

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-03339-SVW-JEM	Date	June 7, 2021
Title	<i>Aliign Activation Wear, LLC v. lululemon athletica Canada Inc. and lululemon USA Inc.</i>		

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz  
Deputy Clerk

N/A  
Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

**Proceedings:** ORDER GRANTING [104] MOTION FOR SUMMARY JUDGMENT OF NO INFRINGEMENT, DENYING ON THE MERITS [68] MOTION FOR SUMMARY JUDGMENT AS TO TRADEMARK PRIORITY, AND DENYING AS MOOT [63] MOTION FOR SUMMARY JUDGMENT AS TO DAMAGES.

Before the Court are three motions for summary judgment filed by lululemon athletica Canada Inc. and lululemon USA Inc. (hereinafter collectively referred to as “Defendants” or “lululemon”). *See* Dkt. 104. Aliign Activation Wear, LLC (hereinafter “Plaintiff” or “AAW”) opposes the motion. *See* Dkt. 115. For the below reasons, Defendants’ motion for summary judgment of no infringement is GRANTED. Defendants’ motion for summary judgment as to trademark priority is DENIED on the merits, and Defendants’ motion for summary judgment as to damages is DENIED as moot.

**I. Factual and Procedural Background.<sup>1</sup>**

Plaintiff is an event, lifestyle, and apparel company based in Los Angeles, California. Plaintiff’s founder, Jerry Park, alleges that he first created the mark “ALIIGN” in 2007 as a unique identifier of personal values that he wanted to promote with a business that focused on personal wellness, spiritual awareness, and socially conscious behavior. Park allegedly began using the ALIIGN mark to sell jewelry in 2009. In 2011, Park allegedly began selling ALIIGN-branded yoga mats, yoga

<sup>1</sup> The facts in this section are derived from the parties’ briefs and supporting materials. Nothing in this section should be construed as a factual finding; rather, this section is merely background information regarding the instant lawsuit.

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apparel, and yoga accessories.

In 2014, Park incorporated the business entity AAW. That same year, AAW applied for registration of the ALIIGN mark in connection with the sale of active wear. The USPTO approved that application in 2017.

AAW’s apparel sales have been limited. The company fulfilled a single \$20,000 retail order for Urban Outfitters in 2014. Since then, AAW has sold 7 units of yoga apparel.

Defendants are a yoga apparel and accessories company that began operating in 1998. After opening their original store in Vancouver, Canada, Defendants expanded their operations and now have approximately 500 stores worldwide.

In 2008, Defendants allegedly began selling a yoga mat called the “Align Mat.” Defendants sold over 200,000 units of the mat (or one of its varieties) between 2008 and 2016.

In 2015, Defendants extended the “Align” brand from yoga mats to yoga apparel. Since 2015, Defendants have sold over \$1 billion of Align branded yoga apparel.

Plaintiff filed the instant lawsuit on April 9, 2020, and a third amended complaint on February 2, 2021. Plaintiff asserts a variety of claims that all stem from the allegation that Defendants are infringing upon the ALIIGN trademark. Plaintiff alleges that Defendants’ “Align” brand is likely to cause consumer confusion regarding the origin, sponsorship, or approval of Plaintiff’s and Defendants’ goods.

On March 29, 2021, Defendants filed motions for summary judgment as to damages and trademark priority. Dkts. 63, 68. On April 26, 2021, Defendants filed a motion for summary judgment of no infringement on the grounds that there is no likelihood of consumer confusion. Dkt. 104.

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**II. Legal Standard.**

Summary judgment should be granted where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of . . . [the factual record that] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies its initial burden, the non-moving party must demonstrate with admissible evidence that genuine issues of material fact exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (“When the moving party has carried its burden under Rule 56 . . . its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.”).

A material fact for purposes of summary judgment is one that “might affect the outcome of the suit” under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists where “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* Although a court must draw all inferences in the non-movant’s favor, *id.* at 255, when the non-moving party’s version of the facts is “blatantly contradicted by the record, so that no reasonable jury could believe it, [the] court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment,” *Scott v. Harris*, 550 U.S. 372, 380 (2007). Moreover, “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252.

**III. Analysis.**

Plaintiff asserts a claim for federal trademark infringement under the Lanham Act, 15 U.S.C. § 1114. “A successful trademark infringement claim under the Lanham Act requires a showing that the claimant holds a protectable mark, and that the alleged infringer’s imitating mark is similar enough to ‘cause confusion, or to cause mistake, or to deceive.’” *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 630 (9th Cir. 2005) (quoting *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004)).

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The likelihood of confusion standard is oriented from the perspective of a “reasonably prudent consumer” in the marketplace. *See Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir. 1998). Confusion on the part of a negligible number of consumers is insufficient for the trademark holder to prevail. Rather, a trademark holder must establish that “an appreciable number of people” will be confused as to the source of the product. *M2 Software, Inc. v. Madacy Ent.*, 421 F.3d 1073, 1085 (9th Cir. 2005). Additionally, the plaintiff “must show sufficient evidence to permit a rational trier of fact to find that confusion is probable, not merely possible.” *Id.*

To analyze the likelihood of confusion, courts consider eight factors known as the *Sleekcraft* factors: (1) strength of the mark(s); (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels; (6) degree of consumer care; (7) the defendants’ intent; and (8) the likelihood of expansion by the trademark holder.<sup>2</sup> *See id.* (citing *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979)).

However, the *Sleekcraft* factors “should not be rigidly weighed; [courts] do not count beans.” *Dreamwerks*, 142 F.3d at 1129. The *Sleekcraft* factors are “an adaptable proxy for consumer confusion, not a rote checklist.” *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1145 (9th Cir. 2011); *see also Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1030 (9th Cir. 2010) (“This eight-factor analysis is ‘pliant,’ illustrative rather than exhaustive, and best understood as simply providing helpful guideposts.”). Ultimately, “[t]he factors should be considered together to determine, under the totality of the circumstances, whether a likelihood of confusion exists.” *Ironhawk Techs., Inc. v. Dropbox, Inc.*, 994 F.3d 1107, 1118 (9th Cir. 2021).

The two primary theories of confusion are “forward confusion” and “reverse confusion.” *See Survivor*, 406 F.3d at 630. The *Survivor* Court explained the two theories as follows:

Forward confusion occurs when consumers believe that goods bearing the junior mark came from, or were sponsored by, the senior mark holder. To avoid summary judgment on a forward confusion claim, [AAW] must raise a material question of fact regarding whether the buying

<sup>2</sup> The parties agree that the likelihood of expansion factor is irrelevant here because both parties compete in the same marketplace. *See* Dkt. 104 at 5 n.3; Dkt. 115 at 20.

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public thought that [AAW] was either the source of, or was sponsoring, [lululemon’s] product line. By contrast, reverse confusion occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior one. To survive a summary judgment motion on a reverse confusion claim, a question of material fact would have to be raised as to whether consumers believed that [lululemon] was either the source of, or was a sponsor of, [AAW’s] wares.

*Id.* (citations omitted). A third theory of confusion is “initial interest confusion.” Initial interest confusion occurs when a consumer is “lured to a product by its similarity to a known mark, even though the consumer realizes the true identity and origin of the product before consummating a purchase.” *J.K. Harris & Co., LLC v. Kassel*, 253 F.Supp.2d 1120, 1124 (N.D. Cal. 2003) (quoting *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 464 (7th Cir. 2000)). Here, to survive summary judgment on an initial interest confusion claim, AAW must raise a question of material fact as to whether consumers searching for AAW’s product are confused and lured to lululemon’s products. *See Network Automation*, 638 F.3d at 1149 (“[B]ecause the *sine qua non* of trademark infringement is consumer confusion, when [courts] examine initial interest confusion, the owner of the mark must demonstrate likely confusion, not mere diversion.”).

The Court reviewed the parties’ briefs and supporting materials. Having done so, the Court finds that no reasonable juror could find a likelihood of forward confusion, reverse confusion, or initial interest confusion. The Court will address each theory in turn.

**A. Summary Judgment on the Forward Confusion Theory is Warranted Because No Reasonable Juror Could Find that a Reasonably Prudent Consumer Thinks that AAW is the Source of lululemon’s Products.**

Applying the *Sleekcraft* factors here, the Court concludes that no reasonable juror could find a likelihood of forward confusion. This is because no reasonable juror could find that a reasonably prudent consumer thinks they are buying AAW’s apparel when, in fact, they are buying lululemon’s apparel.

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**1. No Reasonable Juror Could Find that the Strength of AAW’s Mark Weighs in Favor of AAW.**

The first *Sleekcraft* factor is the strength of AAW’s mark. “The more likely a mark is to be remembered and associated in the public mind with the mark’s owner, the greater protection the mark is accorded by trademark laws.” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1207 (9th Cir. 2000). “Th[e] ‘strength’ of the trademark is evaluated in terms of its conceptual strength and commercial strength.” *Id.*

Here, no reasonable juror could find that that the conceptual or commercial strength of ALIIGN favors AAW’s theory of forward confusion.

