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Paper 31
Entered: February 25, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON USA, INC.,
Petitioner,

v.

NIKE, INC.,
Patent Owner.

IPR2023-01460
Patent 9,730,484 B2

Record of Oral Hearing
Held: December 16, 2024

Before JOSIAH C. COCKS, CARL M. DeFRANCO, and GEORGE R. HOSKINS, *Administrative Patent Judges*.

APPEARANCES:

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The above-entitled matter came on for hearing on Monday, December 16, 2024, commencing at 1:30 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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JUDGE COCKS: All right. Good afternoon and welcome to the Board. We're here today for oral argument in proceeding IPR2023-01460 involving Patent Number 9,730,484. I am Judge Cocks and I am joined remotely today by Judges DeFranco and Hoskins.

Let's begin with introduction of counsel. Counsel for -- actually, counsel for Petitioner, would you please state your appearance today?

MR. RAZAI: Good afternoon. Ali Razai from Knobbe Martens on behalf of the Petitioner. With me is my partner, Jacob Peterson, also from Knobbe Martens.

JUDGE COCKS: Thank you, Mr. Razai. And would counsel for Patent Owner please state their appearance today?

MR. HARRIS: Yeah. Thank you, Your Honor. Good afternoon. I'm Michael Harris for Patent Owner Nike, Inc. And with me is Lindsey Staubach. Also Nike's in-house attorney regrettably could not be here today, but she is listening on the remote link. Her name is Kim Van Voorhis. Thank you.

JUDGE COCKS: Thank you. Now, as we set forth in the trial hearing order, each side has 60 minutes of argument time. Petitioner bears the burden of showing unpatentability and will argue their case first. You may reserve rebuttal time. Patent Owner will then argue their opposition and may reserve surrebuttal time.

One reminder is that the Panel has the parties' demonstratives. But for the benefit of my colleagues, if they could please refer to the slide number of each slide deck so that we also have a clear transcript.

With that being said, Mr. Razai, if you're ready, you may proceed.

MR. RAZAI: Your Honor, can we use this HDMI cable for the demonstratives?

JUDGE COCKS: Yes, please. Thank you. Whenever you're ready.

MR. RAZAI: There's just -- the slides aren't showing up. That's why I was pausing.

JUDGE COCKS: And do you wish to reserve rebuttal time?

MR. RAZAI: Twenty minutes, Your Honor.

JUDGE COCKS: Twenty minutes. Are we having technical difficulties?

MR. RAZAI: I can plug it here. It was working on this HDMI cable, Your Honor. May just be that it's not working at the HDMIs on the desks. Would you like me to move it over here? I can.

JUDGE COCKS: It's up to you. Whatever you feel more comfortable with.

MR. RAZAI: Whatever's best. It's probably better here, but if it's not working, then I'll just do it over here. Easy works.

JUDGE COCKS: We do not seem to have a technical support at the moment. Hopefully they will stop by.

MR. RAZAI: I know this was working, so this is fine as soon as it starts. There we go.

Good afternoon, Your Honors. Again, I'm Ali Razai from Knobbe Martens. I'm presenting on behalf of the Petitioner lululemon. With me Mr. Peterson is going to be taking the portions of the arguments that have to do with the loop limitations. We would like to reserve 20 minutes collectively for rebuttal.

Starting with slide 2, this is showing a figure from the '484 patent. The '484 patent, as you guys are fully aware by now, disclose flat-knitted uppers of footwear to a final desired shape to avoid cutting steps. Now, the patent also discloses forming three-dimensional shapes, for example, as seen here in figure 10A on slide 2. Now, here you can see a domed three-dimensional portion which is over the vamp or the toe region. And it's meant to extend over the foot of a wearer and it's flanked on both sides with a first side portion and a second side portion. Now, although the '484 patent discloses these 3D structures, it doesn't really teach how to make them and it kind of leaves it to the skilled artisan to practice their disclosure.

Slide 3 shows the claim. And as you can see, the portion that really isn't in dispute here is the flat-knitted element, including a first layer having a central portion having a domed, three-dimensional structure configured for extending over the top of the foot.

Now, lululemon had originally had additional grounds in its original petition, grounds 1 and 2. And that was based on what we understood with a claim construction that Nike was setting forth and it was an alternative. And eventually Nike agreed to the position that we had on claim construction. And as a result, grounds 1 and 2 have been dropped and we're starting with ground 3 in this petition.

Ground 3 is based on a combination of *Dua, Lockwood*, and *Hong*. And as we can go --

JUDGE COCKS: Counsel, let me stop you just so I understand. So when you say they've been dropped, are you withdrawing those two grounds?

MR. RAZAI: We are withdrawing those two grounds. We're not proceeding under those true grounds, Your Honor. And that's because of the claim construction agreement that the parties had in district court. It wouldn't make sense under that particular claim construction that we agreed to.

So going to slide 4, this shows *Dua* and *Lockwood*. And when it comes to *Dua*, for example, *Dua* is a patent that was published in 2005 and it's one of Nike's own patents and it discloses flat-knitted footwear, various layers of flat-knitted footwear to impart different properties by varying the yarn, the stitch type, or a combination thereof. So it gives different properties to the actual upper itself, which is then eventually assembled into a shoe by putting it with a sole.

As we can see in figure 8, which is reproduced here on the slide from *Dua*, *Dua* discloses a flat-knitting of footwear upper that has a central portion. As you can see, it's marked right in that middle. It's got a flanking first side portion and a flanking second side portion. Now what *Dua* doesn't show is a three-dimensional domed upper over the vamp region, over the foot region.

But going to *Lockwood*, *Lockwood* is a reference that issued -- is a patent that issued in 1972 and it teaches making a footwear upper with a domed three-dimensional vamp cone portion. Sort of the exact reasons that are taught in the '484 patent. Basically, it's a three-dimensional structure over the foot that extends over the foot in the upper itself and it's on a plane that's higher than the plane of the first flanking structure and the second flanking structure on the left and on the right.

Now, we're going to discuss *Hong* in more detail in a minute, but *Hong* is an article that published in 1994, and as stated in the introduction of *Hong* on page 1, this is a quote from *Hong*, "This work describes the use of the new flat knitting machines to knit 3D structures by using different techniques in the Shima Seiki SES 122FF flat knitting machine." Again, it bears repeating, "This work describes flat knitting machines to knit 3D structures." That's what the -- it says this work is directed to complete.

Now, we don't believe that motivation to combine is a dispute. There were some arguments in the reply in the POR about the motivation to combine on grounds 1 and 2. They were not repeated for grounds 3 and 4. But just to recap, to make sure that everyone's on the same page and not miss anything, the prior art itself confirms the motivation to combine these references to create this three-dimensional structure. And the majority of our motivation to combine grounds are set forth in the petition pages 41 to 42, and I'll repeat some of them here. *Lockwood*, it explains that forming an upper with a domed three-dimensional structure of the vamp, it simplifies assembly of the upper and it avoids waste and additional cutting as well. Now, *Lockwood* says that at column 1, lines 60 to 64; column 6, lines 40 to 45; and column 7, lines 21 to 37.

Hong teaches that "knitting directly the 3D shapes can overcome fabric waste and diminish the labor cost inherent to the use of two-dimensional fabrics." Now, that's -- again, we'll get back to this quote in a second. This is a quote that I just read from *Hong*. And what's interesting here, it says knitting directly the 3D fabric, so first of all, it's talking about directly knitting 3D. And then it distinguishes it by saying that it reduces the fabric waste and labor cost that's inherent to the use of two-dimensional

fabrics. So if it was knitting two-dimensional fabrics, there's no reason to distinguish why it's such a great advancement over the knitting of two-dimensional fabrics. Whether it's knit to shape or whether it's cut-and-sew, it doesn't distinguish that.

Now, a skilled artisan would have been motivated to include a domed three-dimensional vamp in the central portion of *Dua* to simplify the assembly of uppers by pre-shaping them.

Going to slide 7, here we see *Hong*. The dispute here centers on whether *Hong* discloses knitting three-dimensional fabrics, and we believe it unequivocally does. *Hong* is titled, "The Development of 3D-Shaped Knitted Fabrics for Technical Purposes on a Flat Knitting Machine." And it expressly discloses, and this is a quote that we'll see, "knitting directly the three-dimensional shapes again can overcome fabric waste and diminish the labor cost inherent to the use of two-dimensional fabrics."

Now, I don't want the Board to think that this is the only quote that I have. This is a very important quote, but we're going to get some more quotes from *Hong* in a minute that, again, reaffirm over and over again that the entirety of the reference is to knitting three-dimensional fabrics.

Figure 7 also shows a flat knit three-dimensional dome, which you see in the bottom figure. That's figure 7 from *Hong*. As Dr. Brookstein said in his declaration, and this is at Exhibit 1002, paragraph 89, "*Hong* describes that a three-dimensional concept," which is on the left, that's that half dome that we see on the left with the arcs, "may be envisioned as a two-dimensional pattern," which we see in the middle, "which is used by an electronic controlled flat knitting machine to produce a knitted three-dimensional fabric." So basically what he's saying is that you take a concept

and then you have to make a two-dimensional pattern because that's what's used to program the machine and then you use the machine to knit a three-dimensional fabric.

Now, Nike and this expert, they destroy the teachings of *Hong* and what they claim -- and they try to rewrite the reference. And here's a quote from Nike, "*Hong* merely discloses a process for knitting two-dimensional patterns that are later assembled into three-dimensional structures." But Nike and its expert's interpretation are inconsistent with the expressed teachings of *Hong*. So let's go to some of the portions of *Hong* that basically say that the two-dimensional pattern is used to program the -- it's used to program the needles and courses that will knit the three-dimensional structure. That's the purpose of the two-dimensional patterns.

