

EXHIBIT A

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**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK**

PELOTON INTERACTIVE, INC.,

Plaintiff,

v.

LULULEMON ATHLETICA CANADA
INC.,

Defendant.

Civil Action No. 1:21-cv-10071-ALC

**DEFENDANT'S MOTION TO DISMISS
COMPLAINT**

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Defendant lululemon athletica canada inc. (“lululemon”) hereby moves to dismiss the Declaratory Judgment Complaint of Plaintiff Peloton Interactive, Inc. (“Peloton”).

I. INTRODUCTION

Peloton’s counsel misled lululemon’s counsel so that Peloton could select its preferred venue for this design patent and trade dress dispute. lululemon’s outside counsel sent a cease-and-desist letter to Peloton, informing Peloton that lululemon would sue Peloton for patent and trade dress infringement if Peloton did not cease its infringement by November 19, 2021. Peloton’s counsel responded that it was reviewing lululemon’s allegations, but needed until November 24 to provide a substantive response. lululemon granted this request for additional time “as a professional courtesy.” Peloton responded to this courtesy, not with a responsive letter, but with the present anticipatory declaratory judgment action under lululemon’s express threat of suit. Peloton’s request for additional time and precipitous action served only one purpose – to deprive lululemon of its choice of venue in which to enforce its rights.

Federal courts, including both the Second Circuit and Federal Circuit, uniformly condemn this sort of conduct. If permitted, this conduct would discourage potential plaintiffs from communicating with potential defendants in an effort to reach out-of-court resolutions of their disputes. Potential plaintiffs would be forced to file suit whenever they believed they had a claim, or risk having their case decided in the forum the potential defendant perceives to be most favorable to it. Worse still, potential defendants would be encouraged to engage in deceptive conduct, like feigning an interest in out-of-court discussions, in order to manipulate venue. Courts in this district and elsewhere uniformly reject this type of gamesmanship.

Peloton has asked this Court to ignore its conduct because, in its view, this Court is a more convenient forum than the Central District of California, where lululemon has filed its

infringement action. But the convenience of the parties matters little when both parties are major corporations who can litigate in any U.S. forum with little difficulty. Moreover, there are very strong connections between this case and California. lululemon's Los Angeles office is effectively its U.S. headquarters for product and branding, where lululemon makes most of its major product development and branding decisions. Members of lululemon's strategic leadership team work out of the Los Angeles office. And Peloton's representatives twice visited lululemon's Los Angeles office to view product samples. In addition, the inventor of one of lululemon's patents, who is no longer employed by lululemon, resides in California. Inventors are key witnesses in any patent case, and this inventor will be subject to a trial subpoena only in California. The remaining inventors all reside in the area of Vancouver, British Columbia, which is much closer to the California court than to this one. Thus, Peloton's arguments about convenience are weak at best. In addition, California has a strong interest in resolving this dispute because Peloton has more than twice as many retail locations in California than in New York; and Peloton's retail locations are where the infringement occurs.

Accordingly, this Court should exercise its discretion and dismiss Peloton's Complaint, particularly in light of the anticipatory nature of Peloton's declaratory judgment action, and Peloton's misleading pre-litigation correspondence.

II. BACKGROUND

lululemon is the world's leading provider of yoga and fitness apparel. Declaration of Ali S. Razai ("Razai Decl."), Ex. 3, ¶ 1. Peloton is also a major player in the fitness industry, perhaps best known for its Peloton-branded exercise bicycles. Dkt. 1 ¶ 14. In 2016, lululemon and Peloton entered into a co-branding agreement. *Id.* ¶ 16. Under that agreement, lululemon supplied Peloton with some of lululemon's most innovative and popular athletic apparel.

Peloton then applied its own trademarks to the apparel, alongside lululemon's famous logo, and re-sold the co-branded apparel to the public. Razai Decl. Ex. 3, ¶ 3.

