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On behalf of **lululemon usa inc.**

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LULULEMON USA INC.,
Petitioner,

v.

NIKE, INC.,
Patent Owner.

Case IPR2024-00460
Patent 8,266,749

**PETITIONER'S AUTHORIZED RESPONSE TO PATENT OWNER'S
REQUEST FOR DIRECTOR REVIEW**

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The Board correctly determined that Nishida (Ex. 1005) anticipates the claims of the '749 patent. Paper 30 ("FWD"). Nike does not identify any allegedly erroneous material factual finding beyond its disagreement with the Board's conclusion that Nishida discloses the limitation "simultaneously knitting a textile element with a surrounding textile structure" (the "simultaneously knitting" limitation). Given that it cannot demonstrate any material error in the Board's analysis, Nike rehashes a rejected argument that lululemon's expert somehow admitted the claims were valid. He did not and instead repeatedly attested and testified that Nishida anticipates the claims of the '749 patent. In the FWD, the Board analyzed the prior art, weighed the experts' testimony, and properly concluded that the claims of the '749 patent were unpatentable.

I. THE BOARD CORRECTLY FOUND NISHIDA ANTICIPATES

The independent claims of the '749 patent are broad, reciting just three basic steps for manufacturing an article of footwear:

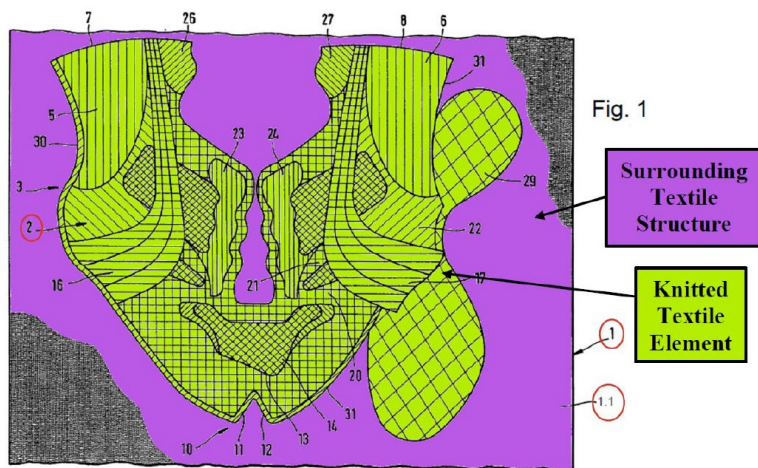
- 1[a] simultaneously knitting a textile element with a surrounding textile structure, the knitted textile element having at least one knitted texture that differs from a knitted texture in the surrounding textile structure;
- 1[b] removing the knitted textile element from the surrounding knitted textile structure;
- 1[c] incorporating the knitted textile element into an article of footwear.¹

Ex.1001, Claim 1. Nike disputes only the first clause of limitation 1[a] that the

¹ For the issues addressed here, Claims 1 and 13 are substantively the same.

knitted textile element and surrounding textile structure in Nishida are knit *simultaneously*.

The Petition explained that Nishida discloses a method for manufacturing an article of footwear, which includes simultaneously knitting a textile element with a surrounding textile structure. Paper 1 (“Pet.”), 19-50. Nishida describes a knitted material sheet, referred to as “material web 1,” which is comprised of “surface areas 1.1” and “unwound web parts 2” (also referred to as “patterns (2).”). Pet., 26-27. These features are illustrated in Figure 1:



FWD, 17 (coloration added by Petitioner; red circles added by the Board). Nishida’s “unwound web parts 2” are knitted textile elements, which Nishida discloses can be simultaneously knit with the “surface areas 1.1,” the surrounding textile structure.

Nishida states, for example, that “when the strip of material (1) is manufactured, the patterns (2) of the uppers are produced, *at the same time* as the strip of material.” Ex. 1005, Abstract (emphasis added). Nishida also discloses the production of a material web, which, “*during its production* by a method customary

in the textile industry, e.g., by weaving and/or *knitting* and/or embroidering, is provided with a single or a plurality of unwound web part(s) 2 for the shoe-upper shape 3.” Ex. 1005, at 5 (emphases added). The Board determined that “[w]hen read with the disjunctive conjunction, Nishida discloses the use of a single process that may be chosen from among a list of examples” FWD, 23.

Nishida further discloses that:

during the production of the material web (1), both the patterns or partial patterns in the form of the shoe upper (3) unwound web part (2), as well as the patterns or partial patterns in the form of a sole part (29) are produced by a print process *on* the material web (1) and/or by a textile production method *within* the material web.