On page 3, this is a quote from *Hong*, "The main technique consists in transferring the three-dimensional form to a two-dimensional pattern because the fashioning operation (increasing or decreasing the number of knitting needles) is only determined according to two-dimensional patterns. The three-dimensional shape knitted fabrics presented in this work are all knitted by this technique." Basically he's saying you need the two-dimensional pattern to program the machine and then you knit a three-dimensional fabric.

On page 4, when talking about this particular figure 7 *Hong* says it is not difficult to knit a spherical form in the SES 122FF flat knitting machine. Now, this is the part that's key. To knit a spherical form with a radius R, it is necessary to start by transferring the three-dimensional concept to a two-dimensional pattern as shown in figure 7. That's the middle figure. And then -- and then -- establishing the number of operating needles and the

number of knitted courses as follows, and it has a formula on the bottom. If you're knitting a two-dimensional pattern, why are you then programming the Shima Seiki machine to then knit a three-dimensional pattern? The two-dimensional pattern is only meant to program the machine to output a three-dimensional structure. Now, *Hong* expressly teaches using a two-dimensional pattern because that's what the Shima Seiki machine reads to program the needles and courses to then knit the three-dimensional structure.

JUDGE COCKS: So, Counsel, just to be clear, in every case in *Hong*, a 2D pattern is required?

MR. RAZAI: In every -- because that's what the machine requires to output a three-dimensional structure, Your Honor. But, yes, you need a two-dimensional pattern to program the machine, to program the needles and courses that then output a three-dimensional knitted textile. Again, there's nothing in *Hong* that ever talks about post processing. It's all about knitting the three-dimensional structure.

Going to slide 8, Nike's argument here that we see at the PTAB is tailor made for this proceeding. When it was prosecuting the European counterpart of the '484 patent, it understood that *Hong* teaches flattening a three-dimensional structure. So in the European Patent Office, the Examiner rejected the counterpart and it said, "The application does not meet the requirements of Article 83 and 84 EPC because claim 1 is not clear to such an extent that it cannot be carried out by a skilled person." Now, if we're wondering what was being rejected as enablement, let's read the rest of this particular rejection.

"The subject matter of claim 1 discloses an upper comprising a central portion, wherein the central portion has 'a domed shape formed

through the flat knitting process such that the central portion has a three-dimensional structure'; the present subject matter is only disclosed at paragraphs 54 and 55 of the description, wherein nothing is described nor disclosed nor explained on how a domed three-dimensional knitting elements could be manufactured through a flat-knitting process. It is clear to any skilled person that the present subject matter lacks essential information on how such an effect (domed portion) could be achieved."

This is talking about the same disclosure that's before Your Honors today. And what did Nike do? Nike pointed squarely at *Hong* and said, "There are numerous prior art documents which disclose that achieving three-dimensional knitted textiles may generally be obtained through flat knitting." For example, *Hong*, that's the title of the reference that's before you, "The Development of 3D-Shaped Knitted Fabrics for Technical Purposes on a Flat Knitting Machine." *Hong, et al.,* with the citation.

JUDGE COCKS: Counsel, as you go forward, can we take one step back and what is absent from *Lockwood* that you're relying on *Hong* as well?

MR. RAZAI: What we're relying on *Hong* for is the flat knitting of a three-dimensional textile with the three-dimensional shape. So it's more -- the thing that's really -- it's not an absence of an idea or the concept. That's a great question, you, Honor. It's showing that within the scale of the art there was the ability to use *Dua* and make a three-dimensional knit where the vamp has that shape. But with respect to *Dua* and *Lockwood* together, they teach all the features that we're talking about here. *Hong* is meant to solely show that that a skilled artisan in 2006 was able to take *Dua* and make a flat-knitted upper that had a domed three-dimensional shape that extends above the planar first and side -- second side portions.

JUDGE COCKS: Okay. Thank you.

MR. RAZAI: So slide 13 actually addresses exactly what Your Honor was asking. So here *Dua* and *Lockwood* together have all the features of the '484 path. They disclose making a flat-knitted upper multilayer in *Dua* with the domed three-dimensional vamp flanked by first side and second side portions.

And then when we get to *Hong*, *Hong* teaches how to knit a domed three-dimensional structure. *Hong* is focused entirely on describing three-dimensional knitting. Specifically, *Hong* describes the Shima Seiki machine which was new in 1994 and capable of knitting three-dimensional structures now. Now, even Nike's expert can't bring himself to disagree that these machines could knit three-dimensional structures in the 1990s and definitely by 2006 as of the filing date of the '484 patent.

Instead, this is what Nike argues. This is from the surreply page 4. "The question is not whether knitting machines that predate the '484 patent had the capability to knit three-dimensional structures. The question is whether those machines were actually being used in that way prior to the priority date of the '484 pattern." As an initial matter, that is not the question. The question is would a skilled artisan be motivated to combine *Lockwood* and *Dua* and would they have the ability to create it? Those answers are all yes. But to Nike's point, if that were the standard, there are -- there is evidence that those machines were being used that way. *Hong* has ample evidence that they were being used that way. They just don't believe it.

Go on to slide 16. Nike argues that *Hong*'s discussion of these methods only reaffirms the true nature of *Hong*'s claimed invention:

methods of knitting precisely shaped, two-dimensional pattern pieces that can later be formed into three-dimensional structures. But Nike's argument ignores the entire purpose of *Hong* and its disclosure of knitting directly the 3D shapes which we saw a few minutes ago.

Hong repeatedly describes three-dimensional knit flat structures. The first one we've seen a couple times, knitting directly the 3D shapes. The second one, the use of the new flat knitting machines to knit three-dimensional structures. The next one, it is not difficult to knit a spherical form in the SES 122FF flat knitting machine. By exploiting the capacity of this machine it is possible to knit more types of three-dimensional knitted fabrics, and on and on. And there's a particular quote that was in the Institution Decision and was in our briefing where it says *Hong* also shows to knit a tube, like in figure 5, during knitting the two smaller tubes are separately knitted with two cam systems.

In their surreply at page 6, Nike says whoa, whoa, whoa, that's not what it says. That's not what it means. It's not a double cam. Nike suggests that this is unimpressive because what the passage actually means is that, and I quote, "two separate cam systems were used to knit the two-dimensional pattern." But *Hong* expressly even contradicts this tortured reading and it's clear that the reference is referring to a double cam system that's able to create a three-dimensional structure.

Looking on page 1 of *Hong* it describes the virtues of this machine and the advancements of the Shima Seiki SES 122FF. Here's a quote: "The double cam system has knitting and transfer facilities at each cam system in which 31 different stitch lengths can be set." Again, the double cam system. So *Hong* disclosed that this innovation, combined with the other innovations

listed below, that was the first innovation, that was the primary thing that the author of *Hong* listed as an innovation of the SES, is, "able to overcome former restrictions in knitting design and shaping, thus enabling the development of 3D knitted structures for technical purposes."

JUDGE HOSKINS: Mr. Razai, this is Judge Hoskins.

MR. RAZAI: Yes, sir.

JUDGE HOSKINS: I just want to note for the record that the quotes that you started with there were on your slide 16 so that the transcript is clear when we get one. Thank you.

MR. RAZAI: Thank you, Your Honor.

JUDGE HOSKINS: I'm sorry, slide 17. Slide 17.

MR. RAZAI: That's right, Your Honor. That's right.

JUDGE HOSKINS: Okay. Thank you.

MR. RAZAI: Thank you, Your Honor. On slide 18, Nike next argues that *Hong*'s reference to knitting to shape is limited to two-dimensional fabrics. We're not talking about three-dimensional here. But the entirety of *Hong*'s disclosure is related to three-dimensional flat-knit textiles. And even Nike's expert can't disagree that knit to shape includes two-dimensional and three-dimensional structures. In the context of *Hong*, they're talking about three-dimensional structures.

Nike then argues that certain figures of *Hong* can't be three-dimensional because they have seams. But *Hong* never discloses seams. Dr. Pastore points to things that he sees as seams. We did the same thing and said look at the '484 patent. There are seams there. Their response? The '484 patent doesn't disclose seams. I don't think *Hong* did either. But the presence of seams doesn't negate the fact that they were knit in 3D.

Going to slide 20, citing lululemon's expert, Nike argues that the benefits recited in *Hong* overcoming fabric waste and diminishing labor cost are benefits of knitting to shape two-dimensional patterns, not three-dimensional structures. But Dr. Brookstein expressly testified that these benefits apply to directly knitting three-dimensional structures.

And I apologize to Dr. Brookstein. I keep saying "Brooksteen," and he prefers Brookstein.

Going next to slide 22. Nike then argues that Brookstein never even considered certain of *Hong*'s disclosures. But Dr. Brookstein was merely saying he didn't rely on them. He read that reference over 20 times before he formed his opinion and presented that. He, of course, considered every figure, just relied on figure 7 when providing his opinion because that's all he needed. There's a reference in Nike's slides as well, and we spoke before the hearing, that the reference says that he reviewed it two times. That slide was mistyped. It's 20 times from that transcript portion as well. He read the reference 20 times. Of course he considered it.

Going to slide 26 --

JUDGE DeFRANCO: Counsel, this is Judge DeFranco.

MR. RAZAI: Yes, sir.

JUDGE DeFRANCO: I read Dr. Brookstein's deposition testimony, and there are places where he does say that he only relies on figure 7 and he did not consider some of those other figures. Can you tell me or explain why he really focused on figure 7?

