

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

_____)
LULULEMON USA INC.,

Petitioner,

Case IPR2024-00460

v.

Patent 8,266,749

NIKE, INC.,

Patent Owner.

_____)

REMOTE DEPOSITION OF
CHRISTOPHER PASTORE, PH.D.

January 14, 2025

10:00 a.m. Eastern Standard Time

Reported by: Lori J. Goodin, RPR, CRR, RSA,
California CSR #13959

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lululemon Ex. 1026
lululemon v. Nike
IPR2024-00460

1 REMOTE DEPOSITION of CHRISTOPHER
2 PASTORE, PH.D., in the above-titled action, held
3 on Tuesday, January 14, 2025, commencing at
4 approximately time 10:00 a.m. before Lori J.
5 Goodin, RPR, CRR, RSA, California CSR #13959,
6 Registered Professional Reporter, Certified
7 Realtime Reporter, Realtime Systems
8 Administrator, and Certified Shorthand Reporter,
9 and Notary Public of the State of Florida, State
10 of California, State of Maryland, District of
11 Columbia, State of Delaware and Commonwealth of
12 Pennsylvania.

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20

21

22

1 INDEX TO EXAMINATION

2 WITNESS: CHRISTOPHER PASTORE, PH.D.

3

4 EXAMINATION BY

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1 TUESDAY, JANUARY 14, 2025, 10:00 a.m. EST

2

3 PROCEEDINGS

4 * * *

5 Whereupon,

6 CHRISTOPHER PASTORE, PH.D.,

7 a witness called for examination, having been
8 first duly sworn, was examined and testified as
9 follows:

10 * * *

11 MR. SMITH: Good morning.

12 Appearance for the record, I am Brandon Smith
13 from Knobbe Martens on behalf of petitioner,
14 lululemon. And with me is my partner, Jacob
15 Peterson.

16 MS. STAUBACH: Good morning.

17 Lindsey Staubach of Arnold & Porter on behalf
18 of patent owner, Nike, Inc. and the witness.

19 COURT REPORTER: Unless an objection
20 is heard at this time, all parties to this
21 deposition are appearing remotely and have
22 agreed to the witness being sworn in

1 remotely.

2 Counsel, you may proceed.

3

4 * * * * *

5 EXAMINATION

6 BY MR. SMITH:

7 Q. Good morning Dr. Pastore. How are
8 you?

9 A. Good morning. Well, thank you.

10 Q. Can you please state your full name
11 for the record.

12 A. Christopher Pastore.

13 Q. And you understand this is a
14 deposition for an IPR relating to U.S. patent
15 number 8,266,749?

16 A. Yes, I do.

17 Q. Are you okay if I refer to that as
18 the '749 patent today?

19 A. Yes.

20 Q. And just for the record this is IPR
21 number 2024-00460.

22 A. Yes.

1 Q. Perfect.

2 Is there any reason you can't give
3 truthful and accurate testimony today?

4 A. No, there is not.

5 Q. No medications that would affect
6 your testimony today?

7 A. No.

8 Q. You have been through this several
9 times so I will keep the preliminaries brief.

10 Let me know if there are any
11 questions you don't understand. Otherwise I am
12 going to assume you understand them.

13 Is that okay?

14 A. Yes.

15 Q. Let me know if you need a break.
16 Otherwise I will plan to take a break roughly
17 every hour or so.

18 Does that sound okay?

19 A. Yes, it does.

20 Q. How did you prepare for today's
21 deposition?

22 A. I prepared by reviewing the

1 declaration that I prepared and the relevant
2 patents that are referenced in that declaration.

3 Q. How long --

4 MS. STAUBACH: Brandon, before you
5 move on I just wanted to let you know
6 Dr. Pastore brought some of the files
7 materials in with him.

8 He has got his declaration, which is
9 Exhibit 2003. He has got Zuckerman, which is
10 Exhibit 1008, Nichida, Exhibit 1005, Doughty,
11 Exhibit 1017. And the '749 patent,
12 Exhibit 1001.

13 MR. SMITH: You saved me a bunch of
14 questions, Lindsey. Thank you.

15 BY MR. SMITH:

16 Q. I'm assuming those are all clean
17 copies of those materials?

18 A. Yes, they are.

19 Q. Perfect. All right.

20 How long did you spend preparing for
21 today's deposition?

22 A. I'm not sure how to answer that

1 because I guess in a sense since I wrote the
2 report, the declaration that was the beginning of
3 preparing for today's deposition.

4 But, in the past week, it was maybe
5 eight, ten hours.

6 Q. Did you meet with anyone other than
7 counsel to prepare for today's deposition?

8 A. No, I did not.

9 Q. And other than the materials that
10 you have on the table in front of you, did you
11 review anything other -- anything else to
12 prepare?

13 MS. STAUBACH: I will caution the
14 witness not to reveal the substance of any
15 attorney/client communications.

16 If you can answer the question
17 beyond that, go ahead.

18 THE WITNESS: This was my primary
19 review.

20 I did also look at the Nichida
21 American patent, but only briefly when I
22 realized this was the wrong one and switched

1 over to the translation that is relevant.

2 BY MR. SMITH:

3 Q. Perfect. Okay. You have your
4 report there in front of you, right?
5 Exhibit 2003?

6 A. Yes.

7 MR. SMITH: And just for the record
8 I guess we are going to mark Exhibit 2003
9 digitally.

10 (Exhibit Number 2003
11 marked for identification.)

12 BY MR. SMITH:

13 Q. It will be on the screen as well.
14 However, feel free to refer to the
15 copy in front of you if that is easier. And same
16 goes for all of the exhibits throughout the day,
17 assuming you have them in front of you.

18 A. I understand.

19 Q. All right. Can you turn to Page 4
20 of your declaration.

21 A. My Page 4 or Exhibit Page 4?

22 Q. Oh, your Page 4. Thank you for the

1 clarification.

2 You see there is a section called
3 Legal Standards there?

4 A. Yes.

5 Q. Does that Legal Standards section
6 contain all of the legal principles that you
7 considered for your analysis of the '749 patent
8 in this proceeding?

9 A. These are the legal standards that I
10 understood from counsel, yes. And I did not
11 extend beyond that.

12 Q. So, there is no legal standards that
13 you applied for this proceeding that are not
14 contained in your declaration?

15 A. To the best of my understanding, no.

16 Q. Great. You can turn to, it would be
17 your Page 7. You see there is a section titled
18 Level of Ordinary Skill in the Art.

19 A. Yes.

20 Q. Does your declaration set forth your
21 entire opinion regarding the level of skill in
22 the art for the '749 patent?

1 A. Yes, it --

2 MS. STAUBACH: Objection.

3 THE WITNESS: Yes, it does.

4 BY MR. SMITH:

5 Q. You see at the bottom of
6 Paragraph 19 you state, "For the purposes of this
7 declaration, I applied lululemon's definition of
8 a POSITA"?

9 A. Yes.

10 Q. Do you agree with the level of skill
11 in the art proposed by lululemon and
12 Dr. Brookstein?

13 A. I believe it is perfectly fine for
14 the analysis of this. I have no objections to
15 it.

16 Q. Do you believe that you were a
17 person of ordinary skill in the art as of March,
18 2004?

19 A. I believe that my experience and
20 training puts me a above a person of ordinary
21 skill in the art as of 2004.

22 Q. And what experience and training are

1 you referring to specifically?

