

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

NIKE, Inc.

Plaintiff,

v.

PUMA North America, Inc.

Defendant.

Civil Action No. 1:18-cv-10876-LTS

NIKE, INC.'S OPENING CLAIM CONSTRUCTION BRIEF

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Exhibit B	U.S. Patent No. 7,401,420 (the “’420 patent”)
Exhibit C	U.S. Patent No. 7,637,032 (the “’032 patent”)
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I. INTRODUCTION

NIKE filed this lawsuit to stop PUMA's infringements of ten patents directed to NIKE footwear technologies. Determining patent infringement is a two-step process. First, the Court must construe any disputed claim terms to ascertain their meaning and scope. Second, the trier of fact – the jury in this case – must compare the properly construed claims with the accused products.

PUMA asks the Court to construe 18 claim terms. Controlling Federal Circuit law provides a heavy presumption that claim terms have their ordinary and customary meanings. There are only two narrow exceptions to this presumption: (i) when an inventor acts as a lexicographer by defining a claim term, and (ii) when an inventor makes a clear and unmistakable disavowal of the full scope of a claim term. If neither exception applies, the Court may determine a term has its “ordinary and customary” meaning and no further construction is required, particularly when a claim term uses commonly understood words. Claim construction is not an exercise in redundancy.

Here, neither of the narrow exceptions applies for 17 of the 18 claim terms PUMA asks the Court to construe. Those 17 claim terms have the full scope of their ordinary and customary meanings, and those meanings are readily apparent because the claim terms use commonly understood words. No further construction is needed. For the remaining claim term, the inventors acted as their own lexicographers and the Court should adopt their express definition.

II. BACKGROUND

NIKE asserts ten patents against PUMA. The patents are directed to various aspects of NIKE footwear technologies. The '032, '749, '488, '046, and '679 patents relate to NIKE Flyknit technology. The '746 and '065 patents relate to NIKE cleat assembly technology. The '420 patent relates to NIKE Air technology. The '917 patent relates to NIKE Fuse technology. And the '411 patent relates to NIKE cushioning technology. NIKE addresses each patent in more detail below.

III. LEGAL STANDARD

Claim construction is an issue of law for the Court. *Markman v. Westview Instruments*,

Inc., 517 U.S. 370, 372 (1996). Federal Circuit law applies. *Absolute Software, Inc. v. Stealth Signal, Inc.*, 659 F.3d 1121, 1129 (Fed. Cir. 2011).

A. There is a heavy presumption that claim terms have their ordinary and customary meanings

To determine the meaning of a disputed claim term, courts start by considering the intrinsic evidence. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc). The intrinsic evidence includes the claims themselves, the specification, and the prosecution history. *Id.* at 1314. The general rule—subject to two narrow exceptions discussed below—is that a disputed claim term is construed according to its ordinary and customary meaning as understood by one of ordinary skill in the art at the time of the invention in the context of the patent. *Id.* at 1312–13; *Azure Networks, LLC v. CSR PLC*, 771 F.3d 1336, 1347 (Fed. Cir. 2014) (“[t]here is a heavy presumption that claim terms carry their accustomed meaning”) (vacated on other grounds).

Claims “‘must be read in view of the specification, of which they are a part.’” *Phillips*, 415 F.3d at 1315. The specification “‘is always highly relevant to the claim construction analysis.’” *Id.* But, “particular embodiments and examples appearing in the specification will not generally be read into the claims.” *Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998). “[I]t is improper to read limitations from a preferred embodiment described in the specification—even if it is the only embodiment—into the claims absent a clear indication in the intrinsic record that the patentee intended the claims to be so limited.” *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 913 (Fed. Cir. 2004).

The prosecution history may be another tool to supply context for claim construction. *Phillips*, 415 F.3d at 1317. But “because the prosecution history represents an ongoing negotiation between the [Patent Office] and the applicant, rather than the final product ..., it often lacks the clarity of the specification and thus is less useful for claim construction purposes.” *Id.* at 1317.

Extrinsic evidence may also be useful in some cases, but it is “‘less significant than the

intrinsic record in determining the legally operative meaning of claim language.” *Id.* For example, technical dictionaries may help a court understand the underlying technology and the manner in which one skilled in the art might use technical terms. *Id.* at 1318.

B. There are only two narrow exceptions to the heavy presumption: claim terms have their ordinary and customary meaning unless a patentee acts as its own lexicographer or clearly disavows claim scope

There are only two narrow exceptions to the general rule that claims are construed according to their ordinary and customary meaning: “1) when a patentee sets out a definition and acts as his own lexicographer, or 2) when the patentee disavows the full scope of the claim term either in the specification or during prosecution.” *Info-Hold, Inc. v. Applied Media Techs. Corp.*, 783 F.3d 1262, 1265-66 (Fed. Cir. 2015); *Straight Path IP Grp., Inc. v. Sipnet EU S.R.O.*, 806 F.3d 1356, 1361 (Fed. Cir. 2015) (“unless there is a disclaimer or redefinition [] the proper construction of any claim language must ... stay true to the claim language, and . . . avoid giving invention defining effect to specification language included for other descriptive and enablement purposes”).

The standards for finding lexicography or a disavowal are “exacting.” *Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371 (Fed. Cir. 2014). To act as a lexicographer, “a patentee must clearly set forth a definition of the disputed claim term other than its plain and ordinary meaning and must clearly express an intent to redefine the term.” *Id.* (holding patentee was not lexicographer because there were “no words of manifest exclusion or restriction”). To disavow or disclaim the full scope of a claim term, the patentee’s statements in the specification or prosecution history must amount to a “clear and unmistakable” surrender. *See, e.g., Massachusetts Inst. of Tech. v. Shire Pharm., Inc.*, 839 F.3d 1111, 1118-19 (Fed. Cir. 2016) (no disclaimer); *GE Lighting Solutions, LLC v. AgiLight, Inc.*, 750 F.3d 1304, 1309 (Fed. Cir. 2014) (no disclaimer).

C. Claim construction is not an exercise in redundancy, and the Court may construe claim terms as having their “ordinary and customary meaning”

In some cases, “the ordinary meaning of claim language as understood by a person of skill

in the art may be readily apparent even to lay judges,” and claim construction in those cases “involves little more than the application of the widely accepted meaning of commonly understood words.” *Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 805 (Fed. Cir. 2007). Where there is “no facial ambiguity or obscurity in the claim term,” the Federal Circuit imposes “demanding standards for displacing . . . an ordinary meaning . . . [because] the terms at issue have so clear an ordinary meaning that a skilled artisan would not be looking for clarification in the specification.” *Ancora Techs., Inc. v. Apple, Inc.*, 744 F.3d 732, 738 (Fed. Cir. 2014); *see also Straight Path*, 806 F.3d at 1361 (where the claim language “leav[es] no genuine uncertainties on interpretive questions . . . it is particularly difficult to conclude that the specification reasonably supports a different meaning”); *Info-Hold*, 783 F.3d at 1266–67 (“transmit” has ordinary and customary meaning because “no linguistic ambiguity to resolve” and “specification confirms the term’s neutrality”).

Claim construction “is not an obligatory exercise in redundancy.” *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997). If a claim uses common words, the Court may determine a disputed term has its “ordinary and customary” or “plain and ordinary” meaning and no further construction is required. *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1206–07 (Fed. Cir. 2010) (affirming construction of disputed term as “plain and ordinary meaning”); *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312, 1326 (Fed. Cir. 2012) (“the district court did not err in concluding that these terms have plain meanings that do not require additional construction”); *Summit 6, LLC v. Samsung Elecs. Co., Ltd.*, 802 F.3d 1283, 1291 (Fed. Cir. 2015) (“because the plain and ordinary meaning of the disputed claim language is clear, the court did not err by declining to construe the claim term”).