MR. RAZAI: What he was trying to -- and again, I had a conversation with him and I can explain to you from my perspective, it's not in the record, but to answer your question, Your Honor, his issue was a

difficulty conceptualizing the difference between consider and rely. And the opinions that he formed, he was citing to figure 7, not citing to the other figures. And so when it was asked, did you consider them, he, of course, considered the entirety of the reference, but the foundation of his opinions were based on figure 7. And he didn't want to say something that wasn't true in his declaration, so he was careful not to say he considered them. But what he meant was he didn't rely on them and they don't form the factual foundation of the opinions in that declaration, Your Honor.

JUDGE DeFRANCO: So which facts are missing from the other figures that are found in figure 7?

MR. RAZAI: There's no facts that are missing, Your Honor. The thing is that figure 7 gets you there because it's a domed three-dimensional structure. And he said that's all I really needed to kind of get across the fact that a skilled artisan would be able to knit a domed three-dimensional structure that extends above the plane of whatever would be two-dimensional on its sides. That was the reason he used that fact as the underpinning of it, not some of the other structures that included tubes or other things, but not that he believed that those were not knit three-dimensionally, just didn't need them in terms of supporting his opinion that *Hong* would enable the skilled artisan to knit in a three-dimensional fashion.

JUDGE DeFRANCO: Okay. That's because the claim requires a domed --

MR. RAZAI: That's exactly it, Your Honor.

JUDGE DeFRANCO: -- configuration.

MR. RAZAI: That's correct, Your Honor.

JUDGE DeFRANCO: Okay. Thank you.

MR. RAZAI: Of course, Your Honor. Now, going to slide 26, Nike then argues that there's no expectation of success because figure 7 of *Hong* does not show that a skilled artisan can knit a three-dimensional structure. This is specifically what Nike says. The fact that *Hong* says that figure 7 is "not difficult to knit," so the fact that *Hong* said that figure 7 is, -- and this is me saying it, and then the quote from their submission is, "not difficult to knit." And then next quote, "says nothing about the process for creating the figure shown in figure 7-3, let alone that the figure is formed during the knitting process." But if we look at the recitation, it says, but *Hong* states that the spherical form is knit in the SES 122FF flat knitting machine. It's knit in the machine, of course it's knit three dimensionally.

Going to slide 27. Nike argues that it would have been impossible to knit most of the fabrics shown in figures 3 to 9 of *Hong*'s working examples during the knitting process. So now they just want to discredit the reference and say it's not enabling without really making a non-enablement argument. But Nike can't even bring itself to argue that none of them were possible, just that most of them were not possible. Again, Nike's expert testified, as you can see here, that the Shima Seiki could flat knit three-dimensional structures as of the filing date of the '484 patent. Lululemon's burden --

JUDGE DeFRANCO: Counsel?

MR. RAZAI: Yes, Your Honor.

JUDGE DeFRANCO: Counsel, is *Hong* limited to knitting 3D structures, rather is this Shima Seiki machine that's disclosed in *Hong* limited to knitting 3D structures?

MR. RAZAI: No, your Honor, it is not. The Shima Seiki is able to knit three-dimensional structures and it also is able to knit two-dimensional

structures. And there's a citation from Dr. Brookstein's deposition that shows that these machines are able to do both.

JUDGE DeFRANCO: Is this the citation that you're showing now --

MR. RAZAI: No, we'll get to that in one second, Your Honor.

JUDGE DeFRANCO: -- on slide 27?

MR. RAZAI: No, we're going to get to that in a few slides. I can get there now if you prefer, Your Honor.

JUDGE DeFRANCO: Okay. Well, you can continue as long as we're going to get there.

JUDGE COCKS: Sorry, Judge DeFranco, I have one question.

MR. RAZAI: Yes.

JUDGE COCKS: So this slide 27, was it in dispute that these -- the SES 122FF machine could knit 3D structures? Was that disputed or is it still in dispute?

MR. RAZAI: I don't believe there's any such dispute. This is Dr. Pastore's deposition transcript.

JUDGE COCKS: Go ahead.

MR. RAZAI: Okay. Again, Nike's expert testified that Shima Seiki could flat knit as of the filing date. Lululemon's burden is simply to show that we have.

Slide 28, Nike also argues that it was not possible in 1994 or 2006 to output the figure shown in *Hong*. But the relevant inquiry is not the figures of *Hong*, but the domed three-dimensional structure of the '484 patent. And it absolutely can because Nike said it can.

Now let's go to slide 10, if we can. Actually, I can take care of it. I'm going to jump back to slide 10. *Hong* showed that it was possible and

this is confirmed by what's not disclosed in the '484 patent. So slide 10, there's no teaching in the '484 patent on how to knit the claim domed three-dimensional structure. Nike nor its expert point to anything that technologically sets this teaching of the '484 apart from the art.

So if we go to slide 11 --

JUDGE HOSKINS: So you're actually on slide 13 -- sorry, Counsel, but you're actually on slides 13 and 14.

MR. RAZAI: Thank you for pointing that out. I just saw that. I'm really bad at technology, so I'm really glad I'm doing knitting as opposed to actual high-tech stuff. So it lacks the disclosure of having looked at three-dimensional structures.

Go to slide 11, Nike can't demand details from *Hong* where the '484 patent relies on a POSA's knowledge for such details. Now, *In re Epstein* from the Federal Circuit is directly on point on this case. There is no better example. The Board's observation that appellant did not provide the type of detail in a specification that he now argues is necessary in prior art references supports the Board's finding that one skilled in the art would have known how to implement the features of the reference and would have concluded that the reference disclosed would have been enabled.

To your point, Judge Cocks, *Hong* probably isn't even necessary based on the lack of disclosure in this reference to show that a skilled artisan would have known how to flat knit a three-dimensional structure just using *Dua* and *Lockwood*.

Now we're going to go to slide 30. Hopefully, I can get this one right. I'm going to try really hard. All right. Go to slide 30. Nike next argues that there cannot be any expectation that the combination of ground 3

would lead to a structure with a domed three-dimensional upper and flanking flat sides. As an initial matter, *Abbott* is informative on this issue. Now, *Abbott* is a case that was cited on page 20 of lululemon's reply. There the District Court had found that -- had granted summary judgment of no invalidity based on a finding that there's no reasonable expectation of success. The Federal Circuit reversed that decision and said that the fact that the patentee's level of disclosure in his patent was so low demonstrated that it believed that the technology was within the skill in the art when it reversed the District Court's finding and sent it back to the District Court, basically saying the patentee didn't have disclosure. How can you require that level of disclosure to show expectation of success when it was clear that the lack of disclosure by the patentee showed that it was within the skill in the art? And that's *Abbott*, 452 F.3d 1331, pinpoint cite at 1341.

But more than that case, we actually have established the likelihood of success. Slide 31, the machine described in *Hong*, this is the slide that you were looking for, Judge DeFranco, it can knit two-dimensional and three-dimensional structures. And this is at transcript Exhibit 2005, page 116, lines 7 to 25. The Shima Seiki machine can knit two-dimensional and three-dimensional structures and it would not have been in any way a burden to do that.

So to sum up, *Dua* and *Hong*, teach the domed three-dimensional vamp incorporated into the central portion that actually has a plane higher than the first portion and the second side portion. We don't even need *Hong*. But *Hong* is there to show that it's within the skill in the art to have flat knit that by using *Dua*'s teachings.

If there's no questions, I'm going to turn it over to my partner, Mr. Peterson, for the loop portions.

JUDGE DeFRANCO: Counsel, I have a question. How does *Lockwood* manufacture the domed aspect shown in figure 35 of *Lockwood*?

MR. RAZAI: It's used with a mold, Your Honor. So basically it's a thermoplastic that then is molded to create the three-dimensional vamp. So it's *Lockwood* -- we're using *Lockwood* for the concept of the motivation to combine to create a preformed textile upper that has a three-dimensional vamp that would extend over the foot and the ease with which --

JUDGE DeFRANCO: Okay. *Lockwood* doesn't disclose anything about knitting that domed configuration, correct?

MR. RAZAI: No, Your Honor. That's what we're using *Dua* for, *Dua* and *Hong*.

JUDGE DeFRANCO: You're relying on both.

MR. RAZAI: Yes.

JUDGE DeFRANCO: Right. Because *Dua* doesn't say anything about 3D, does it?

MR. RAZAI: That is correct, Your Honor. But the reason why I'm saying that *Hong* may not even be necessary, but the ground is based on *Hong*, so that is there. So that is there for your consideration, Your Honor. But the fact of the matter is --

JUDGE DeFRANCO: Right.

MR. RAZAI: -- it was within the skill in the art based on a lack of disclosure in the '484 patent on how to create a three-dimensional flat knit. But *Hong* is there to show that you can knit a three-dimensional domed structure onto that flat-knitted textile upper.

JUDGE DeFRANCO: Okay. Thank you for the clarification.

MR. RAZAI: Thank you, Your Honor.

JUDGE COCKS: You have about 12 minutes remaining in your opening.

MR. RAZAI: Thank you.

MR. PETERSON: Your Honors, we'd next like to turn to the loop limitations of the claims and specifically claims 2 through 4 and 10 and 18 to 19 of the '484 patent. So claim 2 of the '484 patent is representative of the loop limitation claims. And claim 2 provides an article of footwear of claim 1 further comprising a first loop being formed as a second layer of unitary construction with the first layer. So to help understand what's meant by a first loop and what it means for that first loop to be formed as a second layer, we'll next turn to one of the three figures of the '484 patent that show the claimed domed three-dimensional structure as well as such loops.

So turning to figure 10A, which is shown on the right-hand side of slide 36, there's an annotated version of figure 10A. And in the annotations here you can see first loops as well as those first loops being designated as second layers. And also shown is a first layer. Now, there's not much detail in the '484 patent about these particular loops, but you can see what it provides on the left. There's an upper 70 that includes, among other things, eight lace loops 73. And then further down below in that paragraph, it talks about a lace may extend through those lace loops to provide adjustability.