2 A. My education and my employment
3 experience and my research.

4 Q. And although you are -- you believe
5 you are beyond a level of skill of a person of
6 ordinary skill in the art, it is correct that
7 your opinions set forth in this proceeding
8 reflect how a person of ordinary skill would have
9 interpreted the claims, the prior art, and other
10 evidence we are looking at, right?

11 MS. STAUBACH: Objection, form.

12 THE WITNESS: Yes.

13 BY MR. SMITH:

14 Q. By March 2004, were you generally
15 familiar with the capabilities of warp knitting
16 machines?

17 A. Yes.

18 Q. What about the capabilities of
19 circular knitting machines?

20 A. Yes.

21 Q. Would a person of ordinary skill in
22 the art by March 2004 have been generally

1 familiar with the capabilities of warp knitting
2 machines?

3 MS. STAUBACH: Objection, form.

4 THE WITNESS: Yes. It is a
5 requirement of the education and the three
6 years of experience working with knitted
7 textiles would allow for that.

8 BY MR. SMITH:

9 Q. Same answer for circular knitting
10 machines?

11 MS. STAUBACH: Same objection.

12 THE WITNESS: Yes.

13 BY MR. SMITH:

14 Q. By March 2004, it was a known
15 technique to place different yarns in different
16 areas of a knitted structure, correct?

17 MS. STAUBACH: Objection, form.

18 THE WITNESS: Yes.

19 BY MR. SMITH:

20 Q. By March 2004, was it known that you
21 could place different yarns in different areas of
22 a knitted structure using a warp knitting

1 machine?

2 MS. STAUBACH: Objection.

3 THE WITNESS: Yes.

4 BY MR. SMITH:

5 Q. By March, 2004, was it known that
6 you could place different yarns in different
7 areas of a knitted structure using a circular
8 knitting machine?

9 MS. STAUBACH: Objection, form.

10 THE WITNESS: Yes.

11 BY MR. SMITH:

12 Q. Okay. By March 2004, it was known
13 to use multiple types of yarn in a single
14 knitting process, correct?

15 MS. STAUBACH: Objection, form.

16 THE WITNESS: Yes.

17 BY MR. SMITH:

18 Q. Do you agree that yarn selection can
19 impact the weight of a fabric?

20 A. Yes.

21 Q. For example, by picking a lighter
22 weight yarn and knitting that into one region and

1 a heavier weight yarn and knitting that into a
2 different region of the same textile structure,
3 you create a fabric that has a region of
4 lightweight yarn and a region of heavier weight
5 yarn. Correct?

6 MS. STAUBACH: Objection.

7 THE WITNESS: That can be done, yes.

8 BY MR. SMITH:

9 Q. Could that have been done by
10 March 2004?

11 A. Yes.

12 Q. Do you agree that yarn selection can
13 impact the expense of a fabric?

14 A. Yes.

15 Q. So, if we are using the same
16 example, you could pick an inexpensive yarn, knit
17 it into one region of a fabric. Pick a more
18 expensive yarn, knit it into a different region
19 of the fabric.

20 And you would have a resulting
21 fabric that has an inexpensive and expensive
22 regions, correct?

1 MS. STAUBACH: Objection, form.

2 THE WITNESS: Certainly from the
3 perspective of the cost of the yarn, yes.

4 BY MR. SMITH:

5 Q. Do you agree that by March 2004, it
6 was possible to knit multilayered textiles?

7 MS. STAUBACH: Objection, form.

8 THE WITNESS: Yes.

9 BY MR. SMITH:

10 Q. And, are you familiar with spacer
11 mesh?

12 A. Yes.

13 Q. Is that sometimes also referred to
14 as spacer fabric?

15 A. More frequently, spacer fabric, yes.

16 Q. Can I refer to those interchangeably
17 today?

18 A. Certainly.

19 Q. Is spacer mesh or spacer fabric an
20 example of a multilayered knit textile?

21 A. Yes.

22 Q. And, for a spacer mesh, are the

1 layers knit simultaneously?

2 MS. STAUBACH: Objection, form.

3 THE WITNESS: Typically in a spacer
4 fabric, they are knit simultaneously.

5 BY MR. SMITH:

6 Q. And a person of ordinary skill in
7 the art would have known about spacer meshes
8 before 2004, correct?

9 MS. STAUBACH: Objection, form.

10 THE WITNESS: Correct.

11 BY MR. SMITH:

12 Q. What is a nonwoven fabric?

13 A. A nonwoven fabric is a fabric that
14 can be formed without yarns but more -- sometimes
15 with yarns.

16 But more specifically, without
17 interlacings, interlooping or intertwining of
18 textile elements.

19 Q. Can you give me an example of a
20 nonwoven fabric?

21 A. A common example that people are
22 familiar with is felt.

1 Q. That is the one I was thinking of so
2 I'm glad we are on the same page there.

3 So, just to be clear, nonwoven
4 fabrics are not knit, correct?

5 A. Correct. It is not a wonderful
6 name. We have tried to change the name to direct
7 formed fabrics, but it has not stuck.

8 Q. And, is one way of forming a
9 nonwoven fabric, pressing a number of fibers
10 together using heat, for example?

11 A. That is one of the steps that can be
12 used in certain nonwoven applications.

13 Q. What is a composite fabric?

14 MS. STAUBACH: Objection, form.

15 THE WITNESS: Composite fabric can
16 define multiple things.

17 At its core, when we say it is a
18 composite fabric, we mean that it comprises
19 two or more chemically distinct fiber
20 elements at the same time.

21 So, for example, something as simple
22 as a cotton polyester blend is technically a

1 composite fiber. And, so if I we weave that
2 into a shirt, it is a composite shirt.

3 But, composites sometimes is meant
4 to mean that there is a reinforcing fiber
5 that is encapsulated in a surrounding matrix
6 material.

7 So, it depends on context what is
8 meant by that.

9 BY MR. SMITH:

10 Q. Sounds like composite can refer to
11 the composition of the fibers themselves or
12 alternatively the composition of the textile as a
13 whole.

14 Is that fair?

15 A. Yes.

16 MR. SMITH: Okay. Let's turn to the
17 '749 patent, which is Exhibit 1001.

18 (Whereupon, previously marked
19 Exhibit 1001,
20 first referral.)

21 BY MR. SMITH:

22 Q. How many times do you think you have

1 reviewed the '749 patent?

2 A. I'm not certain. It is certainly in
3 the tens, but I can't be more precise.

4 Q. And you have opined regarding the
5 '749 patent in multiple proceedings, correct?

6 A. That is correct.

7 Q. I think, by my count, it is at least
8 three proceedings at this point, right?

9 A. That sounds right to me.

10 Q. Do you agree that the '749 patent
11 does not describe a multistep knitting process?

12 MS. STAUBACH: Objection, form.

13 THE WITNESS: The '749 patent
14 describes an article of footwear and how it
15 is produced with the knitting operation.

