

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON USA INC.,

Petitioner,

v.

NIKE, INC.,

Patent Owner.

Case IPR2024-00159

Patent No. 9,375,046

PATENT OWNER'S PRELIMINARY RESPONSE

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EXHIBITS

Exhibit No.	Description
2001	File History of U.S. Patent No. 9,375,046 (Excerpted)
2002	Declaration of Dr. Christopher M. Pastore
2003	lululemon's Responsive Claim Construction Brief (ECF No. 88), <i>Nike, Inc. v. lululemon usa inc.</i> , No. 1:23-cv-00771 (S.D.N.Y.) (Excerpted)
2004	12/10/2023 Markman Hearing Transcript, <i>Nike, Inc. v. lululemon usa inc.</i> , No. 1:23-cv-00771 (S.D.N.Y.) (Excerpted)
2005	Nike's Opening Claim Construction Brief (ECF No. 74), <i>Nike, Inc. v. lululemon usa inc.</i> , No. 1:23-cv-00771 (S.D.N.Y.) (Excerpted)

I. INTRODUCTION

Patent Owner Nike, Inc. (“Nike”) submits this Preliminary Response to the Petition of lululemon usa inc. (“lululemon”) challenging the patentability of Claims 1–3, 7–9, and 14–20 (the “Challenged Claims”) of U.S. Patent No. 9,375,046 (the “’046 Patent”) (Ex. 1001). The Board should deny institution because lululemon has not established a reasonable likelihood that it will prevail for any claim in any Ground raised in the Petition.

The ’046 patent generally relates to articles, e.g., footwear, having a knitted component. The knitted component includes tubular structures and webbed areas disposed in an alternating manner across the component. The ’046 patent has three independent claims—claims 1, 8, and 20. Claims 1 and 20 are directed more generally to “an article,” whereas claim 8 is directed specifically to a footwear “upper.”

lululemon presents three grounds of invalidity against the Challenged Claims. Each ground involves only a single reference. In each ground, lululemon challenges the independent claims only under an anticipation theory. Ground 1 is based on U.S. Patent No. 4,702,091 (“Good”; Ex. 1005). Ground 2 is based on U.S. Patent No. 3,910,005 (“Munsing”; Ex. 1006). Ground 3 is based on U.S. Pat. Appl. Pub. No. 2014/0130374 (“Minami”; Ex. 1007). Grounds 1 and 2 challenge only the “article” claims; Ground 3 challenges only the “upper” claims. lululemon’s only obviousness

assertions are with respect to three dependent claims: claim 3 (Ground 1), and claims 9 and 15 (Ground 3).

None of the prior art references disclose every feature of the Challenged Claims. In Grounds 1 and 2, neither Good nor Munsing disclose the “tubular structures” recited in claims 1 and 20. And in Ground 3, Minami does not disclose tubular structures having “a first curved portion with a first curve length” greater than “a second curve length” of “a second curved portion,” as recited in claim 8. Nor does Minami disclose “webbed areas configured to move between a neutral position and an extended position,” as recited in claim 8.

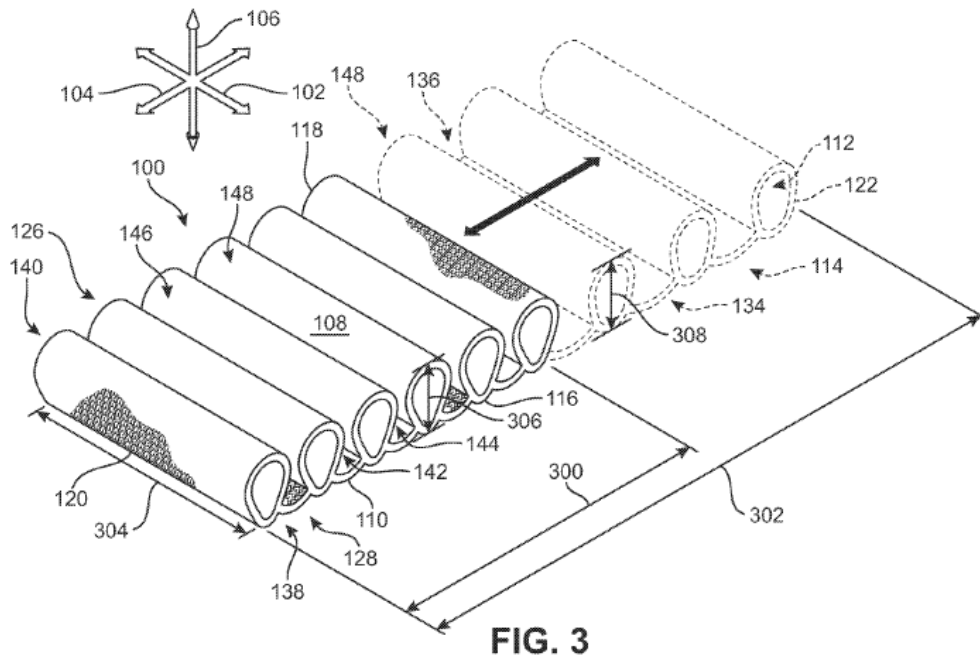
lululemon identifies a claim construction dispute about the meaning of “tubular structures.” But the Board need not resolve that dispute because all of lululemon’s Grounds 1–3 fail under either party’s construction. For these reasons and those discussed below, Nike respectfully requests that the Board decline to institute review.

II. BACKGROUND

A. ’046 Patent

The ’046 Patent is directed to articles, e.g., footwear, having knitted components “provided with different structural portions that affect the properties

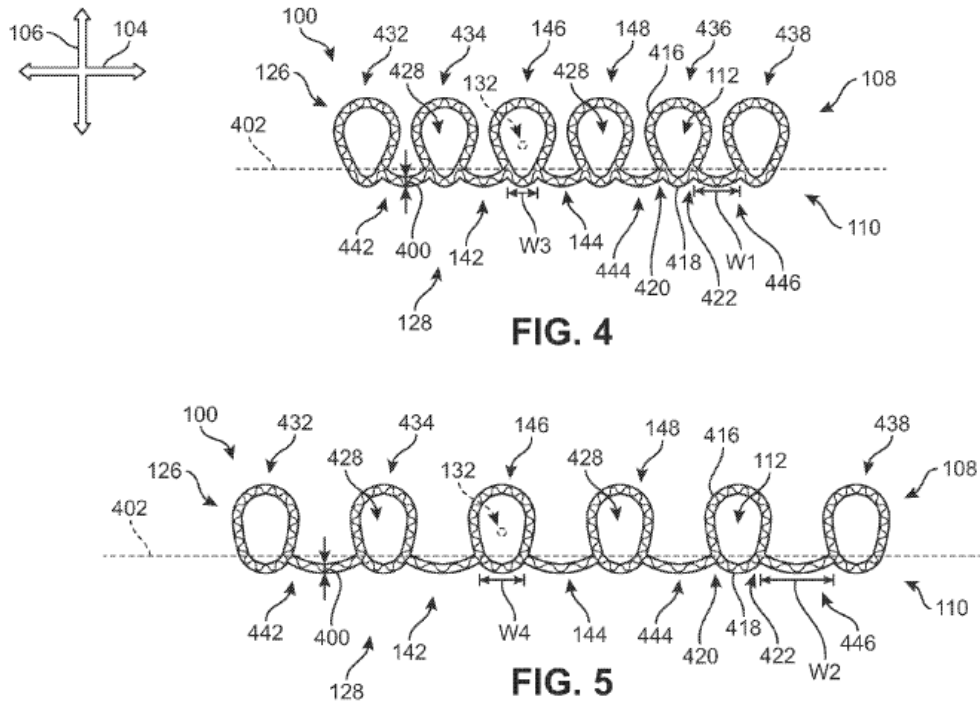
and/or physical characteristics of the knitted component.”¹ Ex. 1001, 4:29–55. In certain embodiments, the specification describes that these “different structural portions” include “tubular rib structures” and “webbed areas.” *See, e.g., id.*, 4:55–61, 7:9–13. Figure 3 of the ’046 patent reproduced below is an embodiment of a knitted component including these features.



