

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON USA, INC.,
Petitioner,

v.

NIKE, INC.,
Patent Owner

IPR2024-00159
Patent 9,375,046 B2

Held: April 3, 2025

BEFORE: CARL M. DEFRANCO, GEORGE R. HOSKINS, and
STEPHEN E. BELISLE, Administrative Patent Judges.

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The above-entitled matter came on for hearing on April 3, 2025, commencing at 1:00 p.m., at the U.S. Patent and Trademark Office in Alexandria, Virginia.

P R O C E E D I N G S

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JUDGE BELISLE: Good afternoon. This is the oral hearing in IPR2024-00159 involving US Patent Number 9,375,046 B2. The court reporter will prepare the official transcript for this hearing. Petitioner is lululemon USA, Inc. Patent Owner is Nike, Inc.

I am Judge Belisle, and I'm joined by Judge DeFranco on your right and Judge Hoskins on your left. Judges DeFranco and Hoskins are appearing remotely by video.

Counsel, please enter your appearances beginning with counsel for petitioner.

MR. EVERTON: Good afternoon, Your Honor. Ben Everton from Morgan Lewis on behalf of Petitioner lululemon. With me I have backup counsel, Jacob Peterson, and then also Juliana Kirby, who is also from Morgan Lewis.

JUDGE BELISLE: Thank you.

Patent Owner?

MR. HARRIS: Yeah. Good afternoon, Your Honor. Michael Harris and Lindsey Staubach for Patent Owner Nike, Inc. Thank you.

JUDGE BELISLE: Thank you.

Although I see some familiar faces here and this is not the first Nike and lululemon case, for purposes of our record in this case, you're going to hear some general guidance that will sound quite familiar to you. We have the entire record available to us, including the parties' demonstratives. When referring to demonstratives, papers, or exhibits,

1 please do so clearly and explicitly by slide or page number. Importantly,
2 please pause a few seconds after identifying the page you want us to go to,
3 to provide us time to find it.

4 Please do not interrupt the other party while that party is presenting
5 its arguments. If you have an objection, raise it during your argument.
6 Pursuant to our hearing order, each party has 60 minutes to present its
7 argument. In addition, one of Patent Owner's counsel is participating in this
8 hearing as a LEAP practitioner, and so we've granted Patent Owner an
9 additional 15 minutes of argument time for a total of 75 minutes.

10 Each party may reserve time solely to rebut the opposing party's
11 arguments. You may not use rebuttal to address an issue for the first time.
12 During the hearing, petitioner will proceed first because it bears the burden
13 of proving unpatentability.

14 Petitioner, how much time, if any, do you wish to reserve for
15 rebuttal?

16 MR. EVERTON: I'd like to reserve 20 minutes, Your Honor.

17 JUDGE BELISLE: Twenty minutes. Thank you.

18 All right. So Petitioner, you may begin. And yes, I'll wait until
19 you're ready before I start that clock.

20 MR. EVERTON: Okay. Good afternoon. I'd like to give some
21 background to this IPR first, so if we can please turn to Slide 2 of Petitioner
22 lululemon's slides demonstratives. Here I'd just like to talk real briefly about
23 the '046 patent and what it's about. And here we show on Slide 2 a few of
24 the figures from the '046 patent. We have Figure 1 and Figure 2, and these
25 show an example of tubular structures and then also webbed areas. And in
26 blue, we have the tubular structures, and then in green, we've highlighted the

1 webbed areas.

2 And the '046 patent describes these tubular rib structures as being
3 able to pull apart and stretch as the material stretches and thus revealing the
4 webbed areas in between the tubular rib structures. And apparently, this is
5 desirable for aesthetic reasons. Although the '046 patent discloses examples,
6 like this one, of tubular rib structures, it does not limit those structures to any
7 specific type of tubular structures or the ones that are shown here in the
8 figures. Like most patents, the '046 patent provides example embodiments
9 without confining itself to the specific embodiments that it shows.

10 As you'll see, these are the main features really in the claims.
11 Some of the claims are directed towards an article, so they can be very
12 broad, and others are more focused on an actual shoe, the upper of a shoe.
13 So an important question to consider as we go through this is what, if
14 anything, did the '046 patent contribute that wasn't already present in the
15 prior art, and specifically, in Nike's own patents that previously showed
16 these tubular structures with webbed areas in between?

17 Now let's turn to Slide 3. This shows Claim 1 of the '046 patent.
18 Again, a very broad claim. It's directed to an article, and the article has these
19 features, the webbed areas, the plurality of tubular structures, and then those
20 are able to move between different positions. So quite a broad claim,
21 especially in view as we get later on into the Good reference and the Minami
22 reference, which have these features. But we'll see that it boils down to
23 really, the issue boils down to what is this plurality of tubular structures and
24 what qualifies as a tubular structure. And for Claim 1, we have Ground 1,
25 which is based on the Good reference.

26 Now, if we turn to Slide 4, this Claim 8 of the '046 patent, another

1 independent claim. This one is a little more specific. It is directed to an
2 upper, a shoe upper. It also includes tubular rib structures and the webbed
3 areas but adds on top of that this limitation that the first curve length being
4 greater than the second curve length. So we'll go into that in much more
5 detail.

6 JUDGE BELISLE: Counsel, while you're on that -- this is Judge
7 Belisle -- is there any dispute between the parties as to the aspect of the
8 curved portions, like what that means?

9 MR. EVERTON: No, Your Honor. I don't think there is. The
10 curved portions, you'll have one curved portion and another curved portion,
11 and those form the tubular structure basically.

12 Now, let's turn to one of the main issues here, and that's claim
13 construction, and specifically, claim construction of the term "tubular
14 structures" or "tubular rib structures." And just to let you know up front,
15 those mean the same thing, and the parties don't dispute that. The tubular
16 structures and tubular rib structures should be treated the same. But here in
17 Slide 6, we have the parties' constructions. lululemon proposed an elongated
18 hollow structure. Nike proposed tube-like structures, and they need not be
19 hollow. So really the dispute is about hollow or not hollow, but both saying
20 that they are tube-like structures.

21 And then the Puma court -- we've provided that in our papers that
22 there's this parallel district court case between Nike and Puma. And in the
23 Puma case, the district court agreed with Nike that tubular means tube-like
24 structures and also agreed that broadly, it doesn't even require that they're
25 hollow.

26 JUDGE BELISLE: So Counsel, isn't the real fight more about

1 whether that tube has to be a complete perimeter as opposed to having a
2 break in it at some point as opposed to not so much whether it's filled or not
3 filled?

4 MR. EVERTON: Exactly. And that's what I'm trying to show
5 with this slide, is that really, the constructions are very similar. The
6 constructions don't say anything about closed loop or closed periphery.
7 They just say an elongated structure or a tube-like structure, and that's the
8 same thing that the district court did.

9 But you're right that in the Institution Decision, the POPR, this
10 other issue was raised that there was a supposed agreement that it had to be a
11 closed loop. And that's the main issue we're going to address. But I wanted
12 to just point out that there's nothing here in these constructions about that,
13 nothing here that we require a closed loop.

14 Now, if we turn to Slide 7, lululemon knew going into it that
15 tubular structures had to include other structures that didn't have closed
16 peripheries, and this one example here. So the specification is very clear
17 that the disclosed tubular structures can include channels, and in fact, that
18 this portion at the specification, it describes the tubular structures as in
19 alternative embodiments, in different embodiments being a channel instead
20 of a tube.

21 So it says -- and I'll just read this; you can see it on a slide -- "In
22 different embodiments, tubular rib structures 126 can define one or more
23 hollow tubes. A hollow tube 112 may be a generally unsecured area
24 disposed between the curved portion 416 and second curved portion 418 of
25 the tubular rib structure" -- and this is the key -- "that has the configuration
26 of a tunnel or channel."

1 So we see here that it's talking about different embodiments, right,
2 various different embodiments that are disclosed in the patent. And in some
3 of those different embodiments, the hollow tube can have the shape of and
4 be a channel. And Nike argues that this disclosure refers just to the specific
5 numbered illustrated features, the 126 and what's shown in the figures,
6 which are closed loop. But that really disregards the context here, that this is
7 talking about alternative embodiments that aren't shown. It's not just the
8 ones that are shown in the figures, but in alternate ones, the shape could be a
9 channel. The tubular structure could be a channel instead of a closed-loop
10 tube.

11 And this is not merely describing the illustrated tunnel
12 embodiments from the figures. Rather, it's describing different
13 embodiments and configurations that are also disclosed as part of the '046
14 patent. So it makes sense that the parties, lululemon and Nike, proposed
15 broad constructions for tubular structures, that it just needs to be tube-like or
16 have the shape of a tube. Not that it has to be a tube or closed. It doesn't
17 have to be. In fact, there's embodiments that show otherwise.

18 So now if we can move to Slide 8.

19 JUDGE DEFRANCO: Mr. Everton?

20 MR. EVERTON: Yes.

21 JUDGE DEFRANCO: Where are those other embodiments that
22 you just spoke of that supposedly show an open tunnel or an open channel?

23 MR. EVERTON: Right. So the other embodiments, those are on
24 the slide that I just came from, Slide 7, that we just discussed, where it talks
25 about different embodiments, different from the ones that are shown in the
26 figures that can have a configuration of a tunnel or a channel. Those are the

1 different embodiments that I was referring to.

2 JUDGE DEFRANCO: Yeah, but how is a tunnel or a channel a
3 different embodiment from what's shown in Figures 4 and 5?

4 MR. EVERTON: Right. Because a channel --

5 JUDGE DEFRANCO: So Figures 4 and 5 show a tunnel and a
6 channel. That's what that passage was referring to. So tell me how we're
7 supposed to read tunnel or a channel to be something different than what's
8 shown in Figures 4 and 5?

9 MR. EVERTON: So we understand a different reading of this
10 and that this, when it's saying in different embodiments and then describes
11 these tubular rib structures, that in different embodiments, the tube 112, the
12 tube itself, it may be a generally unsecured area. And then down at the end
13 of the sentence, that has the configuration of a tunnel or channel. So the
14 embodiments do show a tunnel, a closed loop, but it may also be a channel.
15 And a channel is something different, and we've shown evidence that I'll
16 show in the next slide --

17 JUDGE DEFRANCO: What evidence do you have that a channel
18 is different than a tunnel? Because a channel can be closed or open.

19 MR. EVERTON: Right. And --

20 JUDGE DEFRANCO: There's nothing in this patent that suggests
21 that the channel is open, that I see anyway. I mean, if you have evidence
22 within the specification that shows that this is an open channel or that this
23 patent is speaking to an open channel, definitely point us to that.

24 MR. EVERTON: We agree with you, Your Honor, that channels
25 do encompass both. They could be open or closed, and in this situation, a
26 channel encompasses open grooves, an open, not closed periphery structure.

1 And in the next Slide 8 --

2 JUDGE DEFRANCO: Where does this patent speak to grooves?
3 I've never seen that currently.

4 MR. EVERTON: This patent does not --

5 JUDGE DEFRANCO: Okay.

6 MR. EVERTON: It does not. But I'll get to where the grooves.
7 So if we go to Slide 8, this will help with what a person of skill in the art
8 would understand a channel to be in this context. So we'll get into that now
9 in Slide 8.

