Exhibit S

lululemon v. NIKE, Inc.
IPR2024-00460
Patent No. 8,266,749
Ex. 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 1:23-cv-00771-AS
- x
NIKE, INC.,

Plaintiff,

- against -

LULULEMON USA INC.,

Defendant.
- x
June 5, 2024
9:00 a.m.

** HIGHLY CONFIDENTIAL **
** ATTORNEYS' EYES ONLY **

VIDEO RECORDED DEPOSITION of DR. DAVID BROOKSTEIN, an Expert Witness for the Defendant herein, taken by the Plaintiffs, held at the offices of Knobbe Martens, 1155 Avenue of the Americas, New York, New York, before Sara K. Killian, a Registered Professional Reporter, Realtime Certified Reporter and Notary Public of the State of New York.

A P P E A R A N C E S :

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BY: ALI RAZAI, ESQ.

ALSO PRESENT:
MARCELO RIVERA, Veritext Videographer

STIPULATIONS

IT IS HEREBY STIPULATED AND AGREED by and among counsel for the respective parties hereto, that the sealing and certification of the within deposition shall be and the same are hereby waived;

IT IS FURTHER STIPULATED AND AGREED all objections except as to form of the question, shall be reserved to the time of the trial;

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be signed before any Notary Public with the same force and effect as if signed and sworn to before the Court.

* * *

THE VIDEOGRAPHER: Good morning. We are going on the record at 9:22 a.m. on June 5th, 2024.

Please note that the microphones are sensitive and may pick up whispering and private conversations. Please mute your phones at this time. Audio and video recording will continue to take place unless all party agree to go off the record.

This is media unit one of the video recorded deposition of Mr. David Brookstein in the matter Nike Inc. versus lululemon USA, Inc., filed in the United States District Court for the Southern District of New York.

This deposition is being held at Knobbe Martens, located at 1155 Avenue of the Americas, New York, New York.

My name is Marcelo Rivera, representing Veritext Legal Solutions, and I'm the videographer. The court

reporter is Sara Killian in association with Veritext Legal Solutions. I'm not related to any party in this action, nor am I financially interested in the outcome.

If there are any objections to proceeding, please state them at the time of the appearance.

Counsel and all present will state their appearances and affiliations for the record, beginning with noticing attorney.

MR. BOWLING: Aaron Bowling of Arnold & Porter on behalf of Nike and with me today is Lindsey Staubach, also of Arnold & Porter.

MR. RAZAI: Ali Razai from Knobbe Martens on behalf of the defendant.

D A V I D B R O O K S T E I N, after having first been duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

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EXAMINATION BY

MR. BOWLING:

Q. Mr. Brook --

A. Dr. Brookstein.

Q. Dr. Brookstein. My apologies.

Thank you for being here today. I know you've been in depositions before. I'll quickly go over some ground rules for you. I'm going to be asking you a series of questions today. If there's anything you don't hear, let me know. I'm happy to repeat myself.

If there's anything you don't understand, same thing, let me know. I'll work with you to figure out what it is you don't understand.

If you answer the question, I'm going to assume that you heard me, you understand and that you're answering to the best of your ability.

Sound good?

A. I understand.

Q. Okay.

Today's deposition is being

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transcribed, so if you could please give verbal answers instead of nodding or saying mm-hmm, that would be helpful to the court reporter.

We can take breaks whenever you'd like. The only exception is that if I have a question pending, I'll ask you to answer the question and then we could take a break immediately after.

A. I understand.

Q. Sound good?

A. I understand.

MR. BOWLING: Okay.

I'm handing you what we've marked as Brookstein Exhibit 1.

(Whereupon, Exhibit 1 was marked for identification.)

BY MR. BOWLING:

Q. Do you recognize Brookstein Exhibit 1?

A. I do.

Q. What is it?

A. It's my notice of deposition.

Q. Okay.

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You understand that today you'll be testifying on behalf of -- as an expert for the lululemon under oath, the same type of oath you'd be under in a courtroom?

A. I do.

Q. Is there any reason you can't give truthful testimony today?

A. Absolutely not.

(Whereupon, Exhibit 2 was marked for identification.)

BY MR. BOWLING:

Q. Dr. Brookstein, I am handing you what we marked as Brookstein Exhibit 2.

Do you recognize Brookstein Exhibit 2?

A. I do.

Q. What is it?

A. It's my responsive expert report.

Q. I'm going to ask you to turn to page 103 of Brookstein Exhibit 2 -- page 105. I'm sorry.

A. One-oh-five. Okay. Yes.

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Q. Do you see at the bottom of the page there's a signature and a date?

A. I do.

Q. That's your signature?

A. It is.

Q. Okay.

You submitted this report on the date shown there, May 17th, 2024; is that right?

A. That's when I executed it, yes.

Q. Okay.

How much time did you spend preparing the responsive expert report, Brookstein Exhibit 2?

A. I'd have to estimate, about 40 to 50 hours.

Q. As you sit here today, are you aware of any inaccuracies in Brookstein Exhibit 2?

A. When I went through both my expert reports, I noticed a couple times where I had a citation, a typo. That's all. I can't remember where those typos are.

Q. Typos in citation of documents

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you reviewed?

A. Yes.

Q. You don't remember where those typos were?

A. No, I don't.

Q. Approximately how many typos do you recall noticing in your responsive expert report?

A. Maybe two or three.

Q. Are you aware of any omissions in your responsive expert report, things that you left out?

MR. RAZAI: Objection to form.

A. No.

Q. As you sit here today, are there any changes that you'd like to make to your responsive expert report aside from the two typos we discussed?

A. No.

Q. Is it accurate to say that your responsive expert report sets forth your opinions on non-infringement in this matter?

A. It is directed towards the report that was given on infringement on

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behalf of your client.

Q. Okay.

Do you have any opinions related to infringement in this matter that are not contained in your responsive expert report, Brookstein Exhibit 2?

A. Not that I recall.

Q. I'm going to ask you to turn to Brookstein Appendix B at the end of your report, page one specifically.

A. Yes. Let me get to it. Let me unclip this. It makes it easier for me. Exhibit B. Exhibit B, okay. Yes. Yes.

You mean Appendix B?

Q. Appendix B, correct.

A. Yes.

Q. Okay.

Do you see at the top of page one of Appendix B it says Materials Considered?

A. Yes, I do.

Q. This Appendix B, this is a list of all the materials you considered when rendering your opinions that are set forth

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in this responsive expert report; is that right?

A. I would have to go through this 70 pages here. Do you want me to go through all 70 pages?

Q. You'd have to go through all 70 pages to do what?

A. You're asking me are these all the materials I considered. This is a 73-page report, appendix. Do you want me to go through each one?

Q. Are you aware of any materials that you considered in preparing your responsive expert report that aren't listed in Appendix B?

A. I'm not aware at this time. That is correct.

Q. And you're not aware of any inaccuracies in the list of materials considered listed in Appendix B?

A. Unless I read through all 74 pages, no.

Q. As you sit here today, you're not aware of any?

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A. As I sit here today, no.

Q. Before you submitted Appendix B, the list of materials considered, did you review it for accuracy?

A. Yes.

Q. Okay.

At that time, you didn't notice any inaccuracies or omissions?

A. At that time, I didn't notice any.

Q. Since that time, you have not become aware of any inaccuracies or omissions?

A. That is correct.

(Whereupon, Exhibit 3 was marked for identification.)

BY MR. BOWLING:

Q. Dr. Brookstein, we're handing you what we've marked as Brookstein Exhibit 3.

Do you recognize this document, Brookstein Exhibit 3?

A. I recognize this document, Exhibit 3.

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Q. And what is it?

A. It's the Patent 8,266,749 titled Article of Footwear having a Textile Upper.

Q. This is what you refer to in your report and what we refer to in this litigation as the '749 patent?

A. That is what we call it.

Q. Okay.

So if I refer to the '749 patent today, you'll know I'm referring to this patent?

A. That's true.

Q. Okay.

Have you read the entire '749 patent?

A. Yes.

Q. How many times?

A. I would estimate maybe 20 times.

Q. Okay.

When was the last time that you read the '749 patent?

A. Sometime this week. I don't

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remember when.

Q. So within the last few days?

A. That would be a good answer, yes.

Q. Okay.

Have you read the prosecution history for the '749 patent?

A. The prosecution history that I cited in my report, yes.

Q. When you say the prosecution history that you cited in your report, can you point me to where in Appendix B that prosecution history is listed?

A. Yes.

There's so many pages. Can you give me a hint on where that is?

Q. It looks like the first heading of Appendix B is Patents, Patent Publications and File Histories.

A. Okay.

Q. Looks like it might be second --

A. Oh, file history of US patent. Yes.

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Q. Okay.

So you read the entire prosecution history for the '749 patent?

A. I did not read -- you know, prosecution history says a lot of things that have nothing really to do with the material in the patent or about dates, things like that.

Q. Right.

A. No, I did not read those.

Q. Okay.

So when this says the file history of the 8,266,749 patent, that's not entirely accurate?

MR. RAZAI: Objection to form. Argumentative.

A. I read the parts that were addressing the actual subject of the patent, not all of the things that go into a prosecution history, like when they got the -- when the Patent Office got a letter or something from one of the counsel or things like that. No.

Q. How did you know which parts of

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the prosecution history to review?

A. The material parts.

Q. How did you know which parts were material if you didn't review all of them?

A. I knew because they didn't have a heading that would say we got this on a certain date, we got that on a certain date.

Q. So you made determinations of what was relevant in the prosecution history based on the headings?

A. I think that's mischaracterizing it. What I said was I read the parts of the prosecution history that actually talked about the patent and the stuff -- the material preceded the patent, yes.

Q. But how do you know which pieces of the prosecution history talked about the patent if you didn't review all the pieces of the prosecution history?

A. You're mischaracterizing.

I did look at every page of the prosecution history. But when I saw it was

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something that was -- what I'll call transactional, like, you know, we got this on this certain date, I would just flip it over and go to the next page and then I would keep doing it until we got to parts that were specific to the material that the patent was about.

Q. Okay.

So you put eyes on every single page of the prosecution history?

A. Yes, I did.

Q. And you made a determination about whether a given page contained information that would be helpful for you to consider and if you thought it was, you considered it. If it was some administrative filing, you didn't look at it further.

Is that right?

MR. RAZAI: Objection to form.

A. I think that's a fair characterization.

Q. Okay.

How many times did you review

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the prosecution history in its entirety?

MR. RAZAI: Objection to form. Foundation.

A. I can't answer that. More than once, but I can't answer that.

Q. When was the last time you did that?

A. I'm not sure.

Q. This week?

A. I'm not sure.

Q. Have you reviewed it since you submitted your report?

A. Yes.

Q. In preparing this responsive report, you considered the opening expert report of Nike's expert, Dr. Pastore, correct?

A. I did.

Q. At any time in rendering your opinions in this matter, did you communicate with lululemon's other expert, Ms. Young?

A. I've never spoken to Ms. Young.

Q. Did you review her expert report at any time?

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A. I did.

Q. And you reviewed Ms. Young's report as part of preparing your opening expert report; is that correct?

A. I don't recall that. I don't recall that.

Q. Have you ever reviewed Dr. Pastore's rebuttal expert report?

A. Yes, I have.

Q. When did you review that?

A. Right after he submitted it on May 17th --

Q. Okay.

A. -- 2024.

MR. BOWLING: Dr. Brookstein, we're handing you what we marked as Brookstein Exhibit 4.

(Whereupon, Exhibit 4 was marked for identification.)

BY MR. BOWLING:

Q. Do you recognize this document?

A. I do.

Q. What is it?

A. It's US Patent 9,375,046 B2,

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titled Article of Footwear Incorporating a Knitted Component with Inlaid Tensile Elements and a Method of Assembly.

Q. And this is the patent that you refer to in your report as the '046 patent; is that right?

A. That is correct.

Q. Today, if I use the term '046 patent, you'll know that I'm referring to this patent?

A. I will.

Q. Okay.

How many times did you review the '046 patent when you were rendering your opinions in this case?

A. For this case? Probably 20 times or so.

Q. When was the last time you reviewed it?

A. Sometime this week.

Q. And same thing with the prosecution history? In this instance, you put eyes on every page and you made determinations about what was material or

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not and you considered everything that you thought may be material to rendering your opinions?

A. That would be the same answer as I gave for the previous patent.

Q. Did you also review this prosecution history more than once?

A. Yes.

Q. When I asked you how many times you had reviewed the '046 patent, you said in this case.

A. Yes.

Q. Have you reviewed the '046 patent outside of the context of rendering your opinions in this case?

A. Yes.

Q. When was that?

A. Well, when I did the IPR for this case.

Q. Okay.

A. And I also reviewed it once on another case.

Q. Which case was that?

A. It was a case involving adidas

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and I don't remember any details of it. I also have an NDA with them, so I can't talk about the adidas case because I understand it was settled.

MR. BOWLING: So Ali, is it your position today that he can't talk about the adidas litigation because of the NDA?

MR. RAZAI: I don't have a position. I'm here representing lululemon, not adidas.

MR. BOWLING: Okay.

THE WITNESS: My position is I have an NDA, so I'm not going to discuss it.

MR. BOWLING: Okay.

BY MR. BOWLING:

Q. How many times did you review the '046 patent when you were rendering your opinions in the IPR that's parallel to this case?

A. I didn't actually count them, but I would suspect about 20 times.

Q. Okay.

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So you have reviewed the '046 patent at least 40 times?

A. For these two cases and then for the adidas case, probably another 20 times.

Q. Did you review the '749 patent during your work on the adidas case?

A. I don't recall.

(Whereupon, Exhibit 5 was marked for identification.)

BY MR. BOWLING:

Q. Do you recognize this document, Brookstein Exhibit 5?

A. I recognize this document.

Q. Okay.

What is it?

A. It's US Patent 9,730,484 B2 titled Article of Footwear having a Flat Knit Upper Construction or Other Upper Construction.

Q. Okay.

This is the patent that you refer to in your report as the '484 patent?

A. That is correct.

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Q. If I use the term '484 patent, you'll understand that I'm referring to this patent?

A. I will.

Q. Have you reviewed the '484 patent in its entirety?

A. Yes.

Q. How many times?

A. Again, approximately -- for this case?

Q. Sure.

A. Approximately 20 times.

Q. Okay.

What about outside of the context of this case?

A. Again, for the IPR, probably about 20 times.

Q. Any other times?

A. Not that I can recall.

Q. When was the last time you reviewed the '484 patent?

A. Sometime this week.

Q. Did you review the prosecution history for the '484 patent in its entirety?

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A. Not in its entirety.

Q. Same answer as before?

A. Same answer as before.

Q. You put eyes on everything and made determinations about what was material. To the extent you found it material, you considered it?

A. I'd like to clarify that.

I did not pay attention to what I call the transactional elements, when something was submitted or something of that nature.

Q. Okay. Understood.

You reviewed the prosecution history for the '484 patent more than once?

A. Yes.

Q. For the '749, '046 and '484 patents, you reviewed all of those patents in their entirety at least 20 times and for the '046 and '484 patent, at least 40 times?

A. When you include the IPRs, yes.

Q. Okay.

A. And for the record, IPR, inter partes review.

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Q. Thank you.

What is your experience with knitted footwear?

A. Knitted footwear? I have never made any knitted footwear. No.

Q. Have you ever made any non-knitted footwear?

A. No.

Q. Okay.

We're going to turn back to Brookstein Exhibit 2, your responsive report.

A. Let me get that out. That's, I think, the one with the clip. Yes, sir.

Q. I'm going to ask you to turn to paragraph 63. It's on page 28.

A. Yes.

Q. So I just want to make sure I understand your position that's set forth here in these couple of paragraphs.

Is it your opinion that --

A. Excuse me. Which paragraph are you talking about?

Q. Sixty-three, 64, 65, 66, 67 and

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68.

A. Yes, sir.

Q. We can focus for now on paragraph 63.

A. Okay.

Q. Is it your opinion that if lululemon shoes infringe the '749 patent, then the adidas A3 and the adidas wrestling shoe would invalidate the '749 patent?

A. Can you repeat that question, please?

Q. Sure.

Is it your opinion that if lululemon's shoes infringe the '749 patent, then the adidas A3 shoe and the adidas wrestling shoe would invalidate the '749 patent?

MR. RAZAI: Objection.

Form.

A. Invalidate -- my view is the A3 and the wrestling shoe's invalidation is separate from this. If a patent is invalidated, then there can't be infringement.

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Q. Right. But here in paragraph 63 and paragraph 64, you refer to an interpretation that you think Dr. Pastore has made.

Is that right?

A. Can I take a minute to read it?

Q. Sure.

A. Okay. Up to what paragraph number?

Q. You could read all the way through 68, if you'd like.

A. Could you ask me the question again?

Q. Sure.

Is it your opinion that if the '749 patent is interpreted in a way that lululemon shoes are found to be infringing, that the adidas A3 shoe and the adidas wrestling shoe would invalidate the '749 patent?

A. I think you have it the other way around. If a patent is invalidated, there's no such -- you can't infringe an invalidated patent. That's the way I

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understand it.

Q. Okay. Let's stick with paragraph 63 here.

A. Okay.

Q. I want to direct you to the third sentence that begins with: Lululemon has previously taken the position ...

Do you see that?

A. I do.

Q. What does that sentence mean? Can you explain that to me?

A. Let me read it. I think that sentence means what I just said, that if the A3 and the -- well, I'll say the adidas shoes. So when I say adidas shoes, I mean the A3 and the wrestling shoe.

If they are invalidated, then they can't infringe -- an invalidated patent can't infringe anything. That's what I'm trying to say here.

Q. So when you say in that sentence: Accordingly, the scope of those claims must be different than what Nike contends in its contentions and not

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encompass any of the '749 accused products to preserve the validity of those claims, what does that mean?

A. It means if you had different claims in there that weren't invalid, then it could be, but that's a hypothetical. The claims in the '749 are the claims in the '749.

Q. So when you say the scope of those claims must be different than what Nike contends, what is that referring to?

A. It would mean you have to have different claims.

Q. The scope of those claims -- claims one through 13 -- must be different than what?

A. Than what is in -- what's been invalidated.

Q. Let's look at paragraph 67.

A. Okay.

Q. The first sentence says: Based on footnote two, it appears that Dr. Pastore concludes that for purposes of invalidity, no knitted texture on the textile element

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can be the same as a knitted texture on the surrounding knitted material.

Do you see that?

A. I do.

Q. Then in paragraph 68, second sentence, you say: I have analyzed non-infringement under Dr. Pastore's apparent understanding of the claims of the '749 patent as set forth in footnote two of his opening report.

Do you see that?

A. I see that sentence.

Q. So is it accurate to say that all of your non-infringement opinions in this case were provided under your understanding of what Dr. Pastore says in footnote two, which you describe in paragraph 67 as being that no knitted texture on the textile element can be the same as a knitted texture on the surrounding knitted material?

MR. RAZAI: Objection to form.

A. I'd like to see footnote two, please.

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(Whereupon, Exhibit 6 was marked for identification.)

BY MR. BOWLING:

Q. Dr. Brookstein, we're handing you what we've marked as Brookstein Exhibit 6.

Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's the opening expert report of Christopher M. Pastore, PhD on Infringement of US Patent Nos. 8,266,749, 9,375,046 and 9,730,484.

Q. This is the report you referred to earlier when you said that your responsive report, Brookstein Exhibit 2, is responding to, correct?

A. That is correct.

Q. The footnote two we were just discussing runs from page 18 to page 19 of Dr. Pastore's opening report?

A. Yes. Let me open it up so I could see it.

I'd like you to ask me the

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question again.

Q. Sure.

Is it accurate to say that all of your non-infringement opinions in this case were provided with the understanding of what you interpret Dr. Pastore to say in footnote two, which you describe in paragraph 67 of your rebuttal report as being that "no knitted texture on the textile element can be the same as a knitted texture on the surrounding material"?

MR. RAZAI: Objection to form.

A. No.

Q. Okay.

So in paragraph 68 of your rebuttal report --

A. Hold on. Now I'm a little -- wait. What do I have here? Give me a second here. I'm not sure what this is. It starts on page 31. I'm not sure if this is my -- I'm not sure what this is.

Q. That's your rebuttal report, I believe. We were just on page 30. You may have put the rest of it underneath.

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A. I see. Let me put it back in the right place.

Q. It may be underneath what you're holding in your right hand.

A. No. It says responsive report, there's a page 31 here and this is not page 31. I don't know what this one is. I don't know what this one is. It starts on page 31 and I don't see --

MR. BOWLING: Okay. Should we go off the record for a minute?

THE WITNESS: It's definitely not the responsive report because there's a 31 here. It's different than the 31 here.

MR. BOWLING: We could go off the record for a minute and sort out.

THE VIDEOGRAPHER: The time is 10:01 a.m.

We're going off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 10:02 a.m.

We're back on the record.

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BY MR. BOWLING:

Q. So in paragraph 68 of your rebuttal report on page 30 --

A. Page 68 or paragraph 68?

Q. Paragraph 68.

A. I thought I said page 68. Okay.

Q. Okay.

Paragraph 68, second sentence, you say: I have analyzed non-infringement under Dr. Pastore's apparent understanding of the claims of the '749 patent as set forth in footnote two of his opening report.

Do you see that?

A. Yes.

Q. That apparent understanding you're referring to, that's what you describe in paragraph 67 of your rebuttal report, correct?

A. I'm not talking about all the claims. I'm talking about claims one and I think 13.

Q. That apparent understanding that you refer to in paragraph 68 of your

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rebuttal report is what you described in the preceding paragraph, 67, correct?

A. That's his conclusion, yes.

Q. That's your understanding of his conclusion, correct?

A. That's my -- right. It starts with it appears. That's my understanding of his conclusion.

Q. Right. In paragraph 68, when you say I have analyzed non-infringement under Dr. Pastore's apparent understanding of the claims of the '749 patent --

A. Excuse me. Which paragraph are you talking about?

Q. Paragraph 68.

A. Yes. Go ahead.

Q. When you say in the second sentence, I have analyzed non-infringement under Dr. Pastore's apparent understanding of the claims of the '749 patent, the apparent understanding that you're referring to is what you describe in paragraph 67 of your rebuttal report, correct?

A. You haven't read the whole

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paragraph. If you're going to cite that paragraph, don't you have to cite the whole paragraph?

Q. I'm asking you a question about the term you used in paragraph 68. You can read the whole paragraph if you'd like. I'm asking about a specific term.

A. What is your question again?

Q. In paragraph 68 of your rebuttal report, in the second sentence, when you say: I have analyzed non-infringement under Dr. Pastore's apparent understanding of the claims of the '749 patent, the apparent understanding you're referring to is what you describe in paragraph 67 of your report, correct?

A. That would be correct.

Q. That apparent understanding is that no knitted texture on the textile element can be the same as a knitted texture on the surrounding knitted material; is that right?

A. That is correct.

Q. Now, in the next sentence of

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paragraph 68, you say that: I have also set forth my opinion regarding Nike's failure to carry its burden to show infringement under either interpretation of the claims of the '749 patent.

Do you see that?

A. I do.

Q. When you say either interpretation, what's the other interpretation you're referring to?

A. It really refers back to that first sentence where I say I understand the claims are to be interpreted the same for infringement and invalidity. So in some cases, I'll see Nike will say something for invalidity about a claim and then something different for infringement.

Q. So I understand that. My question is a little different.

A. Okay.

Q. We've talked about one interpretation.

A. Right.

Q. That's the one you describe in

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paragraph 67 where you say "no knitted texture on the textile element can be the same as a knitted texture on the surrounding knitted material."

A. Yes.

Q. Okay.

So that's one interpretation --

A. That's one interpretation.

Q. -- of the '749 patent claims?

A. Right.

Excuse me. There are a lot of claims in here. Which claim are you talking about?

Q. When I say claims, I'm referring to what you say in paragraph 68, second sentence: I have analyzed non-infringement under Dr. Pastore's apparent understanding of the claims of the '749 patent.

A. Yes. I use the word claims, but I haven't said which claims.

Q. Okay.

You're referring to claims one and 13, correct?

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A. As best as I can recall, yes.

Q. Okay.

So we've talked about one interpretation of those claims?

A. Right.

Q. That's what you set forth in paragraph 67 where you say: No knitted texture on the textile element can be the same as a knitted texture on the surrounding knitted material, correct?

A. That is correct.

Q. So that's one interpretation?

A. For the purpose of invalidity. That's what the whole sentence says.

You're taking this out of context.

Q. What's the other interpretation of the '749 patent claims that you're referring to when you say in the third sentence of paragraph 68: I have also set forth my opinion regarding Nike's failure to carry its burden to show infringement under either interpretation of the claims in the '749 patent?

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A. Well, there I'm referring to the infringement.

Q. Okay.

We can call it the infringement interpretation?

A. The infringement interpretation.

Q. What is that?

MR. RAZAI: Objection to form.

A. The infringement interpretation is that the surrounding fabric has to be a different texture than the textile elements within the product that you're making.

Q. Okay.

So help me understanding the difference between those two interpretations that you're referring to.

You said you rendered your opinions under either interpretation?

A. Yes.

Q. What's the difference between the two interpretations?

A. One interpretation you could have the same texture on the surrounding

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fabric and not on the item that you're going to cut and one you could have different.

Q. So in one interpretation, no knitted texture on the textile element can be the same as a knitted texture on the surrounding knitted material.

Then in the other interpretation, you can have a knitted texture on the textile element that's the name as the knitted texture on the surrounding knitted material.

Is that right?

MR. RAZAI: Objection to form.

A. Yes. One would be for infringement and one would be for invalidity.

Q. Which of those interpretations is right in your opinion?

A. I think in the infringement you can have a different -- you should have, the way the claim reads, something that doesn't correspond directly to what's in the product. Notice I say directly.

