

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON ATHLETICA CANADA INC. AND LULULEMON USA INC.,

Petitioners,

v.

NIKE, INC.,

Patent Owner.

Case IPR2023–00424

Patent No. 10,923,225

PATENT OWNER’S OPPOSITION TO MOTION TO EXCLUDE

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I. INTRODUCTION

Patent Owner Nike, Inc. (“Nike”) respectfully submits this opposition to Petitioner’s Motion to Exclude. Petitioners lululemon athletica canada inc. and lululemon usa inc. (collectively, “lululemon”) move to exclude Exhibit 2003—a definition of “data” from the Oxford Dictionary of Computing—because the dictionary post-dates the challenged patent’s priority date by two years. Paper No. 33. According to lululemon, the dictionary is thus irrelevant and inadmissible under Federal Rules of Evidence 401, 402, and 403. *Id.* But lululemon’s motion is unsupported by any law or evidence—and lululemon falls far short of the high burden for excluding evidence.

II. ARGUMENT

A. Legal Standard

As the moving party, lululemon “has the burden of proof to establish that it is entitled to the requested relief.” 37 C.F.R. § 42.20(c). On a motion to exclude, that burden is high.

The Board typically does not exclude evidence. Instead, its “general approach” is to leverage its “administrative expertise” to “determine and assign the appropriate weight” to all evidence presented. *Pelican Biothermal, LLC v. VA-Q-TEC AG*, PGR2021-00085, Paper 35, 30–31 (PTAB June 16, 2023). This approach is guided by “strong public policy” that supports making “all information filed in a

non-jury, quasi-judicial administrative proceeding available to the public.” *K-40 Elecs., LLC v. Escort Inc.*, IPR2013-00203, Paper 46, 6 (PTAB Aug. 27, 2014). Because the Board—not a jury—acts as factfinder in an IPR proceeding, the admission of evidence presents “little danger of unfair prejudice” or confusion. *Intri-Plex Techs., Inc. v. Saint-Gobain Performance Plastics Rencol Ltd.*, IPR2014-00309, Paper 83, 17 (PTAB Mar. 23, 2015).

B. lululemon’s Motion to Exclude is Unsupported by Law or Evidence

lululemon argues that the definition of “data” shown in Exhibit 2003 is inadmissible because the Oxford Dictionary of Computing was published in 2008—two years after the 2006 priority date of the ’225 patent. Paper 33, 1–4 (citing Fed. R. Evid. 401, 402, and 403). lululemon’s motion should be denied for two reasons.

First, lululemon cites no authority for the proposition that a dictionary is inadmissible simply because it postdates a patent’s priority date. In fact, the Board has repeatedly held the opposite, even where the time difference is far more drastic. As just one example, the Board recently rejected a motion to exclude a dictionary dated **23 years** after a patent’s priority date. *Unified Patents, LLC v. Digimedia Tech, LLC*, IPR2022-01182, Paper 26 at 42 (PTAB Jan. 12, 2024). Exclusion of the dictionary was unnecessary, the Board explained, because the Board “is well positioned to determine and assign appropriate weight to evidence presented.” *Id.* The same is true here.

Second, the 2008 Oxford Dictionary of Computing is reliable evidence of how a skilled artisan in 2006 would understand the ordinary meaning of “data.” Ex. 2004 at ¶42. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1318 (Fed. Cir. 2005) (en banc) (technical dictionaries “assist the court in determining the meaning of particular terminology to those of skill in the art of the invention” because they “collect the accepted meanings of terms used in various fields of science and technology.”). As Dr. McLean testified, a skilled artisan in 2006 would understand that the definition of “data” in Exhibit 2003 is “consistent with the ordinary and customary meaning of ‘data’ in the context of the ’225 patent.” Ex. 2004 at ¶42. lululemon has presented no evidence—or even argued—that the ordinary meaning of “data” in 2006 is somehow different from the ordinary meaning of “data” articulated in the 2008 Oxford Dictionary of Computing. This further supports denial of lululemon’s motion. *Samsung Elecs. Co., Ltd. et al. v. Elm 3ds Innovations, LLC*, IPR2016-00386, Paper 68 at 30 n. 11 (PTAB June 23, 2017) (crediting a two-year-postdated dictionary because the movant failed to argue that “the usage of these terms changed in those intervening two years.”).

III. CONCLUSION

For at least these reasons, Nike respectfully requests that the Board deny lululemon’s motion to exclude.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies service on lululemon, pursuant to 37 C.F.R. § 42.6(e) and by agreement of counsel, by electronic (e-mail) delivery of a true copy of the foregoing **PATENT OWNER’S REPLY TO MOTION TO EXCLUDE**, was served on April 2, 2024 to the following Counsel for lululemon via e-mail:

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