10 So here we provided other Nike patents that confirm what a person
11 of skill would understand a channel to be. And in these other Nike patents,
12 they do equate and synonymously describe a deep channel or a deep groove.
13 For example, one of the Nike patents says "deep channel," "deep groove,"
14 and "primary groove" are used interchangeably and synonymously. And this
15 is evidence of how Nike and its inventors understood the scope of the term
16 "channel" in the context of its patents and products. They understood that a
17 channel includes an open groove.

18 Now, Nike argues that these are different patents and can't be used
19 for the meaning of channel, but they do show and they are evidence as to
20 what a person of ordinary skill would understand channel to mean and that it
21 would be and could encompass grooves, open grooves that are not closed
22 periphery. And Nike hasn't pointed to any other contrary meanings for
23 channel that would go against this meaning, that it would include an open
24 groove.

25 And not only do the Nike's patents confirm this meaning of
26 channel, but lululemon's expert also provided testimony regarding the

1 meaning of a channel in this context. So Dr. Brookstein, lululemon's expert,
2 he explained in his deposition that a person of skill would know that a
3 channel has an open periphery and is not completely surrounded. So I'd like
4 to read part of his deposition testimony, read that into the record. So this is
5 from Dr. Brookstein, his deposition, which is Exhibit 2007, at page 39, line
6 19 through page 40, line 8. And we cited this in our reply at page 6.

7 So here he was asked, "Can you provide an example of something
8 that would not have a closed periphery or circumstance that would meet the
9 claim tubular structures?" His answer is, "A channel."

10 "QUESTION: And what does a channel look like?

11 "ANSWER: Well, in engineering, you would know that a channel
12 would have an opening. It would not be completely surrounded. There
13 would still be a tube.

14 "QUESTION: In your opinion, would that still meet a tubular
15 structure?

16 "ANSWER: In my opinion as an engineer, yes."

17 So this is additional and un rebutted evidence that that a person of
18 ordinary skill would understand the disclosed channel in the '046 patent,
19 those configurations, to include open periphery, like a groove, like an open
20 groove. And Nike has failed to provide any evidence for the meaning of
21 channel. This is the only evidence that we have in the record as to what a
22 person of skill would understand a channel to be as disclosed in the '046
23 patent.

24 JUDGE HOSKINS: Mr. Everton?

25 MR. EVERTON: Yes.

26 JUDGE HOSKINS: This is Judge Hoskins. Can you go back to

1 your Slide 7 for one moment? I just want to confirm something. I think this
2 is right, but I just want to make sure I have this correct.

3 From an intrinsic evidence perspective, if we were to take the two
4 words "or channel" out -- I know they're there, right there in the patent.
5 They're clearly there. But it seems to me that your whole claim construction
6 from an intrinsic evidence standpoint is relying on those two words. Is there
7 anything else -- in intrinsic evidence, I'm asking -- that helps you get to
8 where you want to go from a claim construction perspective?

9 MR. EVERTON: I think there is. I think there's more in the
10 patent that suggests that tubular structures should be read broadly. Even in
11 describing the illustrated embodiments that are in the figures, the patent is
12 also always very careful to say "may be" or "can be," you know, they can be
13 sewn together, they can be closed off. It's very intentional to keep it broad
14 and keep tubular structure much broader than just a tube, just a closed off
15 tube. I think just using the word "tubular" instead of saying "tube" broadens
16 it out. That's further evidence that there could be other structures as long as
17 they're tube-like, as long as they look like a tube or have the shape of a tube.

18 So I think, overall, the specification -- and the parties don't
19 disagree -- the constructions in this case are very broad. It's just tube-like.
20 So I think there is significant evidence in the intrinsic record for this broad
21 reading of the tubular structure.

22 JUDGE HOSKINS: Thank you. I appreciate that. So then I have
23 one more question for you before you move on from the claim construction.

24 I'm looking at Figure, I guess, 4 of the '046 patent. Do you have
25 the ability to take a look at that in front of you?

26 MR. EVERTON: Sure. Let me turn to that.

1 Okay. I got it.

2 JUDGE HOSKINS: Actually, I'm just looking at Figure 5, which
3 is hopefully right below. They're on the same page. So in Figure 5, I'm
4 wondering that if we're going to open up the term "tubular" to an open
5 periphery, I'm wondering how open it can be and still be tubular. That's the
6 core of my question.

7 And so I'm looking at, for example, in Figure 5. This is not what
8 the claim is directed to, these tubular structures. But I'm looking in between
9 what are the tubular structures. In between the elements 416, we've got a
10 little space with a little curve to the -- let's call it 444, for example, the webs.
11 So there's a space there. It's kind of got three holes around it. Would that
12 part of what's shown in Figure 5 be a tubular structure to you because it has
13 an open periphery?

14 MR. EVERTON: So, Your Honor, I'm trying to understand
15 exactly which part of the curved portions that you're talking about.

16 JUDGE HOSKINS: I'm looking at 444, so at the bottom --

17 MR. EVERTON: Yeah, 444.

18 JUDGE HOSKINS: -- there's 444 and then an arrow.

19 MR. EVERTON: Okay. So the webbed area in between?

20 JUDGE HOSKINS: Correct. So there's a webbed area on kind of
21 the bottom here, and then you've got two kind of tubular structures that are
22 surrounding it. And I'm wondering if that space that's in between the two
23 tubular structures, if you think that's another tubular structure, because it is
24 an open periphery there.

25 MR. EVERTON: Yeah. I think that would depend on how the
26 person of skill viewed it. In view of the constructions proposed by the

1 parties, it's just -- is it tube-like? So is that slightly curved webbed area in
2 between tube-like? I don't know. I don't know if a person of skill would say
3 that. I think that would probably not be a tubular structure. It's not quite
4 tubular, right? It's just a curve, a single curve.

5 And the patent does talk about two curved areas, that at least in
6 some embodiments, there are different curved areas. But here you just have
7 a single curve that I don't think under the parties' constructions of tube-like
8 or elongated, shaped like a tube, that that would qualify.

9 JUDGE HOSKINS: If we were to adopt your claim construction,
10 how are we to tell what is within the scope of the claim and what's not?

11 MR. EVERTON: Well, I think in this case, you wouldn't have to
12 because Good clearly shows a tubular structure. In the illustrated
13 embodiment in some of the figures, it's just not quite closed off at the very
14 end. Clearly, it's a tubular structure that is circumferential. A person of
15 ordinary skill looking at that would look at Good and say that has a shape of
16 a tube. It goes all the way around. It's just not closed off at the ends.

17 JUDGE HOSKINS: Thank you.

18 MR. EVERTON: Now if we can turn to Slide 10.

19 JUDGE DEFRANCO: Mr. Everton, just following up on Judge
20 Hoskins' point about the intrinsic evidence as far as this channel being open
21 periphery. Is there anything else within the intrinsic record aside from that
22 word "channel" that you're relying on to show that the tunnel, a tubular
23 structure, we should construe it to be open periphery? Aside from that word
24 "channel."

25 MR. EVERTON: So aside from the word "channel" and those
26 embodiments, those different embodiments that would have a channel

1 configuration instead of a tube, like I said previously, I think the broad
2 descriptions saying that the tubular structures can be a tube in some
3 embodiments, that also suggests that they can be other things.

4 Let me see if I have this in a slide here. Yeah. So if we go to my
5 Slide 14, if you look at the specification as a whole when it's describing
6 these tubular rib structures, it says, "In some cases, the rib structures can be
7 hollow tubes formed of knitted component 100." Well, what are the other
8 cases? It's telling us that there are other cases, there are other embodiments
9 where it's not a full tube, a closed off tube.

10 In the next bullet here on Slide 14, "At least one tubular course 804
11 may be joined by knitting to at least one web course 806 to form a loop and
12 close tubular rib structure." Well, if it's joined, it says "may be joined," so
13 that leaves open that it could also not be joined in other embodiments, and if
14 it's not joined, then it's an open. It's not a closed-loop configuration. So
15 even within the description of the closed-loop embodiments, there is this
16 disclosure that there are other embodiments outside of those that would not
17 be closed-loop. It would not have the same limitation. The specification
18 with this language is very careful not to limit itself to those embodiments
19 that are shown in the figures and that had a closed loop.

20 And going back to your question on intrinsic evidence. Sorry, if
21 we go back up to Slide 9. I don't want to forget this one. We also provided
22 this claim differentiation argument. So here in Slide 9, we provided this
23 other Nike patent. It's a related patent, shares the same specification. It's, I
24 think, a grandchild of the '046 patent. And if you look at the claims there,
25 the dependent claims that we've shown, 10 and 11, the dependent claims
26 include a claim tubular structure that is not closed loop.

1 So I'll go through this and explain it in a little more detail. So
2 specifically, Dependent Claim 10 here, it recites, "The first curved portion
3 and the second curved portion are attached together to define a tube forming
4 a tubular rib structure." So this merely specifies the attachment of the two
5 curved portions, right?

6 Then in Dependent Claim 11, it says, "Wherein the second curved
7 portion is attached to the first curved portion at the first edge and the second
8 edge." So this further narrows Claim 10 by specifying a closed periphery.
9 You have both edges attached now so you know you have a closed
10 periphery.

11 So to be narrowed by Claim 11, claim 10 must necessarily
12 encompass a tubular rib structure that is not attached at both edges and thus
13 is an open loop. And for these, Nike's claims to be valid that open loop that
14 is claimed here must be disclosed in that specification. And if it's disclosed
15 in that specification, it must be disclosed in the '046 patent specification,
16 which is the same. They don't share its specifications.

17 So Nike's response to this evidence kind of misunderstands the
18 argument here. We're not saying that there's claim differentiation between
19 these two patents or their claims, nor are we comparing the claims between
20 the two patents. Rather, what we're saying is that with claim differentiation
21 within the '604 patent, it is clear that it claims open-periphery embodiments,
22 which means that its specification includes those embodiments, which
23 means that the specification of the '046 also discloses open-periphery
24 embodiments.

25 Now, if we turn to Slide 10, just want to take a quick look at
26 statements that were made by Nike and the court in the Puma litigation. So

1 first, in the Puma litigation, the court found, and Nike agreed, that tubular
2 structures need only resemble a tube. They do not need to have an actual
3 tube shape. They don't have to be a tube. And second here, Nike argued in
4 the Puma IPR that "ordinary meaning of tubular or tube-like is broader than
5 tube because it can encompass something that merely resembles a tube."
6 Think of the Good reference. Something that merely resembles a tube. And
7 lastly, Nike's expert in the Puma IPR asserted that "a structure can be
8 tubular without having a tube shape." So it's been clear all along that
9 tubular should be interpreted very broadly.

10 If we go to Slide 11, where there's no special definition or
11 disclaimer, the term should be given its full scope of its ordinary meaning.
12 And in Slide 12, Nike confirmed that "the inventors did not act as their own
13 lexicographers, and the inventors did not disavow the full scope of the term
14 in the specification or during prosecution."