Now, turning to the prior art, *Dua*'s upper includes lace loops. And Dr. Brookstein explained *Dua*'s figure 13 in particular shows first loops for laces. This is shown on slide 37. And as you can see here in figure 13, Dr. Brookstein has identified four first loops and that those first loops comprise -

- or are formed of a second layer rather. And then shown as well is a first layer.

Now, turning to paragraph 37 of *Dua*, and this is a quote --

JUDGE DeFRANCO: So Mr. Peterson, let me understand. So you're relying solely on Brookstein's testimony that *Dua* discloses lace loops, correct? Because there's nothing in *Dua*, in the description, that discloses lace loops, right?

MR. PETERSON: Yeah, it does not use the explicit terminology "lace loops," but it discloses lacing systems, laces, and then illustrates here what a POSITA would understand to be laces and lace loops.

JUDGE DeFRANCO: Got it.

MR. PETERSON: So *Dua* in --

JUDGE HOSKINS: Mr. Peterson? Sorry.

MR. PETERSON: Oh, sure.

JUDGE HOSKINS: Before we let you move on, I just want some clarification on first and second layers because this is a unitary construction. And so I'm trying to kind of think of those two things at the same time. Is it a second layer simply because it extends out from what is otherwise the side of the shoe, so as long as we have a loop somewhere, we're going to have a second layer? Or is it that on the side of the shoe there are actually two layers that form the sidewall of the shoe and that one of those two layers is then extended out to form the loop?

MR. PETERSON: I believe Your Honor is correct, that it's simply the loops themselves are a layer distinct from the first layer and that's where the terminology of second layer comes in. And that the second layer is

integrated through the flattening process to create a combined unitary element.

JUDGE HOSKINS: So my first kind of -- I gave you two alternatives.

MR. PETERSON: Yeah.

JUDGE HOSKINS: You're agreeing with the first of the two alternatives, is that right?

MR. PETERSON: I believe so. Could you remind me again the second alternative?

JUDGE HOSKINS: Well, the second one, which I think you're saying is not correct, but the second one was when we're talking about two layers. So the wall of the shoe that I see here in figure 13 of *Dua*, it could -- those -- that two layers that we see in the claims could mean that that wall of the shoe has two layers and that one of those two layers then gets extended to form the loops that we see. And I think what you were saying is, no, you don't really need that to satisfy these claims. Really all that you need are these things that you can point to and say here are the loops, and the loops themselves are the second layer.

MR. PETERSON: That's my understanding as well, Your Honor. Yes.

JUDGE HOSKINS: Okay. Thank you.

MR. PETERSON: All right. So looking to *Dua*'s paragraph 37. Now, this is a quote from *Dua*. "Upper 30 is at least partially formed from textile element 40, which forms regions 31 to 35 and may also include laces or other elements associated with conventional upper for footwear. Textile element 40 is a single material element that is formed to exhibit a unitary,

that is one-piece construction." Now, these disclosures together show that *Dua* described a single material element with regions for laces.

Now, Nike's arguments point to *Dua*'s figure 12, attempting to negate this disclosure. But figure 12 is an alternative embodiment and does not limit *Dua*'s other embodiments. And Nike also cites to Dr. Brookstein's deposition testimony for the proposition that *Dua* does not support the loop limitations. But Nike's arguments miss the mark here. These portions of *Dua* indeed support that, one, *Dua* discloses loops for laces and, two, that an integrated -- too, that integrating upper components in a flat-knit, unitary upper material was also not new.

So turning to slide 38 --

JUDGE COCKS: So, Counsel, before you do that --

JUDGE DeFRANCO: So, Counsel, just going back to that paragraph 37 in *Dua*. So that first sentence that you pointed to says, "including laces or other elements associated with conventional upper." So it's the other elements that you're thinking or that you're contending implies loops, lace loops?

MR. PETERSON: Yes, yes. Among other disclosures in *Dua*, yes, that covers --

JUDGE DeFRANCO: In conjunction -- reading that in conjunction with figure 13.

MR. PETERSON: Correct, Your Honor.

JUDGE COCKS: Counsel, does that reading suggest then that paragraph 37 is saying the laces are also part of a unitary structure? So laces, the lace loops, and the upper are all a unitary structure?

MR. PETERSON: No, it does not in that I think the point that you're getting at is that might not make sense. And what I would point to here actually on this next slide, paragraph 36 -- or actually, let me see, slide 38. So *Dua* actually explains why such an integration and single unitary material is desirable. And it's with this in mind that we can read paragraph 37 and understand what paragraph 37 is referring to. In particular, here *Dua* discloses that by forming a textile element to be a single unitary element of material, efficiency is increased relative to having numerous joined elements. So to the extent that that laces were joined and that made the upper nonfunctional, that wouldn't make sense. But to the extent that, as *Dua* was talking about here, conventional uppers include elements that are stitched or adhesively joined, that is described to be, and known to be, undesirable given it impacts adversely on efficiency.

JUDGE DeFRANCO: So let me clarify. So the lace loops are part of the textile element that are -- that's formed by a unitary construction as opposed to the laces themselves?

MR. PETERSON: Yes. Yes, Your Honor.

JUDGE DeFRANCO: That's your contention?

MR. PETERSON: Yes. And turning to slide 39, considering these disclosures from *Dua* further in combination with *Hong*, Dr. Brookstein explained that a POSA would have understood that flat knitting machines like those in *Hong* could desirably create integrated loops such as loops for laces and that permit the creation of fully fashioned uppers with integrated lace loops like those illustrated in *Dua*. So it's the combination of these disclosures together, I think, paints a clear picture of the motivation to

integrate them and that this was all feasible using knitting technology disclosed in *Hong*.

JUDGE DeFRANCO: But, Counsel, Mr. Peterson, here's my trouble with that contention or with Petitioner's reliance on *Hong*. You know, I read through some of the deposition testimony and it seems like Dr. Brookstein conceded that he's not relying upon *Hong* for purposes of the lace loop limitations of the claims. He seemed to have excluded *Hong*. And I think -- well, Patent Owner does make that argument maybe in their surreply. And I was a little skeptical of their argument until I actually did read through Dr. Brookstein's deposition testimony. He does seem to support Patent Owner's argument in that regard.

MR. PETERSON: Yeah. But, Your Honor, you see paragraph cite for the analysis for claim 2 in Dr. Brookstein's deposition. But see, I think during deposition, he, like Mr. Razai discussed earlier, was having trouble with discerning distinctions between the underlying basis and support for what was loops in *Hong* and what was knitting in *Hong*. And I think that point was what left the deposition testimony less clear than his deposition testimony in his declaration that was filed.

JUDGE DeFRANCO: Let me ask you, can you -- would you still prevail on these lace loop limitations if it was just *Dua* and *Lockwood*?

MR. PETERSON: *Dua* and *Lockwood* without *Hong?*

JUDGE DeFRANCO: Yes.

MR. PETERSON: Yes, yes. I think consistent also with the *In re Epstein* discussion and the *Abbott* discussion that Mr. Razai presented before. If you read the '484 patent, much like the claimed dome structure, there's scant detail about how the lace loops are even manufactured. So I

think, again, Nike is relying on one of skill's ability to know how to knit such lace loops. And as you've seen here, lace loops are not new and knitting three-dimensional structures is also not new. And the motivation to do so, as described in *Dua*, to integrate upper components to improve efficiency was also known.

JUDGE DeFRANCO: Okay. And it's your position that this newest disclosure of other elements means lace loops and that's part of that textile element for you that's --

MR. PETERSON: Yes.

JUDGE DeFRANCO: -- developed as part of a unitary construction?

MR. PETERSON: Yes. Yes, Your Honor.

JUDGE DeFRANCO: Okay. Thank you.

JUDGE COCKS: Counsel, where does *Dua* talk about efficiency, you've mentioned it, which paragraph?

MR. PETERSON: Yeah, it was this one here on the bottom of slide 38.

JUDGE COCKS: Sixty.

MR. PETERSON: Paragraph 60. And it contrasts in particular conventional uppers. So, for example, Nike and some of Nike's arguments point to figure 12, which is express about including some components of conventional uppers. So we would say it's other disclosures within *Dua*, including paragraph 60, that would be the understanding that what is described in figure 12 is not consistent with the full benefits that *Dua* teaches.

JUDGE COCKS: Counsel, you're into your rebuttal time.

MR. PETERSON: Okay. Thank you. We'll next turn to ground 4, unless there are any additional questions about ground 3.

All right. So ground 4 adds *Voughlohn* to the combination of ground 3. And *Voughlohn* discloses integrating lace loops in its upper. And we're beginning on slide 41 here. And *Voughlohn* discloses lace receivers and terms them as fabric rings 103, 104, 105; describes them as being attached to or integrated into the footwear, and describes in various places. And this is illustrated in *Voughlohn*'s, figure 10 where it shows loops 103, where 104, and 105.

So with respect to the combination, Dr. Brookstein explained that a POSA would have been motivated to incorporate *Voughlohn*'s fabric rings in an upper like *Dua*'s for many reasons, including to realize benefits described in *Voughlohn*. And this is from *Voughlohn*, "a convenient, safe, aesthetic system which could fasten footwear quickly, easily, and is affordable, compact, and simple." And "the combination would have involved no more than integrating a known structure," that is loops for laces, "in an upper like *Dua*'s for a readily understood benefit to a POSA, such as permitting the creation of fully fashioned uppers with integrated lace loops like those illustrated in *Dua*."

And unless Your Honors have any further questions, we'll reserve the remaining of our time for rebuttal.

JUDGE COCKS: I don't think we have any further questions. Thank you.