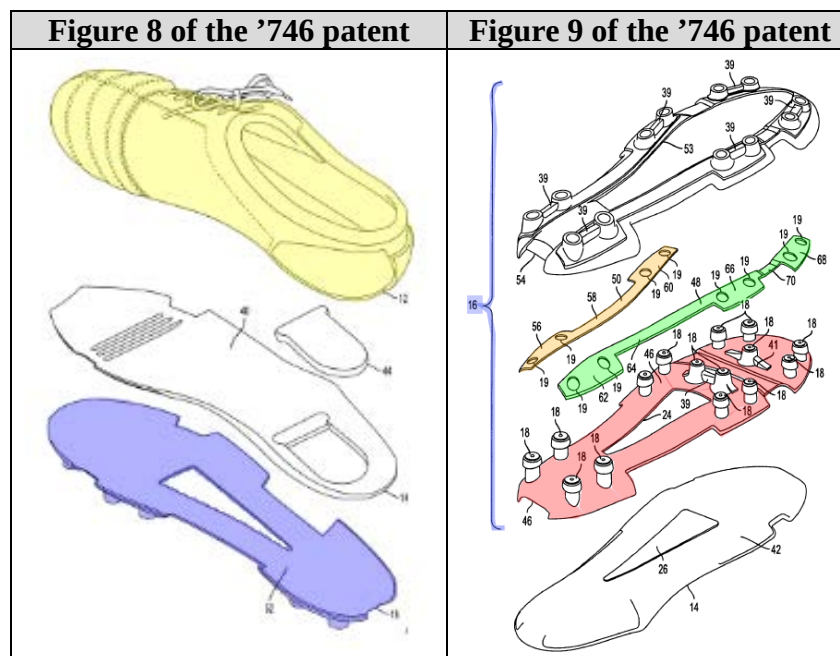
IV. THE PERSON OF ORDINARY SKILL IN THE ART

The disputed claim terms use common, non-technical words that are readily understood by judge, jury, and persons of ordinary skill in the art alike. Thus, the Court need not expressly define

the person and level of ordinary skill in the art for purposes of claim construction. *See, e.g., SecurityPoint Holdings, Inc. v. U.S.*, 111 Fed. Cl. 1, 6 (Ct. Fed. Cl. 2013) (refusing to make a ruling as to the level of skill in the art since it did not impact the claim construction analysis).

V. THE '746 PATENT

The invention of the '746 patent relates to a cleated article of footwear that “controls the motion of a wearer’s foot during running, and that increases comfort and reduces fatigue.” (Ex. A, 2:4-7.) Figures 8 and 9 of the patent, reproduced below with highlighting, show exploded views of an example article of footwear in accordance with the invention. (*Id.*, 2:58-63.)



The footwear in this example has an upper, highlighted in yellow, coupled to a cleat assembly, highlighted in blue. (*Id.*, 3:59-61.) The cleat assembly includes a base, highlighted in red. (*Id.*, 4:31-35.) The base has medial and lateral sides and a plurality of cleats. (*Id.*, 4:31-34.) The cleat assembly also includes medial and lateral support bars, highlighted in green and orange, respectively. (*Id.*) A portion of the assembly located near a midfoot section of the medial support bar is stiffer than a portion located near a midfoot section of the lateral support bar. (*Id.*, 2:12-16.)

NIKE asserts claims 1, 5, and 6. Claim 1 is below with the disputed terms emphasized.

1. An article of footwear, comprising:
an upper; and
a cleat assembly coupled to the upper, the cleat assembly including:
 - a base having medial and lateral sides,
 - a plurality of downwardly extending ground engaging members,
 - a medial support bar located on the medial side,
 - a lateral support bar located on the lateral side,
 - a ***lateral stiffened section*** located in a region of the cleat assembly generally corresponding to a midfoot portion of the lateral support bar, and
 - a ***medial stiffened section*** located in a region of the cleat assembly generally corresponding to a midfoot portion of the medial support bar, the ***medial stiffened section being stiffer than the lateral stiffened section***.

A. “lateral stiffened section” and “medial stiffened section”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	<i>lateral stiffened section</i> : the region of the cleat assembly that generally corresponds to the midfoot portion of the lateral support bar <i>medial stiffened section</i> : the region of the cleat assembly that generally corresponds to the midfoot portion of the medial support bar

These claim terms have the full scope of their ordinary and customary meanings. Neither of the exceptions to the presumption of giving claim terms their ordinary and customary meanings applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the terms in the specification or during prosecution. (Ex. A, 1:5-8:14.)

The ordinary and customary meanings of these terms are readily apparent because the terms use non-technical, commonly understood words. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity” in any of these words. *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326.

The claim language confirms these terms have their ordinary and customary meanings. (Ex. A, 8:16-33.) The claim provides that the “cleat assembly” includes a “lateral stiffened section” that is “located in a region of the cleat assembly generally corresponding to a midfoot

portion of the lateral support bar,” and a “medial stiffened section” that is “located in a region of the cleat assembly generally corresponding to a midfoot portion of the medial support bar.” (*Id.*)

The specification also confirms these terms have their ordinary and customary meanings. (*Id.*, 1:5-8:14.) It provides that in one embodiment “[c]leat assembly 16 includes medial and lateral stiffened sections that are generally located in regions corresponding to the midfoot sections 64 and 58 of respective medial and lateral support bars 48 and 50.” (*Id.* A., 5:64-67.)

PUMA’s constructions incorrectly substitute the word “region” for “section.” The claim language, however, provides that the “lateral stiffened section” and “medial stiffened section” are “sections” of the cleat assembly; not “regions” of the cleat assembly. (*Id.*, 8:16-33.)

PUMA’s constructions also incorrectly include the regions of the cleat assembly where the “lateral stiffened section” and “medial stiffened section” are located. But the claim already provides the regions where those sections are located. (*Id.*, 8:25-30.) The claim states, “a lateral stiffened section located in a region of the cleat assembly generally corresponding to a midfoot portion of the lateral support bar,” and “a medial stiffened section located in a region of the cleat assembly generally corresponding to a midfoot portion of the medial support bar.” (*Id.*)

Thus, these claim terms have their ordinary and customary meanings, which are readily apparent because the terms use commonly understood words. No further construction is required.

B. “medial stiffened section being stiffer than the lateral stiffened section”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	the stiffened section of the cleat assembly at the midfoot region that generally corresponds to the midfoot portion of the medial support bar is more resistant to deformation due to torsional forces, bending forces, and/or compressive forces than the stiffened section of the cleat assembly at the midfoot region that generally corresponds to the midfoot portion of the lateral support bar

This term includes three phases: “medial stiffened section,” “lateral stiffened section,” and “being stiffer than.” The phrases “medial stiffened section” and “lateral stiffened section” have

their ordinary and customary meanings and no further construction is required for the reasons NIKE set forth above in Section V.A. NIKE will not repeat those arguments here.

The real dispute here is the meaning of “being stiffer than.” The phrase “being stiffer than” also has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. A, 1:5-8:14.)

The ordinary and customary meaning of “being stiffer than” is readily apparent because the phrase uses non-technical, commonly understood words. *Acumed*, 483 F.3d at 805. For example, “stiff” means “not easily bent or changed in shape; rigid.” (Ex. L.) There is “no facial ambiguity or obscurity” in the words of this phrase. *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

The claim language confirms “being stiffer than” has its ordinary and customary meaning. (Ex. A, 8:16-33.) The claim provides that the “cleat assembly” includes a “medial stiffened section” and a “lateral stiffened section,” with the “medial stiffened section being stiffer than the lateral stiffened section.” (*Id.*)

The specification also confirms “being stiffer than” has its ordinary and customary meaning. (*Id.*, 1:5-8:14.) It provides that in one embodiment “a portion of the cleat assembly generally located near a midfoot section of the medial support bar is stiffer than a portion of the cleat assembly generally located near a midfoot section of the lateral support bar.” (*Id.*, 2:7-16.) The specification also provides several broad examples of how the medial stiffened section may be stiffer than the lateral stiffened section. (*Id.*, 5:67-6:13.) In some non-limiting embodiments, this may be achieved by making the midfoot section of the medial support bar thicker than the

midfoot section of the lateral support bar. (*Id.*) In other non-limiting embodiments, the midfoot sections of the medial and lateral support bars may have the same thickness, but a connecting matrix overlaying the midfoot section of the medial support bar is thicker than a connecting matrix overlaying the midfoot section of the lateral support bar. (*Id.*)

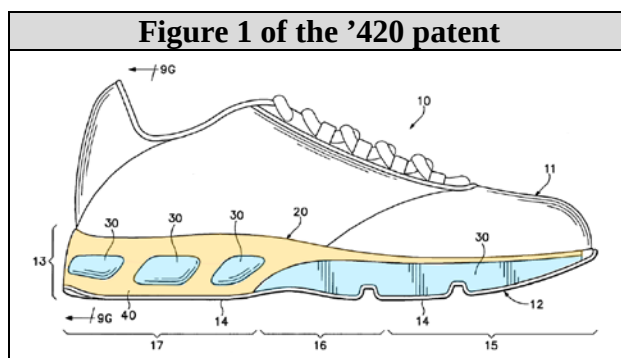
PUMA's construction is incorrect for a number of reasons. First, PUMA proposes different constructions for "lateral stiffened section" and "medial stiffened section" in the context of this claim term than it does for those terms by themselves. (*Compare* Section V.A above *with* this disputed term.) "Lateral stiffened section" and "medial stiffened section" should have consistent meanings throughout all of the claims of the patent. *Phillips*, 415 F.3d at 1314 ("claim terms are normally used consistently throughout the patent").