15 JUDGE DEFRANCO: Mr. Everton, what is the purpose of the
16 tubular structure in the Nike patent?

17 MR. EVERTON: In the '046 patent?

18 JUDGE DEFRANCO: Yes.

19 MR. EVERTON: So as far as we can tell, it's this hide and reveal
20 feature, where the tubular structure, there's a series of them, and in between,
21 you have the webbed areas, so when they're stretching, the tubular structures
22 move apart from one another, and then you can see the underlying webbed
23 areas. It's an aesthetic benefit to a reason. And --

24 JUDGE DEFRANCO: And I see that it also holds some sort of
25 filament.

26 MR. EVERTON: That's true. In some of the embodiments, that is

1 correct. It can have a filament, it can have a different material that runs
2 through the center of the -- it can hold that, yes.

3 JUDGE DEFRANCO: I'm just wondering all of a sudden you
4 open the periphery of those tubular structures, if it destroys the whole
5 essence of the function of those tubular structures.

6 MR. EVERTON: I don't think there's any suggestion of that in
7 the '046 patent. I definitely don't think it would affect the purpose of the
8 function by having an open periphery, like the channels that are described.

9 JUDGE DEFRANCO: Judge Hoskins pointed out that in Figures 4
10 and 5 of the 046 patent, those webbed areas there, those are a channel,
11 meaning the 444 area. That would be channel, or you said that that would
12 not be a tubular structure. But if all of a sudden you open up the periphery
13 of those tubular structures, aren't you just left with a series of channels?

14 MR. EVERTON: So maybe I misunderstood Judge Hoskins'
15 question before. I thought he was only talking about the webbed area itself
16 and whether that would be considered a tubular portion or a tubular
17 structure. And that's what I was saying maybe not. Maybe a person of skill
18 would say that's not because it's really just a slightly curved segment and it
19 might not be tube-like. But are you asking, Judge, if you combine that --

20 (Simultaneous speaking.)

21 MR. EVERTON: -- middle segment with the walls of the other
22 tubular structures?

23 JUDGE DEFRANCO: Yes. What would you call those?

24 MR. EVERTON: Well, I think then you're getting close --

25 JUDGE DEFRANCO: The area between the tubular structures
26 shown in Figures 4 and 5.

1 MR. EVERTON: Yeah. Then I think you're getting closer to the
2 Good reference, where you do have a base and sides, and if those sides do
3 curve around to give it a tube-like shape, like the Good reference, then I
4 think you could have a tubular structure there.

5 JUDGE DEFRANCO: So you could say that that's just a series of
6 tubular structures, closed-periphery tubular structures and open-periphery
7 tubular structures?

8 MR. EVERTON: Yeah. I think you could have tubular structures
9 extending on the outside and tubular structures extending on the inside. So
10 if the Good reference had that, it had both tubular structures protruding
11 outwardly and inwardly, yes, it would be a series of alternating tubular
12 structures. But again, it would have to fall within the proposed claim
13 constructions of tube-like.

14 JUDGE DEFRANCO: I understand your position. Thank you.

15 MR. EVERTON: Now, if we look at Slide 13, Dr. Brookstein,
16 lululemon's expert, has consistently explained and held to his opinion that
17 tubular structures can be open loop, do not require a closed loop. When
18 asked, "Do you agree that a tubular structure at least has a closed periphery
19 or circumference?" he answered, "Not necessarily. I disagree with this."
20 And he --

21 JUDGE BELISLE: Counsel, just a quick question. This is Judge
22 Belisle. Is there any dispute that a tube must have a closed periphery, that a
23 tube must be closed, the perimeter of it? Or is that also debated in this case?

24 MR. EVERTON: I don't think there's much debate on that, and
25 there have been dictionary definitions that have been provided on what a
26 tube is, and I'll get to those. Maybe I can show here now. In our Slide 18,

1 the tube dictionary definitions say that it is a hollow cylinder, hollow
2 cylinder, hollow cylinder. So pretty consistently, we know what a tube is.
3 It's just that where we get in tubular. Tube is not the claim language,
4 unfortunately.

5 JUDGE BELISLE: Right. So --

6 MR. EVERTON: Or fortunately, depending on which way you
7 want it. But tubular is broader than tube.

8 JUDGE BELISLE: And that's where I was heading with this. So
9 if we don't have a dispute, and Patent Owner can speak to that later, but if
10 it's not disputed that a tube has to be closed, the claim doesn't say tube. The
11 claim says tubular structure.

12 MR. EVERTON: Mm-hmm.

13 JUDGE BELISLE: And I think, hopefully, when we hear from
14 Patent Owner, we're going to hear a lot of focus on why if we shift from the
15 term "tube" to "tubular structure," why that doesn't open up the door for
16 something broader than what a tube is.

17 MR. EVERTON: Exactly.

18 JUDGE BELISLE: You can continue.

19 MR. EVERTON: Yes, exactly. That hits it right on the head is
20 we're not talking about tube. That's not the claim language. It's tubular.
21 Everyone agrees tubular is broader than tube, but what is it? And
22 specifically, does it include closed loop? That's really the issue.

23 Okay. Let's now go to Slide 14. I already went through most of
24 these examples, but the examples that Nike points to in the specification of
25 the embodiments with closed loop, they're there. We see them in the
26 figures. We know they're there. But again, they're always qualified by this

1 language that it's only in some cases, and it may be joined, and it may be --
2 so these are conditional things. They're not requirements that could be
3 imported into the claim. And we provide this in case law in Slide 15 that
4 such non-limiting phrases are not a clear disavowal. In fact, they suggest the
5 opposite.

6 So in interest of time, I'll skip ahead a little bit here to Slide 17.
7 So with all of this evidence and information that I've discussed from the
8 '046 patent, we were very surprised when we saw the POPR at this
9 statement from the Nike that the parties agree that a tubular structure must
10 be a closed-loop structure that is shaped like a tube.

11 lululemon never agreed to this and never suggested this. If you
12 look at the art that we're relying on in all of our arguments, it's very clear
13 that we don't think tubular structure should be limited to closed loops. This
14 was never our position, and it's not suggested by anything that lululemon
15 has done.

16 JUDGE DEFRANCO: Mr. Everton.

17 MR. EVERTON: Yes.

18 JUDGE DEFRANCO: Why didn't you ask to file a reply?
19 Because in our decision to institute, we kind of relied on your silence to
20 think that, okay, this is an agreement. And I thought maybe you would have
21 filed a reply if you were in disagreement or ask for authorization --

22 (Simultaneous speaking.)

23 MR. EVERTON: That's a great question. That's a great question.
24 We did not ask to file a reply. I'm trying to remember back, but I do know
25 that we considered it and thought, in view of our arguments and the prior art
26 that we were relying on, the Board would clearly see that this is incorrect.

1 This can't be the case just looking at our grounds. It's not even close. So
2 we thought there's no need to try to get a reply or respond, because we
3 thought the Board would see kind of the unreasonableness of this position,
4 that there clearly is no agreement here.

5 But, as you said, the Board did rely on -- not entirely right, the
6 Board in the Institution Decision said that the parties "appear," appear to
7 agree that there is an agreement. But it did have some drastic effects,
8 because then the Board did in the Institution Decision go on to find that the
9 prior art did not have closed loop and therefore was not covered by the
10 claims. So now we're grateful that the Minami reference was in there and
11 that we had that ground to survive so that we could get through Institution
12 and clear this up and fix this misrepresentation that there is definitely no
13 agreement in this closed-loop structure requirement.

14 JUDGE DEFRANCO: Okay. I appreciate the fact that it's always
15 a quandary for parties when they seek more briefing at this stage. I
16 understand.

17 MR. EVERTON: So now going to Slide 18, if you look closely at
18 this mischaracterization of an agreement and look at what Nike relied on,
19 interestingly they relied on some of lululemon's statements but left out the
20 important ones. And so I've highlighted that in red here, that in saying that
21 the parties agreed, they left out the fact that our construction was actually
22 elongated hollow structures and not requiring a tube or a closed loop but just
23 a very broad elongated hollow structure.

24 Also, they provided some of the dictionary definitions, but they left
25 out the important ones, which are tubular. That's the claim language. Those
26 were the dictionary definitions we were relying on. And tubular is just like a

1 tube or having a shape of a tube, definitely not requiring a closed loop.

2 And Slide 20, I won't go through the entire slide, but this just
3 summarizes everything that we've talked about here, all the different reasons
4 and evidence that show that lululemon never agreed that there was a closed
5 loop requirement for tubular structures. It must include open-periphery
6 embodiments that are disclosed in the specification, and all of the arguments
7 that we've made are consistent with that. But importantly, Nike can't point
8 to anything that shows that lululemon did limit tubular structures to be
9 closed loop or closed periphery. There's just no evidence of that.

10 Now, we'll turn to the actual grounds briefly and touch on Ground
11 1, which relies on the Good reference. So this is Slide 22. This shows the
12 various figures of the Good reference, and as we've discussed, a person of
13 ordinary skill --

14 JUDGE DEFRANCO: Mr. Everton, can I ask you just real
15 quick --

16 MR. EVERTON: Uh-huh.

17 JUDGE DEFRANCO: If you can hop up to Ground 2, the
18 Munsing ground, because I know that you didn't address it in your reply.

19 MR. EVERTON: Right. We have not formally withdrawn it
20 or anything, but I'm not going to spend any time today discussing the
21 Munsing ground.

22 JUDGE DEFRANCO: Am I correct -- I think I saw this in Patent
23 Owner's demonstratives or somewhere, Patent Owner's briefs -- that your
24 expert admitted that Munsing does not disclose tubular structures? And I'm
25 just wondering, is that why you didn't address it in your reply?

26 MR. EVERTON: No. I'm not aware of that. I don't think our

1 expert admitted to that.

2 JUDGE DEFRANCO: Okay.

3 MR. EVERTON: It's more we just didn't want to spend the space
4 on that ground in view of the claim construction and the issues discussed in
5 the Institution Decision.

6 JUDGE DEFRANCO: So we still need to address that ground just
7 relying on your briefs.

8 MR. EVERTON: Yes. I think that's the case where we haven't
9 withdrawn it; we just haven't expended any more effort on it. Yeah.

10 JUDGE DEFRANCO: Okay. Thank you.

11 MR. EVERTON: So that's the Good reference that we've already
12 talked about. A person of skill looking at the Good rib structures would say
13 that those are tube-like. In fact, Dr. Brookstein explained this. Good's rib
14 portions, in Slide 23, are tubular structures. Going to Slide 24, under both
15 parties' constructions, Good's rib structures are tubular structures. They are
16 elongated hollow structures. They are also tube-like.

17 JUDGE BELISLE: Counsel, just so you know, you are in rebuttal
18 time, and you're free to use whatever you want with that to continue.

19 MR. EVERTON: Yeah. I'll take a couple more minutes here.

20 So now going to Slide 25, Nike argues that Good's rib portions
21 cannot be tubular portions because they stretch out and become flatter, but
22 Good's rib portions are tubular structures, at least in some of the positions
23 and configurations. And we have the case law here that Good's portions
24 don't need to be tubular in all modes of operation or in all configurations,
25 just some. That's enough for anticipation. Also, beyond that, Good itself
26 says that it maintains the outwardly rolled configuration when relaxed or

1 extended.