Q. What do you mean by that?

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A. Well, for instance, if we talk about the wrestling shoe, the adidas wrestling shoe -- and I'm sure we'll get to this -- there are two textures on the structure -- okay? -- on the actual shoe.

If in the surrounding part you had those same two but -- same two structures -- but in those two structures, one was different than one of the other structures in the flat panel or the -- excuse me -- the median or lateral side, that would not be -- that would not be infringing.

Q. So you say in the first sentence of paragraph 67 that claims are being interpreted the same for infringement and invalidity, right?

A. It's my understanding that that's the law. Yes, you can't have two different ways to interpret.

Q. Okay.

So we talked about two interpretations. In the first interpretation, which you say is

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Dr. Pastore's apparent understanding --

A. Yes.

Q. -- the textile element cannot have any knitted texture that's the same as a knitted texture on the surrounding knitted material, right?

A. For the infringement claim. For the infringement argument, yes.

Q. So your understanding is that the interpretation of the claims is the same for infringement and invalidity, right?

A. That's what I've been told. I'm not a patent attorney, I'm not a patent agent. That's what I've been instructed by counsel, yes.

Q. Okay.

So it shouldn't matter whether we are referring to infringement or invalidity. It's the same interpretation?

A. Interpretation should be the same.

Q. Okay.

So let's take infringement, invalidity out of it.

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I'm just going to ask you about the two interpretations and ask you which you think is correct.

Okay?

A. Of the claim?

Q. Correct. We're just interpreting the claims, claims one of 13 at this point.

A. Can I see the claims?

Q. Sure. You have them in front of you in Brookstein Exhibit 3, column 11, line 43.

A. Where on the -- okay. Let me get to the claims.

Q. Column 11, line 43.

A. Yes.

Q. You see it begins we claim and then claim one is provided?

A. Yes. I'd like to see these claims broken out in the format that's in my report where -- it's the same wording, it's just it makes it easier for me to understand them.

Q. Okay.

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A. They're both in my responsive report and my --

Q. You have your responsive report in front of you?

A. I do. Okay.

Q. Okay.

In Brookstein Exhibit 2, the claims are set forth on page ten. Or page nine and ten.

A. Nine and ten. Okay. I'm reading claim -- in my report, as we've labeled 1A: Simultaneously knitting a textile element with a surrounding textile structure, the knitted textile element having at least one knitted texture that differs from a knitted texture in the surrounding knitted textile structure.

Q. Okay.

We've talked about two interpretations of claims one and 13, correct?

A. Whose two interpretations?

Q. Okay.

In paragraph 68 of your

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responsive report --

A. Okay.

Q. -- on page 30 -- I think you have it in your hand.

A. No, I don't --

MR. RAZAI: You do.

A. Okay, I do.

What page?

Q. Thirty.

A. Okay.

Q. Last sentence.

A. Yes.

Q. I have also set forth my opinion regarding Nike's failure to carry its burden to show infringement under either interpretation.

Right?

A. Yes.

Q. Either interpretation of the claims of the '749 patent?

A. Yes.

Q. So we're discussing two interpretations of the claims of the '749 patent. In particular, claims one and 13,

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right?

You understand?

A. Of Nike's interpretation.

Q. Sure.

THE WITNESS: Excuse me.

Can I get a tissue?

BY MR. BOWLING:

Q. So we're discussing two interpretations.

You understand that, right?

THE WITNESS: Excuse me one second. Can I get a tissue? Thanks.

A. Okay. Your question again is?

Q. Okay.

Your opinions in this matter on non-infringement of the '749 patent, as set forth in your report, you say that you have set forth your opinions under either interpretation of the claims of the '749 patent, right?

A. That's correct.

Q. Okay.

There's two interpretations that you've opined on in your report?

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A. Correct. And they're shown in two different pictures.

Q. Okay.

A. Drawings.

Q. I want to talk about those two interpretations --

A. Okay.

Q. -- of the claims of the '749 patent.

A. Yes.

Q. Under the first interpretation, no knitted texture in the textile element can be the same as a knitted texture in the surrounding knitted material.

Correct?

A. Are you reading from the claim?

Q. I'm reading from paragraph 67 of your report.

A. I know, but like I said, since it's referring to the claim, I want to -- I want you to -- I'll read the claim element.

Q. You can read the claim element as many times as you want today during the deposition. I'm asking you about what

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you've written in your report and I'm asking you for clarification about specific aspects of your report.

A. Okay.

MR. RAZAI: Objection. Argumentative.

Q. In paragraph 68, you refer to two interpretations of the claims of the '749 patent, correct?

A. Correct.

Q. One of those interpretations you describe in paragraph 67 of your report. You describe it as no knitted texture on the textile element can be the same as a knitted texture on the surrounding knitted material, correct?

A. Yes.

Q. That's one interpretation.

You call that Dr. Pastore's apparent understanding of the '749 patent, right?

A. Correct.

Q. The other interpretation is where a knitted texture on the textile

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element can be the same as a knitted texture on the surrounding knitted material, correct?

MR. RAZAI: Objection.

Form.

A. You're asking about 67 and 68, but 66 is part of that argument and the drawing that goes with 68 is part of that argument and the drawing that goes with 67 is the drawing on the other side. There's two different drawings here. You're not -- you're taking this out of context by not going to the drawings.

Because there, I demonstrate it.

Q. Was there something about my question that you didn't understand?

MR. RAZAI: Objection.

Form.

A. I think you're asking it in a way that I don't understand.

Q. Okay.

You agree with me on the first interpretation? It's set forth explicitly

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in paragraph 67, right?

A. I agree with you that 67 refers to an interpretation that's illustrated by the figure on page 30.

Q. Okay.

Let's call this interpretation in paragraph 67, the first sentence, the first interpretation.

Okay?

MR. RAZAI: Objection.

Form.

A. That would be the second interpretation. The first interpretation is on page 66 -- I mean paragraph 66.

Q. Okay.

Where in paragraph 66 is the first interpretation?

A. Illustrated by that drawing where if you look at the drawing on paragraph 66, what looks like a light purple is up against the part of the knitted textile element that is green and then on the other side, a purple part is up against the surrounding textile material that is

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green.

Q. Do you set forth in text anywhere that first interpretation of the claims of the '749 patent?

A. When you say anywhere, what do you mean?

Q. In paragraph 66 that you're directing me to.

A. And your question?

Q. You just testified that paragraph 66 --

A. Yes.

Q. -- sets forth what you call the first interpretation of the claims of the '749 patent, correct?

A. That is one interpretation, yes.

Q. Sure. Can we call that the first interpretation today?

A. You can call that the first interpretation.

Q. You'll know that I'm referring to the interpretation in paragraph 66?

A. That's illustrated by the

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figure.

Q. Sure.

Do you set forth in text that first interpretation anywhere in paragraph 66?

A. Sixty-six describes the figure that's underneath it. Yes.

Q. Okay.

So where it says in paragraph 66, the second sentence: Each knitted textile element has at least one texture on the knitted textile element that differs from at least one texture on the surrounding textile structure that was removed when the knitted textile element was cut from the larger knitted textile structure, is that an articulation of what you understand to be the first interpretation?

A. Yes, as illustrated by the figure.

Q. I understand.

It's further illustrated by the figure, but in text, that's your understanding of the interpretation?

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A. That text describes the figure, yes.

Q. Okay.

So we have the interpretation in paragraph 66 that we just read and the paragraph 67 has the second interpretation where no knitted texture on the textile element can be the same as the knitted texture on the surrounding knitted material, correct?

A. Correct.

Q. Which interpretation is correct?

A. They're both -- correct in what -- for who?

Q. How would a skilled artisan in 2004 understand the claims of the '749 patent? Would they interpret it in accordance with the first interpretation or the second interpretation?

MR. RAZAI: Objection.

Form.

Outside the scope.

A. I would interpret it as the

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interpretation in paragraph 66.

Q. Okay.

Where in your report do you provide non-infringement opinions under the first interpretation, i.e., the interpretation set forth in paragraph 66 of your rebuttal report?

A. I'll have to read my rebuttal report. I don't know where I said them. Help me out here. Where do I say that?

THE WITNESS: By the way, it's coming -- actually, it's a little more than an hour. I'm 74 years old, that means --

MR. BOWLING: Sure. We could take a break whenever you like.

THE WITNESS: Sure. I'll be back in a minute.

THE VIDEOGRAPHER: The time is 10:24 p.m.

We're going off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 10:31 a.m.

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We're back on the record.

BY MR. BOWLING:

Q. Dr. Brookstein, I don't see anywhere in your report where you provide a non-infringement opinion under what we're referring to as the first interpretation, which is the interpretation set forth in paragraph 66 of your report.

Can you point me to somewhere where you provide a non-infringement opinion under that interpretation?

A. I don't have that burden. I don't have an infringement burden. Nike does. All I'm doing is responding to Dr. Pastore's report.

Q. Okay.

So do you provide non-infringement opinions under what we're referring to as the first interpretation, which is the interpretation set forth in paragraph 66 of your rebuttal report?

MR. RAZAI: Objection.

Form.

A. All I do is respond to

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Dr. Pastore's infringement report because Nike has the burden to do that. It's not my job to prove non-infringement.

Q. So I understand your understanding of burdens. I'm not asking you about burdens.

I'm asking you what's in your report. Specifically, in your report, do you provide non-infringement opinions under what we've called the first interpretation, which is the interpretation set forth in paragraph 66 of your rebuttal report?

MR. RAZAI: Objection.

Form.

Asked and answered.

A. I've already told you what I said. Again, I did not write a non-infringement report. I wrote a rebuttal to Dr. Pastore's infringement report. I'm rebutting what he said.

Q. I understand that. My question is a little bit different.

A. Then I don't understand your question.

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Q. Okay.

Can you point me to anywhere in your report where you render an opinion as to infringement under what we've called the first interpretation, which is the interpretation of the '749 patent claims set forth in paragraph 66 of your rebuttal report?

A. All I'm doing, again, is rebutting what Dr. Pastore said.

Q. So can you point me to anywhere in your report where you render an infringement -- an opinion as to infringement under that first interpretation?

MR. RAZAI: Objection.

Form.

A. I don't render any opinions under infringement. I render opinions about his report.

Q. As you understand it, does Dr. Pastore provide any infringement positions under what we've called the first interpretation, which is the interpretation

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of the '749 patent claims set forth in paragraph 66 of your report?

A. I'd like to see his report then.

Q. I believe you have it in front of you.

A. No. His report? No, I don't have his report. Oh, I do. Okay. I'll need some time to -- that was on page 18 and 19 I think you said. Well, are you referring to footnote two?

Q. I'm asking you about what opinions you've provided.

A. My opinion says by contrast -- no, that's what he writes. He writes by contrast -- remember, his job is to write this.

By contrast, the photographs and physical samples of the adidas warp knit shoes do not show the structure of the surrounding material and thus do not show that these shoes have a textile element, have a different texture from the texture in the surrounding material.

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For at least this reason and others I may address in my validity expert report as to why adidas warp knit shoes do not invalidate the '749 patent asserted claims. The 749 accused products differ from the adidas warp knit shoes.

Q. Okay. Let's look at paragraph 68 of your rebuttal report.

A. Okay. There's 68.

Q. Second sentence, you say "I have analyzed non-infringement under Dr. Pastore's apparent understanding of the claims of the '749 patent, as set forth in footnote two of his opening report."

Correct?

A. Yes, but that doesn't really say what I meant. What I meant was I've analyzed his infringement report.

Q. Okay.

A. Analyzed his infringement report.

Q. And your understanding, as you said here, of Dr. Pastore's infringement opinions is that Dr. Pastore assessed

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infringement using the second interpretation of the '749 patent claims, which you set forth in paragraph 67 of your rebuttal report, correct?

A. That is correct.

Q. Okay.

As you understand it, does Dr. Pastore provide infringement opinions under any other interpretation, for example, the first interpretation, of the '749 patent claims?

A. Not that I recall.

Q. Okay.

So when you say that all you have done in your responsive report is respond to Dr. Pastore's infringement opinions, that is to say that you have not provided any opinions regarding infringement under the first interpretation of the '749 patent claims, which is the interpretation set forth in paragraph 66 of your rebuttal report, correct?

MR. RAZAI: Objection.

Form.

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A. It appears that way, yes.

Q. Okay.

So you don't provide any opinions related to infringement under what you call the first interpretation of the '749 patent claims, correct?

MR. RAZAI: Objection.

Form.

A. My opinion is that his interpretation is wrong.

Q. Okay.

All of your infringement opinions are under the second interpretation of the '749 patent claims, which is what you understand Dr. Pastore's interpretation to be, which you think is wrong.

Correct?

MR. RAZAI: Objection.

Form.

A. When you say all, what do you mean, all?

Q. What does the word all mean to you?

A. I don't know how many claims

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there are in this patent. You're talking about all the claims. I'm only talking about claim 1A.

Q. Okay.

I'm asking about all of your infringement opinions was the question.

MR. RAZAI: Same objection.

BY MR. BOWLING:

Q. Is it accurate to say that all of your infringement opinions are under the second interpretation of the '749 patent claims which you set forth in paragraph 67 of your rebuttal report?

A. And illustrated by that drawing, yes.

Q. Okay.

So in the third sentence of paragraph 68 where you say: I have also set forth my opinion regarding Nike's failure to carry its burden to show infringement under either interpretation of the claims of the '749 patent, where do you set forth that opinion?

A. In here.

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Q. Where?

A. Well, the drawing that's on -- at the bottom of 67 and the drawing on the bottom of 66. If it's either or, they haven't met it.

Q. Where do you set forth your opinion regarding Nike's failure to carry its burden to show infringement under the first interpretation of the claims of the '749 patent?

A. Because in the first drawing, it shows that you could have the surrounding fabric against part of the textile element and in the other side, the right side, it's a different fabric.

Q. You're not answering my question, Dr. Brookstein.

A. I don't understand your question.

Q. Where in your report do you -- I'm quoting now from paragraph 68 -- set forth your opinion regarding Nike's failure to carry its burden to show infringement under the first interpretation of the claims

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of the '749 patent?

A. They haven't shown it for what's in 66.

Q. Where do you set forth that opinion?

A. Right there.

Q. That's it?

A. As far as I can recall, yes.

Q. So the extent of your opinions regarding the first interpretation of the claims of the '749 patent is contained in this single sentence in paragraph 68; is that right?

MR. RAZAI: Objection. Form.

A. Could you repeat question?

Q. Sure.

The extent of your opinions regarding the first interpretation of the claims of the '749 patent, which is the interpretation set forth in paragraph 66 of your rebuttal report, all of your opinions under that interpretation are contained in this single sentence in paragraph 68; is

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that correct?

MR. RAZAI: Objection.

Form.

A. It says either interpretation.

Q. Right.

A. So either of those interpretations, it's my opinion that Nike hasn't met their burden.

Q. Okay.

Let's talk about the first interpretation.

A. Okay.

Q. I understand you have other paragraphs talking about the second interpretation. We're going to talk about the first interpretation.

Where in your report do you set forth your opinion about Nike's failure to carry its burden to show infringement under the first interpretation?

A. Paragraph 66.

Q. Anywhere else?

A. I don't recall.

Q. As you sit here today, you

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don't recall anywhere else other than paragraph 66 where you provide opinions about Nike's failure to carry its burden to show infringement under the first interpretation of the claims of the '749 patent?

MR. RAZAI: Objection to form.

A. To the best I can recall, right.

Q. Okay.

Let's look at paragraph 69 of your declaration.

A. Okay. Yes.

Q. Do you see it says: Images of the front and back of the knitted material of lululemon's Strongfeel footwear product are shown below?

A. I do.

Q. Do you see the two pictures on the top of page 31?

A. I do.

Q. So you've labeled with arrows there what you say is the same texture.

Do you see that?

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A. I do.

Q. You can see there's a textile element there.

Do you see that?

A. You have to be more specific.

Which textile element are you talking about?

Q. Sure.

Do you see the shape of a shoe upper textile element?

A. I see an entire textile element, yes.

Q. Okay.

What do you mean by entire textile element?

A. I see an element that has multi textures in it.

Q. Okay. Let's look back quickly, just for simplicity's sake. Let's look back at paragraph 67 of your report, please.

A. Yes.

Q. In paragraph 67, you refer to a textile element and surrounding knitted material.

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Do you see that?

A. Which sentence are you talking about?

Q. The first sentence.

A. In paragraph 66?

Q. Sixty-seven.

A. Oh, 67.

That concludes that for the purpose of invalidity, no knitted texture on the textile element can be the same as the knitted texture on the surrounding. For purposes of invalidity, yes.

Q. Okay.

So you refer to a textile element and surrounding knitted material, right?

A. Correct.

Q. You've used a figure on the next page to color to illustrate different textures, right?

A. Correct.

Q. Two of those colors are in the textile element that you referred to, right?

A. Which two colors are you

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talking about?

Q. Okay.

In the image shown below paragraph 67, does that show the textile element and the surrounding knitted material that you refer to in the text of paragraph 67?

A. Yes.

Q. Okay.

What colors are in the textile element?

A. Light green and light purple.

Q. Okay.

What color is the surrounding knitted material?

A. It's similar to orange.

Q. How would you characterize the shape of the textile element in that picture? Is it the shape of the shoe upper?

A. It appears to be a shoe upper, yes.

Q. Okay.

Now, let's look at the images below paragraph 69.

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A. Yes.

Q. That are at the top of page 31.

Do you see a textile element that's in the shape of a shoe upper?

A. I do.

Q. Okay.

So for purposes of this next series of questions, if I use the term "textile element," you'll understand I'm referring to the textile element in the shape of a shoe upper.

Okay?

A. That refers to more than one texture.

Q. I'm just asking you if I use the term "textile element," you'll understand that I'm referring to the textile element that's in the shape of a shoe upper.

Does that make sense? We could talk about the textures in a little bit.

A. I understand.

Q. I was asking if you understand when I say "textile element," you know that I'm referring to the element that's in the

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shape of a shoe upper.

A. If that's the way you want to define it, yes. That's not the way it's defined in the patent, but yes.

Q. Okay.

So if we're looking in the images below paragraph 69, one says exterior surface, one says interior surface, correct?

A. Yes.

Q. Okay.

In the left-hand image that says exterior surface at the top of page 31, you use annotations to point to what you call the same texture.

One of those arrows goes to the surrounding knitted material, one of the arrows goes to the textile element, correct?

A. To part of the textile element, yes.

Q. Sure.

So in that image, one arrow goes to the surrounding knitted material, one arrow goes to part of the textile element, correct?

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A. That's what that picture shows, yes.

Q. Okay.

Does that textile element have any textures that are different from the surrounding knitted material?

A. Not the way you define textile element. There are parts of that textile element that have different textures to it, but I only pointed to the one that has the same texture as the surrounding material.

Q. Okay.

Are there parts of the textile element shown in the picture on the left-hand side of the top of page 31 that have a different texture as compared to the texture of the surrounding knitted material?

A. It appears to, yes.

Q. Let's turn now to paragraph 81.

A. Of the responsive expert report?

THE WITNESS: I'm sorry.

Off the record, please.

THE VIDEOGRAPHER: The time is

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10:50 a.m.

We're going off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 10:51 a.m.

We're back on the record.

BY MR. BOWLING:

Q. Okay.

So going back to paragraph 69 of your rebuttal expert report --

A. Yes, sir.

Q. The image there shows that the Strongfeel product has parts of the textile element that have different textures than the texture of the surrounding knitted material, correct?

A. When you say Strongfeel -- when you say Strongfeel footwear or Strongfeel fabric?

Q. I'm using your language from paragraph 69.

A. That's not what my language says. My language says the knitted material of the Strongfeel.

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Q. Okay. Thank you for the clarification.

Is it your opinion that in the knitted material for lululemon's Strongfeel footwear product the textile element has textures that are different from the texture of the surrounding knitted material?

A. Can you repeat the question?

Q. Sure.

Is it your opinion that in the knitted material for lululemon's Strongfeel footwear product, parts of the textile element have a texture that are different from the texture of the surrounding knitted material?

A. Yes.

Q. Now, let's turn to paragraph 81 of your report.

A. Yes.

Q. Here, you talk about the Blissfeel footwear product and we see similar images where you've highlighted parts of the textile element that have the same texture, correct?

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A. That is correct.

Q. Is it your opinion that in the knitted material for lululemon's Blissfeel footwear product, parts of the textile element have a texture that are different from the texture of the surrounding knitted material?

A. Yes.

Q. I'm going to ask you to turn to paragraph 86 of your rebuttal expert report.

A. Yes.

Q. Here, you'll see you discuss the Blissfeel 2 footwear product. We see similar images below, below that paragraph.

Do you see that?

A. I do.

Q. Is it your opinion that in the knitted material for lululemon's Blissfeel 2 footwear product, parts of the textile element have a texture that is different from the texture of the surrounding knitted material?

A. Well, this only shows the face part of the textile material. It doesn't

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show the back.

Q. Is it your opinion that in the knitted material for lululemon's Blissfeel 2 footwear product, parts of the textile element have a texture that is different from the texture of the surrounding knitted material?

A. Which parts? The back or the front?

Q. I'm just asking you if there are any parts.

A. Not that I can tell.

Q. So in your opinion, there are no portions of the textile element of the Blissfeel 2 that have a texture that is different from the texture of the surrounding knitted material?

MR. RAZAI: Objection.

Form.

A. Can you repeat that again?

Q. Sure.

So your opinion is that there are no portions of the textile element of the Blissfeel 2 that have a texture that is

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different from the texture in the surrounding knitted material; is that right?

MR. RAZAI: Objection.

Form.

A. I don't label it, but on the picture on the left, it does appear that there's some type of embossing or something at the top of the picture and that would be a little different, yes.

Q. Okay.

So is it your opinion that in the knitted material for the lululemon's Blissfeel 2 footwear product, parts of the textile element have a texture that is different from the texture of the surrounding knitted material?

MR. RAZAI: Objection to form.

Outside the scope.

A. The paragraph under the picture says: As the images illustrate, the exterior layer of the knitted material for the Blissfeel 2 footwear product is the same texture both on the alleged textile element and the alleged surrounding structure.

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Q. So that wasn't my question. I'm just trying to understand your opinion. Okay?

A. Then I don't understand your question. You have to repeat the question.

Q. Is it your opinion that in the knitted material for lululemon's Blissfeel 2 footwear product, parts of the textile element have a texture that is different from the texture of the surrounding knitted material?

A. No.

Q. So your opinion is that no portion of the textile element of the Blissfeel 2 footwear product has a texture that is different from the texture of the surrounding knitted material?

A. Of the face side.

Q. Did I accurately characterize your opinion?

A. You didn't say the whole thing. I'm only showing the exterior side. Yes, of the exterior side. Yes.

Q. Does the interior side have

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different --

A. No, but the interior side has a different texture than the exterior side. That would have -- when you read the claim, it would meet the claim. Excuse me. It would not meet the claim.

Q. Why is that?

A. Well, let's go back and read the claim, claim one.

This is page nine: Simultaneously knitting a textile element with a surrounding textile structure, the knitted textile element having at least one knitted texture that differs from the surrounding knitted texture. So if there's two textures in there, it would have a second texture.

Q. What do you mean, it would have a second texture?

A. The texture on the backside.

Q. Would that meet the claim limitation?

MR. RAZAI: Objection. Form.

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Outside the scope.

A. I can't offer an opinion there.

Q. Why not?

A. Because I can't.

Q. What's your understanding of Dr. Pastore's opinion of the Blissfeel 2 footwear product from an infringement standpoint?

A. I'd have to see.

Q. You don't know?

A. I don't recall.

Q. Let's look at paragraph 85.

A. Excuse me. He doesn't address this in his report, so how can I --

Q. Let's look at paragraph 85 of your report.

It says: In addition, Dr. Pastore alleges that he determined the vamp has at least two different textures --

A. What paragraph is that?

Q. Eighty-five.

A. Hold on. Paragraph 85 says Dr. Pastore alleges that "he determined the vamp has at least two different textures,

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but fails to identify the two textures."

So he didn't identify the textures.

Q. Do you agree with Dr. Pastore that the vamp of the Blissfeel 2 product has at least two different textures?

MR. RAZAI: Objection.

Outside the scope.

A. He's saying they don't have -- he says he hasn't been able to identify two different --

Q. He doesn't say that. Dr. Pastore says he's determined that the vamp has at least two different textures.

Do you agree with that or disagree with that?

MR. RAZAI: Objection.

Outside the scope.

A. The second part of that sentence says he has not identified any of the different textures.

Q. That's your opinion.

A. Right.

Q. Do you agree or disagree with

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his opinion that he determined that the vamp has at least two different textures?

MR. RAZAI: Objection.

Form and outside the scope.

A. Could you repeat the question?

Q. You understand that Dr. Pastore opines that he determined the vamp of the Bliss Feel 2 footwear product has at least two different textures, correct?

A. That's what he said, yes.

Q. Do you agree with that?

MR. RAZAI: Objection.

Form.

Outside the scope.

A. I'm just saying what he said.

Q. Do you agree with his opinion?

MR. RAZAI: Objection.

Form.

Outside the scope.

A. I didn't really think about it because he never identified any of the different textures.

Q. You have no opinion on whether the Blissfeel 2 footwear product has a vamp

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with at least two different textures; is that right?

MR. RAZAI: Objection.

Outside the scope.

A. I say, as the images illustrate, the exterior of the knitted material for the Blissfeel 2 footwear is the same texture on both the alleged textile element and the alleged surrounding textile structure. The difference in the appearance of the material are a function of the middle layer of the mesh. Dr. Pastore does not address this in his report or explain how different textures would be created in this situation.