Earlier this year, Peloton ended the co-branding agreement, and lululemon stopped supplying Peloton with authentic lululemon merchandise. Dkt. 1 ¶ 18. After the shipments from lululemon stopped, Peloton began selling copies of the same lululemon products it had been selling under the co-branding agreement. Razai Decl. Ex. 3, ¶ 4. These copies include Peloton's Strappy Bra, Cadent Laser Dot Legging, Cadent Laser Dot Bra, High Neck Bra, and Cadent Peak Bra, which collectively infringe six of lululemon's design patents, and the One Lux Tight, which infringes lululemon's "Align" trade dress.¹ *Id.*

On November 11, 2021, shortly after learning of Peloton's conduct, lululemon sent a cease-and-desist letter to Peloton, explaining Peloton's patent and trade dress infringement in detail. Dkt. 1 ¶ 20. The letter demanded "that Peloton immediately stop infringing the lululemon Patents and the Align Trade Dress." Dkt. 1, Ex. 1 at 2. The letter demanded a response by November 19, 2021, confirming that Peloton would cease its infringement. *Id.* "[O]therwise," the letter explained, "***lululemon will file a Complaint for patent and trade dress infringement ... in federal court.***" *Id.* (emphasis added)

Peloton responded through counsel by email on November 15, 2021. Razai Decl. Ex. 2. In that email, Peloton's counsel represented that: "We are beginning our review of the issues and will respond in due course." *Id.* Counsel further stated that "I cannot guarantee that [the response] will be by your November 19 deadline. If that presents an issue, let me know." *Id.* Counsel for lululemon then responded by email as follows: "As a matter of professional

¹ Peloton asserts that it actually began selling its copies of lululemon's apparel before Peloton terminated the co-branding agreement. Regardless of the timing of Peloton's sales, the issue in this case is the legality of Peloton's sales of its copies.

courtesy, we are happy to consider extending the deadline for response but cannot do so until we know when Peloton proposes to respond. Please let us know and we will discuss the request with our client.” *Id.* Peloton’s counsel then requested an extension of time until November 24, 2021, to respond to lululemon’s demands and lululemon agreed: “lululemon agrees to extend the deadline for Peloton’s response to November 24. We look forward to hearing from you.” *Id.*

Peloton used the extra time, granted by lululemon as a professional courtesy, to prepare a Complaint for declaratory judgment and then race to this courthouse, its home forum, to preempt lululemon from filing a Complaint in its choice of forum. Peloton filed its Complaint in this Court on the November 24 deadline it had requested – the day before the Thanksgiving holiday. lululemon responded by filing its own Complaint for patent and trade dress infringement in the United States District Court for the Central District of California on Monday November 29, 2021 (the “California Action”), the first business day after the Thanksgiving weekend. Razai Decl. Ex. 3. There is a complete identity of claims between the California Action and Peloton’s anticipatory declaratory judgment action. *Compare* Dkt. 1, *with* Razai Decl. Ex. 3 (California Action Complaint). lululemon now moves to dismiss Peloton’s Declaratory Judgment Complaint as an improper anticipatory action so the parties can litigate their dispute in the California Action, in lululemon’s chosen forum and with lululemon as the natural plaintiff.

III. THIS COURT SHOULD DISMISS PELOTON’S ANTICIPATORY DECLARATORY JUDGMENT ACTION

A. The Federal Courts Strongly Disfavor Anticipatory Declaratory Judgment Actions, Which Are An Abuse Of The Declaratory Judgment Act

Under the first-to-file rule, “[a]s a general rule, where there are two competing lawsuits, the first suit should have priority.” *Emp’rs Ins. of Wausau v. Fox Entm’t Grp., Inc.*, 522 F.3d