2 So just quickly let's turn now to the Minami ground -- this is
3 Ground 3 -- and Slide 31. So Nike doesn't dispute the basic claim features
4 here of webbed areas, tubular structures, first and second curved portions.
5 Really, they don't dispute what Minami's Figure 7 shows and that it shows a
6 longer curve length on the top and a shorter curve length on the bottom.
7 Instead, Nike argues that lululemon cannot rely on Minami's Figure 7 for
8 disclosing that first curve length is greater than the second. That's what the
9 real issue is here.

10 But Nike is wrong. And if we go to Slide 33, Dr. Brookstein, our
11 expert in this case, explained that looking at Figure 7A, one can see that the
12 first curved portion on the top is longer than the one on the bottom, and
13 that's what it would teach to a person of ordinary skill in the art.

14 Turning to Slide 34, Nike's expert, Pastore, he admitted that Figure
15 7A shows an upper curve length that is longer than the lower curve length.
16 He had to admit what the figure clearly shows. He says here, "I think that
17 might be true." He finally gave in and said, "I think that might be true."
18 The figure shows the first curve length portion being longer than the second,
19 and Nike can't deny this. So really, it gets into the case law, and Nike
20 argues that based on the case law, you can't use figures for these type of
21 measurements.

22 If we go to Slide 35, if we look closely at the case law, which the
23 Board already did in the Institution Decision, we've provided some of the
24 cases here. These PTAB cases are right on point. Where limitation involves
25 a broad qualitative comparison of illustrative features, the prior art drawings
26 can be relied on for what they show.

1 So for example, in this Ex parte Jurek case, the Board said, “Such a
2 determination is not the result of measurements to determine precise
3 proportions or particular sizes of elements. Rather, it is based on what is
4 illustrated in Praisner’s Figure 3 to a person of ordinary skill in the art by
5 mere viewing and comparing two dimensions, that is, the length of the first
6 axial distance d_1 and the length of the second axial distance d_2 .” And
7 similarly, in the Nested Bean IPR, “The use of the figure was sufficient to
8 show that width of the suit between the wing portions is greater than the
9 width of the bodice.”

10 So these cases, we think, are exactly on point. There’s another one
11 on Slide 36, and then on Slide 37, we’ve provided two more. These are all
12 in the briefing, so I’m not going to go through and burden you with
13 describing these cases.

14 So in Slide 39, Nike also argues that Minami’s Figure 7A was not
15 intended to show any dimensions, but the specification indicates that there is
16 purpose and intention for the tubular structures to be raised outwardly more
17 than inwardly. And so here we pointed to some of the language that the
18 wearer would have enhanced ball control if the outwardly extending tubular
19 structures would have been larger than the inwardly. And that’s on Slide 39.
20 We included that in the brief.

21 Also, Nike argues that the material of Minami is not configured to
22 stretch and doesn’t stretch between the two positions, but that’s just not the
23 case. We provided on Slide 43 where Minami itself talks about it being
24 designed and configured to stretch, and Dr. Brookstein confirmed that this
25 type of material is designed to stretch.

26 And with that, I will reserve the remainder of my time for rebuttal.

1 JUDGE BELISLE: Okay. Thank you.

2 MS. STAUBACH: Good afternoon.

3 JUDGE BELISLE: Good afternoon. How much time, if any, do
4 you want to reserve for rebuttal?

5 MS. STAUBACH: We'll reserve 20 minutes.

6 JUDGE BELISLE: Twenty? Okay.

7 MS. STAUBACH: Thank you.

8 JUDGE BELISLE: You may begin.

9 MS. STAUBACH: Okay. I want to start first kind of in the
10 middle with lululemon's Ground 2, which was anticipation over Munsing.
11 Thank you for asking that question about whether they're still pursuing that
12 ground, because it wasn't totally clear in our minds.

13 But you also asked a question about whether lululemon's expert,
14 Dr. Brookstein, had actually admitted that Munsing only discloses a non-
15 tubular rib, and so that's what we're displaying here on Nike's Slide 50. So
16 we asked, "Do you agree that Ground 2, which is based on the Munsing
17 reference, in that ground Munsing only discloses a non-tubular rib?" And he
18 responded, "That's what I said."

19 So it's Nike's position that Munsing, which is directed to an article
20 of underwear, and only shows micro scale knitted loops as you can see on
21 Nike's Slide 49 here in the bottom right hand side. Those are not tubular
22 structures. And in the Institution Decision, the Board found that "Nowhere
23 does Munsing indicate that the rows of stitches or loops form a rib that is
24 tubular-like, let alone one with a closed periphery." So regardless of the
25 construction here, whether it's open or closed periphery, the Board said,
26 "Nowhere does Munsing indicate that rows of stitches or loops form a rib

1 that is tubular-like.” So unless the Board has questions about Ground 2,
2 we’ll leave that one and go to claim construction.

3 Well, actually, first, I will ask you to just listen to a couple more
4 minutes about the ‘046 patent itself, a brief overview, if you will indulge me.
5 So the ‘046 patent is directed to articles, like footwear, having a knitted
6 component that has certain structural features, including tubular rib
7 structures and webbed areas.

8 So one of the features is that, and as is shown here in Figure 3 and
9 in Figures 4 and 5, basically, when there is stretch applied in a transverse
10 manner to these tubular rib structures, they separate and reveal these webbed
11 areas. And it’s described in the specification that some of the purpose of
12 these tubular rib structures and webbed areas is providing strength and
13 support to the knitted component, but also it can have this color change
14 effect, which when the fabric is subjected to different stresses -- so let’s
15 think of an article of footwear. If someone was wearing an upper that had
16 these features and they’re running or jumping, then they’re stressing the
17 fabric in different locations, and if the webbed areas have a contrasting color
18 to the tubular rib structures, it will have this kind of dynamic color change
19 effect.

20 All right. We can go to claim construction now.

21 JUDGE BELISLE: So Counsel, before you go there, and we’re
22 still on sort of the inventive features in this patent --

23 MS. STAUBACH: Sure.

24 JUDGE BELISLE: -- what would happen if those tubular
25 structures were not a complete -- I’ll say circle, they’re not a circle -- but not
26 a complete circle, and for some reason, if they had a separation in them, how

1 would this function?

2 MS. STAUBACH: It's a good question. So I would direct you to
3 the Good reference, and so in that case, in neither the neutral position or the
4 extended position are these closed-periphery structures. And so when you
5 extend the cuff of Good's sock, as you can see in this rightmost figure,
6 Figure 4, it really just unfurls. It kind of becomes almost linear. And so that
7 kind of destroys this function of, number one, adding strength and support to
8 the knitted component, which if this in the instance of an article of footwear,
9 if what happens when you move, the shoe just completely comes apart, then
10 that's going to destroy those benefits.

11 Does that answer your question? Sorry.

12 JUDGE BELISLE: Yes. I think it's perhaps a bit intuitive as to
13 what will probably happen if they're not fully closed.

14 MS. STAUBACH: All right. We'll go back to claim
15 construction.

16 JUDGE BELISLE: And as you enter into claim construction, I
17 think that the Panel is very interested to hear the party's position on the
18 difference between tube, tube-like, and tubular structure. And it's difficult
19 to accept they all mean the same thing.

20 MS. STAUBACH: Yes.

21 JUDGE BELISLE: Because we're not using the same word.
22 We're using different words in a context of the claim and then in patent law.
23 So tube, tube-like, tubular structure, all yours.

24 MS. STAUBACH: Absolutely. And I'll try to answer that a little
25 bit right now, but the answer will also be revealed more as I go through
26 these slides. But tube, and I don't think there's any dispute about this, and I

1 believe one of Your Honors just asked counsel for lululemon, “Is there a
2 dispute as to whether a tube has a closed periphery, a tube?” And they said
3 no. And Nike agrees.

4 So a tube, it’s the understanding that it’s a hollow structure, it’s
5 typically cylindrical. I mean, that’s been presented through dictionary
6 definitions. But what the claims say is tubular structures, right, so tubular,
7 not tube. Tubular is broader than tube. That’s always been Nike’s
8 contention in every case, and we’re going to walk through some specific
9 evidence that shows what Nike has actually represented with regard to
10 tubular. But in Nike’s view, tubular is tube-like. Those two things are the
11 same.

12 Okay. So tubular structures and tubular rib structures are the same.
13 They’re used interchangeably throughout the ‘046 patent. We’re just
14 sharing a reproduction of Claim 1 and Claim 8. Claim 1 is the one of the
15 article claims, and Claim 8 is one of the upper claims. So just highlighting
16 where tubular structures or tubular rib structures appears here.

17 JUDGE HOSKINS: Ms. Staubach?

18 MS. STAUBACH: Yes.

19 JUDGE HOSKINS: As you kind of go through your slides, could
20 you help me out in following you by giving me the slide number?

21 MS. STAUBACH: Yes, I will do my best to do that. We are now
22 on Nike’s Slide 16. So the dispute is not about whether tubular structures
23 are hollow, it’s not about whether they’re elongated. The dispute is about
24 whether they have closed peripheries or open peripheries. And a closed
25 periphery is anything with a continuous cross section, so it could be circular,
26 it could be elliptical, could be tear-drop shaped or egg-shaped, as is shown in

1 Figures 4 and 5 of the '046 patent. Could be, essentially, anything that has a
2 continuous periphery, so it wouldn't include something like what we see in
3 Good. It wouldn't include a circle with a part of it missing, like an arc. It
4 wouldn't include with a square with a side missing.

5 JUDGE BELISLE: Okay. And so with that, Counsel, I think we
6 can all accept that tube could have any cross section. Could be square
7 tubing, rectangular tubing, all different forms of tubing cross section. So to
8 me, that means we take the cross-sectional shape out of the equation when I
9 ask, well, what is tube-like? So now, what is the feature that is being
10 changed that makes something tube-like that isn't the cross-sectional shape?
11 What is left? What is the difference between tube-like and tube if it's not
12 the cross-sectional shape?

13 MS. STAUBACH: Well, so if tube is a cylinder, then varying in
14 shape and dimension would include varying the cross-sectional shape. But
15 what else could vary is whether it's hollow. That's just not at issue in this
16 proceeding, so that's something that's been at issue in other proceedings,
17 and Nike has taken the position that tubular structure doesn't need to be
18 hollow.

19 So let's think about or let's look at what lululemon has said about
20 tubular structures in the parties' parallel district court litigation. So they've
21 said that, "The ordinary meaning and specification compel the conclusion
22 that the claimed tubular structures have the shape of tubes." Compel the
23 conclusion. And as we know, there is no dispute from lululemon that tubes
24 have a continuous cross section. So in the parties' parallel district court
25 litigation, that's what they said. They also supported this with dictionary
26 definitions of tubular and tube, in which tube is defined as being a hollow

1 cylinder for conveying fluids.

2 So let's go to this IPR. What do they say in the petition? In the
3 petition, they said, "Petitioner submits that tubular structure must have the
4 shape of a tube," period. And again, we just heard from them today, no
5 dispute that a tube has a continuous cross section. This last sentence here
6 says, "This construction is consistent with the claim language and
7 specification."