16 BY MR. SMITH:

17 Q. And that knitting operation in the
18 '749 patent is simultaneously knitting a textile
19 element in a surrounding textile structure,
20 correct?

21 MS. STAUBACH: Objection, form.

22 THE WITNESS: Correct. Correct.

1 BY MR. SMITH:

2 Q. The knitting process described in
3 the '749 patent does not involve knitting a
4 surrounding text -- or knitting a textile
5 structure -- strike that. I will start over.

6 The knitting process described in
7 the '749 patent does not involve first knitting a
8 textile structure and then knitting a textile
9 element on or within that textile structure,
10 correct?

11 MS. STAUBACH: Objection, form.

12 THE WITNESS: Correct.

13 BY MR. SMITH:

14 Q. If you would turn to the bottom of
15 Column 6, top of Column 7, in the '749 patent.

16 If you could read to yourself the
17 paragraph starting at Column 6, Line 65, down to
18 Column 7, Line 4.

19 Are you with me, Dr. Pastore?

20 A. Yes, sir.

21 Q. So, you would agree that paragraph
22 describes various known processes for

1 manufacturing textiles, correct?

2 MS. STAUBACH: Objection, form.

3 THE WITNESS: Yes. Specifically the
4 part we just reviewed talks about different
5 kind of warp knitting.

6 BY MR. SMITH:

7 Q. And then if you move down a little
8 bit further here, Column 7, Lines 9 and 10, where
9 it says, "Textile element 40 may be formed
10 through any of the mechanical processes
11 described -- or discussed above."

12 Do you see that?

13 A. Yes.

14 Q. So, do you understand the textile
15 element in the '749 patent may be formed through
16 either warp or weft knitting?

17 A. Yes.

18 Q. And by March 2004, do you agree
19 there were known knitting machines that were
20 capable of making the textile elements described
21 in the '749 patent?

22 A. Yes.

1 Q. Does that include warp knitting
2 machines?

3 A. Yes.

4 Q. Does that also include weft or weft
5 knitting machines?

6 A. Yes.

7 Q. I am going to move down a little
8 further in Column 7 to line --

9 The paragraph starting Line 26
10 refers to a wide tube circular knitting machine
11 as produced by Santoni S.p.A.?

12 Do you see that?

13 A. Yes.

14 Q. Now, that sentence continues --
15 describing the machine, "as capable of forming
16 various types of stitches within a single textile
17 structure."

18 Do you see that?

19 A. Yes.

20 Q. Do you agree that no knitting
21 machines by March 2004 were capable of forming
22 various stitches within a textile structure?

1 MS. STAUBACH: Objection, form.

2 THE WITNESS: Yes.

3 BY MR. SMITH:

4 Q. And those known machines, those were
5 also programmable, to use selectable types of
6 stitches at desired locations, correct?

7 MS. STAUBACH: Objection, form.

8 THE WITNESS: Yes.

9 BY MR. SMITH:

10 Q. And the ability to place selected
11 types of stitches at desired locations allowed
12 skilled artisans to knit various patterns,
13 textures or designs on the textile structure,
14 correct?

15 MS. STAUBACH: Objection, form.

16 THE WITNESS: Correct.

17 BY MR. SMITH:

18 Q. And those capabilities we have just
19 discussed are not unique to the Santoni S.p.A.
20 wide tube circular knitting machine. Correct?

21 A. Correct.

22 Q. Let's go to Paragraph 31 of your

1 declaration where you are discussing

2 Exhibit 1005, Nichida.

3 (Whereupon, previously marked

4 Exhibit 1005,

5 first referral.)

6 BY MR. SMITH:

7 Q. So, it is your opinion that

8 Nichida's material web 1 always has two primary

9 components, unwound web parts 2 and material base

10 4.

11 Correct?

12 A. I'm sorry, Daniel had the wrong

13 report. Okay. Now, I see it.

14 I'm sorry. Can you repeat the

15 question, Brandon? I was thrown off.

16 Q. Is it your opinion that Nichida's

17 material web 1 always has two primary components,

18 unwound web parts 2 and material web base 4,

19 correct?

20 MS. STAUBACH: Objection, form.

21 THE WITNESS: Yes.

22 BY MR. SMITH:

1 Q. Your opinion that we just discussed
2 is based on Figure 2 of Nichida, correct?

3 I realize that is not the only
4 basis, but it is based, in part, on Figure 2 of
5 Nichida, correct?

6 A. Yes. Figure 2 shows that, yes.

7 Q. And then it is also based -- I
8 apologize, I'm flipping over to the Nichida
9 reference.

10 It is also based on a sentence in
11 Page 5 that says, "the material web base 4 may be
12 a common woven or knitted fabric, e.g. consisting
13 of warp and weft."

14 Correct?

15 MS. STAUBACH: Objection, form.

16 THE WITNESS: Correct.

17 MR. SMITH: And what I just read for
18 the record was from Exhibit 1001, Page 5.

19 BY MR. SMITH:

20 Q. Now, you agree that the unwound web
21 parts and material web base in Nichida are part
22 of a single material web. Correct?

1 A. Yes.

2 Q. But, it is your opinion that single
3 material web is always produced using a two-step
4 process, correct?

5 MS. STAUBACH: Objection, form.

6 THE WITNESS: A minimum of two
7 steps, yes.

8 BY MR. SMITH:

9 Q. So, sticking with the two step -- I
10 realize you think there could be more steps.

11 But, sticking with the two-step
12 example, in Nichida it is your opinion that the
13 first step of the creation of the material web is
14 to manufacture the material web base. Correct?

15 A. Correct.

16 Q. And then in the second step the
17 unwound web parts are either printed with fabric
18 printing process or produced with the textile
19 production process on top of or within the
20 preexisting base.

21 That is your opinion, right?

22 A. Yes.

1 Q. So, just for clarification, it is
2 your opinion that Nichida never describes a
3 process during which the material web base and
4 the unwound web parts are produced in a single
5 manufacturing step?

6 A. Correct.

7 Q. Do you agree that Nichida discloses
8 that the material web base can be knit?

9 A. Yes.

10 Q. Nichida also discloses that the
11 unwound web parts, sometimes referred to as
12 pattern elements, can be knit.

13 Correct?

14 A. Correct.

15 Q. Following this through, you -- do
16 you also agree that Nichida discloses that the
17 entire material web, inclusive of both the
18 material web base and unwound web parts, can be
19 knit?

20 MS. STAUBACH: Objection, form.

21 THE WITNESS: Nichida discloses that
22 web base may be knit and the unwound web

1 parts may be knit, yes.

2 BY MR. SMITH:

3 Q. Do you agree, though, that Nichida
4 discloses an embodiment in which both the
5 material web base and the unwound web parts are
6 knit?

7 MS. STAUBACH: Objection, form.

8 THE WITNESS: I'm just hesitating
9 because knit can be used as a noun or a verb
10 in this case.

11 But, yes. Nichida discloses that
12 the web and the -- that the web base and the
13 unwound web parts may both be knitted
14 fabrics.