271, 274-75 (2d Cir. 2008). However, there is a critical exception to the first-to-file rule – “where the first-filed lawsuit is an improper anticipatory declaratory judgment action.” *Id.* at 275 (citing *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 219 (2d Cir. 1978)). This exception applies where, as here, a declaratory judgment action is “filed in response to a direct threat of litigation that gives specific warnings as to deadlines and subsequent legal action.” *Id.* at 276. This rule is based on the principle that “the ‘federal declaratory judgment is not a prize to the winner of a race to the courthouses.’” *Id.* at 275 (quoting *Factors*, 579 F.2d at 219)). A party “should not be permitted to file a ‘preemptive action in order to deprive the natural plaintiff of its choice of forum.’” *Id.* at 276 n.4 (quoting 17 James Wm. Moore et al., *Moore’s Federal Practice* § 111.13[1][c][i] (3d ed. 2007)). Applying these principles, courts in the Second Circuit ordinarily refuse to give priority to anticipatory declaratory judgment suits. *See, e.g., Factors*, 579 F.2d at 219; *Crosman Corp. v. Heckler & Koch, Inc.*, 2008 WL 4347528, at *4-*5 (W.D.N.Y. Sept. 17, 2008); *Mondo, Inc. v. Spitz*, 1998 WL 17744, at *2 (S.D.N.Y. Jan. 16, 1998); *Cooperative Centrale Raiffeisen-Boerenleen Bank B.A. v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 778 F. Supp. 1274, 1278 (S.D.N.Y. 1991); *Great Am. Ins. Co. v. Houston Gen. Ins. Co.*, 735 F. Supp. 581, 585-86 (S.D.N.Y. 1990).

In patent cases, the Federal Circuit similarly recognizes the strong public policy against anticipatory declaratory judgment suits. *See Commc’ns Test Design, Inc. v. Contec, LLC*, 952 F.3d 1356 (Fed. Cir. 2020). As the Federal Circuit has explained, “trial courts have discretion to make exceptions to [the first-to-file] rule in the interest of justice or expediency, and we have recognized that such exceptions are not rare.” *Id.* at 1362. A party’s intention to preempt another’s infringement suit is a critical factor in dismissing a first-filed declaratory judgment action in favor of an affirmative action filed by the true plaintiff. *Id.* Moreover, “[w]hen one of

two competing suits in a first-to-file analysis is a declaratory judgment action, district courts enjoy a ‘double dose’ of discretion: discretion to decline to exercise jurisdiction over a declaratory judgment action and discretion when considering and applying the first-to-file rule and its equitable exceptions.” *Id.* The Federal Circuit also instructs the district courts to consider other factors in deciding whether to dismiss an anticipatory declaratory judgment action. *Id.* These factors include whether “there are ongoing negotiations” that make “the need for judicial relief” less compelling, *id.* at 1364, or that make the declaratory action “inconsistent with the policy promoting extrajudicial dispute resolution.” *Id.* at 1365. In addition, the Federal Circuit instructs the courts to consider which of the two competing forums is more convenient. *Id.*

Applying these factors in *Communications Test Design*, the Federal Circuit affirmed the district court’s dismissal of a first-filed declaratory judgment action. *Id.* at 1365. There, the patentee sent a letter to a potential infringer stating that the patentee has “a good faith basis to believe” there was infringement and asking the potential infringer “whether it was willing to discuss potential terms for a patent license agreement.” *Id.* at 1359. The letter warned that if the patentee did not receive the requested confirmation, it would sue for patent infringement. *Id.* While license negotiations were ongoing between the parties’ executives, the potential infringer filed suit for a declaratory judgment. *Id.* The patentee then filed its own separate action for patent infringement and moved to dismiss the declaratory judgment complaint. *Id.* at 1360.

The district court dismissed the declaratory judgment action and the Federal Circuit affirmed. In particular, the Federal Circuit affirmed the district court’s findings that the plaintiff “filed its declaratory judgment complaint in anticipation of [the patentee’s] patent infringement complaint,” that the plaintiff’s declaratory judgment suit “interfered with ongoing negotiations

between the parties and did not serve the objectives of the Declaratory Judgment Act,” and, on balance, the patentee’s chosen forum was “a more convenient forum.” *Id.* at 1363. Both courts specifically noted that the declaratory judgment plaintiff “did not have the right to string [the patentee] along just long enough to get the judicial drop and file this lawsuit in its own backyard.” *Id.* at 1360, 1364.

