

Ali S. Razai  
ali.razai@knobbe.com  
Joseph F. Jennings  
joe.jennings@knobbe.com  
Brandon G. Smith  
brandon.smith@knobbe.com  
KNOBBE, MARTENS, OLSON & BEAR, LLP  
2040 Main St., 14<sup>th</sup> Floor  
Irvine, CA 92614  
Telephone: (949) 760-0404  
Facsimile: (949) 760-9502

Inzer C. Ni  
inzer.ni@knobbe.com  
Stacy Rush  
stacy.rush@knobbe.com  
Knobbe, Martens, Olson & Bear, LLP  
1155 Avenue of the Americas, 24th Floor  
New York, NY 10036  
Telephone: (212) 849-3000  
Facsimile: (212) 849-3001

Jonathan E. Bachand  
Jon.bachand@knobbe.com  
Knobbe, Martens, Olson & Bear, LLP  
1717 Pennsylvania Avenue N.W.  
Suite900  
Washington, DC 20006  
Tel: 202-640-6400  
Fax: 202-640-6401

Attorneys for Defendant  
LULULEMON USA INC.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

NIKE, INC.,

Plaintiff,

v.

LULULEMON USA INC.,

Defendant.

Case No.: 1:23-cv-00771-AS

**LULULEMON USA INC.'S RESPONSIVE  
CLAIM CONSTRUCTION BRIEF**

lululemon v. NIKE, Inc.  
IPR2024-00159  
Patent No. 9,375,046  
Ex. 2003

## TABLE OF CONTENTS

|                                                                                                                                                                 | Page No. |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| I. FACTUAL BACKGROUND .....                                                                                                                                     | 1        |
| II. THE PERSON OF ORDINARY SKILL IN THE ART .....                                                                                                               | 1        |
| III. ARGUMENT .....                                                                                                                                             | 3        |
| A. “tubular structures” (’046 Patent) .....                                                                                                                     | 3        |
| 1. The Plain Meaning of “Tubular” and the Specification Both<br>Compel the Conclusion That “Tubular Structures” Are Hollow .....                                | 3        |
| 2. This Court Should Reject Nike’s Reliance on a Conclusory<br>Decision from Another District in <i>Nike v. Puma</i> .....                                      | 5        |
| B. “flat-knitting process” (’484 Patent) .....                                                                                                                  | 7        |
| 1. Background on Warp Knitting and Weft Knitting .....                                                                                                          | 8        |
| 2. The Intrinsic Evidence Supports Construing Flat Knitting as a<br>Sub-Type of Weft Knitting Consistent with the Accepted<br>Definition in the Field .....     | 9        |
| 3. Nike Previously Argued Flat Knitting is a Sub-Type of Weft<br>Knitting Only .....                                                                            | 11       |
| 4. Nike’s Inventors Previously Testified Flat Knitting is Weft<br>Knitting .....                                                                                | 12       |
| 5. Nike’s Attempt to Justify Its Construction Here Should be<br>Rejected .....                                                                                  | 13       |
| 6. lululemon’s Expert Did Not Agree with Nike’s Definition .....                                                                                                | 15       |
| C. “a flat-knitted element formed from at least one yarn mechanically<br>manipulated in a flat-knitting process” (’484 Patent) .....                            | 16       |
| D. “incorporating [the knitted element / at least one of the first and<br>second knitted textile elements] into the article of footwear” (’749<br>Patent) ..... | 18       |

### **III. ARGUMENT**

#### **A. “tubular structures” (’046 Patent)**

| <b>Nike’s Construction</b>                           | <b>lululemon’s Construction</b>                                 |
|------------------------------------------------------|-----------------------------------------------------------------|
| Ordinary and customary meaning; tube like structures | Plain and ordinary meaning, which is elongated hollow structure |

Asserted claims 1-3, 16, 17, and 20 of the ’046 patent (D.I. 1-2) are directed to an article, such as a fabric for use in shoes. The claimed article includes a plurality of “tubular structures.” Both the ordinary meaning and the specification compel the conclusion that the claimed “tubular structures” have the shape of tubes, namely elongated hollow structures. Nike purports to advocate for the ordinary meaning of “tubular structures,” but ignores that the ordinary meaning of a “tube” is an elongated ***hollow*** structure. Not surprisingly, Nike fails to cite a single definition of “tube” or “tubular” that would support defining tubular structure to be something other than a hollow structure. Nike attempts to broaden the definition to allow it to argue to the jury that ***solid*** ribs in lululemon’s shoes are “tubular structures.” The Court should reject Nike’s invitation to expand the scope of the term “tubular structures” beyond its plain meaning.