Second, PUMA improperly adds limitations to this claim term. PUMA proposes that "stiffer" means "more resistant to deformation due to torsional forces, bending forces, and/or compressive forces." There is no support in the intrinsic record for requiring that the "medial stiffed section" be "more resistant to deformation due to torsional forces, bending forces, and/or compressive forces" than the "lateral stiffened section." (Ex. A., 1:5-8:14); *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations to claim terms).

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses commonly understood words. No further construction is required.

VI. THE '420 PATENT

The invention of the '420 patent relates to a sole component for an article of footwear that includes a fluid-filled bladder and an external reinforcing structure. (Ex. B, 1:24-30.) Figure 1 of the patent, reproduced below with highlighting, shows an example sole component with a fluid-filled bladder highlighted in blue and a reinforcing structure in orange. (*Id.*, 3:36-38; 5:1-4.)



NIKE asserts claims 14-17, and 19. Claim 14 recites:

14. An article of footwear comprising:

a sole structure incorporating a **fluid-filled bladder** and a reinforcing structure secured to the bladder, the sole structure having an upper surface and an opposite lower surface, the upper surface forming a ridge that defines a first portion of a lasting surface, at least a portion of the ridge being an inclined surface formed by the reinforcing structure and located over the bladder, the bladder defining a second portion of the lasting surface; and an upper secured directly to the first portion of the lasting surface and the second portion of the lasting surface.

A. “fluid-filled bladder”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	bladder to which a fluid has been added

This claim term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. B, 1:20-23:11.)

The parties’ dispute is over the term “filled.” The ordinary and customary meaning of this term is readily apparent at least because “filled” is a non-technical, commonly understood word. *Acumed*, 483 F.3d at 805. “Filled” means “cause (a space or container) to become full or almost full.” (Ex. L.) There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

The claim language confirms this term has its ordinary and customary meaning. (Ex. B, 24:19-29.) Claim 14 provides that the article of footwear comprises, among other things, “a sole structure incorporating a fluid-filled bladder.” (*Id.*)

The specification also confirms this term has its ordinary and customary meaning. (*Id.*, 1:20-23:11.) For example, it broadly describes the fluid-filled bladder as any bladder filled with any fluid, including pressured fluids or non-pressurized fluids such as ambient air:

The fluid within bladder 30 may be any of the gasses disclosed in U.S. Pat. No. 4,340,626 to Rudy The fluid may also include gasses such as pressurized octafluoropropane, nitrogen, or air. In addition to gasses, various gels or liquids may be sealed within bladder 30. Accordingly, a variety of fluids are suitable for bladder 30. With regard to pressure, a suitable fluid pressure is fifteen pounds per square inch, but may range from zero to thirty pounds per square inch. Accordingly, the fluid pressure within bladder 30 may be relatively high, or ***the fluid pressure may be at ambient pressure*** or at a pressure that is slightly elevated from ambient in some embodiments of the invention.

(*Id.*, 8:3-16 (emphasis added).)

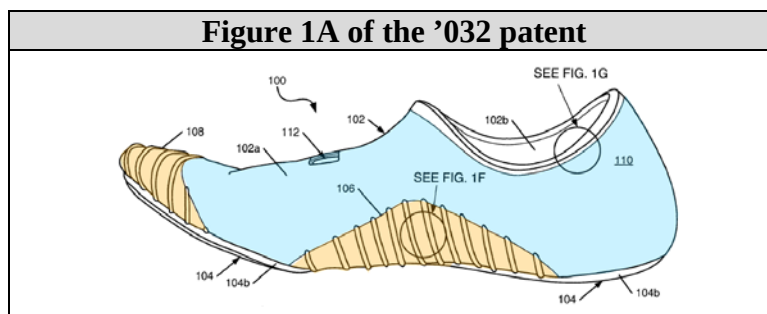
PUMA’s construction improperly adds a requirement that fluid be “added” to the bladder. *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations). PUMA’s construction not only lacks support in the intrinsic record (Ex. B, 1:20-24:50)—which on its own provides a sufficient basis to deny the construction—but the construction also improperly excludes an embodiment expressly disclosed in the specification. For example, the specification provides that a fluid-filled bladder may be any bladder filled with any fluid, including non-pressurized fluids such as ambient air. (*Id.*, 8:3-16.) That includes, for example, a bladder filled with air that is encapsulated in the bladder as the bladder is formed; not “added” to the bladder after it is formed. (*Id.*) But PUMA’s construction improperly excludes this embodiment. *Rambus Inc. v. Rea*, 731 F.3d 1248, 1253 (Fed. Cir. 2013) (“A claim construction that excludes the preferred embodiment ‘is rarely, if ever, correct’”).

Thus, this claim term has its ordinary and customary meaning, which is readily apparent

because the term uses commonly understood words. No further construction is required.

VII. THE '032 PATENT

The invention of the '032 patent relates to articles of footwear incorporating upper members at least partially formed from textile materials, such as knitted textile materials. (Ex. C, 1:60-2:36.) The footwear may include knitted “stability ribs or other stability-enhancing structures in or on the upper member.” (*Id.*, 1:60-2:3.) Figure 1A of the patent, reproduced below with highlighting, shows an example article of footwear of the invention. (*Id.*, 2:44-46.)



In this example, the footwear includes a knitted upper member engaged with a sole member. (*Id.*, 4:58-60.) The exterior surface of the upper includes regions having ribbed structures to provide stability, highlighted in orange. (*Id.*, 5:48-52.) It also includes a region having a non-ribbed structure (e.g., a smooth structure as depicted above), highlighted in blue. (*Id.*, 5:52-53.)

NIKE asserts claims 1-4, 8, 13-19, 23, 30-31, and 33-34. Claim 1 recites:

1. An article of footwear, comprising:

an upper member substantially constructed from textile material, wherein the upper member includes an exterior portion substantially constructed from knitted textile material, the exterior portion including a first region having **stability ribs** integrally formed in the knitted textile material and a second region continuous with the first region, the second region not including **stability ribs**;

wherein a first portion of the first region extends along a forefoot portion of the exterior portion of the upper member and a second portion of the first region extends along a lateral midfoot side of the exterior portion of the upper member;

wherein a portion of the second region extends along a junction between the upper member and the sole member and between the first portion of the first region and the second portion of the first region on a lateral midfoot side of the exterior portion of the upper member; and
a sole member engaged with the upper member.

Claim 16 is similar, except it recites “*enhanced stability structures*” instead of “stability ribs.”

A. “stability ribs” and “enhanced stability structures”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	<i>stability ribs</i>: ribs that increase the resistance to bending or stretching of the upper member in the region of the upper where the ribs are located in order to provide support to a wearer’s foot in that region <i>enhanced stability structures</i>: structures that increase the resistance to bending or stretching of the upper member in the region of the upper where the ribs are located in order to provide support to a wearer’s foot in that region

These claim terms have the full scope of their ordinary and customary meanings. Neither of the exceptions to the presumption of giving claim terms their ordinary and customary meanings applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the terms in the specification or during prosecution. (Ex. C, 1:10-19:45.)

The parties’ dispute is over the word “stability.” The ordinary and customary meaning of the term is readily apparent at least because “stability” is a non-technical, commonly understood word. *Acumed*, 483 F.3d at 805. “Stability” means “the state of being stable,” and “stable” means “not likely to give way or overturn; firmly fixed.” (Ex. M.) There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326.