**a. Conceptual Strength.**

“A mark’s conceptual strength depends largely on the obviousness of its connection to the good or service to which it refers.” *JL Beverage Co. v. Jim Beam Brands Co.*, 828 F.3d 1098, 1107 (9th Cir. 2016). “As the uniqueness of the mark increases, so too does the degree of protection.” *Id.* at 1106.

A trademark’s strength falls into one of five categories. The two strongest marks are “arbitrary” and “fanciful” marks. *See Surfivivor*, 406 F.3d at 631. “‘Arbitrary’ marks are common words that have no connection with the actual product—for example, ‘Dutch Boy’ paint. ‘Fanciful’ marks consist of ‘coined phrases’ that also have no commonly known connection with the product at hand. Examples of fanciful marks include ‘Kodak’ cameras or ‘Aveda’ skin care products.” *Id.* at 631–32 (cleaned up).

A third category—“suggestive” marks—do not describe features but, instead, suggest them. *See Kendall-Jackson Winery v. E. & J. Gallo Winery*, 150 F.3d 1042, 1047 n.8 (9th Cir. 1998). “The exercise of some imagination is required to associate a suggestive mark with the product. Examples include ‘Slickcraft’ boats or ‘Air Care,’ for a service that maintains medical equipment for administering oxygen.” *Surfvivor*, 406 F.3d at 632.

The fourth category of marks is “descriptive” marks. *Kendall–Jackson*, 150 F.3d at 1047. Descriptive marks define a particular characteristic of the product in a way that does not require any

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exercise of the imagination. *See id.* at 1047 n.8. An example of a descriptive mark is “Honey Roasted” for nuts roasted with honey. *See id.*

“The final category of marks consists of ‘generic’ marks, which describe the product in its entirety, and which are not entitled to trademark protection.” *Survivor*, 406 F.3d at 632. “Examples include ‘Liquid controls’ for equipment that dispenses liquid, or ‘Multistate Bar Examination’ for a bar examination that may be taken across multiple states.” *Id.*

Here, no reasonable juror could find that AAW’s mark—ALIIGN—is conceptually strong. The concept of alignment is central to yoga and not unique to AAW or its products. *See, e.g.*, Dkts. 107-3 (article titled “Yoga Alignment: Why it Matters So Much” explaining that “[a]lignment is the term we use in yoga asana to describe the precise way to do any given pose in order to maximize its benefits and minimize the risk of injury”); 107-4 (blog post titled “What is Yoga Alignment?”); 107-5 (article titled “Yogic Alignment – Body, Mind & Spirit” explaining that “Yoga practice brings ‘alignment’ to all aspects of life”); 107-6 (yoga video titled “Yoga from HAWAII: Align body, mind and spirit”); 107-8 (article titled “Align Your Chakras With These 7 Chakra Yoga Poses”). Indeed, Park—the founder of AAW—testified that the term “align” is “a very strong term within the yoga community, getting into alignment, aligning your mind, body and soul . . . when people hear aligning your mind, body and soul, they’re thinking either yoga or meditation in some form.” Park Depo. at 59:20–60:11.

“Courts—at least in the trademark infringement context—have also considered a third party’s use of the mark in assessing likelihood of confusion.” *Arcona, Inc. v. Farmacy Beauty, LLC*, 976 F.3d 1074, 1080 (9th Cir. 2020). When other companies use the same mark, that is evidence that the mark is “not so unique or strong.” *Id.*

Here, there is substantial evidence that third parties use the mark. Park testified that other high-end retailers such as North Face, Alo Yoga, and Gaiam have all used “align” on their apparel. *See* Dkt. 116 at 5–6. Companies selling yoga apparel or athletic wear regularly use the word “align” in their company or product names. *See* Dkt. 107, Ex. 24 (Nike Men’s Tri-Blend Align T-Shirt); Ex. 23 (Mizuno Women’s Align Volleyball Pants); Ex. 11 (sleeveless hoodie sold by Align Bodywork & Yoga); Ex. 12 (sports bra sold by Align Clothing Co.); Ex. 13 (tank top sold by Align Brooklyn); Ex. 14 (women’s Align shorts sold by Align Method); Ex. 15 (tank top sold by Align Pilates); Ex. 17

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(AlignMed leggings); Ex. 21 (Align Tank sold by Manduka); Ex. 22 (Align Yoga Strap sold by Manduka); Ex. 25 (Align Yoga Scrub Pant sold by Urbane Align). And yoga apps and yoga studios across the country use the word “align” in their names. See *id.*, Exs. 16, 37a–37r, 37x–37aa.

The widescale use of “align” in this manner undermines the strength of AAW’s mark. See *Miss World (UK) Ltd. v. Mrs. America Pageants, Inc.*, 856 F.2d 1445, 1449 (9th Cir. 1988) (“A mark which is hemmed in on all sides by similar marks on similar goods or services cannot be very distinctive. It is merely one of a crowd of marks. In such a crowd, customers will not likely be confused between any two of the crowd and may have learned to carefully pick out one from the other.”).

AAW argues that the mark is strong because ALIIGN is a misspelling of the word “align.” See Dkt. 115 at 11–12. However, courts have found that marks derived from misspellings are, at best, suggestive rather than fanciful or arbitrary. See *Surfvivor*, 406 F.3d at 632 (rejecting argument that mark “Surfvivor” is fanciful or arbitrary but finding mark suggestive because it “requires some imagination to associate it with the company’s beach-related goods”); *Gastroceuticals, LLC v. Diamond Water, LLC*, 2014 WL 12318803, at \*4 (C.D. Cal. Jan. 3, 2014) (“The Court rejects Gastroceuticals’ contention that ‘Dymund’ is fanciful merely because it is a misspelling of ‘diamond.’ Gastroceuticals offers no support for this contention, and the Ninth Circuit’s ‘Surfvivor’ case undermines it.”). Indeed, some courts have found that similar misspellings are merely descriptive. See *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 328 (1938) (finding “Nu-Enamel” descriptive where mark misspelled “new”).<sup>3</sup>

Even if a reasonable juror could find that ALIIGN is suggestive, the Ninth Circuit has explained that “suggestive marks are presumptively weak.” *Brookfield Communications, Inc. v. W. Coast Ent.*

<sup>3</sup> For the reasons articulated in this section, Defendants’ motion for summary judgment on the trademark priority issue is denied. The briefing on that motion presents an odd role-reversal, wherein lululemon is arguing that the mark “Align” is strong, and AAW—the holder of the “ALIIGN” trademark—is arguing that the mark is weak. Notwithstanding that unique posture, the Court finds that a reasonable juror could conclude lululemon used the mark “Align” in a merely descriptive sense. The Court makes that finding for the same reasons that no reasonable juror could find that the mark “ALIIGN” is conceptually strong—*i.e.*, the centrality of “alignment” to yoga and yoga products and the widespread use of “align” in the yoga and athleticwear industry. The Court also notes that lululemon used “align” and “alignment” to describe the product. See Avrith Decl., Exs. 9–11.

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*Corp.*, 174 F.3d 1036, 1058 (9th Cir. 1999). Although that presumption can be rebutted with evidence of “widespread recognition” of the mark, *see id.*, AAW offers no such evidence here.

Finally, AAW argues that the USPTO’s registration of the mark constitutes “substantial evidence” of the strength of the ALIIGN mark. Dkt. 115 at 11. “However, ‘while the registration adds something on the scales, [courts] must come to grips with an assessment of the mark itself.’” *Network Automation*, 638 F.3d at 1149–50 (finding federally registered mark suggestive) (quoting *Zobmondo Ent., LLC v. Falls Media, LLC*, 602 F.3d 1108, 1115 (9th Cir. 2010)).

Under these circumstances, no reasonable juror could find that the mark ALIIGN is conceptually strong because the mark is, at best, suggestive, and the obviousness of the mark as it relates to yoga is clear. *See JL Beverage*, 823 F.3d at 1107.

**b. Commercial Strength.**

“Commercial strength is based on ‘actual marketplace recognition.’” *Network Automation*, 638 F.3d at 1149. “[A]dvertising expenditures can transform a suggestive mark into a strong mark.” *Brookfield*, 174 F.3d at 1058.

Here, there is no genuine issue of material fact regarding the commercial strength of the ALIIGN mark. AAW concedes that the mark is “commercially weak.” Dkt. 115 at 19.

