

**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 RESPONSIVE CLAIM CONSTRUCTION BRIEF

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NIKE attached Exhibits A through N to its opening brief. Those exhibits are at ECF Nos. 100-1 through 100-14. NIKE cites to those exhibits in this responsive brief. NIKE also cites to the additional exhibits listed in the table below, which are attached to this responsive brief.

Exhibit	Description
Exhibit O	Excerpts from transcript of July 19, 2019, deposition of Michael Steszyn
Exhibit P	Excerpts from transcript of July 23, 2019, deposition of Dr. Darren J. Stefanyshyn

I. INTRODUCTION

PUMA's constructions are confusing, unhelpful, add no clarity to the disputed terms, and, if adopted, lead to reversible error because they import limitations from example embodiments into the claims. PUMA seeks these improper constructions in an attempt to manufacture non-infringement defenses. But if the inventors had wanted to limit the claims to specific elements of example embodiments, they would have included those elements in the claims. The inventors elected not to do so and the Patent Office granted the asserted patents. Thus, NIKE requests that the Court resolve the parties' claim construction disputes consistent with Federal Circuit law by rejecting PUMA's constructions and ascribing the disputed terms their ordinary meanings.

II. PUMA INCORRECTLY ARGUES THE COURT MAY NOT RESOLVE CLAIM CONSTRUCTION DISPUTES BY GIVING DISPUTED TERMS THEIR ORDINARY MEANINGS

PUMA incorrectly argues the Court may not determine any of the disputed terms have their ordinary meanings and no further construction is required. (ECF No. 99 at 1-2, 11, 15, 24, 29-30, 32-34 (citing *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351 (Fed. Cir. 2008) and *MedIdea, L.L.C. v. DePuy Orthopaedics, Inc.*, No. 1:17-cv-11172, 2018 WL 5830849 (D. Mass. Nov. 7, 2018)).) The Federal Circuit has rejected PUMA's argument. *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1206-07 (Fed. Cir. 2010) (a court may resolve a dispute regarding the scope of a term consistent with *O2 Micro* by rejecting one party's proposed construction and ascribing the term its ordinary meaning); *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1324-26 (Fed. Cir. 2012) (same).

In *Finjan*, the parties disputed the meaning of "addressed to a client" in patent claims directed to proactive scanning technology for computer security. *Finjan*, 626 F.3d at 1206-07. The plaintiff argued the term had its "ordinary meaning within the context of the claims." *Id.* at 1206. The defendant argued the court should construe "addressed" as "containing the Internet

Protocol address of the client computer,” and “client” as “the computer from which the user is making a request.” *Id.* The court rejected the defendant’s construction because it “would unjustifiably narrow the term’s broad scope, which was not explicitly limited or redefined by the specification.” *Id.* The court construed the term as having its “plain and ordinary meaning.” *Id.*

The defendant lost at trial and appealed. *Id.* at 1200. It argued the district court “shirked its responsibility to construe a disputed claim term by adopting ‘plain and ordinary meaning,’ violating the principles of *O2 Micro*.” *Id.* at 1207. The Federal Circuit disagreed. *Id.* It explained that, unlike *O2 Micro*, the district court rejected the defendant’s construction thereby resolving the parties’ dispute. *Id.* In other words, *O2 Micro* does not require that a district court redefine every disputed term. *Id.* Rather, a district court may resolve a dispute consistent with *O2 Micro* by rejecting one party’s proposed construction and ascribing the term its ordinary meaning. *Id.*

The Federal Circuit reached the same conclusion in *ActiveVideo*, 694 F.3d at 1324–26. In that case, the parties disputed the terms “superimposing the first indication over the display of the first anchor channel” and “including with the first indication a second indication” in a patent related to a two-dimensional method of channel surfing having anchor channels oriented on a vertical axis and channels related to the anchor channels (multiplex channels) oriented on a horizontal axis. *Id.* at 1324-25. The infringer argued the district court should construe the terms to require “that the first and second indications must be overlaid on the displayed anchor channel *and* that they must be distinct from the content of the anchor channel.” *Id.* at 1325. The patent owner responded that the infringer’s construction “was confusing, unhelpful, add[ed] no clarity to the claim language itself, and [was] erroneous to the extent it attempte[d] to narrow the claims by adding ‘overlay’ and ‘distinct’ limitations.” *Id.* It argued the district court should simply give the terms their ordinary meanings. *Id.* The district court rejected the infringer’s proposed construction and construed the terms as having their ordinary meanings. *Id.*

The infringer lost at trial and appealed. *Id.* Like the defendant in *Finjan*, the infringer argued the district court shirked its responsibility to construe a disputed term by adopting ordinary meaning, violating the principles of *O2 Micro*. *Id.* at 1325-26. The Federal Circuit again disagreed. *Id.* at 1326. It held the infringer’s proposed construction erroneously read limitations into the claims, and the district court properly rejected that construction and resolved the dispute between the parties, thereby complying with *O2 Micro*. *Id.*

The district courts routinely follow *Finjan* and *ActiveVideo* to resolve claim construction disputes by rejecting one party’s proposed construction and ascribing the disputed term its ordinary meaning. *See, e.g., Keurig, Inc. v. JBR, Inc.*, No. 11-11941, 2013 WL 1213061, at *6, *13 (D. Mass. Mar. 22, 2013) (construing the terms “inclined position,” “vertical position,” “open position,” “closed position,” and “handle” to have their ordinary meanings). This is particularly true when a disputed term uses common words that are readily apparent to laypersons. *Id.*; *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (“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 such cases involves little more than the application of the widely accepted meaning of commonly understood words.”).