JUDGE DeFRANCO: Counsel, I have one question. Does *Voughlohn* disclose anything or teach anything about how the lace loops are created, those lace rings?

MR. PETERSON: *Lockwood*? I don't believe so, you, Honor.

JUDGE DeFRANCO: No, I'm sorry, *Voughlohn*.

MR. PETERSON: Oh, Voughlohn. Oh, yes. It talks about the fabric rings are sewn and attached. I don't know that it goes into much additional detail.

So, to your point, one of Nike's arguments is further that *Voughlohn* does not disclose flat knitting those lace loops and then does not disclose integrating through flat knitting those lace loops into the upper. But our reliance on *Voughlohn* here is not about a bodily incorporation of those lace loops. The petition showed in paper pages 75 to 76, that a POSA would have been motivated to incorporate those rings from Voughlohn into *Dua*'s upper, and that also that *Dua* specifically discloses that its upper components are desirably formed of a flat-knit unitary construction.

Any additional questions, Your Honor?

JUDGE DeFRANCO: It's your position that the lace loops are a necessary component of an upper and, therefore, would have been manufactured with lace loops.

MR. PETERSON: They were a known structure.

JUDGE DeFRANCO: *Dua*'s --

MR. PETERSON: Yeah.

JUDGE DeFRANCO: That *Dua*'s upper would have been manufactured with lace loops because it's a necessary component of any upper that's used --

MR. PETERSON: In at least some embodiments, yes.

JUDGE DeFRANCO: Okay.

JUDGE COCKS: All right, Counsel. We asked some questions, but you'll have 18 minutes of rebuttal time.

Mr. Harris, whenever you're ready. Do you wish to reserve any surrebuttal time?

MR. HARRIS: Yeah, thank you, Your Honor. I'll reserve 15 minutes.

Thank you, Your Honors. Again, this is Michael Harris for Patent Owner Nike. I'm going to address two -- what we believe are two fundamental flaws and lack of proof or evidence in lululemon's case. And I think that lululemon knows that these are weak spots. They glossed over them today. In fact, I'll get into the details. But on the first one, the only thing we heard, and I was listening very closely, the only thing we heard was, "I don't think *Hong* discloses seams." And I'm going to explain why this is important. I'm going to walk through all the undisputed record evidence on why that's important.

And that's the only thing we heard from Opposing Counsel is, "I don't think *Hong* discloses seams." Eighteen years after the priority date of the '484 patent the only thing that lululemon has on this point is attorney argument from a non-skilled artisan about whether he thinks *Hong* discloses seams. You're going to see there's no evidence, no record evidence from their expert on this point.

Okay. So two issues, and I'm going to come back to that and explain why that's important, but two issues. The first is whether *Hong* teaches or discloses knitting a 3D fabric during the knitting process. That's issue number one. Issue number two is even if we assume that *Hong* teaches that knitting a 3D fabric during the knitting process, even if we assume that, has

lululemon come forward with evidence to show that a skilled artisan would have combined *Hong*, *Dua*, and *Lockwood*, how they would have combined those, why they would have combined them with some reasonable expectation of success? Those are the two issues I want to focus on.

So the first issue --

JUDGE COCKS: Counsel?

MR. HARRIS: Yes.

JUDGE COCKS: Mr. Harris, let me just to clarify, I think your Opposing Counsel said that motivation to combine was not at issue. It sounds like it very much is. Is that --

MR. HARRIS: Well, I think our argument is lululemon has not shown how a skilled artisan would combine these three very different references in any type of way that would result in the claimed limitation with reasonable expectation of success. That's our argument. And that is very much has been our argument in our briefing. I can point you to the briefing pages if we need that.

But okay, the issue is what does *Hong* disclose? Does it teach knitting a 3D fabric during the knitting process? And just to frame the issue, Judge Cocks, I think you asked if there's a dispute about whether *Hong* teaches knitting a 3D element. Just to be clear, there's no dispute. We agree that the end result of what *Hong* teaches is a three-dimensional fabric. The dispute is around whether that -- the three-dimensional nature of that fabric is created during the knitting process or post knitting process with additional steps.

Hong is a 1994 reference, six pages, that is describing the Shima, a company out of Japan, the Shima flat knitting machine. And most of *Hong*

is directed to what *Hong* calls its working examples. There are seven working examples. And I'm on slide -- Nike slide 20 now.

Hong tells us the knitting technique that is used to make all of the working samples that are disclosed in *Hong*. And I think my colleague across the aisle agreed that all of the working samples, all the disclosure in *Hong*, it's all knitted according to the same technique. And the technique that *Hong* describes is you have a three-dimensional -- a theoretical three-dimensional shape. You transfer that or translate it to a two-dimensional pattern. And then, and this is where the dispute is, what happens at that point is that two-dimensional pattern knitted with 3D structure during the knitting process or after. Right?

We cited this portion of *Hong* in our preliminary response, and Your Honors noted it and said, you know, we don't really read *Hong* that way. We think that portion of *Hong* says that you take the 2D -- or you take the 3D theoretical concept, translate it into a 2D pattern, and then the machine creates a 3D structure. This is on pages 8 and 9 of your Institution Decision. And on page 9 of your Institution Decision, you said, you know, here's why we think that way. And the parties are free to explore this issue, these issues during trial. And Nike did explore that issue; lululemon ignored that issue.

So how did Nike explore this issue? Well, you know, we asked our expert, the technical expert, Dr. Pastore, we asked him, how would a skilled artisan take the technique that is disclosed in *Hong* and create a 3D structure from that 2D pattern using the flat knitting machine during the knitting process? And what did Dr. Pastore testify to? What did he say? He said it's impossible, it could not be done. Why? Well, he pointed us to figure -- the

working example in figure 3. And this is what *Hong* refers to as its knee example. It's a knee covering.

JUDGE COCKS: Mr. Harris, when you said something's impossible, just what exactly you're saying is impossible?

MR. HARRIS: Yeah. That's -- yeah, so it's impossible to create the 3D knee structure shown in figure 3 on the flat knitting machine -- the Shima flat knitting machine that's described in *Hong*. It's impossible and here's why. This is what Dr. Pastore testified to. This is the record evidence. It's actually unrebutted record evidence. It is impossible to make that 3D structure.

And if you look at slide 22, Your Honor, Nike's slide 22, the 3D knitted fabric of this working example is shown on the far right there. This is the knee structure. It's impossible to create that during the knitting process on the knitting machine because the sides that are labeled in this figure 3, the sides that are labeled H and the sides that are labeled G have to be joined and seamed to create the 3D fabric, the 3D knitted fabric. They have to be -- they have to physically be joined together and seamed and it is -- Dr. Pastore says it is impossible to do that on a flat knitting machine.

So this 3D fabric that's shown in figure 3, the only way, according to Dr. Pastore's unrebutted testimony, the only way that can be created is by knitting the 2D pattern, removing the 2D pattern, joining sides H and H and side G and G, and knitting or stitching them together to create those seams.

JUDGE COCKS: So this is going to be --

JUDGE DeFRANCO: Counsel -- go ahead, Judge Cocks.

JUDGE COCKS: This is going to be an unsurprising question, but how is it done in the '484 patent?

MR. HARRIS: Yeah. So you have to keep in mind that the '484 patent and *Hong* are, what, 12 years apart. Right? So -- and the '484 patent is not limited to or even necessarily, you know, directed to the Shima flat knitting machine of 1994. So I don't, as I stand here right now, I don't know -- I don't believe there's any record evidence on how a fabric that practices the '484 patent, would be knitted on the 1994 Shima machine.

JUDGE COCKS: So just to clarify, I think Opposing Counsel, when I asked the question about whether that machine -- whether it was in dispute about producing a 3D structure, it seemed to be the case that the answer was no. But is it actually yes, that that particular machine wouldn't be able to create a structure, I guess, according to the claims of the '484 patent?

MR. HARRIS: Well, I think that 1994 machine, you can create a 3D structure with it. You just can't create it during the knitting process as it's disclosed in *Hong*. So what you could do is exactly what *Hong* discloses, which is you have a theoretical 3D form, you translate it into a 2D pattern, you knit the pattern to shape. It was talking about knitting it to shape. You remove the pattern and then form it, fold it, seam it, and you have your 3D fabric. So you can use *Hong* to create a 3D fabric. It's just the *Hong* disclosure doesn't teach creating the 3D dimension, that three dimension, in the knitting process itself. Dr. Pastore says it's impossible.

Now, if it was possible to do that, to use the *Hong* disclosure, what's disclosed in *Hong*, to create that 3D nature during the knitting process, Dr. Brookstein had an opportunity to respond to Dr. Pastore and say, no, you're wrong. Here's how you would do this. Here's how you would do it. He didn't. He didn't respond.

In fact, we asked him, well, did you even consider the knee structure that's disclosed in *Hong*? How would a skilled artisan create that? How would a skilled artisan and join those scenes? What did Dr. Brookstein say? This is Exhibit 2005, page 100. This is Dr. Brookstein's testimony when he was asked about this seam issue and this portion of *Hong*. He said, "I haven't looked at the knee structural. I was only looking at the spherical structure."

Question, "You never looked at the knee structure?"

Answer, "No."

Now, Judge DeFranco, I think you asked about some of the inconsistencies in Dr. Brookstein's testimony, and I think we heard a couple times from lululemon's counsel that he was having a hard time discerning distinctions between reviewing or analyzing or considering or relying. It doesn't really matter because the reality is, the truth is there is no record evidence, none, no opinion from Dr. Brookstein on Dr. Pastore's opinion that it would be impossible to make the 3D structure during the knitting process because you have to form those seams. None. Whether he considered these other figures or not, what we do know is that Dr. Brookstein has not testified on how a skilled artisan would have used *Hong* to form those seams during the knitting process.