The claim language confirms “stability” has its ordinary and customary meaning. (Ex. C, 19:48-67.) Claim 1 provides that the article of footwear comprises an upper that includes “a first region having stability ribs integrally formed in the knitted textile material and a second region continuous with the first region, the second region not including stability ribs.” (*Id.*)

The specification also confirms “stability” has its ordinary and customary meaning. (*Id.*, 1:10-19:45.) For example, the specification broadly describes the “stability” ribs or structures as inherently providing stability because they are ribs or other structures:

[T]he exterior layer 102 a of the upper member 102 may be formed from plural material constructions or formations that each impart different properties or characteristics . . . (e.g., ribbed or other support or stability structures in some areas to provide higher stability as compared to other (e.g., non-ribbed) areas, etc.).

(*Id.*, 10:24-30.) Furthermore, the specification provides that the “stability” ribs or structures are not limited to any particular construction or characteristic:

[N]ot all of the ribbed regions 106 and 108 (or other areas of increased stability) need have the same exact constructions, structures, textures, patterning, or other characteristics. Rather, if desired, different ribbing patterns or structures may be used in the various areas, differences in the ribbing structures and/or patterns may be provided within a given single region (e.g., different rib heights, widths, spacings, etc.), and the like.

(*Id.*, 6:20-27.)

PUMA’s constructions improperly add limitations, requiring that the “stability” ribs or structures “increase the resistance to bending or stretching of the upper member in the region of the upper where the ribs are located in order to provide support to a wearer’s foot in that region.” *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations). PUMA’s construction finds no support in the intrinsic record. The claims do not say anything about “increas[ing] the resistance to bending or stretching” or “providing support to a wearer’s foot in that region.” Moreover, the specification provides that, in some embodiments, the region of the upper where the stability ribs or structures are located may provide stretchability; not “increase the resistance” to it:

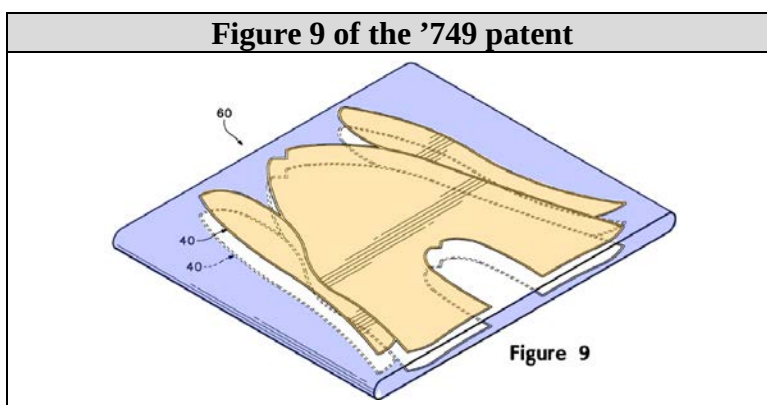
As shown, the ribbed regions may include enlarged rib elements 120 formed by the knitting process (e.g., for stability purposes). Gathered material areas 122 (also formed in the knitting process in this example structure) between the enlarged ribs 120 provide, for example, additional material for flexibility, stretchability, and material return purposes, as well as stability.

(Ex. C, 14:5-11). PUMA’s construction improperly excludes those embodiments. *Rambus*, 731 F.3d at 1253 (incorrect to exclude preferred embodiments).

Thus, these claim terms have their ordinary and customary meanings, which are readily apparent because the terms use commonly understood words. No further construction is required.

VIII. THE '749 PATENT

The invention of the '749 patent relates to a method of manufacturing footwear using knitting technology. (Ex. D, 3:25-60.) The method includes simultaneously knitting a textile element with a surrounding textile structure. (*Id.*, 11:43-52.) Figure 9 of the patent, reproduced below with highlighting, shows an example textile element and surrounding textile structure that have been simultaneously knitted. (*Id.*, 4:13-14 and 7:38-63.) The textile element is highlighted in orange and the surrounding textile structure is highlighted in blue. (*Id.*)



NIKE asserts claims 1, 5, 6, 8, and 11. Claim 1 recites:

1. A method of manufacturing an article of footwear, the method comprising:

simultaneously knitting a textile element with a surrounding textile structure, the knitted textile element having at least one knitted texture that differs from a knitted texture in the surrounding knitted textile structure;

removing the knitted textile element from the surrounding knitted textile structure;

incorporating the knitted textile element into the article of footwear.

A. “simultaneously knitting”

NIKE's Construction	PUMA's Construction
Ordinary and customary meaning. No further construction is needed.	knitting at the same time during a single knitting process

This claim term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies.

The inventors did not act as their own lexicographers, and the inventors did not disavow the full

scope of the term in the specification or during prosecution. (Ex. D, 3:25-11:41.)

The parties' dispute is over the word "simultaneously." The ordinary and customary meaning of "simultaneously" is readily apparent because it is a non-technical, commonly understood word. *Acumed*, 483 F.3d at 805. "Simultaneously" means "occurring, operating or done at the same time." (Ex. N.) There is "no facial ambiguity or obscurity." *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

PUMA's construction improperly adds a requirement that the "simultaneous knitting" be "during a single knitting process." PUMA will likely point to the prosecution history as alleged support for its construction, but the inventors did not "clearly and unmistakably" limit this term to "a single knitting process." The inventors stated the following during prosecution:

The claims generally recite that a knitted textile element is simultaneously formed with a surrounding knitted textile structure. Referring *for example* to FIG. 9 of the instant application, ... [a]s the textile structure 60 is knitted, the knitted textile element 40 is also knitted. In other words, the textile structure 60 and the textile element 40 are knit at the same time during a single knitting process—they are "simultaneously formed."

In contrast, Nishida fails to disclose a knitted textile element simultaneously formed with a knitted textile structure during a knitting process.

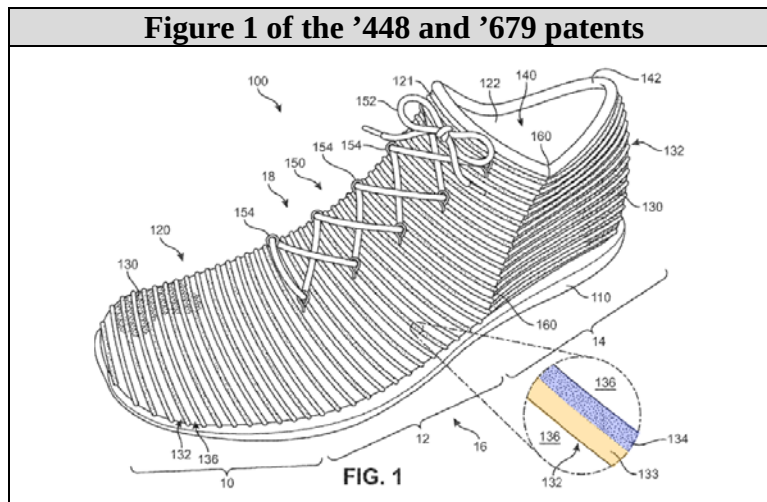
(Ex. K, at 7 (emphasis added).) As can be seen, the inventors first described one of the *example* embodiments of their invention as having a structure and an element that are knitted at the same time during a "single" knitting process. (*Id.*) But the inventors continued on to distinguish their invention as a whole (not just one example) from the prior art, and they did not limit the invention in that context to a "single" knitting process. (*Id.*) The inventors' statements regarding the example embodiment, therefore, are not a "clear and unmistakable" disavowal of claim scope for the invention as a whole. *See, e.g., MIT*, 839 F.3d at 1121 (no disclaimer).

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses commonly understood words. No further construction is required.

IX. THE '448, '046, and '679 PATENTS

The '448, '046, and '679 patents are related in that they all claim priority to the same provisional patent application. (Exs. E, F, and G.) The '679 patent is also a continuation of the '488 patent. (Exs. E, F.) That means those two patents have the same disclosure and are directed to the same invention, but there are some variations in the scope of the claims. *Transco Prod. Inc. v. Performance Contracting, Inc.*, 38 F.3d 551, 555 (Fed. Cir. 1994).