This Court’s decision in *MedIdea* does not reach a different conclusion. *MedIdea*, 2018 WL 5830849 at *4. As the Court knows, the *MedIdea* case involved patents directed to total knee replacement implants featuring cam-and-post designs. *Id.* The patents contained many disputed technical terms. *Id.* For example, one of the disputed terms was “cam.” *Id.* The Court found “cam” was not “a term with which laypeople are likely to be familiar.” *Id.* The Court, therefore, construed the term with additional language, as opposed to construing it as “ordinary and customary meaning.” *Id.* But the Court did not reject *Finjan* and *ActiveVideo* and hold that it may never determine, in any case, that a disputed claim term has its ordinary meaning. *Id.*

III. PUMA’S EXPERT TESTIMONY SHOULD BE DISREGARDED

PUMA relies on testimony from two alleged experts: (1) Mr. Steszyn, who opines on disputed terms in five of the ten asserted patents, including the ’032, ’749, ’488, ’046, and ’679 patents, (ECF No. 99-28 at ¶ 1); and (2) Dr. Stefanyshyn, who opines on disputed terms in the remaining five asserted patents, including the ’065, ’746, ’917, ’420, and ’411 patents. (ECF No. 99-26 at ¶ 2.) The Court should disregard this testimony for two reasons. First, PUMA failed to establish Mr. Steszyn is qualified to give opinions related to claim construction in this case. Second, the testimony and opinions of both witnesses are unreliable and unhelpful because they merely provide improper and conclusory legal opinions that are at odds with the intrinsic evidence.

A. PUMA FAILED TO ESTABLISH MR. STESZYN IS QUALIFIED TO GIVE OPINIONS RELATED TO CLAIM CONSTRUCTION IN THIS CASE

PUMA bears the burden of showing Mr. Steszyn is qualified to give expert testimony based on his “knowledge, skill, experience, training, or education” in the relevant technology. Fed. R. Evid. 702; Fed. R. Evid. 104(a); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 n. 10 (1993). The Federal Circuit has explained that only one of ordinary skill in the art who is qualified as a technical expert under Rule 702 may offer expert testimony on technical matters in a patent case. *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1363 (Fed. Cir. 2008) (“where an issue calls for consideration of evidence from the perspective of one of ordinary skill in the art, it is contradictory to Rule 702 to allow a witness to testify on the issue who is not qualified as a technical expert in that art”); *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, 395 Fed. App’x 709, 715 (Fed. Cir. 2010) (same).

The Federal Circuit’s opinion in *Extreme Networks* is instructive. The defendant in that case argued a person of ordinary skill in the art would have “a bachelor of computer science or computer engineering degree, or equivalent experience, and 2–3 years experience in the computer industry working on the design or development of high speed switches, bridges, or routers for wide

area networks.” *Extreme Networks*, 395 F. App’x at 715. The plaintiff proposed a different level of skill in the art. *Id.* The Federal Circuit found the district court did not abuse its discretion in excluding the defendant’s expert because that expert did not qualify as a person of ordinary skill in the art under the defendant’s own proposed definition. *Id.* The expert had a computer science degree and had worked as a system administrator, but she did not have 2-3 years experience working on “the design or development of high speed switches, bridges, or routers.” *Id.* The Federal Circuit explained that “general experience in a related field may not suffice when experience and skill in specific product design are necessary to resolve patent issues.” *Id.* (citing *Flex–Rest, LLC v. Steelcase, Inc.*, 455 F.3d 1351, 1360–61 (Fed. Cir. 2006) (affirming exclusion of an ergonomics expert where the invention at issue related to an ergonomic keyboard design).

Similarly, here, PUMA failed to establish Mr. Steszyn is qualified under its own definition. PUMA contends a person of ordinary skill in the art for the patents on which Mr. Steszyn opined would have, among other things, “at least three years of experience in knitted footwear development in an industrial context.” (ECF No. 99 at 3-4 (citing ECF No. 99-28 at ¶ 24).)¹ But Mr. Steszyn admitted on cross-examination that he has less than three years of experience in knitted footwear development. (Ex. O at 46:11-14; 37:21-39:12; 43:4–44:21; 44:22–46:10.)

