Patent Owner:

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