Ex. 1005, 9 (emphases added). The Board found: “Reading the sentence with the disjunctive conjunction and recognizing the different preposition [“on” / “within”] yields two processes—printing *on* the material web *or* a textile production method (e.g., knitting) *within* the material web.” FWD, 20-21 (citing Ex. 1005, 5, 9).

Dr. Brookstein also analyzed each of these passages and concluded that Nishida discloses that “[t]he single textile structure of Nishida’s material web 1 ... is knit during a single knitting process” and includes both a textile element and surrounding textile structure. Ex.1003, ¶ 76. The Board found Dr. Brookstein’s testimony “consistent with [Nishida] and based on decades of experience in the textile field.” FWD, 22.

Neither Nike nor its expert ever explained how Nishida's unambiguous disclosure of knitting the textile elements "at the same time as" or "during the production of" the surrounding material could mean anything other than knitting as part of a single process. Reply, 8-10. Instead, Nike focused on Nishida's arguable disclosure of other processes and attempted to rewrite Nishida's clear text.

Although Nike conceded that Nishida discloses that both the textile elements and surrounding textile structure could be knit (Paper 20 ("Sur-Reply"), 13 n.3), it contended that Nishida discloses *only* a multi-step manufacturing process that utilizes a pre-existing base.² See Paper 15 ("POR,") 9-10 (arguing that Nishida discloses a two-step process where "the material web base is formed as a separate preexisting base"); Paper 31 ("Request"), 4 ("forming Nishida's material requires at least two steps"). Specifically, Nike asserted Nishida's disclosure that "during its production by a method customary in the textile industry, e.g., by weaving and/or knitting and/or embroidering, is provided with a single or a plurality of unwound web part(s) 2 for the shoe-upper shape 3" (Ex.1005, 5) only described a multi-step production process. POR, 18-19. Nike made similar assertions regarding other

² Nike merely implied this contention. FWD, 20 ("We disagree with Patent Owner's implied argument that Nishida discloses only a two-step method."); see Sur Reply, 12. Nike's Request was the first time it affirmatively argued this point. Request, 4.

passages of Nishida, including its claim. *Id.* Nike’s analysis was inconsistent with Nishida’s disclosure, which plainly recites alternative methods of manufacturing. Ex.1005, 5 (“weaving and/or knitting and/or embroidering”). The Board rejected Nike’s interpretation, holding “Nishida discloses the use of a single process that may be chosen from among a list of examples Nishida does not disclose, as Patent Owner implies, only forming the material web by a multi-step production process.” FWD, 23.

During his deposition, Dr. Brookstein explained that Nishida was not limited to multi-step methods or embodiments with a pre-existing base material:

Q. So you could print Unwound Web Parts 2 on an existing web base?

A. Yeah. But Nishida doesn’t limit it to that. That’s just one example.

...

Q. And what does it mean when it says “a textile production method within the material web”?

A. That tells me it could be either knitting or weaving within the material web.

Q. Within an existing material web?

A. **No. At the same time you’re making a material web.**

Ex.2004, 99:2-25 (emphasis added).

In a fifteen-page section of the FWD, the Board agreed with lululemon. FWD, 15-30. It noted that “Patent Owner does not direct our attention to any disclosure in Nishida that **requires** the knitting to be performed by an ‘asynchronous production process.’” FWD, 25 (citing POR, 19-20) (emphasis added). Based on Nishida’s disclosure, the Board concluded Nishida “discloses the recited, ‘simultaneously knitting a textile element with a surrounding textile structure.’” FWD, 22.

Here, Nike focuses less on rewriting the reference as it did before the Board and focuses on its argument that Dr. Brookstein somehow characterized Nishida as not disclosing “simultaneously knitting.” He did not. The relevant testimony is shown below, with the emphasized portion omitted from Nike’s brief:

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. . . .”

Ex.2005, 257:5-23. Nike never identified any passage or figure in Nishida for context and started a question with precise language (“unwound parts number two”) but finished it using a term never appears in Nishida (“base material”). *Id.* The answer to Nike’s follow up question, which Nike omitted from every paper it filed, supports Dr. Brookstein’s rejection of Nike’s pre-existing base theory. Ex.2004, 98:22-99:25. The testimony in response to Nike’s imprecise, out-of-context question shows that it was not clear what Nike was asking or how Dr. Brookstein understood the question.

