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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NIKE, INC.,

Plaintiff,

v.

23 CV 00771

LULULEMON USA, INC.,

Defendant.

Conference

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New York, N.Y.
December 11, 2023
2:00 p.m.

Before:

HON. ARUN SUBRAMANIAN,

District Judge

APPEARANCES

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Attorney for Plaintiff

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lululemon v. NIKE, Inc. IPR2024-00159 Patent No. 9,375,046 Ex. 2004
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1 there's a tube, and you fill it with concrete, it's still
2 tubular. It's about, at some point -- a tube of toothpaste --
3 I'm not sure whether you were calling it upon implementation --
4 I'm trying to understand that terminology, but if you have a
5 tube-like structure on a shoe, and then you put a lace through
6 it, or you put a tensile element through it, it's still
7 tubular. But if you put a rib on a shoe, that's not tubular.

8 THE COURT: Got it. Okay.

9 Mr. Bowling.

10 MR. BOWLING: Yes. Thank you, your Honor.

11 So the parties agree this term should be given its
12 ordinary, customary meaning. Lululemon isn't alleging any
13 lexicography, disclaimer, or anything like that.

14 And the parties also agree that "tubular" is "like a
15 tube." It's not the same as "tube." And we can see that right
16 on their responsive brief at page 3. The third line in the
17 second paragraph says, "dictionaries define tubular as like a
18 tube." We agree with that. The claims don't say "tube
19 structures." It's "tubular structures." And we think that's
20 an important distinction.

21 And if we can point your Honor to page 16 of Nike's
22 demonstrative, we've pulled a portion of the specification of
23 the 046 patent here, and you can see that it says, in the
24 highlighted portion, "first tubular structure, .46, can have a
25 tube shape in some embodiments." So the tubular structures are

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1 not always a tube. They're tubular. They're like a tube.

2 Maybe it's a hollow rectangle with, you know, a
3 rectangular, a square cross-section, so it's not a cylindrical
4 shape. Maybe it's a cylinder that's filled, and so from
5 outside observation, which we know is the purpose of this
6 patent, the visual observation, maybe they look like a tube,
7 they're tube like, but not necessarily hollow.

8 So the parties agree "tubular" does not include
9 hollow. Tubular only means "like a tube." If we look at their
10 brief, the only instances where they can point to a dictionary
11 definition that includes "hollow" is when they're defining
12 "tube." That's not the claim term. It's tubular structure,
13 and we think that's an important distinction.

14 THE COURT: Well, you know, if you put "tubular" into
15 Google, the Oxford Dictionary definition is "a hollow
16 cylinder." I just did it before I came up here, so I'm putting
17 that out there.

18 I think the OED does have, as one of the primary
19 definitions of "tubular," a hollow, cylindrical structure. So
20 that is at least one definition. I do believe that Lululemon
21 points to at least one definition. This is at Exhibit 7 to the
22 Razai Declaration, which defines "tubular" as "of or shaped
23 like a tube," and "tube" as "a hollow cylinder."

24 So I guess what their position is, is "tubular" refers
25 to "tube-like" or the properties of a tube, but the only

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1 defining property of a tube is that it is hollow, right?

2 Otherwise it wouldn't be a tube. It would be a cylinder or a
3 rod."

4 MR. BOWLING: We agree, your Honor. They're taking
5 "tubular," and trying to replace it with "tube," and taking the
6 definitions of "tube" and putting them as if they were
7 definitions of "tubular." But if we look at their brief,
8 that's not what any of the definitions say. Tubular is like a
9 tube or shaped like a tube. And there's nothing in those
10 definitions of tubular that requires hollow.

11 And when we look at the specification, that confirms
12 the ordinary meaning of tubular, which, as your Honor knows,
13 must be read in the context of the specification, does not
14 require that the tubular structures be hollow. We just looked
15 at one that says, the tubular structure can have a tube shape
16 in some embodiments, and if we look at slide 17 of Nike's
17 demonstrative, we see that the tubular structures can generally
18 be shaped as a cylinder, they can be circular, an elliptical
19 cylinder. "The knitted component" -- at the very bottom of the
20 excerpted portion, "the knitted component can include
21 differently shaped tubular rib structures."

22 So in the context of this specification, we think the
23 ordinary meaning of tubular does clearly not require that it be
24 hollow.

25 THE COURT: Well, I think the response from Lululemon

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1 is, like if you look at the language you're pointing to on page
2 17 of the demonstrative, this is talking about the shape of a
3 tubular rib structure, already assuming that it is hollow, and
4 speaking more about the shape of the tubular rib structure to
5 be contrasted with rib structure itself, which is potentially
6 something that might not have that hollow attribute that you
7 would associate with a tube.

8 That's at least their position that they're taking
9 based on some language in the specification.

10 So what's your response to that?

11 MR. BOWLING: Yes, your Honor.

12 They seem to be drawing this false distinction between
13 "tubular rib structures" and "rib structures" in the
14 specification. We think if you review the specification,
15 you'll see that that's not the case. "Tubular rib structure"
16 is used some 130 number of times. "Rib structure" only appears
17 three times in the specification, and is used synonymously with
18 tubular rib structure. We don't think there's any distinction
19 between those, they appear to be used as synonyms.

