

Arnold & Porter

December 30, 2024

VIA ECF

Hon. Arun Subramanian
U.S. District Court S.D.N.Y.
500 Pearl Street
New York, New York 10007

Re: Nike, Inc. v. lululemon usa, inc. (Case No. 1:23-cv-00771-AS)
Construction of the phrase “surrounding textile structure”

Dear Judge Subramanian,

Plaintiff Nike, Inc. submits this letter brief regarding the proper construction of the phrase “surrounding textile structure” in claims 1 and 14 of the ’749 patent.

The parties agree that “surrounding textile structure” should be given its ordinary and customary meaning—and that no lexicography or disclaimers apply. Bowling Decl., Ex. A at 13:14–14:15. And there is no dispute about the meaning of “textile structure.” *See id.*

The parties’ only dispute is the meaning of “surrounding” in the claimed “surrounding textile structure.” *Id.* Nike contends the “surrounding textile structure” must completely or mostly surround the textile element. *Id.* at 18:4–10. lululemon contends the “surrounding textile structure” is “*any*” material outside the textile element—even if that material abuts only a tiny portion or percentage of the textile element. *Id.* (emphasis added).

Where, as here, the parties present a fundamental dispute regarding the scope of a claim term, “it is the court’s duty to resolve it.” *O2 Micro Intern. Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008). But the Court need only resolve this dispute “to the extent necessary to resolve the controversy.” *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999). The Court has no obligation to eliminate all “other potential ambiguities that have no bearing on the operative scope of the claim.” *GPNE Corp. v. Apple Inc.*, 830 F.3d 1365, 1372 (Fed. Cir. 2016). In other words, *O2 Micro* requires the Court to resolve only one question: does “surrounding” textile structure mean (i) a textile structure that completely or mostly surrounds the textile element (Nike’s construction); or (ii) a textile structure that abuts “any” amount of the textile element—even a tiny fraction (lululemon’s construction)? For the reasons set forth below, the Court should adopt Nike’s construction.

i. Applying the “widely accepted meaning”: the claimed “surrounding textile structure” must completely or mostly surround the textile element

The term “surrounding” in claims 1 and 14 of the ’749 patent is a non-technical term that has the same meaning that laypersons afford the term in everyday parlance. The “surrounding textile structure” must completely or mostly surround the claimed textile element. This meaning is “readily apparent to lay judges,” and proper construction involves “little more than the

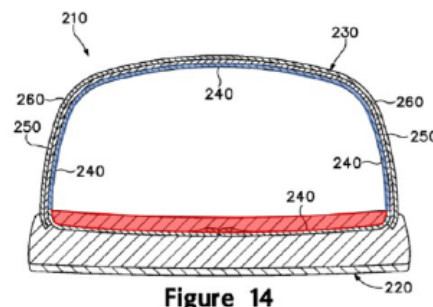
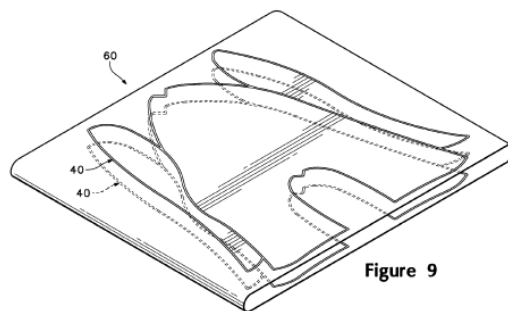
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application of the widely accepted meaning of commonly understood words.” *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005). General purpose dictionaries are often “helpful” in articulating that commonly understood meaning of a disputed term. *See id.* And that’s the case here, as general-purpose dictionaries describe the term “surrounding” as “enclosing or encircling.” *E.g.*, Bowling Decl., Ex. B. The synonyms “enclosing” and “encircling” confirm that the “surrounding textile structure” must completely or mostly surround the claimed textile element.