In Figure 3, knitted component 100 includes “a plurality of tubular rib structures 126” and “a plurality of webbed areas 128.” *Id.*, 7:9–11. Tubular rib structures 126 are “constructed with two or more co-extensive and overlapping knit layers.” *Id.*, 7:15–17. Webbed areas 128 “extend between” tubular rib structures. *Id.*, 7:56–58.

¹ The '046 Patent includes claims 1–7, 16–18, and 20 directed to an “article.” Claims 8–15 and 19 are directed more specifically to a footwear “upper.”

The '046 patent specification describes that webbed areas 128 and tubular rib structures 126 “can flex, deform, or otherwise move as knitted component 100 stretches.” *Id.*, 8:17–20. The “first width 300” portion of Figure 3 depicts knitted component 100 in a neutral position. *Id.*, 8:28–33, 8:40–48. The “second width 302” portion depicts knitted component 100 in a stretched position. *Id.* Figures 4 and 5 reproduced below show a cross-sectional view of knitted component 100 in neutral and stretched positions, respectively.



The specification explains that, “[w]hen viewed in cross-section,” tubular rib structures 126 include “first curved portion 416” and “second curved portion 418.” *Id.*, 10:20–23. The first and second curved portion may be knitted together and “disposed opposite” of one another “on the respective top and bottom of tubular knit

structures 126.” *Id.*, 10:23–28. In Figures 4 and 5, the first and second curved portions 416 and 418 “meet along a first transition 420 edge.” *Id.*, 10:28–30. The ’046 patent describes that the number of courses of first curved portion 416 and second curved portion 418 may vary such that one portion is longer than the other. *See id.*, 10:50–62. In Figures 4 and 5, for example, first curved portion 416 is substantially longer than second curved portion 418.

The specification further describes that “the arrangement of adjacent tubular rib structures 126” may be such that “webbed areas 128 disposed between” the tubular rib structures are “at least partially obscured from visual observation in the neutral or unstretched position when viewed from top surface 108.” *Id.* 12:41–46. In other words, as shown in Figure 4, tubular rib structures 146 are “touching or close to each other” such that webbed areas 128 are “not visible.” *Id.*, 12:46–49. And when a stretching force is applied to knitted component 100, as shown in Figure 5, the webbed areas 128 “may be revealed.” *Id.*, 12:49–56. In some embodiments, the webbed areas may be of “a contrasting type of color of yarn” than the tubular rib structures. *Id.*, 12:56–61.

Figure 26 reproduced below shows an embodiment in which tubular rib structures (1802) and webbed areas (1800) are incorporated into footwear.



B. Relevant File History

During prosecution of the '046 Patent, the Examiner issued a non-final office action rejecting claims 1–7 as being anticipated by Kuroda (Ex. 1008), and alternatively rejecting claims 1–4, 6, and 7 as anticipated by Woolley (Ex. 1009). Ex. 2001 [7/20/2015 Non-Final Rejection], 3–7. The Examiner rejected claims 8–15 as obvious over Dua (Ex. 1010) and Woolley. *Id.*, 7–9. Nike thereafter amended independent claims 1 and 8, adding that “at least one of the webbed areas or tubular structures is configured to stretch to move the webbed areas to the extended position in response to a force applied to the article.” *Id.* [10/20/15 Claims], 12, 14.

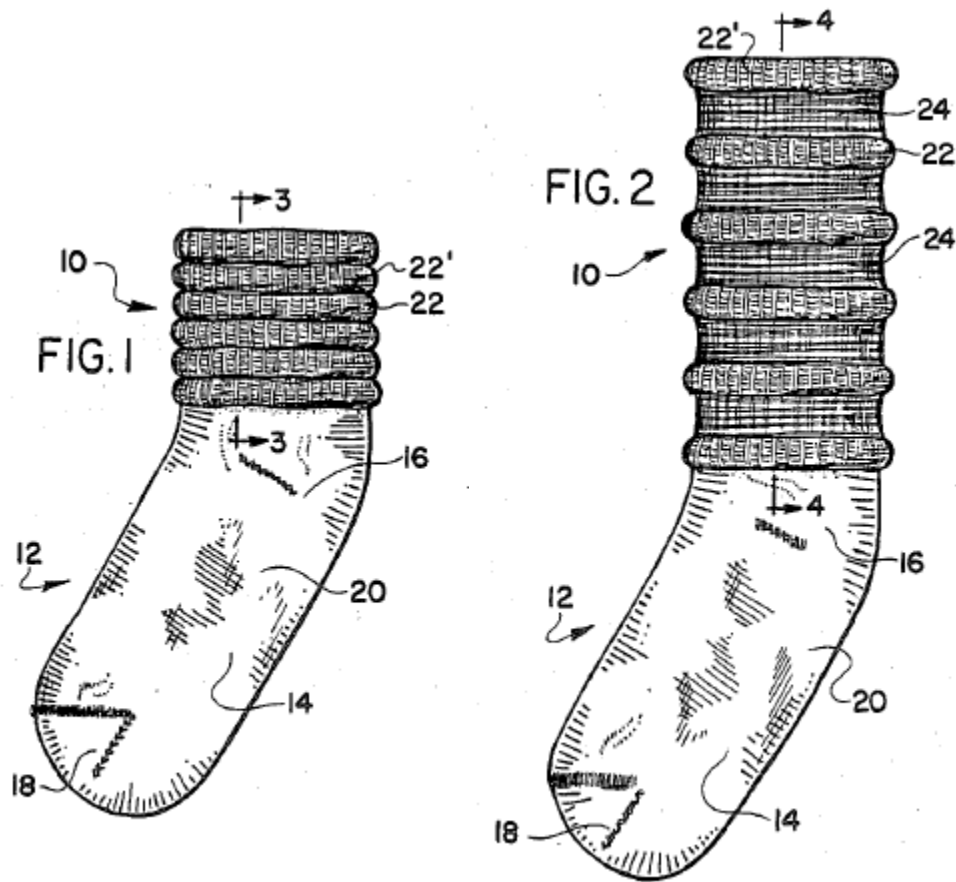
Nike and the Examiner held an interview to discuss these pending claims in light of Kuroda, Woolley, and Dua. *Id.* [11/12/2015 Remarks], 22–23. During the

interview, the Examiner proposed adding into independent claim 1 that “the first area of the front surface is hidden from visual observation from a first viewing perspective, and in the extended position, the first area of the front surface is revealed for visual observation from the first viewing perspective.” *Id.* The Examiner also proposed adding into independent claim 8 that “a first curved portion with a first curve length extends from the front side of the webbed areas, and a second curved portion with a second curve length extends from the back side of the webbed areas, the first curve length being greater than the second curve length.” *Id.* Nike amended claims 1 and 8 to recite these features, and added independent claim 26 (now claim 20) having similar limitations to claim 1. *Id.* [11/12/15 Claims], 17, 19, 21. The Examiner then allowed the claims. *Id.* [2/25/16 Notice of Allowability], 28.

C. Alleged Prior Art References

1. Good

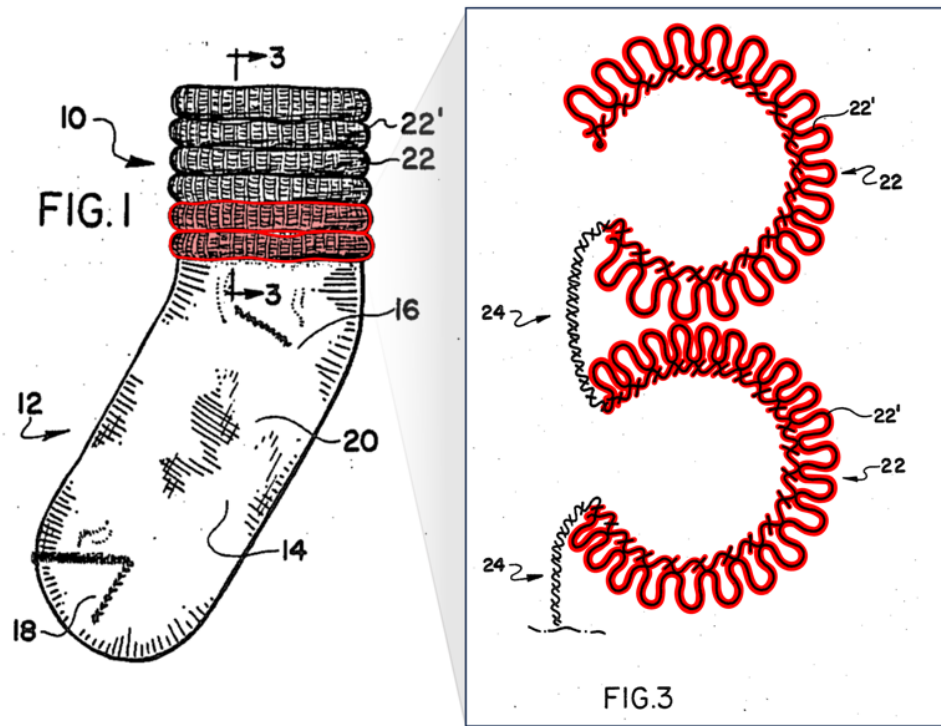
Good (Ex. 1005) is directed to a “tubular circularly-knitted cuff member.” Ex. 1005, Abstract. Good’s cuff member is embodied in the “anklet-type children’s sock” shown in Figures 1 and 2 below. *Id.*, 3:49–53.