Mr. Steszyn testified he did not have any experience developing knitted footwear prior to 2004, which is the earliest invention date of the asserted patents on which he opined. (Ex. O at 20:23-25; 25:22-26:1; 30:7-10.) Mr. Steszyn also testified he has developed only four knitted footwear products in his career, and all four of those experiences came after 2004. (*Id.* at 46:11-14.) The first time he attempted to develop a knitted footwear product was in approximately 2008,

¹ NIKE disagrees with PUMA’s definition. (ECF No. 100 at 4-5.) The level of ordinary skill in the art as it relates to other case issues, such as validity, is a factual question and NIKE reserves the right to provide its own proposed level of ordinary skill in the art in those contexts.

and he spent about six months developing that product. (*Id.* at 37:21-39:12.) His second attempt was sometime after 2008, and he spent about a year developing the product. (*Id.* at 39:13-41:6.) His third attempt was within the past five years, and he spent about three to four months developing that product. (*Id.* at 43:4 - 44:21.) His fourth and final attempt was also within the past five years, and he spent about six months developing that product. (*Id.* at 44:22 – 46:10.) Thus, his total combined experience in knitted footwear development is two years and four months.

Moreover, most if not all of Mr. Steszyn’s experiences in knitted footwear development were not in the required “industrial context” of PUMA’s definition. Mr. Steszyn defined “an industrial context” to include “manufacturing in volume.” (Ex. O at 83:11-24.) But he admitted he did not commercialize or sell at least two of the knitted footwear products he developed, and one of the products was a promotional item. (*Id.*, at 37:21-38:1; 39:18-20; 44:22 – 46:10.) None of those experiences included manufacturing knitted footwear products in volume. (*Id.*)

Thus, PUMA has not shown Mr. Steszyn has “at least three years of experience in knitted footwear development in an industrial context.” He has at most two years and four months of experience in knitted footwear development, and most if not all of that experience was not in an industrial context. Under PUMA’s own definition, Mr. Steszyn is not qualified to offer expert testimony related to claim construction in this case. *Sundance*, 550 F.3d at 1362-63; *Extreme Networks*, 395 Fed. App’x at 715. The Court should disregard his testimony and opinions. *Id.*²

B. MR. STESZYN AND DR. STEFANYSHYN PROVIDE IMPROPER AND CONCLUSORY LEGAL OPINIONS THAT ARE AT ODDS WITH THE INTRINSIC EVIDENCE

The role of expert testimony in claim construction is limited. *Teva Pharm. USA, Inc. v.*

² NIKE does not dispute Dr. Stefanyshyn has the low level of ordinary skill in the art PUMA contends applies to the asserted patents on which he opines. But NIKE notes the Patent Trial and Appeal Board (“PTAB”) rejected his opinions as “unpersuasive” in the only prior case where a court or board considered his opinions regarding claim construction. (Ex. P at 28:5-32:12.)

Sandoz, Inc., 135 S. Ct. 831, 841 (2015); *Phillips*, 415 F.3d at 1317-18 (expert testimony less significant than intrinsic evidence); *Crane Sec. Techs., Inc. v. Rolling Optics AB*, 166 F. Supp. 3d 76, 90 (D. Mass. 2016) (expert declaration was “weak evidence” and “largely unhelpful”). Experts may not provide legal conclusions or ultimate constructions of disputed terms. *Teva*, 135 S. Ct. at 841. Rather, experts may offer opinions regarding the state of the art at the time of the invention or the meaning of relevant technical terms outside the context of the patent. *Teva*, 135 S. Ct. at 841; *Phillips*, 415 F.3d at 1318-19.

Conclusory expert testimony as to the meaning of terms is not useful to courts. *Phillips*, 415 F.3d at 1318-19. Similarly, courts discount any expert opinion that is “at odds with the claim construction mandated by” the intrinsic evidence. *Id.*; see also *MedIdea*, 2018 WL 5830849 at *4 (court may not rely on extrinsic evidence to “change the meaning of claims in derogation of the” intrinsic evidence); *Network Commerce, Inc. v. Microsoft Corp.*, 422 F.3d 1353, 1361 (Fed. Cir. 2005) (rejecting expert testimony regarding disputed term where opinion was a conclusory statement and expert failed to support opinion with “references to industry publications or other independent sources,” and further because the opinion was at odds with intrinsic evidence).

Applying that law here, Mr. Steszyn and Dr. Stefanyshyn do not offer the types of opinions courts look to in claim construction. That is, neither offers an opinion regarding the state of the art at the time of the inventions or the meaning of relevant technical terms outside the context of the patents. (ECF No. 99-28 at ¶¶ 27-77; ECF No. 99-26 at ¶¶ 27-95.) Rather, both witnesses provide conclusory, litigation-induced legal opinions regarding how they believe the Court should construe the disputed terms. (*Id.*) Their opinions regarding the ultimate legal questions at issue here are unreliable and unhelpful. *Teva*, 135 S. Ct. at 841; *Phillips*, 415 F.3d at 1318-19.

For example, their legal opinions are unreliable and unhelpful at least because they base their opinions on an incomplete understanding of the relevant legal principles that govern claim

construction. (ECF No. 99-28 at ¶¶ 13-20; ECF No. 99-26 at ¶ 14-21.) PUMA selectively shared certain legal principles with each of the witnesses. (*Id.*) The witnesses reproduced those legal principles in their declarations, and they testified they did not base their opinions on any legal principles other than those set forth in their declarations. (*Id.*; Ex. O at 58:6-60:2; Ex. P at 54:15-55:9.) But several important principles are missing from their lists. They did not consider many of the legal principles this Court will consider when resolving the disputes in this case, including: (i) it is improper to read limitations from example embodiments in the specification into the claims; (ii) the standards for finding a disclaimer are exacting and require a patentee's statements to amount to a clear and unmistakable surrender of claim scope; and (iii) claim differentiation.

