

6/12/2024

Nike, Inc. v. Lululemon USA Inc. Christopher M. Pastore, Ph.D.
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Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NIKE, INC.,

)

)

Plaintiff, Counter-Defendant,)

)

vs.

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

)

LULULEMON USA INC.,

)

)

Defendant, Counter-Plaintiff.)

)

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

VIDEOTAPED DEPOSITION OF CHRISTOPHER M. PASTORE, Ph.D.

Chicago, Illinois

Wednesday, June 12th, 2024

REPORTED BY: GREG S. WEILAND, CSR, RMR, CRR

DIGITAL EVIDENCE GROUP

1730 M Street, NW, Suite 812

Washington, D.C. 20036

(202) 232-0646

lululemon Ex. 1025
lululemon v. Nike
IPR2024-00460

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1

June 12th, 2024

2

9:02 a.m. Central Daylight Time

3

4

Videotaped Deposition of CHRISTOPHER M.

5

PASTORE, Ph.D., taken before GREG S. WEILAND, CSR,

6

RMR, CRR, pursuant to the Federal Rules of Civil

7

Procedure for the United States District Court

8

pertaining to the taking of depositions, at

9

Suite 4200, 70 West Madison Street, in the City of

10

Chicago, Illinois, commencing at 9:02 a.m. Central

11

Daylight Time, on the 12th day of June, 2024.

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1 PRESENT:

2 ON BEHALF OF THE PLAINTIFF:

3 ARNOLD & PORTER KAYE SCHOLER LLP

4 BY: MR. MICHAEL J. HARRIS

5 70 West Madison Street, Suite 4200

6 Chicago, Illinois 60602-4231

7 (312) 583-2422

8 Email: michael.harris@arnoldporter.com

9

10 ON BEHALF OF THE DEFENDANT:

11 KNOBBE MARTENS

12 BY: MR. JONATHAN BACHAND

13 1717 Pennsylvania Avenue N.W.

14 Washington, DC 20006

(202) 640-6400

15 Email: jonathan.bachand@knobbe.com

- and -

16 KNOBBE MARTENS

17 BY: MR. ALI S. RAZAI

18 2040 Main Street

19 Irvine, California 92614

20 (949) 760-0404

21 Email: ali.razai@knobbe.com

22

ALSO PRESENT:

18 MR. PETER VAN WINKLE, The Videographer

MR. DAVID BROOKSTEIN

19 MR. KIERAN MOORE

20

21

22

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2 June 12th, 2024

3 TESTIMONY OF CHRISTOPHER M. PASTORE, Ph.D

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5 Examination by Mr. Bachand 8

6

7 DEPOSITION EXHIBITS

8 NUMBER DESCRIPTION PAGE

9 Pastore Exhibit 1 15

10 Opening Expert Report of Christopher M.

11 Pastore, Ph.D. on Infringement of U.S. Patent

12 Nos. 8,266,749, 9,375,046, and 9,730,484

13 Pastore Exhibit 2 22

14 Rebuttal Expert Report of Christopher M.

15 Pastore, Ph.D. on Validity of U.S. Patent

16 Nos. 8,266,749, 9,375,046, and 9,730,484

17 Pastore Exhibit 3 40

18 United States Patent 8,266,749, Bates labeled

19 NIKE0485343 through 0485365

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21

22

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1	DEPOSITION EXHIBITS (CONTINUED)		
2	NUMBER	DESCRIPTION	PAGE
3	Pastore Exhibit 4		69
4	Transcript, Deposition of Christopher		
5	Pastore, taken August 3, 2022, In the Matter		
6	of Certain Knitted Footwear, Bates labeled		
7	adidas-lululemon_00000151 through 00000507		
8	Pastore Exhibit 5		83
9	Initial Report of Christopher M. Pastore		
10	(Infringement and Domestic Industry), In the		
11	Matter of Certain Knitted Footwear, Bates		
12	labeled adidas_lululemon_00000532 through		
13	00001600		
14	Pastore Exhibit 6		125
15	United States Patent 9,730,484, Bates labeled		
16	NIKE0001094 through 0001121		
17	Pastore Exhibit 7		163
18	United States Patent 9,375,046, Bates labeled		
19	NIKE0004532 through 0004578		
20	Pastore Exhibit 8		242
21	Responsive Expert Report of Dr. David S.		
22	Brookstein		