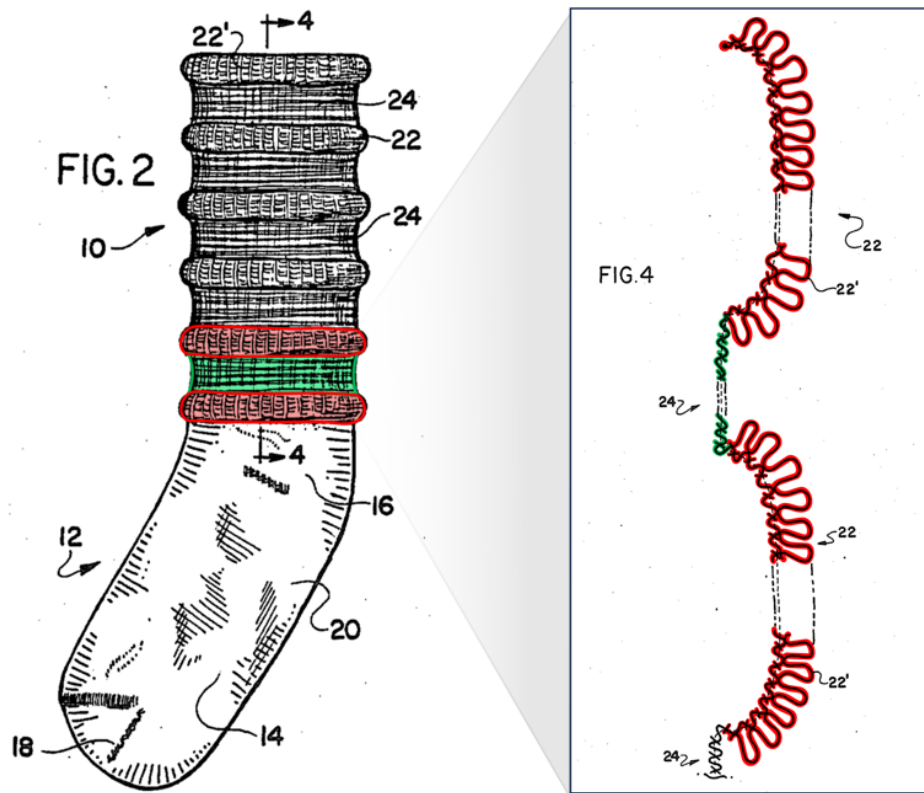
Good describes that “sock 12” includes “several annular circumferentially-extending rib portions 22” and “several annular circumferentially-extending connection portions 24” knit in an “axially alternating arrangement” along cuff member 10. *Id.*, 3:67–4:4. Good further explains that the cuff member 10 is “stretchable axially” from the position shown in Figure 1 (below) to the position shown in Figure 2 (below). *Id.*, 4:8–18.

Good explains that rib portions 22 are “of a terry pile fabric construction” having “a radi[a]lly outwardly rounded terry loop surface 22’.” *Id.*, 4:4–7. A vertical

cross-section of Good's "relaxed cuff member" taken along line 3-3 in Figure 1 is shown below.



A vertical cross-section of Good's "elongated cuff member" taken along line 4-4 in Figure 2 is shown below.

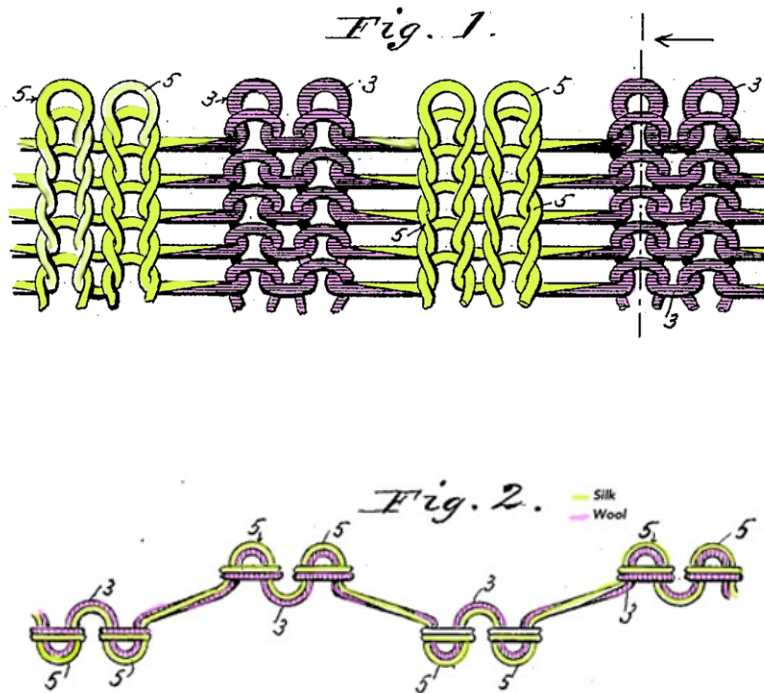


As shown in Figures 3 and 4, Good's rib portions (red) are not closed loop structures. They are merely C-shaped knitted portions that substantially flatten out when stretched.

2. Munsing

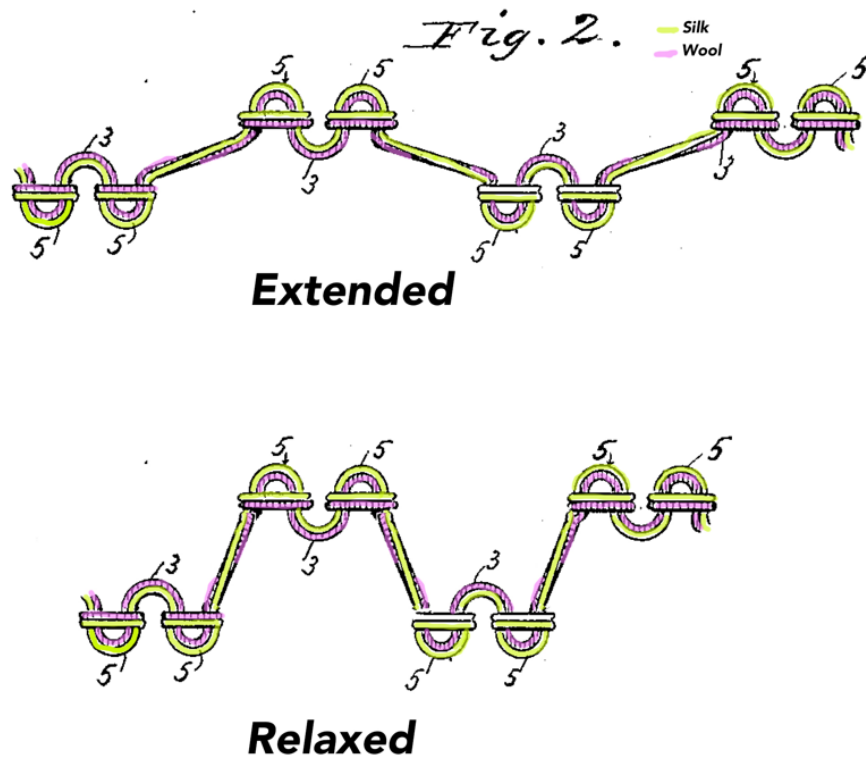
Munsing (Ex. 1006) is a patent from 1888 directed to improving knit fabrics for underwear. Ex. 1006, 1:7–10. Munsing purports to overcome the difficulties associated with creating underwear that has three desirable qualities: (i) “heavy enough to be sufficiently warm”; (ii) “a fine, attractive and handsomely finished outer surface”; and (iii) “will not irritate the flesh of the wearer.” Munsing achieves these qualities by knitting a “double-ribbed jersey fabric” formed from wool and

silk. *Id.* 1:27–44. Figure 1 below shows Munsing’s knitted fabric as viewed from above (a “plan view”). *Id.*, 1:46–50. Figure 2 shows Munsing’s knitted fabric as viewed from the top edge of the fabric. *Id.*