Mr. Steszyn's and Dr. Stefanyshyn's legal opinions, which were almost certainly spoon-fed to them by PUMA's counsel, are also unreliable and unhelpful because, in most instances, they are at odds with the intrinsic evidence. (See ECF No. 99-28 at ¶¶ 27-77; ECF No. 99-26 at ¶¶ 27-95); *Phillips*, 415 F.3d at 1318-19; *MedIdea*, 2018 WL 5830849 at *4. They also fail to support any of their opinions with "references to industry publications or other independent sources." *Network Commerce*, 422 F.3d at 1361.

NIKE addresses the substance of Mr. Steszyn's and Dr. Stefanyshyn's testimony in more detail below in connection with the disputed terms. But, in sum, the Court should disregard their testimony because both witnesses merely provide improper and conclusory legal opinions that are at odds with the intrinsic evidence.

IV. PUMA'S CONSTRUCTIONS ARE CONFUSING, UNHELPFUL, ADD NO CLARITY TO THE DISPUTED TERMS, AND LEAD TO REVERSIBLE ERROR BECAUSE THEY IMPORT LIMITATIONS INTO THE CLAIMS

To be clear, NIKE is not proposing that the Court shirk its responsibility to resolve the claim construction disputes in this case. The disputed terms use common words with meanings that are readily apparent to laypersons. They are not technical terms with special meanings in the

art. The intrinsic evidence does not narrow the scope of the terms in any way. The terms, therefore, mean exactly what they say and the Court does not need to redefine them with other commonly understood words. PUMA’s constructions, in contrast, are confusing, unhelpful, add no clarity to the terms, and lead to reversible error because they import limitations into the claims. The Court may resolve the disputes and satisfy *O2 Micro* by rejecting PUMA’s constructions and giving the terms their ordinary meanings. *Finjan*, 626 F.3d at 1206-07; *ActiveVideo*, 694 F.3d at 1324–26.

A. THE ’746 PATENT

1. “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 medial stiffened section of the cleat assembly is more resistant to deformation due to torsional forces, bending forces, and/or compressive forces than the lateral stiffened section of the cleat assembly

The parties no longer dispute “medial stiffened section” and “lateral stiffened section.” (ECF No. 106.) The only remaining dispute is the term “stiffer,” and whether the Court should construe the term as its ordinary meaning of “stiffer,” or whether the Court should import a limitation into the term that requires “more resistant to deformation due to torsional forces, bending forces, and/or compressive forces.”

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 7-9; ECF No. 99-26 at ¶¶ 54-57; Ex. P at 138:25-139:9.) Thus, there is no dispute that the Court must give the term the full scope of its ordinary meaning. *Info-Hold, Inc. v. Applied Media Techs. Corp.*, 783 F.3d 1262, 1265–67 (Fed. Cir. 2015) (term given full scope of its ordinary meaning where neither exception applied).

The ordinary meaning of “stiffer” is exactly what it says. (ECF No. 100 at 7-9.) It is a common term and the scope of its meaning is readily apparent to even laypersons: “not easily bent

or changed in shape; rigid.” (*Id.*) It is not a technical term with a special meaning in the art. (*Id.*) For the reasons NIKE provided in its opening brief, the intrinsic evidence confirms the claims use the term in its ordinary way. (*Id.*) The Court does not need to redefine this commonly understood word with other words to resolve the dispute.

There is no support in the intrinsic or extrinsic evidence for importing an additional limitation that requires “more resistant to deformation due to torsional forces, bending forces, and/or compressive forces.” PUMA incorrectly argues its construction is “consistent with the specification,” which “explains that the alleged invention addresses fatigue and injuries associated with excessive pronation.” (ECF No. 99 at 8.) But it is important to note: PUMA misquotes and mischaracterizes the specification to make that argument. PUMA first cites a portion of the specification that spans two separate sections, including the “Background of the Invention” section and the “Summary of the Invention” section. (*Id.*) The cited “Background of the Invention” section—which describes the background, not the invention—states that excessive pronation can lead to fatigue and injuries. (ECF No. 100-1 at 1:66-67.) The cited “Summary of the Invention” section states “the invention provides a cleated article of footwear that controls the motion of a wearer’s foot during running, and that increases comfort and reduces fatigue.” (*Id.* at 2:1-7.) PUMA then jumps to an example embodiment that provides “[b]y increasing the stiffness of appropriate sections of a medial portion of a cleat assembly 16, the flattening out of the foot (i.e., pronation) is reduced.” (ECF No. 99 at 8.) But that is merely one of several example embodiments. The inventors never stated anywhere in the specification that their invention as a whole “addresses fatigue and injuries associated with excessive pronation,” as PUMA incorrectly contends.