8 JUDGE HOSKINS: Ms. Staubach? This is Judge Hoskins. Let
9 me stop you there. I think they pretty clearly said it doesn't have to be
10 continuous. So what is it in your argument today? I'm looking at your Slide
11 16. What exactly is it from what lululemon said in the district court that tells
12 us that their claim construction position in the district court was it has to
13 have a continuous outer periphery?

14 MS. STAUBACH: Okay. So we're back on Slide 16, Nike's
15 Slide 16. First of all, they said, "The ordinary meaning and the specification
16 compel the conclusion that the tubular structures have the shape of tubes."
17 And they've looked to and supported what tubular and tube means with
18 dictionary definitions, where the definitions say, "The tube is a hollow
19 cylinder." And I don't think there's any dispute as to what a cylinder is. A
20 cylinder would just have a circular cross section that is continuous 360
21 degrees.

22 JUDGE HOSKINS: Thank you.

23 MS. STAUBACH: So at Institution, the Board said, "We're
24 construing tubular structures at least as having a closed periphery or
25 circumference." We're on Nike Slide 19 now. In response, lululemon came
26 forward and said, "The claim term at issue is not 'tube' but 'tubular

1 structure.” And they said, “This does not require all the properties of an
2 actual tube.” But in Nike’s view, that is inconsistent with what they’ve said
3 in the parties’ parallel district court litigation, where they supported that the
4 specification compels that tubular structures have the shape of a tube and
5 supported that with dictionary definition saying tube is hollow cylinder.

6 JUDGE BELISLE: And Counsel, just at the risk of putting words
7 in Petitioner’s mouth, to say that it has the shape of a tube, to me, means
8 shapes of tubes: circles, squares, rectangles. I’m not convinced that that
9 goes as far as agreeing that it can’t have a break, some little break
10 somewhere in the circle or in the rectangle, particularly in view of the word
11 “channel” that’s been raised.

12 So again, I’ll come back to what I’m still waiting to hear, is I know
13 a tube can be multiple cross sections, all kinds of cross sections. That’s
14 tube. So then what feature changes when I go to tube-like? It’s not the cross
15 section. I’m going to rule that out. Something else is changing, and so what
16 is it?

17 MS. STAUBACH: Well, Nike’s position, that hasn’t had to be at
18 issue in this case, has always been in prior cases that tubular structure can be
19 filled. It does need to be hollow. So that would be something that’s tube-
20 like, if you look at it, it resembles a tube, right? If you see it from the
21 outside, it may look like a cylinder, may look like a square cross section, but
22 it’s filled.

23 JUDGE BELISLE: Just to play Devil’s advocate on that, the tube
24 is filled, but I want to know about the tube. The tube is filled, so let’s move
25 that aside too. It’s a feature of the tube, not whether it’s filled or not filled,
26 and not as cross section. So I’ve still got to get to some feature that’s

1 different that's not the cross section and it's not whether it's filled; it's
2 something about the tube that is different. And I know Petitioner's argument
3 is the thing that's different is whether it truly is a complete, unbroken
4 perimeter or if there's some break in it. And what I want to hear from Patent
5 Owner is when we use the term "tube-like," what feature is different in
6 Patent Owner's view that's not a filling and not a cross section?

7 MS. STAUBACH: Well, although the filling, whether the tube
8 was hollow or not, was not at issue in this preceding -- this case does not
9 turn on that -- it's still Nike's position that that's what tube-like means, so
10 Nike never wants to say that this is a tube, because it's not our contention.
11 Our contention is that it could be filled, and if tube means cylinder, it can be
12 different cross sections.

13 So I'm sorry, I think we're just disagreeing with each other maybe
14 on this point. I will talk about channels and why it is Nike's view that
15 tubular structures always have closed peripheries, so we can talk about that
16 now if that would be helpful.

17 JUDGE BELISLE: Okay.

18 MS. STAUBACH: So lululemon says that -- they have a couple of
19 arguments for claim constructions. But they say, first, that the Board's
20 construction would exclude embodiments and would exclude embodiments
21 where a tubular structure has the configuration of a channel.

22 They point at two things, and I know we looked at this already, but
23 I will just read it again. So this piece on the left here says, "In different
24 embodiments, tubular rib structures can define one or more hollow tubes. A
25 hollow tube may be a generally unsecured area disposed between first
26 curved portion 416 and second curved portion 418 of tubular rib structure

1 that has the configuration of a tunnel or channel."

2 And so what does this tell us? Well, it tells us that this piece is
3 talking about what's shown in Figures 4 and 5. It's calling out the part
4 numbers. It's saying "these tubular rib structures 126," "hollow tube 112,"
5 "first curved portion 416," "second curved portion 418," so we know this is
6 talking about what's shown in Figures 4 and 5. And we know that this says
7 that tubular rib structures can have the configuration of a tunnel or channel.

8 But nowhere, nowhere here in the specification, does this lend to
9 the conclusion that a channel is open periphery. Channel here is in the
10 context of Figures 4 and 5. And Figures 4 and 5 show that there is a closed
11 periphery. Also, nowhere does this not suggest that these are just used
12 synonymously -- have the configuration of a tunnel or channel.

13 So the second thing lululemon points to is this disclosure right
14 here. And if we could read the first sentence, it says, "For example,"

15 -- I'm sorry, we're on Slide 24 -- "For example, knitted component
16 100 can include ribs, tunnels, peaks and troughs, corrugations, steps, raised
17 ridges and recessed channels, or other uneven features formed by the knit
18 structure of knit component 100." So yes, this is a list of the types of
19 structures that knitted component can include, and it does say recessed
20 channels, and it again says tunnels, but there is no indication that these are
21 open periphery.

22 And what's more, this disclosure is not even talking about tubular
23 rib structures, because later in the same paragraph, we see, "In some
24 embodiments, knitted component can include a plurality of tubular rib
25 structures and a plurality of webbed areas." These are the only two things in
26 the specification that lululemon points to as alleged support that tubular rib

1 structures include open periphery structures.

2 The other thing that they look to -- and we're on lululemon's Slide
3 8 now -- is two unrelated Nike patents. It seems like lululemon went to
4 Google Patents and searched for the word "channel," and they found this in
5 two unrelated Nike patents. But let's consider where we are at this point in
6 the claim construction process. Not only are we looking to unrelated patents
7 here when we don't need to, but we're also looking to other language than
8 the term in issue. We're looking for the term "channel" in these patents.

9 But Patentees Nike is not required to use the term "channel" the
10 same across different unrelated patents, and in fact, if you look at this
11 bottom excerpt here, this says, "The terms 'deep channel,' 'deep groove,'
12 and 'primary groove' are used interchangeably and synonymously in the
13 specification." Patentees are free to be their own lexicographers in various
14 patents and especially unrelated patents like this. And it appears that that
15 may be what they're doing here. But just as a baseline, we shouldn't be
16 looking to this because that term may not have the same meaning in those
17 patents that it does here. And every --

18 JUDGE BELISLE: So Counsel, let's say we did look there. Does
19 it support their position that it doesn't have to be closed?

20 MS. STAUBACH: It's just our opinion that we should not be
21 turning to that extrinsic evidence and that it can't be instructive of the
22 meaning because it's an unrelated patent, and patentees can define things
23 differently in different patents.

24 JUDGE BELISLE: Is it defined in that patent as closed?

25 MS. STAUBACH: I haven't done that analysis, and I'm not the
26 person skilled in the art, but yes.

1 Okay. So if all I have are those disclosures and those unrelated
2 patents, there's no specification support for an open periphery configuration.
3 And contrary to what lululemon argues, Nike is not seeking to write in
4 limitations from the specification here. We're not arguing for a disclaimer.
5 We're not seeking to narrow the scope of the term. We're looking to
6 identify the ordinary meaning of the term here. And as Your Honors know,
7 that claim terms must be read in light of and must be tethered to the
8 specification, and here, a POSITA in 2014 looking at the '046 patent would
9 have understood tubular structures to be closed periphery structures. So
10 Nike is not asking for a departure from the ordinary meaning.

11 But lululemon's construction is not supported by the intrinsic
12 record and, instead, is improperly reaching far beyond the scope of the
13 specification. And the Federal Circuit routinely rejects such attempts to
14 broaden scope in that fashion.

15 So we saw this slide from lululemon. This is lululemon's Slide 10.
16 And they're pointing to the Puma claim construction order, and they're
17 pointing to other statements that Nike has made previously, and they're
18 saying, well, those suggest that the ordinary meaning is broader and
19 encompasses an open periphery configuration. But this wrong.

20 So let's look at the Puma claim construction order. So let's see
21 what the Puma court said. So they said there's a disagreement over the
22 constructions of tubular structures, and it's twofold. So it's one, whether the
23 claimed element has the shape of an elongated cylinder; and two, whether
24 it's hollow. And when they turn to the specification to show that the tubular
25 structure can vary in shape and dimension, they point to this disclosure,
26 which says, "In an exemplary embodiment, tubular rib structures can have

1 an elongated cylindrical shape with a wider top portion associated with front
2 surface 108 and a narrower lower portion associated with back surface 110.
3 In other embodiments, tubular rib structures 126 can be shaped as a
4 generally circular or elliptical cylinder. And knitted component can include
5 differently shaped tubular rib structures.”

6 None of that is inconsistent with what Nike is saying. That is just
7 saying that there can be a wider top and a narrow bottom. It’s saying that
8 the cross section can be circular, or it can vary from that circular
9 arrangement and it can be, for example, elliptical. As we discussed, we’ve
10 seen in Figures 4 and 5, it could be teardrop, it could be egg-shaped. But
11 nothing in there suggests that this would be open periphery.

12 So what else did they point to? They say, “Nike argued in the
13 Puma litigation that the ordinary meaning of tubular or tube-like is broader
14 because it can encompass something that merely resembles a tube.” But
15 here, as we can see, Nike said, “Nike is arguing that the term has its ordinary
16 meaning of tubular or tube-like, which is broader than tube because it can
17 encompass something that merely resembles a tube,” and they say, “The
18 defendant, like Puma, argued the term meant a tube or a tubular that must be
19 hollow.”

20 So again, here we’re talking about this hollow piece. So in Puma
21 case, Puma said it’s got to be an elongated hollow cylinder. So does it have
22 to be cylindrical? No. It can be any other cross section. And does it have to
23 be hollow? No. So nothing that Nike has said in the past is inconsistent
24 or is consistent with lululemon’s proposed construction and would
25 encompass a construction that has an open periphery configuration.

26 JUDGE BELISLE: Counsel, before you move off that and for the

1 record, when you were saying “here,” where is here? What is that you’re
2 referring to?

3 MS. STAUBACH: Okay. So we were looking at a case and
4 drawing similarities to that case. So the plaintiff, like Nike here, that’s just
5 what’s in the --

6 JUDGE BELISLE: Sorry, Counsel. I mean specifically, what is
7 the document?

8 MS. STAUBACH: Oh, I’m sorry. This is Exhibit 1021, and this
9 is Nike’s claim constructions brief in the Puma case. Thank you.

