

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 REPLY TO PATENT OWNER'S OPPOSITION TO
MOTION TO EXCLUDE**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. EXHIBIT 2003 SHOULD BE EXCLUDED	1
III. CONCLUSION.....	4

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Nycomed US Inc. v. Glenmark Generics Ltd.</i> , No. 08-5023, 2010 WL 11622643 (W.D.N.Y. Oct. 25, 2010).....	2
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc)	1-2
<i>Samsung Electronics Co., Ltd. v. Elms 3DS Innovations, LLC</i> , IPR2016-00386, Paper 68 (P.T.A.B. June 23, 2017)	3
<i>Unified Patents, LLC v. Digimedia Tech, LLC</i> , IPR2022-01182, Paper 26 (P.T.A.B. Jan. 12, 2024)	3

Other Authorities

37 C.F.R. § 42.6(e)(4)	5
FRE 401	2
FRE 403	2, 4

I. INTRODUCTION

Patent Owner Nike offered a post-dated dictionary definition of a term in support of its proposed claim construction in the Patent Owner Response (POR) (Paper 19). Petitioner timely objected, and Nike chose not to file supplemental evidence of a contemporaneous dictionary definition. Patent Owner's Opposition (Paper 34) provides nothing to foreclose exclusion. Thus, the Motion to Exclude should be granted.

II. EXHIBIT 2003 SHOULD BE EXCLUDED

Patent Owner relies on Exhibit 2003 in its POR. (*See* Paper 19, 2, 9, 20.) Petitioner timely objected to Exhibit 2003 on October 17, 2023. (*See* Paper 20, 1-2.) Patent Owner does not dispute in its Opposition that the objection was timely. Nor does Patent Owner dispute that it and its expert relied upon the '225 patent's provisional filing date (September 7, 2006) for the claim construction analysis.

As explained in the Motion, Exhibit 2003 purports to be a definition of the term "data" according to a Sixth Edition of an Oxford Dictionary of Computing dated 2008. Once again, Patent Owner does not dispute this fact. It instead argues that Petitioner did not cite any authority for the exclusion of a post-dated dictionary for claim construction. But *Phillips v. AWH Corp.* makes clear that the claim construction analysis must be done at the time of the purported invention, here

2006 according to Patent Owner: “We have made clear, moreover, that the ordinary and customary meaning of a claim term is the meaning that the term would have to 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.***” 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc) (emphasis added). Otherwise, dictionary evidence submitted after the filing date would not reflect the meaning that would have been attributed to the term at that time by a POSITA. *See, e.g., Nycomed US Inc. v. Glenmark Generics Ltd.*, No. 08-5023 (CBA, RLM), 2010 WL 11622643, at *13 (W.D.N.Y. Oct. 25, 2010) (“These documents are not contemporaneous to the [patent-at-issue], and are not relevant to the understanding of a POSA at the time of the invention.” (citing *Brookhill-Wilk 1 vs. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1299 (Fed. Cir. 2003))). Thus, the 2008 definition offered in Exhibit 2003 is not relevant to the understanding of a POSITA at the time of the ’225 patent’s alleged invention in 2006 and should be excluded as not relevant under Federal Rules of Evidence (FRE) 401 and FRE 403.

Patent Owner attempts to support the relevance of Exhibit 2003 by pointing to its expert’s testimony that “a POSITA in 2006 would understand that [the definition of the 2008 Oxford Dictionary of Computing] [is] consistent with the ordinary and customary meaning of ‘data’ in the context of the ’225 patent.” (Ex. 2004, ¶ 42.) However, Patent Owner and its expert’s statements are merely

conclusory—failing to offer any evidence *why* a POSITA would have the same understanding about a term two years before the effective filing date of the patent application.

And unlike Patent Owner’s cited cases, “data” in this proceeding is a term specific to computers, and Exhibit 2003 is not a general-purpose dictionary where the definitions are unlikely to change. In *Unified Patents, LLC v. Digimedia Tech, LLC*, Patent Owner relied on website printouts of Merriam-Webster’s dictionary definitions for the terms “detail” and “separate.” IPR2022-01182, Paper 26 at 42 (P.T.A.B. Jan. 12, 2024). Albeit untimely, Patent Owner nevertheless submitted evidence showing that the meanings of “these common words” have not changed since the date of the invention. *Id.* Here, Nike offers no such evidence.

As for *Samsung Electronics Co., Ltd. v. Elms 3DS Innovations, LLC*, that case involved “general-purpose” dictionary definitions (of the terms “flexible” and “substantial”)—which is not the case here. IPR2016-00386, Paper 68 at 30 n.11 (P.T.A.B. June 23, 2017). Given the nature of the general-purpose dictionary, the Board was persuaded that the definitions of the terms would likely not have changed. *Id.* Moreover, Petitioner did not contest use of the dictionary or that usage of the terms changed since the date of the invention. *Id.*

Accordingly, Exhibit 2003 is irrelevant, prejudicial, and confusing. The minimal probative value of Exhibit 2003 is outweighed at least by a danger of

confusing the issues, and thus, should be excluded as lacking relevance to any issue in this proceeding. *See* FRE 403.

III. CONCLUSION

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

Dated: April 9, 2024

Respectfully submitted,

By: /Mehran Arjomand/
Mehran Arjomand
Registration No.: 48,231
MORRISON & FOERSTER LLP
707 Wilshire Boulevard, Suite 6000
Los Angeles, CA 90017-3543
Email: MArjomand@mofo.com
Tel: (213) 892-5200

Counsel for Petitioner

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

I hereby certify that the attached PETITIONER’S REPLY TO PATENT OWNER’S OPPOSITION TO 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:

Christopher J. Renk (Reg. No. 33,761)
Michael J. Harris (Reg. No. 62,957)
Aaron P. Bowling (Reg. No. 67,311)
David C. McMullen (Reg. No. 69,922)
Arnold & Porter Kaye Scholer LLP
70 West Madison Street, Suite 4200
Chicago, IL 60602-4231
Email: chris.renk@arnoldporter.com
Email: michael.harris@arnoldporter.com
Email: xNIKE-lululemonIPRs@arnoldporter.com

Date: April 9, 2024

By: /Mehran Arjomand/
Mehran Arjomand, Reg. No. 48,231