Even if the inventors had made that representation in the specification, which is not the case, PUMA identifies no support in the intrinsic evidence for why that representation would limit the ordinary meaning of “stiffer” to “more resistant to deformation due to torsional forces, bending

forces, and/or compressive forces.” (ECF No. 99 at 7-9.) PUMA does not, and cannot, contend that any of the claims require an avoidance of pronation. (*Id.*) Indeed, Dr. Stefanyshyn conceded that none of the claims are limited to an article of footwear that prevents or addresses pronation. (Ex. P at 142:13-22.) And even if the claims were somehow limited to the avoidance of pronation, which is not the case, PUMA does not, and cannot, argue that the inventors limited or measured the avoidance of pronation by resistance to deformation due to torsional forces, bending forces, and/or compressive forces. (ECF No. 99 at 7-9.) PUMA does not, and cannot, point to anything in the intrinsic evidence where the inventors even mentioned resistance to deformation due to torsional forces, bending forces, and/or compressive forces. (*Id.*)

PUMA incorrectly argues Dr. Stefanyshyn “explains” that “a person of ordinary skill in the art would understand ‘stiffer’ in this context to refer to greater resistance to at least one or any combination of torsional forces, bending forces, or compressive forces.” (ECF No. 99 at 8.) But that is not what Dr. Stefanyshyn “explained” in his declaration, it is not consistent with his testimony on cross-examination, and it is not consistent with his opinions in a declaration he submitted to the PTAB in support of PUMA’s petition for *inter partes* review for the ’746 patent.

First, Dr. Stefanyshyn did not “explain” in his declaration that “a person of ordinary skill in the art would understand ‘stiffer’ in this context to refer to greater resistance to at least one or any combination of torsional forces, bending forces, or compressive forces.” PUMA cites paragraphs 55 and 56 of his declaration. (ECF No. 99 at 8.) In paragraph 55, Dr. Stefanyshyn states he “agrees with PUMA” that this term should be construed as PUMA proposes. (ECF No. 99-26 at ¶ 55.) In other words, he did not come-up with the construction, but rather he agrees with the construction PUMA manufactured. (*Id.*) In paragraph 56, Dr. Stefanyshyn states—without any support—that “a person of ordinary skill would understand ‘stiffer’ to refer to increasing resistance to at least one or any combination of torsional forces, bending forces or, compressive

forces.” (*Id.* at ¶ 56.) He does not “explain” why that is or what his basis is for that statement. (*Id.*) He does not “support his conclusion with any references to industry publications or other independent sources.” *Network Commerce*, 422 F.3d at 1361 (rejecting conclusory expert opinion not supported by “references to industry publications or other independent sources”).

Second, during cross-examination, Dr. Stefanyshyn admitted a person of ordinary skill would not understand “stiffer” to mean only increasing resistance to at least one or any combination of torsional forces, bending forces or, compressive forces. (Ex. P at 137:20-138:6.) He conceded that, within footwear, the term “stiff” “can have many different meanings, a broad scope, just like it does outside of the context of footwear.” (*Id.*)

Third, Dr. Stefanyshyn recently submitted a declaration to the PTAB in support of PUMA’s petition for *inter partes* review of the ’746 patent in which he opined that “stiffer” should be construed as “stiffer,” just as NIKE proposes here. (ECF No. 99-26 at ¶ 57.) He admitted on cross-examination that his proposed construction in the PTAB proceeding is correct. (Ex. P at 146:6-147:6 (admitting the construction “is not incorrect”).)

Consequently, for all the above reasons, PUMA’s construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

B. THE ’420 PATENT

1. “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

The parties dispute whether the Court should construe this term to mean what it is (*i.e.*, a “fluid-filled bladder” or a “bladder filled with fluid”), or whether the Court should import

limitations into this term that limit *how and when* the bladder becomes fluid-filled (*i.e.*, a requirement that fluid be “added” to the bladder after it is formed).

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 19-22; ECF No. 99-26 at ¶¶ 78-82.) Thus, there is no dispute that the Court must give the term its ordinary meaning. *Info-Hold*, 783 F.3d at 1265–67.

The ordinary meaning of “fluid-filled bladder” is exactly what it says. (ECF No. 100 at 10-12.) The term uses common words and the scope of its meaning is readily apparent to even laypersons: “fluid-filled bladder” or “bladder filled with fluid.” (*Id.*) This is not a technical term with a special meaning in the art. (*Id.*) For the reasons NIKE provided in its opening brief, the intrinsic evidence confirms the claims use this term in its ordinary way. (*Id.*) The Court does not need to redefine these commonly understood words with other words to resolve the dispute.