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1	DEPOSITION EXHIBITS (CONTINUED)		
2	NUMBER	DESCRIPTION	PAGE
3	Pastore Exhibit 9		288
4		Photocopies of photographs, Bates labeled	
5		adidas_lululemon_00015925 through 00015946	
6	Pastore Exhibit 10		298
7		Article, Nike: Sustainability and Innovation	
8		through Flyknit Technology, by Carly Fink,	
9		Bates labeled NIKE0498899 through 0498903	
10	Pastore Exhibit 11		299
11		Nike, Inc.'s First Supplemental Responses and	
12		Objections to Lululemon USA Inc.'s First Set	
13		of Interrogatories (Nos. 1-4)	
14	Pastore Exhibit 12		315
15		LinkedIn profile, Carly Fink	
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1 THE VIDEOGRAPHER: We're now on the
2 record.

3 This is Tape Number 1 in the videotaped
4 deposition of Dr. Chris Pastore. The date --
5 I'm sorry -- taken by the defendant in the
6 matter of Nike, Incorporated, versus Lululemon
7 USA Incorporated, pending in the U.S. District
8 Court for the Northern [sic] District of
9 New York, Case Number 1:23-cv-00771-AS.

10 This deposition is being held at
11 Arnold & Porter, Chicago, Illinois, on
12 June 12th, 2024. The time on the monitor is
13 9:03 a.m.

14 My name is Peter Van Winkle. I'm the
15 legal videographer with Digital Evidence Group.
16 The court reporter is Greg Weiland, in
17 association with Digital Evidence Group.

18 Will counsel please introduce yourselves
19 for the record, after which the court reporter
20 will swear in the witness.

21 MR. BACHAND: Jonathan Bachand from
22 Knobbe Martens on behalf of Lululemon. With me

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1 is Ali Razai, also of Knobbe Martens,
2 David Brookstein, our expert, and Kieran Moore
3 from Lululemon.

4 MR. HARRIS: Good morning. Michael Harris
5 with Arnold & Porter for Nike, Inc.

6 (Witness sworn.)

7 CHRISTOPHER M. PASTORE, Ph.D

8 after being first duly sworn, testified as follows:

9 EXAMINATION

10 BY MR. BACHAND:

11 Q. Good morning, Dr. Pastore.

12 A. Good morning.

13 Q. Can you state your name and personal
14 address for the record, please.

15 A. Yes. Christopher Pastore, [REDACTED]

[REDACTED]
17 Q. Okay. I know you've met me before. My
18 name is Jon Bachand, and I'll be asking you a series
19 of questions today.

20 You've been deposed before, correct?

21 A. Yes, I have.

22 Q. Okay. Approximately how many times have

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1 MR. HARRIS: Objection to the extent
2 you're asking the witness for a legal
3 conclusion.

4 But you could answer if you're able to do
5 so.

6 THE WITNESS: I guess plain and ordinary
7 is plain and ordinary.

8 BY MR. BACHAND:

9 Q. And that definition should apply both as
10 part of an infringement analysis as well as an
11 invalidity analysis, correct?

12 MR. HARRIS: Objection, form, scope, and
13 to the extent you're asking for a legal
14 conclusion.

15 THE WITNESS: Could be.

16 BY MR. BACHAND:

17 Q. Okay. And at the bottom of Page 98, you
18 were asked a question about Figure 9 of the
19 '749 patent, correct?

20 A. On the top of Page 99, yes.

21 Q. And you can take the '749 patent out --
22 it's marked in front of you -- if you want to look

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1 at what Figure 9 is.

2 And you were asked in the deposition:

3 "In Figure 9, you see there's a strip of
4 textile between the element and the end of the
5 structure, correct?"

6 That's what you were asked?

7 A. Yes.

8 Q. And you say:

9 "If I look at the bottom layer, are you
10 referring to the portion of surrounding textile
11 structure that represents the end of the fabric
12 distinct from the element that's illustrated?"

13 Do you see that?

14 A. Yes.

15 Q. And they respond: "Yes."

16 And you say: "Yes."

17 And they asked:

18 "So if that wasn't there and instead the
19 element extended to the edge, would that still
20 have surrounding textile structure?"

21 Correct?

22 A. Yes.

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1 Q. And you say: Well, I don't -- strike
2 that.