10 JUDGE BELISLE: What page are you on?

11 MS. STAUBACH: We are on page 24.

12 JUDGE BELISLE: Thank you.

13 MS. STAUBACH: Yes.

14 Let’s talk about lululemon’s claim differentiation argument. So
15 they argue that Nike’s or the Board’s construction violates the doctrine of
16 claim differentiation. So which claims of the ‘046 patent do they look to?
17 Well, they don’t. As they showed you, they’re looking to claims of a
18 different continuation patent. There are a number of issues with --

19 JUDGE BELISLE: So Counsel, when you say “continuation
20 patent,” is it a direct continuation or a divisional, meaning it shares the
21 identical specification?

22 MS. STAUBACH: It’s a grandchild, and it shares the same
23 specification. And from hearing counsel for lululemon speak today, we
24 understand that they’re saying because Claim 11 depends from Claim 10,
25 and Claim 11 says that the second curved portion is attached to the first
26 curved portion at the first edge and the second edge -- we’re on Nike’s Slide

1 29 now -- that means that Claim 10 in that continuation patent would have to
2 have an open edge. But that's not correct either.

3 So Claim 10 says, "Comprising a second curved portion, wherein
4 the first curved portion and the second curved portion are attached together
5 to define a tube, forming a tubular rib structure." And in Claim 11, it says,
6 "The second curved portion is attached to the first curved portion at the first
7 edge and the second edge." But this is just merely describing the positions
8 of attachment. This doesn't say that if this isn't attached at this edge and
9 this edge, it's got to encompass an open periphery above in Claim 10.

10 These could have overlapping sections. They might not be
11 attached at the very edge. But more than that, claim differentiation is not a
12 hard and fast rule of construction. It can't be used to overshadow the
13 specification, and it can't be used to broaden the claims beyond their correct
14 scope, and that's what lululemon is trying to do here by bringing in a
15 construction that includes open periphery structures.

16 And we just want to touch on lululemon's argument about the
17 specification not absolutely requiring closed loop. So they point to a few
18 disclosures where they said, "well, this is optional," because it says "in some
19 cases" or it says "may." And actually, I heard opposing counsel say, "Well,
20 this says 'may be closed off sometimes,' " but that's not true. So if we look
21 at what they actually point to -- let's take the first example here -- "In some
22 cases, rib structures can be hollow tubes formed in the knitted component
23 100 by co-extensive and overlapping knit layers that are closed to form the
24 tube."

25 Okay. So couldn't this just mean in some cases, rib structures can
26 be hollow tubes? It's not in some cases, they may be closed off, as opposing

1 counsel suggested when he was up here. So Nike's position is that these do
2 not suggest that the specification encompasses open periphery
3 configurations.

4 Let's go to Ground 1.

5 JUDGE BELISLE: One last thing, Counsel, before you go --

6 MS. STAUBACH: Sure.

7 JUDGE BELISLE: -- into the whole tube thing. In the
8 cardiovascular world, there's a thing called a stent, and it's made of a mesh-
9 type fabric formed into a closed -- I'll say closed -- sort of circle. Would
10 you dispute that that's a tube, assuming you understand what a stent is? Is
11 that a tube?

12 MS. STAUBACH: Well, I think it would depend -- I'm not a
13 person of a skill of the art, but I think what you're saying is that there is --

14 JUDGE BELISLE: Basically a pipe made with mesh instead of
15 solid.

16 MS. STAUBACH: Right. So it would be difficult to carry fluid
17 through that pipe is what you're saying.

18 JUDGE BELISLE: Right, but it could hold something inside it.

19 MS. STAUBACH: Yeah. I'm not a person of ordinary skill in the
20 art, but it may be the case that that would be a closed periphery tubular
21 structure.

22 JUDGE BELISLE: Continue, please.

23 MS. STAUBACH: Okay. So we're looking at Ground 1, which is
24 over the Good reference. We're talking about Claim 1, talking about tubular
25 structures here. So under the proper construction of this term, tubular
26 structures, Good does not disclose tubular structures, and we've talked at

1 length about this. So Figures 3 and 4 of Good show the cross sections here,
2 and in the neutral or the extended state, neither of these have a closed
3 periphery cross section.

4 We're on Nike's Slide 39. In the Petitioner's reply, lululemon
5 contrasts tubular structures in the '046 patent with rib structures and says
6 that these are different from one another because rib structures have a wavy,
7 undulating, corrugated, or otherwise uneven appearance. And that's what
8 Good discloses. Good discloses something that's wavy or undulating or
9 corrugated by not having that closed periphery structure.

10 Okay. We can go to Ground 3. We're on Nike's Slide 57. All
11 right. So this is over the Minami reference. We're on Slide 58. We're only
12 going to talk about Claim 8 right now, and so that is anticipation theory.
13 We're going to talk about two limitations. The first of those limitations --
14 we're on Slide 59 -- is Minami does not disclose the tubular rib structures
15 having a first curved portion with a first curved length that is greater than a
16 second curved length of a second curved portion.

17 All right. So what do lululemon and Dr. Brookstein point to for
18 the limitation in the petition? Well, two things. The first one is Paragraph
19 61, and so as we see here, this is discussing knitted component 130, includes
20 a plurality of protruding areas 133 that extend outward and away from the
21 void within upper. They form bulges, protrusions, bumps, or other
22 outwardly extending portions in knitted component 130. But this never
23 discloses or talks about first curved portions or second curved portions of
24 tubular structures. It doesn't discuss their lengths, doesn't discuss relative
25 lengths.

26 So lululemon also points to Figure 7A. And when we talked with

1 Dr. Brookstein in his deposition, we asked him in Paragraphs 131 through
2 133, where he addresses this limitation, he cites anything else in Minami
3 other than Figure 7A or Paragraph 61, and he says, “No.”

4 So with that in mind, Minami’s written specification does not
5 discuss the lengths of the first curved portion and the second curved portion.
6 So let’s look at Figure 7A, what lululemon looks at. At the top, this is
7 Figure 7A. It’s been annotated by lululemon. And at the bottom is what
8 they actually point to for this limitation. So what they’ve done is they’ve
9 cropped Figure 7A, they’ve taken out one of these portions 133 and blown it
10 up, and then they have highlighted the first curved portion in red and the
11 second curved portion in yellow.

12 But Minami, in Paragraph 10, has a disclaimer of scale. Minami
13 says, “The components in the figures are not necessarily drawn to scale,
14 emphasis instead being placed upon illustrating the principles of the
15 invention.” And we asked Dr. Brookstein, who is a professor of mechanical
16 design, we said, “If a drawing is not to scale, then it doesn’t have to have the
17 same proportions as what its representing.” And he answered, “If it’s not to
18 scale, it doesn’t have the same proportion.”

19 And we heard from lululemon’s counsel that Dr. Pastore admitted
20 that Figure 7A has this first curved portion that’s longer than the second
21 curved portion, but that’s not true. What he said is that, “Well, that might
22 be,” but what he then said is that, “I don’t think a person of ordinary skill in
23 the art would look at this and say, wait a minute. Let me check to see if the
24 top curved length is greater than the bottom curved length. This is a not-to-
25 scale drawing that’s just trying to illustrate the inlays are inside the knit
26 structure. I don’t think it’s trying to show anything more than that.”

1 lululemon's reliance solely on Figure 7A, absent any disclosure
2 about these curved lengths or the actual length of them, the relative length of
3 them, is improper. In Hockerson-Halberstadt in 2000, the Federal Circuit
4 said, "Under our precedent, it's well-established that patent drawings to not
5 define the precise proportions of the elements and may not be relied on to
6 show particular sizes if the specification is completely silent on the issue."

7 Now, I want to talk about a little bit of a case study here. What
8 was the Hockerson-Halberstadt court considering? Well, as it happens, they
9 were also considering a patent about athletic footwear. And so on the left
10 side here, we have a figure, and this is really looking at a shoe from the
11 bottom from the back, like looking down at the heel. And so on the left and
12 right, the bottommost portions are fins that would contact the ground, and in
13 the middle, there's this curved groove.

14 And so the issue on appeal was the district court's construction of
15 the term "central longitudinal groove." This district court said that the width
16 of the groove had to be less than the combined width of the two fins. And
17 on appeal, Hockerson-Halberstadt, HHI, argued that that construction was
18 improper because figures in the patent showed a groove that was wider than
19 the fins. The Hockerson court said that the patent drawings could not define
20 the precise proportions of the elements because the patent is devoid of an
21 indication the proportions of the groove and fins are drawn to scale. So
22 because it did not have an express statement that these figures are drawn to
23 scale, and it did not discuss in the written description those relative lengths,
24 these figures could not be relied upon to show that.

25 What lululemon is trying to do here is no different from
26 Hockerson-Halberstadt. So what lululemon is doing is taking Figure 7A and

1 they're saying the first curved portion is longer than the second curved
2 portion, but that's no different than HHI using patent figures to say that the
3 groove is wider than the fins. Neither of those comparisons involves exact
4 ratios or magnitudes. It's only a relative comparison of components. Is this
5 wider? Is this component wider than another component? Is this component
6 longer than another component?

7 So lululemon, they try to distinguish Hockerson-Halberstadt by
8 casting what's going on here as qualitative, but there really is no difference
9 in between what the court was considering in that case and what's going on
10 here. So what's been happening since Hockerson-Halberstadt? Well, the
11 Federal Circuit has found reversible error where courts attempt to read
12 precise proportions in patent drawings where there no do expressly provide
13 such proportions.

14 JUDGE BELISLE: Counsel, this is Judge Belisle. Do you deem
15 there to be a difference between a precise proportion, like an actual ratio,
16 versus just is A bigger than B? Or is that precise for you?

17 MS. STAUBACH: When Hockerson-Halberstadt characterized
18 this as precise proportions, they were characterizing a comparative view of
19 the widths of two components as a precise proportion. So we believe that --

20 JUDGE BELISLE: Based on a singular line, though, correct, in
21 the drawing?

22 MS. STAUBACH: I'm sorry. I'm not sure I understand your
23 question.

24 JUDGE BELISLE: Oh, so if we go to your slide --

25 MS. STAUBACH: Sixty-four?

26 JUDGE BELISLE: Slide 64, and to the left there's at least a

1 portion of Figure 12B, the aspects of that drawing that were at issue in the
2 case, you say they're the two fins and then the part in the middle. But that's
3 one continuous sort of part of the drawing, I'll say. It's just basically one
4 line, where it starts on the left, comes across to a fin, arcs up and around and
5 then down to the other fin. So it's a single sort of line in the drawing, and
6 the issue in the case was, could I take two parts of that line and compare
7 them to some other part of the line? And the case said no, because it's not to
8 scale.

9 So my question, though, is compared to what Petitioner is arguing
10 here, where we have two lines in a drawing, and they're simply arguing one
11 is shown as bigger than the other or longer than the other. I guess your
12 position is that you can't do that either. You can't look at two separate lines
13 in the same drawing and deem one bigger than the other.

14 MS. STAUBACH: Yes, Your Honor. That is our position.
15 Absent any written description to that effect -- to that this has these two
16 curve lengths, one of those is longer than the other, or this figure is drawn to
17 scale -- absent either one of those things, you can't look at Figure 7A, or
18 lululemon can't look at Figure 7A, and say this curve length is greater than
19 the other curve length, because it's just not representative of accurate
20 proportions.