PUMA asks the Court to import an “added” limitation into this term because it wants to manufacture a potential non-infringement defense. The bladder in PUMA’s accused shoe is filled with air. The air is encapsulated in the bladder as it is formed. The air is not added to the bladder after it is formed. PUMA’s bladder is clearly a fluid-filled bladder—it is a bladder filled with fluid. And there is nothing in the intrinsic record that precludes the asserted claims of the ’420 patent from reading on that type of fluid-filled bladder. As NIKE explained in its opening brief, the inventors provided example embodiments in the specification that cover a fluid-filled bladder where air is encapsulated in the bladder, as opposed to being added to the bladder after it is formed. (ECF No. 100 at 11 (citing examples in specification where the fluid in the bladder is at “ambient pressure,” and other examples where the pressure is anywhere from “zero to thirty pounds per square inch”)); *Rambus Inc. v. Rea*, 731 F.3d 1248, 1253 (Fed. Cir. 2013) (“claim construction that excludes the preferred embodiment ‘is rarely, if ever, correct’”).

PUMA incorrectly argues the specification “describes its bladder as one to which a fluid has been added so as to pressurize the bladder,” and that it “does not describe any embodiments with bladders to which fluid has not been added.” (ECF No. 99 at 20.) PUMA ignores the embodiments NIKE identified and described in its opening brief. (ECF No. 100 at 11.)

PUMA also incorrectly argues the specification limited the “present invention” to embodiments where “the bladder encloses a pressurized fluid that exerts an outward force upon the barrier material.” (ECF No. 99 at 20.) PUMA again misquotes and mischaracterizes the specification. (*Id.*) The “present invention” sentence in the specification is at column 2, lines 43-45, which is not what PUMA cites in its brief. That “present invention” sentence does not say anything about pressurized fluid or “adding” fluid to a bladder. (ECF No. 100-2 at 2:43-45.) It states the “present invention is an article of footwear incorporating a sole component that includes a bladder and a reinforcing structure.” (*Id.*) And the sentence PUMA actually cites in its brief does not say anything about the “present invention.” (*Id.* at 2:45-47.) It states, “[t]he bladder is formed of a barrier material, and the bladder encloses a pressurized fluid that exerts an outward force upon the barrier material.” (*Id.*) The inventors claimed that particular embodiment in non-asserted claim 1, which includes a limitation that requires “the bladder enclosing a fluid that exerts an outward force.” (*Id.* at 23:13-28.) The inventors did not, however, include that limitation in asserted claim 14, and it would be improper for the Court to do so here. *Liebel-Flarshein Co. v. Medrad, Inc.*, 358 F.3d 898, 913 (Fed. Cir. 2004) (improper “to read limitations from a preferred embodiment described in the specification . . . into the claims”).

PUMA’s reliance on *Verizon* is misplaced. (ECF No. 99 at 20 n.14.) The Federal Circuit recently explained that a “present invention” phrase in a specification is not limiting if, for example, other portions of the intrinsic evidence do not support applying the limitation to the entire patent. *Cont’l Circuits LLC v. Intel Corp.*, 915 F.3d 788, 798 (Fed. Cir. 2019). In that case, the

Federal Circuit reversed a district court for importing limitations into a term based on “present invention” language. *Id.* The Federal Circuit remanded with instructions for the district court to construe the term as its “plain and ordinary meaning.” *Id.* at 800. Here, the “present invention” sentence that PUMA relies on does not say anything about “adding” fluid to a bladder and, even if it did, other portions of the intrinsic evidence do not support applying that limitation to all the claims. (*See, e.g.*, ECF No. 100-2 at 8:3-16 and 23:13-28.)

The remainder of the intrinsic record on which PUMA relies includes example embodiments describing bladders filled with fluid pressurized above ambient pressure that exert or induce an outward force, and example descriptions of how a bladder may be filled with such pressurized fluid. (ECF No. 99 at 20; ECF No. 99-26 at ¶¶ 79-81.) None of these examples say a fluid must be “added” to the bladder, but Dr. Stefanyshyn speculates the examples “*allude* to the fact that the fluid is being inserted into the bladder, [s]o the pressurized fluid contained in the bladder induces the outward force.” (Ex. P at 178:19-179:23.) He further speculates “it’s *likely* that the fluid was being added to the bladder” in those example embodiments. (*Id.*) But not all of the embodiments in the specification require pressurized fluid or a fluid that exerts an outward force. The specification confirms a fluid-filled bladder may be any bladder filled with any fluid, including pressurized fluids or *non-pressurized fluids such as ambient air*. (ECF No. 100-2 at 8:3-16.) Further, in contrast to other claims of the ’420 patent that expressly require “a fluid that exerts an outward force upon the [surfaces of the bladder],” the asserted claims of the patent do not require the fluid to exert an outward force. (*Compare id.* at 23:13-28 with *id.* at 24:19-29; *see also* Ex. P at 181:7-13; 213:16-23.)

PUMA’s reliance on the ’420 patent’s reference to the prior art U.S. Patent No. 4,320,626 (“the ’626 Patent”) is also misplaced. (ECF No. 99 at 21; ECF No. 99-26 at ¶ 81.) The ’420 patent references the prior art ’626 patent as disclosing exemplary fluids that may be within the fluid-

filled bladder. (ECF No. 100-2 at 8:3-7.) PUMA cites to the '626 patent's disclosures of a "self-inflating device" to incorrectly conclude "the '420 patent's reference to that teaching [show] that a fluid must be added to the bladder of the '420 patent in order to inflate it." (ECF No. 99 at 21.) The Federal Circuit has rejected similar attempts to import the teachings of a cited reference to understand the meaning of a disputed term. *3M Innovative Properties Co. v. Tredegar Corp.*, 725 F.3d 1315, 1334 (Fed. Cir. 2013) ("our claim construction standards do not support exploring tangential prior art references to understand the meaning of the claims.").