When Nike later questioned him about Nishida, Dr. Brookstein testified Nishida discloses knitting the unwound web parts “[a]t the same time you’re making a material web” (i.e., discloses the “simultaneously knitting” limitation). Ex.2004, 99:12-25. Thus, Nike’s interpretation of Dr. Brookstein’s deposition testimony is not only inconsistent with all his other testimony, but also with Nishida’s disclosure and the record as a whole.

The Board analyzed Nike’s question, Dr. Brookstein’s testimony, the surrounding context, Nike’s follow up question, and Dr. Brookstein’s other testimony, and rejected Nike’s interpretation. FWD, 27-29. In view of the full record, it determined that the testimony was “too ambiguous to show that Dr. Brookstein inexplicably changed his opinion and agreed with Patent Owner’s assertion that ‘Nishida does not disclose knitting unwound web parts 2 during the same knitting process as material web base 4.’” FWD, 28 (quoting POR, 21).

The FWD concluded that Nishida anticipates the independent claims of the ’749 patent, and held that all other claims were anticipated or obvious in view of the grounds presented in the Petition. *See generally* FWD.

II. ARGUMENT

A. Nishida Discloses The “Simultaneously Knitting” Limitation

As explained above, Nishida expressly discloses “simultaneously knitting a textile element with a surrounding textile structure.” FWD, 21-22, 29-30; Pet. 24-

27. This includes, for example, Nishida’s disclosure of knitting the patterns (2) (textile elements) “at the same time” as and “during the production of” the surrounding material. The Board properly reached this conclusion, and there was no erroneous finding of material fact. *See supra*. Nike presents two arguments here: (1) “other disclosures in Nishida undermines the Board’s finding” and (2) Nishida’s disclosures “lack sufficient precision to be anticipatory.” Request, 13. Nike’s arguments lack merit.

1. Nike’s Argument Ignores Nishida’s Full Disclosure

Nike contends that the Board’s conclusion that Nishida discloses the “simultaneously knitting” limitation is “incompatible with Nishida’s depiction and description of material web base 4 as a separate component from material web 1.” Request, 15. As an initial matter, there is *nothing* in Nishida that describes a material web base 4 that is knit separately from material web 1.

Next, the Board relied on Nishida’s express disclosure that unwound web parts 2 (textile element) and surface areas 1.1 (surrounding textile structure) are produced simultaneously to satisfy the simultaneous knitting limitation. FWD, 29. In response to Nike’s argument that material web base 4 is formed as a separate preexisting base and the unwound web parts are printed or produced on the preexisting base, POR, 9-10, the Board “disagree[d] with Patent Owner’s implied argument that Nishida discloses only a two-step method using multiple production

processes and involving a pre-existing material base.” FWD, 20. Even if Nishida disclosed a separate embodiment where a material web base 4 is a separately knitted component from material web 1, which it does not, it does not affect the Board’s conclusion that Nishida anticipates. *See, e.g., Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1381-82 (Fed. Cir. 2015) (disclosing the patented system as one of many options is still anticipation).

2. Nike’s Lack of Precision Argument Is An Improper New Argument That Is Inconsistent With The Record

Nike also contends that “Nishida’s disclosure lacks sufficient precision to anticipate the ’749 patent.” Request, 14. Nike did not make this specific contention in any of the prior briefing. Rather, Nike argued, by implication, that Nishida disclosed only multi-step asynchronous production processes. *See* FWD, 20, 23. Nike’s new argument is untimely and should be rejected for that reason alone. *See* 37 C.F.R. § 42.75(c)(3); Director Review Process Website, Part 3.E.

Moreover, Nike’s argument is incorrect. Nishida unambiguously discloses “simultaneously knitting” in multiple places, including through the disclosure that patterns are knit “at the same time” as and “during the production of” the surrounding textile structure. *See supra* § I. Nishida’s disclosure of “simultaneously knitting” meets the standard for anticipation. *See Am. Calcar, Inc. v. Am. Honda Motor Co., Inc.*, 651 F.3d 1318, 1341 (Fed. Cir. 2011) (“To be anticipatory, a reference must describe ... each and every claim limitation.”).