In Figures 1 and 2, the thread shown as “3” is wool (pink), while the thread shown as “5” is silk (green). *Id.*, 1:61–65. Munsing describes that in a “normal condition, the ribs lie close together and the fabric has the appearance of a silk surface.” *Id.*, 1:99–102. Munsing further describes that, when “the fabric is stretched as the garments are worn,” the “uncovered portions of the woolen thread will be exposed.” *Id.*, 2:1–4. In the annotated figures below, Munsing’s Figure 2 (top) is

depicted above what Munsing's fabric would look like in the "normal condition" (bottom).

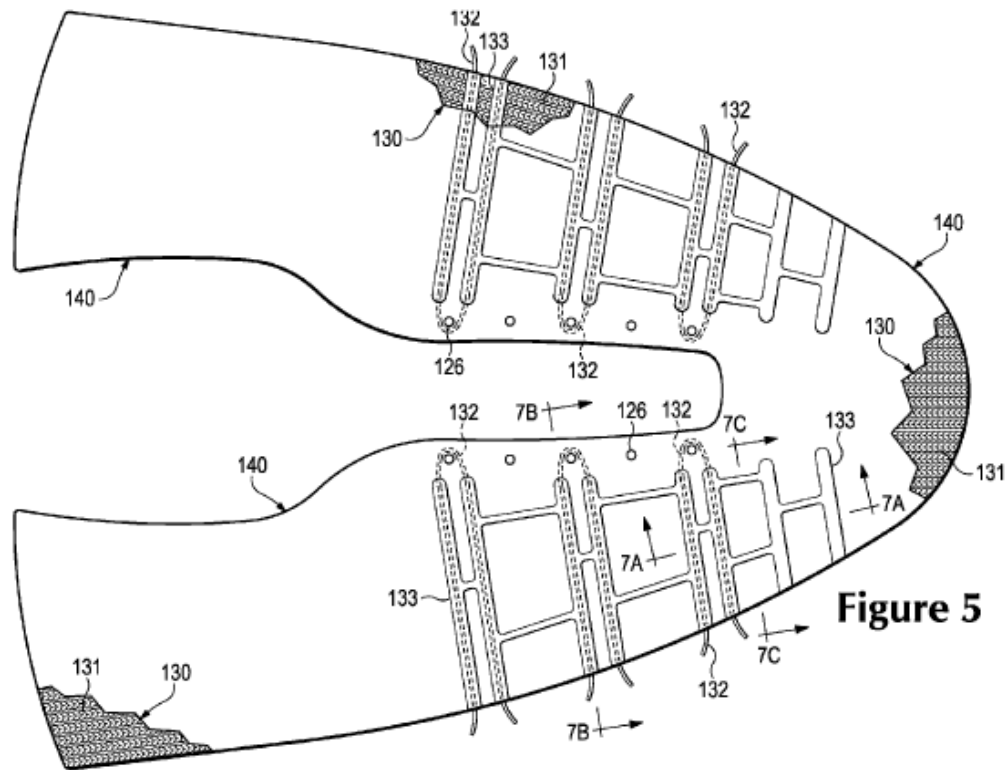


Although Munsing refers to the peaks and valleys of its fabric as "ribs," Munsing's ribs are not tubular rib structures, i.e., they are not shaped like tubes.

3. Minami

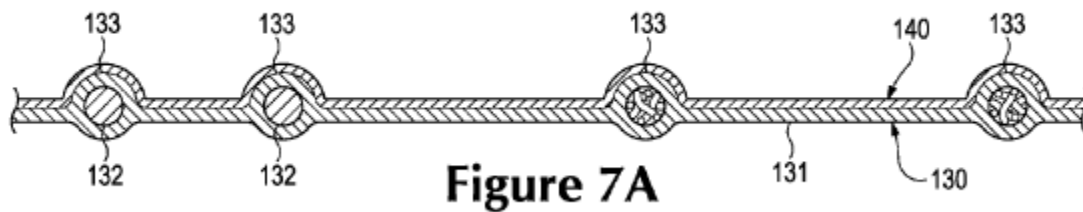
Minami (Ex. 1007) is a patent application publication assigned to Nike. Minami is directed to an article of footwear having an upper including a knitted component. Ex. 1007, Abstract, [0005]. The knitted component has various structural features, which may include (i) a "skin layer," and (ii) "protruding areas"

that include tubular structures with inlaid strands. *Id.* An embodiment of Minami's upper including these features is shown in Figure 5 below.



In Figure 5, “knitted component 130” has “protruding areas 133” and is covered by “skin layer 140.” *Id.*, [0042]. Skin layer 140 is designed to “inhibit stretch” and “impart a relatively tight and glove-like fit to upper 120.” *Id.*, [0043]–[0044]. Skin layer 140 may include “polymer sheet, elements of leather or synthetic leather, a woven or non-woven textile, or a metal foil.” *Id.* Minami explains that covering the protruding areas 133 in skin layer 140 enhances ball control in soccer. *Id.*, [0062].

The “primary elements” of Minami’s knitted component 130 are “a knit element 131 and an inlaid strand 132.” *Id.*, [0048]. As shown in Figure 7A below, inlaid strand 132 passes through “various loops” knitted within knit element 131. *Id.*, [0051].



Specifically, knit element 131 “forms two separate and spaced textile layers” that “define a channel or tubular structure” through which inlaid strand 132 passes. *Id.* Minami explains that the inlaid strands 132 impart “stretch-resistance” to the part of the upper where they’re located. *Id.*, [0052].

III. DEFINITION OF A PERSON OF ORDINARY SKILL IN THE ART

For the purposes of this Preliminary Response only, Nike applies lululemon’s proposed level of skill in the art: a POSITA for the ’046 Patent would have had a bachelor’s degree in mechanical engineering, textile engineering, or similar technical degree and at least 3 years of experience working with knitted textiles for use in fabric-based articles, including apparel such as footwear. Petition, 13–14. For individuals with different educational backgrounds, a person could still be of ordinary skill in the art provided that person’s additional experience compensates

for any differences in that person's education as stated above. *Id.* Nike reserves the right to further address lululemon's formulation of a POSITA if trial is instituted.

IV. CLAIM CONSTRUCTION

lululemon identifies a dispute over the terms "tubular structures/tubular rib structures" based on claim construction positions taken by the parties in the parallel district court case. Petition, 14–16. lululemon argues that "tubular structure" should be construed to mean an "elongated hollow structure." *Id.*, 15. Nike asserted in district court that tubular structures "need not be hollow." *Id.*

But the Board need not construe these terms because claim construction is not necessary to resolve the controversy presented by lululemon's petition. *See Realtime Data, LLC v. Iancu*, 912 F.3d 1368, 1375 (Fed. Cir. 2019) ("The Board is required to construe 'only those terms ... in controversy, and only to the extent necessary to resolve the controversy.'") (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)). Under either party's construction, lululemon has not demonstrated a reasonable likelihood of prevailing on any Challenged Claim. Under either party's construction, lululemon has not shown that Good (Ground 1) or Munsing (Ground 2) disclose "tubular structures." And because Minami (Ground 3) fails to teach other limitations of the Challenged Claims, lululemon also fails to meet its burden under either party's construction of "tubular structures."