The invention of the '488 and '679 patents relates to footwear incorporating knitted components. (Ex. E, 1:23-25; Ex. F, 1:28-30.) The footwear includes an upper that incorporates one or more lenticular knit structures, which generate a visual effect that changes depending on the viewing angle. (Ex. E, 2:24-3:23; Ex. F, 2:30-3:35.) Figure 1 of the patents, reproduced below with highlighting, shows an example of the invention. (Ex. E, 3:33-35; Ex. F, 3:45-47.)



In this example, the upper may be a knitted component formed of unitary knit construction. (Ex. E, 7:35-37 and 7:64-65; Ex. F, 7:50-52 and 8:12-13.) The knitted component may also have one or more lenticular knit structures, labeled 132. (Ex. E, 9:3-6; Ex. F, 9:21-24.) A first portion of the lenticular knit structure may be knit using a first yarn, and a second portion may be knit using a second yarn that is different from the first yarn. (Ex. E, 10:11-21; Ex. F, 10:30-40.) In the figure above, a first portion is highlighted in orange and a second portion in blue. (*Id.*) The types

of yarn may vary, for example, in color, texture, or denier. (*Id.*)

NIKE asserts claims 1–5, 10, 16, 17 of the '448 patent and claim 1 of the '679 patent.

Claim 1 of the '448 patent recites:

1. An article of footwear including an upper and a sole structure attached to the upper, the upper incorporating a knitted component formed of **unitary knit construction**, the knitted component comprising:

at least one **lenticular knit structure** including a first portion and a second portion disposed on opposite sides of the **lenticular knit structure**; and

a base portion disposed adjacent to the at least one **lenticular knit structure**;

wherein the at least one **lenticular knit structure** extends away from the base portion on an exterior surface of the upper; and

wherein the first portion of the at least one **lenticular knit structure** is associated with a first visual effect when the upper is viewed from a first viewing angle and the second portion of the at least one **lenticular knit structure** is associated with a second visual effect when the upper is viewed from a second viewing angle that is different than the first viewing angle.

Claim 1 of the '679 patent recites:

1. A **lenticular knit structure** for providing color-shifting properties to a knitted component, the **lenticular knit structure** comprising: a first portion disposed on a first side of the **lenticular knit structure**;

a second portion disposed on a second side of the **lenticular knit structure**, the second side being disposed opposite the first side; and

wherein the first portion of the **lenticular knit structure** is associated with a first visual effect when the **lenticular knit structure** is viewed from a first viewing angle and the second portion of the **lenticular knit structure** is associated with a second visual effect when the **lenticular knit structure** is viewed from a second viewing angle that is different than the first viewing angle;

wherein the knitted component includes a front side and an opposite-facing back side, and

wherein the **lenticular knit structure** is disposed on the front side of the knitted component.

The invention of the '046 patent also relates to articles incorporating knitted components.

(Ex. G, 1:20-22.) The articles include knitted webbed areas that move between a neutral position

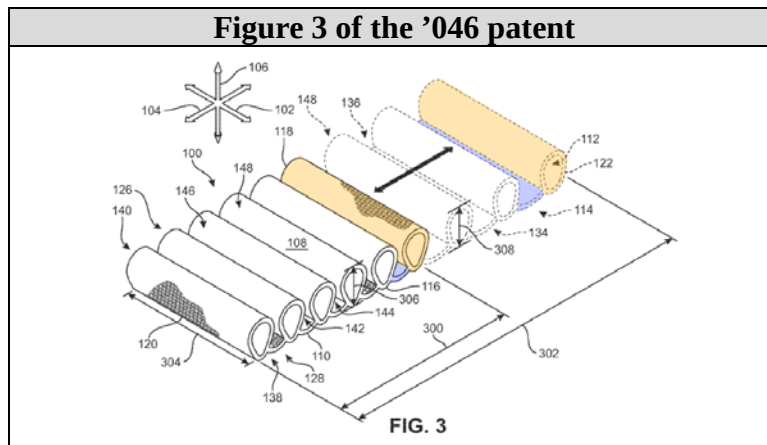
and an extended position and knitted tubular structures that are adjacent to the webbed areas. (*Id.*,

32:40-59.) When in the neutral position, a first area of the front surface of the webbed areas is

hidden from visual observation. (*Id.*) When in the extended position, the first area of the front

surface is revealed for visual observation. (*Id.*)

Figure 3 of the patent, reproduced below with highlighting, is an example embodiment of the invention where the article is shown in a neutral position with solid lines and in an extended position with broken lines. (*Id.*, 3:23-26.) In this example, one of the knitted webbed areas is highlighted in blue and one of the knitted tubular structures is highlighted in orange, in both the neutral and extended positions. (*Id.*, 8:40-46.)



NIKE asserts claims 1-2, 17, 18, 20 of the '046 patent. Claim 1 recites:

1. An article comprising:

a plurality of **webbed areas** that include a plurality of **courses** formed from a first yarn, the **webbed areas** having a front surface, the **webbed areas** configured to move between a neutral position and an extended position, the **webbed areas** being biased to move toward the neutral position and

a plurality of **tubular structures** that are adjacent to the **webbed areas**, the **tubular structures** including a plurality of **courses**;

wherein at least one of the **webbed areas** or **tubular structures** is configured to stretch to move the **webbed areas** to the extended position in response to a force applied to the article wherein in the neutral position, a first area of the front surface is hidden from visual observation from a first viewing perspective, and

wherein in the extended position, the first area of the front surface is revealed for visual observation from the first viewing perspective.

A. “lenticular knit structure”

NIKE's Construction	PUMA's Construction
Ordinary and customary meaning. No further construction is needed.	a knit structure configured to present at least two different colors to a viewer when viewed from different viewing angles

This claim term appears in asserted claims of the '488 and '679 patents. The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. E, 2:24-25:12; Ex. F, 2:30-25:52.)

The ordinary and customary meaning of this term is readily apparent because the term uses non-technical, commonly understood words. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity” in the words. *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

PUMA’s construction improperly adds a limitation requiring that the “first visual effect” and the “second visual effect” “present at least two different colors.” But the “first visual effect” and the “second visual effect” are not limited to “different colors.”

This is confirmed by the other claims of the '488 and '679 patents. Differences among claims in the same or related patents are a useful guide in construing claim terms. *Phillips*, 415 F.3d at 1314–15. The presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim. *Id.* That is the case here. Dependent claim 3 of the '488 patent, for example, requires that a first yarn and a second yarn form the first and second portions of the lenticular knit structure, and that the first yarn and second yarn “are one or more of different yarn types, **different colors**, different textures, and different deniers.” (Ex. E, 25:38-41 (emphasis added).) As another example, independent claim 1 of the '679 patent recites: “a lenticular knit structure for **providing color-shifting properties** to a knitted component.” (Ex. F, 25:54-55 (emphasis added).) The inventors expressly chose to add a “color-shifting” limitation to some claims, but not others. (*Id.*)

The specification also confirms that that a “lenticular knit structure” is not limited to color-shifting. It provides that “the varying visual effect provided between [two yarns] may include other characteristics [than color], including, but not limited to, yarn type, denier, texture, or other properties that generate different visual effects.” (Ex. E, 18:65-19:3, 24:24-28; Ex. F, 19:29-34). PUMA’s construction improperly excludes these embodiments. *Rambus*, 731 F.3d at 1253 (incorrect to exclude preferred embodiments).

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses commonly understood words. No further construction is required.

B. “unitary knit construction”

NIKE’s Construction	PUMA’s Construction
Formed as a one-piece element through a knitting process.	substantial construction of a one-piece element through a knitting process without the need for additional manufacturing steps or processes

This claim term appears in asserted claims of the ’488 and ’046 patents. The inventors acted as their own lexicographers and expressly defined this term in the specification:

As used herein and in the claims, a knitted component . . . is defined as being formed of “unitary knit construction” when formed as a one-piece element through a knitting process.”

(Ex. G, 5:56-60; Ex. E, 7:65-8:1.) The Court should adopt this express definition.