The specification confirms that “surrounding” in the ’749 patent carries this commonly understood meaning. For example, Figure 9 (below left) depicts a “textile element” (40) that is completely encircled by a “textile structure” (60). ’749 patent at Fig. 9. As another example, the ’749 patent explains that “interior layer” (240) of Figure 14 “removes perspiration from the area immediately *surrounding* the foot.” *Id.* at 10:45–48. The “interior layer” of Figure 14 (annotated in blue) abuts the wearer’s foot on three sides, i.e., it mostly surrounds the wearer’s foot. In view of the specification, Nike’s expert, Dr. Pastore, opined that a skilled artisan would understand “surrounding” in the ’749 patent to carry its widely accepted meaning. *E.g.*, Bowling Decl., Ex. C at 38:7–10.



lululemon's own technical expert—Deborah Young—unambiguously testified that Nike’s construction is correct. *See* Bowling Decl., Ex. D at 54:18–23 (Q: So as you understand the term “surrounding textile structure” as it’s used in the ’749 patent, that refers to waste material that entirely surrounds or close to entirely surrounds the textile element; is that right? A: Yes.); *see also id.* at 152:4–10, 46:17–24; 53:24–54:6.

ii. There is no basis for lululemon’s proposed construction

lululemon’s proposed construction is entirely results-driven. It’s divorced from both the specification and the widely accepted meaning of “surrounding,” and it is directly contradicted by lululemon’s own expert’s testimony. *E.g.*, *id.* at 46:17–24. Nothing in the specification supports construing “surrounding textile structure” to mean “any” material outside the textile element. *Cf.*, ’749 patent at Figs. 9, 14. And a textile structure that abuts only a small fraction of the textile element would not be “enclosing or encircling” the textile element. *See* Bowling Decl., Ex. B.

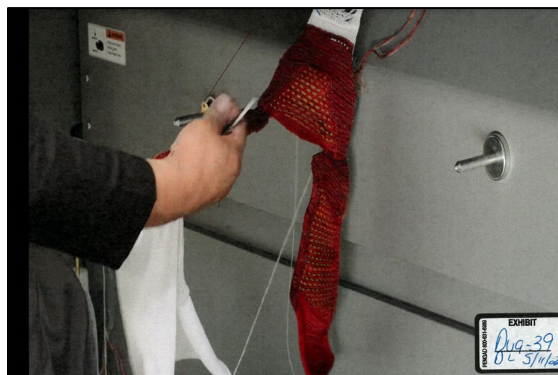
The only support lululemon can muster are out-of-context expert materials from a different litigation. When viewed in the proper context, neither reference actually supports lululemon’s position. And in any event, this type of extrinsic evidence cannot override the specification’s use of the ordinary and customary meaning of “surrounding textile structure.” *Phillips*, 415 F.3d at

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1318 (“[A] court should discount any expert testimony that is clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent.”); *see also Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1584 (Fed. Cir. 1996) (“[E]xpert testimony . . . may not be used to vary or contradict the claim language. Nor may it contradict the import of other parts of the specification.”). As the Federal Circuit explained in *Omega Eng’g, Inc. v. Raytek Corp.*, lululemon’s reliance on expert testimony “not to shed light on this field of art, but to rewrite the patent’s specification and explicitly provide for [a desired outcome]” is improper. 334 F.3d 1314, 1332 (Fed. Cir. 2003).