**V. LULULEMON HAS NOT ESTABLISHED A REASONABLE
LIKELIHOOD OF PREVAILING FOR ANY CHALLENGED CLAIM**

lululemon bears the burden on institution of “demonstrating a reasonable likelihood that it will prevail in showing the unpatentability of at least one claim.” *SMIC, Ams. v. Innovative Foundry Techs., LLC*, IPR2020-00837, Paper 13, 13–14 (PTAB Oct. 9, 2020) (citing 35 U.S.C. §§ 314(a) and 312(a)(3)). In making this showing, lululemon’s Petition must identify “the evidence that supports the grounds for the challenge to each claim.” *Id.* lululemon has not met that burden here.

lululemon alleges that each of independent claims 1, 8, and 20 are invalid as anticipated under 35 U.S.C. § 102. Anticipation requires “that a single prior art reference discloses each and every element of a claimed invention.” *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 607 F.3d 784, 796 (Fed. Cir. 2010). A reference must not only explicitly or inherently disclose every claimed element, but those elements must also be arranged within that reference as they are in the claim. *See Net MoneyIN, Inc. v. Verisign, Inc.*, 545 F.3d 1359, 1369–71 (Fed. Cir. 2008). Disclosures from multiple, distinct embodiments of a prior art reference cannot be combined to anticipate the challenged claim. *See id.*, 1371. And “differences between the prior art reference and a claimed invention, however slight, invoke the question of obviousness, not anticipation.” *Id.*

Here, lululemon has not shown a reasonable likelihood of success for any challenged claim under any ground of unpatentability. The Board should thus deny institution.

VI. GROUND 1: LULULEMON HASN'T SHOWN A REASONABLE LIKELIHOOD THAT GOOD ANTICIPATES OR RENDERS OBVIOUS CLAIMS 1–3, 7, 16–18, OR 20

lululemon fails to show to a reasonable likelihood that Good anticipates or renders obvious any challenged claim in Ground 1.

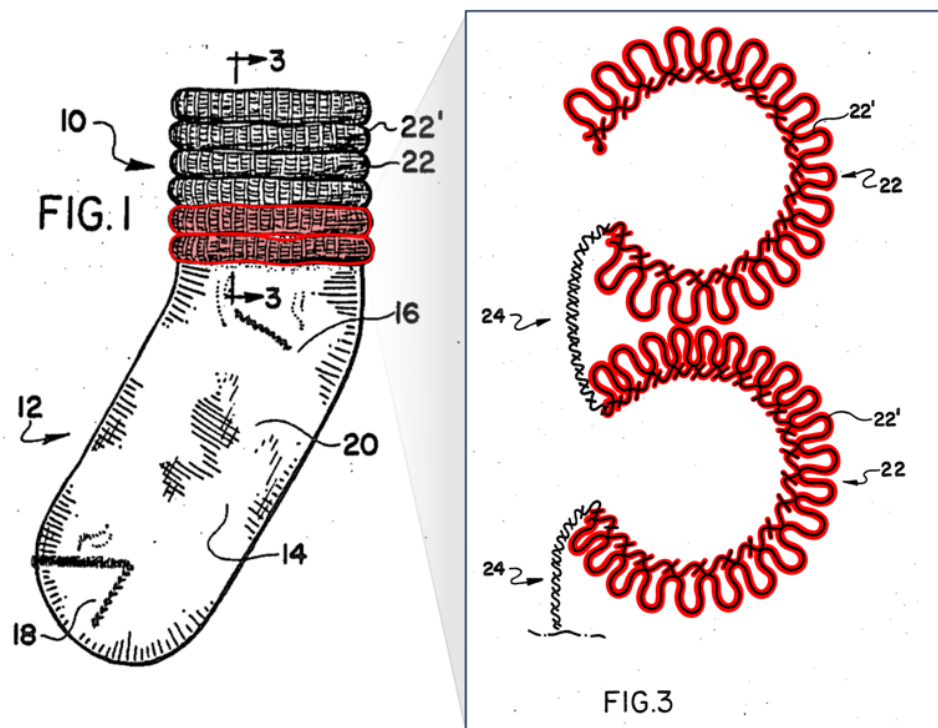
A. Good does not disclose the “tubular structures” recited in claims 1 and 20

Under either party’s proposed construction of “tubular structures”—whether “hollow,” “elongated,” or neither—Good does not disclose any “tubular structures.”

The parties agree that, under either construction, a “tubular structure” must be a closed-loop structure that is shaped like a tube. Ex. 2003, 3 (“the specification compel[s] the conclusion that the claimed ‘tubular structures’ have the shape of tubes”), 3 (citing definition of “tube” as “hollow cylinder” “that conveys a fluid or functions as a passage”); Ex. 2004, 68 (“a full tube of toothpaste is still a tube”); Ex. 2005, 12 (“tubular structures” can be shaped as “a generally circular or elliptical cylinder”); Ex. 2004, 56–57, 61; *see* Ex. 2002, ¶¶37–38. The parties’ positions parallel the ’046 patent specification, which also discloses “tubular structures” as closed-loop structures. For example, the specification discloses that “at least one

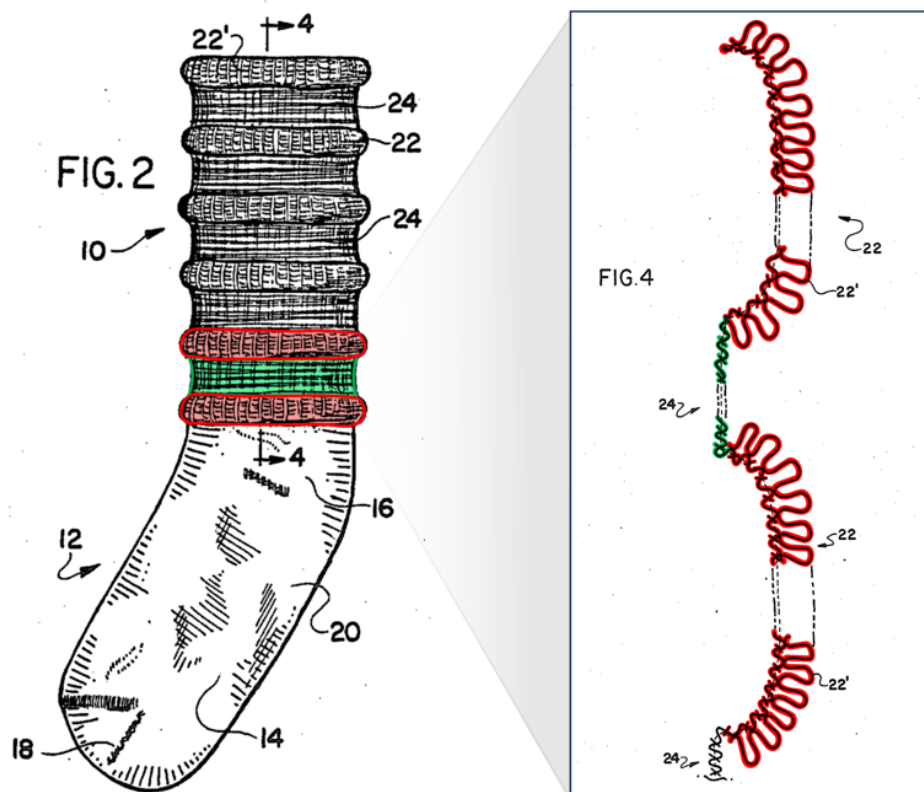
tubular course 804 may be joined by knitting to at least one web course 806 so as to *form a loop and close tubular rib structure 126.*” E.g., Ex. 1001, 17:43–46; *see also, e.g.*, Figs. 1–8, 11, 12–17 (all figures depicting closed-loop structures).

Good, on the other hand, does not disclose closed-loop tubular structures. Good discloses a sock (12) having an ankle cuff member (10) with ribbed portions (22), as shown in Figure 1 below.