15 BY MR. SMITH:

16 Q. So, using -- I understand the
17 confusion. I'm not trying to trick you in going
18 back on your opinion here.

19 All I'm asking is, using knit as a
20 noun, does Nichida describe an embodiment in
21 which both the material web base and the unwound
22 web parts are knit?

1 MS. STAUBACH: Objection, form.

2 Asked and answered.

3 THE WITNESS: Nichida does disclose
4 that the material web base and the unwound
5 web parts may both be knitted fabrics, yes.

6 BY MR. SMITH:

7 Q. And it is your opinion that in an
8 embodiment in which both are knitted fabrics, it
9 is two separate knitting processes used to make
10 that material web. Correct?

11 A. Yes.

12 Q. I think you said you had Nichida in
13 front of you, correct?

14 A. I do.

15 Q. That is Exhibit 1005. If we could
16 pull that up and turn to Page 5.

17 Looking at the first full paragraph
18 starting with, "In Figs 1 and 2, 1 indicates a
19 material web which, during its production by a
20 method customary in the textile industry, e.g. by
21 weaving and/or knitting and/or embroidery, is
22 provided with a single or a plurality of unwound

1 web parts 2 for the shoe-upper shape 3."

2 You agree that this sentence I just
3 read states that one of the ways the material web
4 can be produced is by knitting, correct?

5 MS. STAUBACH: Objection.

6 THE WITNESS: This sentence, I guess
7 you are pointing out, is not well written.
8 But, it tells us that it is provided with
9 single or plurality of unwound web parts.

10 So, somehow we are taking one or
11 more unwound web parts during the production
12 which may have been through a weaving or a
13 knitting or an embroidery process.

14 We provide those parts to the
15 material web.

16 BY MR. SMITH:

17 Q. You agree that the list after the
18 e.g. is disjunctive, correct?

19 MS. STAUBACH: Objection, form.

20 THE WITNESS: Yes.

21 BY MR. SMITH:

22 Q. And this sentence describes knitting

1 as a method that is customary in the textile
2 industry, correct?

3 A. Yes, it does.

4 Q. Going back to Page 4 of Nichida.
5 The third paragraph down starting with, "With the
6 method according to the invention, only those
7 parts of the material web corresponding to the
8 pattern or an area of the pattern of the shoe
9 upper or the associated sole part are produced in
10 the required quality, thickness, multilayered or
11 the like."

12 Are you with me?

13 A. Yes.

14 Q. As I understood your opinion in your
15 report, it is your opinion that the word
16 "multilayered" here indicates that a two-step
17 process is used to manufacture Nichida's material
18 web.

19 Correct?

20 MS. STAUBACH: Objection, form.

21 THE WITNESS: Not solely. But, yes.

22 BY MR. SMITH:

1 Q. Do you agree the list here:

2 Quality, thickness, multilayered, or the like, is
3 disjunctive, correct?

4 MS. STAUBACH: Objection, form.

5 THE WITNESS: Disjunctive from what?

6 I'm not seeing it.

7 BY MR. SMITH:

8 Q. Got it. You agree the sentence does
9 not require -- strike that.

10 Do you agree Nichida is not
11 describing that its uppers are always
12 multilayered, correct?

13 MS. STAUBACH: Objection, form.

14 THE WITNESS: No, they are not
15 always required to be multilayered.

16 BY MR. SMITH:

17 Q. You mentioned earlier that
18 multilayer was just part of your opinion for why
19 Nichida describes a multistep process.

20 So, let's go to, it would be
21 Paragraph 42 of your declaration, Exhibit 2003.

22 Are you with me, Dr. Pastore?

1 A. Yes.

2 Q. All right. So, you say in the
3 middle of this paragraph, "In my opinion, the
4 mentions of producing multilayered pattern
5 elements and the differential in quality between
6 surface areas and the pattern elements means that
7 the pattern elements are formed in a separate
8 process from the material web base 4, which may
9 be formed from gauze or with low to very low
10 number of warps and/or wefts."

11 As we talked about multilayered,
12 what are you referring to when you say the
13 differential in quality between the surface areas
14 and the pattern elements?

15 A. As we just saw previously from
16 Nichida -- I have lost the page here. Nichida
17 talks about quality.

18 Q. We were on Page 4 of Nichida, if
19 that helps.

20 A. Yes. The produced in the required
21 quality, thickness, multilayered or the like.

22 So, Nichida tells us there can be

1 different qualities between the surface areas and
2 the pattern. There are differences in quality
3 that can be produced.

4 Q. So, when you say differential in
5 quality, are you just referring to quality as
6 stated on Page 4 of Nichida or is there something
7 else you are referring to?

8 MS. STAUBACH: Objection, form.

9 THE WITNESS: I'm referring to
10 quality as just general characteristics, the
11 qualities of a material.

12 BY MR. SMITH:

13 Q. Okay. Would that include, for
14 example, the weight of the material?

15 A. Yes.

16 Q. Would it include the cost of the
17 material?

18 A. Yes.

19 Q. Are there any other qualities you
20 are specifically referring to other than weight
21 and cost?

22 MS. STAUBACH: Objection, form.

1 THE WITNESS: Yes. Qualities such
2 as the texture. We know these things might
3 be weaves. They might be knits. They might
4 be embroidery. There might be printing.

5 There could be "ands" used there.
6 There can be weaving and knitting. There are
7 different qualities that are formed.

8 BY MR. SMITH:

9 Q. So, when you are referring to a
10 differential in quality between surface areas and
11 the pattern elements, part of the basis for that
12 opinion is that Nichida describes processes such
13 as embroidery and printing. Correct?

14 A. And weaving and knitting, yes.

15 Q. All right. Moving on to the latter
16 half of that same sentence in your declaration
17 here talking about -- I think you are quoting
18 Nichida gauze or with a low to very low number of
19 warps and/or wefts.

20 Does that sentence describe a knit
21 fabric?

22 A. No, generally when we talk about the

1 number of warps and/or wefts, we are typically
2 talking about a woven fabric.

3 Q. Could it describe a knit fabric?

4 A. Again, this translation is less than
5 perfect, but it would be very rare to use number
6 of warps and wefts to describe a knit.

7 It would be someone who wasn't
8 familiar with the typical language of the
9 industry.

10 Q. Okay. So, going back to Page 4 of
11 Nichida, same paragraph we have been looking at.

12 It says, "The remaining area of the
13 material web may be of a simple lightweight or
14 inexpensive fabric quality."

15 Are you with me or is that not
16 showing up?

17 A. Yes. It is not highlighted but I'm
18 with you.

19 Q. You agree that a lightweight or
20 inexpensive fabric quality can refer to a knit
21 material, correct?

22 A. Yes, there is no specification of

1 the fabric structure.

2 Q. Go to your Page 19 of your report.

3 So, it is your opinion that Nichida
4 does not disclose that the knitted textile
5 element has a substantially planar configuration
6 upon removal from the surrounding knitted textile
7 structure, correct?

8 A. Correct.

9 Q. I'm going to refer to Figures 1 and
10 2 of Nichida here.

11 But, are you okay referring to the
12 ones that are on the bottom of your report that
13 are colored?

14 A. Yes.

15 Q. Great. So, for Nichida's Figure 1,
16 do you agree that the material web depicted in
17 this image is depicted as being substantially
18 planar?