PUMA also attempts to confuse the Court in two ways. (ECF No. 99 at 21.) First, PUMA argues NIKE's construction is broad enough to "encompass bladders to which no fluid has been added." (*Id.*) But the claims are not limited to bladders to which fluid has been "added." Rather, the claims require a bladder filled with fluid. This includes both bladders filled with fluid as the bladder is formed, and bladders filled with fluid by "adding" fluid to the bladder after it is formed. Second, PUMA argues NIKE's construction encompasses "bladders from which any ambient air has been removed." (*Id.*) Not true. If all the fluid has been removed from a bladder such that it is no longer filled with fluid, it is not a fluid-filled bladder.

Dr. Stefanyshyn's declaration does not help PUMA. (ECF No. 99-26 at ¶¶ 78-82.) He does not offer opinions regarding the state of the art at the time of the invention or the meaning of "fluid-filled bladder" outside the context of the patent. (*Id.*) He merely states he "agree[s] with" PUMA's construction. (*Id.* at ¶ 78.) He cites the same example embodiments PUMA cited in its brief, and provides a conclusory opinion that a person of ordinary skill would understand "fluid-filled bladder" to mean what PUMA proposes. (*Id.* at ¶¶ 79-82.) He ignores the embodiments where the fluid pressure within the bladder may be "zero pounds ... per square inch" or "may be at ambient pressure." (*Id.*) When confronted with those examples on cross-examination, he testified he disagrees with the inventors' descriptions of their own examples. (Ex. P at 212:8-12

(“I would suspect that people of skill in the art would not consider ambient air to be a fluid that’s filled into the bladder”).) But he fails to “support his conclusion with any references to industry publications or other independent sources.” *Network Commerce*, 422 F.3d at 1361.

Consequently, for all the above reasons, PUMA’s construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

C. THE ’032 PATENT

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

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

The parties do not dispute that “ribs” means “ribs,” and “structures” means “structures.” The dispute is “stability,” and whether the Court should construe the term as its ordinary meaning of “stability,” or whether the Court should import limitations into the term that require the ribs/structures provide both “stability” and “increase the resistance to bending or stretching of the upper member in the region of the upper where the ribs/structures are located in order to provide support to a wearer’s foot in that region.”

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 22-24; ECF No. 99-28 at ¶¶ 32-34; Ex. O at 112:2-10.) Thus, there is no dispute that the Court must give the term its ordinary meaning. *Info-Hold*, 783 F.3d at 1265–67.

The ordinary meaning of “stability” is exactly what it says. (ECF No. 100 at 13-14.) The term is a common word and the scope of its meaning is readily apparent to even laypersons:

“stability” commonly means “the state of being stable,” and “stable” commonly means “not likely to give way or overturn; firmly fixed.” (*Id.*) This is not a technical term with a special meaning in the art. (*Id.*) For the reasons NIKE provided in its opening brief, the intrinsic evidence confirms the claims use this term in its ordinary way. (*Id.*) The Court does not need to redefine this commonly understood word with other words to resolve the dispute.

Mr. Steszyn admitted on cross-examination that, despite PUMA’s proposed construction, he believes a person of ordinary skill in the art would understand “stability” to mean “providing support.” (Ex. O at 107:2-5 (“Q. And the meaning of stability to a person of ordinary skill in the art is support, providing support, correct? A. Yes.”) Mr. Steszyn’s admission that “stability” means “providing support” is consistent with the ordinary meaning of the term—*i.e.*, “the state of being stable,” where “stable” is “not likely to give way or overturn; firmly fixed.”

There is no support in the intrinsic or extrinsic evidence for PUMA’s argument that the stability ribs/structures also “increase the resistance to bending or stretching of the upper member.” As a starting point, both of PUMA’s purported expert witnesses conceded on cross-examination that “stability” and “stretch-resistance” are different properties in footwear. Mr. Steszyn admitted that “stability” and “stretch-resistance” are “not the same to a person of ordinary skill in the art for the asserted patents.” (Ex. O at 116:18-21.) Dr. Stefanysyn testified that, in footwear, “stability” and “flexibility” generally “have different meanings.” (Ex. P at 49:22-50:1.)

PUMA cited to example embodiments in the specification as alleged support for its argument that the stability ribs/structures also “increase the resistance to bending or stretching of the upper member.” (ECF No. 99 at 22-23.) But none of those embodiments describe the “stability” as increasing the resistance to bending or stretching. (*Id.*) That is not found anywhere in the specification. In fact, as NIKE explained in its opening brief, the specification provides the opposite, explaining that “stability” and “stretch-resistance” are different properties. (ECF No.

100 at 14; *see also* ECF No. 100-3 at 11:30-34.)