20 And if we look at what they say in their responsive
21 brief at page 4, they're talking about these rib structures, as
22 your Honor just noted, this is their argument, and they say
23 that the specification explains -- and we are in this second
24 paragraph here. We're starting in the third sentence. It
25 begins with, in some cases, the specification -- continues --

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1 rib structures can be hollow tubes. And they're saying,
2 therefore, the specification contemplates that those rib
3 structures can be solid and hollow.

4 And if we look back at slide 16 of Nike's
5 demonstrative, we see almost the exact same thing, talking
6 about whether the tubular structures have to be a tube. In
7 some embodiments, the first tubular structure can have a tube
8 shape.

9 And so, using their logic, their reading in the
10 specification, the specification, thus, contemplates both tube
11 like -- tubular structures that are shaped like a tube and
12 tubular structures that may not be. And if we look at all the
13 portions of the specification that they're relying on, and you
14 can see some of these at Nike's demonstrative slide 18, every
15 instance where they're pointing out that tubular structure is
16 used to describe a tube or a tunnel, it's all permissive
17 language. It's some embodiments --

18 THE COURT: What does "tube like" mean, if it doesn't
19 have any element of hollowness?

20 MR. BOWLING: So, your Honor, we think it's something
21 like a tube, so if you have a tube that has a cross-section of
22 a square or a triangle, it's not a cylinder, but it's tube
23 like. In that case, it may be hollow. Or if you have a
24 cylinder that's filled, from outside observation, that looks
25 like a tube. If you're walking down the street and see a

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1 construction site, you don't know if you're looking at a
2 concrete tube with a hollow middle, or if it's all the way
3 filled. You still might be think it's a tube-like concrete
4 cylinder.

5 So we think "tube like" could mean hollow. It
6 certainly does mean hollow in some instances, in some
7 embodiments, but we don't think there's anything in the meaning
8 or in the specification that requires "tubular structure" to be
9 hollow.

10 THE COURT: Okay.

11 MR. BOWLING: And if I may, that is what the Court in
12 the District of Massachusetts found. It looked at precisely
13 this issue in the same patent, the same term, same
14 specification, and it looked at all the same evidence as being
15 asserted here, and it found that the ordinary meaning of
16 "tubular structure" does not require it to be hollow. And --

17 THE COURT: I mean, I know that the *Puma* Court said
18 that. It's at the bottom of the page, and then I looked at the
19 next page, and it was just the next exhibit, because apparently
20 the Court just kind of said that the normal definition of
21 "tubular" would be "tube like" and would not require an element
22 of hollowness. And then there's no explanation after that what
23 the Court used as the basis for that understanding.

24 So I understand your position on *Puma*. You definitely
25 prevail on this claim construction under *Puma*, but I think

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1 Lululemon's position is it's only persuasive authority, and it
2 shouldn't have the power to persuade in this case. But I
3 understand your position on the specification references.

4 So let's hear from Lululemon.

5 MR. RAZAI: Thank you, your Honor.

6 If we can just start with page 4 of the
7 demonstratives. I think we've kind of gone through the
8 definitions a few times. This is the American Heritage
9 Dictionary. Exhibit 7 and 8 to my declaration have dictionary
10 definitions for "tubular," which, it must mean something, your
11 Honor. We've heard nothing about what it does mean. It could
12 be a structure based on what -- from what I'm hearing.

13 We're not arguing it needs to be a cylinder. We're
14 not arguing it needs to be a triangle or a hexagon, but it has
15 to be a tube, or has to be tubular. And if you look at the
16 specifications, the specification distinguishing ribs from --

17 THE COURT: Right. So I think that Mr. Bowling is
18 saying that if look at the definition of "tubular" here, it's
19 "of or having the form of a tube." So he gives the example of
20 something that may look as if it might -- someone might say
21 something's a tube even though it happens to be totally filled
22 and have no hollow center.

23 MR. RAZAI: Again, I agree it can be filled, but it
24 can't start out as a solid structure is what we're saying. And
25 that's when it's a tube. It's tubular when it has that

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1 to be hollow on implementation. That's my issue. If you have
2 a tubular structure, but then it's later filled in, I still
3 think someone could call that a tube or a structure --

4 MR. RAZAI: Absolutely. Yes.

5 THE COURT: But when you said "upon implementation,"
6 that's precisely the issues, in terms of what you're talking
7 about --

8 MR. RAZAI: I was trying to use the terminology that
9 the Court would use, but from my perspective, a clarification
10 on that hollowness would be appropriate, similar to a structure
11 that at some point was hollow. For example, a full tube of
12 toothpaste is still a tube.

13 That clarification is fully appropriate, so the jury
14 understands what we mean by hollow, so there isn't that
15 confusion, because the claims do recite the ability to fill it
16 with a tensile element and give it strength, which I believe is
17 one of the alleged inventions in the 046 patent. But if there
18 were a clarification to be added -- and "elongated" was just to
19 show it was similar to what the definitions in the dictionaries
20 were. I'm not wedded to it. It's not anything that affects
21 the dispute --

22 THE COURT: I think he has a good point that, in terms
23 of the shape of the tubular structure, the specification does
24 provide for variations, so I don't think "elongated" is
25 appropriate here. But you have a real argument on hollow