JUDGE DeFRANCO: Mr. Harris, I disagree. Dr. Brookstein testified at length about *Hong*'s disclosure of how this would be done. And my recollection, and Petitioner can certainly clarify, my recollection is that Dr. Brookstein pointed to pages 1 and 2 of *Hong* as disclosing or teaching exactly how to knit-to-shape -- knit-to-shape in a 3D dimension as opposed to a 2D configuration.

MR. HARRIS: And I think you hit on a really important point there, Judge DeFranco. He testified that you would use *Hong* to knit-to-shape. That's exactly what he was testifying to, you're right about that. That you can use *Hong* to knit-to-shape.

JUDGE DeFRANCO: Are you saying knit-to-shape is limited to only two dimensions and not to three dimensions?

MR. HARRIS: No, no, no, no, not at all, Your Honor. I'm saying knit-to-shape is really a separate issue. Knit-to-shape is knitting a textile, a fabric that leaves the machine in a specific shape as opposed to the more conventional process, which is when the knitted fabric comes off a flat machine, it's just a giant rectangle. So instead of having a giant rectangle that comes off the machine, when you knit-to-shape, you can have a variety of different shapes. It's all two-dimensional when it comes off that flat machine described in *Hong*. But knit-to-shape is different than a three-dimensional fabric. And that's what Dr. Brookstein was testifying about is, hey, look, *Hong* discloses knit-to-shape. It's really -- you know, we're not disputing that today, but it's not the issue. The issue is *Hong* doesn't teach how you would take a knit-to-shape fabric and create that in three dimensions on the knitting machine. Dr. Pastore says, you can't do that. It would be physically impossible. And that's what Dr. Brookstein --

JUDGE DeFRANCO: Why does Dr. Pastore testify, and I think Petitioner pointed to it on slide 27, where -- I'm not sure where it's -- where Dr. Pastore confirms that the Shima Seiki machine can do knit-to-shape of three-dimensional structures?

MR. HARRIS: Well, yeah, it can. It can. That's not --

JUDGE DeFRANCO: You made that admission, right? You made that admission.

MR. HARRIS: Right, and that's not disputed. The Shima machine can create knit-to-shape and you can use that to create three-dimensional structures. But that's not the issue for this particular claim limitation. This claim limitation requires that that 3D component during the knitting process. Dr. Pastore didn't say that was possible. In fact, he said the opposite. He said that *Hong* -- you can't do that. It's impossible with the working examples shown in *Hong*.

JUDGE DeFRANCO: Well, what I'm looking at on slide 27 and Petitioner is pointing to Exhibit 1022, which is Dr. Pastore's deposition testimony on page 27, lines 11 through 15, the question is asked, so the Shima Seiki machine that has the capability to flat knit three-dimensional structures, that that machine was available in 1990. And Dr. Pastore replies, yes. So he confirms that the Shima Seiki machine is capable to flat knit three-dimensional structures. It's not talking about post knitting assembly. It's talking about to flat knit. That's my understanding of the way Dr. Pastore would have understood that question.

MR. HARRIS: Yeah, and, respectfully, we disagree, Your Honor. I think what Dr. Pastore was saying was that -- exactly what the *Hong* reference teaches. You can use that flat knitting machine disclosed in the *Hong* reference in 1994, you can use that reference to create a fabric that's ultimately 3D. He has admitted that all along. We admit that. That's what *Hong* discloses.

JUDGE DeFRANCO: Okay, you can move on. I think you have two problems though: your expert's deposition testimony, as well as your

admission during the European prosecution, because there you relied on *Hong* in order to support enablement of your own patent specification in the EPO. And now what Petitioner is doing is they're relying on your admission to show enablement of *Hong* as disclosing the knitting of 3D structures. Knitting of 3D structures, not assembly of 3D structures.

MR. HARRIS: Yeah, and I appreciate that, Your Honor, and respectfully disagree. If what Nike said in Europe, and you know, the European proceedings pursuant to different patent laws, there's really no record evidence of what all happened in that proceeding and what the impact of certain statements in Europe are under European patent law. But if lululemon is correct that what Nike said in Europe was that *Hong* discloses creating a three-dimensional fabric during the knitting process, if that's true, and we disagree with that, but if that's true, the European Patent Office never would have allowed these claims. Okay.

JUDGE DeFRANCO: I think they'd allow them based on your representation.

MR. HARRIS: But that's what I'm saying, Your Honor. If our representation was that *Hong* teaches knitting a three-dimensional element during the knitting process, the European Patent Office wouldn't have allowed the claims.

JUDGE DeFRANCO: Well, you said it was well known in the art. That's why the EPO allowed it.

MR. HARRIS: Well, Nike --

JUDGE DeFRANCO: Your representation there is that it’s very well known in the art and, therefore, somebody comes to the table -- a POSITA

comes to the table knowing that art and, therefore, that specification would have been enabling.

MR. HARRIS: Right. What Nike said in Europe, candidly, is consistent with what Dr. Pastore has said in this proceeding. Your Honor, you could use a flat knitting machine to create a fabric that was ultimately three-dimensional. There's no dispute about that.

Now --

JUDGE HOSKINS: Mr. Harris, before we move on too far away, you know, the claim shape that we require here is a dome, right? Is that the word? Domed. Domed three-dimensional shape. And so I can see -- I'm looking at the, you know, the original exhibit itself of *Hong*, and I can see kind of something that might be seams in that figure 3 for the knee shape. But what we're really concerned about here is the dome shape, which is shown in figure 7. So -- and the picture of the "knitted fabric" in figure 7 isn't all that good. It's just kind of this, you know, this black shape that we can't really see all that much about what the knitted fabric might be.

So what does your expert have to say? I understand what you said about figure 3, but how does that then necessarily translate to the other shape, the dome shape, that we see in figure 7?

MR. HARRIS: Yeah. Thank you, Judge Hoskins. That's where I was going next.

So the reason it translates is let's go back to what *Hong* says on page 3. This is Nike's slide 20. The last sentence of this portion of *Hong* that we have shown here on slide 20, *Hong* says that, "The three-dimensional knitted fabrics presented in this work," meaning all of the working examples, which

would include the sphere example, all of them are "knitted using the same technique." They're all knitted using the same technique. So if --

JUDGE HOSKINS: So if that's true, then I have to point you to one of the statements that they pointed us to that talks about -- the Petitioner pointed us to, knitting directly the 3D shapes. *Hong* says that.

MR. HARRIS: Yeah.

JUDGE HOSKINS: It says knitting directly. So if they're all knitted using the same technique, why isn't that statement telling us that that technique gives us a 3D shape without further processing?

MR. HARRIS: Right. And again, Your Honor, this goes back to knitting to shape, and we're not disputing here today that *Hong* is talking about knitting to shape, meaning knitting to --

JUDGE HOSKINS: I'm sorry, but it says knitting to 3D shape.

MR. HARRIS: Right. The shape --

JUDGE HOSKINS: It doesn't just say knitting to shape.

MR. HARRIS: Yeah, the shape that's going to be used in this 3D element, this 3D product.

JUDGE HOSKINS: Directed.

MR. HARRIS: Yeah. Whatever the end result is, whether it's the knee cover or a sphere, the end result is a three-dimensional object. But the unrebutted testimony is that you cannot on this Shima machine, in *Hong*'s disclosure, you cannot create that end ultimate 3D product on the machine itself. Unrebutted. Okay.

JUDGE DeFRANCO: Counsel, let me point you to one other aspect of *Hong*. This is on page 1 of *Hong* and it's in the second column. So it's the first quote of that paragraph in the second column of the introduction to

Hong. It says, and I quote, "This work describes the use of the new flat knitting machines to knit 3D structures by using different techniques in the Shima shape flat knitting machine." So it says "to knit 3D structures" by using that machine. How do you get out from under that disclosure?

MR. HARRIS: We get out from it by what Dr. Pastore testified to and Dr. Brookstein failed to respond to. The only way to create all of the working examples, there's one technique that's disclosed in *Hong*. One technique. One technique only applies to all the working examples. It would be impossible to create the 3D nature of that article on the machine itself.

JUDGE DeFRANCO: The problem we have is that Dr. Pastore's testimony is inconsistent with the plain, simple disclosure of *Hong*.

MR. HARRIS: Respectfully, Your Honor, we would disagree. *Hong* is saying that you can use the Shima machine to create a 3D article. We agree with that. That's what *Hong* discloses.

JUDGE DeFRANCO: It's not saying to create. It's saying to knit. That's your problem right there. The express disclosure of *Hong* is to knit a 3D structure. And this isn't the only place it says it. It says in a couple of other places, as Judge Hoskins and Judge Cocks pointed out. So, you know, you don't even need to get to Dr. Pastore's testimony, which, frankly, is inconsistent with the express disclosure of the *Hong* reference.

MR. HARRIS: Well, respectfully, Your Honor, we think you do need to.

JUDGE DeFRANCO: Is there a requirement, let me ask you, is there a requirement that we have to take into account the expert testimony in order to interpret a reference for ourselves?

MR. HARRIS: Well, in this case, Your Honor, there's only one expert that has opined on how the working samples of *Hong* could actually be formed and whether --

JUDGE DeFRANCO: I tend to -- let me -- I tend to disagree with that. And it's only because during the deposition, you actually opened the door to Dr. Brookstein testifying about those other figures and he did explain to you that, yeah, I didn't necessarily focus on those figures, but they do disclose 3D knitting as well. And I think he made that explanation pretty clear during his deposition. So I just want to give you -- I just want you to know where I'm coming from in case you want to respond to that at this point --

MR. HARRIS: Okay.

JUDGE DeFRANCO: -- Dr. --

MR. HARRIS: Yeah. Thank you. Thank you, Your Honor.