So I'm just reporting that he hadn't explained it. That's all I'm saying.

Q. I'm not asking you to read from your report verbatim.

A. I understand.

Q. I'm asking whether you have an opinion on a specific issue.

Do you understand whether you have an opinion on the Blissfeel 2 as to

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whether or not the vamp has at least two different textures?

MR. RAZAI: Objection.

Argumentative.

Outside the scope.

A. I'd have to study it more. No.

Q. You don't know if you have an opinion?

MR. RAZAI: Objection.

Outside the scope.

A. It's not that I don't know. At this point in time, I don't have an opinion without looking at the fabric.

Q. Okay.

As you sit here today, you do not have in any opinions on whether the Blissfeel 2 footwear product has a vamp with at least two different textures, correct?

MR. RAZAI: Objection.

Form.

Outside the scope.

A. That would be correct, yes.

Q. Okay.

Let's turn to paragraph 90 of

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your rebuttal expert report.

A. Yes.

Q. Let's actually turn down to 92, please.

A. Okay.

Q. Do you see here that you're discussing the Chargefeel Mid footwear?

Do you see that?

A. I do.

Q. Is it your opinion that the knitted material for lululemon's Chargefeel Mid footwear product has parts of the textile element with a texture that is different from the texture of the surrounding knitted material?

MR. RAZAI: Objection.

Form.

Outside the scope.

A. I only talked about 93. The process of manufacturing the Chargefeel Mid footwear does not include limitation 1A.

Q. What's limitation 1A?

A. Let's go back and look.

Simultaneously, knitting a

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textile element with a surrounding textile structure, the knitted textile element having at least one knitted texture that differs from a knitted texture in the surrounding textile structure.

Q. So I'm asking you the same question I asked you with respect to a lot of earlier shoes that you've answered. So I'm asking you the same question, just for this product.

Do you understand that?

A. I do.

Q. Okay.

Is it your opinion that in the knitted material for lululemon's Chargefeel Mid footwear product, parts of the textile element have a texture that is different from the texture of the surrounding knitted material?

MR. RAZAI: Objection.

Form.

Outside the scope.

A. I can't answer that because I can only respond to what Dr. Pastore did or

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did not do.

Q. Dr. Pastore opines, as you say in paragraph 94, that the vamp has at least two different textures.

Do you see that?

A. That's what he says, but he -- the rest of the sentence says he didn't identify any of the two different textures.

Q. Okay.

In the image that's shown in paragraph 92 of your rebuttal report, you have arrows that point to portions of the knitted textile element that say same texture.

Do you see that?

A. I do.

Q. What does is that refer to?

A. It refers to parts of the element that have the same texture.

Q. Same as what?

A. Same as each other.

Q. Okay. Let's read the sentence in paragraph 92 right above that.

I have illustrated below where

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the texture on alleged textile element and the texture on the alleged surrounding material are the same.

Do you see that?

A. Yes.

Q. So you made a determination and a comparison between the texture of the surrounding material and parts of the textile element, correct?

A. Correct.

Q. Okay.

So you've looked at the surrounding textile element and made a determination about whether those textures are the same or different than the textile element, correct?

A. That's what I wrote, yes.

Q. So I'll ask you again.

Is it your opinion that in the knitted material for lululemon's Chargefeel Mid footwear product parts of the textile element have a texture that is different from the texture of the surrounding knitted material?

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MR. RAZAI: Objection.

Form.

Outside the scope.

A. That's what that picture says to me, yes.

Q. So that's your opinion? I characterized it accurately?

A. Yes.

Q. Okay.

Let's look at paragraph 100, please.

Here, you see you're discussing the Chargefeel Low footwear products sold by lululemon, correct?

A. Correct.

Q. And you'll see images here where again you've identified areas of the textile element and areas of the surrounding knitted material that have the same texture, correct?

A. I've done my best to do it based on his simulation of files.

Q. Is it your opinion that in the knitted material for lululemon's Chargefeel

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Low footwear product, parts of the textile element have a texture that is different from the texture of the surrounding knitted material?

MR. RAZAI: Objection.

Form.

Outside the scope.

A. That's Pastore's theory. I can't tell anything from these simulation figures.

Q. Do you have an opinion about whether the knitted material for lululemon's Chargefeel Low footwear product has a textile element with textures that are different from the texture of the surrounding knitted material?

A. Not based on these simulation pictures.

Q. I'm not asking about the simulation photos. I'm asking you --

A. That's all I have. That's all I have.

Q. So you never looked at anything beyond the simulation files?

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A. For this item, yes.

Q. So your testimony is that for the Chargefeel Low footwear product, you did not look at anything when you were rendering your opinions about infringement except for the simulation files shown here?

A. I never rendered any opinions on infringement. I only rebutted Dr. Pastore's report.

Q. And in your -- as you understand it, you haven't rendered any opinions on infringement one way or the other?

MR. RAZAI: Objection to form.

A. I've only rebutted what he wrote.

Q. Okay.

So as far as you understand your responsive expert report, you did not render any opinions related to infringement?

MR. RAZAI: Objection to form.

Asked and answered.

A. Only as they relate to his report.

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Q. Okay.

Did you consider -- in rendering your opinions in this responsive report, did you consider any evidence that Dr. Pastore did not consider?

MR. RAZAI: Objection to form.

A. I looked at the fabrics that were available to me, yes.

Q. Anything else?

A. I don't recall.

Q. Did you look at the fabrics for the Blissfeel -- I'm sorry -- for the Chargefeel Low footwear product?

A. Which page are you on so I can tell what it is?

Q. The same page we were looking at, page 44, paragraph 100. I can direct your attention to paragraph 98.

You say: Lululemon did produce and I have inspected a vamp and other components of the Chargefeel Low.

Do you see that?

A. Yes.

Q. Okay.

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Having inspected those components --

A. No. Say what you just said again, please.

Q. I'm just reading from the second sentence of paragraph 98.

You say: Lululemon did produce and I have inspected a vamp and other components of the Chargefeel Low.

A. Right. But I thought you said the actual raw knitted material. Yes, I did see the vamp and the other components. Yes.

Q. Having reviewed those materials, do you have an opinion as to whether in the knitted material for the lululemon Chargefeel Low footwear product the textile element has a texture that is different from the texture of the surrounding knitted material?

A. I never saw the surrounding knitted material, so I can't offer an opinion.

Q. So you have no opinion on whether the material of the lululemon

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Chargefeel Low footwear product has a textile element with a texture that's different from the texture of the surrounding knitted material, correct?

A. Correct.

Q. Let's look at paragraph 106 of your rebuttal report.

A. Okay. Paragraph 106. Yes.

Q. Do you see here that you're discussing the Chargefeel Low 2 footwear product?

A. I do.

Q. Do you see where you've identified areas in which the textile element has the same texture as the surrounding knitted material?

A. I've labeled that, yes, that way.

Q. Is it your opinion that in the knitted material for lululemon's Chargefeel Low 2 footwear product parts of the textile element have a texture that is different from the texture of the surrounding knitted material?

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A. Yes.

MR. RAZAI: Objection.

Outside the scope.

Form.

Q. Let's go next to paragraph 110 of your rebuttal expert report.

A. Yes.

Q. You say that Dr. Pastore's analyses, again, heavily depends on the simulation files.

Do you see that?

A. I do.

Q. What do you mean by that?

A. If you look at paragraph 152, paragraph 155 to 156, paragraph 160, 162, 164, 167 and 168, he's always going back to the simulation files, not the actual fabrics.

Q. Is it your understanding that Dr. Pastore's infringement analysis only considered simulation files?

MR. RAZAI: Objection.

Form.

A. For certain parts of the --

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where he's looking at what the fabric textures are, yes.

Q. Okay.

Let's go to Dr. Pastore's report and look at some of those paragraphs you just cited.

A. Okay. And five-minute warning.

Q. Okay.

Let's look at paragraph 153 --

A. Excuse me?

Q. One fifty-three.

A. Okay. 153. Yes, sir.

Q. Do you see that in addition to the simulation files, Dr. Pastore is also relying on images of the knitted elements?

A. I see that.

Q. You see he does the same thing in paragraph 158 of his report?

A. I see that.

Q. Paragraph 165?

A. One sixty-five, yes.

Q. When you say earlier that Dr. Pastore's analysis for the fabric textures relies only on simulation files,

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that's not true, right? He's looking at simulation files and images of the knitted elements?

MR. RAZAI: Objection.

Form.

Misstates the record.

A. If we look at paragraph 165, for example, the statement says: Lululemon produced an image of the knitted sheet using the form Chargefeel Low 2 vamps straight off the knitting machine.

So he's not -- he's just looking at an image.

Q. So your understanding is that even though he discusses the image and provides a picture of it, he didn't consider that image?

A. Well, he -- your question is?

Q. You've said a couple of times now that Dr. Pastore's analysis of textures of the textile element was based only on simulation files, but it seems quite clear that he also looked at at least images of the textile element --

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A. I should have said images or simulation files, not the fabrics.

Q. Okay.

So you agree that Dr. Pastore looked at both simulation files and images of the actual knitted elements?

A. In some cases.

Q. Okay.

Are there any cases you're aware of where he didn't look at the knitted elements?

A. I'd have to look at the report. I don't recall either way.

Q. I think there were some instances where you didn't look at the images of the knitted elements because you say in your report that they weren't available from lululemon, correct?

A. I think only one instance. Everything else I looked at the fabrics and felt the fabrics.

THE WITNESS: And we're at the five-minute break.

MR. BOWLING: Okay.

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THE VIDEOGRAPHER: The time is 11:20 a.m.

We're off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 11:27 a.m.

We're back on the record.

BY MR. BOWLING:

Q. Okay.

Dr. Brookstein, do you agree that in rendering his infringement opinions, Dr. Pastore looked at both simulation files and images of the actual knitted elements to the extent those images were available and provided by lululemon?

MR. RAZAI: Objection.

Form.

Outside the scope.

Asked and answered.

A. I would agree.

Q. Okay.

Let's look at paragraph 69 of your rebuttal report, please.

A. When you say rebuttal, you mean

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my responsive report?

Q. Yes.

A. I just want to be careful here. Sixty -- what -- did you say page or paragraph?

Q. Paragraph 69.

A. Paragraph 69. Okay.

Of my rebuttal report?

Q. Yes.

A. You have a -- is this my report? This is my opening report. Wait a second. This is Pastore's opening report. I don't think you've given me my responsive expert report. Or have you? Yes, you have. Yes, you have. So let me put this here.

You want to go to page 69?

Q. Paragraph 69.

A. Paragraph 69. Okay. I see where we are. Okay. Yes, sir.

Q. Okay.

Going back to this image where we talked about the same texture between the surrounding knitted material and the textile element -- do you remember that?

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A. Yes I do.

Q. Okay.

How do we know where the textile element begins and ends?

A. Well, I know because I had the fabric and I could actually physically examine it.

Q. Okay.

And how did you know when you examined it?

A. I looked at it under a pick out glass, which is a common thing used in textiles. It's a low magnifying glass and also haptically, using my hand.

Q. What did you see and feel?

A. I felt different textures and saw different knit structures.

Q. So you were able to discern what was the textile element and what was the surrounding material?

A. I was able to determine what -- one, what the shape of the vamp was; two, what the texture was of all the textile elements, including the surrounding texture.

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Yes.

Q. How did you know the shape of the vamp?

A. Optically, you could see that it was a vamp. I could see it.

Q. What did you see specifically?

A. I saw an outline that looked like a vamp.

Q. Is that the same for all of the knitted materials that you reviewed for the lululemon footwear products?

A. I think I saw all the fabrics except for one and I don't recall which one it was.

Q. Okay.

A. But yes, all the pictures in here are fabrics that I actually physically could see and examine.

Q. Okay.

For each lululemon footwear product for which there was a knitted material for you to review, you could see the shape of the vamp because, as you said, "there was an outline that looked like a

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vamp."

Is that right?

A. Not necessarily a physical outline, but an outline, yes, I could tell where the vamp ended.

Q. Okay.

A. And I knew I was looking -- these were fabrics for shoes, so they had to have the shape of something that would be used in the shoe.

Q. Okay. Let's turn to paragraph 129 of your rebuttal report.

A. Okay. Responsive report?

Q. Sure.

If I say rebuttal report, you'll understand that I'm referring to the responsive report?

A. I will, but this is from being a teacher for 49 years. I'm very precise with my students and their language.

Q. Okay.

A. You'll have to deal with that. I'm sorry.

Q. That's okay by me.

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A. Okay.

Q. Okay.

Paragraph 129, are you there?

A. I am.

Q. Here, we're discussing the claim element in claim seven, which requires that longitudinal edges be joined together.

Do you see that?

A. Yes, I do.

Q. Okay.

You'll see in this paragraph you point to portions of the '749 patent and specific figures where the longitudinal edges, you think, are joined together in the way that the claim recites.

Is that right?

A. Let me look at the patent and tell me -- I don't think I said what figure it was. Can you help me out and tell me what figure I'm talking about? I didn't put that down.

Q. In paragraph 129, I think you point to figures eight and figures four through seven.

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A. Figures eight and -- what's the other one?

Q. I'm just quoting from your paragraph 129.

A. I see. The numbers refer to that figure, yes, so it would be figure eight. Yes.

Q. Okay.

In your opinion, you say at the top of page 55 --

A. Top of page 55 -- 55 of --

Q. Of your report.

A. Okay. Yeah.

Q. In each case, securing various edges of textile element 40 together does not involve the use of intermediate components.

Do you see that?

A. I do see that.

Q. Why is that important?

A. Well, it's important because the claim -- claim seven says -- which is the pending claim -- the longitudinal edges are joined together.

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Q. Does the claim say anything about the use of intermediate components?

A. Well, the last sentence on paragraph 129 says: I note the interpretation of joined together that permitted one or more intermediate components would render this claim language superfluous because every component of a shoe is joined together.

Q. What does it mean that a claim term is rendered superfluous?

A. It doesn't really add anything.

Q. Why does that matter?

A. Because every shoe is joined together.

Q. Why does it matter if claim language is rendered superfluous?

A. Because that could mean you could have an intermediate something -- so they don't have been to be joined together, but they could be like a mid sole or something like that.

Q. When you say joined together would be rendered superfluous, what do you

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mean by that?

A. It means every component is joined together in that indirect sense.

Q. So why does that render claim language superfluous, as you say?

A. I don't know.

Q. You don't know?

A. I mean, as I sit here, I can't remember why I wrote it that way.

Q. As you sit here today, do you have any opinion about whether any language of claim seven would be rendered superfluous if we interpret joined together to permit intermediate components?

A. Well, it's, like I said, the sentence. I note the interpretation of joined together with one or more intermediates would render this claim language at superfluous.

Q. I'm asking what you mean by that.

A. It would be unnecessary is what I'm saying --

Q. But why?

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A. Because everything is joined together.

Q. Okay.

But what does that have to do with the claim language being superfluous?

A. It doesn't add anything.

Q. I mean, couldn't you have longitudinal edges that aren't joined together at all?

A. Then the shoe would fall apart. You have to be joined together somehow.

Q. What significance does the rest of the claim language have that says to define at least a portion of a void for receiving a foot?

A. Is this claim seven?

Q. Yes.

A. Let me go back and look at claim seven.

Q. It's in paragraph 128 of your rebuttal report.

A. It describes how the shoe has to be so you can then have a void for to put a foot.

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Q. So is all that rendered superfluous in your opinion?

A. No. I was just talking about the longitudinal edges are joined together. I think that's all I said.

Q. You don't remember what you mean by that?

A. No, I -- it's not so much as -- it's not that I don't remember what I meant by that. I said everything has to be joined together for a shoe or else you don't have a shoe. That's what I meant.

Q. Right.

But not everything is joined together to define at least a portion of a void for receiving a foot, right?

A. Well, that's the second part of the claim. Right.

Q. Right.

A. So what I was saying was the first part is superfluous, but everything has to be joined together so you can get your foot into it.

Q. How does the claim preclude a

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scenario where intermediate components are used to join together two longitudinal edges to define at least a portion of a void for receiving a foot?

A. I don't follow your question.

Q. Is it your opinion that the claim includes a scenario where longitudinal edges are joined together with intermediate components to define at least a portion of a void for receiving a foot?

A. Can you say that again, please?

Q. Is it your opinion that the claim language precludes a scenario where longitudinal edges are joined together with intermediate components to define at least a portion of a void for receiving a foot?

A. To meet requirements of what claim seven is, they have to be seemed together. Yes. That's what the figure shows. That's what the claim says.

Q. Why? Why does the claim say --

A. I didn't write the claim.

Q. Where does it say you can't use intermediate components?

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A. Well, it says it in the drawing, which is part of specification.

Q. Can you point me to the drawing specifically in the patent?

A. Yeah. If you look at figure five --

Q. Okay. Anything else?

A. Well, figure four, the heel portion, yeah.

Q. Anything else?

A. Figure seven, which is on line 51. I mean not line -- element 51, which is described as being stitched or adhesively together.

Q. Anything else?

A. Figure six also, line 52, element 52.

Q. Okay.

Anything else?

A. Figure three, you see part of it because you don't see the inside. You see it around the ankle region. Fifty-one.

Q. If I understand your testimony right, those figures that you've just

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identified limit the claim so that intermediate components cannot be used to join the longitudinal edges?

A. Can you repeat the question?

Q. Is it your opinion that the figures that you've just identified in the '749 patent limit the claim such that the longitudinal edges of claims seven cannot be joined together with intermediate components?

A. No. They could -- they could because it would still be joined together because then you have edge one, something in the middle, edge two, and they're connected, they're joined together. Yes. This is just one figure.

Q. Okay.

So the longitudinal edges in claim seven can be joined together with intermediate components, right?

MR. RAZAI: Objection.

Form.

A. Not the way the claim reads and the way the drawings are.

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Q. I thought you just said it could?

A. Well, I was wrong.

Q. Okay.

So in your opinion, claim seven is limited to figures four through seven and eight such as that the longitudinal edges cannot be joined together with one or more intermediate components; is that right?

MR. RAZAI: Objection.

Misstates the testimony.

A. That's right.

Q. That's right?

A. That's correct.

Q. What did you do to arrive at that interpretation of claim seven?

A. I read the claim.

Q. Anything else?

A. No.

Q. It sounds like you --

A. Yes, I looked at the figures.

Q. Did you consult the prosecution history to see if join together was ever referenced?

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A. I don't recall.

Q. Do you know if join together is described anywhere in the specification?

A. Well, the drawings are part of the specification, yes.

Q. Is the term "join together" used anywhere in the specification?

A. In the verbal part of the specification? I'm asking you --

Q. Is the term "joined together" that term -- used anywhere in the specification?

A. So that would be in the verbal specification. I don't recall.

Q. Did you look?

A. Yes, but I don't recall.

Q. You don't remember?

A. I don't remember.

Q. When did you look?

A. I don't remember the exact date I looked or when. The figures, which are part of the specification, satisfied me.

Q. So you didn't have the look at the rest of the specification?

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A. I didn't say I didn't have to. I said I don't recall.

Q. And your opinion is that those figures limit claim seven because an interpretation that allowed for the use of intermediate components would render the claim language superfluous; is that right?

A. I'm not sure why I used the word "superfluous" to be honest with you.

What I'd like to say is my testimony is that to meet claim seven, they have to be joined together and the way is shown in figures four through seven or whatever those numbers that I said earlier. And if they weren't, they didn't meet claim seven.

Q. So in your opinion, does the ordinary meaning of join together preclude the use of intermediate components?

A. It depends on the application.

Q. In this case?

A. Your question is?

Q. Does join together, the ordinary meaning of that term in the '749

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patent, preclude the use of intermediate components?

A. Yes.

Q. In your opinion, are the shoelaces of a shoe and the toe bumper of a shoe joined together in the way that claim seven uses that term?

A. No, because claim seven is referring only to the figures that don't have shoelaces or anything like that.

Q. But you said in paragraph 129 that every component of a shoe is joined together in that indirect sense.

A. Which paragraph?

Q. The last sentence of paragraph 129.

A. Well, I wouldn't call shoelaces a component of the shoe. They're added on later.

Q. What about a toe bumper?

A. What do you mean by a toe bumper?

Q. The rubber part of the shoe in the front by the toes.

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A. What about that?

Q. Is the toe bumper and the tongue of the shoe joined together in the way that claim seven uses that term?

A. I don't know.

Q. So when you said every components of a shoe is joined together in that indirect sense, what components were you referring to?

A. The knitted components.

Q. Just the knitted components?

A. Just the knitted components.

Q. Let's turn to paragraph 134 of your rebuttal report.

A. Okay.

Q. You say here that Dr. Pastore fails to demonstrate that the alleged seam of claim 12 extends along the lower region of the upper.

Do you see that?

A. I do.

Q. Does claim 12 require that the edges of the knitted textile element form a seam that extends along the bottom portion

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of the upper?

A. I have to look at claim 12.

Q. It's in paragraph 131 of your report.

A. And your question is?

Q. Does claim 12 require that the edges of the knitted textile element form a seam that extends along a bottom portion of the upper?

A. That's what the claim says, yes.

Q. Where does it say that?

A. It says to form a seam that extends along a lower region of the upper and securing the upper to a sole structure.

Q. Okay.

So it says the lower region of the upper, correct?

A. Correct.

Q. It doesn't say the bottom portion of the upper?

A. Lower region of an upper is the bottom portion of an upper.

Q. How do you know that?

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A. Well, an upper, you have a top and bottom. It's lower part of it and the drawings show that.

Q. Where?

A. Figure seven, figure -- yeah, seven in particular.

Q. Where does that describe the bottom portion of the upper being the same as the lower region of the upper?

A. I have to look and see what --

Q. Go ahead.

A. -- what element 34 is in the drawing. When I look at that, that's a cross section of the knitted shoe and 51 is at the bottom. So if it's at the bottom, it's at the lower part.

Q. So your opinion is that the lower portion of the upper must mean the bottom portion, the underneath portion of the upper, the underfoot portion?

A. Well, when you say under, are you talking -- how to put this?

The top part of the upper -- okay. Fabric has a top and a bottom. Every

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fabric has two sides.

Q. Okay.

A. It goes down and that's the lower portion.

Q. Okay.

So when you say the bottom portion of the upper, are you referring to one of the two sides of the knitted element, the top and the bottom?

A. No. I'm talking -- the shoe -- if we go back to figure seven, the top is 33, the sides are 31, 32 and the bottom is 34.

Q. Okay.

What if I go -- if I'm looking at 31 and I go -- do you see those hash marks on 31, diagonal?

A. Yes.

Q. If I count up -- let's say I count down from the top of 31 -- do you follow?

A. Yes.

Q. I count down, one, two, three, four -- 13 hash marks. Can you mark that

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for me with a pen?

A. Yes.

Q. So you're marking figure seven of Brookstein Exhibit 3?

A. Yes.

Q. Can you hold it up so I could see it?

A. Is that what you're talking about? I'll do it this way.

Q. Can you put an arrow next to the 13th hashmark counting down from the bottom?

A. Yes.

Q. Okay.

Can you label that with a star?

A. Yes.

Q. Okay.

A. How about an asterisk?

Q. Sure.

So that asterisk is on the side of the upper, right?

A. Yes.

Q. Is it part of 31?

A. Yes.

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Q. Is that the lower region of the upper?

A. No.

Q. It's not? Why not?

A. It's the end of the side and the lower is 34.

Q. And why is that not the lower region of the upper?

A. Because 34 is the lower end of the upper.

Q. The bottom of the upper?

A. Whatever, yeah. Yes.

Q. Okay.

So if I divided 31 in half --

A. Yes.

Q. -- top and bottom of 31 --

A. Yeah.

Q. Right? There would be a top half and a bottom half of that side?

A. Of that side, yes.

Q. Right?

That asterisk you've just made would be on the bottom half of the side of the shoe, right?

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A. Where 31 ends, yes.

Q. But that's still not the lower region of the upper in your view?

A. No. Lower region is 34.

Q. Is there anywhere in the '749 patent where the lower region of the upper is defined as the bottom under foot portion of the upper?

A. I'd have to look at the patent and see what it says 34 is.

Q. Okay. Go ahead.

A. This might take a few minutes.

Okay. I think I see something here. Column five, line 21. The upper 30 is depicted in figures two through five as having lateral region 31 -- excuse me -- a lateral edge of 31.

So that's what you asked me to cross hatch. That's where you pointed to the cross hatching and that's called a lateral region and opposite medial region 32, that's the other side. A lower region 34, which is what I just said.

Q. Right.

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Your understanding of claim 12 is that lower region of an upper must be the bottom underfoot portion of the upper based on that portion of the specification you're pointing to?

A. Yes.

Q. Claim 12 also references a seam that extends along a lower region.

Do you see that?

A. Yes.

Q. Does claim 12 require that seam to be down the middle of the bottom portion of the upper?

A. Let me look at what 51 says.

It says on column five, lines 50 to 52, seam 51 extends along the longitudinal length of the lower region and is centrally located with respect to the lateral region and the median region.

Did you hear me?

Q. Yes.

A. Okay. I think that answers your question.

Q. Does claim 12 require the seam

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to be down the middle of the bottom portion?

A. Claim 12 is talking about what's in the specification, yes.

Q. So as you understand the claims --

A. Yes.

Q. -- and as you've applied them to your rebuttal or response to Dr. Pastore, your understanding is that the claims are all limited by these examples in the specification; is that right?

MR. RAZAI: Objection to form.