Nike argues that “the Office ... acknowledged that Nishida lacked precision.” citing to the examiner’s analysis of Nishida-US during prosecution. *See* Request, 14. However, the examiner’s analysis during prosecution is not binding. *See* PTAB Consolidated Trial Practice Guide, 46 (Nov. 2019). Additionally, “[t]he record is devoid of any indication that the Examiner considered or apprehended the extent of [Nishida-US’s] disclosure.” Paper 8 (“ID”), 23-24. Moreover, the record showed a “clear inconsistency” between Nishida’s disclosure and the examiner’s office action. ID, 23. Nike provides no rationale supporting the Examiner’s conclusions nor does it address the Board’s conclusion in the *adidas IPR* that Nishida-US disclosed the “simultaneously knitting” limitation. Ex.2022, 29-31.³ Regardless, the Board “considered the statements of the examiner during prosecution,” and “on the full record ... [found] that Nishida discloses simultaneously knitting a textile element and surrounding textile structure.” FWD, 26-27.

³ The *adidas IPR* specifically found that Nishida-US discloses the “simultaneously knitting” limitation. Ex.1022, 29-31. Nike argument that this finding was “speculative” because it was in the context of obviousness is illogical as a reference’s disclosure is not affected by the legal theory of invalidation. Request, 10. Regardless, the FWD did not rely on the *adidas IPR* as the basis for anticipation by Nishida.

Next, Nike argues that “the board acknowledged that Nishida lacked precision,” asserting that “during oral argument in this IPR, the Board described Nishida’s alleged disclosure of ‘simultaneous knitting’ as ‘[not] a slam dunk in [either] direction.’” Request, 14 (citing Paper 29, 36:24 (brackets Nike’s)⁴). Nike grossly mischaracterizes Judge Fitzpatrick’s statement. In full, the relevant portion of the oral argument transcript reads:

JUDGE FITZPATRICK: I can tell you, this -- Mr. -- I’m reading this and it -- I get the opposite. I get the -- I gather the opposite from it. And I’m going to -- it says, “In Figures 1 and 2, 1 indicates a material web, which during its production,” and then describes some production methods. But “During its production, is provided with a single or a plurality of Unwound Web Parts 2.” I’m not saying it’s a slam dunk in the other direction. I’m just saying that strikes me as the opposite of what you were just saying.

Paper 29, 36:19-25. Judge Fitzpatrick did not describe Nishida as ambiguous, and one judge does not speak for the Board. Nike’s misrepresentation of the oral argument is inconsistent with the FWD and should be rejected.

Nike contends Nishida’s disclosure aligns with the art in *Wasica*. Request, 14. However, in *Wasica*, the Board concluded the art’s disclosure “was at best ‘unclear.’” *Wasica Fin. GmbH v. Continental Automotive Sys.*, 853 F.3d 1272, 1284 (Fed. Cir. 2017). Here, the Board made no such finding. Instead, it explained Nishida’s plain disclosure of the “simultaneously knitting” limitation, rejecting

⁴ An apparent typo in Nike’s Request references page 26.

Nike's arguments as inconsistent with Nishida's unambiguous disclosure. FWD, 15-30. *Wasica* is inapposite.

B. The Board Properly Considered All Dr. Brookstein's Testimony

Because Nike cannot identify anything in Nishida undermining anticipation, it argues the Board abused its discretion "by disregarding Dr. Brookstein's clear testimony based only on speculative attorney argument." Request, 10.

The Board has substantial discretion to weigh witness testimony and evidence. *See, e.g., Regents of Univ. of Minn. v. Gilead Sciences, Inc.*, 61 F.4th 1350, 1358-59 (Fed. Cir. 2023). The Board did not abuse that discretion by evaluating the totality of Dr. Brookstein's testimony. This includes the Board's finding that Brookstein did not change his opinion that Nishida discloses the "simultaneously knitting" limitation: "this testimony is too ambiguous to show that Dr. Brookstein inexplicably changed his opinion and agreed with Patent Owner's assertion that 'Nishida does not disclose knitting unwound web parts 2 during the same knitting process as material web base 4.'" FWD, 28 (quoting POR, 21).

1. Dr. Brookstein Did Not Change His Opinion

Nike asserts Dr. Brookstein's district court deposition completely recanted his opinions. Nike's position lacks merit. Before and after the district court deposition, Dr. Brookstein unequivocally explained that Nishida disclosed the "simultaneously knitting" limitation. Ex.1003, ¶¶ 31, 74-76, 79-80, 106; Ex.2004 98:3-99:25.

The Board analyzed the record as a whole, including the context for this testimony, and Dr. Brookstein's other testimony, and determined that this testimony was not an inexplicable change in Dr. Brookstein's opinion. FWD, 27-29. That is a proper exercise of discretion, particularly given the Board's multi-page explanation of its reasoning.