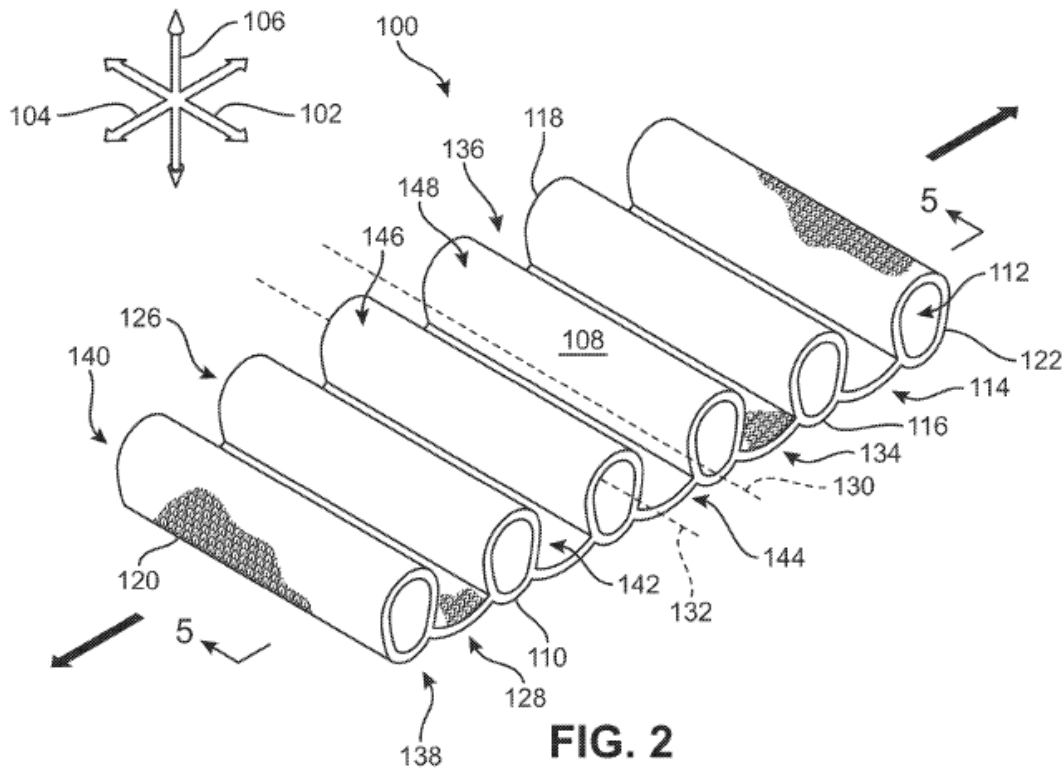


lululemon alleges that Good’s rib portions 22 meet the claimed “tubular structures” because each rib portion has “the shape of a tube, namely an elongate hollow structure.” Petition 29–30. lululemon further points to the vertical cross-section of the cuff member of Figure 1, shown in Figure 3 (reproduced above), as alleged

support. *Id.*, 30. But Good’s “rib portions” (red) are C-shaped knitted portions, not tubular structures. Ex. 2002, ¶¶39–42. When Good’s cuff is stretched—as shown in Figures 2 and 4 below—there is no doubt that Good’s “rib portions” are not tubular structures. To the contrary, Good’s rib portions are essentially linear. *Id.*



In at least this way, Good’s “rib portions” are far different from the “tubular structures” recited in the ’046 patent. As shown in Figure 2 of the ’046 patent, the “tubular structures” retain their closed-loop, “tubular” shape, even when the knitted component is stretched. *Id.*, ¶38.



lululemon's expert, Dr. Brookstein, admits that Good's "rib portions" are not closed-loop structures. Ex. 1003, ¶59. The best he can muster is that Good's rib portions "roll substantially together in a relaxed condition" and "maintain" an "outwardly rolled configuration" in an extended condition. Ex. 1003, ¶59 (citing Ex. 1005, 12:34–44, 12:55–59). But portions of a knit element that merely "roll" together are different from "tubular structures." Ex. 2002, ¶¶40–42. Good's rib portions are not "in the shape of a tube" in either the "relaxed condition" of Figure 3 or the "extended condition" of Figure 4. *Id.*; Ex. 1005, Figs. 3, 4; Petition, 29–30.

As a result, lululemon has not shown that Good discloses the “tubular structures” recited in independent claims 1 and 20 of the ’046 patent. lululemon thus fails to show a reasonable likelihood that Good anticipates or renders obvious any challenged claim in Ground 1.

VII. GROUND 2: LULULEMON HASN’T SHOWN A REASONABLE LIKELIHOOD THAT MUNSING ANTICIPATES CLAIMS 1–3, 7, 17, 18, OR 20

For two reasons, lululemon fails to show to a reasonable likelihood that Munsing anticipates the challenged claims in Ground 2. First, lululemon has not shown that Munsing discloses the “tubular structures” recited in claims 1 and 20. Second, lululemon has not shown that Munsing discloses a “first area of the front surface” that is “revealed for visual observation” in “the extended position,” as recited in claim 1.

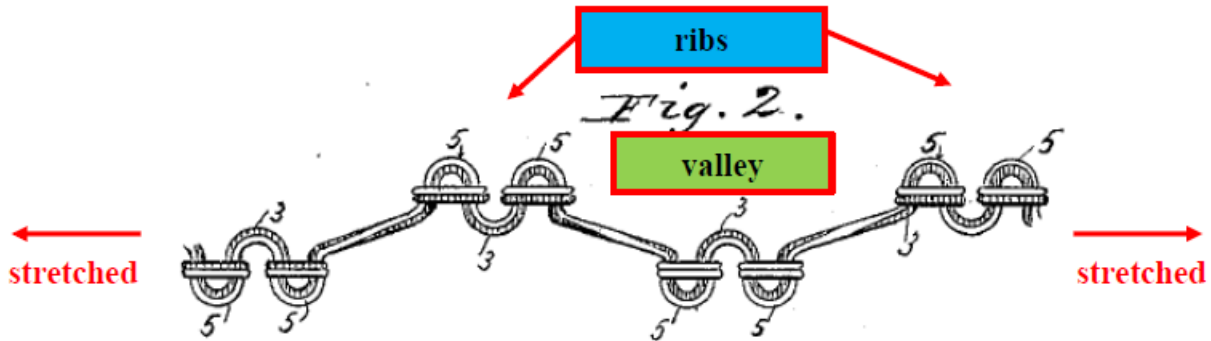
A. Munsing does not disclose the “tubular structures” recited in claims 1 and 20

Under either party’s proposed construction of “tubular structures”—whether “hollow,” “elongated,” or neither—Munsing does not disclose any “tubular structures.” Ex. 2002, ¶44.

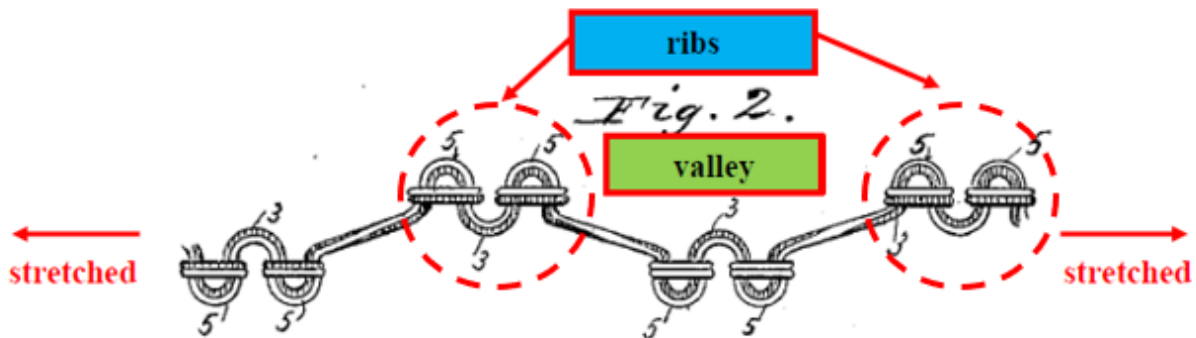
lululemon’s identification of “tubular structures” in Munsing is but a single sentence. Petition, 50; Ex. 2002, ¶45. lululemon’s Petition explains that the “ribs separating the valleys are tubular structures positioned adjacent to the webbed areas

(valleys between ribs).” *Id.* lululemon provides no further explanation as to why Munsing’s ribs meet the “tubular structures” limitation. lululemon cites paragraph 101 of Dr. Brookstein’s declaration as support. *Id.* But Dr. Brookstein merely parrots this same language verbatim. Ex. 1003, ¶101. As a matter of law, Dr. Brookstein’s conclusory opinions on this point cannot support lululemon’s argument. *See Wasica Fin. GmbH v. Cont’l Auto. Sys., Inc.*, 853 F.3d 1272, 1286 (Fed. Cir. 2017) (holding that Petitioners are required to “identify with particularity the evidence that supports the grounds for the challenge to each claim”).