Indeed, no reasonable juror could find otherwise. After Urban Outfitters purchased approximately \$20,000 of apparel from AAW in 2014, the relationship between the two companies “fizzled out slowly.” Park Depo. at 304:7-13. Since then, AAW has sold 7 units of goods: 2 leggings, 2 sweatshirts, 1 beanie, 1 long sleeve trainer, and 1 yoga mat.<sup>4</sup> Dkt. 107-2 (AAW Interrogatory

<sup>4</sup> In its interrogatory responses, AAW states that, although it was “not actively selling apparel from early 2015 through December 22, 2018, [it] always had t-shirts and yoga mats available for purchase and sold a small number of each every year.” Dkt. 107-2 at 32. AAW also states that a “substantial part of [its] records and files . . . were destroyed in the Woolsey fire in November 2018. [AAW] knows that some sales of ALIIGN T shirts, yoga mats, athletic bags and jewelry took place prior to 2014, and from 2015-2018, but does not have records” regarding those sales. *Id.* at 32–33. This conclusory assertion that AAW sold goods prior to 2018 without any supporting evidence is insufficient to survive summary

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Responses) at 32. These items were sold in 2019 and 2020 and, aside from the long sleeve trainer and one of the sweatshirts, all of the items were purchased by Park’s friends. Park Depo. at 331:1-334:8.

In light of the foregoing, no reasonable juror could find that the strength of the ALIIGN mark favors AAW’s theory of forward confusion.

**2. A Reasonable Juror Could Find that the Relatedness of the Goods Weighs in AAW’s Favor.**

The second *Sleekcraft* factor is the relatedness of the goods. “Related goods are generally more likely than unrelated goods to confuse the public as to the producers of the goods.” *Brookfield*, 174 F.3d at 1055. “[T]he danger presented is that the public will mistakenly assume there is an association between the producers of the related goods, though no such association exists.” *Sleekcraft*, 599 F.2d at 350. The relatedness of goods is measured by whether the products are: (1) complementary; (2) sold to the same class of purchasers; and (3) similar in use and function. *Network Automation*, 638 F.3d at 1150.

Here, there is no doubt that the goods are related. The goods produced by each party are the same: high-end yoga apparel. And, because the goods are the same, they inherently are sold to the same class of purchasers. Indeed, lululemon acknowledges that, “[b]ecause both parties sell yoga apparel, the parties’ goods are related.” Dkt. 104 at 8.

Accordingly, a reasonable juror could find that that the relatedness of the goods weighs in AAW’s favor.<sup>5</sup>

judgment. *See Matsushita*, 475 U.S. at 586 (“When the moving party has carried its burden under Rule 56 . . . its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.”).

<sup>5</sup> Nevertheless, the Ninth Circuit has cautioned that, where goods are virtually interchangeable, this factor “must be considered in conjunction with the labeling and appearance of the advertisements and the degree of care exercised by the consumers” of the products. *Network Automation*, 638 F.3d at 1150. As discussed below, *see infra* at 11–12, 15–16, no reasonable juror could find that those two factors weigh in AAW’s favor.

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**3. No Reasonable Juror Could Find that the Similarity of the Marks—or Lack Thereof—Weighs in AAW’s Favor.**

The third *Sleekcraft* factor is the similarity of the marks. This factor is analyzed by considering “the way the marks are encountered in the marketplace and the circumstances surrounding the purchase of the [apparel].” *Lindy Pen Co. v. Bic Pen Corp.*, 725 F.2d 1240, 1245 (9th Cir. 1984); *see also Arcona*, 976 F.3d at 1080 (considering the “packaging, size, color, shape, and all other attributes” of the products). Courts also consider the placement of “housemarks”—here, “lululemon” for Defendants and “Align” for Plaintiff—on the product or packaging. *See id.* (“[T]he ‘use of a housemark can reduce the likelihood of confusion.’”) (citing *Sleekcraft*, 599 F.2d at 351).

Here, no reasonable juror could consider “the way the marks are encountered in the marketplace” and conclude that this factor weighs in favor of AAW. *Lindy Pen*, 725 F.2d at 1245. First, lululemon’s allegedly infringing mark—“Align”—does not appear on the apparel itself. Rather, it only appears on the “hang tag,” *i.e.*, the tag attached to the clothing that is removed before the clothing is used. *See* Richmond Depo. at 31:16-20 (“For almost all—for our products the product name is only on what we call a hang tag. Or on a sticker. So, for example, on any of our shorts, our leggings, our tops, there is no product name on it. It is simply on what we call a hang tag.”); 38:3-6 (“I’m not aware of the Align products identifying outside of being on the hang tag and next to the name lululemon. To my knowledge it is just the name of the product.”).

Second, lululemon places its logo on all of its apparel. *See id.* at 128:20-24 (“[W]e try to put the equity around the logo and the lululemon brand. Because once you take the packaging off, or the hang tag, there is no descriptor outside of the logo or lululemon brand.”). Moreover, when individuals search for “Align” on lululemon’s website, nearly all of the results include the brand name “lululemon” next to the word “Align.” *See* Dkt. 90-2 at 49–60.<sup>6</sup> Accordingly, the likelihood of confusion is reduced by lululemon’s use of the logo rather than the mark “Align” on the apparel itself, and also by the inclusion of the brand name “lululemon” next to “Align” on the online website. *See Arcona*, 976 F.3d at 1081 (“Otherwise similar marks are not likely to be confused where used in conjunction with the clearly

<sup>6</sup> Of the 37 products that appear on the search results page that include the mark “Align,” 34 begin with the word “lululemon.” *See* Dkt. 90-2 at 49–60.

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displayed name and/or logo of the manufacturer.”) (quoting *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 487 (1st Cir. 1981)).

Finally, as discussed below, *see infra* at 14–15, Plaintiff’s and Defendants’ goods are never sold in the same store or on the same website. Thus, the marks “as they appear in the marketplace” are dissimilar. *Alpha Indus., Inc. v. Alpha Steel Tube & Shapes, Inc.*, 616 F.2d 440, 444 (9th Cir.1980); *see also id.* (noting that courts should consider the “circumstances surrounding the purchase of the goods”) (citations omitted); *Lindy Pen*, 725 F.2d at (noting that courts should consider “the way the marks are encountered in the marketplace”); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002) (“[A]lthough the parties superficially use the identical slogan as a trademark, consumers will actually encounter the trademarks differently in the marketplace.”); *Stonefire Grill, Inc. v. FGF Brands, Inc.*, 987 F.Supp.2d 1023, 1044, 1055 (C.D. Cal. 2013) (finding this factor “weighs in favor of no confusion” in part because the “marks are not encountered side-by-side in the marketplace”).

Plaintiff argues that the marks are highly similar because they look and sound the same. *See* Dkt. 115 at 14. In doing so, Plaintiff correctly notes that the similarity of the marks is assessed, in part, in terms of the marks’ sight, sound, and meaning. *See Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1392 (9th Cir. 1993) (citations omitted).

However, “court[s] should not myopically focus on only the alleged [infringing] marks to the exclusion of the entire product or even common sense.” *Arcona*, 976 F.3d 1074, 1080 (9th Cir. 2020). Rather, “the marks should be ‘considered in their entirety and as they appear in the marketplace.’” *Id.* (quoting *Brookfield*, 174 F.3d at 1054). There may be cases where “the mark itself is so strong in the marketplace that the use of an identical mark by itself may cause consumer confusion, even if other aspects of the products are different.” *Id.* at 1080 n.4.

This is not such a case. Rather, as discussed above, no reasonable juror could find that AAW’s mark is conceptually or commercially strong, *see supra* at 6–10, and no reasonable juror could conclude that the marks’ similarity—as gauged by the way they appear in the marketplace—weighs in AAW’s favor, *see supra* at 11–12.

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In light of the foregoing, no reasonable juror could find that this factor weighs in favor of AAW.

**4. No Reasonable Juror Could Find that the Evidence of Actual Confusion—or Lack Thereof—Weighs in AAW’s Favor.**

The fourth *Sleekcraft* factor is evidence of actual confusion. “Evidence of actual confusion by consumers is strong evidence of likelihood of confusion.” *Survivor*, 406 F.3d at 633. In analyzing this factor, courts should consider whether merchants, consumers, or non-purchasing members of the public were actually confused. *Id.*

Here, there is little to no evidence of actual confusion. Plaintiff did not conduct a survey of consumers to demonstrate actual confusion. *See Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1265 (9th Cir. 2001) (relying on survey evidence in finding summary judgment not warranted on likelihood of confusion).

Instead, Plaintiff offers a single email from one customer who contacted Park to confirm that a pair of yoga pants sold on a resale website was made by AAW. *See* Dkt. 90-1 ¶ 17, Ex. D.

This email is insufficient to survive summary judgment because AAW must show that “an appreciable number of people” will be confused as to the source of the product. *M2 Software*, 421 F.3d at 1085; *see also Playboy Enterprises v. Netscape Communications*, 354 F.3d 1020, 1026 (9th Cir. 2004) (“[A]ctual confusion among *significant numbers of consumers* provides strong support for the likelihood of confusion.”) (emphasis added). Indeed, the Ninth Circuit has found that this factor weighed in favor of the holder of the junior mark—here, lululemon—where only a single retailer and a single customer were actually confused by the allegedly infringing mark. *See Survivor*, 406 F.3d at 633.

Under these circumstances, no reasonable juror could find that this factor weighs in AAW’s favor.