19 A. We are seeing a drawing of a
20 projection of this fabric. So that the drawing
21 appears to contain a planar structure but it is
22 not described anywhere.

1 Q. Do you agree that the material web
2 depicted in Figure 2 is depicted as being
3 substantially planar?

4 A. Figure 1 is just a zoom of Figure 2.
5 And, it is drawn as a projection.

6 It looks like a two-dimensional
7 drawing but of course it is on a piece of paper
8 so we can't really judge that.

9 Q. What do you mean by it is on a piece
10 of paper so we can't really judge that?

11 A. Well, we have no sense of the third
12 dimension of this. It is not drawn in isometric.
13 It is just drawn as a projection.

14 Q. So, as I understand it, it is your
15 opinion that Nichida does not show the pattern
16 elements after they are removed from the material
17 web. Right?

18 MS. STAUBACH: Objection, form.

19 THE WITNESS: Correct. In the
20 context of a shoe.

21 BY MR. SMITH:

22 Q. So, I just want to follow through

1 and make sure I'm understanding you correctly.

2 It is your opinion that Nichida is
3 effectively silent on whether its pattern
4 elements are substantially planar after the
5 removal of the material web. Correct?

6 A. Correct.

7 Q. Now, going to Paragraph 47 of your
8 report, on the next page.

9 You say in the third sentence, "In
10 my opinion, the varying processes that Nichida
11 describes for forming pattern elements 2 may
12 impart a curl or three-dimensional structure to a
13 removed pattern element such that it is not
14 substantially planar."

15 In that sentence --

16 A. Okay --

17 Q. -- what varying processes are you
18 referring to?

19 A. The processes that Nichida describes
20 for making the elements that form up the pattern
21 element.

22 Q. So, would that include embroidery?

1 A. It would include embroidery.

2 Q. So, is it your opinion that
3 embroidery may impart a curl or three-dimensional
4 structure to a removed pattern element?

5 A. It is possible depending on the
6 specifics of the production technique.

7 Q. So, it may or it may not. Is that
8 correct?

9 MS. STAUBACH: Objection, form.

10 THE WITNESS: That is correct.

11 BY MR. SMITH:

12 Q. By varying processes, are you also
13 referring to weaving?

14 A. Yes.

15 Q. And is it your opinion that weaving
16 may impart a curl or three-dimensional structure
17 to the removed pattern element?

18 A. It is my opinion that depending on
19 the way that the, in our example, the woven
20 elements are attached to the web base, upon
21 removal from the material web it may induce
22 curvature.

1 Q. And again you say may induce
2 curvature, but it may not. Correct?

3 A. Correct. It is unknown because
4 there is no description of the process.

5 Q. So, let's go to the example. I
6 think we agreed upon where, I know in your
7 opinion two-step process, both the base and the
8 pattern elements are knitted.

9 Are you with me?

10 A. Yes.

11 Q. In that example, is it your opinion
12 that when the pattern element is removed from the
13 base, it may impart a curl or three-dimensional
14 structure to the removed pattern element?

15 MS. STAUBACH: Objection, form.

16 THE WITNESS: Yes. By the same
17 logic.

18 We don't know how that knitted
19 pattern element is attached to the web base.
20 And depending on the details, it may or may
21 not impart curvature and cause a
22 three-dimensional structure when it is

1 removed from the base.

2 BY MR. SMITH:

3 Q. Does the term --

4 Claims 5 and 15 of the '749 patent
5 use the phrase "substantially planar," right?

6 A. Yes.

7 Q. In your opinion, is any amount of
8 curl permitted for a textile element to be
9 substantially planar after removal from the
10 surrounding textile structure?

11 MS. STAUBACH: Objection, form.

12 THE WITNESS: I think substantially
13 is intended to mean it does not need to be
14 perfectly planar.

15 But, substantially it would appear
16 to be planar even if a measurement could
17 indicate that it wasn't planar.

18 BY MR. SMITH:

19 Q. So, I'm back to the question: Is
20 any amount of curling permitted?

21 MS. STAUBACH: Objection, form.

22 THE WITNESS: It would depend on the

1 context, but I believe substantially allows a
2 very small amount of curling or curvature to
3 be present.

4 BY MR. SMITH:

5 Q. Going back to your opinion in
6 Paragraph 47 of your report. When you say "in
7 part, a curl," are you referring to a more
8 significant curl than the very small amount that
9 you think is permitted by the claim?

10 MS. STAUBACH: Objection, form.

11 THE WITNESS: Yes. I am referring
12 to enough of a curl or three dimensionality
13 that a POSITA would say no, that is not
14 substantially planar.

15 BY MR. SMITH:

16 Q. Is it your opinion that whether or
17 not that curl is present is a function of the
18 manufacturing processes used, right?

19 A. Yes.

20 Q. And it would be within the skill of
21 a person of ordinary skill in the art to select
22 the manufacturing process from among those

1 described in Nichida such that it would not
2 impart a curl. Right?

3 MS. STAUBACH: Objection, form.

4 THE WITNESS: You are asking if it
5 is possible to do this without curling?

6 I, I -- I'm not quite catching what
7 the POSITA's goal was here.

8 BY MR. SMITH:

9 Q. Strike that. We can move on.

10 I'm going to ask you to assume -- I
11 know you disagree, but I'm going to ask you to
12 assume that Nichida's material web base and
13 pattern element are simultaneously knit.

14 Okay? Are you with me?

15 MS. STAUBACH: Objection.

16 THE WITNESS: I understand your
17 premise.

18 BY MR. SMITH:

19 Q. Okay. Assuming the web base and
20 pattern element are simultaneously knit, will the
21 removed pattern element be substantially planar?

22 MS. STAUBACH: Objection, form.

1 THE WITNESS: There is not enough
2 information to judge.

3 BY MR. SMITH:

4 Q. Okay.

5 MR. SMITH: Dan, can you pull up
6 Exhibit 2009.

7 (Whereupon, previously marked
8 Exhibit 2009,
9 first referral.)

10 BY MR. SMITH:

11 Q. And Dr. Pastore, are you familiar
12 with Exhibit 2009? This is the Leach reference
13 that is in Paragraph 43.

14 A. Yes.

15 Q. The title of this reference is
16 Geotextile Fabric Construction. Right?

17 A. Yes.

18 Q. Do you agree that geotextiles are
19 composite fabrics that are used in construction
20 sites to prevent erosion?

21 MS. STAUBACH: Objection, form.

22 THE WITNESS: Yes, that is one of

1 the applications.

2 BY MR. SMITH:

3 Q. The Leach reference we are looking
4 at describes knitting through a nonwoven fabric,
5 correct?

6 A. Correct.

7 Q. You would also agree that knitting
8 through a nonwoven fabric unavoidably damages the
9 nonwoven fabric. Correct?

10 MS. STAUBACH: Objection, form.

11 THE WITNESS: Correct.

12 BY MR. SMITH:

13 Q. And that is because the knitting
14 needles will go through the nonwoven fabric,
15 right?

16 A. Yes.

17 Q. Is it also correct that when you
18 knit through, say you -- strike that.

19 You are knitting through a sheet of
20 nonwoven fabric, if you removed the portion you
21 knit, does your nonwoven fabric -- strike that.
22 I'm forming a poor question.