PUMA improperly paraphrases the inventors’ definition, and, in doing so, proposes a construction that improperly adds limitations not only unsupported—but in fact contradicted—by the specifications and claims. PUMA’s construction replaces the inventors’ definition of “formed as a one-piece element” with “substantial construction of a one-piece element,” and improperly adds a limitation of “without the need for additional manufacturing steps or processes.” Put another way, PUMA’s construction improperly limits unitary knit constructions to knitted components that are substantially constructed without the need for *any* additional manufacturing steps or processes. But the specification provides that the unitary knit construction is formed when

“the knitting process substantially forms the various features and structures of knitted component [] without the need for **significant** additional manufacturing steps or processes.” (Ex. G, 5:60-63; Ex. E, 8:1-4 (emphasis added).) The specification expressly provides that “knitted component 130 remains formed of unitary knit construction when other elements [...] are added following the knitting process.” (Ex. G, 6:5-13; Ex. E, 8:14-22.)

Because NIKE’s construction is the express definition the inventors provided in the specification, and PUMA’s construction improperly limits the scope in contrast to the express definition and examples provided in the specification, the Court should adopt NIKE’s construction. *Rambus*, 731 F.3d at 1253 (incorrect to exclude preferred embodiments).

C. “webbed areas”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	a knit base

This claim term appears in asserted claims of the ’046 patents. The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. G, 2:13-32:37.)

The ordinary and customary meaning of this term is readily apparent because the term uses non-technical, commonly understood words. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

The intrinsic record confirms this term has its ordinary and customary meaning. (Ex. G, 2:13-32:37.) For example, the claim language provides that the “webbed areas ... include a

plurality of courses formed from a first yarn,” that “the webbed areas hav[e] a front surface,” that “the webbed areas [are] configured to configured to move between a neutral position and an extended position, the webbed areas being biased to move toward the neutral position,” and that the webbed areas are “adjacent to” the tubular structures. (Ex. G, 32:41-49.) The specification likewise provides non-limiting descriptions of the webbed area:

Generally, webbed areas 128 **may** be connecting portions between various elements and/or components of knitted component 100. Webbed areas 128 are formed of unitary knit construction with the remaining portions of knitted component 100 and **may** serve to connect various portions together as a one-piece knit element. Knitted component 100 **can** include any suitable number of webbed areas 128. In different embodiments, webbed areas 128 **can** be an area of knitted component 100 comprising one knit layer.

(*Id.* at 7:45-53 (emphasis added).)

PUMA’s construction improperly adds a “knit base” limitation to the claim. There is no support for this limitation anywhere in the intrinsic record. Nothing in the claim language or the specification refers to the “webbed areas” as a “knit base,” or even as a “base.” (Ex. G, 2:13-35:6); *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations).

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses commonly understood words. No further construction is required.

D. “tubular structure”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	tube shaped structure, i.e., having the structure of a hollow elongated cylinder

This claim term appears in asserted claims of the ’046 patents. The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. G, 2:13-32:37.)

The ordinary and customary meaning of this term is readily apparent because the term uses non-technical, commonly understood words. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

PUMA’s construction improperly adds a limitation, requiring that the “tubular structure” have “the structure of a hollow elongated cylinder.” *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations). The “tubular structure” is not limited to a “hollow elongated cylinder.” This is confirmed by the other dependent claims of the patent that expressly claim the tubular structure is hollow. Dependent claim 16, for example, requires that the “plurality of tubular structures comprise ... a central area that is generally unsecured to form a hollow between two knit layers.” (Ex. G, 34:43-46); *Phillips*, 415 F.3d at 1314 (claim differentiation is a useful guide).

The specification also confirms that “tubular structure” is not limited to only the shape defined by PUMA’s construction. While the specification provides that a “tubular structure [] can have a tube shape in some embodiments,” (*Id.*, 10:19-20 (emphasis added)), the specification also provides that the tubular structure can vary in shape and dimensions in other embodiments:

In other embodiments, ***the shape and dimensions*** of tubular rib structures 126 ***can vary*** across knitted component 100. In some embodiments, tubular rib structures 126 can generally be shaped as a cylinder. In an exemplary embodiment, tubular rib structures 126 may have an elongated cylindrical shape with a wider top portion associated with front surface 108 and a narrower lower portion associated with back surface 110. In other embodiments, tubular rib structures 126 can be shaped as a generally circular or elliptical cylinder. ***Knitted component can include differently shaped tubular rib structures*** 126.

(*Id.*, 7:34-44.) PUMA’s construction improperly excludes these other embodiments. *Rambus*, 731 F.3d at 1253 (incorrect to exclude preferred embodiments).

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses commonly understood words. No further construction is required.

E. “course”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	row of loops

This claim term appears in asserted claims of the ’046 patents. The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. G, 2:13-32:37.)

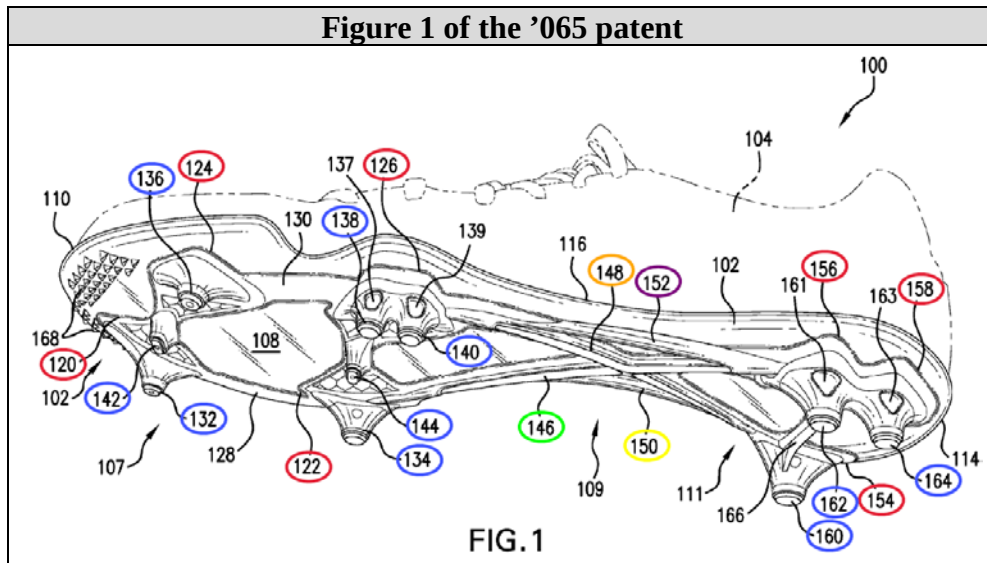
The ordinary and customary meaning of this term is readily apparent because the term uses a non-technical, commonly understood word. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

The parties agree the common meaning of “course” includes a row of loops, but PUMA’s construction improperly excludes a row with one loop. Nothing in the intrinsic record excludes a row with one loop. (Ex. G, 2:13-32:37.) Thus, “course” should be given the full scope of its ordinary and customary meaning, which includes a row of one or more loops.

X. THE ’065 PATENT

The invention of the ’065 patent relates to an article of footwear with a base plate having an innovative structure and studs. (Ex. H, 1:6-7.) The structure may moderate stud pressure and enhance support during the first step of sprinting, quick directional changes, and backward movement. (*Id.*, 1:20-24.) Figure 1 of the patent, reproduced below with highlighting, shows an example article of footwear with a base plate in accordance with the invention. (*Id.*, 3:60-12:58.) The structure disposed on the base plate includes: pads highlighted in red, studs highlighted in

blue, a first diagonal rib highlighted in green, a second diagonal rib highlighted in orange, a medial midfoot bar highlighted in yellow, and a lateral midfoot bar highlighted in purple. (*Id.*)



NIKE asserts independent claim 1, which recites:

1. An article of footwear comprising:

a base plate including a forefoot region, a heel region, a midfoot portion disposed between the forefoot region and the heel region, a longitudinal axis extending through the forefoot region and heel region, a forward edge, a rearward edge, a medial edge, and a lateral edge; a structure disposed on the base plate, the structure including a medial forefoot **pad** disposed on the forefoot region proximate the midfoot portion and the medial edge, a lateral forefoot **pad** disposed on the forefoot region proximate the midfoot portion and the lateral edge, a medial heel **pad** disposed on the heel region proximate the medial edge, a first lateral heel **pad** disposed on the heel region proximate the lateral edge, a first diagonal rib extending from the medial forefoot **pad** to the first lateral heel **pad**, a second diagonal rib extending from the lateral forefoot **pad** to the medial heel **pad**, a medial midfoot bar substantially parallel to the longitudinal axis and disposed proximate the medial edge, and a lateral midfoot bar substantially parallel to the longitudinal axis and disposed proximate the lateral edge;

a medial forefoot **stud** disposed on the medial forefoot **pad**;

a medial heel **stud** disposed on the medial heel **pad**;

a first lateral forefoot **stud** disposed on the lateral forefoot **pad**; and

a first lateral heel **stud** disposed on the first lateral heel **pad**;

the first diagonal rib having a first lateral edge intersecting with the first lateral heel **pad**;

the second diagonal rib having a second lateral edge intersecting with the first lateral forefoot **pad**;

the lateral midfoot bar having a third lateral edge;

wherein the medial midfoot bar extends from a first point on the first diagonal rib to a second point on the second diagonal rib; and

wherein the third lateral edge of the lateral midfoot bar intersects with, and terminates at, a third point on the second diagonal rib at a forward end of the lateral midfoot bar;
 wherein the third lateral edge of the lateral midfoot bar intersects with, and terminates at, a fourth point on the first diagonal rib at a rearward end of the lateral midfoot bar;
 wherein the third point is ***spaced from*** the lateral forefoot ***pad***; and
 wherein the fourth point is ***spaced from*** the first lateral heel ***pad***.