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**5. No Reasonable Juror Could Find that a Comparison of Marketing Channels Used by Plaintiff and Defendants Weighs in AAW’s Favor.**

The fifth *Sleekcraft* factor relates to the marketing channels used by the parties. This factor is assessed by considering whether the parties distribute their goods in the same stores or on the same websites. *See id.*

Here, a comparison of distribution channels leads the Court to conclude that no reasonable juror could find that this factor weighs in AAW’s favor. Defendants sell their products on their website and in a select number of yoga studios. *See* Richmond Depo. at 42:5–17. There is also some evidence that Defendants’ products appear on websites for Amazon and Walmart. *See* Dkt. 115, Exs. 4, 7. By contrast, AAW’s products are only sold on their website. *See* Dkt. 66, Ex. 6 at 300–01 (“Since December 2018, AAW has sold ALIIGN products on its website [www.aliignmovement.com](http://www.aliignmovement.com).”). There is no evidence that AAW sells its products alongside lululemon’s products, either in a particular store or on a particular website.<sup>7</sup>

Plaintiff offers the expert testimony of a marketing professor, Margaret Campbell, who opines that the likelihood of confusion is bolstered by the fact that “[b]oth companies sell their products over the internet.” Campbell Report at 19.

This is insufficient to survive summary judgment. “Some use of the Internet for marketing . . . does not alone and as a matter of law constitute overlapping marketing channels.” *Entrepreneur Media*, 279 F.3d at 1151. Rather, the inquiry is whether the parties’ marketing channels “overlap to any significant degree.” *Id.* As discussed above, there is little to no overlap of marketing and distribution

<sup>7</sup> Plaintiff suggests that both AAW and lululemon sell their goods on Poshmark. *See* Dkt. 116 at 15. Yet, because Poshmark is a website for consumers to re-sell used clothing—*i.e.*, both lululemon and AAW cannot control whether and how their goods appear on the website—the appearance of both parties’ goods on Poshmark without any involvement from either party is not evidence that “both parties ‘use the Web as a *substantial* marketing and advertising channel.’” *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002) (quoting *GoTo.com*, 202 F.3d at 1207). Moreover, a single overlapping marketing channel is insufficient to survive summary judgment. *See M2 Software*, 421 F.3d at 1084 (affirming summary judgment finding of no likelihood of confusion despite single overlapping marketing channel of Amazon.com).

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channels.

Finally, this factor carries little weight in the analysis because “it would be the rare commercial retailer that did not advertise online, and the shared use of a ubiquitous marketing channel does not shed much light on the likelihood of consumer confusion.” *Network Automation*, 638 F.3d at 1151; *see also Playboy*, 354 F.3d at 1028 (“Given the broad use of the Internet today . . . this factor merits little weight.”).

Accordingly, no reasonable juror could find that this factor weighs in AAW’s favor.

**6. No Reasonable Juror Could Find that the Degree of Consumer Care Weighs in Favor of AAW.**

The sixth *Sleekcraft* factor is the degree of care exercised by consumers when they purchase the products. A higher degree of care supports a lower likelihood of confusion and, whereas lower consumer care increases the likelihood of confusion. *See Network Automation*, 638 F.3d at 1152 (citing *Playboy*, 354 F.3d at 1028). In assessing the likelihood of confusion to the public, the standard used by courts is the typical buyer exercising ordinary caution. *Sleekcraft*, 599 F.2d at 353. However, where the buyer has expertise in the field or when the goods are expensive, the buyer can be expected to exercise greater care in the purchase. *Network Automation*, 638 F.3d at 1152.

Here, the parties’ yoga apparel is priced similarly. For example, a typical pair of lululemon yoga pants costs \$98, while AAW yoga pants retail for \$78. *See* Dkt. 104 at 15–16; Dkt. 115 at 16.

While roughly similar to one another, however, these prices are far greater than the prices for yoga pants or leggings sold by major retailers, many of which offer those items for less than \$20. *See* Dkt. 107, Ex. 27 (Forever 21 leggings sold for \$14.99); Ex. 28 (Old Navy leggings sold for \$18); Ex. 29 (Gap leggings sold for \$14.97); Ex. 30 (Target leggings sold for \$14.99); Ex. 31 (leggings at Nordstrom’s sold for \$20).

The relatively high price of the parties’ apparel strongly suggests that consumers of the parties’ products are exercising a higher degree of care. *See Brookfield*, 174 F.3d at 1060 (“What is expected of

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this reasonably prudent consumer depends on the circumstances. We expect him to be more discerning—and less easily confused—when he is purchasing expensive items.”). Indeed, AAW’s expert notes that, “[w]hen faced with a significant, expensive purchase, consumers tend to process more deeply . . . .” Campbell Report at 15.

This is not a case of “moderately priced goods, such as non-designer clothing.” *Survivor*, 406 F.3d at 634. Rather, both parties bill themselves as selling high-end yoga apparel. *See* Dkt. 48 ¶ 2 (AAW’s Third Amended Complaint) (“[T]he ALIIGN® mark has come to signify high-quality, cutting-edge designs, marketed with a socially-responsible and eco-friendly story.”); *see also* Dkt. 104 at 16 (noting that lululemon sells “expensive yoga apparel”).

In light of the foregoing, no reasonable juror could find that the degree of care exercised by reasonably prudent consumers purchasing the parties’ goods weighs in AAW’s favor.

**7. No Reasonable Juror Could Find that Defendants’ Intent in Selecting the Mark Weighs in AAW’s Favor.**

The seventh *Sleekcraft* factor is the defendant’s intent in selecting the mark. In a forward confusion case, courts consider “whether [the] defendant in adopting its mark intended to capitalize on [the] plaintiff’s good will.” *Fortune Dynamic*, 618 F.3d at 1043.

Here, no reasonable juror could find that this factor weighs in favor of AAW. First, Defendants began using the word “Align” on their products in 2008.<sup>8</sup> Dkt. 84 ¶ 10. This was well before February 2011, the date that AAW alleges it first used its mark “ALIIGN.” Dkt. 48 ¶ 2.

Second, as discussed above, Plaintiff’s mark is neither conceptually nor commercially strong. *See supra* at 6–10. Given the lack of commercial strength, “common sense” dictates that AAW possessed little to no goodwill that lululemon could capitalize on. *See Arcona*, 976 F.3d at 1080 (“A

<sup>8</sup> Although a genuine issue of material fact exists as to the manner in which lululemon used the word “Align,” *see supra* at 8 n.3, the fact that lululemon used the word in *some* sense is relevant to the lack of bad faith or intent. *See Gizmo Beverages, Inc. v. Park*, 2019 WL 141461 at \*6 (C.D. Cal. Jan. 9, 2019) (finding this factor weighs in defendants’ favor where defendant used mark before plaintiff existed).

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court should not myopically focus on only the alleged [infringing] marks to the exclusion of the entire product or even common sense.”).

Third, lululemon conducted a trademark search in February 2015 before launching its “Align” branded yoga apparel, and that search did not reveal Plaintiff’s “ALIIGN” mark.<sup>9</sup> See LULU\_0094291–97. Moreover, a lululemon executive testified that the first time lululemon learned of Plaintiff’s “ALIIGN” mark was after lululemon applied for a trademark for “Align.” Richmond Depo. at 59:20-25.

Given the foregoing, no reasonable juror could find that lululemon adopted the “Align” mark in order to capitalize on AAW’s good will.

\* \* \*

Although a plaintiff need not satisfy every *Sleekcraft* factor to survive summary judgment, they must make a “strong showing” with respect to at least some of them. *Survivor*, 406 F.3d at 631. Here, no reasonable juror could find in AAW’s favor on six of the seven relevant *Sleekcraft* factors. See *supra* at 6–17.

Under these circumstances, no reasonable juror could find that consumers purchasing lululemon think that AAW was either the source of, or was sponsoring, lululemon’s product line. To the contrary, the “record taken as a whole” could only lead a rational trier of fact to one conclusion: consumers purchasing lululemon products know the products were created by lululemon and not AAW. *Matsushita*, 475 U.S. at 587 (“Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’”) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

<sup>9</sup> Plaintiff suggests that it has not yet seen the results of the clearance search, see Dkt. 115 at 5, but the results were produced by Defendants and expressly identified to counsel by Bates number, see Dkt. 118-3. Plaintiff also states that “the term ‘Align’ was among the product names included in the search.” Dkt. 115 at 5. That is correct but also not entirely relevant because Plaintiff is suing for infringement of the mark “ALIIGN,” not “Align.” The search results do not include AAW’s mark “ALIIGN.” See LULU\_0094295–97. Instead, the results appear to include the mark “Align” in relation to a footwear company. See *id.*

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**B. Summary Judgment on the Reverse Confusion Theory is Warranted Because No Reasonable Juror Could Find that a Reasonably Prudent Consumer Thinks that lululemon is the Source of AAW’s Products.**

As noted above, reverse confusion occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior one. *See Surfivor*, 406 F.3d at 630. To survive a summary judgment motion on a reverse confusion claim, a question of material fact would have to be raised as to whether consumers believed that lululemon was either the source of, or was a sponsor of, AAW’s products. *See id.*; *see also Walter v. Mattel, Inc.*, 31 F.Supp.2d 751, 758 (C.D. Cal. 1998), *aff’d*, 210 F.3d 1108 (9th Cir. 2000) (“In other words, a potential consumer of Plaintiff’s goods, while making a purchasing decision, must believe that they are dealing with [the defendant].”).