Since the recent decision in *Communications Test Design*, the district courts in patent cases have commonly dismissed anticipatory declaratory judgment actions. For example, in *Amperex Tech. Ltd. v. Maxell, Ltd.*, 2021 WL 4398804, at *3-*6 (D.N.J. Sept. 27, 2021), the court dismissed an anticipatory first-filed declaratory judgment action, relying heavily on *Communications Test Design*. The *Amperex* court explained that the anticipatory nature of a declaratory judgment action “is an important factor that favors departing from the first-to-file rule.” *Id.* at *4. And an anticipatory suit is one which, as in the present case, “is undertaken to preempt a specific, concrete threat of imminent litigation.” *Id.* at *5. “[I]n cases where there is evidence that the first-filing party engaged in bad-faith negotiations to win a race to the courthouse to seek a forum more convenient and amenable to their legal interests, courts have been especially reluctant to give priority to a first-filed declaratory action.” *Id.* at *4 (citation omitted). *See also Candid Care Co. v. Smiledirectclub, LLC*, 2021 WL 3269092, at *3 (D. Del. July 30, 2021) (refusing to follow the first-to-file rule because “litigation gamesmanship should not be rewarded with a rigid application of the first-to-file rule”); *Google LLC v. Sonos, Inc.*, 2020 WL 6822880, at *2 (N.D. Cal. Nov. 20, 2020) (staying first-filed declaratory judgment case because “the manifest purpose of Google’s suit was to beat the clock and defeat the patent owner’s choice of venue”).

Communications Test Design and the other authorities cited above strongly weigh in favor of this Court exercising its “‘double dose’ of discretion” to dismiss Peloton’s declaratory judgment action. As discussed above, this Court may exercise its equitable discretion to depart from the first-to-file rule, and it may exercise its discretion to decline to exercise declaratory judgment jurisdiction in the first instance.

B. Peloton’s Declaratory Judgment Action Is Plainly Anticipatory

The present declaratory judgment action is obviously an anticipatory action filed by Peloton to gain a tactical advantage in the face of an explicit warning of imminent litigation. lululemon provided Peloton with written notice of its infringement, threatened Peloton with litigation, and provided Peloton with a specific November 19 deadline to respond. Razai Decl. Ex. 1. At Peloton’s request, and as a professional courtesy, lululemon extended that deadline to November 24. Razai Decl. Ex. 2. Peloton used that extension of time to prepare its Complaint and race to this courthouse to preempt lululemon filing suit in its own choice of forum. Peloton lulled counsel into a false belief that a substantive response was forthcoming, which would allow the parties to negotiate their dispute.

In its prior letter brief to this Court, Peloton attempted to deny that its declaratory judgment action is an anticipatory suit. Dkt. 12 at 2. But Peloton concedes all of the underlying facts. Peloton concedes that it received a November 11, 2021 cease-and-desist letter providing Peloton with a November 19 deadline to respond. *Id.* Peloton concedes that it requested an extension of time to respond to lululemon’s letter. *Id.* And Peloton necessarily concedes that it used the extension of time to prepare its declaratory judgment complaint. *Id.* However, Peloton comes to the surprising conclusion that somehow these facts do not establish an anticipatory action. Peloton’s position is baseless. The facts remain that Peloton led lululemon to believe that

it needed more time to substantively respond to lululemon's allegations of infringement, which were made under the explicit threat of litigation. Peloton used the professional courtesy extended by lululemon to file a declaratory judgment lawsuit in its favored forum and not to engage in any extrajudicial dialogue. Peloton does not explain how this can be characterized as anything other than anticipatory. Peloton's suit was "undertaken to preempt a specific, concrete threat of imminent litigation." *Amperex*, 2021 WL 4398804, at *5. Peloton "was not permitted to string [lululemon] along just long enough to get the judicial drop and file this lawsuit in its own backyard." *Commc'n Test Design*, 952 F.3d at 1364.