A. When I read claims, I go back and look at the specification to get an understanding of what the claims meant, yes.

Q. We've looked at specific examples, right? We looked at the lower portion or the lower region, that term, right?

A. Yes. We looked at 34.

Q. We -- the claim doesn't say 34, right? The claim just says lower region?

A. The claims never have numbers in them.

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Q. Exactly. So we've looked at a couple of examples, we've looked at the word "seam," we've looked at the term "lower region" and we've looked at claim seven about joining together.

We looked at all those terms, right?

A. Correct.

Q. If I understand your testimony, you're saying that when you read those terms, you limited them based on the examples in the specification; is that right?

A. In this case, yes.

Q. Is that your understanding of how terms should be interpreted?

MR. RAZAI: Objection to form.

Outside the scope.

A. That's the way I do it, yes. If you just look -- my experience has been if you look at claims without looking at specification, you have no idea what they're talking about. That's why there are specifications.

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Q. So when you rendered your opinions in this responsive brief with respect to "join together" in claim seven and with respect to the term "seams" in claim 12 and the term "lower region" in claim 12, in all those instances you limited those terms to the examples you identified for us in the specification, correct?

A. I don't want to use the word "limited." They informed me as to what the claims -- what the claims meant.

Q. Okay.

But I think in each case you said that you narrowed the claim so that it was the same as what was described in the examples in the specification; isn't that right?

A. In this particular case, yes.

Q. Okay.

So in those three examples I just gave you, you narrowed the claim language based on examples in the specification, correct?

A. I didn't narrow any claims. I

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interpreted the claims.

Q. Okay.

So you interpreted the claims in a way that narrowed their meaning to the examples in the specification; is that right?

A. That informed the reading --

MR. RAZAI: Objection to form.

A. Informed the reading.

Q. So how is what I asked incorrect?

MR. RAZAI: Objection to form.

Argumentative.

A. Because that's what I do. I look at claims and then I go back and look at the spec to see how it's described.

Q. Right.

And if you see an example -- for example, with seam, there's one example in the specification you pointed us to where it says it's centrally located, right?

A. Correct.

Q. In that instance, you narrowed the meaning of seam to be consistent with

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that one example, correct?

MR. RAZAI: Objection to form.

Outside the scope.

Mischaracterizes testimony.

A. I do that when they don't have various embodiments. There was only one embodiment here. I don't recall there being several embodiments. That becomes a little bit problematic if you have several embodiments in a specification, but I don't recall there being several embodiments here. There was one embodiment.

Q. When you read claims, if there's one embodiment in the claim, you limit the claims for that one embodiment; is that right?

A. I don't want to use the word "limit." The claim is what's limiting. I form -- I'm informed by what that claim means by the specification.

Q. What word would you use instead of "limit"? It sounds like there could be lots of seams and you're telling me that based on this example in the specification,

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the seam has to be centrally located, right?

A. Yes.

Q. So it can't be other types of seams? It can't be a seam on the right, it can't be a seam on the left. You've limited seam to be a centrally located seam, correct?

MR. RAZAI: Objection to form.

A. Correct.

Q. Is it accurate to say that when you were rendering your opinions in response to Dr. Pastore on claims one, 13, seven and 12, if you --

A. Wait. One, 13 -- okay. Go ahead. I'm sorry. I was just thinking aloud.

Q. Is it accurate to say that when you were rendering your opinions in response to Dr. Pastore with respect to claims one, 13, seven and 12 of the '749 patent, you interpreted the claims so that they were consistent with the embodiment you've identified in the specification and not broader than that?

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A. As long as there was no question about claim construction and I don't think in any of those there was a question about claim construction.

Q. Okay.

A. Because when you have claim construction, that's added in there.

Q. Right.

A. That gives you further understanding of what the claim means.

Q. Okay.

A. I don't think any of the terms in those claims you said were not plain and ordinary meaning.

Q. Right.

So is it accurate to say that when you're rendering your opinions in response to Dr. Pastore with respect to claims one, seven, 12 and 13 of the '749 patent, you interpreted the claims so that they're consistent with the embodiment in the specification you identified and not broader than that embodiment?

A. Exactly. And including the

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drawings because the drawings are part of the specification.

Q. Okay. I think I misspoke in the last question, so I'm going to clarify if that's okay with you.

A. You're deposing me, whatever is okay --

Q. When you were rendering your opinions in this case in response to Dr. Pastore's infringement opinions, you used an interpretation of claims one, seven, 12 and 13 that was only as broad as the single embodiments you identified in the specification.

Is that correct?

A. With the assumption that there were no claim constructions in there. I don't recall claim constructions in there.

Q. Okay.

But that was correct?

A. That would be correct.

Q. Okay. Let's turn to paragraph 149. We're going to be changing gears here to the '046.

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A. Okay. 149?

Q. That's right.

A. Okay. Yes. Do I have the 149 -- the '46 patent? I don't recall if you gave it to me. Oh, he did give it to me. Thank you. Okay.

Q. Here, you reference Professor Young's explanation about rib knit structures.

Do you see that?

A. What paragraph?

Q. 149.

A. It just says I'm showing what Professor Young has described as a traditional rib knit structure in her classes, which I have too. I think I've said the same thing. I've done this too.

Q. Do you agree with Professor Young's opinions about rib knit structures?

A. I do.

Q. Is there any aspect of Professor Young's opinions about rib knit structures that you disagree with?

MR. RAZAI: Objection.

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Outside the scope.

A. You took it out of context. A traditional rib knit structure is the wording that is in my report.

Q. Okay.

What's the difference between rib knit structures and traditional rib knit structures?

A. Well, for instance, in rib knits, the way you describe them is how many stitches -- first of all, they have to be done on a two-bed machine and you could have, let's say, for instance, a six wales and 12 wales. That wouldn't be traditional. Traditional rib knit structures are usually one by one, two by two, four by two, around that range in there.

Q. Do you disagree with any aspect of Professor Young's opinions about traditional rib knit structures?

MR. RAZAI: Objection.

Outside the scope.

A. I do not.

Q. In the second sentence of

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paragraph 149, you say: Even on simple visual observation --

A. Wait. Oh, right. Yes.

Q. In the second sentence of paragraph 149, you say that: Even on simple visual observation, the structure of the upper portion of the collar is a traditional rib knit structure that's been used in knitting for decades and perhaps longer.

Do you see that?

A. I do.

Q. What do you mean by the upper portion of the collar?

A. The portion of the collar that is to where it ends on, in this particular case, the shoe.

Q. The collar, can you highlight for me on the image here with your pen what portion of the collar you're referring to when you say the upper portion of the collar in paragraph 149?

A. Yes. You can see it.

Q. Can you label that upper portion of the collar, please?

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A. Mm-hmm. Okay.

Q. Is it possible to create tubular structures with a rib knit structure?

MR. RAZAI: Objection. Improper hypothetical.

A. I have never seen it done, but that does not mean it's not possible.

Q. Is that why the rib knit is important here, because this is a rib knit structure it can't possibly be a tubular structure in your opinion?

A. That's not what I said. You mischaracterized me. What I said is I've never seen that. I've only looked at this -- in this particular case, I've only looked at these rib knit structures. I haven't looked at the universe of the rib knit structures.

Q. Why does it matter that it's a rib knit structures?

A. Because in this particular case, it's a rib knit structure without tubes.

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Q. So does it matter that it's a rib knit structure versus some other type of knit structure, as long as it's not a tube, in your opinion?

A. Well, if I recall, the -- the '46 patent does describe tubes that are made on a v-bed flatbed knitting machine.

Q. So is it your understanding that the '046 patent claims are limited to knitted textile element with tubular structures that are made on a v-bed flatbed knitting machine?

A. It's the only way they could be made.

Q. So yes?

A. Yes. No. They can be made on a circular machine, as long as it has -- I think there's two kinds of two bed machines. There's flatbed v-bed machines and there's circular and dial knitting machines. Either one can do it.

Q. Does the term "tubular structures" in the claims of the '046 patent preclude rib knit structures?

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A. I'd have to look at it. I don't recall. I don't recall.

Q. You don't know?

A. No. I said I don't recall. There's a difference between I don't know and I don't recall.

Q. As you sit here today, do you know if tubular structures, as that term is used in the '046 patent claims, can be made using a rib knit?

A. No, it can't be used as a rib knit. A rib knit has an opening, which is shown in figure 150. You can see they're open.

THE WITNESS: We're getting close to the five-minute mark.

MR. BOWLING: Sure. We could take a break.

THE WITNESS: No, I said we're getting close to the five-minute mark.

MR. RAZAI: Let's go through 9:30, if we can, or 9:27.

THE WITNESS: We could stop now. It's just we're getting close.

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MR. BOWLING: Let's take a quick break.

THE VIDEOGRAPHER: The time is 12:22 p.m.

We're going off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 1:04 p.m.

We're back on the record.

BY MR. BOWLING:

Q. Dr. Brookstein, we're going to start where we left off, paragraph 150 of your rebuttal report.

A. Yes, sir.

Q. Do you see those two images shown there?

A. Yes.

Q. Those are images of the Chargefeel Mid collar; is that right?

A. That's correct.

Q. Help me understand what's shown here, where you took the image from and --

A. Sure. The way I took these pictures were the following: I cut along a

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straight line as best as I could the top part of the collar of which I call the upper portion of the collar. I cut it with a razor blade by taking a razor and pushing it straight down. I didn't want to disturb -- I wanted to minimize the disturbance of the yarns. I then mounted each piece between two -- each of these samples between two pieces of poster board. Okay?

I then used -- can you give me that clip please? Can you hand me that clip?

It was important that I looked straight down, so I came up with an idea to put the two pieces of cardboard with the fabric parallel to the surface and then used this as a jig so it would be straight up and then used a camera with magnifying lens to take the picture.

For the stretch one, what I did was I used two more clips to pull it and hold it. Okay?

Q. So you used binder clips to hold the cut portion of the collar --

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A. Right.

Q. -- between two pieces of poster board?

A. Mm-hmm.

And I used binder clips for the stretch version, to stretch it and hold it.

Q. I think you said at the beginning that you cut the upper portion of the collar.

Is that the same portion of collar that you circled in paragraph 149?

A. That is correct. Because the fabric at that very top course is transferred to a plain jersey knit fabric. It's very small, less than a quarter of an inch, less than an eighth of an inch.

Q. Both of those images in paragraph 150, the unstretched and the stretched images, were those taken while binder clips were exerting pressure down on the collar?

A. That is correct. It's the same piece of fabric for both of them.

Q. Okay.

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Those binder clips were exerting enough pressure that when you stretched it, you could put the binder clips back on and it remained stretched?

A. Yes, sir.

Q. Okay.

A. So they were a top view, looking down.

Q. So that's showing a cross section of --

A. Yes.

Q. -- that after you cut it?

A. Yes, sir. And again, I cut it with a brand new razor blade by just pressing straight down to minimize any shearing action.

Q. Right. Okay.

Paragraph 152, you say in the last sentence that the yellow structure is not part of the collar.

Do you see that?

A. Wait. Where do you see that?

Q. The second sentence.

A. Yellow? On page -- what

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paragraph is that?

Q. 152?

A. Oh, 152. Yes. The yellow -- this is Dr. Pastore's picture. Yes.

Q. What does that mean when you say that the yellow structure is not part of the collar?

A. I think he means -- I think he means the same thing that I did there where he wasn't looking at that little top part. Because actually you can tell above it -- you can still see a little bit of material.

Q. I'm not asking you what he meant. I'm just asking when you say "but the yellow structure is not part of the collar," what do you mean by that?

A. Where do I say that?

Q. Second sentence, paragraph 152.

A. 152. Tubular structure with the rib of collar running through it -- I think he means the same thing I did where he wasn't talking about that little top edge --

Q. I'm not asking what Dr. Pastore meant.

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A. Okay. That's what I mean --

Q. In the second sentence of 152, what do you mean when you say the yellow structure is not part of the collar?

A. What I mean is similar to what I did, what I did also.

Q. What do you mean when you say the yellow structure is not part of the collar?

A. The part of shaded with yellow is not part of the collar.

Q. Why not?

A. Because above the part where it says tubular structures adjacent to webbed areas, there's space above it.

Q. Can you --

A. Let me just say it really should say the top part of the collar.

Q. Okay.

So earlier you testified that the fabric at the very top course is transverse to a plain jersey net fabric?

A. Where do I say that?

Q. You said that in your testimony

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earlier.

A. Do you remember where that was referring to?

Q. In paragraph 149 earlier, you circled for us what you referred to as the upper portion of the collar.

Do you remember that?

A. Yes, I do.

Q. Okay.

Then earlier, you testified that at the "very top course" of the collar --

A. Yes.

Q. -- that's different, that's a plain jersey knit fabric?

A. That's correct.

Q. Okay.

So when you say in paragraph 152 that the yellow structure is not part of the collar, what are you referring to?

A. I'm referring to the top of where that circle is that I drew here and this is a rough -- a rough drawing.

Q. So your testimony is that where

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you've drawn the circle is not part of the collar?

A. Then I said I really meant the top of the collar. If I could reword that, I'd say the top of the collar. The top several courses of collar, but the rest --

Q. So not in the circled area?

A. Right.

Q. So why does that matter?

A. I think it does matter because the claim says there's tubular structures in here and I was trying to show that there aren't tubular structures.

Q. So when you said but the yellow structure is not part of the collar --

A. Right.

Q. There's no purpose for saying that?

A. It's just an observation.

Q. And you didn't mean --

A. And I did that -- by the way, remember this is done in rebuttal of what he did. So if this is the way he did it, that's the way I wanted to do it.

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Q. But there's a -- that's not entirely accurate. You do think the yellow structure is part of the collar. It's not -- and it's part of the upper portion of the collar that you highlighted in paragraph 149. You're just saying that it's not the very top of the collar that's that jersey knit portion, right?

A. It's not the edge. It's not the edge.

Q. Okay.

So that sentence in 152 should say but the yellow portion is not the edge of the collar?

A. That would be a better way to put it.

MR. RAZAI: Objection.

Form.

Q. Okay. Let's look at paragraph 154.

A. Yes.

Q. Here, you're looking at the Chargefeel Mid 2 collar to see if it includes tubular structures; is that right?

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A. That is correct.

Q. And there's an image shown below paragraph 154 and that's the portion of the Chargefeel Mid 2 collar that you removed?

A. Yes.

Q. Why is that cut so uneven there? Did you not use the razor blade?

A. Where do you say it's not cut even?

Q. The image that I just referred to in paragraph 154.

A. Oh, I might have cut that with a -- that part of it, I might have cut with a scissors because that wasn't the part that I was examining. I was examining the top part.

Q. So you didn't -- so does this picture that's shown in 155, the unstretched and the stretched, are we looking at the edge that you cut or the uncut edge?

A. Yes. Can I draw a picture?

Q. Sure.

A. It was this part here. Can you

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see it?

Q. Yes.

A. It was that part there.

Q. So the images in 155 are showing the part that you've circled on paragraph 154?

A. Right. And the pieces on 175 that are here were cut with the same technique that I used to push the razor blade down.

Q. What are you referring to? 175?

A. I said 175? I must have misspoke. 155. 155.

Q. Okay.

So for the Chargefeel Mid in paragraphs 159 and 150 and for the Chargefeel Mid 2 in paragraphs 154 and 155, you cut a portion of the collar --

A. I cut a portion of the collar out.

Q. -- and then you took pictures of a cross section of where you had cut?

A. No. I cut sections out that

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were these ragged edges here. Okay? Then I used the razor blade pressing straight down to get these cross sections. I did the exact same thing that I did for the first one.

Q. Do you have any pictures of the Chargefeel Mid 2 collar after you made the razor blade cut?

A. These what these are.

Q. Aside from the pictures in 155?

A. I did have -- when we went to Vartest, I did SEM pictures which I think were produced to you. The problem with that was they weren't directly vertical.

The way the SEM machine works, you can't actually get in there to adjust them to make them vertical and I wanted to be able to look down as best as possible and not see part of the fabric beneath it.

Q. Okay.

So the SEM pictures weren't reliable?

A. That's right and that's when I decided to do it this way. Well,

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Mr. Bowling, the SEM pictures weren't reliable for this part of what my investigation was. They were reliable to determine they were cut ends, which shows up somewhere else here. But they weren't reliable for showing the ribs.

Q. Can you draw a dotted line in the picture underneath paragraph 154 where you used a razor blade to cut it?

A. Sure.

Q. That dotted line --

A. That's approximate, I mean. It's below the part, the rounded part --

Q. So you drew a circle, it looks like?

A. Well, yeah, that's only because --

Q. Can you just draw a dotted line?

A. I did. I did. Look. Look at it.

Q. Can you extend the dotted line out so it's not part of the circle?

A. Sure. Is this better?

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Q. Yes, thank you.

Can you write cut next to that?

A. I want to put razor blade cut because that's what it was.

Q. Sure.

A. I want to put new razor blade cut.

Q. Okay. Let's turn to paragraph 167 of your rebuttal report.

A. Yes.

Q. Okay. I'm sorry. 176.

A. Yes.

Q. So you're saying that he -- Dr. Pastore -- inserted rods into the hollows of the tubular structures, right?

A. That's what he says. That's what he says he did.

Q. Okay.

So what's your opinion on what he actually did?

A. My opinion is that he used a -- he uses the word, I think, picks. He says, in this particular case, rods, but in other places, he says picks, which led me to

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believe it was a toothpick, a sharp toothpick. And all he did was push these toothpicks through a thick piece of fabric and then made the opinion that there were tubes.

Unfortunately, when the attorney from Knobbe and I went to Washington to see these, he had already embedded them in epoxy which made it impossible to really tell what he did. That shouldn't have been done.

Q. What were you unable to see specifically as a result of the epoxy?

A. I was unable to see where he, in fact, did that and --

Q. What do you mean by that?

A. Where he put those rods through to make that determination that it was a hollow structure.

Q. Why couldn't you see where they were pushed through?

A. Well, you could see where they were pushed through, but you know something? If I took a ball of wool and pushed a

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toothpick and put it through it, it would go through it. Does that mean the ball of wool is hollow? No. All he did was push away part of the yarns. That doesn't mean it's hollow.

Q. When he pushes the toothpick through that portion of the upper, there was a knit portion on the top and the bottom, right?

A. I don't know. I didn't see the way he did it.

Q. You couldn't tell that?

A. No, I can't and he didn't leave the samples for me to inspect.

Q. So the epoxy prevented you from seeing if there was fabric on top and fabric on the bottom?

A. Definitely on the bottom because the epoxy went down below the bottom. I never saw the bottom. He had it all mounted up.

Q. I'm referring to the bottom of the fabric.

A. I know exactly what you're

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talking about.

Q. So you couldn't see this from this top view?

A. I certainly couldn't see it from the top view. I couldn't even see it from the side view. It was, frankly, a poor way to do it. So it doesn't tell us anything.

Q. So you say it makes it impossible to determine Dr. Pastore's methodology.

What about his methodology did the epoxy prevent you from knowing?

A. To be able to actually look at the fabric.

Q. Right. But what about his methodology were you unable to determine due to the epoxy?

A. He had no notes or anything saying how he did it.

Q. I understand that.

But what portion of his methodology were you unable to determine?

A. How he did it.

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Q. Specifically?

A. That if he did -- I'm using the analogy of a ball of wool. Did he just take a piece of fabric and put a toothpick through it? Which we did on the next page. We did that and, in fact, we found that you could do the same thing with just a regular fabric. That doesn't mean there's tubes in it.

Q. Did you test to see whether you could reproduce Dr. Pastore's methodology?

A. I didn't have -- that was the reason why I did this. That's the reason why I did these.

Q. Did you test Dr. Pastore's methodology of sticking the pick through the alleged tubular structures?

A. Not through the -- not those tubular structures, no.

Q. Why not?

A. Because I felt that this was a better way to do it.

Q. When you say this was a better --

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A. The picture shown in 170 or -- whatever they were. Paragraphs 155 and paragraphs 150.

This is what -- from my point of view -- remember, I've been teaching textile engineering since 1975. If I gave this assignment to students to tell me -- this is how I would tell them to do it. That's after 49 years of teaching textile engineering.

Q. So your opinion is that Dr. Pastore, that his methodology of inserting rods into the hollows of the tubular structures didn't effectively demonstrate whether those were, in fact, tubular structures?

A. Right. If I gave one of my students, in the many years I've taught textile engineering, to tell me if a fabric has tubular structures and they came back with that as their solution, they'd get an F.

Q. I'm not asking you about your students.

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A. I'm telling you it's the wrong way to do it. It's the wrong way to do it.

Q. Did you ever try to reproduce Dr. Pastore's methodology?

A. Not at all. Well, that's not true. If you go to paragraph 178 and paragraph 186, that is kind of what he tried to do.

Q. Yes, but in those paragraphs, you explicitly say that you're inserting rods into a different part of the upper, right?

A. Yeah, but then I went -- after this report was done, I did do it. I did do it.

Q. Where does it say that?

A. No, I said after this report.

Q. So that's not in here?

A. No, because this was --

Q. Is there any evidence of that?

A. No.

Q. Do you have any notes of that?

A. Just mental notes. No.

Q. Okay.

HIGHLY CONFIDENTIAL - D. Brookstein

No images?

A. No.

Q. Okay.

So for purposes of this report, your responsive report to Dr. Pastore, you never once tested his methodology with respect to inserting rods into the hollows of the tubular structures?

A. That is correct.

Q. So when you say that after you submitted the report you tried to reproduce his methodology, right?

A. Yes. Remember, I got his report on May 17th. There was no chance for me to do another report, but I could do the experiment, which I did.

Q. His opening report was submitted a month before that.

A. This one? Okay. No, I didn't do it. No, I shouldn't say that. After I went and visited -- I forget what day we visited in May. It was right before the next set of reports were due.

Q. So how were you able to

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reproduce Dr. Pastore's methodology, which you have no notes or images for --

A. Right.

Q. But how are you able to do that if what you say is true, that it was impossible to determine his methodology?

A. No, it was impossible to determine the results of his methodology.

Q. Okay.

So you knew what he did?

A. I said -- yes, I did -- he did say what he did. So I said okay, I'll do it.

Q. But that's not in your report?

A. No, because that was after.

Q. After you submitted --

A. No. Definitely after I submitted the report, but after I visited the Arnold Porter office in Washington and saw the samples.

Q. Okay.

So before you submitted this rebuttal report, this responsive report --

A. Right.

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Q. -- on May --

A. Seventeen.

Q. -- 17th, did you try to reproduce Dr. Pastore's methodology of inserting rods into the hollows of the tubular structures?

A. No.

Q. Okay.

You did that after May 17th?

A. Yes.

Excuse me. You know, I don't really remember the dates. Do you remember the dates? Because you were there. I don't remember the dates. It was right around that time. I don't remember the date.

Q. But either way, it's not in your report?

A. It's not in my report.

Q. Why didn't you include it in your report?

A. Because I got the information I needed by doing it the way I did it, which is, from my point of view, a much better way to do it.

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Q. So there's no record whatsoever of you testifying Dr. Pastore's methodology of inserting rods into the hollows of tubular structures?

MR. RAZAI: Objection.

Form.

Asked and answered.

Q. Right?

MR. RAZAI: Argumentative.

Q. Is that right?

MR. RAZAI: Objection.

Same objections.

A. There's no record.

Q. Okay.

So you knew what portion of the knit structure Dr. Pastore inserted the rods into, right?

A. No, he just said -- no, he doesn't really describe it like I did. I don't think he described it like I did.

Q. Did you know what portion of the knit textile he inserted the rods into it?

A. Well, he said he inserted it

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into places where he assumed there were tubular structures. That's all I know.

Q. You also note that the rods were broken or cut off.

Why does that matter?

A. I don't know why it matters. It was just an observation.

Q. It doesn't matter?

MR. RAZAI: Objection to form.

A. I'm not saying it does or it doesn't. It was an observation.

Q. I'm asking you does it matter?

MR. RAZAI: Objection.

Form.

A. I don't know.

Q. As far as you know, it doesn't matter?

MR. RAZAI: Objection.

Form.

A. To me, it didn't matter.

Q. Okay.

In paragraph 178, you say that you inserted a toothpick into a different part of upper?

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A. Yes.

Q. What you call the non-ribbed area, right?

A. Yes.

Q. Then you say that on the interior of the shoe, the toothpick didn't poke through.

That's the image on the right of those two images?

A. That's right. I want to correct -- not correct. I want you to read what this actually says. I didn't say I did it. I said I illustrated this below.

One of the attorneys for Knobbe, I said -- because they had it here, I said could you do this and on Zoom, I told them what to do and watched it. So I never said I did this. I said I illustrated this below.

Q. Okay.

So you never inserted a toothpick into any portion of the Chargefeel Mid footwear; is that correct?

A. I personally did not, that's

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correct. I instructed someone how to do it.

Q. Sure. But you never did it?

A. I never did it.

Q. That goes for the Chargefeel Mid 2 as well?

A. Yes.

Q. You never inserted a toothpick into any portion of the upper of the Chargefeel Mid 2?

A. No. I instructed someone else how to do it.

Q. You never did it?

A. No.

Q. So in the second image on the right in paragraph 178, why don't we see the toothpick at all?

A. Could you repeat that?

Q. Okay.

In the image on the right underneath paragraph 178, why don't we see the toothpick at all?

A. Because -- I have no idea. We didn't see it.

Q. You have no idea?

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A. I have no idea.

Q. But we don't see it inside or outside of the --

A. Right. We don't see it inside or outside. But like I said, one of the reasons why we did this is to show you could take any thick fabric -- by the way, these were toothpicks with sharp edges and they just -- we just went through the fabric.