1 If you knit a pattern element on a
2 nonwoven fabric and then remove that pattern
3 element, are you also removing a portion of the
4 nonwoven fabric?

5 MS. STAUBACH: Objection, form.

6 THE WITNESS: I'm not sure what you
7 have in mind with removing. If you mean
8 cutting it out?

9 BY MR. SMITH:

10 Q. Yes, cutting it out.

11 A. Then, some of that nonwoven fabric
12 would be in the pattern element that you have
13 removed, yes.

14 Q. And the presence of that nonwoven
15 fabric in the pattern element that you have
16 removed would impact the properties of that
17 pattern element, correct?

18 MS. STAUBACH: Objection, form.

19 THE WITNESS: Correct.

20 MR. SMITH: All right. I'm about to
21 switch topics. This is probably a good time
22 for our first break.

1 (Recess taken -- 10:57 a.m.)

2 (After recess - 11:09 a.m.)

3 BY MR. SMITH:

4 Q. Welcome back, Dr. Pastore.

5 I've got to ask this question: Did
6 you discuss the substance of your testimony with
7 counsel on a break?

8 A. No, I did not.

9 Q. Okay. Okay. Let's turn to
10 Zuckerman, Exhibit 1008.

11 (Whereupon, previously marked
12 Exhibit 1008,
13 first referral.)

14 BY MR. SMITH:

15 Q. Do you have that in front of you?

16 A. I do.

17 Q. And, just so, to orient you in your
18 report, the opinions regarding Zuckerman, I guess
19 largely start on Page 21.

20 All right. So, it is your opinion
21 that Zuckerman does not disclose a surrounding
22 textile structure; is that correct?

1 A. That is correct.

2 Q. I think you have Zuckerman in front
3 of you.

4 If you are looking at Figure 1 of
5 Zuckerman, you do agree -- well, first, let's
6 orient you.

7 You understand that Reference
8 Number 11 in Zuckerman is the blank, correct?

9 MS. STAUBACH: Objection, form.

10 THE WITNESS: Yes.

11 BY MR. SMITH:

12 Q. And as depicted in Figure 1 of
13 Zuckerman, there is knitted fabric on both sides
14 of the blank.

15 Correct?

16 A. Correct.

17 Q. You just disagree that that fabric
18 constitutes a surrounding textile structure,
19 correct?

20 A. Correct.

21 Q. Now, your disagreement is based in
22 part on your opinion that a person of ordinary

1 skill in the art would understand that a
2 surrounding textile structure extends around most
3 or all of the periphery of the textile element,
4 correct?

5 A. Correct.

6 Q. And for clarification, by most you
7 mean at least 50 percent?

8 MS. STAUBACH: Objection.

9 THE WITNESS: I believe it is
10 substantially more than that, but it would
11 depend on the context. We would have to know
12 exactly what we were considering.

13 But, definitely more than
14 50 percent.

15 BY MR. SMITH:

16 Q. So, in your opinion, is the lower
17 bound of determining whether there is a
18 surrounding textile structure -- strike that.

19 In your opinion, does a surrounding
20 textile structure need to extend around at least
21 50 percent of the textile element?

22 A. At a minimum, yes. But

1 substantially more I would think, depending on
2 the specific context we are looking at.

3 Q. Going back to Zuckerman Figure 1.
4 It is your opinion that the knit material on
5 either side of Zuckerman's blank would be
6 considered two separate textile structures,
7 correct?

8 MS. STAUBACH: Objection, form.

9 THE WITNESS: Yes.

10 BY MR. SMITH:

11 Q. And it is your opinion that two
12 separate textile structures cannot be considered
13 a surrounding textile structure, correct?

14 MS. STAUBACH: Objection, form.

15 THE WITNESS: Correct.

16 BY MR. SMITH:

17 Q. So, if there is just a very small
18 gap between two separate textile structures that
19 otherwise surround over 50 percent of the textile
20 element, you still would not consider that a
21 surrounding textile structure, correct?

22 MS. STAUBACH: Objection, form.

1 THE WITNESS: You are asking if
2 there were two separate regions that do not
3 touch each other, would they be considered a
4 singular textile structure. I would say no.

5 BY MR. SMITH:

6 Q. Even if the gap between those two
7 separate regions is very small?

8 MS. STAUBACH: Objection.

9 THE WITNESS: I don't think the size
10 of the gap matters, just whether it was one
11 or more regions of textile.

12 BY MR. SMITH:

13 Q. All right. Thank you.

14 So, focusing still on Figure 1 of
15 Zuckerman. You would agree that there is no
16 textile adjacent to the top edge of the blank in
17 Figure 1. Right?

18 MS. STAUBACH: Objection, form.

19 THE WITNESS: Correct.

20 BY MR. SMITH:

21 Q. The top edge of the blank is bounded
22 by air, right?

1 A. Presumably, yes.

2 Q. Is that also true for the bottom
3 edge?

4 MS. STAUBACH: Objection, form.

5 THE WITNESS: Yes.

6 BY MR. SMITH:

7 Q. So, if you ignore the edges that are
8 bounded by air, each remaining edge of
9 Zuckerman's blank is adjacent to a textile
10 structure. Correct?

11 A. Correct.

12 Q. So, it is your opinion that a person
13 of ordinary skill would consider the edges of the
14 textile element that are bounded only by air when
15 determining whether there is a textile structure
16 that extends around most or all of the textile
17 element. Correct?

18 A. Yes.

19 Q. All right. So turning to the
20 section that starts on Page 23 of your
21 declaration regarding the incorporating step.

22 Is it your opinion that Zuckerman

1 does not disclose incorporating the knitted
2 textile element into the article of footwear?

3 A. Yes, it is.

4 Q. Do you agree that Zuckerman's
5 slipper when completed is an article of footwear,
6 as the term is used in the '749 patent?

7 A. Yes.

8 Q. So, then you agree that the term
9 "article of footwear" as used in the '749 patent
10 does not require the sole to be a physically
11 distinct component from the upper, then. Right?

12 MS. STAUBACH: Objection, form.

13 THE WITNESS: Yes. There must be a
14 sole. There must be an upper. But, they
15 need not be separate.

16 BY MR. SMITH:

17 Q. Turn to your Page 24 of your
18 declaration. You see the figures at the bottom
19 half of that page?

20 A. Yes.

21 Q. And am I understanding correctly to
22 what you are depicting is effectively a flow

1 chart of various manufacturing steps?

2 A. Yes.

3 Q. All right. So, in Figure 1 of
4 Zuckerman, is the blank an article of footwear?

5 MS. STAUBACH: Objection, form.

6 THE WITNESS: It is an incomplete
7 article of footwear.

8 BY MR. SMITH:

9 Q. What do you mean by incomplete?

10 A. There is some seaming required
11 before it is complete into the invention.

12 Q. So, in Figure 1 of Zuckerman, it is
13 your opinion that the blank has both an upper and
14 a sole?

15 A. Yes.

16 Q. Okay. Then in Figure 2, when
17 seam 33 is joined, it is still your opinion that
18 the blank is an article of footwear?