In assessing a claim of reverse confusion, courts apply the same *Sleekcraft* factors as discussed above, but the import of each factor on the ultimate question of likelihood of confusion is different. For example, in a reverse confusion case, the first *Sleekcraft* factor—*i.e.*, the strength of the mark—requires consideration of the strength of the junior user’s mark to determine if the junior mark is so strong that it could swamp the senior mark with a larger advertising campaign. *See Ironhawk*, 994 F.3d at 1119. As another example, when considering the similarity of the marks as they are used in the marketplace, the inclusion of a housemark on the products may “aggravate confusion by reinforcing the association between the mark and the junior user.” *Id.* at 1121.

Nevertheless, even in a reverse confusion case, the *Sleekcraft* factors “should not be rigidly weighed; [courts] do not count beans.” *Dreamwerks*, 142 F.3d at 1129. “Rather, the factors are intended to guide the court in assessing the basic question of likelihood of confusion.” *Gallo Winery*, 967 F.2d at 1290; *see also Network Automation*, 638 F.3d at 1145 (“The *Sleekcraft* factors are intended as an adaptable proxy for consumer confusion, not a rote checklist.”); *Fortune Dynamic*, 618 F.3d at 1030 (“This eight-factor analysis is ‘pliant,’ illustrative rather than exhaustive, and best understood as simply providing helpful guideposts.”); *Eclipse Assoc. Ltd. v. Data Gen. Corp.*, 894 F.2d 1114, 1118 (9th Cir. 1990) (“These tests were not meant to be requirements or hoops that a district court need jump through to make the determination.”). Ultimately, “[t]he factors should be considered together to determine, under the totality of the circumstances, whether a likelihood of confusion exists.” *Ironhawk*, 994 F.3d at 1118.

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Here, in light of the totality of the circumstances, the Court finds that no reasonable juror could find a likelihood of reverse confusion. This is so for several reasons.

The first is the near absence of sales by AAW. That fact is highly relevant because, to survive summary judgment on a reverse confusion claim, AAW must raise a genuine issue of material fact that an appreciable number of consumers believe they are purchasing lululemon’s products when they are, in fact, purchasing AAW’s products. *See Surfivivor*, 406 F.3d at 630.

Indeed, in cases cited by AAW where courts found reverse confusion or a triable issue regarding reverse confusion, the senior user had an *appreciable number* of consumers or revenue. For example, in *Ironhawk*, the senior user “generated significant revenue between 2009 and 2019,” contracted with the United States Navy, and sold software that cost “thousands and tens of thousands of dollars.” 994 F.3d at 1117, 1123–24. In *Ameritech, Inc. v. American Information Technologies Corp.*, the senior user sold two millions dollars in goods and services. 811 F.2d 960, 961 (6th Cir. 1987). And in *Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, the senior user sold \$500,000 of peat moss each year, which accounted for 25% of the U.S. peat moss market. 30 F.3d 466, 470 (3d Cir. 1994).

Here, by contrast, hardly anyone purchases AAW’s products. As discussed above, AAW has sold 7 units of goods from 2015 onwards: 2 leggings, 2 sweatshirts, 1 beanie, 1 long sleeve trainer, and 1 yoga mat. Dkt. 107-2 (AAW Interrogatory Responses) at 32. These items were sold in 2019 and 2020 and, aside from the long sleeve trainer and one of the sweatshirts, all of the items were purchased by Park’s friends. Park Depo. at 331:1-334:8. Under these circumstances, no reasonable juror could find an *appreciable number* of consumers are likely to be confused and believe they are buying lululemon.

Second, AAW’s distribution channels render it virtually impossible for a consumer purchasing AAW’s products to believe that they are purchasing lululemon. As noted above, AAW sells its goods on its website. *See* Dkt. 66, Ex. 6 at 300–01. Yet, Park expressly testified that “if [a consumer] is on our website and they found us, then they obviously know that they’re on Aliign’s site.” Park Depo. at 343:17-21.

Third, there is scant evidence of actual confusion. Plaintiff did not offer a survey indicating that consumers are confused. Instead, Plaintiff only offered an email from a single consumer. *See*

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Dkt. 90-1 ¶ 17, Ex. D. This single instance of confusion is insufficient to survive summary judgment. *See Surfivivor*, 406 F.3d at 633 (finding no reverse confusion where 1 retailer and 1 customer confused parties’ products).

Moreover, it is not entirely clear that the email constitutes an instance of reverse confusion. In the email, the consumer asks Park to confirm if a product she discovered on Poshmark was an AAW product. *See* Dkt. 90-1 ¶ 17, Ex. D. In other words, the consumer purchasing AAW’s goods did not believe she was purchasing lululemon; if that were the case, she would not be emailing AAW. *See Surfivivor*, 406 F.3d at 630 (reverse confusion occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior one); *cf. M2 Software*, 421 F.3d at 1083 (“Even if we consider Ms. Weymss’s testimony, the evidence fails to show actual confusion.”).

Fourth, the degree of consumer care is high. As discussed above, yoga pants sold by AAW and lululemon are approximately four to five times as expensive as those sold by major retailers. *See supra* at 15–16. Accordingly, an individual who is buying either AAW or lululemon yoga pants is likely exercising a high degree of care while doing so. *See Brookfield*, 174 F.3d at 1060 (“What is expected of this reasonably prudent consumer depends on the circumstances. We expect him to be more discerning—and less easily confused—when he is purchasing expensive items.”). This includes consumers of AAW, who are likely to exercise caution—and therefore ensure they are actually buying AAW, not lululemon—before buying yoga pants that are four time the cost of those at major retailers.

\* \* \*

“Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587. Here, the record as a whole could not lead a rational trier of fact to find for AAW on the reverse confusion issue. Indeed, after considering the “totality of the circumstances,” *see Ironhawk*, 994 F.3d at 1118, no reasonable juror could conclude that consumers of AAW’s products believe they are purchasing lululemon products. Rather, a rational trier of fact could only reach one conclusion: an individual purchasing AAW’s products knows the products are made by AAW and not lululemon.

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Accordingly, summary judgment against AAW is warranted on the reverse confusion issue. *See Cohn*, 281 F.3d at 843 (affirming summary judgment in favor of junior user on reverse confusion and explaining that “[t]his is an unusual case where there is no likelihood of confusion even though the parties use the same mark for similar goods and services. Considering all the factors, there is no evidence that reasonably attentive [consumers of yoga apparel] would mistakenly affiliate [lululemon] with [AAW]. . . . [D]espite [more than] six years of close coexistence, [AAW] could offer no evidence that any customers had actually been confused.”).

**C. Summary Judgment on the Initial-Interest Confusion Theory is Warranted Because No Reasonable Juror Could Find that Consumers Searching for AAW’s Products are Confused and Lured to lululemon’s Products.**

“Initial interest confusion is customer confusion that creates initial interest in a competitor’s product. Although dispelled before an actual sale occurs, initial interest confusion impermissibly capitalizes on the goodwill associated with a mark and is therefore actionable trademark infringement.” *Playboy*, 354 F.3d at 1025. Here, to survive summary judgment on an initial interest confusion claim, AAW must raise a question of material fact as to whether consumers searching for AAW’s product are confused and lured to lululemon’s products. *See Network Automation*, 638 F.3d at 1149 (“[B]ecause the *sine qua non* of trademark infringement is consumer confusion, when [courts] examine initial interest confusion, the owner of the mark must demonstrate likely confusion, not mere diversion.”).

Plaintiff’s initial interest confusion theory stems from the results of Google searches for the phrase “align pants” and “aliign yoga pants.” Dkt. 115 at 21; Dkt. 90-1 (Park Decl.), Exs. A, B; Campbell Report at 14. The results of those searches are provided by Plaintiff and included below as Appendices I, II, and III.

As seen in the appendices, when consumers search for “align pants,” Google instead recommends results for “align pants.” *See* Appendix I. Google also informs users—at the top of the recommended search results—that it is “[s]howing results for *align* pants,” and that the user can “[s]earch instead for aliign pants.” *Id.* The option to “[s]earch instead for aliign pants” is hyperlinked, so the user can simply click the link to search for “aliign pants.” *Id.*

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Similarly, when consumers search for “align yoga pants,” Google instead recommends results for “align yoga pants.” See Appendix II. Google also informs users—at the top of the recommended search results—that it is “[s]howing results for *align* yoga pants,” and that the user can “[s]earch instead for align yoga pants.” *Id.* The option to “[s]earch instead for align yoga pants” is hyperlinked, so the user can simply click the link to search for “align yoga pants.” *Id.*

As demonstrated by the search results provided by Plaintiff and included in the Appendices below, when Google chooses to show results for “align pants” instead of “align pants”—or results for “align yoga pants” instead of “align yoga pants”—nearly all of the results and advertisements are for lululemon apparel. See Appendices I, II. When users click “[s]earch instead for align yoga pants,” the first result that is not an advertisement is for AAW’s website. See Appendix III.