Q. So you don't know where in this second image the toothpick is, the image on the right? Is it at the top of the image --

A. Well, it's the inside of what the one on the left is.

Q. Where's the toothpick?

A. It's in the non-ribbed area. I don't know exactly where it is, but if you took the shoe and looked at the curve --

Q. So you don't know if at the top or the right or the left or the bottom of the image, what portion of the collar --

A. We know it's below where there were ribbed areas.

Q. Yeah, but we can only see half

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of the collar here. The rest of it is cut off.

A. That's correct.

Q. So is what's shown here the portion where the toothpick was inserted or we don't know?

A. I'm not sure what you mean when you say the portion -- we took a shoe and pushed it through the fabric.

Q. You didn't. Somebody else did.

A. Someone did it at my instructions, yes.

Q. Over Zoom?

A. Over Zoom.

Q. You never inspected it personally?

A. No. They were in California. But as I testified, I did subsequently do it myself, but I didn't take any pictures because I got the same results.

Q. But there's no record of that?

A. There's no written record of it or photographic record of it.

Q. Okay.

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A. Because, again, I come back to that the pictures that I showed that I've discussed before on these ones where I'm showing paragraph 155 and paragraph -- paragraph 155 and paragraph 150 demonstrated to me, as a textile engineer, that there were no tubes in those.

Q. Okay.

So the only testing that you conducted with respect to the collars of the Chargefeel Mid and the Chargefeel Mid 2 that you personally conducted --

A. Yes.

Q. -- were the binder clip experiments where you smashed the textile between binder clips?

MR. RAZAI: Objection to form.

A. And we also did the SEM pictures.

Q. But those were unreliable?

A. To me, they were unreliable.

Q. Okay.

So the only testing that you personally conducted with respect to the

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collars of the Chargefeel Mid and the Chargefeel Mid 2 to determine if there were tubular structures is the testing where you smashed the collar between binder clips and poster board?

MR. RAZAI: Objection. Mischaracterizes the testimony.

A. You're definitely mischaracterizing testimony. I did not smash anything. I measured the thickness of the fabric before I did the test and I measured the thickness of the fabric after I, using your words, smashed them and it was imperceptible.

Q. Where is that data?

A. I didn't record it.

Q. Is there any record of those measurements?

A. No. Well, it might be on my desk or something, but --

Q. It's not in the report?

A. It's not in the report. No, it's not in the report.

Q. So we have no way of knowing

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the relative thickness before and after the binder clips were applied?

MR. RAZAI: Objection.

Form.

A. Yes, we have no way -- the relative thickness?

Q. Yeah.

A. Other than my word and my testimony.

Q. Right. No documentation?

A. No documentation.

Q. So we have the SEM testing --

A. Right.

Q. -- which is unreliable, right?

A. Yes.

Q. We have the toothpick experiments which you didn't personally conduct, you just watched over Zoom, correct?

A. Upon my instruction.

Q. Sure. But you watched it over Zoom?

A. Yes.

Q. And then we have the binder

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clip experiment and we don't have any record of the measurements, correct?

A. Yes. We have no written record of the measurements.

Q. Okay.

No other testing of the Chargefeel Mid and the Chargefeel Mid 2 collars, right?

A. Not that I -- no, not that I can remember. No.

Q. Okay.

If you're submitting a responsive report to the test conducted by an expert --

A. Right.

Q. -- do you think it's important to try and verify their methodology and results?

MR. RAZAI: Objection to form. Argumentative.

A. I've submitted many of these. Sometimes and sometimes not. Sometimes counsel will accept the fact because it is part of -- I'm under oath and it's testimony

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and I'm testifying that there was hardly any change.

By the way, I don't think that would have mattered. It would have made those spaces look even smaller.

Q. But you don't know?

A. Oh, it's kind of obvious. If you squeeze -- if you keep using the word you used, smash, smash means make them thinner. That's why I take exception when you use the word smash because I wasn't smashing anything.

Q. You talked a lot about your students. If you asked your students to verify a methodology and results that were reached in a given test --

A. Yes.

Q. -- and they didn't recreate that test or recreate that methodology, what would grade would you give them?

MR. RAZAI: Objection.

Form.

Improper hypothetical.

A. I can't tell you what grade.

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It would depend on what the rubric for grading is. I can't answer that question.

Q. Well, you said you would have given an F earlier --

A. Well, that's a -- that's slang. I mean, maybe they would have got an D. The point is I wouldn't have been pretty happy with them. Okay? I would say go back and get it right. And that's -- and then let's say I had this report in front of me and I could use this. I would say here's the way person X did it and this is the way I want person Y to do it. Tell me why you think person X's reason is a bad way to do it. And they would give you the -- if they were doing it right, they would give the same reasons.

And the real fault here was embedding the damn things -- the darn things. Embedding them. Once you've done that, you've spoliated.

Q. What do you mean, embedded?

A. Put it in plastic so you couldn't actually see the fabric.

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Q. Upon realizing that they were put in plastic and you couldn't see the fabric, you never thought about recreating it and documenting your results?

MR. RAZAI: Objection to form. Argumentative.

A. I didn't have to because I would have never done it that way anyway. I think the way I did it was a far superior way.

I'd like to add I have an award from the American Society of Testing and Materials. It's only given once a year. That's a very high-level award and I got that award for my testing abilities.

Q. Does that American Society of Testing and Materials, does that organization follow the scientific method?

A. Very much so. It stands for the ASTM and they've been around for over 100 years and it's composed of volunteers who are professionals in various fields and they write testing standards for a whole range of things, including a lot of textile

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things.

This is not part of an ASTM test. The point is I was recognized for my abilities in textile fiber utilization. It's a very high award.

Q. Scientific method is important?

A. Very important.

Q. Okay.

What was your hypothesis with respect to Dr. Pastore's test using toothpicks inserted into the tubular structures? Was your hypothesis that that test was unreliable?

A. Yes.

Q. Did you test that hypothesis?

A. There was nothing to test. There was nothing to see.

Q. So the answer is no?

A. Embedded in plastic? The answer is no. No.

Q. So you didn't follow the scientific method?

MR. RAZAI: Objection.

Argumentative.

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A. I didn't follow -- I followed his method, which I would never have recommended to my students --

Q. But you didn't follow it --

MR. RAZAI: Objection. Argumentative.

THE COURT REPORTER: One at a time, please.

MR. RAZAI: Let him finish and then me object and then don't talk over him --

THE WITNESS: I understand. I understand.

MR. RAZAI: Just do it in an orderly fashion.

BY MR. BOWLING:

Q. Okay. Let's turn to paragraph 194, please.

A. Sure. 194, yes.

Q. Okay.

Here, you're discussing images that Dr. Pastore took and then annotated with a first curve portion and a second curve portion, right?

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A. That's what those pictures say, yes.

Q. Okay.

So in paragraph 196, you're discussing that image --

A. Yes.

Q. And in the second sentence, you say: However, the stretched material plainly demonstrates that his lines do not correspond with tubes, but rather the front and back of the ribbed portions.

Do you see that?

A. Yes, I do.

Q. Okay.

So your opinion is that the lines drawn by Dr. Pastore show "the front and back of the ribbed portions."

Right?

A. Yes.

Q. And those lines are curved?

A. As best as I can tell. It was a very hard picture to make out. It was -- I really can't tell much from that picture, to be honest with you. It's not a very good

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picture.

Q. You had access to the high resolution version of this picture, right?

A. I don't know. I got it from counsel. I don't know if it was high resolution or not.

Q. So when you stretch the material, those curved portions are still curved, right? They're just flatter; is that right?

A. You can't be flat and curved at the same time. They're either flat or they're curved.

Q. They're flatter. So they're still curved when you stretch it out?

A. You can't say something is flatter. Either something is flat or not flat. It's like saying someone is pregnant or partially pregnant. It's either flat or not flat. You can't use those terms.

Q. Okay.

When you stretch the material, are the lines there that he's drawing still

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curved to some degree?

A. The lines he did?

Q. The portions that he highlighted with his annotations, when you stretch out the material, are those still curved?

A. I can barely tell based on that picture.

Q. Well, the picture in your report is shrunken down. Dr. Pastore had a high resolution version, right?

MR. RAZAI: Objection.

Calls for speculation.

A. He had what's in my report.

Q. Did you review a larger version of this picture?

A. Oh, yes.

Q. Okay.

So when you reviewed that larger portion of the picture --

A. Yes.

Q. When you stretched out the material or the portions that Dr. Pastore identifies are the first curved portion and

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the second curved portion still curved to some degree?

A. On mine?

Q. Yes.

A. No, they were essentially -- well, they were curved a little bit on the unstretched, but on the stretched, they were essentially flat.

Q. I thought something had to be completely flat or not flat --

A. Yes, I know. When I said that -- they were flat.

Q. Completely flat?

A. Since I just corrected you on the word "flat," they were not curved. I'll leave it at that.

Q. So your testimony is that when you stretch the Chargefeel Mid collar, the curved front and back portions of the ribbed portions are entirely flat? That's your opinion?

A. Flat like. I know --

Q. Are they all the way flat or close to flat?

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A. They were enough to show me that they were channels. That's what they are. They're channels.

Q. I'm not asking you if they're channels. I'm asking you --

A. I'm telling you what they are.

Q. That's great.

But when you stretch them, are they still curved or are they entirely flat?

A. They weren't really curved to begin with. A rib structure is not curved.

Q. Okay.

Well, you just testified that they were curved a little bit.

A. A little bit.

Q. Sure. So that's curved, right?

A. If you want to be -- yes.

Q. I'm just using your definition of curved and flat and you just gave me --

A. Yes, I know you are. And that's okay. That's okay. That's okay. That doesn't change anything.

Q. So when you stretch the collar, are those -- is that front portion and the

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back portion of the rib structure entirely flat?

A. I'll say they're partially curved.

Q. Thank you.

Okay. Let's turn to paragraph 206 of your report.

A. Yes.

Q. We're now shifting to the '484 patent?

A. Yes, sir.

Q. I want to direct you to page 80, the top -- the second line at the top begins with instead?

A. Yes, sir.

Q. You say: Dr. Pastore analyzes a number of images and physical exemplars illustrating the collars of these products after certain post processing has been performed.

A. Yes.

Q. Do you see that?

A. Yes.

Q. So Dr. Pastore's materials

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considered and the text of his report describe him considering videos and images of the collars immediately after they come off the knitting machine, right?

A. I don't recall those, no.

Q. You don't know?

A. I said I don't recall.

Q. I'm going to ask you to turn to page 258 of Dr. Pastore's opening report.

A. Yes. I have it here. Is that Exhibit 6? What page? What paragraph?

Q. 258?

A. Paragraph or page? Paragraph or page?

Q. Page. I'm sorry.

A. Yes.

Q. Okay.

So do you see that image on 258?

A. I do.

Q. At the top of the page?

A. I do.

Q. Do you know what that image shows?

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A. I have to read and see what it says. It says: The below image confirms that the collar of the Chargefeel Mid is formed with a dome three dimensional central portion directly after knitting.

Q. Does that image look like -- does that show you that the textile element shown there is still attached to another textile element, it's just coming off the machine?

A. As best as I can see, yes.

Q. As far as you can tell, this image at the top of page 258 shows the Chargefeel Mid collar immediately as it's coming off the machine?

A. As best as I can tell. Well, not really. I mean because -- see the way there's serrated edges all the way around? When it comes off the machine, it comes off -- it doesn't come off looking like that. The outline of that is not the way it comes off the machine. It's cut out from pieces on the machine.

Q. What's attached at the very top

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of the image there? What would be --

A. You'll have to show me when you say attached at the top of the image.

Q. At the very top of the image, do you see how there's the same pattern that we see -- kind of the collar portion there, it looks like it's attached up at the top of the image as well. Do you see that?

A. I see it, but I don't know what it is.

Q. Does that look like it's another instance of the same element attached in a sequence?

A. All of the black it looks like the same element, yes.

Q. Okay.

Then what's that striped portion at the very top of the image?

A. Or the bottom of the image. It's something he's saying is a dome. I didn't say it was a dome. I said he's saying it's a dome.

Q. So in your opinion, what's shown here in the image at the top of page

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25 [redacted]

Q. I'm asking you about this one.

A. This picture, I can't tell if it was ironed or not.

Q. So you have no way of knowing this if textile element has been ironed or not yet?

A. Not this -- not based on this picture, no.

THE WITNESS: Five-minute warning.

BY MR. BOWLING:

Q. Do you see that stripe portion that is kind of halfway down the image at the top of page 258?

A. Yes.

Q. What's your opinion as to how that was formed?

A. That's formed on a knitting machine. That's all I could tell.

Q. So it came off the knitting

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machine looking like that?

MR. RAZAI: Objection to form.

Asked and answered.

A. What I can't tell is whether it's a separate thing that was sewn on or not. I can't tell.

Q. If you knew that this came off as one single piece off the knitting machine, how would you then opine as to how that portion -- that striped portion of the image in 258 -- was formed?

MR. RAZAI: Objection.

Improper hypothetical.

A. Probably on Shima Seiki full fashion machine.

Q. And it would have come off the machine looking just like that?

A. I don't know. I'd have to see it coming off the machine.

Q. What would be your best guess?

A. I don't like to guess in testimony.

MR. BOWLING: We could go ahead and take a break if you'd like.

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THE VIDEOGRAPHER: The time is 2:01 p.m. and we're going off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 2:10 p.m.

We're back on the record.

BY MR. BOWLING:

Q. Do you remember a moment ago, Dr. Brookstein, we were looking at the image on page 258 of Dr. Pastore's opening report?

A. I do.

Q. Can you pull that up for me?

A. Wait. Hold on. I do, but -- I remember, but where did I put it? It's got to be here. I have 259. I just saw 260 --

MR. BOWLING: We could go off the record.

MR. RAZAI: No, I don't want to go off the record.

THE WITNESS: I don't see 258.

MR. BOWLING: Go off the record quickly while he looks for the exhibits in front of him.

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THE VIDEOGRAPHER: The time is 2:11 p.m.

We're going off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 2:14 p.m.

We're back on the record.

BY MR. BOWLING:

Q. Dr. Brookstein, we were just looking at page 258 of Dr. Pastore's opening report.

Do you have that in front of you?

A. I do.

Q. This is the knitted element that we were talking about, whether it came off the machine.

Do you remember that?

A. I do.

Q. Can you turn to page 81 of your responsive report, specifically paragraph 209?

A. 209. Yes, sir.

Q. Okay.

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Now, let's go back to Dr. Pastore's opening report, 258.

Can you look at that for me?

A. I got both things there.

Q. So earlier you testified that those cuts on that knitted element -- I'm pointing at 258 now, Dr. Brookstein.

A. Yes.

Q. The cuts on 258, you said it couldn't have just come off the knitting machine, right?

A. Well, what I said was it was a piece cut off from the knitting machine. I think I said it that way.

[redacted]

Q. When it comes off the machine, it doesn't come off looking like that?

A. Correct.

Q. Okay.

Now, let's look at your report, paragraph 209.

You say: An image of the

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collar of the Chargefeel Mid as it appears after removal from the knitting machine but before any processing is shown below.

Do you see that?

A. Yes.

[redacted]

Q. So which is it?

A. Well, this says after removal from the knitting machine. What was the first part of what you had said? How did you word that?

[redacted]

A. Right.

Q. Okay.

[redacted]

[redacted] I should have added that.

Q. So when you said before any processing, you didn't mean that?

A. I should have said post process.

Q. Okay.

So you wrote the opposite of what you meant to say there?

A. Not the opposite. I wasn't clear. If I could rewrite that sentence, I would say it appears after the removal from the knitting machine and cut and then before any post processing is shown.

Q. Okay.

So the image in Dr. Pastore's report, page 258, in your opinion, did not come off the machine looking like that, it had to be cut?

A. Correct.

Q. How do you know that?

[redacted]

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[redacted]

Q. Did you watch any videos of the Chargefeel Mid being knit?

A. No.

Q. None?

A. None.

[redacted]

Q. So you're certain?

A. Yes.

Q. Are you a knitting expert?

A. Yes.

Q. So you know the way knitting works?

A. Yes.

[redacted]

(Whereupon, Exhibit 8 was

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marked for identification.)

MR. BOWLING: Okay.

We're going to show you a video that has Bates number Lulu-NikeFW-0026179.

THE WITNESS: Where do I see that?

MR. BOWLING: We're going to show you here in a moment.

MR. RAZAI: Can you email it to me -- is that possible -- so I can look at it simultaneously?

MR. BOWLING: Yes, we could show it here.

MR. RAZAI: I just want it to be close enough for him to be able to see it.

(Video played)

[redacted]

BY MR. BOWLING:

Q. Okay.

So in your opinion -- well,

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let's take a step back.

Have you ever seen that video before?

A. No, I just said I've never seen that video before.

Q. Was that video made available to you during the time when you were rendering your opinions?

A. I don't recall.

Q. Did you review everything that was made available to you during the time when you were rendering your opinions?

A. I'm pretty sure I did, yes.

Q. In your own words, can you describe what that video shows?

[redacted]

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[redacted]

Q. That's what the video shows?

A. That's what the video shows.

Q. Looking back at Dr. Pastore's report, page 258, that image that's shown in paragraph 365, that image of the Chargefeel Mid upper, that's exactly what the upper looks like when it comes off the machine, correct?

A. I didn't see the whole upper come off the machine.

Q. You didn't?

A. No. It was only about ten seconds. I saw part of it come off.

Q. Okay.

Did you see the part of the upper that's shown here in Dr. Pastore's report at paragraph 365 come off the machine?

A. The white part? I don't think I saw the white part.

Q. You didn't see the whole element there?

A. I don't think so. Can I see it

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again?

Q. I think the white part may be a table that's underneath.

Is that what you're referring to?

A. No, the -- this part here, the collar part.

MR. BOWLING: Okay. Let's watch the video once more.

(Video played)

THE WITNESS: The white part is hanging off. I didn't see it being knitted though, but it's hanging off.

Okay. Thank you.

BY MR. BOWLING:

Q. In the video that you just watched, does the knitted element coming off the machine bear any differences to the knitted element that's shown on page 258 of Dr. Pastore's report?

A. Your question again?

Q. In the video that you just watched, does the knitting element coming off the knitting machine have any

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differences that you can identify as compared to the knitted element that's shown on page 258 of Dr. Pastore's report?

A. Do we have any documentation that says that is that fabric there or is it just something that's being knitted?

Q. I'm asking you if you can identify any differences between the two.

I can represent to you that that's been represented to us as an accurate video of lululemon's Chargefeel Mid being knit.

A. That's fair. It's hard to tell because when you see it coming off, it's just kind of hanging loose. It's not something that you could actually see.

Q. Are you able to identify any differences between the knitted element that you just watched in the video coming off the machine and the knitted element that's shown on page 258 of Dr. Pastore's report?

A. It appears to be.

Q. The same?

A. That's the strongest I could

say. It appears to be.

Q. The same?

A. The same.

Q. So in your opinion -- and I understand you've just watched that video for the first time twice --

A. I watched it twice.

Q. -- but as far as you can tell, this picture shown in Dr. Pastore's report on page 258 shows the knit element of the Chargefeel Mid, the collar, as it comes off the machine as best you can tell?

A. I would agree with that.

Q. You're sure you've never seen that video before?

A. I don't recall ever seeing it before.

Q. If you were rendering an opinion on the way in which a certain object was manufactured, would you say that a video showing the manufacturing of that object would be better evidence than images or other documents?

A. It depends on the quality of

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the video, the angles that were taken.

Q. Assuming the quality is good?

A. The quality is good, but -- you want to see different angle of it. You want to see a lot more than just that picture, I mean that video.

Q. Would you say that that video is critical evidence to understanding how that object was manufactured?

A. What do you mean by critical?

Q. Is it important?

A. It's not unimportant.

Q. So it's important?

A. There's a difference between important and not unimportant.

Q. Okay.

So just to make sure we're clear, your opinion is that a video showing the manufacturing, the knitting of the knitted textile in dispute is not important evidence?

MR. RAZAI: Objection.

Argumentative.

Asked and answered.

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A. That's not what I said.

Q. Is it important?

A. That's not what I said. I said it's not not important.

Q. Right. So I'm asking --

A. Read back what -- read back the exact words I used.

Q. Is it I'm asking you --

A. I don't remember the words I used.

Q. -- is it important evidence?

A. Important in what regard? You have to be more specific.

Q. In rendering your opinions about the manner in which the collar of the Chargefeel Mid was manufactured, is a video showing the knitting of that collar of the Chargefeel Mid important evidence?

MR. RAZAI: Objection.

Argumentative.

A. Important in what way?

Q. Important to your analysis, important to your opinions.

A. Not an opinion -- to my final

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conclusion that it's not a dome? No.

Q. It's not important?

A. Not important to show it's not a dome.

Q. You mentioned dome just now. What does dome mean in the context of the '484 patent?

MR. RAZAI: Objection. Outside the scope.

A. A dome is a three-dimensional item that has a curved surface.

Q. If we're looking, again, at the image in Dr. Pastore's report on page 258 --

A. Yes.

Q. -- is that striped collar portion three dimensional in your opinion?

A. Yes.

Q. Is it curved in your opinion?

A. No.

Q. So your opinion is that that striped portion of the collar shown on page 258 of Dr. Pastore's report is not curved?

A. That is correct.

Q. So based on your earlier

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testimony, your testimony is that it's entirely flat?

A. I don't recall saying that.

Q. Earlier, you said something is either curved or it's flat.

MR. RAZAI: Objection. Mischaracterizes the testimony.

A. I was talking about it's curved or it's flat with regard to the tubes. I wasn't talking about a large structure.

Q. So curved has a different meaning here when you say curved?

A. In the context of what this patent is about, yes.

Q. What does curved mean here?

A. Curved would be -- I don't know if -- I know I can do this for the video. I'll do it anyway. Like that (indicating).

Q. So not a straight line?

A. Not a straight line. Curved.

Q. Okay.

A. More than not a straight line. Curvature.

Q. What does curvature mean if it

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doesn't mean something other than the straight line?

A. Well, you could have something that's like that, like a channel. That wouldn't be a dome. Like a three sided --

Q. Because it would have straight edges?

A. It would have no curve. Yes.

Q. So a rectangular aqueduct would not be a dome? It would be a channel?

A. In that case, it would be a channel, yes.

Q. And it's not a dome, in your opinion, because it has straight lines?

A. Correct.

Q. I don't see any straight lines in the picture shown on page 258 of Dr. Pastore's report.

A. This is not in its final form. This is just -- it's a loose piece of fabric.

Q. So is it curved there?

A. Not that I can tell, no.

Q. That doesn't look curved to

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you?

A. No.

Q. Does the '484 patent define dome in the way that you've defined it?

A. No. I think it's plain and ordinary meaning.

Q. How did you determine the plain and ordinary meaning for dome?

A. From my experience what a dome is. I'm a mechanical engineer.

Q. Let's look at paragraph 212 of your report.

A. Two twelve of my report. Okay. Paragraph 212. My responsive report or -- which report --

Q. Yes, the one that's in front of you.

A. The responsive report?

Q. Do you see those two images --

A. Let me get to it.

Q. If you have Dr. Pastore's --

A. I'm here now. Okay. Go ahead. I'm at two --

Q. Paragraph 212?

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A. Yes, I think so. Yes.

Q. Is it your opinion that there's no dome in that upper?

A. Let me read what I wrote. These are getting out of order. I don't know how. This is out of order. Okay. So we'll go to the other report.

Q. Let's set aside your report. Maybe your attorney can sort that out.

Let's look at Dr. Pastore's report.

A. Okay.

Q. Turn to page 243, please.

A. Two forty-three. Okay.

Paragraph 243 or page 243?

Q. Page 243.

A. This stuff's all getting out of order. Is this the report?

Q. Page 243.

A. I'm looking, I'm looking. Are you talking about this? Okay.

Q. Okay.

A. Mm-hmm.

Q. Do you see a series of eight

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images on page 243?

A. I do.

[redacted]

Q. Okay.

What shoe is shown there, what shoe component?

A. Chargefeel Mid 2. Chargefeel Mid 2.

Q. Okay.

So this is the collar component of Chargefeel Mid 2?

A. Yes. Well, it's more than the collar. It's more than the collar. It includes the collar.

Q. Okay.

You see that this is a progression as you move from left to right, top to bottom?

A. Yes.

Q. So the first image is, like, a step one, then the second image, step two,

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third image, step three, step four, step five, six, seven, eight.

Do you see that?

A. Yes, I do.

Q. Okay.

[redacted]

A. Yes.

[redacted]

Do you see that?

A. I do.

[redacted]

A. Correct.

Q. And that top left image has some three dimensionality to it, doesn't it?

A. It appears to.

Q. Okay.

How would you describe that

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three-dimensional portion?

A. It's too small. I can't tell.

Q. Is it domed?

A. I can't tell. No, it looks like straight edges, but it's very hard to tell.

Q. What about in the third step, the top right image?

A. Yes.

Q. Does that look like a dome?

[redacted]

Q. Okay. Let's turn now -- can we go back to your report if you have that sorted out?

THE WITNESS: Ali, is that my report now?

MR. RAZAI: You have the other part somewhere. Maybe he's referring

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to something that's later than that.

THE WITNESS: Okay. Let me -- my responsive report, is that the rest of this?

MR. BOWLING: No. That's Pastore's report.

MR. RAZAI: Part of it is. That's part of Pastore's report. Put that back in that stack. Here is the rest of your --

THE WITNESS: Okay, I'll put this back here. We'll do a little housekeeping. This looks like it's out of order, too, Ali.

A. Okay. So this is -- I'm looking at my responsive report, is that correct? Is that what you want me looking at, my responsive are report?

Q. Yes, please.

A. What page or what paragraph?

Q. Okay. Let's go to 243, please.

A. Okay. 243. Where it starts with the word "furthermore"?

Q. Let's go up to 240, if that's

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okay.