2. Nishida's Anticipatory Disclosure Controls

lululemon asserted that Nishida anticipates the claims of the '749 patent. *See* FWD, 7. Thus, the issue before the Board was what Nishida discloses, not what the experts said. *See VirnetX Inc. v. Apple Inc.*, 665 F. App'x 880, 884-85 (Fed. Cir. 2016) (holding that the Board can make factual findings regarding what a POSITA would have understood from a reference without expert testimony) (citing *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1079 (Fed. Cir. 2015)). The Board determined, based on the disclosure of Nishida, that Nishida discloses the "simultaneously knitting" limitation. *See, e.g.*, FWD, 15-27. Nike's continued arguments about Dr. Brookstein's testimony seek to distract from the Board's ultimate conclusion.

3. Nike Argues For The Wrong Legal Standard

Nike also misrepresents the legal standard applicable to the Board weighing expert testimony. Request, 10-11. Relying on *Imperium*, Nike argues the Board was not "at liberty" to disregard certain of Dr. Brookstein's testimony. Request, 10-11 (citing *Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, 757 F.

App’x 974, 979 (Fed. Cir. 2019)). *Imperium* does not support Nike’s position.

In *Imperium*, the Federal Circuit addressed the Fifth Circuit’s standard for motions for judgment as a matter of law. *Imperium*, 757 F. App’x at 979. Relying on *Fanduel*, Nike argues that *Imperium* applies equally to PTAB determinations. Request, 10-11 (citing *Fanduel, Inc. v. Interactive Games LLC*, 966 F.3d 1334, 1345 (Fed. Cir. 2020)). But Nike relies on *Fanduel*’s **dissent**. *Fanduel*, 966 F.3d at 1345 n.2 (J. Dyk, dissenting in part). The *Fanduel* majority did not cite *Imperium*, much less hold that its standard applies in IPRs.

In fact, in an appeal of an IPR, the Federal Circuit has explained that it, and by implication the Board, “**must** disregard the testimony of an expert that is plainly inconsistent with the record,” even if that testimony is unrebutted. *Homeland Housewares, LLC v. Whirlpool Corp.*, 865 F.3d 1372, 1378 (Fed. Cir. 2017) (emphasis added) (disregarding unrebutted expert testimony that the prior art did not anticipate because the testimony was inconsistent with the record); *Juniper Networks, Inc. v. Swarm Tech. LLC*, 2025 WL 1793722, at *5 (Fed. Cir. June 30, 2025) (upholding the Board’s discounting of an expert’s contradictory cross-examination testimony as inconsistent with the intrinsic record).

Juniper Networks is directly on point. There, the Federal Circuit upheld the Board’s rejection of an expert’s inconsistent cross-examination testimony. *Juniper Networks*, 2025 WL 1793722, at *5. “The Board recognized that ‘[the expert]

appears to have changed his testimony without prompting,’ described the situation as ‘unusual,’ and decided it would not ‘credit [the expert’s] cross-examination testimony.” *Id.* The Federal Circuit upheld the Board’s determination, and noted that “[e]xpert testimony, even when uncontroverted, cannot result in a claim construction that contradicts the intrinsic record.” *Id.* As Nike’s entire argument is based on the incorrect legal standard, it should be rejected.

Nike’s argument fails even under the *Imperium* standard. Dr. Brookstein testified that Nishida disclosed the “simultaneously knitting” limitation. Ex.1003, ¶¶ 31, 74-76, 79-80, 106; Ex.2004, 98:3-99:25. Even adopting Nike’s interpretation, the district court testimony at most shows Dr. Brookstein’s testimony here was contradicted or impeached. *Imperium* applies only to “uncontradicted and unimpeached testimony.” *Imperium*, 757 F. App’x at 979.

Moreover, under Nike’s interpretation of Dr. Brookstein’s allegedly “discarded” testimony, the testimony is inconsistent with Nishida’s disclosure such that the Board would have been required to disregard it. *See Homeland Housewares*, 865 F.3d at 1378 (Fed. Cir. 2017) (expert testimony that is inconsistent with the record must be disregarded).

III. CONCLUSION

Nike’s Request identifies nothing that warrants Director Review of the FWD in this proceeding. Nike’s Request should be denied.

lululemon v. Nike
IPR2024-00460

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

Dated: September 12, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on the date below a true and correct copy of
**PETITIONER'S AUTHORIZED RESPONSE TO PATENT OWNER'S
REQUEST FOR DIRECTOR REVIEW** is being served via email pursuant to 37
C.F.R. § 42.6(e), to counsel for Patent Owner as addressed below:

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