Peloton also argues that it filed the present action because it could not afford the harm to its reputation from leaving lululemon's claims unanswered. Dkt. 12 at 2-3. But lululemon's claims at that time were not public and thus posed no harm to Peloton's reputation. It was Peloton that publicly aired the parties' dispute. Moreover, there was no risk that Peloton would be leaving those claims unanswered. If Peloton believed discussions with lululemon were fruitless, despite requesting more time to engage in those discussions, then Peloton could have simply responded to lululemon's imminent complaint. lululemon provided Peloton with prompt deadlines for responding to lululemon and made clear that a lawsuit was imminent. Peloton filed its declaratory judgment lawsuit on the final day of the extended deadline. Peloton could not possibly have believed that it was in danger of having a Sword of Damocles hang over its head in the form of unanswered allegations. *See Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 734-35 (Fed. Cir. 1988) (explaining the purpose of the Declaratory Judgment Act is to avoid a "Damoclean threat"). Accordingly, the plainly anticipatory nature of Peloton's declaratory judgment action weighs heavily in favor of dismissal of this action. *Commc'ns Test Design*, 952 F.3d at 1362-65; *Emp'r Ins. of Wausau*, 522 F.3d 271, 275.

C. Allowing Peloton’s Declaratory Judgment Action To Proceed Would Be Inconsistent With The Purposes Of The Declaratory Judgment Act And Sound Public Policies

As in *Communications Test Design*, 952 F.3d at 1365, Peloton’s race to the courthouse “was inconsistent with the policy promoting extrajudicial dispute resolution, not to mention sound judicial administration and the conservation of judicial resources.” lululemon approached Peloton in good faith, in an effort to resolve this matter without involving the courts. Peloton’s response is flatly inconsistent with the public policy of promoting extrajudicial dispute resolution, as well as the conservation of judicial resources. Moreover, the Declaratory Judgment Act was not designed as a weapon to provide accused infringers with a tactical advantage in lieu of engaging in good faith negotiations. *Id.* at 1364. This is especially so here, where Peloton used the professional courtesy of an extension of time to secretly prepare a declaratory judgment complaint.

D. The Balance Of Convenience Does Not Favor Keeping This Anticipatory Declaratory Judgment Action In This Court

Peloton argued in its letter brief that the balance of conveniences should factor heavily in the Court’s analysis, despite Peloton’s anticipatory race to the courthouse. Dkt. 12 at 3-4. As an initial matter, if Peloton believed that lululemon would file suit in an inconvenient forum, it could always have moved to transfer under 28 U.S.C. § 1404. Fear of possibly litigating in an inconvenient forum does not justify Peloton preempting lululemon’s action for patent and trade dress infringement.

Regardless, Peloton overlooks the obvious fact that both parties are enormous, publicly-traded companies, each having annual revenues exceeding \$4 billion. Razai Decl. ¶ 8. For two

companies of this size, each having a nationwide presence, litigation in any specific venue in the United States is not particularly convenient or inconvenient. *See Amersham Pharmacia Biotech, Inc. v. Perkin-Elmer Corp.*, 11 F. Supp. 2d 729, 730 (S.D.N.Y. 1998) (the convenience of the parties “is less weighty when, as here, the suit is between two large corporations that regularly conduct business on a national or international basis”); *CBS Interactive Inc. v. Nat’l Football League Players Assoc. Inc.*, 259 F.R.D. 398, 409-10 (D. Minn. 2009) (convenience of the parties is insignificant where they are “large corporations that have the financial wherewithal to bear the expense of litigating this action in either forum”); *Rollenhagen v. Int’l Speedway Corp.*, 2008 WL 11509172 at *2 (E.D. Mich. Jan. 22, 2008) (convenience of “large corporations” is “entitled to little weight”). In fact, Peloton recently litigated a lawsuit in the Northern District of California. *See Albright v. Peloton Interactive, Inc.*, Case No. 3:21-cv-02858 (N.D. Cal.).