19 MS. STAUBACH: Objection, form.

20 THE WITNESS: Yes.

21 BY MR. SMITH:

22 Q. It is still incomplete at that

1 point?

2 A. Correct.

3 Q. Is it the same for what is depicted
4 in Figure 3?

5 MS. STAUBACH: Objection, form.

6 THE WITNESS: Yes.

7 BY MR. SMITH:

8 Q. And Figure 4 is still an incomplete
9 article of footwear, correct?

10 MS. STAUBACH: Objection, form.

11 THE WITNESS: Figure 4 shows us the
12 completed article of footwear.

13 BY MR. SMITH:

14 Q. Why do you say Figure 4 is a
15 completed article of footwear?

16 A. That is ready to wear. The toe can
17 be sewn up, but as it is, it could be worn.

18 Q. Zuckerman describes knitting a blank
19 within a strip of textile, removing the blank
20 from the strip of textile and transforming the
21 blank into an article of footwear. Correct?

22 A. Correct.

1 Q. It is your opinion that process does
2 not satisfy the claim language from Claim 1 of
3 the '749 patent "incorporating the knitted
4 textile element into an article of footwear."

5 Is that correct?

6 A. That is correct.

7 Q. So then is it your opinion that the
8 textile element must be combined with another
9 separate structure to be incorporated into an
10 article of footwear?

11 A. Yes. In the context of '749, it is
12 very specifically attached to a sole.

13 Q. So, is it your opinion that the
14 textile element must be attached to a sole to be
15 incorporated into an article of footwear?

16 A. That is what '749 teaches us, yes.

17 Q. And is that what is required by the
18 claim term "incorporating the knitted textile
19 element into the article of footwear"?

20 A. I believe so.

21 Q. Zuckerman describes embodiments
22 where the knitted blank is combined with other

1 components. Correct?

2 A. Yes. A decoration could be added to
3 the shoe, yes.

4 Q. And one of the components that
5 Zuckerman describes combining with its blank is
6 an insert 47. Correct?

7 A. Yes.

8 Q. It is your opinion that -- strike
9 that.

10 The insert 47 can also be described
11 as a toe covering portion, correct?

12 A. Correct.

13 Q. And it is your opinion that toe
14 covering portion is an adornment. Correct?

15 A. Correct.

16 Q. Just to make sure I understand your
17 opinion, the article of footwear you believe is
18 complete prior to the addition of the toe
19 covering portion. Is that right?

20 A. Yes. I believe that is an article
21 of footwear shown in Figure 4.

22 Q. And it is a complete article of

1 footwear. Correct?

2 MS. STAUBACH: Objection, form.

3 THE WITNESS: I'm not sure what
4 complete means as you are describing it, but
5 it is an article of footwear. It has an
6 upper and a sole that can be worn.

7 BY MR. SMITH:

8 Q. So, when you refer to an
9 adornment -- and I am in Paragraph 60 of your
10 report, by the way.

11 When you refer to adornments such as
12 Zuckerman's toe covering portion 47, are you
13 referring to structures that are added after the
14 blank is transformed into an article of footwear?

15 MS. STAUBACH: Objection, form.

16 THE WITNESS: Yes. These are
17 adornments, decorations added to an article
18 of footwear.

19 BY MR. SMITH:

20 Q. And, it is your opinion that
21 combining the blank 11 and toe covering portion
22 47 does not satisfy the incorporating step of

1 Claim 1 of the '749 patent. Correct?

2 A. Correct.

3 Q. It is also your opinion that
4 combining the blank with pom-pom 51 does not
5 satisfy the incorporating step of Claim 1 of the
6 '749 patent. Correct?

7 A. Correct.

8 Q. Just for completeness, it is also
9 your opinion that the pom-pom is an adornment?

10 A. Yes.

11 Q. You agree -- or strike that.

12 Do you agree that Zuckerman
13 describes an embodiment of its slipper that does
14 not incorporate the toe covering portion 47?

15 MS. STAUBACH: Objection, form.

16 THE WITNESS: Certainly it is
17 disclosed from Figure 4 where the claim
18 requires the toe covering.

19 BY MR. SMITH:

20 Q. When you say the claim requires the
21 toe covering, are you referring to Claim 1 of
22 Zuckerman?

1 A. Claim 1, yes. My apologies.

2 Q. Okay. If you could go to, I guess
3 it is Page 2, right-hand column, Line 39.

4 "Slippers may also be made from
5 blank 11 as shown in Figures 8, 9, and 10 without
6 using inserts 47."

7 A. Yes.

8 Q. So, that would be an embodiment of
9 Zuckerman that does not use the toe covering
10 portion, correct?

11 A. Correct.

12 Q. Moving to, it is Page 26 of your
13 report.

14 It is your opinion that Zuckerman
15 does not disclose knitting an outline of the
16 textile element, correct?

17 A. Correct.

18 Q. In the bottom of Paragraph 63 of
19 your report, Exhibit 2003, you say, "For at least
20 this reason, Zuckerman also fails to knit an
21 outline of the textile element within a
22 surrounding textile structure."

1 Are you with me?

2 A. Yes.

3 Q. Okay. Now is it your opinion that
4 the outline is a feature separate from the
5 textile structure and the textile element that
6 must be knitted within the surrounding textile
7 structure?

8 MS. STAUBACH: Objection, form.

9 THE WITNESS: Yes, the outline would
10 be a knitted structure that delineates the
11 difference between the surrounding textile
12 structure and the textile element.

13 BY MR. SMITH:

14 Q. Does the outline need to be separate
15 from the textile element?

16 MS. STAUBACH: Objection, form.

17 THE WITNESS: The outline would
18 represent the boundary between the two.

19 BY MR. SMITH:

20 Q. But does not need to be a separate
21 knit structure. It just needs to delineate a
22 boundary; is that correct?

1 A. Correct.

2 Q. Is it your opinion that the knitted
3 outline must go entirely around the textile
4 element?

5 MS. STAUBACH: Objection, form.

6 THE WITNESS: It must delineate the
7 difference between the textile element and
8 the surrounding textile structure.

9 BY MR. SMITH:

10 Q. So, for example, if the surrounding
11 textile structure goes around 51 percent of the
12 textile element, it is your opinion that the
13 outline must at least delineate the boundary
14 between that 51 percent that is adjacent in the
15 surrounding textile structure?

16 MS. STAUBACH: Objection.

17 THE WITNESS: I resist the notion
18 that we could have a 51 percent perimeter
19 that would be considered surrounding.

20 But, yes, the outline must cover the
21 border between the element and the textile
22 structure throughout the surrounding textile

1 structure.

2 BY MR. SMITH:

3 Q. Okay. So, for whatever portion of
4 the textile element is bounded by the surrounding
5 textile structure, that portion must have a
6 boundary delineated by an outline to satisfy
7 Claim 3. Correct?