21 Okay. So we're back on Nike's Slide 66, and we were talking
22 about decisions post Hockerson-Halberstadt. So in the Nystrom case, which
23 was in 2005, the Federal Circuit said, "The district court erred in not
24 properly applying the principles set forth in our prior precedents that
25 arguments based on drawings not explicitly made to scale in issued patents
26 are unavailing." They said, "Since there's no indication that these are drawn

1 to scale in the patent, we can't rely on figures for that purpose."

2 In the Plantronics case -- this one is interesting -- Plantronics, the
3 Federal Circuit, in 2013, rejected an argument that patent drawings show a
4 certain component was elongated, so just really like longer and narrower
5 than it is wide. They cited MPEP 2125, which includes language that says,
6 "Proportions of features in a drawing are not evidence of actual proportions
7 when drawings are not to scale." That court said, "Because the figures in the
8 '453 patent do not evidence actual dimensions, they can't be relied upon to
9 argue that the disputed term should be limited to a particular structure." In
10 that case, elongated.

11 Now, lululemon has come forward with no binding authority since
12 Hockerson-Halberstadt and nothing that presents the same set of
13 circumstances here, which is silence in the written description and a
14 disclaimer of scale.

15 So we turn to Nike's Slide 67. One other --

16 JUDGE DEFRANCO: Ms. Staubach.

17 MS. STAUBACH: Yes.

18 JUDGE DEFRANCO: Help me out. As far as this figure which
19 shows the two curved portions, the bottom curved portion, meaning the one
20 in yellow, that's on the inside of the shoe; am I correct?

21 MS. STAUBACH: I believe that's right.

22 JUDGE DEFRANCO: And the red one is on the outside of the
23 shoe, right?

24 MS. STAUBACH: Yes.

25 JUDGE DEFRANCO: And doesn't the specification talk about
26 the outer curved portion as being a hollow loop, too, or something that

1 extends outward in order to help ball control or some other aspect of
2 footwear, meaning whether it's aesthetic or helps with ball control when
3 playing soccer or whatnot. Am I correct?

4 MS. STAUBACH: I think we can go back to Paragraph 61 here,
5 which says, "Protruding areas 133 can form bulges or protrusions or
6 bumps." Is that what you're referring to?

7 JUDGE DEFRANCO: Yes. There you go.

8 MS. STAUBACH: That never mentions first and second curved
9 portions, and the only thing that lululemon relies on for first and second
10 curved portions is Figure 7A. And this also --

11 JUDGE DEFRANCO: Couldn't you read the figure -- wouldn't
12 you read Figure 7A in context of what's disclosed in the description?

13 MS. STAUBACH: It doesn't discuss or preclude those interior
14 portions, and whether or not it's on the inside of the shoe, we don't know
15 what other components are on the shoe that would be in between a wearer's
16 foot and that knitted component.

17 JUDGE DEFRANCO: I mean, would you agree that Nike is not
18 out to make an uncomfortable shoe for something on the inside of the foot?

19 MS. STAUBACH: I don't think I'm qualified --

20 JUDGE DEFRANCO: If those bulges are really extending
21 outward, I mean, they're going to bother the foot against the skin. So it's
22 really to their benefit that they're speaking of bulges on the outside --

23 MS. STAUBACH: Well, I can't speak to Nike's shoe.

24 JUDGE DEFRANCO: -- not the inside.

25 MS. STAUBACH: Yeah. Thank you. I can't speak to Nike's
26 shoe design. And I'm not a person of ordinary skill in the art, and so I --

1 JUDGE DEFRANCO: But this is a Nike patent, correct?

2 MS. STAUBACH: This is a Nike patent, yes.

3 JUDGE DEFRANCO: Minami is Nike.

4 MS. STAUBACH: Yes.

5 JUDGE DEFRANCO: Okay. All right. My only point is you
6 have to read everything in context. I don't think Petitioner is just relying on
7 Figure 7A. I think they're relying on common sense as well as reading that
8 description in -- what is it? Paragraph 61, as well as Figure 7A, and how
9 one skilled in the art would digest all of that disclosure, not simply looking
10 at Figure 7A alone. And I think that's how you have to come at it.

11 MS. STAUBACH: Well, again, Paragraph 61 never mentions the
12 first and second curves at all. It doesn't discuss whatever internal curved
13 areas, and Nike's position is that for that disclosure, lululemon is truly
14 relying only on Figure 7A, which has no corresponding written description
15 about those first and second curve lengths.

16 JUDGE BELISLE: Counsel, has either expert in this case talked
17 about with respect to the -- well, let's go back to Slide 67 of Patent Owner's
18 slides.

19 MS. STAUBACH: Mm-hmm.

20 JUDGE BELISLE: And has either expert opined on the fact that if
21 you look at that drawing -- I'll use the word "plainly" just for purposes of
22 my question. Plainly, the horizontal line is not centered on the circle, the
23 internal circle. So by fact of it being off-center would necessarily mean that
24 the top and bottom arcs, one is going to be longer than the other. Has that
25 come up?

26 MS. STAUBACH: I think this would tie in to what we talked

1 about with Dr. Pastore. I don't think he ever addressed whether this was off-
2 center. He was asked whether he could see if the top curved portion, or if
3 the first curved portion was longer than the second curved portion. And as
4 we discussed, he did not admit that. He said, "Well, that might be, but
5 actually, this doesn't show precise proportions." It's not to scale, so it
6 doesn't show the correct proportions.

7 JUDGE BELISLE: So the expert did not take a position that his
8 own eyes looking at that -- putting aside what the proportions actually are --
9 that actually looking at that drawing, whether one looked bigger than the
10 other? There was no response to that?

11 MS. STAUBACH: There was a response. He said, "Well, that
12 might be. I could maybe envision a case where I could see what Dr.
13 Brookstein means, but because this is not drawn to scale, this is not meant to
14 evidence those proportions." It's what he said. All right.

15 JUDGE BELISLE: Counsel, just before we move on from that, I
16 have one more thing. Let's assume that we disagree that you can't tell
17 looking at that drawing, the upper arc is bigger than the lower arc. What is
18 Patent Owner's argument against unpatentability if we don't agree with how
19 you interpret this drawing?

20 MS. STAUBACH: First and foremost, our argument has been that
21 it's legally improper under the Federal Circuit case law, but we have another
22 limitation that we dispute in Claim 8 as well.

23 But before we move on to that, if I may, so lululemon's
24 enlargement of Figure 7A is further evidence that reliance on Figure 7A is
25 improper. So actually, in the case that lululemon cites, In re Mraz, discusses
26 that the CCPA had previously rejected attempts to rely on greatly enlarged

1 portions of drawings that were not intended to show the dimensions, and
2 that's what we have here. I believe the case that they were citing was In re
3 Olson. And we're on Slide 68.

4 So the last limitation we want to discuss is in Claim 8, and this is
5 that Minami doesn't disclose webbed areas that are configured to move
6 between a neutral position and an extended position. So throughout its
7 petition, lululemon points to Figure 7A as disclosing the claimed features.
8 That's the case for this limitation as well.

9 Figure 7A includes skin layer 140, and we have Dr. Pastore's
10 declaration here on the left side. This is Slide 71, if I didn't say that. This is
11 from Paragraph 64 of Dr. Pastore's declaration, Exhibit 2006. He says,
12 "Minami further discloses that skin layer prevents knit element 132 from
13 stretching, provides structural reinforcement, and gives Minami's shoe a
14 relatively tight and glove-like fit." And we have Paragraph 44 that he's
15 referring to from Minami over here on the right.

16 And so it's clear that even if this knit element, in Figure 7A, even
17 if this knit element 131 is capable of stretching to some degree, it would be
18 fighting the skin layer 140, which is intended such that this doesn't stretch.
19 If this is a soccer shoe, we don't want this moving around a lot, and so this
20 would be holding back this knit component from stretching. That's not the
21 spirit of the claim.

22 JUDGE DEFRANCO: Well, Ms. Staubach, this document,
23 Minami says that skin layer is optional.

24 MS. STAUBACH: Well, the skin layer is shown in Figure 7A,
25 and that's what lululemon is relying on.

26 JUDGE DEFRANCO: I understand that, but elsewhere in the

1 specification of Minami, it says that skin layer is optional. Does Dr. Pastore
2 ever address that optionality of skin layer?

3 MS. STAUBACH: I can't say with certainty, but I don't think that
4 he does, but I would bring to Your Honor's attention that this is an
5 anticipation ground. And I know in lululemon's reply, I believe they cited to
6 other embodiments in which Minami does not include the skin layer. But
7 this is an anticipation ground, and they haven't shown why separate
8 embodiments would be combined here.

9 JUDGE DEFRANCO: I'm not sure they're relying on different
10 embodiments. I think they're relying on the fact that any of the
11 embodiments Minami recognizes as skin layer is optional.

12 MS. STAUBACH: Well, we just again point to the fact that
13 throughout its petition, lululemon relies on this Figure 7A for all of these
14 limitations.

15 JUDGE DEFRANCO: Okay.

16 MS. STAUBACH: In addition --

17 JUDGE DEFRANCO: All right. I understand.

18 MS. STAUBACH: In addition, Minami discloses that portions of
19 the knitted component that had these inlaid strands -- so it would be the
20 strands that are inside of the protruding elements 133 -- those portions have
21 stretch resistance, and so, again, what we're looking at in Figure 7A are
22 obviously portions of an upper that have these inlaid strands, and so it would
23 also be subject to that stretch resistance. And just --

24 JUDGE DEFRANCO: Let me ask, if you took away skin layer
25 140 in Figure 7A -- I understand your position is Figure 7A has skin layer --
26 but if we took it away, do the webbed areas in green, would you agree they

1 stretch?

2 MS. STAUBACH: Nike would not agree that they are designed to
3 stretch or configured to stretch between a neutral and an extended position.
4 And further, for the reason we were just discussing, which is that portions of
5 the upper that have these inlaid strands are also configured to be stretch-
6 resistant.

7 JUDGE DEFRANCO: I understand the blue part, you know, with
8 the strands. The way Minami describes it is that they're stretch-resistant;
9 however, my understanding of Minami and its description of the webbed
10 areas 131, the knitted element 131, is that it does stretch, it has a stretching
11 capability. And I think that's the way Nike describes it. They didn't --

12 MS. STAUBACH: Yeah. Nike --
13 (Simultaneous speaking.)

14 MS. STAUBACH: Nike and its expert, Dr. Pastore, Dr. Pastore
15 has opined that, of course, knit element 131 would have some degree of
16 stretch. I think he has said that everything stretches. Steel stretches. But
17 it's not configured to stretch between a neutral and an extended position in
18 the context of the '046 patent.

19 JUDGE DEFRANCO: So it's Nike's position that that 131 green
20 area is not designed to stretch as described in the Minami reference?

21 MS. STAUBACH: No, it's --

22 JUDGE DEFRANCO: I find that surprising. Knowing Nike's
23 reputation as a shoe manufacturer, that they're going to make a shoe that
24 does not have some sort of stretching characteristics to the knitted element.