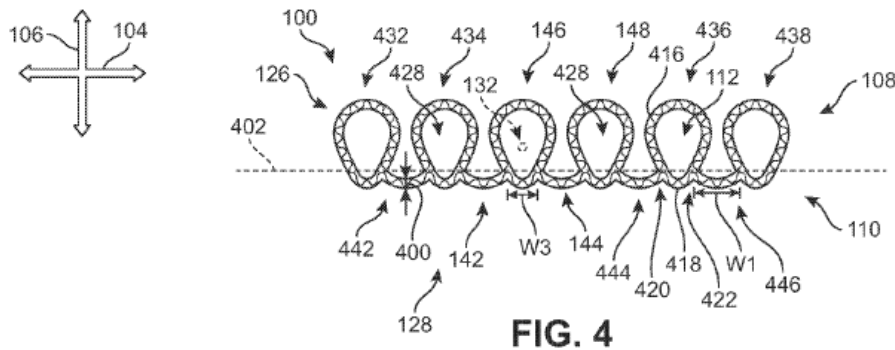
lululemon’s barebones analysis is telling—because the “ribs” that lululemon identifies in Munsing are far different from the “tubular structures” claimed in the ’046 patent. Ex. 2002, ¶¶46–47. Munsing never depicts how the “ribs” appear on its article of underwear. *See* Ex. 1006, Figs. 1–6. Munsing only shows the “ribs” on a micro scale. *See id.*, Fig. 2. And at that scale, Munsing’s “ribs” bear no resemblance to the “tubular structures” of the ’046 patent. Ex. 2002, ¶¶46–47. lululemon’s annotated version of Munsing’s Figure 2, which identifies “ribs” and “valleys,” is reproduced below. Petition, 48.



Munsing describes the fabric shown in Figure 2 as a “two-and-two knit fabric”—i.e., a fabric having two-course ribs. Ex. 1006, 2:45–49. In the below figure, Nike further annotates lululemon’s annotated version of Figure 2 by adding a circle around each two-course rib.



As this figure shows, Munsing’s ribs are not closed-loop structures. Munsing’s two-course ribs have a wavy, or corrugated cross-sectional shape—as opposed to a tubular shape. Ex. 2002, ¶¶46–47. Munsing’s ribs are thus far different from the “tubular structures” recited in the ’046 patent, which are depicted in Figure 4 below.

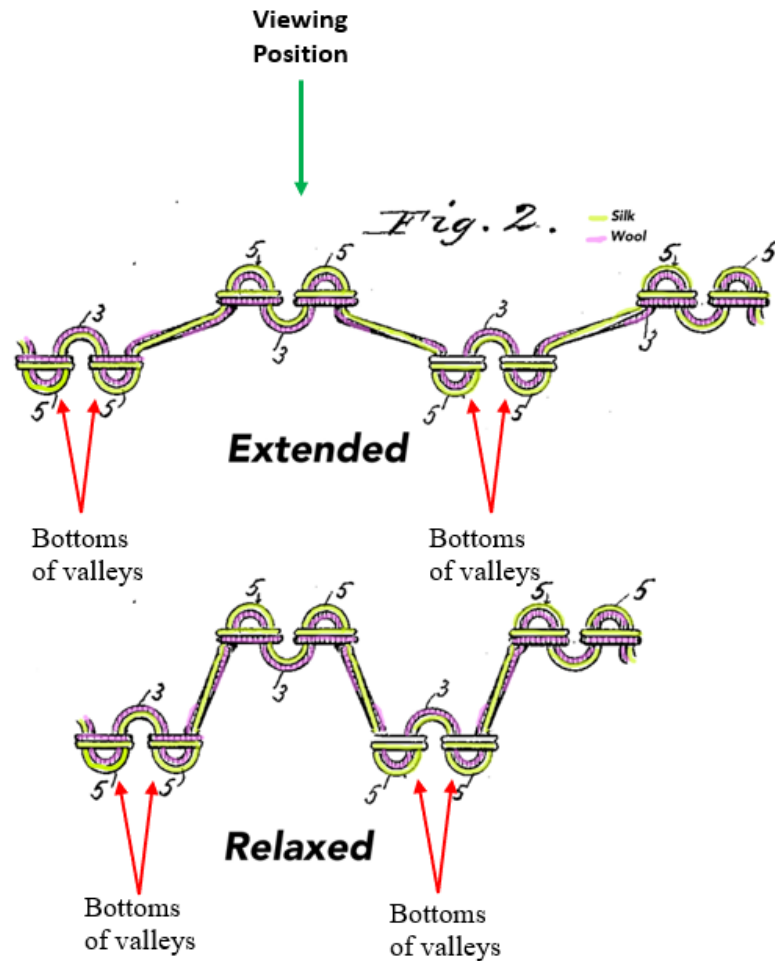


For at least this reason, lululemon fails to show a reasonable likelihood that Munsing anticipates any challenged claim in Ground 2.

B. lululemon has not shown that Munsing discloses that “in the extended position” the “first area of the front surface is revealed for visual observation from the first viewing perspective,” as recited in claim 1

lululemon has not shown that “the first area of the front surface” of the webbed areas in Munsing is “revealed for visual observation” in “the extended position,” as recited in claim 1. *See* Petition, 51–53. lululemon only shows that a different area is revealed in the extended position.

In its Petition, lululemon points to “[t]he bottoms of the valleys between the ribs” as being the “first area of the front surface” of the webbed areas. Petition, 51–52. The figures below identify the “bottoms of the valleys” in Munsing’s figure 2, showing both the extended position (top) and relaxed position (bottom).



lululemon then argues that, in the extended position, the “uncovered portions,” i.e., “valleys between the ribs” are “at least partly revealed from the first viewing perspective.” Petition, 52–53. In other words, lululemon is arguing that the *valleys as a whole*—not the *bottom* of the valleys—are “revealed for visual observation” in “the extended position.” lululemon has not even alleged, let alone shown, that the bottoms of the valleys are revealed from the first viewing perspective in an extended position.

For at least this reason, lululemon fails to show a reasonable likelihood that Munsing anticipates any challenged claim in Ground 2.

VIII. GROUND 3: LULULEMON HASN'T SHOWN A REASONABLE LIKELIHOOD THAT MINAMI ANTICIPATES OR RENDERS OBVIOUS CLAIMS 8, 9, 14, 15, OR 19

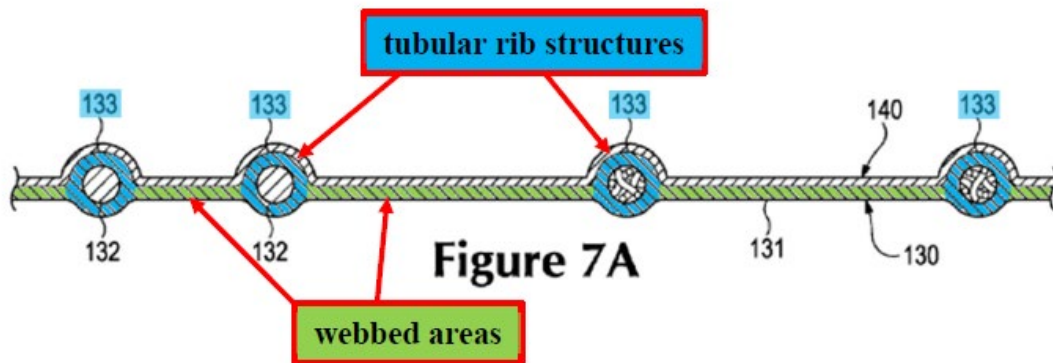
lululemon fails to show to a reasonable likelihood that Minami anticipates or renders obvious any challenged claim in Ground 3. Specifically, lululemon fails to show that Minami discloses at least two limitations in independent claim 8. First, lululemon has not shown that Minami discloses “tubular rib structures” having “a first curved portion” with “a first curve length” that is “greater” than “a second curve length” of “a second curved portion.” Second, lululemon has not shown that Minami discloses “webbed areas” that are “configured to move between a neutral position and an extended position.”