Peloton also argues that “New York is the central locus of this dispute.” Dkt. 12 at 3. In support, Peloton relies on its allegation that some discussions relating to the parties’ co-branding agreement took place in New York. *Id.* However, this is a patent and trade dress infringement case, not a contract case. Neither party alleges any breach of their co-branding agreement. That agreement merely provides background and context for the parties’ infringement dispute.

When correctly analyzed as a patent and trade dress case, it is clear that New York is far from the central locus of this dispute. In patent cases, “inventors’ testimony is extremely important, inventors are key witnesses and the Court gives greater weight to their convenience.” *VLSI Tech. LLC v. Intel Corp.*, 2019 WL 8013949, at *5 (W.D. Tex. Oct. 7, 2019). Here, the sole inventor of one of the patents-in-suit, Julia Breitwieser who invented U.S. Patent No. D923,914, resides in California. Razai Decl. ¶ 5. Ms. Breitwieser no longer works for lululemon and is a third-party, making her convenience of even greater importance. *Indian*

Harbor Ins. Co. v. Factory Mut. Ins. Co., 419 F. Supp. 2d 395, 402 (S.D.N.Y. 2005) (“The convenience of non-party witnesses is accorded more weight than that of party witnesses.”). The remaining inventors of lululemon’s asserted patents and trade dress all reside in Vancouver, British Columbia, Razai Decl. ¶ 6, which is substantially closer to the Central District of California than to the Southern District of New York. Thus, the convenience of these key witnesses weighs heavily in favor of the Central District of California.

Other potential witnesses also reside in California. For example, lululemon’s Chief Product Officer, Sun Choe, resides in Los Angeles. Declaration of Ashlee Fallon (“Fallon Decl.”) ¶ 4. She coordinates all product development for lululemon, and leads lululemon’s design team. *Id.* lululemon’s Los Angeles office, out of which Ms. Choe works, functions as lululemon’s main U.S. headquarters where lululemon makes most of its majority major company decisions relating to product launch and product branding. *Id.*

In addition, Ashlee Fallon, lululemon’s Key Accounts Manager, is based in Los Angeles. Fallon Decl. ¶ 3. She attended two key meetings in Los Angeles with Peloton at which Peloton selected the clothing that it first would market with lululemon, and later would copy in violation of lululemon’s patent and trade dress rights. *Id.*, ¶ 7. The selection of Los Angeles for these two meetings was no coincidence. lululemon’s Los Angeles facility is the only location in the United States where lululemon maintains samples of all of its products and is where prototypes of products are sent for lululemon’s review. Fallon Decl. ¶¶ 5-6.

Moreover, California, not New York, is the center of Peloton’s infringing activities. Peloton maintains 13 showrooms in California, its greatest number in any state, compared to only 6 showrooms in New York. Razai Decl. ¶ 7. And Peloton maintains 7 showrooms within the Central District of California, with only 3 within the Southern District of New York. *Id.*

lululemon similarly focuses on the California market. Over [REDACTED] of its U.S. sales are in California, compared to only about [REDACTED] in New York. Fallon Decl. ¶ 8. Similarly, 17% of lululemon's retail stores are located in California, and just 6% are located in New York. *Id.*, ¶ 9.

In short, this case has at least as much connection to California as it does to New York. And Peloton, as a large, publicly-traded corporation, would suffer no hardship from litigating in the Central District of California. Thus, in light of the balance of convenience, the flagrantly anticipatory nature of Peloton's declaratory judgment action, and the strong federal policy in favor of encouraging parties to resolve their disputes without the involvement of the courts, this Court should dismiss Peloton's Complaint.

IV. CONCLUSION

lululemon respectfully requests that this Court dismiss Peloton's improper anticipatory declaratory judgment action. In patent cases, like all others, this Court should not encourage deceptive pre-litigation communications by counsel, or a race to the courthouse that discourages potential plaintiffs from attempting to resolve their disputes out of court.

Respectfully submitted,
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Dated: January 7, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 7, 2022, the attached document was filed electronically through CM/ECF system, which will send notice to the registered participants identified on the Notice of Electronic Filing.

Dated: January 7, 2022

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