A. Anything is okay. 240. It starts with purported benefits?

Q. Yes.

A. Okay.

Q. Okay.

So here you're discussing, starting in paragraph 240, certain opinions that Dr. Pastore rendered in his opening report titled "The Benefit to the Claimed Technology."

Correct?

A. Yes.

Q. You say here in paragraph 240 that you disagree with Dr. Pastore that the alleged benefits are attributable to the features recited in the claims of the asserted patents, right?

A. Yes.

Q. What do you mean by that?

A. Well, you have to go on. I then list -- like you'll see 241 starts first and then I think the next page probably starts second and then you've got

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to go through the whole thing. It starts with this Fink article.

Q. Okay.

So one thing the Fink article says, for example, is that unlike traditional shoes that need to be glued and stitched, the fly knit methods allow for continuous thread woven into a lightweight shoe that would allow for more breathability and support, correct?

A. That's what Fink says, yes.

Q. Your opinion, if I understand it right, is that Dr. Pastore doesn't show that those benefits are attributable to these specific patents, right?

A. No. I'm saying that the Fink quotation means nothing. It's a magazine article. He's not an expert. He's just a guy writing an article. He doesn't even know the difference between woven and knit, so I kind of discount anything he says.

Q. Okay.

So you don't think the statements in that article are reliable?

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A. No, I don't think so because, like I said, the guy doesn't know the difference between woven and knit. That's the difference between white and black. Anything I read in that means nothing to me.

Q. Okay.

You also say in paragraph 243 that: Furthermore, Dr. Pastore does not correlate the statements in the Fink article to any asserted claim.

Right?

A. Yes.

Q. What do you mean by that?

A. Well, he's not using Fink -- let's say an obviousness argument -- to justify his -- any of what he says. He's just making statements from a guy who -- or a woman, I guess it's a woman, Carly, who really is not qualified to be making any of these statements. These all go back to her.

Q. But Dr. Pastore and Nike's fact witnesses agreed with those things, right?

A. I don't think he agreed. The way I read this, he's using her to support

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what he's saying, but it doesn't add anything.

Q. Did you review the deposition transcripts of Nike's fact witnesses?

A. No.

Q. Did you review their statements about the benefits of the claimed technology?

A. Actually, I did read some of their depositions. I read Dua's and Mr. Meir's.

Q. Okay.

You understand that the two of them emphasize the same benefits, right?

A. Yes. But they're not unbiased, they're from Nike. They're not -- they don't necessarily have to be objective.

Q. So you discounted their statements?

A. Yes.

Q. Did you have any evidence to suggest that the claimed inventions don't offer the benefits that Dr. Pastore describes in his report?

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A. Where is it where he talks about the advantages of domes?

Q. That's what this whole section --

A. No, he's basing it all on Fink. Fink means nothing to me. And he's basing it off what Dua and Meir said, who are Nike employees, so they can't be objective about things that are not things -- that all you can do is make subjective statements. I wouldn't call that evidence.

Q. You don't view the deposition transcripts of Nike's fact witnesses to be evidence?

A. That's not what I said.

Q. I think you just said you wouldn't call that evidence.

A. Yes, that particular thing where they're talking about benefits. I would talk about -- if they gave fact evidence that says this is knitted on an XYZ machine, that's fine. This is knitted with polyester yarns, that's fine. But when they're making statements like oh, it has

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more comfort, it has more this, no.

Q. Not evidence?

A. No. Not credible evidence.

Q. So you didn't consider any testimony from Nike's fact witnesses about alleged benefits to the claimed inventions because you believe their testimony is biased and unreliable?

MR. RAZAI: Objection.

Misstates the testimony.

Argumentative.

A. You're misstating what I said. I'm talking about when they're talking about subjective benefits. They can't speak in an unbiased viewpoint. They're employees of the company that's trying to keep their patents alive.

Q. What about my question misstated your testimony?

A. Say that again.

Q. What about my question misstated your testimony?

MR. RAZAI: Objection.

Argumentative.

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A. You have to tell me the question again.

Q. As I understand what you just told me, you didn't consider any testimony from Nike's fact witnesses about their beliefs of the alleged benefits of the claimed inventions because you don't think their testimony on that topic is reliable; isn't that right?

MR. RAZAI: Objection.

Lacks foundation.

Misstates the testimony.

A. Correct.

Q. You didn't consider the Fink article describing benefits of flyknit technology because you found that to be unreliable, correct?

MR. RAZAI: Objection.

Misstates the testimony.

A. No, I found the person to be unreliable.

Q. Did you consider the article to be reliable?

A. Once I saw that the person was

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misusing words like woven and knitted, I stopped. I realized they don't know what they're talking about.

Q. So you didn't consider the Fink article considering the benefits of flyknit technology because you found that to be unreliable evidence, correct?

A. That's correct. Uncreditable evidence.

Q. Okay.

What fact evidence did you consider when you were assessing the alleged benefit to the claimed inventions?

A. I was only looking -- remember, I'm rebutting -- excuse me. I'm responding to what Pastore said. It wasn't my job to find that evidence. My job was to rebut what he said.

Q. I'm going to ask the question again because I don't think you're answering it.

What fact evidence did you consider when you were assessing the alleged benefits of the claimed inventions?

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MR. RAZAI: Objection to form.

A. I didn't.

Q. No evidence?

A. Not that I can recall.

THE WITNESS: Excuse me.

Are we done with this stuff here for the time being?

MR. BOWLING: Yes, for the time being.

THE WITNESS: Ali, can I ask you -- I don't know what's here. I'm sorry. I'm jumping around.

MR. BOWLING: I'll leave this on for you. I think you're going to take it off right away.

THE WITNESS: Can I ask a favor? You should give me one of these at a time.

MR. BOWLING: To the extent I can, I'll do that. At times, we want to compare certain things --

THE WITNESS: Or if not, say we're going to do another one so I'll bind it --

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MR. BOWLING: Sure. You may might want to remove that stuff off the desk and that way you have more space.

THE WITNESS: That's a good idea. Okay. I'm with you.

(Whereupon, Exhibit 7 was marked for identification.)

BY MR. BOWLING:

Q. Dr. Brookstein, I'm handing you what we've marked as Brookstein Exhibit 7.

Do you recognize this document?

A. My opening expert report.

Q. What was the subject matter of this opening report?

A. Invalidity of the asserted patents.

Q. Okay.

And I'll represent to you that just for ease of using the exhibit today, we have excluded the appendices from what I've just handed you. Everything else is complete, but we didn't attach the appendices, just so it's easier to work with.

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A. As long as you don't ask me questions about the appendices, that's fine.

Q. If we do, we'll give them to you. Sound good?

A. Okay.

Q. Okay.

I'm going to ask you to flip to the very last page, page 335 of this report.

A. Mm-hmm.

Q. Actually, I'm sorry, 334.

A. Two thirty-four?

Q. Three thirty-four.

Do you see there's a date and signature on 334?

A. Yes.

Q. That's your signature?

A. It is.

Q. April 15th, that's the date submitted this report?

A. It's the day I executed it, yes.

Q. Approximately how long did you spend preparing this report?

A. Let me see.

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In April, again somewhere between 40 and 80 hours. That's an estimate. Not eight hours and not 200 hours.

Q. As you sit here today, are you aware of any inaccuracies in your opening expert report?

A. Just as I mentioned earlier, there might be some typos on citations.

Q. How many typos?

A. Probably less than five.

Q. All in citations?

A. As best as I can recall, yes.

Q. Did you omit from this report any opinions that you have?

A. None.

Q. As you sit here today, are there any changes you'd like to make to your opening expert report aside from fixing the citation typos?

A. None.

Q. Do you have any opinions with respect to the validity of Nike's asserted patents that aren't set forth in your

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opening report?

A. I have to look. I'm not going to go through 350 pages. I'm just looking at the table of contents.

No, I think everything is here, other than where I talk about the grounds for the IPRs. I don't have the IPRs in here, but they're incorporated by reference.

Q. Okay.

So as you sit here today, you don't have any opinions with respect to the validity of Nike's asserted patents that aren't set forth in your opening report or the materials incorporated by reference, correct?

A. Including the IPRs? Oh, you said included by reference? No, I have no other opinions.

Q. I think the no there might be a little confusing, so I'm going to ask you one more time.

A. That's fine.

Q. As you sit here today, do you have any opinions with respect to the

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validity of Nike's asserted patents that are not set forth in your opening report or the materials incorporated by reference in your opening report?

A. I have none.

Q. Appendix B to your opening report was your materials considered. As I mentioned, we didn't attach the appendix here just for ease of use.

As you sit here today, are you aware of any materials that are not listed in your materials considered for this opening report that you relied upon?

MR. RAZAI: Objection to form.

A. I can't recall.

Q. So you're not aware of?

A. I'm not aware of any that I can recall at this time.

Q. Right.

So as you sit here today, as far as you know, the materials considered list for this opening report contains every material that you considered in rendering the opinions discussed herein?

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A. As best I can recall, yes.

Q. Okay.

Earlier, you mentioned that you relied upon Ms. Young's report in rendering your opinions in this opening report.

Is that right?

MR. RAZAI: Objection to form.

A. I don't think -- I don't think I said I relied. I said I agreed with some of her opinions.

Q. Okay.

You reviewed her opinions?

A. I read her report, yes.

Q. You considered them as part of forming your analysis?

A. No. I -- no, I did my own analysis. I saw they agreed with what she said for the most part.

Q. Had you completed the rendering of your opinions at the time you read her report?

A. No. I mean, I was doing it all at the same time.

Q. During the time when you were

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analyzing for validity and coming up with your opinions, you were simultaneously reviewing Ms. Young's opinions?

A. No. Because I saw her report close to the end when this was done and then I had that -- I had read that. It was due April 15th, too. I had it sometime, like, if I recall, a week or so before. I had already written the bulk of my report and I was just saying oh, she's saying the same thing. So I didn't rely on them.

Q. Upon reading Ms. Young's report, did you change any of your opinions?

A. Absolutely not.

Q. Why did you review her report?

A. I was asked to.

Q. Would you have wanted to review her report if you hadn't been asked to?

A. Not necessarily.

Q. Why not?

A. I generally don't -- I've been doing this for a long time. I generally don't read other people's reports. I like to keep my reports just 100% what I've done.

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Q. Why?

A. Just avoid any kinds of conflict or anything like that.

Q. What kind of conflict --

A. Sometimes attorneys will say have you spoken to the other expert, compared notes, which I've never done and in a way --

Q. Why not?

A. It's just bad form. Because I want my report to be my report.

Q. In what way would comparing notes be bad form?

A. Because I want it to be my report, not someone else's report.

Q. And if you compare notes, it wouldn't be your report?

A. No. It could still be my report. I mean, it still would be my report, but I like to have a clean, sterile report. It's my opinion.

Q. If you compared notes during the preparation of your report, it wouldn't be a clean, sterile report?

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A. Depends on what the notes were. Depends on what the notes were.

Q. In what way does it depend on what the notes were?

A. Well, if I said X and had good evidence and a person said Y and had good evidence, I would be forced to go back and look and see if my X was right. That's all. It's just a confirmation. I don't need that other person's report to write my report.

Q. Do you know if Ms. Young relied on your opinions at all?

MR. RAZAI: Objection to form. Calls for speculation.

A. I have no idea.

Q. Did you share any documents with her, photos?

A. I didn't share them, but I think counsel --

MR. RAZAI: Objection. Don't speculate as to what counsel may have done.

A. I didn't share any.

THE WITNESS: Four minutes to

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break time.

MR. BOWLING: Okay.

We could go ahead and take a quick break now and then we'll jump in and start going through some more of the report. Okay?

THE WITNESS: Yes.

THE VIDEOGRAPHER: The time is 3:07 p.m.

We're going off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 3:17 p.m.

We're back on the record.

BY MR. BOWLING:

Q. Okay.

Dr. Brookstein, can you turn to paragraph 173 of your opening report?

A. Yes, I can. I am there.

Q. Okay.

In paragraphs 173 through paragraphs 260, you provide opinions about the adidas A3 shoe and it rendering certain claims of the '749 patent invalid; is that

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right?

A. Obviously I'm not going to read every paragraph, but what was the final paragraph.

Q. Two sixty.

A. Let me just look. Yes, sir.

Q. Do you have any opinions about the adidas A3 shoe that are not contained in these paragraphs of your report?

A. No. I don't know if this is an opinion, but the other day I was looking at the A3 shoe but I saw something that I hadn't seen before that reinforces what I'm saying.

Q. But that's not in your report?

A. No.

Q. Is there any documentation of that?

A. No.

Q. So it's your opinion as --

A. Excuse me. I said A3. I didn't mean A3.

Q. Okay.

It's your opinion as set forth

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in the header above paragraph 173 that the A3 shoe anticipates claims one, five through six, eight, 11 and 12.

Is that right?

A. Yes, it is.

Q. In your opinion, does the adidas A3 shoe anticipate any other claims?

A. Not that I can recall.

Q. Okay.

When you were rendering the opinions about the method in which the adidas A3 shoe was manufactured, did you review a physical copy of the adidas A3 shoe?

A. Yes.

Q. Did you review any videos showing the manufacturing process of the adidas A3 shoe?

A. No.

Q. Did you review any documents describing the manufacturing process of the adidas A3 shoe?

A. No.

Q. Did you review any technical

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documents related to the adidas A3 shoe?

A. No.

Q. Did you review any knitting programming files related to the adidas A3 shoe?

A. No.

Q. Did you review a bill of materials for the adidas A3 shoe?

A. No.

Q. Did you talk to anyone about the manufacturing process for the adidas A3 shoe?

A. No.

Q. So in your report, you refer to a certain aspect of the upper as the A3 shoe's side panel; is that right?

A. Yes.

Q. It's your opinion that that side panel and the manufacturing of that side panel is what anticipates claims one, five through six, eight, 11 and 12?

A. Could you repeat the question?

Q. Is it your opinion that the manufacturing of that side panel by adidas

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is what anticipates claims one, five through six, eight, 11 and 12?

A. Yes.

Q. So that side panel we're going to be discussing today, you'll know I'm referring to that portion of the shoe?

A. I understand.

Q. Have you ever seen the adidas A3 shoe side panel before it was cut from a textile sheet?

A. No.

Q. Have you ever seen the adidas A3 shoe side panel before it was assembled into a shoe?

A. No.

Q. When you were forming your opinions about the adidas A3 shoe side panel, you made certain cuts to that side panel, right?

A. Yes.

Q. Did you ever remove the adidas A3 shoe side panel in its entirety?

A. No.

Q. Have you ever seen all the

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edges of the adidas A3 shoe side panel?

A. I've seen the stitching of all the edges, yes.

Q. Have you ever seen the edges themselves?

A. Only part of one edge.

Q. So at no point have you ever seen all of the edges of the adidas A3 shoe side panel, correct?

A. As a separate panel, not part of the shoe. No, I've never seen it, the entire part of it.

Q. And you've never seen the full shape of the adidas A3 shoe side panel as a standalone textile element, correct?

A. I thought I answered that. No.

Q. Okay.

Let's turn to paragraph 261, please.

A. Yes.

Q. We're going to do the same thing for the next couple of shoes that we just did the adidas --

A. I understand. 261 to what

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paragraph?

Q. 347.

A. Wait. 261 --

Q. Yes. Through 347.

A. Okay. Hold on. Okay. 261, 347.

Q. Okay. So in paragraphs 261 --

A. Wait. Okay. Yes.

Q. In paragraphs 261 through 347, you set forth the opinions you've rendered about the adidas wrestling shoe, correct?

A. Correct.

Q. Do you have any opinions about the adidas wrestling shoe that are not contained in these paragraphs of your report?

A. No.

Q. When you were forming your opinions about the method in which the adidas wrestling shoe was manufactured, did you review any videos showing the manufacturing process of that shoe?

A. No.

Q. Did you review any documents

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describing the manufacturing process of the adidas wrestling shoe?

A. What do you mean by documents?

Q. Did you review any documents describing the manufacturing process of the adidas wrestling shoe?

A. I did see some articles in a magazine. And I might want to add I did see some articles in the newspaper about the A3 shoe too. I don't know if they're really called documents.

Q. Did those articles describe the manner in which the shoe was manufactured?

A. I don't recall. I was really looking only at the dates of when these articles were there.

Q. So as you sit here today, are you aware of any documents that you reviewed that describe the manufacturing process of the adidas wrestling shoe?

A. No.

Q. As you sit here today, are you aware of any documents that you reviewed that describe the manufacturing process of

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the adidas A3 shoe?

A. No, I am not.

Q. Did you review any technical documents related to the adidas wrestling shoe?

A. No, I did not.

Q. Did you review any knitting program files related to the adidas wrestling shoe?

A. No, I did not.

Q. Did you review a bill of materials for the adidas wrestling shoe?

A. No, I did not.

Q. Did you talk to anyone about the manufacturing process of the adidas wrestling shoe?

A. No, I did not.

Q. When you're rendering your opinions about the adidas wrestling shoe, you described the textile element as the knit panel; is that right?

MR. RAZAI: Objection to form.

A. I didn't hear the question.

Q. When you're rendering your

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opinions about the adidas wrestling shoe -- okay.

When you were rendering your opinions about the adidas wrestling shoe, you specifically discussed what you called the lateral and medial pieces of the upper; is that right?

A. That's correct.

Q. Have you ever viewed the adidas wrestling shoe lateral and medial pieces before they were cut from a textile sheet?

A. No.

Q. Have you ever seen the adidas wrestling shoe lateral and medial pieces before they were assembled into a shoe?

A. No.

Q. At any point did you remove the lateral and medial pieces of the adidas wrestling shoe in their entirety?

A. No.

Q. Have you ever seen all the edges of the lateral or medial pieces of the adidas wrestling shoe?

A. I saw where it was stitched to

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the rest of the fabric, so I think I'd have to answer I'm not sure if it was medial or lateral. I think it was the lateral.

Q. Did you see the edges themselves?

A. Well, they're sewn in, so you can't really see the edges, no.

Q. So you haven't seen them?

A. The actual edges? Only part of one edge.

Q. Have you ever seen all of the edges of either the lateral piece or medial piece of the adidas wrestling shoe?

A. No.

Q. Have you ever seen the full shape of either the lateral piece or the medial piece of the adidas wrestling shoe as a standalone knitted element?

A. A standalone element? No.

Q. Let's go to paragraph 348 of your opening report.

A. Yes. Yes, sir.

Q. Okay.

In paragraphs 348 through 431,

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you render your opinions about the grey Nike Air Presto; is that right?

A. What's the second paragraph?

Q. So 348 through 431?

A. Through 431? That's correct.

Q. Do you have any opinions about the grey Nike Air Presto that are not contained in these paragraphs of your report?

A. No.

Q. When you were forming your opinions about the method in which the grey Nike Air Presto was manufactured, did you review any videos showing the manufacturing process of the grey Nike Air Presto?

A. No.

Q. Did you review any documents describing the manufacturing process of the grey Nike Air Presto?

A. No.

Q. Did you review any technical documents related to the grey Nike Air Presto?

A. Not that I recall.

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Q. Did you review any knitting profiles related to the grey Nike Air Presto?

A. Not that I recall.

Q. Did you talk to anyone about the manufacturing process of the grey Nike Air Presto?

A. No.

Q. Have you ever seen the knit panel of the grey Nike Air Presto before it was cut from a textile sheet?

A. No. No.

Q. When you're discussing the Nike Air Presto in your report, you refer to two panels, specifically the vamp and the tongue.

Is that right?

A. That's correct.

Q. Have you ever seen the vamp or the tongue of the Nike Air Presto before they were cut from a textile sheet?

A. No.

Q. Have you ever seen the vamp or the tongue of the grey Nike Air Presto

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before it was assembled, before either one of them was assembled into a shoe?

A. No.

Q. As part of your analysis, did you remove the vamp or the tongue of the grey Nike Air Presto in their entirety?

A. No.

Q. At any point have you seen all the edges of the vamp or the tongue of the grey Nike Air Presto?

A. I didn't see them, but I felt them.

Q. But you've never seen them?

A. No.

Q. Have you ever seen the full shape of the vamp or the tongue of the grey Nike Air Presto as standalone elements?

A. No.

Q. Let's turn to page 146 of your opening expert report, please.

A. Yes.

Q. There's an image there that shows what you call or what is described as a lay plan.

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Is that right?

A. That's what it's called, yes.

Q. That's from Clothing Technology Book?

A. Yes.

Q. At the very bottom of page 255, there's a sentence on the next page that begins: Thus, placing a small amount of waste material between each textile element ensures that the textile elements themselves are not damaged by the removal process.

Do you see that?

A. Yes.

Q. What is the waste material there referring to?

A. It's sometimes we call it kerf. It's like whenever you cut something, if you cut something, by definition, there's some waste material.

MR. BOWLING: Let's take a quick five-minute break, if that's okay.

THE VIDEOGRAPHER: The time is 3:43 p.m. and we're going off the

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record.

(Recess taken)

THE VIDEOGRAPHER: The time is 4:04 p.m.

We are back on the record.

BY MR. BOWLING:

Q. I'm going to ask you, Dr. Brookstein, to turn to --

A. Excuse me. Can I ask a favor?

Q. Sure.

A. I hate Brookstein. It's Brookstein.

Q. I'm sorry.

A. It happens all the time. It's like chalk board.

MR. BOWLING: Have I been saying that all day?

THE WITNESS: Not all day.

MR. RAZAI: First time today.

MR. BOWLING: I'm sorry. It's because the break was too long.

THE WITNESS: It's funny. It's like fingernails on the chalkboard.

MR. BOWLING: I totally get it.

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BY MR. BOWLING:

Q. Okay.

Dr. Brookstein, I'm going to ask you to turn to -- let's go with paragraph 55 of your opening report.

A. Okay. Yes, sir.

Q. Okay.

I'm going to ask you some questions about this side panel of the adidas A3 shoe.

Okay?

A. That's okay.

Q. So you opine that there are three stripes on this side panel, correct?

A. No. Two stripes.

Q. Two stripes?

A. Oh, you mean -- I thought you meant two types of stripes. You're talking about -- oh, there's more than that. Let's see. One, two, three, four, five -- there's six.

Q. Okay. Six stripes.

Can you flip to page -- paragraphs 56, the top of page 53, there's

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an image?

A. Yes.

Q. Can you label the six stripes for me with arrows?

A. Yes. You want me to put numbers or arrows?

Q. If you could put six arrows and then write stripes, kind of connecting all the arrows.

A. I see what you're saying. Then why don't I do this --

Q. Perfect.

A. I can't draw that, but you know what I'm doing. Stripes. Okay?

Q. Okay.

A. Is that sufficient for you?

Q. Sure.

Do you have any opinion as to whether in the textile element in which the side panel is knitted, did those stripes continue into the surrounding material?

A. Yes.

Q. They do?

A. Yes.

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Q. How do you know that?

A. Let me back up. I assume they do because I haven't seen them.

Q. So you don't know if they do?

A. I don't know if they do.

Q. What makes you think that they might extend into the rest of the textile element?

A. Well, when you work knit, you work knit in a continuous fashion, in a rectangular format. You could conceivably change to have another stitch or not, another type of stitch.

Q. Okay. Let's turn now to paragraph 74, please.

A. Okay.

Q. I'm going to asking you the same thing about the wrestling shoe.

A. Okay. Paragraph 74?

Q. Yes. It's on the top of page 46. There's a short paragraph and below that, there's an image where you labeled second texture, first texture.

Do you see that?

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A. Did you say page 46?

Oh, yes. I do.

Q. Do you have any opinion as to whether the textures that you've identified there, the stripes, continue on to the rest of the knitted textile element --

MR. RAZAI: Objection to form.

Q. -- that you contend surrounds --

A. You're only talking about the stripes, not the fabric that is to the far right of that; is that correct?

Q. Correct.

A. They could.

Q. You don't know?

A. I've never seen them.

Q. For both the adidas wrestling shoe and the adidas A3 shoe, you don't know whether the portion that you think is the surrounding textile structure does or does not have the stripe textures that you've identified in the panels, the knit elements; is that right?

A. That's correct.

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Q. But you think they might?

A. They might.

Q. Okay. Let's turn now to paragraph 210 of your opening report.

A. Okay. Paragraph 210, yes.

Q. Okay. So here you're opining on claim 12 of the '749 patent. This is where the edges are secured along the lower region of the upper.

A. Yes.

Q. Okay.

So we talked about this a little bit earlier. The claim requires that edges -- plural -- of the knitted textile element form a seam that extends along the lower region of an upper, right?

A. Correct.

Q. If you turn now to paragraph 212 --

A. Yes.

Q. And go over to the top of page 128, do you see that image?

A. Yes.

Q. You've pointed there lower edge

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of the fabric upper, right?

A. Yes.

Q. So is it your opinion that only one edge of the side panel is secured to the sole structure?

A. What do you mean, the whole structure?

Q. I said the sole structure.

A. Oh, I thought you said the -- I thought you were saying S-O-L-E, like that's the only structure.

Q. Is it your opinion that only one edge of the side panel is secured to the sole structure?

A. At the bottom? The sole at the bottom? Is that what you're talking about?

Q. Are there other parts of the sole?

A. When you use the word sole, sole could mean only or it could mean a structure, so I'm saying --

Q. Let's look back at claim 12.

The term sole structure appears in claim 12, right?

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A. Yes.

Q. Specifically, claim 12 requires securing edges of the knitted textile element to form a seam that extends along a lower region of an upper and securing the upper to a sole structure.