3 You reply:

4 "Well, it wouldn't be completely
5 surrounded, but I don't think the claim
6 requires completely surrounded. So I suppose
7 we would have to consider that to be surrounded
8 as well."

9 Correct?

10 A. Correct.

11 Q. So in your opinion, if the edge went all
12 the way down in Figure 9 as described in the
13 deposition, that would still be mostly surrounded,
14 correct?

15 MR. HARRIS: Objection, form, and scope.

16 THE WITNESS: Within this context, yes.

17 BY MR. BACHAND:

18 Q. Okay. And so how do you differentiate
19 that between Zuckerman, and why would that not be
20 completely surrounded?

21 MR. HARRIS: Objection, form, scope.

22 Go ahead.

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1 THE WITNESS: In the example that's
2 discussed here, I think you can see if the
3 fabric somehow terminated at the line that
4 Ms. Koballa was questioning, still the vast
5 majority of the perimeter is surrounded by
6 textile material with just a small gap in
7 there. So it's clearly mostly surrounded.

8 BY MR. BACHAND:

9 Q. Okay. And, again, your definition of
10 "surrounding," it just needs to be mostly
11 surrounding, not completely surrounding, correct?

12 A. Mostly or completely.

13 Q. Do you think that was clear from your
14 testimony to the PTAB regarding the '749 patent,
15 that it only had to be mostly?

16 MR. HARRIS: Objection, form, scope,
17 speculation.

18 Go ahead.

19 THE WITNESS: I don't know what "PTAB" is.

20 BY MR. BACHAND:

21 Q. I apologize. In your IPR declaration that
22 you submitted regarding the '749 patent, do you

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1 think it was clear that you didn't believe it needed
2 to be completely surrounded, only mostly surrounded?

3 MR. HARRIS: Objection, form, scope, calls
4 for speculation.

5 Go ahead.

6 THE WITNESS: It was clear to me. If
7 you're asking whether I gave perfect wording,
8 I'm not sure.

9 BY MR. BACHAND:

10 Q. Okay. Do you think a reader could
11 potentially be misled by what you meant the meaning
12 of "surrounding textile structure" was?

13 MR. HARRIS: Objection, form, scope, and
14 calls for speculation.

15 Go ahead.

16 THE WITNESS: I would certainly hope not.

17 BY MR. BACHAND:

18 Q. Okay. Do you know what the plain and
19 ordinary meaning of "enclose" is?

20 MR. HARRIS: Objection, form, scope, and
21 objection to the extent you're asking the
22 witness for a legal conclusion on claim

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1 construction.

2 But go ahead.

3 THE WITNESS: It's not something that I
4 analyzed, and I'm not a walking dictionary, so
5 I don't think I can give you a good answer as I
6 sit here right now.

7 BY MR. BACHAND:

8 Q. But you believe enclosed indicates that
9 it's not completely surrounded on all edges,
10 correct?

11 MR. HARRIS: Objection, form, scope,
12 speculation.

13 THE WITNESS: I think it does not require
14 to be completely surrounding on all points.

15 BY MR. BACHAND:

16 Q. Okay. Does encircle require it to be
17 completely surrounding on all points?

18 MR. HARRIS: Objection, form, scope,
19 speculation.

20 THE WITNESS: Encircle also could be
21 considered small gaps would still allow
22 something to be encircled.

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1 BY MR. BACHAND:

2 Q. And, again, you can't quantify for me how
3 small those gaps can be?

4 A. No, I cannot.

5 Q. Is it based on a total percentage of the
6 boundary area?

7 MR. HARRIS: Objection, form, scope,
8 speculation.

9 Go ahead.

10 THE WITNESS: If I could tell you that, I
11 would be able to quantify it as well.

12 BY MR. BACHAND:

13 Q. Okay. So you can't give me a percentage,
14 correct?

15 A. Correct.

16 Q. You can't give me a number of edges that
17 would have to be included?

18 MR. HARRIS: Objection, form, scope,
19 speculation.

20 THE WITNESS: Correct.

21 BY MR. BACHAND:

22 Q. Okay. It needs to be more than

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1 Q. Okay. And a skilled artisan would have
2 understood that the Adidas wrestling shoe contained
3 panels with two different textures, correct?

