

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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

v.

NIKE, INC.  
Patent Owner.

Patent No. 8,620,413

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*Inter Partes* Review No. IPR2023-00438

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**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 22) 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 2008 (Supplemental Declaration of Dr. Bryan Bergeron)**

lululemon objects to Exhibit 2008 as lacking foundation, assuming facts not in evidence, containing legal conclusions, and mischaracterizing the evidence. lululemon further objects to Exhibit 2008 to the extent that it includes expert opinions for which the factual bases have not been disclosed, for which Dr. Bergeron does not have personal knowledge (Fed. R. Evid. (FRE) 602), and to the extent that Dr. Bergeron’s opinions constitute unreliable and prejudicial expert testimony under FRE 702 and 703. For example, paragraphs 19-32 of Dr. Bergeron’s report include legal conclusions regarding the proper construction and scope of a disputed claim term, which Dr. Bergeron is not qualified to offer.

lululemon also objects to the portions of Exhibit 2008 not discussed or cited in the Patent Owner Response (POR) as irrelevant. In particular, Nike did not cite or discuss at least paragraphs 1-12, 17-19, 32-39, 44, 53-64, 70, 72-73, 83, 87, 92, 101-102, and 114 of Dr. Bergeron’s declaration in its POR.

**B. Exhibit 2009 (Caspersen)**

lululemon objects to Exhibit 2009 as irrelevant and unduly prejudicial. *See* Fed. R. Evid. 401-403. Nike has not established that POSITA would have looked to Exhibit 2009 for a definition of “a level of physical fitness” as of the ’413 patent’s critical date. lululemon further objects to Exhibit 2009 as hearsay because Nike relies on it for the truth of its contents, namely, its discussion of “physical fitness.” (*See, e.g.*, POR at 25-26; Ex. 2008, ¶ 24.) Fed. R. Evid. 802. lululemon further objects that Nike has not authenticated Exhibit 2009. *See* Fed. R. Evid. 901.

**C. Exhibit 2010 (Surgeon General)**

lululemon objects to Exhibit 2010 as irrelevant and unduly prejudicial. *See* Fed. R. Evid. 401-403. Nike has not established that POSITA would have looked to Exhibit 2010 to understand the meaning of “a level of physical fitness” as of the ’413 patent’s critical date. lululemon further objects to Exhibit 2010 as hearsay because Nike relies on it for the truth of its contents, namely, its discussion of “physical fitness.” (*See, e.g.*, POR at 26-27; Ex. 2008, ¶ 25.) Fed. R. Evid. 802. lululemon further objects that Nike has not authenticated Exhibit 2010. *See* Fed. R. Evid. 901.

**D. Exhibit 2011 (McArdle)**

lululemon objects to Exhibit 2011 as irrelevant and unduly prejudicial. *See* Fed. R. Evid. 401-403. Nike has not established that POSITA would have looked

to Exhibit 2011 to understand the meaning of “a level of physical fitness” as of the ’413 patent’s critical date. Further, although the textbook allegedly excerpted in Exhibit 2011 spans over 800 pages, Exhibit 2011 itself only reproduces a few excerpts from that textbook in one or two-page increments. Considering those excerpts in isolation would unfairly prejudice lululemon because the surrounding pages may include important, contextual clues to which a POSITA would have looked when interpreting them. For the same reason, lululemon also objects that Exhibit 2011 is not complete. Fed. R. Evid. 106. lululemon further objects to Exhibit 2011 as hearsay because Nike relies on it for the truth of its contents, namely, its discussion of “physical fitness.” (*See, e.g.*, POR at 27; Ex. 2008, ¶¶ 20, 23, 25, 67, 84.) Fed. R. Evid. 802. lululemon further objects that Nike has not authenticated Exhibit 2011. *See* Fed. R. Evid. 901.

**E. Exhibit 2012 (Deposition Transcript of Dr. Kevin Lynch)**

lululemon objects to Exhibit 2012 for the reasons stated on the record during the deposition.

IPR2023-00438

Dated: October 17, 2023

Respectfully submitted,

By: /Forrest McClellen/

Forrest McClellen

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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: October 17, 2023

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