#### **1. The Plain Meaning of “Tubular” and the Specification Both Compel the Conclusion That “Tubular Structures” Are Hollow**

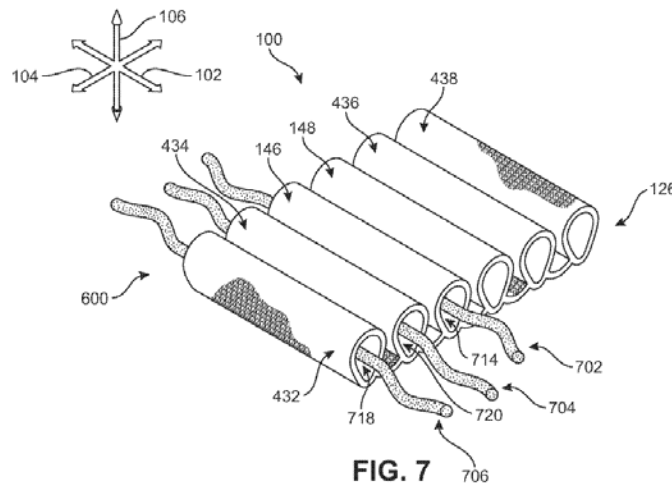
The parties’ central dispute is whether the plain meaning of “tubular structure” refers to a structure that is hollow. The evidence overwhelmingly confirms that a “tubular structure” is hollow. Dictionaries define “tubular” as “like a tube” and “tube” as a “hollow cylinder.” Razai Decl., Ex. 7 at 1557 (defining “tubular” as “of or shaped like a tube” and “tube” as “a ***hollow*** cylinder or pipe or metal, glass, rubber, etc., usually long in proportion to its diameter, used for conveying fluids, etc.”) (emphasis added); Razai Decl., Ex. 8 (defining “tubular” as “[o]f or having the form of a tube” and “tube” as “[a] ***hollow*** cylinder, esp. one that conveys a fluid or functions as a passage”) (emphasis added).

The '046 patent uses the term “tubular structure” consistent with this ordinary meaning. For example, the patent’s figures show the “tubular structures” are hollow. *See* D.I. 1-2 (“’046 patent”), Figs. 1-7, and 11-17. The specification uniformly uses the phrases “tubular structures” and “tubular rib structures” to refer to the hollow structures 126 shown in Figure 1 and analogous components shown in other figures. *See, e.g., id.*, 7:14-44, 9:21-43. The specification also refers to the “inner surface of tubular rib structures 126.” *Id.*, 16:50. Plainly, tubular rib structures could not have an “inner surface” unless they were hollow. Further, the specification equates “tubular structures” with “tunnels.” *See, e.g., id.*, 7:19-22 (“Two or more knit layers may be formed of unitary knit construction in such a manner so as to form **tubes or tunnels**, identified as tubular rib structures 126, in knitted component 100.”) (emphasis added); 10:28-32 (“[F]irst curved portion 416 and second curved portion 418 meet along a first transition 420 edge and also along a second transition 422 edge, forming **a tunnel or tube** shape.”) (emphasis added).

When the specification suggests a broader scope—such as could potentially encompass both solid and hollow structures—it uses the unmodified phrase “rib structures.” For example, the beginning of the Detailed Description states that the “knitted component 100 can include rib structures.” *Id.*, 4:56-57. “In some cases,” the specification continues, “rib structures can be hollow tubes.” *Id.*, 4:58-59. Thus, the specification contemplates both solid and hollow “rib structures.” But the claims are limited to “tubular structures.” And, as just explained, both the plain meaning of “tubular” and the specification make clear that “tubular structures” are hollow.

Construing “tubular structures” as “hollow” as lululemon proposes would not exclude—and in fact supports—embodiments of the '046 patent that include an element passing through the tubular structure. The specification states that, in some embodiments, “other material” may be included “within openings 112 of tubular structures 126, such as tensile elements.” *Id.*, 13:16-18;

see also *id.*, 15:29-32, 21:4-10. The tensile elements 600 passing through the tubular structures are shown in Figure 7, reproduced below.



This disclosure of a tube with something inserted through it provides no support for Nike’s position that “tubular structures” encompasses solid structures. Rather, it supports the opposite. The “tubular structures” are “tunnels” as the specification states. Thus, elements may be inserted through the “tubular structures” because the “tubular structures” are hollow.

**2. This Court Should Reject Nike’s Reliance on a Conclusory Decision from Another District in *Nike v. Puma***

Nike cites no evidence, intrinsic or extrinsic, suggesting the ordinary meaning of a “tubular structure” is something other than a hollow structure. Instead, Nike invites the Court to abdicate its responsibility to construe the term and adopt the decision of another court in *Nike, Inc. v. Puma N.A., Inc.*, Civil No. 18-10876-LTS (D. Mass. Oct. 24, 2019) (submitted as D.I. 74-10). Nike Br. at 12. This is improper.