A. So that defines sole --

Q. Do you see that?

A. Yes, that defines -- you're talking --

Q. Is it your opinion that only one edge of the side panel of the adidas A3 shoe is secured to the sole structure?

A. Yes.

Q. Which edge?

A. The bottom edge.

Q. Where is that secured to the sole structure?

A. When I peeled away the rubber, I could actually see stitching and it was stitched to the sole structure.

Q. Okay. Let's go now to paragraph 90, please.

A. Ninety. Okay. Hold on. This

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is how I get screwed up here, when I do it this way. What did you say? Which paragraph? Which paragraph, Mr. Bowling?

Q. Ninety. We're going to look at page 57 of your report.

A. That makes it a little easier. Yes.

Q. So the outer surface of the textile element of this grey Nike Air Presto, shown here on page 57, that's just one texture on the outside of that shoe; is that right?

A. That's the way I observed it, yes.

Q. The inner surface of that textile element also has just one texture; is that right?

A. Yes.

Q. So if we turn to paragraph 92 --

A. Yes.

Q. -- there you show the exterior surface and the interior surface, right?

A. Correct.

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Q. Is it your opinion that the alleged surrounding structure on which this knitted element was created would have the same textures on the exterior surface and the interior surface as are shown here in the knit element itself?

A. Yes.

(Whereupon, Exhibit 9 was marked for identification.)

MR. BOWLING: Actually, let's make this, if we can, Exhibit 9. That video we will make Exhibit 8.

BY MR. BOWLING:

Q. Dr. Brookstein, we're handing you what we've marked as Brookstein Exhibit 9.

A. Yes.

Q. Do you recognize this document?

A. I do.

Q. What is it?

A. It's an international application published under the Patent Cooperation Treaty, International Patent -- International Publication Number W092/2223

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and it is titled "Method of Producing a Shaped Shoe Part from a Strip of Fabric and a Shaped Shoe Part Produced by this Fabric."

Q. So this document, Exhibit 9, is what you referred to in your report as the Nishida reference; is that right?

A. That is correct.

Q. It's actually an English translation of the Nishida reference?

A. It's a certified English translation, yes.

Q. Is it your opinion, Dr. Brookstein, that unwound parts number two disclosed in Nishida are simultaneously knit with the base material?

A. Not with the base material, no.

Q. No?

A. No.

Q. What makes you say that?

A. You can't knit two separate unconnected fabrics at the same time -- not at the same time. Are we going back to the report?

Q. Yeah, please.

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A. Okay. All right.

Q. Let's go to paragraph 433 of your report. It's on page 223.

A. Okay. Yes.

Q. Paragraph 433 through 456, you're discussing what you refer to as the '296 patent; is that right?

A. Yes, this is the double patenting.

Q. Okay.

Paragraph 433, you're pointing to claim 14 of the '296 patent, right?

A. That's correct.

Q. That claim is directed to an article, not a method of manufacturing; is that right?

A. That's in the preamble, yes, article.

Q. Those claims relate to an article, right? That's the claim they mention, claim 14?

A. Well, an article for receiving a foot of a ware is more than just an article.

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Q. Okay.

So claim 14 recites an article receiving a foot of a ware?

A. Right.

Q. Is there anywhere in claim 14 a discussion of the process that's used to knit that article of footwear?

A. Let me read it. Yes.

Q. Where is that?

A. Second line from the bottom where it says the second section -- the first and second section are connected by tuck stitches. Tuck stitches are only in weft knitting, so a POSA would see the word tuck stitches and know that it was weft knitting.

Q. Anywhere else in the claim that discusses the process for knitting --

A. That does it.

Q. That's it?

A. Yeah. That's pretty strong, though. A POSA wouldn't make that mistake.

Q. Wouldn't make what mistake?

A. By thinking it was something

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other than a weft knit.

Q. Okay. So that tells you it's weft knit.

Do you know anything else about the process of knitting the article described in claim 14?

A. Just the properties of the different stitches and then it just uses the word "knit" and types of stitch. But once you see the word "tuck," you know you're in a weft knit.

Q. Okay.

Is there any mention of a surrounding material in claim 14 of the '296 patent?

A. Not that I see.

Q. Let's turn to paragraph 459.

A. Okay. Yes.

Q. Okay.

So in paragraphs 459 through 500, you set forth opinions --

A. Let me -- hold on. Excuse me a second. What paragraph?

Q. Four fifty-nine to 500.

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A. I got it.

Q. In paragraphs 459 through 500 of your opening report, you set forth opinions about the '046 patent specifically related to the Nike Free 5.0?

A. Correct.

Q. Specifically, you're providing opinions about tubular structures, correct?

A. Correct.

Q. Do you have any opinions about the '046 patent and its validity in view of the Nike Free 5.0 that are not contained in paragraphs 459 through 500?

A. No.

Q. When you were rendering your opinions about the Nike Free 5.0, did you have a physical copy of the shoe?

A. Yes, I did.

Q. Did you review any videos showing the manufacturing process for the Nike Free 5.0?

A. No.

Q. Did you review any documents describing the manufacturing process for the

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Nike Free 5.0?

A. Not that I can recall.

Q. Did you review any technical documents related to the Nike Free 5.0?

A. Not that I can recall.

Q. Did you review any knitting programming files related to the Nike Free 5.0?

A. Not that I can recall.

Q. Did you review a bill of materials for the Nike Free 5.0?

A. Not that I can recall.

Q. Did you talk to anyone about the process for manufacturing the Nike Free 5.0?

A. No. Back to that question, it does say in here I've been informed by counsel of something, but that I think is privileged.

Q. Okay.

On page 234, there's an image at the top of the page where you've pointed to a front surface of the webbed areas?

A. Yes.

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Q. In that picture, was the collar of the Nike Free 5.0 in a stretched position or in a neutral position?

A. I don't know if I state it, but I seem to think it was in the stretched position.

Q. Okay.

Let's look on the top of the page 236. There's two images shown there, one is labeled unstretched or neutral position, the other is labeled stretched or extended position.

Do you see that?

A. Yes.

Q. In the top image, can you see the front surface of the webbed areas?

A. I can't, no, not with my naked eye.

Q. Can you see them in the image shown below that labeled stretched or extended position?

A. Yes.

Q. What about page 240 of your report? There's a pink shoe, about middle

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of the page.

A. What page did you say?

Q. Two forty.

A. Yes.

Q. Can you see the webbed area in that picture, the magnified version?

A. Not really, no.

Q. Not at all?

A. No.

Q. Is that because the image is not good or --

A. I don't know why. I just know I can't see it. I can't tell you why.

Q. Okay.

What about the image at the bottom of page 253? That's an image of Nike Free 5.0, correct?

A. That's correct.

Q. Can you see the webbed areas in that picture?

A. Not really, no.

Q. No? Not at all?

A. Not really. I can only see them when they're stretched.

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Q. Okay. Okay. Let's look now at page 257 of your report, paragraph -- I'm sorry. Paragraph 483.

A. Yes.

Q. Here, you say that similar arbitrary curved lines may be drawn on an image of the collar of the Nike Free 5.0?

A. Yes.

Q. What do you mean by that?

A. Let me read the paragraph. I was talking about the curved areas on the top image, only the top edge.

Q. So where have you drawn those portions? How would you describe where you've drawn the first curved portion and the second curved portion?

A. The top and the bottom edge. On the edge, the stitch on the top, the top of the stitch and on the bottom of the stitch.

Q. The bottom of what stitch?

A. The top stitch.

Q. So are you drawing those on the cross section of the collar?

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A. No, it's a plan view.

Q. Okay.

So you're just drawing this on the side of the collar?

A. Right.

Q. You're saying that you're drawing a first curved portion on the bottom of the top stitch?

A. Yes.

Q. And a second curved portion on the top of the top stitch?

A. Yes.

THE WITNESS: Excuse me.

When you took your break, I didn't take a bathroom break, so now it's time for my bathroom break. I sat here the whole time.

MR. BOWLING: Sure.

THE VIDEOGRAPHER: The time is 4:39 and we're going off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 4:52 p.m.

We're back on the record.

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BY MR. BOWLING:

Q. Okay, Dr. Brookstein.

At the top of page 258 of your opening report, there's an image with annotations labeled first curved portion and second curved portion, correct?

A. That's correct.

Q. Is it your opinion that what you've labeled there as the first curved portion is a first curved portion with a first curve length of the tubular rib structure as recited in claim eight?

A. I never said they were tubular rib structures.

Q. Okay.

So what is the first curved portion? First curved portion of what?

A. I thought I answered that already. Of the top course.

Q. Okay.

So it's a first curved portion of the top course?

A. That's the way it looks to me.

Q. Why did you draw that first

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curved portion there?

A. I think in the limitation there's a -- there's something where limitation 8D, tubular structures having a first curved portion with the first curved length extending from the front side of the webbed areas and a second curved portion with a second curved length extending from the backside, the first curved length being greater than the second curved length.

Q. Right.

And those curved portions I recited in the claims are curved portions of the tubular rib structure, right?

A. Yes.

Q. Okay.

So is that what you have labeled there?

A. Well, no, because they're not -- no, because they're not tubular structures.

Q. Okay.

So in your opinion, the Nike

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Free 5.0 does not have tubular rib structures?

A. Based on -- yes. There's a whole argument I have about why they're not tubular structures.

Q. Okay.

A. Excuse me. Wrong. Let me go -- give me a minute, please. Give me a minute, please, so I don't misspeak.

Q. Then when you're ready, I want to turn to paragraph 491, but take your time.

A. Okay. Give me a second. I want to get something straight for the record.

When you asked me originally about paragraph 459 and asked me if Nike Free 5.0 anticipates claims one through three, seven, eight, nine and 15 and 20, this is the only time today I would like to read into the record what I wrote because I think it's important.

Q. Okay. Which paragraph?

A. Paragraph 459.

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Q. Okay. Sure.

A. It is my understanding the claims are construed the same way for both invalidity and infringement. I've been informed by counsel that Nike's interpretation of tubular structures is broad enough to encompass ribbed portions of a knitted article and that Nike's interpretation of the independent claims of the '046 patent would cover any knitted ribs that may be stretched or separated to reveal portions of the fabric. See Nike's infringement contentions for the '046 patent.

I disagree with Nike's overbroad interpretation of tubular structures and I note that Nike appears to apply a different interpretation in IPR 2024-00159 that requires a tubular structure, a closed loop structure that's shaped like a tube. Patent owner preliminary response 17.

But if the '046 patent claim is interpreted as Nike does, then the Nike Free

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5.0 anticipates those claims that I mentioned earlier. So that would tell me that the Nike Free has tubular structures, based on Nike's overbroad interpretation.

Q. Okay.

Can you turn, please, to paragraph 501 of your opening report?

A. Yes. What page is that?

Q. Page 271.

A. Okay. Yes.

Q. Okay.

Paragraph 501 through paragraph 553 where you offer your opinions about the validity of the '046 patent and view of Nike Lunar 1; is that right?

A. Yes, sir.

Q. Do you have any opinions about the validity of the '046 patent in view of the Nike Lunar 1 that are not included in those paragraphs?

A. Not at this time, no.

Q. Aside from the Nike Lunar 1 and the Nike Free 5.0, do you have opinions related to the collars of any other shoes

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with respect to the '046 patent?

A. Not that I recall, other than what's in the IPR.

Q. Okay.

When you rendered your opinions about the validity of the '046 patent in view of the Nike Lunar 1, did you have a physical copy of that shoe?

A. Yes.

Q. Did you review any videos showing the manufacturing process for the Lunar 1?

A. No.

Q. Did you review any documents describing the manufacturing process of the Nike Lunar 1?

A. No.

Q. Did you review any technical documents related to the Nike Lunar 1?

A. No.

Q. Did you review any knitting programming files related to the Nike Lunar 1?

A. No.

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Q. Did you review a bill of materials for the Nike Lunar 1?

A. No.

Q. Did you talk to anyone about the manufacturing process of the Nike Lunar 1?

A. No.

I'd like to recant something.

Q. Sure.

A. The question you asked me about others with the Chargefeel Mid and the Chargefeel Mid 2, they have tubes under -- tubular structures under Nike's broad interpretation of what a tubular structure is.

Q. Okay.

Aside from the Nike Free 5.0 and the Nike Lunar 1, do you have any opinions about other shoes that render claims of the '046 patent invalid?

A. Could you repeat the question?

Q. Aside from the Nike Free 5.0 and the Nike Lunar 1, do you have any opinions about other shoes that render

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claims of the '046 patent invalid?

A. I just said it. The Chargefeel Mid and the Chargefeel Mid 2.

Q. It's your opinion that those shoes render the '046 patent invalid?

A. Based on Nike's interpretation of what a tubular structure is.

Q. So it's your opinion those are prior art --

A. Oh, prior art?

Q. -- that render the patent invalid?

A. Oh, prior art? No. I don't think you said prior art at first.

Q. Aside from the Nike Free 5.0 and the Nike Lunar, do you have any opinions about other shoes that render the claims of the '046 patent invalid?

A. In terms of prior art?

Q. That render the patent invalid.

MR. RAZAI: Objection to form.

A. Oh, invalid? I'd have to go back and look at my IPR to see what I -- what we have -- we have several grounds.

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Q. Aside from the Nike Free 5.0 and the Nike Lunar 1 and the materials incorporated by reference in your IPR, do you have any opinions about other shoes that render the claims of the '046 patent invalid?

MR. RAZAI: Objection to form.

A. Prior art shoes; is that correct?

Q. Yes, as would be required to render the claims invalid.

A. No, no, no.

Q. Okay.

Let's turn to paragraph 571 of your opening report.

A. Okay. Yes -- oh, paragraph 571?

Q. Yes, I'm sorry. Paragraph 571.

A. Okay.

Q. It's on page 322.

A. Yes.

Q. In this paragraph, you're discussing what you claim to be non-infringing alternatives --

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A. Yes.

Q. -- and you say that the accused products --

A. Tell me what paragraph you're reading from.

Q. Let's see. Let's start with 570.

A. Yes.

Q. You say that for the '749 patent you analyzed whether a process that you refer to as a cut and sew would infringe the claims of the '749 patent?

A. Correct.

Q. For the '046, you analyze whether a non-ribbed collar would infringe?

A. Right.

Q. For the '484 patent, you analyze whether a circular knit collar would infringe any claims of the '484 patent, correct?

A. Correct.

Q. Then you say if any of the accused products were found to infringe the '749 patent, the '046 patent or the '484

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patent, lululemon could have implemented one or more of these alternatives to render each accused product noninfringing.

Do you see that?

A. I do.

Q. Then if you skip a sentence and go down to the sentence that begins: In my opinion -- do you see that?

A. Yes.

[redacted]

Q. And when you're saying would not have posed any technical hurdles and would have worked, what timeframe are you referring to?

A. I don't know timeframe. I know it was based on a conversation I had on Zoom with two people from lululemon, George Robusti and Katie Fleming.

Q. You don't know what timeframe you were analyzing these non-infringing

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alternatives?

A. April 12th.

Q. Not when you had the conversations or created this report --

[redacted]

Q. When you assessed these shoes as non-infringing alternatives, did you assess them at present day?

A. I don't recall.

Q. You don't know?

A. I don't recall.

Q. Is there anywhere in your report when you say the time point at which you assessed the viability of non-infringing alternatives?

A. I don't recall.

[redacted]

Q. Those are employees of

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lululemon, right?

A. It's my understanding they are.

Q. Earlier, you testified that the testimony of Nike employees was unreliable because those individuals were biased in providing their subjective opinion, right?

A. Yes. But they were subjective opinions. These are not subjective opinions. These are factual opinions.

Q. Why?

A. You're talking about manufacturing, how you manufacture something. The Nike people were talking about how things could be more comfortable, more breathable, things like that. Those are unmeasurable.

Q. You can't test breathability?

A. You can test breathability, but there was no evidence that they did that.

Q. Can you test the amount of waste involved in certain manufacturing processes?

A. You can determine it, yes. Also, I might add that the Nike people were

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both patentees and, you know, probably didn't want to lose their patent.

Q. What do you mean by that?

A. They were -- both of those people were listed as patentees on the patents in question.

Q. They were named inventors?

A. Yes.

Q. And your opinion is that that rendered their testimony unreliable?

A. No. It's a in my mind, it's more of a factor. That's all.

Q. So what exactly caused you to discount the testimony of Mr. Dua and Mr. Meir? Was it that they were Nike employees? Was it that they were named inventors or was it that the subject of their testimony was unmeasurable?

A. It was -- yes, you can measure breathability because I have done that. But other things they talked about, comfort -- I have to go back and look what it is they testified to, but when I saw that, I said -- are you listening to me?

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Okay. When I saw that, I said this is way too subjective. But the people -- if I recall, Robusti, he's, like, the lead designer and I forget what Katie Fleming is. These people are people who are on the ground, making and developing new products. So it's more probable than not that they know what they're talking about.

Q. So you said George Robusti and Katie's testimony was reliable because they were on the ground making and developing new products?

A. It wasn't testimony. They weren't under oath. It was just a conversation we were having.

Q. So the information they shared with you was reliable evidence because, as you put it, they were on the ground, making and developing new products, right?

A. Yes.

Q. Were Mr. Dua and Mr. Meir on the ground making and developing new products?

A. I have no idea what they were

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doing. All I know is they were the inventors on the patents.

Q. Okay.

So Mr. Dua, Mr. Meir testified that the claimed inventions allowed Nike to create footwear that was lightweight, correct?

A. Lightweight is a subjective term.

Q. You can't measure weight?

MR. RAZAI: Objection. Argumentative.

A. You certainly can measure weight. But it's like I tell my students, if you're going to use a term like lightweight, heavy, you have to compare it to something. You just can't say lightweight. It doesn't mean anything.

Yes, it's lightweight compared to a brick, but not -- you know, you can't use terms like that. They're meaningless when you use terms like that.

Q. I think they were comparing it clearly to traditional footwear.

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A. Well, you didn't read that. You didn't read that part.

Q. Well, I'm asking you why they discounted their testimony.

A. Oh, no, no, no. If you read that part, then I would agree. But when you first read it, you didn't say that. You just said lightweight.

Q. I'm asking you why you discounted the testimony of Mr. Dua and Mr. Meir and found it not credible.

MR. RAZAI: Objection. Mischaracterized the testimony.

Q. You said you didn't find it credible because they were subjective opinions that were not measurable, right?

MR. RAZAI: Objection. Mischaracterizes the testimony.

A. Yes.

Q. And you said that you could measure breathability, right? Could you measure weight?

A. Yes.

Q. Could you measure stretch?

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A. Yes.

Q. Can you measure cushioning?

A. No.

Q. Can you measure shock absorption?

A. No. In a shoe, no. At least I have no idea how you do it.

Q. You don't have any experience with footwear?

A. No, I have no experience in knowing how you measure cushioning in any product.

Q. Do you have any experience developing or making footwear?

A. You've already asked me that question. No.

Q. Okay.

So it sounds like a number of things that Mr. Dua and Mr. Meri testified about as being benefits of the claimed inventions are things you can measure, right?

A. Some are, some aren't.

Q. Okay.

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So did you consider those parts of their testimony or did you find all of it not credible?

A. What was my exact words?

Q. I'm just asking you --

A. No, but I want to know what I said in my report.

Q. You're free to reference your report --

A. Tell me --

Q. I'm not looking at your report right now. I'm just asking you what portion of Mr. Dua's and Mr. Meir's testimony you found credible. Because earlier you said you didn't consider it at all.

A. Items that are subjective and cannot be measured.

Q. Okay.

So did you or did you not consider the testimony of Mr. Dua about the benefits of the claimed inventions?

A. No.

Q. You didn't?

A. No.

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Q. Same with Mr. Meir?

A. Right.

Q. But you did consider conversations you had with lululemon employees, George Robusti and Katie Fleming?

A. Because they're in the manufacturing and design party. I don't what department Meir and Dua are.

Q. So in your opinion, the testimony of Mr. Robusti and Ms. Fleming was reliable because they were on the ground, developing and making footwear and they're in the design and manufacturing groups?

A. That's correct.

Q. But you don't know if those things are true about Mr. Meir and Mr. Dua whose testimony you did not consider, correct?

A. No. I considered it and I considered it was --

Q. Unreliable?

A. -- unreliable, along with Ms. Fink's.

Q. So you found the testimony of

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Mr. Robusti and Ms. Fleming reliable because they were on the ground, developing and making footwear and because they're in the design and manufacturing groups, but you found the testimony of Mr. Dua and Mr. Meir unreliable, even though you don't know whether they were developing and making footwear or in the design and manufacturing group?

A. That's not what I said. I said because some of the testimony was subjective.

Q. So you didn't find any of their testimony reliable?

A. The parts of their testimony that were subjective I didn't find reliable. The parts that were measurable, probably reliable.

Q. But I just asked you flat out if you considered any of their testimony to be reliable and you said no?

A. Okay. Then it's getting towards the end of the day and I guess I didn't hear you correctly. I would say some

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of it is reliable.

Q. What portions of Mr. Dua's testimony specifically did you find reliable?

A. Anything that's measurable.

Q. That's it?

A. Yes.

Q. In your opinion, you can't measure cushioning, so you didn't consider his testimony about increased cushioning?

A. Right. Here's an example. I looked up -- I told you about ASTM, there's no such standard for cushioning.

Q. And you said you don't like the word lightweight, so you didn't consider his testimony about that?

A. Well, no. I didn't realize you said lightweight compared to other shoes. I only heard the word lightweight.

Q. Well, regardless of how I said it, did you or did you not consider Mr. Dua's testimony about the claimed inventions rendering shoes more lightweight and that being a benefit of the inventions?

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A. That would be a benefit of the invention.

Q. Okay.

So you agree with Mr. Dua and Mr. Meir that the claimed inventions render footwear more breathable, correct?

MR. RAZAI: Objection.

Argumentative.

Q. Correct?

A. Yeah, you keep asking the same question.

Q. I haven't asked that question.

I'm going to ask you to please answer the question.

Do you agree with Mr. Dua and Mr. Meir that the claimed inventions at the time of the invention provided the benefit of rendering footwear more breathable, correct?

MR. RAZAI: Objection to form.

Outside the scope.

A. I can't answer that question.

Q. Why?

A. Because I can't.

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Q. Why not?

A. Why can't I? Because I can't.

Q. Did you review Mr. Dua's testimony about the breathability of footwear?

A. I looked at parts of his deposition testimony, yes.

Q. Did you review Mr. Dua's testimony about the breathability of footwear?

A. I don't recall.

Q. You don't know?

A. No, I said I don't recall.

Q. As you sit here today, do you agree or disagree with Mr. Dua's testimony that the claimed inventions rendered footwear more breathable at the time of the invention?

MR. RAZAI: Objection.

Outside the scope.

Asked and answered.

You can answer it, but we're done after this last one.

THE WITNESS: I understand.

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A. If he measured it, yes. If he didn't measure it, no.

Q. So it depends on what he did?

A. Yes. If you're going -- in anything you do, if you're going to make a statement about a certain property, you have to measure it.

Q. As you sit here today, do you agree or disagree with Mr. Dua's testimony and Mr. Meir's testimony that the claimed inventions rendered footwear more lightweight as compared to traditional footwear?

MR. RAZAI: Objection.

Outside the scope.

Form.

A. If they measured it, yes.

Q. You agree with them if they measured it?

A. If they measured it.

Q. Okay.

As you sit here today, do you agree or disagree with Mr. Dua's testimony and Mr. Meir's testimony that the claimed

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inventions provided the benefit of additional stretch as compared with traditional footwear?

MR. RAZAI: Same objections. Outside the scope. Form.

A. Stretch is a very ambiguous word. Are they talking about stretch in the lateral direction? Are they talking about stretch in the -- when I say lateral, I'm not talking about the dimensions of the shoe, but are they talking along the courses? Along the wales? Are they talking about it in sheers? In textile, there's a whole range of things you could talk about. You would never say something is more stretchy. You've got to say more stretchy in a particular direction.

Q. Did you review their testimony about stretch?

A. I don't recall.

Q. So you don't remember it?

A. Right. I don't recall.

Q. When you rendered your opinions

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about the alleged benefits of the claimed inventions, had you reviewed their testimony?

A. I must have, yes. If I said I did, I did.

Q. At that time, did you agree with Mr. Dua and Mr. Meir about the claimed inventions providing additional stretch in any direction?

A. I don't recall.

Q. You don't know?

A. No, I didn't say that. Yeah, I don't recall.

Q. As you sit here today, do you agree or disagree with Mr. Dua and Mr. Meir's opinion that the claimed inventions provided additional cushioning as compared with traditional footwear?

MR. RAZAI: Objection.

Form.

Outside the scope.

A. If they didn't provide measurements, then I don't recall if they do. Doesn't mean anything to me.

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Q. Where would they have had to provide measurements?

A. In their testimony.

Q. So in your opinion, Mr. Dua's and Mr. Meir's opinions about the alleged benefits of the claimed inventions are only reliable if during their deposition they provided measurements?

MR. RAZAI: Objection. Argumentative.

A. That's the way I see it, yes.

Q. That's regardless of what questions they were asked in the deposition?

A. If they were asked questions that have quantifiable answers, I would like to know what those quantifiable answers are for them to mean anything.

Q. Okay.

Are you familiar with the term controllable loft?

A. Controllable what?

Q. Loft.

A. In what context?

Q. Footwear.

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A. No.

Q. Do you remember seeing that term when you reviewed Mr. Meir's testimony?

A. No.

Q. As you sit here today, do you disagree or agree with Mr. Meir and Mr. Dua's testimony that the claimed inventions allowed Nike to knit specific textures and structural features in different locations that allowed Nike to create footwear with specific features and capabilities for different sports?

MR. RAZAI: Objection.

Form.

Outside the scope.

If there's testimony you want to show him, show him testimony.

You're just making stuff up at this point.