JUDGE DeFRANCO: Pastore's testimony in that regard.

MR. HARRIS: Yeah, I appreciate that. And understood where you are on that. We respectfully disagree. Let me --

JUDGE DeFRANCO: I understand.

MR. HARRIS: Thank you. Let me transition to the next issue. Let's assume, Judge Defranco, for this next issue, that *Hong* teaches knitting a three-dimensional element during the knitting process. Okay. That's what, for purposes of this argument, that's what *Hong* teaches, three-dimensional element. They are fully formed three-dimensional elements. Right? They're all 3D. You can look at all seven working examples. There are no working examples where you have a three-dimensional element with flat, relatively, you know, two-dimensional sides. And lululemon hasn't argued

that *Hong* would disclose that limitation. So *Hong* gives you a fully three-dimensional structure.

Lululemon is asking you to combine that with the *Dua* prior art reference, which teaches a flat two-dimensional structure, and combine it with *Lockwood*, which teaches a plastic upper that's formed in a mold with heat and pressure. How would a skilled artisan combine a full closed 3D object from *Hong*, a flat 2D fabric from *Dua*, and a piece of molded, heated, pressed plastic from *Lockwood*? I asked the question because there is no answer in the record. Here's what lululemon says.

JUDGE DeFRANCO: But, Counsel, this is your reasonable -- no reasonable expectations --

MR. HARRIS: Yes, yes, thank you, Your Honor.

JUDGE DeFRANCO: -- of combining those two references?

MR. HARRIS: That's right.

JUDGE DeFRANCO: Okay. Yeah, I'd love to hear that more --

MR. HARRIS: Here's what --

JUDGE DeFRANCO: Because I think that's your better argument.

MR. HARRIS: Okay. All right, we got something here. Okay. So here's what lululemon says about combining these references. This is on lululemon's slide 33. I've got that on the overhead. Lulu says, well, skilled artisan would combine these together because there would be advantages to doing that. That may or may not be true, but it doesn't answer the question. How would a skilled artisan combine these three references, very different references, how would they do that with a reasonable expectation of success, to end up with a structure -- a knitted structure that has both two-

dimensional -- a two-dimensional dome in the middle of two sides that are relatively flat? There's no record evidence on this.

Dr. Pastore testified, look, there's no record evidence on this. This is our Nike slide 33, Pastore declaration at 2003, paragraph 56. He testifies, I don't -- how would a skilled artisan do it? We don't know. We've never been told. We still don't know. What we do know from lululemon is they think that a skilled artisan would do it, but we don't know how they would do it. How do you take a piece of plastic that's molded, pressed, heated, combine it with a flat 2D structure, and then a fully formed 3D structure?

What did we hear from lululemon today? They said, oh, well, we asked Dr. Brookstein in his deposition if *Hong* could be used for both 2D and 3D structures. And Dr. Brookstein, this is lululemon's slide 31, which quotes Dr. Brookstein's testimony at Exhibit 2005, page 116, and yeah, Dr. Brookstein said, oh, you could use *Hong* for both 2D or 3D. But what doesn't he say? He doesn't say that you could use it for a fabric that is some sort of combination of 2D or 3D or how you would even do it, and how you would combine that with a piece of plastic from *Lockwood* that's molded and pressed. No evidence. None.

So unless there are any questions on that, I'll move on quickly to the loop limitations. Okay.

JUDGE COCKS: I'm going to have one question, but I will do it at the end.

MR. HARRIS: Okay. I just have a minute on the limitations. At this point, we're not even sure what lululemon's argument is on the loop limitations. Today I think I heard that they are relying on *Dua* and *Hong*, but Brookstein seemed to say something different. Look, the bottom line is

the *Dua* reference does not disclose, doesn't talk about, doesn't disclose loop limitations. I know today I heard that they're relying on that reference to other elements. Maybe that's the loop limitations. It's not anywhere in there. There is the figure 13 that shows laces, but there's no description of what those laces are running through. There's no description of what the laces are going through, that lacing system is being knitted or being part of either of the layers of the unitary knit construction that's to make up the upper in claim 2. So we think there's a total lack of evidence on those limitations as well.

JUDGE COCKS: So just to be clear, a loop permutation is a unitary structure formed of the upper and the lace loops.

MR. HARRIS: Yes, that's what the claim says. Yes, Your Honor. Claim 2 says that.

JUDGE COCKS: Okay. My question, and I think you've answered this, but I just want to nail it down, is the abstract of the '484 patent says -- comes right out and says flat knitting allows production of textile structures of a final desired shape. And then it says, "Flat-knitted elements also can be formed directly in desired three-dimensional shapes." And I think you would say that captures -- that those statements capture what the -- you're saying the claim captures, which is forming a 3D shape in a machine.

I then look at *Hong*. I was looking at *Hong*. Let me find. And I see that *Hong* says, with respect to his figure 7 -- or on the same page as figure 7, that the advantages of using flat knitting machine, they include "knitting directly to 3D shapes, can overcome fabric waste, and diminish the labor cost." So I think your argument is, despite the same terminology, that the

"directly" in *Hong* and the "directly" in the abstract of '484 are different, being different things. Is that accurate?

MR. HARRIS: Yeah, absolutely, Your Honor. These references are, what, 12, 14 years apart. And what *Hong* was really talking about was knitting to shape and using those knitted-to-shape fabrics to create 3D products.

JUDGE COCKS: I guess my pushback to that is the word "directly," which is in *Hong*, so knitting something directly to a shape. And you had previously used words like "ultimately form a shape" and whatnot. But I guess can you hit the word "directly" directly?

MR. HARRIS: Yeah. Our position, Your Honor, would be that you have to read that in the context of the entirety of the teaching of *Hong*. And our expert has said, unrebutted has said, I've looked at the entirety. You can't form these products in three-dimensional form in this machine. You can't do it. It was impossible. So in that context "directly" had to mean a shape, knit to shape, take it from the machine, fold it, seam it, you've got your 3D object. Thank you.

JUDGE HOSKINS: Mr. Harris. Hi. This is Judge Hoskins.

MR. HARRIS: Hi.

JUDGE HOSKINS: I just want to give you -- you don't have to say anything, but I want to give you an opportunity to address the claim construction issue I raised with Petitioner's counsel with respect to layers and unitary construction and loops. And I was trying to get my head around what it means to have layers, two different layers being formed of a unitary construction and one of the two layers being used to form these loops. So would you agree with what I understood Petitioner's position to be from a

claim construction perspective, which is that as long as you've got loops, you've got your second layer because the loops are the second layer?

MR. HARRIS: Well, I feel like it's a difficult question to answer. I'm not sure I understood Opposing Counsel's position on that, so I'm hesitant to say I agree with them.

JUDGE HOSKINS: Well, what is your position? That's my --

MR. HARRIS: Yeah. The layers are of unitary knit construction. I think that's what the claim language requires, the first and second layers. So just simply adding a knitted loop to one of the layers, if I understand the question correctly, simply adding a knitted loop to one of the layers would not make the two layers of unitary knit construction. And I appreciate that that may not answer your question because I'm not sure I understand the question fully, so happy to elaborate on that.

JUDGE HOSKINS: No, that's okay. I just wanted to get you to the -- I'm good. Thank you very much.

MR. HARRIS: Okay. Thank you, Your Honor.

JUDGE COCKS: So you'll have 24 minutes for surrebuttal --

MR. HARRIS: Okay, thanks.

JUDGE COCKS: -- if you need it.

MR. RAZAI: I'm not sure there was anything new in that portion, but we'll kind of go through and explain a little bit.

The first thing that was asked was Nike said that, well, why would the EPO have issued the patent? Well, the EPO issued the patent because the concept of a three-dimensional vamp as taught in *Lockwood* was not before the Board. And if it was, I don't think it would have issued.

You know, we first -- the first thing that Nike said was, "I don't think *Hong* discloses seams." There's no disclosure about seams in *Hong*. Whether the figures show a seam or not doesn't negate the entirety of the reference which says knitting directly three-dimensional structures. I can go through all the slides again, but I think we have a ton of examples that actually show that *Hong* was knitting directly three-dimensional structures.

We talked about a three-dimensional concept going to a two-dimensional pattern and then using that to program the needles and courses to create the three-dimensional fabric that comes out of the machine. I don't know how that can be in question. There's never a single passage in *Hong* that could even implicitly be held to be producing a two-dimensional pattern, only that the machine requires a two-dimensional pattern to then form the needles and courses that then directly knit a three-dimensional structure.

In the Institution Decision, this Board invited the parties to explore the issue of whether it's knitting a two-dimensional pattern. Nike paid an expert to rewrite the reference. Lululemon merely relied on the reference and the actual words of the reference. We didn't have to go and rewrite the entire reference.

And the entire verbiage about the testimony being unrebutted is absolutely untrue. And in a second I'll go through the deposition transcript. We had no obligation to provide a second declaration if Dr. Brookstein had already opined that knitting three-dimensional structures was possible with *Hong*. And I'll go in detail as to where that is.

Now, let's assume that figure 3 has seams and as a result *Hong* is lying about the capabilities of the machine. I invite Nike to show seams in

figure 7. We don't see any seams in figure 7, but the machine is actually using these new technological features to knit three-dimensional structures.

There is no dispute, as Judge DeFranco raised, that the Shima Seiki machine is able to knit three-dimensional structures. And again, this knit-to-shape, knit-to-shape could be knitting to shape two-dimensional fabrics or knitting to shape three-dimensional fabrics. But in the context of this patent, we're talking about knitting to shape three-dimensional fabrics.

Let's go to the deposition transcript. This is --

JUDGE COCKS: Counsel, as you do that, just -- I may be at the end of the race here, but when it comes to seams, if seams are present in *Hong*, what does that mean?