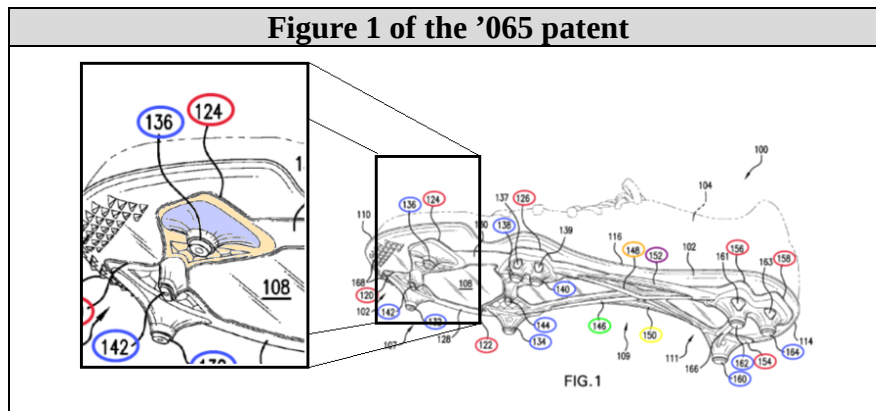
A. “pad”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	the base portion of each cleat

The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. H, 1:20-12:58.)

The ordinary and customary meaning of this term is readily apparent because “pad” is a non-technical, commonly understood word. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

PUMA’s construction improperly requires that a “pad” be a portion of a cleat; namely, “the base portion.” *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations). There is no support for this limitation in the intrinsic record. Nothing in the claim language or the specification requires that the “pad” be a portion of a cleat, let alone a “base portion.” (Ex. H, 1:20-13:39.) On the contrary, as shown below, Figure 1 shows an example where a pad, highlighted in orange, is not a portion of a cleat, highlighted in blue. (*Id.*) In this example, the pad is a separate element from the cleat, and the pad has a larger surface area than any portion of the cleat. (*Id.*) PUMA’s construction improperly excludes this embodiment. *Rambus*, 731 F.3d at 1253 (incorrect to exclude preferred embodiments).



Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses a commonly understood word. No further construction is required.

B. “stud”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	the top portion of each cleat

The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. H, 1:20-12:58.)

The ordinary and customary meaning of this term is readily apparent because “stud” is a non-technical, commonly understood word. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

PUMA’s construction improperly limits a “stud” to only “the top portion of each cleat.” *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations). There is no support for this limitation in the intrinsic record. Nothing in the claim language or the specification limits a “stud” to a “top portion” of a cleat. (Ex. H, 1:20-13:39.) Moreover, PUMA’s construction ignores the

specification, which expressly describes the “stud” as more than simply “the top portion of each cleat.” For example, the specification provides the following non-limiting features of studs:

In some embodiments, second medial forefoot stud 134 may include an aperture 133, second lateral forefoot stud 138 may include an aperture 137, and/or third lateral forefoot stud 140 may include an aperture 139.

(*See, e.g., id.* at 7:18-21.) And as seen above in Figure 1, apertures 133, 137, and 139 are not located at the top portion of the cleat, meaning the studs having apertures 133, 137, and 139 are also not at the top portion of the cleat. (*Id.*) PUMA’s construction improperly excludes this embodiment. *Rambus*, 731 F.3d at 1253 (incorrect to exclude preferred embodiments).

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses a commonly understood word. No further construction is required.

C. “spaced from”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	any distance between an intersection point at which the lateral midfoot bar reaches a midfoot stud or pad or a heel stud or pad

The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. H, 1:20-12:58.)

The ordinary and customary meaning of this term is readily apparent because the term uses non-technical, commonly understood words. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

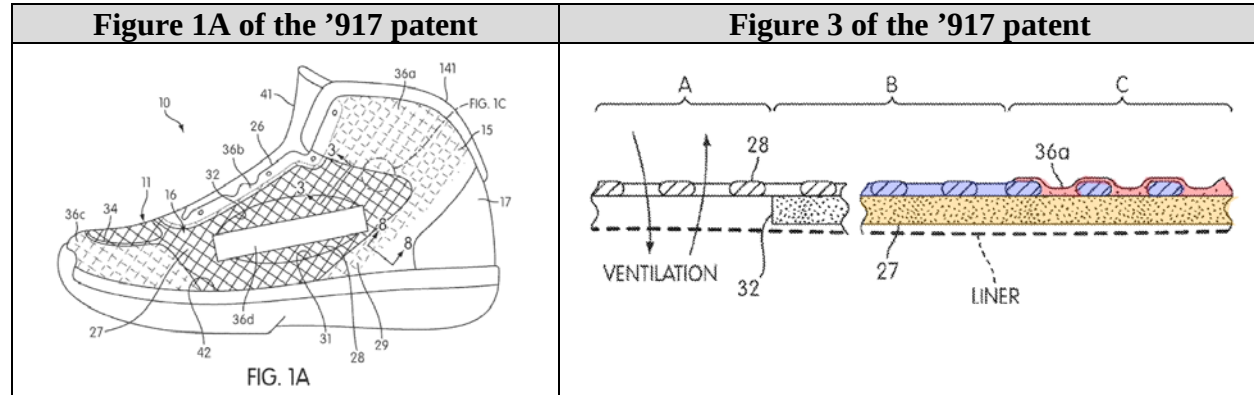
PUMA’s construction improperly adds that “spaced from” means “any distance between an intersection point at which the lateral midfoot bar reaches a midfoot stud or pad or a heel stud

or pad.” *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations). There is no support for this additional limitation in the intrinsic record. (Ex. H, 1:20-13:39.) Nothing in the claim language or the specification limits “spaced from” in this way. (*Id.*)

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses commonly understood words. No further construction is required.

XI. THE '917 PATENT

The invention of the '917 patent relates to an upper for footwear with a composite panel that includes a substrate material panel, a mesh material panel, and a skin material panel. (Ex. I, 1:60-26:5.) Figure 1A of the patent is an example of the invention, and Figure 3 is a cross-sectional view from the location indicated in Figure 1A. (*Id.*, 2:42-52.) The figures are reproduced below with a substrate material panel highlighted in orange, a mesh material panel highlighted in blue, and a skin material panel highlighted in red. (*Id.*, 1:60-26:5.)



NIKE asserts independent claim 1, which recites:

1. An upper for an article of footwear, comprising:
 - a plurality of panels assembled as a composite panel, wherein the composite panel includes
 - a substrate material panel having a first side and a second side,
 - a mesh material panel having a first side facing away from the substrate material panel and a second side facing the substrate material panel, at least a portion of the mesh material panel overlapping the substrate material panel in a mesh/substrate overlap area, and
 - a skin material panel having a first side facing away from the substrate material panel and a second side facing the substrate material panel, at least a portion of the skin material panel overlapping both the substrate material panel and the mesh material

panel in a skin/mesh/substrate overlap area,
 wherein the skin material panel is bonded with the mesh material panel and the substrate material panel throughout the entire skin/mesh/substrate overlap area, the mesh material panel being captured between the skin material panel and the substrate material panel,
 wherein at a portion of the composite panel outside the skin/mesh/substrate overlap area, the mesh material panel is not captured between the skin material panel and the substrate material panel, and
 wherein ***the skin material panel conforms to the mesh material panel and reveals a surface texture corresponding to the mesh material panel in the skin/mesh/substrate overlap area.***

A. “the skin material panel conforms to the mesh material panel and reveals a surface texture corresponding to the mesh material panel in the skin/mesh/substrate overlap area”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	the skin material panel overlapping and conforming to the mesh material panel, at a position where the skin material panel and mesh material panel both overlap the substrate material panel, such that the exterior surface of the skin material panel reveals protrusions of the mesh material panel generally perpendicular to the surface of the skin material panel

The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. I, 1:60-26:5.)