Based on the foregoing, AAW argues that summary judgment on the initial interest confusion theory is not warranted because there is a genuine issue of material fact as to whether consumers searching for AAW’s product are confused and lured to lululemon’s products. Dkt. 115 at 21–22.

This argument is unavailing. In *Multi Time Machine, Inc. v. Amazon.com, Inc.*, the plaintiff, MTM, sold watches under the mark “MTM Special Ops.” 804 F.3d 930, 933 (9th Cir. 2015). MTM did not sell its products on Amazon. *Id.* When users searched for the term “mtm special ops” on Amazon, the website displayed watches for a number of MTM’s competitors. *Id.* at 934. MTM sued Amazon and alleged that Amazon’s search results constituted initial interest confusion. *Id.* The district court granted summary judgment in Amazon’s favor, finding that there was no likelihood of confusion in Amazon’s use of MTM’s trademarks in the search results. *Id.* at 935.

The Ninth Circuit affirmed. In doing so, the court explained that the *Sleekcraft* test was “not particularly apt” for MTM’s claims, and the focus instead was on the “ultimate test for determining likelihood of confusion”—*i.e.*, “whether a ‘reasonably prudent consumer’ in the marketplace is likely to be confused as to the origin of the goods.” *Id.* at 936–37.

More specifically, the court explained that MTM’s claims “can be resolved simply by a[n] evaluation of the web page at issue and the relevant consumer.” *Id.* at 937; see also *Network Automation*, 638 F.3d at 1153 (“In the keyword advertising context the likelihood of confusion will

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ultimately turn on what the consumer saw on the screen and reasonably believed, given the context.”) (cleaned up). Regarding the contents of the web page, the court explained that “the labeling and appearance of the products for sale on Amazon’s web page is the most important factor in this case [because] clear labeling can eliminate the likelihood of initial interest confusion in cases involving Internet search terms.” *Multi Time Machine*, 804 F.3d at 937.

The court then evaluated the relevant consumer and the webpage and affirmed the district court’s grant of summary judgment. First, the court explained that, because the “goods in the present case are expensive,” the relevant consumer was “a reasonably prudent consumer accustomed to online shopping.” *Id.* (quoting *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010)). The court emphasized that “unreasonable, imprudent and inexperienced web-shoppers are not relevant.” *Id.* at 938 (quoting *Tabari*, 610 F.3d at 1176); *see also Network Automation*, 638 F.3d at 1153 (“[W]e expect consumers searching for expensive products online to be even more sophisticated.”).

Second, the court found that “the products at issue are clearly labeled by Amazon to avoid any likelihood of initial interest confusion by a reasonably prudent consumer accustomed to online shopping.” *Multi Time Machine*, 804 F.3d at 937–38. The court noted that all of the products listed on Amazon’s search results were “clearly labeled with the product’s name and manufacturer in large, bright, bold letters and include[d] a photograph of the item. In fact, the manufacturer’s name is listed twice.” *Id.* at 938.

Similarly, here, no reasonable juror could find a likelihood of initial interest confusion. First, as in *Multi Time Machine*, the relevant consumer here is a “reasonably prudent customer accustomed to online shopping.” *Id.* at 938 (quoting *Tabari*, 610 F.3d at 1176). As discussed above, *see supra* at 15–16, there is no genuine issue of material fact that the degree of care exercised by AAW and lululemon consumers is high. The parties’ yoga apparel sells for at least four times the price of similar goods at major retailers. *See supra* at 15–16. Accordingly, “imprudent and inexperienced web shoppers are not relevant.” *Multi Time Machine*, 804 F.3d at 938 ((quoting *Tabari*, 610 F.3d at 1176).

Second, no reasonable juror could find that the search results are not clearly labeled to avoid any likelihood of initial interest confusion. When users search for “align yoga pants,” Google clearly

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-03339-SVW-JEM	Date	June 7, 2021
Title	<i>Align Activation Wear, LLC v. lululemon athletica Canada Inc. and lululemon USA Inc.</i>		

informs the user—at the top of the search results page—that it is “showing results for ***align*** yoga pants.” Appendix II. The new search term—“align”—is bolded and italicized to stand out. *Id.* Immediately below that notice, Google offers the user a hyperlink to “search instead for aliign yoga pants.” *Id.*

Similarly, when users search for “aliign pants,” Google clearly informs the user—at the top of the search results page—that it is “showing results for ***align*** pants.” Appendix I. The new search term—“align”—is bolded and italicized to stand out. *Id.* Immediately below that notice, Google offers the user a hyperlink to “search instead for aliign pants.” *Id.*

Additionally, the search results and advertisements are all clearly labeled with the word “lululemon.” *See* Appendices I, II. As in *Multi Time Machine*, “the manufacturer’s name is listed twice” in the advertisements. *See id.*; *see also* 804 F.3d at 938. In fact, the word “align” never appears in a search result without the word “lululemon” in close proximity, and nearly all of the advertisements only include the word “lululemon,” not “align.” *See id.*

Plaintiff’s expert suggests that there is a likelihood of initial interest confusion when the actual results for the phrase “aliign yoga pants” are shown. Campbell Report at 14. Specifically, although the first non-sponsored result for the search “aliign yoga pants” is AAW’s website, the results still show advertisements for lululemon. *Id.*; *see also* Appendix III.

Yet, those advertisements are all clearly labeled with the name of the manufacturer—*i.e.*, lululemon. *See id.* And the non-sponsored search results are nearly all for AAW’s products.<sup>10</sup> *See id.*

In light of the foregoing, no reasonable juror could find that there is a likelihood that a reasonably prudent customer accustomed to online shopping will be confused by the Google search results. Rather, “[t]he search results page makes clear to anyone who can read English” that the advertisements and search results are for lululemon products, *Multi Time Machine*, 804 F.3d at 938, and users interested in “aliign pants” or “aliign yoga pants” can simply click the links that say, respectively,

<sup>10</sup> The two exceptions are (1) the second search result, which appears to be an article about this lawsuit; and (2) the very last search result, which appears to be a Poshmark listing for lululemon clothing.

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-03339-SVW-JEM	Date	June 7, 2021
Title	<i>Aliign Activation Wear, LLC v. lululemon athletica Canada Inc. and lululemon USA Inc.</i>		

“search instead for aliign pants” or “search instead for aliign yoga pants,” *see* Appendices I, II. As in *Multi Time Machine*, “[t]he search results page is unambiguous—not unlike when someone walks into a diner, asks for a Coke, and is told ‘No Coke. Pepsi.’” *Id.*; *see also id.* at 939 (“I do not think it is reasonable to find initial interest confusion when a consumer is never confused as to source or affiliation, but instead knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the list produced by the search engine so informs him.”) (quoting *Playboy*, 354 F.3d at 1034–35 (9th Cir. 2004) (Berzon, J., concurring)).

For the foregoing reasons, summary judgment against AAW on its initial interest confusion theory is warranted.

\* \* \*

Finally, the court responds to Plaintiff’s argument that “the record of documentary and testimonial evidence is replete with contested issues of material fact that preclude disposition by summary judgment and that must ultimately be decided by a jury.” Dkt. 115 at 2 n.2. Plaintiff repeatedly argues, in broad strokes, that “a jury question exists on the issue.” *Id.* at 23. Plaintiff appears to emphasize this argument—*i.e.*, that there are contested issues of fact requiring a jury—in order to take advantage of Ninth Circuit guidance stating that, “[b]ecause of the intensely factual nature of trademark disputes, summary judgment is generally disfavored in the trademark arena.” *Entrepreneur Media*, 279 F.3d at 1140.

The Court is not persuaded by this argument. The Supreme Court has explained that, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587. And in *Multi Time Machine*, the Ninth Circuit explained that “[t]he likelihood of confusion is often a question of fact, but not always. In a case such as this, where a court can conclude that the consumer confusion alleged by the trademark holder is highly unlikely . . . summary judgment is appropriate.” 804 F.3d at 939. In other words, the fact that the likelihood of confusion question is generally an issue for the jury is insufficient to survive summary judgment. Rather, a trademark holder must demonstrate that there is a *triable* issue on the likelihood of confusion.