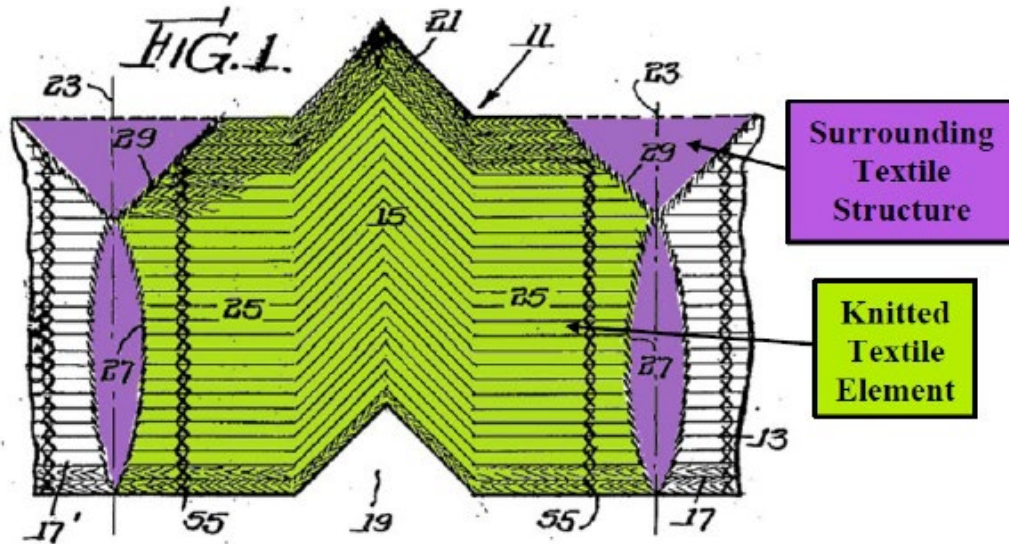
First, lululemon points to a portion of an infringement claim chart appended to Dr. Pastore’s expert report in an ITC investigation involving adidas. *In the Matter of Certain Knitted Footwear*, No. 337-TA-1289 (U.S.I.T.C. 2021); ECF No. 150-4 at adidas_lululemon_00001363–1367. The claim charts provide annotations on top of internal adidas technical documents. The low resolution of these images makes it impossible to determine the extent to which the textile structure surrounds the textile elements. And Dr. Pastore’s corresponding opinions—that “surrounding textile structure . . . constitutes the area of textile outside of and between” the textile elements—is not inconsistent with Nike’s construction. ECF No. 150-4 at adidas_lululemon_00001363–1364. lululemon’s attempt to rely on these blurry images and ambiguous arrows to “diverge significantly from the intrinsic record” is improper. *See Genuine Enabling Tech. LLC v. Nintendo Co., Ltd.*, 29 F.4th 1365, 1373 (Fed. Cir. 2022).

Second, lululemon points to a portion of Dr. Pastore’s deposition testimony from the ITC investigation involving adidas. ECF No. 150-9 at 88:13–89:5. According to lululemon, Dr. Pastore testified that “a skilled artisan would have ignored sides bounded by air when determining if there is a ‘surrounding textile structure.’” ECF No. 148 at 10. But lululemon declines to tell the Court that—beginning on the very same page of the transcript—Dr. Pastore testified that a textile structure abutting only a small portion of a textile element does **not** constitute a “surrounding textile structure.” Bowling Decl., Ex. E at 89:20–91:5. Specifically, Dr. Pastore was asked to consider the below image of a knitted vamp. Bowling Decl., Ex. F. When asked whether the “white fabric” was “surrounding textile structure that has to be removed,” Dr. Pastore testified that “in this instance [] I would say it’s not surrounded.” Bowling Decl., Ex. E at 89:20–91:5. Once again, lululemon’s attempt to rely on out-of-context expert testimony from a different litigation is improper. *See Genuine Enabling.*, 29 F.4th at 1373.



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Even the Patent Trial and Appeal Board (“PTAB”) has disagreed with lululemon’s results-driven construction. In the petition for *inter partes* review filed by lululemon against the ’749 patent, lululemon argued that a prior art reference (Zuckerman) disclosed a “surrounding textile structure.” Bowling Decl., Ex. G at 58–59. lululemon pointed to Zuckerman’s Figure 1 (below) as having a textile element (green) and surrounding textile structure (purple). *Id.* (highlighting and annotations added by lululemon).



In its institution decision, the PTAB correctly found it “difficult [] to characterize the noted purple portions as ‘surrounding’ the noted green portion.” Bowling Decl., Ex. H at 26. This Court should reach the same result.

For the reasons set forth above, Nike requests that the Court resolve the parties’ dispute by rejecting lululemon’s construction and determining that “surrounding textile structure” refers to a structure that completely or mostly surrounds the textile element.

The Court has considered the parties’ proposed constructions of “surrounding textile structure.” The Court adopts Nike’s proposed construction based on the plain and ordinary meaning of the term “surrounding”; the well-understood definition of the term as not simply referring to what is “outside” or “adjacent,” but rather what is around or encircling, *see, e.g.,* Oxford English Dictionary (defining the adjective “surrounding” as “[t]hat is (or are) around; encompassing, circumjacent”); and the lack of any intrinsic evidence supporting a broader understanding of the term. Rather, the evidence there is in the ’749 patent supports the Court’s construction. *See, e.g.,* Fig. 9; Fig. 14.

Best Regards,

/s/ Aaron P. Bowling

Aaron P. Bowling

Counsel for Plaintiff Nike, Inc.

SO ORDERED.



Arun Subramanian, U.S.D.J.
Date: January 17, 2025