Claim construction decisions of one district court are not binding on other courts. See, e.g., *PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, 2014 WL 4199244, at \*8 (N.D.N.Y. Aug. 21, 2014). Each court must make its “own independent assessment of claim construction.” *Id.* The prior decision will only be given deference by the later courts if the later cases do not

involve “a new party that raises new arguments.” *Id.* (quoting *Ravo v. Tyco Healthcare Grp. LP*, 2013 WL 3326657 at \*6 (W.D. Pa. Mar. 13, 2013)). Of course, lululemon was not a party to the *Nike v. Puma* case.

Even more significant, the *Puma* court’s decision is unpersuasive on the merits. The court concluded its construction by stating, “The term ‘tubular’ ordinarily encompasses non-hollow (or solid) tube-like structures and nothing in the intrinsic evidence disavows such structures.” D.I. 74-10 at 17. The court cited nothing as support. As discussed above, however, the specification and the typical usage of “tubular” shows the ordinary meaning requires a hollow structure.

The *Puma* court also stated “there is no suggestion in the patent that tubular structures are limited to hollow tubes.” D.I. 74-10 at 17. But this misses the point—the ordinary meaning of “tubular structure” is a structure having the shape of a tube, which is hollow. And the law does not require a patent to explain the ordinary meaning of a common word. To the contrary, claim terms are generally given their ordinary meaning. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005).

The *Puma* court’s conclusory statement that “‘tubular’ ordinarily encompasses non-hollow (or solid) tube-like structures” also contradicts a legion of district court cases construing the “plain and ordinary” meaning of “tubular” or “tube” to require a hollow structure. *See Bos. Sci. Corp. v. Cordis Corp.*, 2003 WL 27376856, at \*16 (N.D. Cal. Oct. 8, 2003) (“The parties have not asked the Court to interpret the term ‘tube,’ but it seems clear to the Court that the plain meaning of a tube is hollow and thus open at both ends.”); *Wonderland Nurserygoods Co. v. Baby Trend, Inc.*, 2020 WL 13680678, at \*4 (C.D. Cal. Dec. 30, 2020) (“The Court finds that plain meaning applies: an upright/support tube is a hollow cylinder.”); *Bal Seal Eng’g Co. v. Jay Qiang Huang*, 2011 WL 11796683, at \*4 (S.D. Cal. Aug. 1, 2011) (defining “generally tubular shaped” as “[a] structure

“knitted textile element,” which no longer exists after incorporation. ’749 patent, 10:13-31 (“Whereas upper 30 was almost exclusively formed by textile element 40, upper 130 also includes lace 131 and elements 132-135. Accordingly, an upper in accordance with the present invention may incorporate a plurality of additional components.”). Nike contends that there is nothing in the specification restricting “*when* these components are added to the upper.” Nike Br., 10. That might be true. But the claims require incorporation of the “knitted textile element” into the “article of footwear,” not incorporation of the “upper” into the “article of footwear.” These additional components can be added at anytime to the upper *after* incorporation of the “knitted textile element” to the “article of footwear.” But the claimed “knitted textile element” prior to incorporation cannot include non-knitted materials or it is no longer a “knitted textile element” when later incorporated into the article of footwear.

Finally, Nike contends it is improper to include a “negative limitation” absent lexicography or disclaimer. Nike Br., 10-11. lululemon’s construction does not contain a negative claim limitation. Instead, lululemon’s construction simply gives effect to the fact it is the “knitted textile element,” and not a multi-material element, one is “incorporating . . . into the article of footwear.” This is required by the claim language itself and consistent with the specification and the intended benefit of using a single material “knitted textile element.”

Dated: November 10, 2023

Respectfully submitted,

/s/ Ali S. Razai

Ali S. Razai

Joseph F. Jennings

Brandon G. Smith

KNOBBE MARTENS OLSON & BEAR LLP

2040 Main Street, 14th Floor

Irvine, CA 92614-3641

Tel.: (949) 760-0404  
Fax: (949) 760-9502

Inzer C. Ni  
inzer.ni@knobbe.com  
Stacy Rush  
stacy.rush@knobbe.com  
KNOBBE, MARTENS, OLSON & BEAR, LLP  
1155 Avenue of the Americas, 24th Floor  
New York, NY 10036  
Tel: (212) 849-3000  
Fax: (212) 849-3001

Jonathan E. Bachand  
Jon.bachand@knobbe.com  
Knobbe, Martens, Olson & Bear, LLP  
1717 Pennsylvania Avenue N.W.  
Suite900  
Washington, DC 20006  
Tel: 202-640-6400  
Fax: 202-640-6401

*Attorneys for Defendant*  
LULULEMON USA INC.