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-03339-SVW-JEM	Date	June 7, 2021
Title	<i>Align Activation Wear, LLC v. lululemon athletica Canada Inc. and lululemon USA Inc.</i>		

Indeed, the Ninth Circuit has repeatedly affirmed summary judgment rulings where the record as a whole could not lead to a triable issue regarding the likelihood of confusion. *See, e.g., Arcona*, 976 F.3d at 1080–81 (9th Cir. 2020) (affirming summary judgment against trademark holder on likelihood of confusion issue and explaining that “court[s] should not myopically focus on only the alleged counterfeit marks to the exclusion of the entire product or even common sense”); *Multi Time Machine*, 804 F.3d at 940 (9th Cir. 2015) (affirming summary judgment against trademark holder on initial interest confusion issue); *One Indus., LLC v. Jim O’Neal Distrib., Inc.*, 578 F.3d 1154, 1165 (9th Cir. 2009) (“The mere fact that the two companies are direct competitors and happen to use the same letter on their products is not sufficient to show infringement. Accordingly, we conclude that there is no likelihood of confusion in this case, and that the district court properly granted summary judgment to One Industries.”); *Survivor*, 406 F.3d at 634 (2005) (9th Cir. 2005) (affirming district court grant of summary judgment against trademark holder on reverse confusion theory); *M2 Software*, 421 F.3d at 1085 (9th Cir. 2005) (affirming summary judgment against trademark holder and explaining that trademark holder “must show sufficient evidence to permit a rational trier of fact to find that confusion is probable, not merely possible.”) (quotations omitted).

Here, the record as a whole could only lead a rational trier of fact to one conclusion: confusion about the source of AAW’s or lululemon’s goods is not probable. *See id.* Rather, consumers purchasing lululemon know they are purchasing lululemon, consumers purchasing AAW know they are purchasing AAW, and no reasonable juror could find otherwise. Accordingly, summary judgment is warranted on the likelihood of confusion issue.

**IV. Conclusion.**

For the foregoing reasons, Defendants’ motion for summary judgment of no infringement is GRANTED. Defendants’ motion for summary judgment on the trademark priority issue is DENIED on the merits, *see supra* at 8 n.3, and Defendants’ motion for summary judgment on damages is DENIED as moot.

IT IS SO ORDERED.

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## **Appendix I:**

# **Google Recommended Results When Searching for “align pants”**

Source: Park Decl., Ex. A



aliign pants

All Shopping Images Videos News More Settings Tools

About 31,400,000 results (0.68 seconds)

Showing results for align pants
Search instead for align pants

Ads - align pants

Five product ads for lululemon leggings, each with a 'SALE' tag, price, and 'Free shipping' text.

Ad - https://shop.lululemon.com/ (877) 263-9300

Align Pant 25" | Women's Yoga Pants | lululemon - lululemon.com

In style and on schedule no matter the weather. Free Shipping and returns on all orders. Our technical gear has you covered so you can keep your mind on your moves. Shop online!

We Made Too Much - Women

When too much of a good thing is - well, a good thing.

Shop Women's Clothing

Browse exclusive range of Pants, Crops, Shorts and Skirts.

https://shop.lululemon.com Women's Clothes Pants

Align Pant 25" | Women's Yoga Pants | lululemon

Shop the Align Pant 25" | Women's Yoga Pants. Designed to minimize distractions and maximize comfort, these lightweight pants give you full freedom to move. \$98.00 · In stock

People also ask

- What are align pants?
Are Lululemon align pants worth it?
Whats the difference between Align and Align 2?
Do align pants stretch out?

Feedback

https://shop.lululemon.com story align-pants

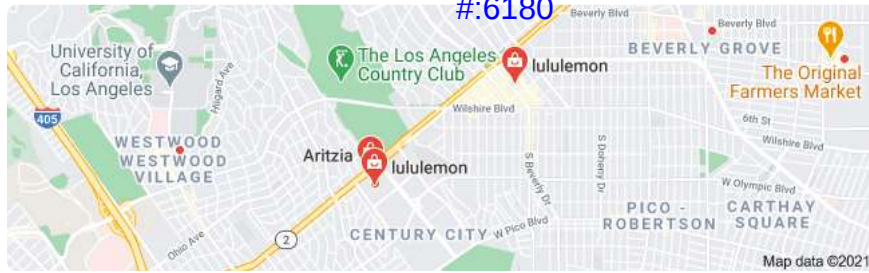
lululemon Align™ Pant 25

We designed this collection to help align your thoughts and movements. First, we innovated Nulu™, a buttery-soft, lightweight fabric. Then crafted a minimal ...

https://www.amazon.com Lululemon-Align-Stretchy-...

Lululemon Align II Stretchy Yoga Pants - High ... - Amazon.com

Lululemon Align II Stretchy Yoga Pants - High-Waisted Design, 25 Inch Inseam · High Rise, 25" Inseam · When you want to feel like you're wearing nothing during ...



Rating Hours

**lululemon**

4.4 ★★★★★ (40) · \$\$\$ · Sportswear store  
10250 Santa Monica Blvd · In the Westfield Century City · (310) 277-0843  
Open · Closes 8PM  
Their website mentions **align pant**



**lululemon**

4.3 ★★★★★ (34) · \$\$\$ · Sportswear store  
Beverly Hills, CA · (310) 858-8339  
Closes soon · 7PM  
Their website mentions **align pant**



**Aritzia**

4.3 ★★★★★ (42) · Women's clothing store  
10250 Santa Monica Blvd Unit 1720 · In the Westfield Century City · (310) 843-9610  
Open · Closes 8PM  
In-store shopping · Curbside pickup



→ View all

<https://www.amazon.com> › Lululemon-Align-Pant-Len...  
**Lululemon Align Pant Full Length Yoga Pants at Amazon ...**

Lululemon **Align Pant** Full Length Yoga Pants · With a longer inseam than the original, these full length lightweight pants minimize distractions and maximize ...

<https://poshmark.com> › lululemon athletic › Women  
**Best 25+ Deals for Lululemon Align Pant | Poshmark**

Get the best deals on lululemon **align pant** and save up to 70% off at Poshmark now! Whatever you're shopping for, we've got it.

<https://www.lulufanatics.com> › item › lululemon-align-...  
**Lululemon Align Pant II (25") - Boysenberry - lulu fanatics**

Lululemon Align HR Pant 28" Size 4 Black Buy it Now or Best Offer, \$79.00. Lululemon **Align Pant** II 25" Yoga Leggings Graphite Purple Womens Size 4  
\$79.00 · In stock

<https://www.glamour.com> › gallery › best-lululemon-le...  
**7 Best Lululemon Leggings: Align II, Invigorate & Wunder ...**

Aug 26, 2020 — Best Overall Leggings: **Align Pant** II 25". Key selling points: Buttery soft, weightless, and an exceptionally thick waistband—what's not to love ...

<https://pretty-sweaty.com> › 2018/08/06 › lululemon-ali...  
**Lululemon Align Pants Review | pretty-sweaty**

Aug 6, 2018 — Dude. Lululemon has a new (to me) pair of all-purpose/ yoga leggings. And they are uh-maze-balls. They're called the **Align Pant**. And they're ...

<https://www.lulufanatics.com> › collection › lululemon-a...  
**Lululemon Align Pant - lulu fanatics**




Align Pant. Lakeside Blue / Samba Snake Kayak Blue Hero Blue - Align Pant. Deep Zinfandel / Miss Mosaic Lilac Deep Zinfandel · Align Pant II. Black ...

https://people.com › Style






### Lululemon's New Align Pants with Pockets Are Selling Out ...

Mar 16, 2021 — The Lululemon Leggings Meghan Markle Loves Just Got a Huge Upgrade — and They're Selling Out Fast. Align Pant fans, your wishes just came ...

#### Related searches

-  Align HR Pant 25
-  Lululemon Align Jogger
-  Lululemon Align shorts

Feedback

-  lululemon align pant sale
-  align vs align ii
-  lululemon align leggings dupe
-  lululemon align pant review
-  lululemon align maternity



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**Appendix II:**  
**Google Recommended Results When**  
**Searching for “align yoga pants”**

Source: Park Decl., Ex. B



align yoga pants

All Shopping Videos Images News More Settings Tools

About 10,100,000 results (0.82 seconds)

Showing results for align yoga pants
Search instead for align yoga pants

Ad · https://shop.lululemon.com/lululemon/pants (877) 263-9300

lululemon® Official Site - Shop Yoga pant

In style and on schedule no matter the weather. Check out what's new online. Our technical gear has you covered so you can keep your mind on your moves. Register Online. Check Order Status. Store Locator. Types: Tanks, Jackets, Yoga Mats, Pants, Crops, Shorts.

Rating for lululemon.com: 4.8 - Order accuracy: 95-100%

We Made Too Much - Women

When too much of a good thing is - well, a good thing.

What's New - Women

Whatever your practice, on or off the mat, we're here to support you.

Women's Best Sellers

From the mat to the gym we've got you covered

Shop Women's Clothing

Browse exclusive range of Pants, Crops, Shorts and Skirts.

Ad · https://www.aloyoga.com/

Alo Yoga® Official Site | Fast & Free Shipping

Go from studio to street with new leggings, jackets, bras, & accessories from Alo.