8 MS. STAUBACH: Objection, form.

9 THE WITNESS: Correct.

10 BY MR. SMITH:

11 Q. So, for the -- strike that.

12 To determine whether there is an
13 outline, we do not need to look at the edges that
14 are bounded by air. Correct?

15 MS. STAUBACH: Objection, form.

16 THE WITNESS: Correct. The outline
17 distinguishes the textile element from the
18 surrounding textile structure.

19 BY MR. SMITH:

20 Q. Do you have the '749 patent in front
21 of you?

22 A. Yes.

1 Q. Can you turn to Figure 9?

2 A. Yes.

3 Q. I think you agree, Figure 9 shows a
4 textile element in the surrounding textile
5 structure. Right?

6 A. Yes.

7 Q. Okay. Does Figure 9 also show an
8 outline of that textile element?

9 A. Yes.

10 Q. If the textile element -- let's just
11 take what I might call the lower half, the half
12 that is the heel.

13 Do you understand what I am
14 referring to?

15 A. What would be on the lower right of
16 the image as it is oriented now on the screen?

17 Q. Yes, yes. If you were to move that
18 lower edge of the textile element to the very
19 edge of the textile structure. Are you following
20 me?

21 A. Yes.

22 Q. Okay. It would still -- there would

1 still be an outline of the textile element,
2 right?

3 MS. STAUBACH: Objection, form.

4 THE WITNESS: It is a little
5 challenging here because that is not -- the
6 outline is not flat on that lower right side.
7 And the way that the knitting machine
8 operates, it is a continuous run, going from,
9 say upper left to lower right.

10 So, I don't know if we had cut the
11 fabric, you mean so that it touched, some
12 part of it touches the edge?

13 BY MR. SMITH:

14 Q. Well, I think we might be talking
15 past each other here.

16 So, in Figure 9 this was knit on a
17 circular knit machine, right?

18 A. Yes.

19 Q. Okay. I see the issue. We can move
20 on there.

21 All right. By 2004, knitting
22 outlines was a known way of differentiating a

1 textile element from other fabric within a sheet
2 of textile, correct?

3 MS. STAUBACH: Objection, form.

4 THE WITNESS: That is a -- you said
5 2009. I'm going to guess you meant 2004.

6 But, I might be wrong there.

7 BY MR. SMITH:

8 Q. Oh, no, I will re-ask it if you
9 heard 2009. The reporter got 2004 but I will
10 re-ask it.

11 By 2004, knitting an outline was a
12 known way of differentiating a textile element
13 from other fabric within a sheet of textile,
14 correct?

15 MS. STAUBACH: Objection, form.

16 THE WITNESS: As I sit here, I can't
17 remember reading anything that introduced
18 this idea of textile elements with
19 surrounding textile structures that had
20 outlines.

21 So, although the technology existed,
22 I don't know if it was a known process or if

1 this was something that two are created from
2 cold cloth, to use a phrase.

3 BY MR. SMITH:

4 Q. Let's go to Page 32 of your report
5 Exhibit 2003.

6 Do you see the sentence starting,
7 "In my opinion," in about the middle of the first
8 paragraph?

9 A. Yes.

10 Q. Okay. So, it is your opinion that a
11 person of ordinary skill in the art would not
12 have used a knitted outline on Zuckerman's
13 knitted strip because the projection and recess
14 shown in Zuckerman would -- could align with a
15 cutting die and this would be a simpler method
16 than knitting an outline. Correct?

17 MS. STAUBACH: Objection, form.

18 THE WITNESS: Correct.

19 BY MR. SMITH:

20 Q. You do agree that changing stitch
21 patterns within a knitted strip can form an
22 outline. Correct?

1 A. Yes.

2 MR. SMITH: Can we pause and take
3 five, Lindsey?

4 MS. STAUBACH: Sure thing.

5 (Recess taken -- 11:41 a.m.)

6 (After recess -- 11:52 a.m.)

7 BY MR. SMITH:

8 Q. Can you bring back up Zuckerman,
9 which is Exhibit 1008, Dr. Pastore?

10 A. Okay.

11 Q. Looking at Figure 1. Do you agree
12 that there is a visually distinct boundary
13 between the blank and other textile structure at
14 Lines 29 and 27?

15 MS. STAUBACH: Objection, form.

16 THE WITNESS: No, those are
17 described as cut lines, I believe, in the
18 patent.

19 BY MR. SMITH:

20 Q. Not quite my question.

21 Does Figure 1 show a boundary
22 between the blank and the other textile structure

1 at Lines 29 and 27?

2 MS. STAUBACH: Objection, form.

3 THE WITNESS: After it has been cut,
4 then the cut would represent a boundary
5 between the blank and the air.

6 But, nothing in the drawing
7 indicates that there is a boundary in the
8 knitted structure.

9 MR. SMITH: Those are all of the
10 questions I have today. Thank you for your
11 time, Dr. Pastore.

12 THE WITNESS: Certainly.

13 MS. STAUBACH: I don't have any
14 redirect.

15 (Whereupon, signature not having been waived,
16 the deposition suspended at 11:54 a.m. EST)

17 * * *

18

19

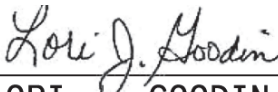
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1 CERTIFICATE OF NOTARY

2
3 I, LORI J. GOODIN, RPR, CRR,
4 CA CSR # 13959 the Notary for this deposition, do
5 hereby certify that the witness whose testimony
6 appears in the foregoing deposition was sworn by
me; that I am neither counsel for, related to,
7 nor employed by any of the parties to the action
in which this deposition was taken; and, further,
8 that I am not a relative or employee of any
attorney or counsel employed by the parties
9 hereto, or financially or otherwise interested
in the outcome of this action.
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11 
LORI J. GOODIN, RPR, CLR, CRR
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12 STATE OF FLORIDA, COUNTY OF SARASOTA

13 Notary Commission Number: GG987804

My Commission expires: May 12, 2028

14 STATE OF CALIFORNIA, CA CSR# 13959

15 My Commission expires: February 22, 2025

16 STATE OF MARYLAND, COUNTY OF ANNE ARUNDEL

My Commission expires: August 2, 2025

17 DISTRICT OF COLUMBIA, WASHINGTON DC

18 My Commission expires: June 1, 2026

19 STATE OF DELAWARE, COUNTY OF KENT

20 My Commission expires: September 9, 2025

21 COMMONWEALTH OF PENNSYLVANIA, COUNTY OF LEHIGH

22 My Commission expires: April 5, 2025

1 Christopher Pastore, Ph.D., c/o
ARNOLD & PORTER KAYE SCHOLER LLP
2 601 Massachusetts Ave, NW
Washington, DC 20001-3743

3
4 Case: Lululemon USA Inc. v. Nike, Inc.
Date of deposition: January 14, 2025
5 Deponent: Christopher Pastore, Ph.D.

6
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9 The deponent may come to this office to sign the transcript,
10 a copy may be purchased for the witness to review and sign,
11 or the deponent and/or counsel may waive the option of
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13 Please forward the errata sheet and the original signed
14 signature page to counsel noticing the deposition, noting the
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10 (Check appropriate box):
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11 complete transcription of the answers given by
me to the questions therein recorded.
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9 Witness Name: Christopher Pastore, Ph.D.

10 Deposition Date: January 14, 2025

11 Page No. Line No. Change

12

13

14

15

16

17

18

19

20

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Signature

Date

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