A. I recall that someone -- I don't remember the name -- someone from the chief counsel at Nike mentioned they had hundreds of patents that do a lot of the things they're talking about.

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For instance, Dua, who has countless patents with Nike -- and a lot of them look the same, some of them are continuations in part, things like that. Nike has a whole bunch of patents that do things.

Their chief counsel said oh, we have -- I think it was like oh, we have over 200 patents in this area. I don't remember his name, but I remember -- I seem to remember that quote.

Q. How many of Mr. Dua's patents have you reviewed?

A. I don't know number, but I'd say somewhere between five and ten.

Q. And you read those in their entirety?

A. Between this case, the adidas case, the IPRs, yes.

Q. This case and the IPRs involve three patents, right?

A. Yes.

Q. And Mr. Dua is an inventor on two of those three patents?

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A. Right. But he's also listed as a -- what's the word I want to use? -- in the grounds with comparing against them, so you had to read those patents too.

Q. Okay.

Aside from the references that are used as grounds in the IPR and the two patents at issue here, are you aware of any other patents on which Mr. Dua's a named inventor?

A. Not as I sit here.

Q. So when you said that the --

A. Oh, excuse me. I do remember I go to sometimes Justia when I see a name like that, and I remember seeing a lot of patents with his name on it with Nike, assigned to Nike.

Q. Did you review any of those patents you saw on Justia?

A. Only the abstracts.

Q. So when you said that Mr. Dua is on countless patents and a lot of them look the same, you were only referring to the patents in the IRP and the patents at

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issue in this litigation?

A. No, and the abstracts I saw at Justia.

MR. RAZAI: Counsel, I need a break.

MR. BOWLING: Okay. Just a couple more.

BY MR. BOWLING:

Q. So when you said a lot of them look the same in reference to Mr. Dua's countless patents, in your words, you were just referring to a comparison you made based on the abstracts?

A. No, including the patents that I told you about that are in the IPRs and the ones that are in the -- these litigations.

Q. Why is it relevant that Nike has over 200 patents in this area?

A. I said that because you said -- it was an answer to your question regarding about how these were special patents that they had and I said they have hundreds of patents.

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MR. RAZAI: Counsel, I need a break.

MR. BOWLING: Okay.

THE VIDEOGRAPHER: The time is 5:26 p.m.

We're going off the record.

(Recess taken)

THE VIDEOGRAPHER: The time is 5:43 p.m.

We're back on the record.

BY MR. BOWLING:

Q. Dr. Brookstein, as you sit here today, do you agree with Mr. Meir's testimony that the claimed invention of the '046 patent allows Nike to incorporate structural features like tubular ribbed areas and webbed areas that provide stretch and cushioning to the upper?

MR. RAZAI: Objection to form.

A. Can you tell me what paragraph that's in?

Q. I'm looking at Dr. Pastore's opening report, paragraph 25.

A. Can I see that? Opening

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report, 25. What is your question?

Q. As you sit here today, do you agree or disagree with Mr. Meir's testimony that the claimed invention of the '046 patent allows Nike to incorporate structural features like tubed areas and webbed areas that provide stretch and cushioning to the upper?

MR. RAZAI: Objection to form.

A. Well, considering his transcript is at least 226 pages long, I'd have to see the whole transcript. I'd have to see the transcript.

Q. Did you render any opinions about paragraph 25 of Dr. Pastore's report?

A. I don't recall.

Q. You don't know?

A. I don't think so.

Q. As you sit here today, do you have any opinions about paragraph 25 of Dr. Pastore's report?

MR. RAZAI: Objection.

Outside the scope.

A. Only if I could go back and

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read Meir's transcript.

Q. Do you have any recollection of reviewing Mr. Meir's transcript?

A. I have a recollection that I did it, but I don't recall those passages.

Q. Earlier, you testified that you only believe that Mr. Dua's and Mr. Meir's opinions about the alleged benefits of the claimed inventions are reliable if during their depositions they provided measurements.

Do you remember that?

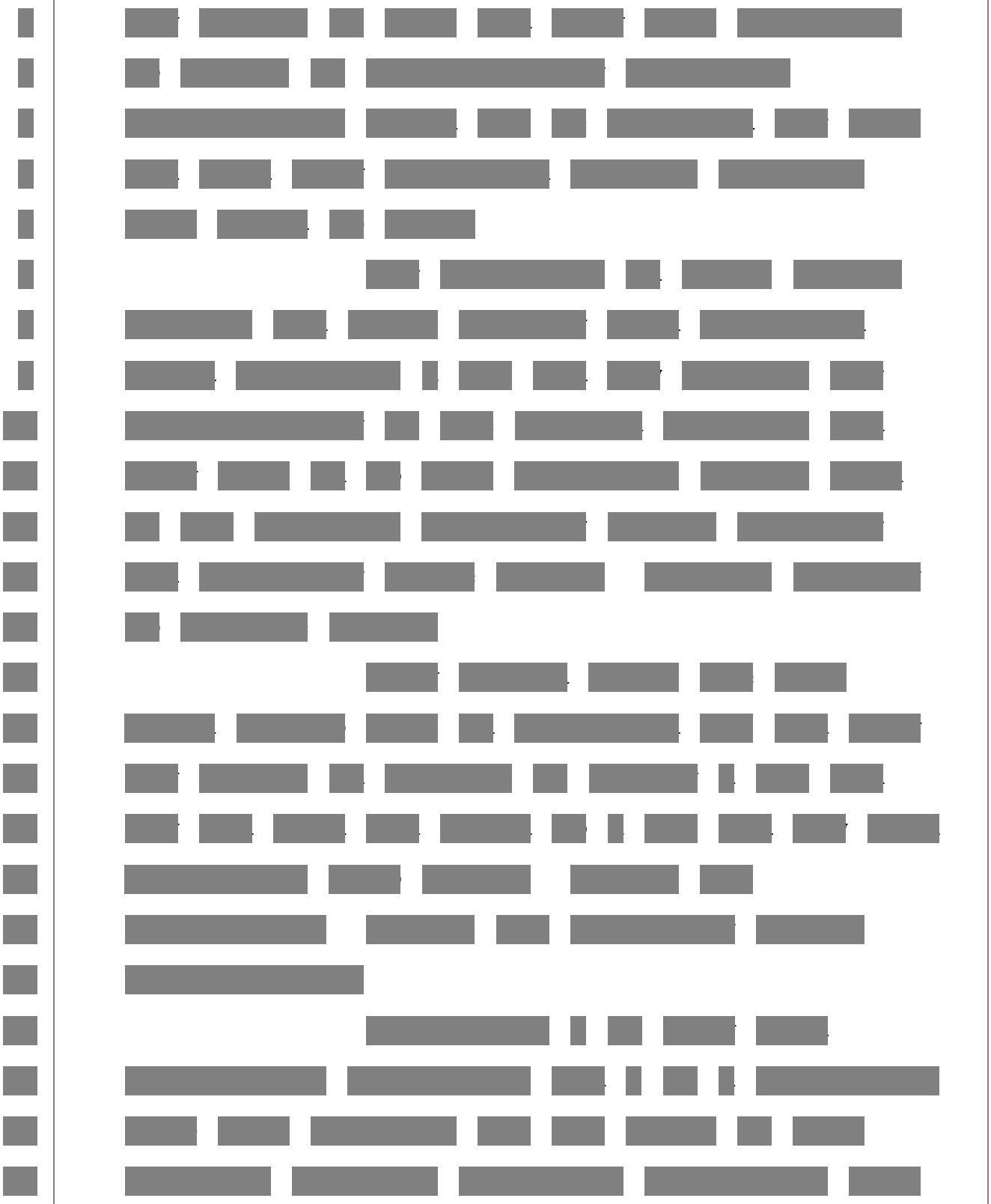
A. Yes. Measurements of measurable things.

Q. When you talked with George Robusti and Katie Fleming of lululemon about technical hurdles and workability of certain non-infringing alternatives, did they provide you with quantifiable measurements?

A. I'd have to go back and look at paragraphs 572 through 599.

Q. Go ahead. Take your time.

[redacted]



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[redacted]

Q. When you talked to George Robusti and Katie Fleming of lululemon about technical hurdles and the workability of

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certain non-infringing alternatives, they did provide you with any quantifiable measurements?

A. No, but they weren't talking about quantifiable measurements. They were talking about manufacturing procedures.

Q. So they weren't talking about things that could be quantified?

A. They were talking about manufacturing procedures.

Q. Manufacturing methods?

A. Methods.

Q. Methods of manufacturing --

A. Yes.

Q. -- knitted uppers?

A. Yes.

Q. In your view, that made their testimony credible?

A. Yes.

Q. And reliable?

A. Yes.

Q. In ways that the testimony of Mr. Meir and Mr. Dua was not credible and not reliable?

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A. Part of the testimony. Part of the testimony of Dua and Meir, yes.

Q. Do you remember with specificity any single aspect of Mr. Meir's testimony that you relied upon?

A. No.

Q. Do you remember with specificity any aspect of Mr. Meir's testimony that you thought was credible?

A. I don't remember.

Q. Do you remember with specificity any aspect of Mr. Dua's testimony that you relied upon?

A. I don't remember.

Q. Do you remember with specificity any aspect of Mr. Dua's testimony that you thought was credible?

A. I don't remember.

Q. In paragraph 578, you refer to the black Air Presto as one of the non-infringing alternatives, correct?

A. Yeah. I have a statement here. The black Air Presto example in the prior art of the cut and sew technique to combine

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different portions of an upper cutting, different textures for at least the single texture material on the vamp of the black Air Presto. A POSA would recognize that a monolithic warp goods could have been used. In other words, you have just had one monolithic piece.

Q. In paragraph 578, you refer to the black Air Presto as one of the non-infringing alternatives, correct?

A. For the which patent?

Q. For the '749 patent.

A. Yeah, because I say the black Air Presto example of prior art of a cut and sew technique to combine different portions of an upper having different textures.

Q. Do you consider the black Air Presto to be a non-infringing alternative for the '749 patent?

A. I don't recall that.

Q. You don't know?

MR. RAZAI: Objection.

A. When I say I don't recall, it doesn't mean I don't know. It's I don't

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recall. There's a difference there.

Q. Okay.

You've just read through the entire non-infringing alternative section of your report just a few minutes ago, correct?

A. Not the entire. Parts of it.

Q. Okay.

Having just reviewed that aspect of your report, do you know whether or not you consider the black Air Presto to be a non-infringing alternative for the '749 patent?

A. I'd have to spend a little bit more time reading it. I haven't read that part in a while.

Q. Go ahead.

A. A while means a while.

Q. I think it's two paragraphs --

A. I know what it is.

Well, if I recall, in '749, it has to have multiple textures and the black Air Presto doesn't have multiple textures, so it wouldn't infringe.

Q. Do you consider the black Air

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Presto to be a non-infringing alternative to the '749 patent?

A. I thought I just said that.

Q. No.

A. That's what -- I said -- if it doesn't have multiple textures on it and the '749 requires at least multiple textures.

Q. Do you or do you not consider the black Air Presto to be a non-infringing alternative for the '749 patent?

A. Yes.

Q. You do?

A. Yes.

Q. How do you know that a cut and sew technique was used?

A. Because it's a warp knit material and warp knit materials can only be made as cut and sew for irregular shapes.

Q. Even today?

A. As far as I know, yes.

Q. How is the black Air Presto different from the grey Air Presto that you discuss in your report?

A. I think just the color.

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Q. That's it?

A. As far as I know, as far as I can tell, yes.

Q. In paragraph 596 of your report, you discuss a non-rib knit collar.

Do you see that?

[redacted]

Q. What requires tubular structures?

A. The '046 patent.

[redacted]

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[redacted]

Q. What would the cost be with that?

A. I have no idea what the cost is.

Q. Did you discuss that with Ms. Fleming?

A. I don't recall if I discussed the cost.

[redacted]

MR. RAZAI: Outside the scope of his report.

Q. [redacted]

[redacted]

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[redacted]

Q. Did the tubular structures provide any structural benefits to the upper, the Chargefeel Mid or the Chargefeel Mid 2?

A. I never made that determination. I wasn't asked to do that.

Q. So would removing tubular structures have any effect on the function or the structure of the shoe?

A. Yeah, it would not have -- they would not have tubular collars. It would be like a pair of socks that was just jersey knit.

Q. Would it affect the performance or physical characteristics of the shoe in any way?

MR. RAZAI: Objection to form.

A. Probably not because it's over the ankle.

Q. Probably not? Do you know? Did you discuss with Ms. Fleming?

[redacted]

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[redacted]

Q. She didn't get into any specifics?

A. No.

Q. How long was your conversation with Ms. Fleming about non-infringing alternatives?

A. We were on the phone for about an hour. Her and George.

Q. At the same time?

A. It seem to remember -- I think I had two conversations with them.

Q. When did you have those conversations?

A. One I know on April 12th and -- I know I had one before this deposition, but I don't know the exact date.

Q. So only one conversation with them before you provided your report?

MR. RAZAI: Objection.

Mischaracterizes the testimony.

A. I know I had one on April 12th

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that's in my report. I don't remember when the other one was.

Q. Collectively, how long were those conversations?

A. I know one was about an hour. I don't know how long the other one was. I didn't time them.

[redacted]

Q. And that's all you remember from that hour-long conversation about the '046 patent specifically?

A. No. It was for the '046, the '44 and the '749. We talked about all

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three.

Q. When you were assessing these non-infringing alternatives, what metric were you using to determine if they were, in fact, alternatives?

MR. RAZAI: Objection to form.

A. If they didn't meet the claims that were in those patents.

Q. Did you consider whether they would be equally attractive to consumers, footwear consumers?

A. Not at all.

Q. Did you consider whether they would function in the same way as far as a shoe?

A. As far as the whole shoe? No.

Q. Did you consider whether the alleged alternatives would perform the same way when worn by a user?

A. No.

Q. So when you assessed these non-infringing alternatives, all you did was look at whether they would infringe the claims?

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A. Yes.

Q. Nothing more?

A. Not really, no.

Q. Okay.

Did you consider cost differences?

A. I didn't --

MR. RAZAI: Objection.

Asked and answered.

Outside the scope.

A. I don't know what the cost differences are.

Q. No, you didn't consider that?

A. No.

MR. BOWLING: Nothing further.

MR. RAZAI: I have a couple questions.

EXAMINATION BY

MR. RAZAI:

Q. All right.

Dr. Brookstein, for pretty long stretch today, Mr. Bowling was asking you whether you agreed with Mr. Meir and Mr. Dua's deposition testimony.

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Do you remember that?

A. Yes, I did.

Q. Did you ever review that deposition testimony?

A. I seem to recall yes.

Q. Was it correct that it was pretty long? Do you remember how long the transcripts were?

A. They were long. They were long. They were at least 226 pages because --

Q. Is that each or total?

A. Oh, each one? I don't recall.

Q. But they were over 100 pages --

A. It was a lot of material in there, yes.

Q. When Mr. Bowling was asking you whether you agreed, did he put any of the testimony in front of you?

A. Excuse me?

Q. When he was asking if you agreed with their testimony, did he put any of that testimony in front of you?

A. He put nothing in front of me.

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Q. Do you have a detailed recollection of all the statements that were made in Mr. Meir and Mr. Dua's respective testimonies?

A. No.

Q. Now, in your opening report that I believe was introduced --

A. This is --

Q. Exhibit 7.

In that opening report, there was an appendix that you attached called Materials Considered; is that right?

A. Yes.

Q. It's not part of Exhibit 7 as Mr. Bowling represented, correct?

A. I don't recall.

Q. Now, do you understand -- now, do you recall putting the Meir and Dua depositions in the Materials Considered section?

A. I don't think I did, but I don't remember. I have to look and see what I -- because --

Q. But you did review them, right?

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MR. BOWLING: Objection. Leading.

Q. Did you review them?

A. I looked at them, yes.

Q. You earlier testified that you looked at them?

A. Yes.

Q. Would you be surprised -- would you have any reason to believe they're not listed in that?

MR. BOWLING: Objection. Leading.

A. Would I be surprised?

Q. Actually, let's go to your rebuttal report, Exhibit 2.

A. Do you want me to look at the appendix that has the material considered?

Q. Let's just keep going. I'm going to ask you again.

Did you review the Meir and Dua testimonies -- deposition testimonies -- in preparation of your report?

A. It's under materials considered, yes.

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Q. Okay.

Do you understand the difference between considered and relied on?

A. Yes.

Q. Now, if those testimonies are in your materials considered, did you mean that you considered them in your testimony?

MR. RAZAI: Objection. Leading.

A. I considered them, but I didn't necessarily rely on them.

Q. But earlier you testified that you didn't consider them.

Based on what we're discussing now, do you agree that you didn't consider them?

MR. BOWLING: Objection. Leading.

A. No, I did consider them. It's in here as transcripts that I considered. Materials I -- what's the actual title of this? Materials considered. Materials considered.

Q. I'm going to give you a

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hypothetical of Mr. Meir in his deposition said these shoes are really pretty and you read that.

Would you have considered that statement?

MR. BOWLING: Objection.

Leading.

Improper hypothetical.

A. I would consider it but it wouldn't mean anything to me.

Q. Now if you were rendering an opinion on whether you thought a shoe was aesthetically pleasing, would you rely on an unsupported statement based on their subjective understanding of something being pretty?

MR. BOWLING: Objection.

Leading.

Improper hypothetical.

A. Absolutely not.

Q. You wouldn't rely on it?

A. I would consider it, but I wouldn't rely on it.

Q. Great.

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During your testimony today, Mr. Bowling was asking you about the A3 shoe. I'd like to take you to your opening expert report, which I believe is number seven.

A. Seven.

Q. The part that I believe Mr. Bowling was talking about begins on paragraph 176.

A. Let me get to that.

Q. Mr. Bowling was asking about -- let's go to paragraph 188.

A. 188? Okay. Not 176?

Q. Go to 188.

A. Okay. Yes.

Q. Do you see that photograph that's below 188?

A. Yes, I do.

Q. Do you recall Mr. Bowling asking you about striping?

A. Yes, I do.

Q. I'm going to quote from what Mr. Bowling asked you. This is at the 16:08 seconds 34:53.

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He asked: Do you have any opinion as to whether the texture that you've identified there, the stripes, continue on to the rest of the knitted materials that you contend surrounds?

Do you remember that question?

A. I do.

Q. Okay.

Now, a few minutes later -- a few seconds later, Mr. Bowling rephrased and said: For both the adidas wrestling shoe and the adidas A3 shoe, you don't know whether the portion that you think is the surrounding texture structure does or does not have this texture.

Do you remember that?

A. Yes, I do.

Q. Did you notice the difference between the first question when he said that -- when he was asking about the knitted element that surrounds the textile element?

MR. BOWLING: Objection.

Leading.

A. I do.

HIGHLY CONFIDENTIAL - D. Brookstein

Q. And then the second question, that phraseology was surrounding textile structure?

A. Yes.

Q. Can I take you to the language of claim one of the '469 patent?

A. Yes, you can.

Q. That patent, I believe is marked Exhibit 3. We go to the claims --

A. Hold on. Which exhibit is it?

Q. It's the '749 patent.

A. Right, right, right. Yes.

Q. In claim one, do you see the language that says "surrounding knitted textile structure"?

A. Yes.

Q. Do you see the word "surrounds" anywhere in that claim?

MR. BOWLING: Objection. Leading.

A. No, I see surrounding used as an adjective, not a verb.

Q. Do you see the phrase "surrounding knitted textile structure"?

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A. I see the phrase "a textile element with a surrounding textile structure."

Q. In your estimation, is there a difference between "surrounds" and "surrounding knitted textile structure"?

A. Yes.

Q. What's the difference?

A. Well, surrounding could be something used in the textile and apparel industry could mean it's adjacent to something, but it doesn't have to go all the way around.

Q. So you don't think a surrounding knitted textile structure has to go all the way around?

A. That's correct.

MR. BOWLING: Objection.

Beyond the scope of the cross-examination.

Leading.

MR. RAZAI: Are you done?

MR. BOWLING: Yes.

Q. So you do recall that

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Mr. Bowling asked you a question about "surrounds" and then later on "surrounding"?

A. I --

MR. BOWLING: Objection. Leading.

A. If that's in the transcript, then I believe it. But I don't remember everything he asked me.

Q. So do you think it's important to clarify how one word might mean something different than the other phrase that's in the claim?

MR. BOWLING: Objection. Leading.

A. Yes, I do.

MR. BOWLING: Can you give me a second to object so she's not typing at the same time?

MR. RAZAI: They're all leading. You could just add that to every objection. It'll save us time, according to Mr. Bowling.

BY MR. RAZAI:

Q. With respect to the testimony,

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going back to the testimony of Mr. Meir and Mr. Dua, do you think you have an obligation to rely on evidence that you yourself can ascertain based on your own independent review?

MR. BOWLING: Objection. Leading.

A. No.

Q. If you found something that one of lululemon's witnesses said was unreliable, would you rely on that?

MR. BOWLING: Objection. Leading.

A. If lululemon said it?

Q. If you found it unreliable --

A. If I found it unreliable?

Q. -- would you rely on it in your opinion?

A. If I find something unreliable, I would not rely on it.

Q. Does it matter who said it?

A. No.

Q. Does it matter whether it's the opposing side or your side?

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A. No.

Q. Is there anything about your testimony today that you want to clarify?

A. No. No.

MR. RAZAI: Okay. I have no further questions.

MR. BOWLING: I don't have anything further.

THE WITNESS: That's a wrap?

MR. BOWLING: It's a wrap.

THE VIDEOGRAPHER: The time is 6:17 p.m.

We're going off the record.

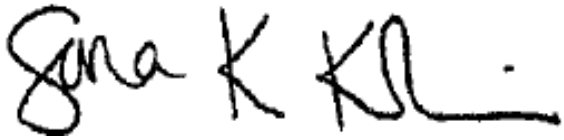
(Time noted: 6:17 p.m.)

CERTIFICATION

I, SARA K. KILLIAN, RPR, RCR, CCR, do hereby certify that DR. DAVID BROOKSTEIN, the witness whose examination under oath is hereinbefore set forth, was duly sworn, and that such deposition is a true record of the testimony given by such witness.

I FURTHER CERTIFY that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of June, 2024.



SARA K. KILLIAN, RPR, RCR, CCR

I N D E X

WITNESS	EXAMINATION BY	PAGE
Dr. Brookstein	Mr. Bowling	6
	Mr. Razai	315

E X H I B I T S

EXHIBITS	DESCRIPTION	PAGE
Exhibit 1	Nike Inc.'s Amended Notice of Deposition for Dr. David Brookstein	7
Exhibit 2	Responsive Expert Report of Dr. David Brookstein	8
Exhibit 3	US Patent No. 8,266,749	13
Exhibit 4	US Patent No. 9,375,046	20
Exhibit 5	US Patent No. 9,730,484	24
Exhibit 6	Opening Report of Christopher M. Pastore, Ph.D.	33
Exhibit 8	Lulu-NikeFW-26179	197
Exhibit 7	Opening Report of Dr. David Brookstein	223
Exhibit 9	Lulu-NikeFW 96323	256

Veritext Legal Solutions
1100 Superior Ave
Suite 1820
Cleveland, Ohio 44114
Phone: 216-523-1313

June 10, 2024

To: Ali Razai, Esq.

Case Name: Nike, Inc. v. Lululemon USA Inc.

Veritext Reference Number: 6712123

Witness: Dr. David Brookstein Deposition Date: 6/5/2024

Dear Sir/Madam:

Enclosed please find a deposition transcript. Please have the witness review the transcript and note any changes or corrections on the included errata sheet, indicating the page, line number, change, and the reason for the change. Have the witness' signature notarized and forward the completed page(s) back to us at the Production address shown above, or email to production-midwest@veritext.com.

If the errata is not returned within thirty days of your receipt of this letter, the reading and signing will be deemed waived.

Sincerely,
Production Department

NO NOTARY REQUIRED IN CA

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 6712123
CASE NAME: Nike, Inc. v. Lululemon USA Inc.
DATE OF DEPOSITION: 6/5/2024
WITNESS' NAME: Dr. David Brookstein

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have made no changes to the testimony as transcribed by the court reporter.

_____ _____
Date Dr. David Brookstein

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;
They signed the foregoing Sworn Statement; and
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal this _____ day of_____, 20____.

_____
Notary Public

_____
Commission Expiration Date

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 6712123
CASE NAME: Nike, Inc. v. Lululemon USA Inc.
DATE OF DEPOSITION: 6/5/2024
WITNESS' NAME: Dr. David Brookstein

In accordance with the Rules of Civil Procedure, I have read the entire transcript of my testimony or it has been read to me.

I have listed my changes on the attached Errata Sheet, listing page and line numbers as well as the reason(s) for the change(s).

I request that these changes be entered as part of the record of my testimony.

I have executed the Errata Sheet, as well as this Certificate, and request and authorize that both be appended to the transcript of my testimony and be incorporated therein.

_____ _____
Date Dr. David Brookstein

Sworn to and subscribed before me, a Notary Public in and for the State and County, the referenced witness did personally appear and acknowledge that:

They have read the transcript;
They have listed all of their corrections in the appended Errata Sheet;
They signed the foregoing Sworn Statement; and
Their execution of this Statement is of their free act and deed.

I have affixed my name and official seal this _____ day of_____, 20____.

_____
Notary Public

_____
Commission Expiration Date

ERRATA SHEET

VERITEXT LEGAL SOLUTIONS MIDWEST

ASSIGNMENT NO: 6712123

PAGE/LINE(S) / CHANGE /REASON

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Date Dr. David Brookstein

SUBSCRIBED AND SWORN TO BEFORE ME THIS _____

DAY OF _____, 20_____ .

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Commission Expiration Date

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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