Rating for aloyoga.com: 4.7 - Order accuracy: 95-100%

Leggings · New Lounge Just Dropped · Yoga Bras · Tees & Tanks · Alo Glow System

Women's Bottoms - from \$32.00 - Sculpting, contouring · More

https://shop.lululemon.com Women's Clothes > Pants

Align Pant 25" | Women's Yoga Pants | lululemon

Shop the Align Pant 25" | Women's Yoga Pants. Designed to minimize distractions and maximize comfort, these lightweight pants give you full freedom to move.

\$98.00 · In stock

People also ask

Are Lululemon align pants worth it?

What leggings are comparable to Lululemon align?

What yoga pants are comparable to Lululemon?

Should I size down in Align leggings?

Feedback

https://shop.lululemon.com story > align-pants

lululemon Align™ Pant 25

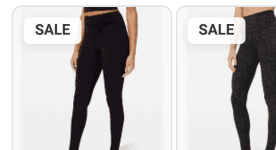
We designed this collection to help align your thoughts and movements. First, we innovated Nulu™, a buttery-soft, lightweight fabric. Then crafted a minimal ...

https://www.amazon.com Lululemon-Align-Stretchy-...

Lululemon Align II Stretchy Yoga Pants - High ... - Amazon.com

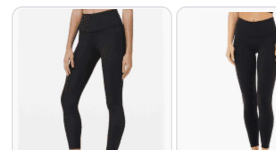
Lululemon Align II Stretchy Yoga Pants - High-Waisted Design, 25 Inch Inseam · High Rise, 25" Inseam · When you want to feel like you're wearing nothing during ...

Ads · align yoga pants



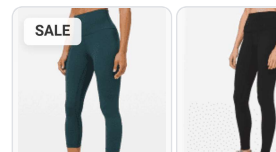
lululemon Women's... \$69.00 \$118 lululemon at... Free shipping

lululemon Women's... \$59.00 lululemon Free shipping



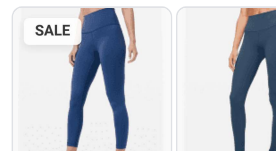
lululemon Women's... \$98.00 lululemon at... Free shipping

7/8 High-Waist... \$78.00 Alo Yoga



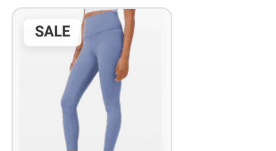
lululemon Women's... \$49.00 \$88 lululemon at... Free shipping

lululemon Women's... \$98.00 lululemon Free shipping



lululemon Women's... \$79.00 \$98 lululemon at... Free shipping

lululemon Women's... \$69.00 lululemon Free shipping



lululemon Women's... \$79.00 \$98



#6184

https://www.amazon.com › Lululemon-Align-Pant-Len...

### Lululemon Align Pant Full Length Yoga Pants at Amazon ...

Buy Lululemon **Align** Pant Full Length **Yoga** Pants and other Active Pants at Amazon.com. Our wide selection is eligible for free shipping and free returns.

lululemon at...  
Free shipping

→ More on Goo



Rating ▾ Hours ▾ ⋮

#### lululemon

4.3 ★★★★★ (34) · \$\$\$ · Sportswear store  
Beverly Hills, CA · (310) 858-8339

Closes soon · 7PM

🌐 Their website mentions **align** and **yoga pants**



#### lululemon

4.4 ★★★★★ (40) · \$\$\$ · Sportswear store  
10250 Santa Monica Blvd · In the Westfield Century City · (310) 277-0843

Open · Closes 8PM

🌐 Their website mentions **align** and **yoga pants**



#### lululemon

4.6 ★★★★★ (34) · \$\$\$ · Sportswear store  
West Hollywood, CA · (310) 659-9590

Closes soon · 7PM

🌐 Their website mentions **align** and **yoga pants**



→ View all

https://www.cnn.com › 2020/01/13 › cnn-underscored › L... ⋮

### Lululemon leggings: This lookalike on Amazon is less than ...

Jan 13, 2020 — The Lululemon **Align** collection is one of the brand's favorites, and we ... You can move in these **pants** — whether you're doing hot **yoga** or ...

https://www.glamour.com › gallery › best-lululemon-le... ⋮

### 7 Best Lululemon Leggings: Align II, Invigorate & Wunder ...

Aug 26, 2020 — Best for Lounging, Walking, or Doing **Yoga**: **Align** Pant 28". Key selling points: All the goodness of an **Align** legging, but cut for a longer length ...

https://www.teenvogue.com › story › best-yoga-pants ⋮

### 14 Best Yoga Pants, According to a Yoga Teacher | Teen Vogue

Jul 13, 2020 — Keep reading to see my top picks for the best **yoga leggings** on the market, from the viral Lululemon **Aligns** to up-and-coming brands you need ...

https://www.purewow.com › fashion › best-lululemon-l... ⋮

### The 5 Best Lululemon Leggings, According to Wearers ...

Feb 1, 2021 — When you think of the best **workout leggings** of all time, one brand ... and compressive version of the **Align**," and having worn them myself, ...

https://www.outdoorgearlab.com › Yoga › Yoga Pants ⋮

### Lululemon Align II Review | GearLab - OutdoorGearLab

Dec 14, 2020 — Whether you are a hot yoga junkie or prefer to adorn yoga pants for "athleisure" attire, the Lululemon Align II comes with the highest of regards.

Cons: Needs delicate care Price: \$98 List

Pros: Buttery soft, easy to move in, great color ...

★★★★★ Rating: 4.8 · Review by Bo Outland

https://poshmark.com › lululemon athletica › Women

### Best 25+ Deals for Lululemon Align Pant | Poshmark

Lululemon crop align pants size 2. \$50 \$98 ... Lululemon Align Leggings Wide Leg Crop Navy sz 10 ... Lululemon Athletica Align Tank for Yoga NWT GUPI. NWT.

#### Related searches

- Align leggings
- Lululemon Align Crop
- Lululemon Align Jogger

Feedback

- lululemon align leggings dupe
- lululemon align leggings review
- lululemon align pant sale
- lululemon leggings
- lululemon align maternity



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**Appendix III:**  
**Google Search Results for**  
**“align yoga pants”**

Source: Campbell Report, Ex. 5



align yoga pants



All Shopping Images Videos News More Settings Tools

About 381 results (0.76 seconds)

Did you mean: [align yoga pants](#)

Ad · shop.lululemon.com/lululemon/pants (877) 263-9300

### [lululemon® Official Site - Shop Women's Pants](#)

Technical gear for running, swimming, **yoga**, travel & training. Check out what's new! We have you covered for all the ways you like to sweat. Find the right **pants** at lululemon. Check Order Status. Register Online. Gift Cards Available. Types: Tanks, Jackets, **Yoga Mats**.

#### [We Made Too Much - Women](#)

When too much of a good thing is - well, a good thing.

#### [Shop Women's Clothing](#)

Browse exclusive range of Pants, Crops, Shorts and Skirts.

#### [Women's Best Sellers](#)

From the mat to the gym we've got you covered

#### [Shop Men's Collections](#)

Shop from our extensive range of apparel, shoes, yoga props & more.

Ad · www.anita.com/yoga/leggings

### [Comfortable high-performance - Ultimate performance leggings](#)

Comfortable and High-Performance. The Massage Sports Tights by Anita Active

Ad · www.walkpop.com/activewear

### [Walkpop Yoga Pants - Get 2 for \\$39 - Stay Home & Shop Online](#)

Do At-Home Workouts In Style. (It's A Mood Booster.) Leggings Start At \$29.95!

www.aliignmovement.com › align-home

### [Home — ALIIGN MOVEMENT](#)

... for a new age of active living, **ALIIGN** active **wear** appeals to the fashion- forward, socially conscious athlete practicing **yoga**, Pilates, running and cross fitness.

www.thefashionlaw.com › Latest News

### [LA-Based Wellness Co. Claims Lululemon Jacked its Name ...](#)

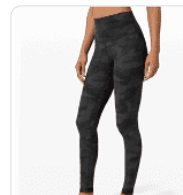
Apr 13, 2020 — They are Lululemon's \$80-plus Align leggings, and they are among ... **ALIIGN**" for use in connection with athletic apparel, bags, and **yoga** mats.

www.pinterest.at › pin

### [ALIIGN Space Capri - Without Walls | Urban outfitters, Fashion ...](#)

**ALIIGN** Printed Space Pant. **ALIIGN'S** far out harem pant in comfy eco-friendly fabrics that move with your body. Perfect for layering over your **workout shorts** or ...

#### Ads · align yoga pants



[lululemon Women's Yoga...](#)

**\$98.00**

[lululemon athle...](#)

Free shipping

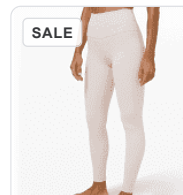


[lululemon Women's Yog...](#)

**\$69.00** ~~\$98~~

[lululemon athl...](#)

Free shipping



[lululemon Women's Yoga...](#)

**\$69.00** ~~\$98~~

[lululemon athle...](#)

Free shipping

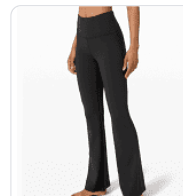


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