The ordinary and customary meaning of this term is readily apparent because the term uses non-technical, commonly understood words. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

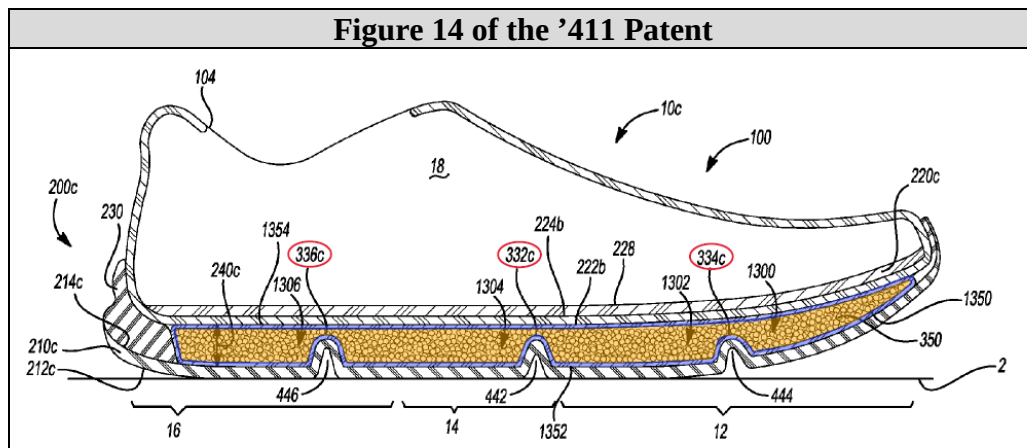
PUMA’s construction improperly adds a number of limitations not found in the claim. *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations). PUMA adds, for example, “overlapping” limitations. PUMA also narrows the term “conforms” by adding a limitation that

“the skin material panel reveals protrusions of the mesh material panel generally perpendicular to the surface of the skin material panel.” There is no support for these limitations in the intrinsic record. (Ex. I, 1:60-27:13.) For example, the word “overlap” appears several times in claim 1, but never in the way PUMA uses the word. (*Id.*) Likewise, the inventors used “protrusion” and “perpendicular” once each in the specification, but never to describe the skin and mesh material panels, nor the way in which the skin material panel conforms to the mesh material panel. The inventors therefore knew how to use the words “overlap,” “protrusion,” and “perpendicular” and would have expressly used it in the way PUMA suggests had the inventors intended to do so.

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses commonly understood words. No further construction is required.

XII. THE '411 PATENT

The invention of the '411 patent relates to articles of footwear having foam beads incorporated with other cushioning. (Ex. J, 1:23-25.) The footwear includes an upper, a casing, a plurality of foam beads in the casing, and an outsole. (*Id.*, 37:37-55.) Figure 14 of the patent, reproduced below with highlighting, is a cross-sectional view of an example in accordance with the invention. (*Id.*, 2:57-60.) The casing is highlighted in blue, the foam beads are highlighted in orange, and the casing has dividers highlighted in red. (*Id.*, 2:10-37:35.)



NIKE asserts claims 1–3, 6–7, and 9–14. Claim 9 recites:

9. An article of footwear comprising:
 an upper component;
 a casing secured to the upper component, the casing comprising:
 a top wall; and
 a bottom wall defining a plurality of laterally extending **dividers** that protrude upward within an interior cavity defined by the casing towards the top wall of the casing to define locations separated by the laterally extending **dividers**, at least a portion of the laterally extending **dividers** being offset from the top wall to define a gap between each laterally extending **divider** and the top wall of the casing;
 a plurality of foam beads disposed within the interior cavity and **operable to migrate between the locations within the interior cavity of the casing via the gaps**; and
 an outsole secured to the casing opposite of the upper component and comprising a plurality of laterally extending grooves aligned with the plurality of laterally extending **dividers**.

A. “divider(s)”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	protrusion that extends partially into a cavity to separate said cavity into regions or portions and restrict migration of foam beads between said regions or portions

The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. J, 2:10-37:35.)

The ordinary and customary meaning of this term is readily apparent because “divider” is a non-technical, commonly understood word. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at 1326; *Summit 6*, 802 F.3d at 1291.

PUMA’s construction improperly adds several limitations, including that the “divider” be a “protrusion that extends partially into a cavity to separate said cavity into regions or portions and restrict migration of foam beads between said regions or portions.” *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations). There is no support for this additional limitation in the intrinsic

record. (Ex. J, 2:10-39:21.) For example, the specification does not contain the word “protrusion.” (*Id.*) The inventors also provided non-limiting examples, including one in which gaps allow migration: “[i]n some examples, the dividers 332c-336c terminate within the casing 1350 and gaps separate the top surface 1354 and the dividers 332c-336c. These **gaps allow some particulate matter 350 to migrate between adjoining regions** 1300-1306 of the casing 1350 during use of the article of footwear 10.” (*Id.* at 20:1-6 (emphasis added).) Similarly, the specification provides that in certain embodiments “[t]he dividers 332c, 334c, 336c may restrict **or manipulate** migration of the particulate matter 350 between the adjoining regions 1300-1306.” (*Id.* at 19:48-50 (emphasis added).) PUMA’s construction improperly excludes these embodiments. *Rambus*, 731 F.3d at 1253 (incorrect to exclude preferred embodiments).

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses a commonly understood word. No further construction is required.

B. “operable to migrate between the locations within the interior cavity of the casing via the gaps”

NIKE’s Construction	PUMA’s Construction
Ordinary and customary meaning. No further construction is needed.	designed to move between regions or portions of the interior cavity of the casing that are separated laterally extending dividers by moving through the gaps above said dividers

The term has the full scope of its ordinary and customary meaning. Neither of the exceptions to the presumption of giving a claim term its ordinary and customary meaning applies. The inventors did not act as their own lexicographers, and the inventors did not disavow the full scope of the term in the specification or during prosecution. (Ex. J, 2:10-37:35.)

The ordinary and customary meaning of this term is readily apparent because the term uses non-technical, commonly understood words. *Acumed*, 483 F.3d at 805. There is “no facial ambiguity or obscurity.” *Ancora Techs.* 744 F.3d at 738; *Info-Hold*, 783 F.3d at 1267. Thus, no further construction is required. *Finjan*, 626 F.3d at 1206–7; *ActiveVideo Networks*, 694 F.3d at

1326; *Summit 6*, 802 F.3d at 1291.

In addition to being grammatically incoherent, PUMA’s construction improperly adds a number of limitations. *Phillips*, 415 F.3d at 1323-1328 (improper to add limitations). For example, PUMA adds a “designed” requirement to this term, and PUMA adds a limitation to “move between regions or portions of the interior cavity of the casing that are separated laterally extending dividers by moving through the gaps above said dividers.” There is no support for this additional limitation in the intrinsic record. (Ex. J, 2:10-39:21.) PUMA’s construction is also improper because it attempts to define other terms that are already described by the claims. For example, claim 14 describes “the gaps” as a “gap between each laterally extending divider and the top wall of the casing.” (Ex. J, 38:29-30.) PUMA instead limits the term to “gaps above said dividers.” But claim terms should have consistent meanings throughout the claims. *Phillips*, 415 F.3d at 1314 (“claim terms are normally used consistently throughout the patent”).

Thus, this claim term has its ordinary and customary meaning, which is readily apparent because the term uses commonly understood words. No further construction is required.

XIII. CONCLUSION

NIKE requests that the Court adopt NIKE’s constructions for the reasons set forth above.

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

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Attorney for Plaintiff, Nike, Inc.