4 A. Correct.

5 Q. And so each panel would have two different
6 textures, correct?

7 A. Yes, on the small scale, yes.

8 Q. Okay. And you inspected the gray Nike Air
9 Presto, correct?

10 A. Correct.

11 Q. And based on your inspection of the gray
12 Nike Air Presto shoe, it includes an upper made from
13 several warp knit panels, correct?

14 A. Correct.

15 Q. And based on your inspection, you could
16 tell that it was a spacer fabric that was used,
17 correct?

18 A. Correct.

19 Q. Could you describe to me what a spacer
20 fabric is?

21 A. A spacer fabric is a fabric that has
22 substantially two planar layers that are separated

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1 yet connected to each other, typically through a
2 monofilament, that both joins and separates the two
3 layers that are formed simultaneously.

4 Q. And have you ever made a spacer fabric
5 before?

6 A. Yes.

7 Q. And when you make a spacer fabric, do you
8 have the ability to decide what types of fabrics
9 would go in the two layers?

10 MR. HARRIS: Objection, form.

11 THE WITNESS: Yes, to a certain extent.

12 You're limited to the type of machinery you're
13 working with.

14 BY MR. BACHAND:

15 Q. So you have the flexibility to have them
16 be the same, correct?

17 MR. HARRIS: Objection, form, scope.

18 THE WITNESS: Generally, depending on the
19 type of equipment.

20 BY MR. BACHAND:

21 Q. And you would also be able to potentially
22 make the layers different, correct?

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1 THE WITNESS: Depending on the equipment
2 available to you, it could be or it might not
3 be.

4 BY MR. BACHAND:

5 Q. Okay. And do you think it would be kind
6 of a cost-effective thing to just make a shape that
7 was not knit to shape but just a perfect, you know,
8 square shape, a one-shot process using warp
9 knitting?

10 MR. HARRIS: Objection, form, and scope.

11 THE WITNESS: It would depend on the
12 design intentions of the shoe.

13 BY MR. BACHAND:

14 Q. If you were making a large amount of
15 shoes, is that an efficient way to doing it?

16 MR. HARRIS: Objection, form, and scope.

17 THE WITNESS: Again, it would depend on
18 the design intents of the shoe itself, how the
19 fabrics were going to be incorporated.

20 BY MR. BACHAND:

21 Q. Okay. If you could take a look at the
22 '749 patent. And looking at the claims of the

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1 '749 patent, I'd like to ask you a question about
2 claim 3.

3 Now, what are some of the different ways
4 you could knit an outline?

5 A. Well, the outline would be the perimeter
6 of the element that you want to incorporate. So by
7 defining the proper number of needles running in
8 each direction, the courses per inch, the wale
9 per inch, what yarns the needles are carrying, this
10 is how you would generate an outline.

11 Q. And is one way you could generate an
12 outline actually using stitches to form the outline?

13 A. Sure. You could incorporate a visible
14 outline if you wanted to.

15 Q. Okay. And you say "a visible outline."
16 What's an invisible outline?

17 A. Well, the outline of the shoe -- of the
18 textile element would be the perimeter of the
19 textile element that you want to use, whether it's
20 visible or not.

21 Q. Okay. But doesn't -- claim 3 requires
22 knitting an outline of the knitted textile element,

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1 C E R T I F I C A T E

2 The within and foregoing deposition of the
3 witness, CHRISTOPHER M. PASTORE, Ph.D, was taken
4 before GREG S. WEILAND, CSR, RMR, CRR, at
5 Suite 4200, 70 West Madison Street, in the City of
6 Chicago, Cook County, Illinois, commencing at
7 9:02 a.m., on the 12th day of June, 2024.

8 The said witness was first duly sworn and
9 was then examined upon oral interrogatories; the
10 questions and answers were taken down in shorthand
11 by the undersigned, acting as stenographer; and the
12 within and foregoing is a true, accurate and
13 complete record of all the questions asked of and
14 answers made by the aforementioned witness at the
15 time and place hereinabove referred to.

16 The signature of the witness was not
17 waived and the deposition was submitted to the
18 deponent as per copy of the attached letter.

19 The undersigned is not interested in the
20 within case, nor of kin or counsel to any of the
21 parties.

22 Witness my signature on this 14th day of
June, 2014.

18

19

20

21 GREG S. WEILAND, CSR, RMR, CRR

22 License No. 084-003472