25 MS. STAUBACH: Yeah.

26 JUDGE DEFRANCO: To me, that's what Nike is all about.

1 MS. STAUBACH: I think we may be talking --

2 JUDGE DEFRANCO: That's the '046 patent, the Minami patent,
3 they're going to add some sort of stretch.

4 MS. STAUBACH: Yeah. We may be talking past each other.

5 JUDGE DEFRANCO: I'm just surprised that you would take that
6 position that Minami doesn't disclose that.

7 MS. STAUBACH: We're not saying that knitted element 131
8 doesn't stretch. We're saying that it doesn't stretch between a neutral and an
9 extended position, as is recited in Claim 8 in the context of the '046 patent.
10 So it's not that knitted element doesn't stretch -- we're not taking that
11 position -- but we are saying that this doesn't meet the claim limitation.

12 JUDGE DEFRANCO: I just thought stretching would include
13 between a neutral and extended position. Something stretches, it goes to an
14 extended position, and, naturally, because it's elastic or has some sort of
15 stretchy characteristics, it's always going to go back to a neutral position
16 eventually when there's no force applied to it, that stretch, that fabric.

17 MS. STAUBACH: So --

18 JUDGE DEFRANCO: Okay. Go ahead. I didn't mean to
19 interrupt you.

20 MS. STAUBACH: That's okay. So we're on Nike Slide 73, and
21 so the Federal Circuit has held that "configured to" requires a structure to be
22 designed to accomplish a specific objective. And here, that objective is
23 stretching between a neutral and an extended position. And in the context of
24 the '046 patent, as we discussed, the purpose of tubular structures and
25 webbed areas, and lululemon agrees, is it's to have this stretching capability
26 such that there is a webbed area reveal. It's also what we discussed with this

1 color changing idea, and what's being shown in Minami does not align with
2 those features. All right.

3 JUDGE BELISLE: So Counsel, just so you know, you are in the
4 rebuttal portion of your time, but you can continue however you wish.

5 MS. STAUBACH: Perfect timing. We are done with this. Thank
6 you.

7 JUDGE BELISLE: As part of the LEAP process, let me ask your
8 co-counsel if there's anything you want to add to the argument.

9 MR. HARRIS: No. Thank you, Your Honor. I think she did a
10 great job, so nothing to add.

11 JUDGE BELISLE: Thank you.

12 Petitioner? Just give me one second to fiddle with the clock here.
13 Round up. There you go.

14 MR. EVERTON: I won't need it.

15 JUDGE BELISLE: Oh. You don't need it.

16 MR. EVERTON: Okay. I will keep this brief. So if we go to
17 Slide 3, Petitioner's Slide 3, there were some interesting questions raised by
18 Your Honors about how would this function, how would this claimed article
19 function if the loops weren't closed on the structures, on the tubular
20 structures.

21 And I think the answer is, just fine. This claim is directed to an
22 article. An article could be a swatch of fabric. It could be a lot of different
23 things. This is a very broad claim. And this article would function just fine
24 if the tubular rib structures were not completely closed. In fact, it could
25 function like Good, like the sock in Good, which functions just as it should.

26 So I also wanted to touch on this claim, Claim 1, and all of the

1 claims really. This is not a groundbreaking invention here. It is a broad
2 claim and simple. It has the webbed areas, the tubular structures. These
3 items are included in the prior art, but now Nike is trying to save these
4 claims by arguing that it's an inventive feature to close off the entirety of
5 that tubular structure on the backside. If you just sew it together on the
6 backside, then you have something patentable over what it is in the prior art.

7 And we just don't think that is enough. Even if it were required,
8 that would not enough for an invention here. And as I explained previously,
9 it's not required. None of the claim constructions proposed by the parties
10 here require a closed loop.

11 Now, if we look at Slide 18, Petitioner's, we had talked about
12 when I was up here the first time, the definitions that were provided for tube
13 and tubular. There was discussion about whether or not lululemon agrees
14 that a tube has to be closed loop, and I wanted to make it clear here that in
15 that discussion I did agree that as far as these definitions go, the definitions
16 do say that a tube is a hollow cylinder. And that's consistent, and the
17 dictionary definitions do seem to suggest that there is a closed loop there.

18 However, if we go to Slide 7, Petitioner's Slide 7, in the '046
19 patent, it does seem a little bit broader than the dictionary definitions when
20 describing a tube. We went through this language several times now, but if
21 you look closely at the second sentence there, it says, "A hollow tube 112
22 may be a generally unsecured area disposed between first curved portion 416
23 and second curved portion 418 of the tubular rib structure." And then it says
24 that that hollow tube has the configuration of a tunnel or a channel.

25 So it seems like the '046 is even treating tube itself a little bit
26 broader than the dictionary definitions. It could be possible in the context of

1 the '046 patent that even a tube, the tubes that are described, would not need
2 to be closed periphery. But luckily, the claim limitations don't say tube;
3 they say tubular, which is even broader, and so we've gone through that
4 exercise that certainly tubular would not require a closed periphery if the
5 '046 suggests that tube itself wouldn't require a closed periphery.

6 JUDGE DEFRANCO: Mr. Everton, let me ask you something
7 about the Slide 7 in that particular passage there. So it says, "A hollow tube
8 may be a generally unsecured area," so the area it's talking about is hollow.

9 MR. EVERTON: Mm-hmm.

10 JUDGE DEFRANCO: And it's disposed between a first curved
11 portion and a second curved portion. Doesn't the fact that it's saying a first
12 curved portion and a second curved portion -- the first curved portion being,
13 I believe it's the bottom part of the tube.

14 MR. EVERTON: Mm-hmm.

15 JUDGE DEFRANCO: And then it says the second curved being
16 the top of the tube. Doesn't the fact that includes a second curved portion
17 mean it was closing off the tube?

18 MR. EVERTON: No, not necessarily. I think it is describing what
19 is shown. It is saying that the hollow tube 112 may be the area in between
20 416 and 418, right? But then it's adding that that could be -- that may be in
21 the configuration of a channel. So I think that is the differentiation, is that in
22 different embodiments, it could be the hollow tube 112, which is shown, and
23 that's clearly a tube between the two curved portions, but it may also be a
24 channel, basically. Then you wouldn't have --

25 JUDGE DEFRANCO: But if it was talking about an open channel,
26 then it would just have one of the curved portions, because one curved

1 portion forms a channel, an open channel. But when you read that passage,
2 it's talking about two curved portions, meaning one on top of the other,
3 which seems to indicate to me that it's a closed channel or a closed tunnel.

4 MR. EVERTON: No, and we don't think that's the case, and it
5 goes back to the claim differentiation that we pointed to earlier, that --

6 JUDGE DEFRANCO: But that's extrinsic evidence.

7 MR. EVERTON: Right.

8 JUDGE DEFRANCO: Right?

9 MR. EVERTON: Well, it's a description. The claim
10 differentiation that we looked at showed that the shared specification with
11 the '046 must disclose this open periphery, open periphery channels. But
12 what I'm saying is that there, the claims spelled this out for us. It said that,
13 well, you can be attached at one edge of the curved portions, or you can be
14 attached at both edges.

15 So that can be one of the differences between open and closed, is,
16 yes, you have the two edges, but you can be closed by attaching at both
17 edges and completely sealing it off, or you can only attach at one edge and
18 leave it still be open. But in either case, you would still have both of the
19 curved portions, 416 and 418, whether it's opened or closed.

20 JUDGE DEFRANCO: Where in the specification here does it talk
21 about attaching only one edge? My understanding it's always talking about
22 joining both edges together or it's having both edges looped.

23 MR. EVERTON: Well, it's here. It's in this description of you
24 can have it this way where you have the tube with both edges attached, or
25 you can have a channel. And then that was further confirmed in those
26 claims that we looked at for claim differentiation, where it talked about you

1 can either have one or both of the edges attached. But either way you would
2 have both edges. So yes, having the two edges doesn't mean that there can't
3 be a channel.

4 I was going to turn to -- and it may take me a second here -- one of
5 Nike's slides. Like to go to Slide 20 of Nike's slides. And on this slide,
6 they show and argue that there's these two conflicting statements by
7 Petitioner. And the first is, "Petitioner submits that tubular structure must
8 have the shape of a tube," and then the second is, "The claim term at issue is
9 not 'tube.' 'Tubular' means 'tube-like' and does not require all properties of
10 an actual tube." Now, these positions by Petitioner are absolutely consistent,
11 and that's what we've explained through this presentation is that having a
12 shape like a tube does not require that it is a tube. Something that has a
13 shape of something else doesn't always have to be that thing.

14 I was thinking the other day and looking online and saw that there
15 are actually buildings -- this is a new thing -- where the buildings have a
16 shape. They're called horseshoe shaped buildings. There's a new one, I
17 guess, in Dubai that they've created. And that's what they're called.
18 They're buildings that are horseshoe shaped and have the shape of a
19 horseshoe, but clearly, that doesn't mean that they are a horseshoe.

20 And that's what we're coming at here. Yes, our position is that it
21 has to be tube-like or have the shape of a tube, but that doesn't mean it has
22 to be an actual tube that has a closed periphery. And lululemon has never
23 said that it has to have a closed periphery. And lastly --

24 JUDGE DEFRANCO: Is typically a tube thought of as being
25 cylindrical?

26 MR. EVERTON: I think that's right. I think typically a tube is

1 thought of as being cylindrical. Let's look at the --

2 JUDGE DEFRANCO: So a tubular structure would be something
3 other than --

4 (Audio interference.)

5 MR. EVERTON: It could be. That could be one way that it's
6 different, just tube-like.

7 Now, if we go to lululemon's Slide 38, Nike has been relying a
8 great deal on the Hockerson-Halberstadt case and provided some description
9 of that, and I just wanted to point out here that that case was different and
10 did apply different standards. And as the Institution Decision noted in
11 Halberstadt, "It stands for the proposition that it is an error to rely on patent
12 drawings for precise proportions for particular sizes of elements if the
13 specification is completely silent as to such proportions or sizes."

14 And I just want to remind you, and it was mentioned previously,
15 that Minami is a Nike patent. This is one of their own patents that predated
16 the '046 patent and provided the nice figures and the details that it did. And
17 now Nike is trying to get us to ignore that. We can't use those figures
18 against their later patents based on case law or a technicality that, to us, just
19 doesn't seem fair. We think that, like I mentioned previously with Claim 1,
20 that these claims are simple and then when it's shown in the prior art, that
21 prior art anticipates those claims.

22 That's all I have, Your Honor.

23 JUDGE BELISLE: Thank you.

24 Just one second, Patent Owner. Okay. You can proceed.

25 MS. STAUBACH: Patent Owner doesn't have anything further,
26 unless there are other questions.

1 JUDGE BELISLE: All right. Well, hold on one second. We'll
2 see if there's other questions.

3 JUDGE HOSKINS: Not from me. Thank you.

4 JUDGE DEFRANCO: No, thank you.

5 MS. STAUBACH: All right. Thank you for your time today.

6 JUDGE BELISLE: Thank you. Okay. Counsel, the case is
7 submitted and taken under advisement. We are off the record.

8 (Whereupon, the above-entitled matter went off the record at 3:29
9 p.m.)

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