For at least these reasons, lululemon fails to show a reasonable likelihood that Minami anticipates or renders obvious any challenged claim in Ground 3.

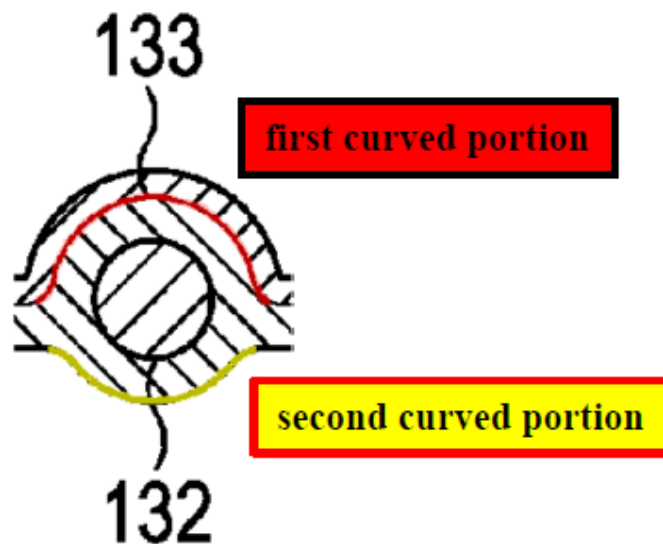
A. Minami does not disclose that “the tubular rib structures have a first curved portion with a first curve length” that is “greater” than “a second curve length” of a “second curved portion,” as recited in claim 8

lululemon has not shown that Minami discloses that “the tubular rib structures have a first curved portion with a first curve length” that is “greater” than “a second curve length” of a “second curved portion,” as recited in claim 8.

lululemon points to Minami's protruding areas 33, shown in Figure 7A below, as the claimed "tubular rib structures."



Petition, 60–61. lululemon then zooms in on Figure 7A and identifies the alleged "first curved portion" and "second curved portion" shown below.



lululemon asserts that the "first curved portion" is longer than the "second curved portion." *See* Petition, 64–65. But lululemon cites no evidence supporting this assertion. Nothing in Minami—either in its description of Figure 7A or

elsewhere—discusses the relative length of the upper and lower portions of protruding area 133. *See generally* Ex. 1007. lululemon points to paragraph 61 of Minami, but that paragraph says nothing about the lengths of these portions. Petition, 65; Ex. 1007, [0061]. lululemon relies strictly on Minami’s Figure 7A for its argument about the relative length of these portions. But as a matter of law, it is improper to rely on patent figures for the precise proportions of certain elements. *See Halberstadt, Inc. v. Avia Grp. Int’l, Inc.*, 222 F.3d 951, 956 (Fed. Cir. 2000) (“it is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue”). Minami even acknowledges the unreliability of relying on the scale of its figures: “[t]he components in the figures are not necessarily to scale, emphasis instead being placed upon illustrating the principles of the invention.” Ex. 1007, [0010].

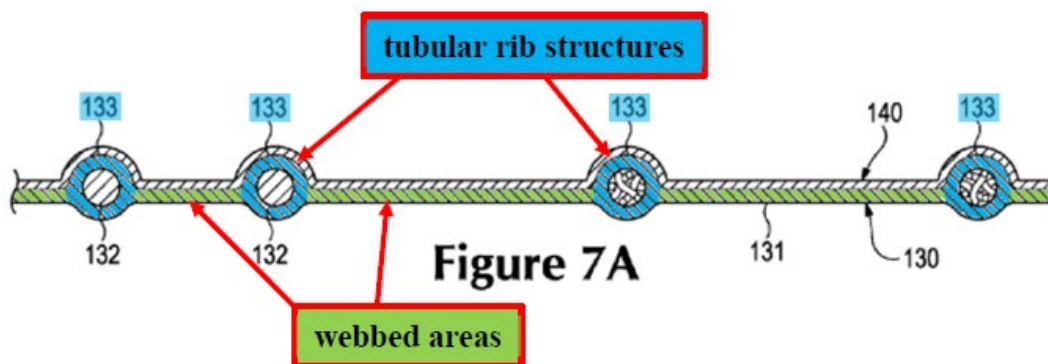
lululemon also cites to Dr. Brookstein’s declaration to support its position. Petition, 64–65 (citing Ex. 1003, ¶¶131–133). But once again, Dr. Brookstein merely parrots the Petition, relying exclusively on Minami’s Figure 7A. His conclusory opinions thus provide no support for lululemon’s argument.

For at least this reason, lululemon fails to show that Minami anticipates or renders obvious any challenged claim in Ground 3.

B. Minami does not disclose “webbed areas” that are “configured to move between a neutral position and an extended position,” as recited in claim 8

lululemon has not shown that Minami discloses “webbed areas” that are “configured to move between a neutral position and an extended position,” as recited in claim 8. Nor can it, because Minami’s knit element is configured *not to stretch*. Ex. 2002, ¶49.

As shown below, lululemon points to the portions of Minami’s knit element 131 that lie between protruding areas 133 as the claimed “webbed areas.”



Petition, 60–61. lululemon argues that Minami’s knit element 131—including the portions between protruding areas 133— “stretches.” Petition, 66 (citing Ex. 1007, [0048]–[0049], [0052]). In support of its argument, lululemon quotes paragraph 49 of Minami because it discloses that “different types of stitches” in knit element 131 “may affect ... stretch.” But this paragraph does not disclose that the connecting portions are “configured to” stretch. Ex. 2002, ¶¶50–52. To show that Minami’s “webbed areas” are “configured to” move between a neutral position and an

extended position, lululemon must show not only that the webbed areas are capable of doing so, it must show that they are *designed to do so*. See *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 672 F.3d 1335, 1349 (Fed. Cir. 2012) (holding that “configured to” requires that a structure be “designed ... to accomplish the specified objective, not simply that [it] can be made to serve that purpose”). lululemon has not made that showing.

To the contrary, Minami teaches that these connecting portions of knit element 131 are configured *not to stretch*. This is true for at least two reasons. First, Minami discloses that the knit element 131 of Figure 7A is coated in a “skin layer” that “inhibit[s] stretch” and “impart[s] a relatively tight and glove-like fit to upper 120.” Ex. 1007, [0044]; Ex. 2002, ¶52. Second, in one of the same paragraphs that lululemon cites as alleged support (Ex. 1007, [0052]), Minami discloses that portions of upper having inlaid strands 132 impart “stretch-resistance” to the upper. Because the connecting portions of knit element 131 shown in Figure 7A of Minami are located between protruding areas 133 having inlaid strands, these are located in a “stretch-resistant” area of the upper. Ex. 2002, ¶53.

lululemon relies on Dr. Brookstein’s declaration in support of its arguments for this limitation. Petition, 66–67 (citing Ex. 1003, ¶¶134–137). But Dr. Brookstein merely cites to the same paragraphs of Minami as the Petition, and opines that Minami’s knit element 131 “allow[s] for stretching.” Ex. 1003, ¶134. Dr.

Brookstein, like lululemon, focuses on whether Minami's knit element 131 is *capable of* stretching, not whether it is *configured to* stretch. This is insufficient.

For at least these reasons, lululemon fails to show that Minami anticipates or renders obvious any challenged claim in Ground 3.

IX. CONCLUSION

For the reasons set forth above, Nike respectfully requests that the Board deny institution of the Petition for all Challenged Claims of the '046 Patent.

Dated: February 29, 2024

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CERTIFICATE OF WORD COUNT

Under the provisions of 37 C.F.R. § 42.24(d), the undersigned hereby certifies that the Microsoft Office word count including all footnotes for the foregoing Patent Owner's Preliminary Response, excluding the table of contents, table of authorities, certificate of word count, appendix and certificate of service, totals 4,757 words, which is less than the 14,000 words allowed under 37 C.F.R. § 42.24(b)(1).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies service on the Petitioner, pursuant to 37 C.F.R. § 42.6(e) and by agreement of counsel, by electronic (e-mail) delivery of a true copy of the foregoing **PATENT OWNER'S PRELIMINARY RESPONSE**, which was served on February 29, 2024 to the following Counsel for Petitioner via e-mail:

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