MR. RAZAI: Nothing. It means that there is a seam put in for some reason to maintain the stability of that structure.

JUDGE COCKS: So why are we talking about it?

MR. RAZAI: Because Nike raised it and we're having to rebut it, Your Honor. The only argument that Nike has to point to anything in *Hong* to say that maybe it's not knitting a three-dimensional structure, the only thing, the only feature that besides misreading the reference, misconstruing the sentences, is to point at a particular portion, say that that must be a seam, and because it's a seam, it must be a two-dimensional fold and sewn. That's the only thing that they have, and I have an obligation to rebut it. Otherwise, I really wouldn't have a role here.

JUDGE COCKS: Okay. So the point, though, is their view, the Opposing Counsel view, would be if there are seams, that suggests that it's somehow a 2D structure that's being knit.

MR. RAZAI: That's how I understand Opposing Counsel's argument. Maybe they can clarify it for you, but that's how I've understood it thus far, Your Honor.

So let's go to page 64 of Dr. Brookstein's deposition transcript. He's asked, "So these three techniques, there are ways to knit-to-shape, different techniques for knitting to shape, right?"

Answer, "Well, you say 'shape.' Are you talking about the shape in the plainer sense or shape in the three-dimensional -- or three dimensions?"

"Well, what we've been talking about, knit-to-shape, what do you mean by that?" That's the question.

Answer, "Well, it could be either, but in this particular case, we're talking about making 3D items. But you could also knit-to-shape, let's say you're making just a flat piece of fabric and you want to change the width, that's knitting to shape, also, basically saying you can knit to shape 3D or 2D."

"Which of these three techniques set forth here in *Hong* on page 2 would allow you to knit a three-dimensional structure during the knitting process?"

Answer, "Using different loop lengths and altering the number of operating needles from course to course."

Now let's jump a page to page 66, line 18. "What about figure 1 tells you that a three-dimensional structure is being formed during the knitting process?"

"Because along each course you're having -- in this particular case, each course has a smaller, a lower number of loops. So you see, in the top course you have 10 loops. The next course we have eight loops. The next

course we have six loops and so on. And then it starts to increase again, so that means you're changing the shape. That's how you're creating the three dimension."

There is no unrebutted testimony on the records, Your Honor. There's no reason to submit another declaration when Dr. Brookstein confirmed that.

Now, issue 2, has lululemon come forward with evidence of how we would have combined them, the way we would have combined them? Let's ignore the fact that we don't have to have bodily incorporation. What I invite my colleague to do when he stands up is show us in the '484 patent, tell us what technological advancement you put in place that creates this expectation of success. I'd like to see that. We're talking about the filing as of 2006. Would a skilled artisan have expected success to combine these references? I'm not saying would they have expected success to take the Shima Seiki machine and do it? If there's a motivation to create a three-dimensional flat knit piece of textile element to then create a three-dimensional dome, would there have been a reasonable expectation of success by what was known at the filing date? Show me where in the '484 patent it says what wasn't in the art that a skilled artisan didn't have that now, all of a sudden, voilà, we do have. There is no argument of expectation of success.

And with respect to what lululemon has done, it has gone above and beyond. My colleague points to slide 33 talking about the advantages. How does that have anything to do with what the expectation of success is? The expectation of success here is that the Shima Seiki machine and other machines can knit two-dimensional and three-dimensional and could have

easily knit a structure like that. When you have *Dua*, the same inventors who invented the *Dua* reference are the same inventors on '484. They just had this novel idea, let's put on a three-dimensional vamp. But guess what? The idea wasn't novel. It was in *Lockwood* 1972, a reference that was never in front of the EPO.

JUDGE COCKS: Counsel, I want to make one point. And I understand your argument, but I just want to clarify that it is not the Patent Owner's burden to show reasonable expectation of success for their patent. It's the Petitioner's burden to show it in combining the references. So I don't think we're going to take your invitation of asking them to do that.

MR. RAZAI: And I appreciate that, Your Honor. And the reason I was making that invitation was because under *Abbott* and other case law from the Federal Circuit, the reasonable expectation of success is there, because without that disclosure in the '484 patent, it would mean that it was within the skill of the skilled artisan, therefore negating any type of a doubt on a reasonable expectation of success. That was the reason for that point, Your Honor.

JUDGE COCKS: Okay.

MR. RAZAI: Now, getting into the issue of bodily incorporation, no one's talking about bodily incorporating. That argument was never raised. It kind of sounds to me like, well, how would you do it? The issue of bodily incorporating is not the law. And if the Board would invite us to brief it, we'd be happy to, but I don't think that there's any reason to because I'm not sure that issue was ever properly raised. But if it were, that's not what the law says.

Now, getting into the reference with respect to the loops, *Dua* says that you want to knit a unitary upper. And *Dua* talks about a multilayered unitary upper, unitary knit. It's the same inventors, the same concept. And what it says is that you don't want to join other pieces together. It's inefficient. So when you're going to -- when you're going -- whether you're two-dimensional or three-dimensional, that fact doesn't change. Going from a two-dimensional upper to a three-dimensional upper, integrating -- creating an integrally knit lace loop on the upper doesn't change whether you're going to a three-dimensional vamp or no three-dimensional vamp. There really is no difference between the two, Your Honor.

Are there other questions that I can address, Your Honor?

JUDGE COCKS: I don't think so.

MR. RAZAI: Thank you for your time. Really appreciate it.

JUDGE COCKS: You have 24 minutes.

MR. HARRIS: I won't need it. Yeah, thank you.

I want to start with the reasonable expectation of success. I didn't hear anything. I didn't hear any record evidence that lululemon can point to where they have shown reasonable expectation of success of combining a reference that teaches a plastic -- a sheet of plastic that's molded through heat and pressure, combine that with a flat-knit two-dimensional textile, combine that with a fully 3D textile. No evidence. None. I didn't hear anything. What I heard was, well, Nike can't show you this. Nike can't show you. That's not our burden, as Judge Cocks noted.

JUDGE DeFRANCO: Well, Counsel, I think they're relying on their expert's deposition testimony. It says that *Hong* -- with *Hong*, you can make 2D configurations and 3D configurations.

MR. HARRIS: Yeah.

JUDGE DeFRANCO: And you can make a sphere that would be the 3D configuration. So they're saying *Hong* doesn't simply teach 3D knitting, it also teaches 2D knitting.

MR. HARRIS: Yeah. And if --

JUDGE DeFRANCO: And they say it's all unitary based on what's in the primary reference of *Dua*.

MR. HARRIS: Yeah. Your Honor, I mean, this is a little too little, too late. If *Hong* really teaches all that, then why are we combining it with a reference from the 1970s that has a plastic upper? And I've got on -- I've got the slide up that lululemon's counsel was referring to and, Judge DeFranco, you were just referring to. This is lulu slide 31. And this is what Dr. Brookstein actually said. He said, oh, well, I think you can use *Hong* to make two-dimensional fabrics or three-dimensional fabrics. But you'll see nowhere on here does he say, I can make a fabric that's both two-dimensional and three-dimensional at the same time. And that's really what the claim of the '484 -- the claims of the '484 patent require. Right? You have a dome structure in the middle, three-dimensional, two relatively flat sides, two-dimensional. That's what lululemon has failed to articulate. They've failed to come forward with any record evidence to show how a skilled artisan would take a piece of plastic from the 1970s that's formed in a mold with heat and pressure and combine that with a purely two-dimensional reference and combine that with a reference that their expert now says can be either 2D or 3D. How do you combine all of those together to come up with a structure that has a three-dimensional dome with two flat sides, relatively flat sides on each side? That's what's missing, Your Honor.

Judge Cocks, you asked about seams. I want to address that quickly. The reason seams are important is because Dr. Pastore looked at the entirety of the *Hong* reference to try to understand what *Hong* is actually disclosing. All of *Hong*'s working examples, all of *Hong*'s disclosure, according to *Hong*, is knitted using the same technique, including the knee structure, the sphere structure, the spherical structure. They're all knitted using the same technique.

On Nike slide 22, we have Dr. Pastore's testimony regarding the third working example in *Hong*. It shows the theoretical 3D concept. That's the figure on the left. The 2D pattern that is used to create the fabric on the machine is in the middle. Dr. Pastore looked at that and said, to go from the 2D pattern in the middle to the 3D structure on the right, you need to join the edges that are labeled H with each other. You need to join the edges that are labeled G with each other. You need to join them together and seam them. And that is impossible to do on that flat knitting machine disclosed in *Hong*.

JUDGE DeFRANCO: So you're saying that that's part of a sewing process that occurs post knitting?

MR. HARRIS: Yeah, that's what Dr. Pastore testified, that it would be impossible to join the sides labeled H to each other on the machine. It would be impossible to join the sides labeled G to each other on the machine. And it's the joining of those sides and stitching them together, that's what creates the 3D object shown to the far right. Impossible to do it on the machine. And that's what Dr. Brookstein has never responded to. If it was possible to do that on the machine, presumably Dr. Brookstein would have said, no, it is possible. Here's how you would do it. We don't have

that. He didn't do it. He had an opportunity. He didn't do it. And again, all of -- all of -- the 3D structures in *Hong* are knitted using the same technique.

Any other questions, Your Honor?

JUDGE COCKS: I have none, and I do not believe my colleagues do so.

MR. HARRIS: All right. Thank you for your time.

JUDGE COCKS: Thank you very much.

JUDGE HOSKINS: Thank you.

JUDGE COCKS: We thank both sides for their presentation and time today. It's been very informative, and clearly a lot of work has gone into it. So with that being said, the case is submitted, and we are adjourned. Thank you. We are off the record.

(Whereupon, the proceedings at 3:11 p.m. were concluded.)

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