Mr. Steszyn also admitted during cross-examination that PUMA’s construction is based on the premise that the stability ribs/structures must provide more “stability” than the portions of the upper that do not have stability rib/structures. (Ex. O at 130:1-10; 133:18-22.) But the claims do not require a comparison of the portions of the upper with stability ribs/structures to the portions without stability ribs/structures. (ECF No. 100-3 at 19:45-24:5; Ex. O at 133:18-24.) Thus, PUMA’s construction is based on an incorrect premise and is fundamentally flawed.

Mr. Steszyn’s declaration does not help PUMA. (ECF No. 99-28 at ¶¶ 32-34.) He does not offer opinions regarding the state of the art at the time of the invention or the meaning of “stability” outside the context of the patent. (*Id.*) He merely references the same irrelevant example embodiments PUMA cited in its brief, and then provides a conclusory opinion that a person of ordinary skill in the art would understand “stability” to mean what PUMA proposes. (*Id.* at ¶¶ 32-34.) He ignores the disclosure in the specification that describe “stability” and “stretch-resistance” as different properties. (*Id.*) He also fails to support his conclusion with “references to industry publications or other independent sources.” *Network Commerce*, 422 F.3d at 1361.

Consequently, for all the above reasons, PUMA’s construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

D. THE ’749 PATENT

1. “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

The parties agree “knitting” means “knitting.” The parties also agree the ordinary meaning

of “simultaneously” is “simultaneously” or “at the same time.” (ECF No. 100 at 15-16; Ex. O at 146:3-147:17 (admitting the ordinary meaning of “simultaneously” is “at the same time.”) But the parties dispute whether the inventors clearly and unmistakably limited “simultaneously” to “during a single knitting process” during prosecution of the patent. The inventors did not do so.

The doctrine of prosecution disclaimer precludes “patentees from recapturing through claim interpretation specific meanings disclaimed during prosecution.” *Massachusetts Inst. of Tech. v. Shire Pharm., Inc.*, 839 F.3d 1111, 1119 (Fed. Cir. 2016). For a prosecution disclaimer to attach, “the disavowal must be both clear and unmistakable.” *Id.* (citing *3M Innovative Props.*, 725 F.3d at 1325). If the alleged disclaimer “is ambiguous, or even ‘amenable to multiple reasonable interpretations,’” the Court should decline to find prosecution disclaimer. *Id.* (citing *Avid Tech., Inc. v. Harmonic, Inc.*, 812 F.3d 1040, 1045 (Fed. Cir. 2016)). PUMA bears “the burden of proving the existence of a ‘clear and unmistakable’ disclaimer that would have been evident to one skilled in the art.” *Id.* (citing *Trivascular, Inc. v. Samuels*, 812 F.3d 1056, 1063–64 (Fed. Cir. 2016)).

PUMA has not, and cannot, satisfy this high standard here. PUMA cites to a single sentence, out of context, where the inventors 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. (ECF No. 99 at 25 (citing ECF No. 99-12 at 6-7); ECF No. 99-28 at ¶¶ 41-44.) PUMA ignores and omits the next sentence where the inventors distinguished their invention as a whole (not just one example) from the prior art. (*Id.*) When the inventors distinguished their invention as a whole, they did not limit the invention to a “single knitting process.” (ECF 99-12 at 7 (“In contrast, Nishida fails to disclose a knitted textile element simultaneously formed with a knitted textile structure during a knitting process”).)

NIKE’s opening brief reproduced the full context of the inventors’ statements. (ECF No.

100 at 16.) When read in context, the inventors were clearly referring to elements “60” and “40” in the example embodiment of Figure 9 of the patent. (*Id.*) That is not a “clear and unmistakable” disavowal of scope for the invention as a whole. *MIT*, 839 F.3d at 1121 (no disclaimer). At a minimum, the inventors’ statement “is ambiguous, or even ‘amenable to multiple reasonable interpretations,’” and the Court should decline to find prosecution disclaimer. *Id.*

PUMA also incorrectly argues two others statements from the prosecution support its disclaimer argument: (i) when the inventors stated the prior art reference “discloses that layouts 2 are printed, embroidered, woven, or knitted onto a *pre-existing* backing material 4,” and (ii) when the inventors stated the prior art disclosures were not “simultaneously knitted” because “the layouts are formed as a separate, subsequent, process to the formation of the backing material.” (ECF No. 99 at 26 (*citing* ECF No. 99-12 at 7-8).) But those statements do not say anything about “a single knitting process.” (*Id.*) They are entirely consistent with the ordinary meaning of “knitting at the same time.” The statements are not a “clear and unmistakable” disavowal of claim scope for the invention as a whole. *MIT*, 839 F.3d at 1121 (no disclaimer).

Consequently, for all the above reasons, the inventors did not clearly and unmistakably limit “simultaneously knitting” to “knitting at the same time *during a single knitting process*” during prosecution. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

E. THE ’046 PATENT

1. “webbed areas”

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

The parties dispute whether the Court should construe the term as its ordinary meaning of “webbed areas,” or whether the Court should import a limitation that requires it to be a “knit base.”

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 12-15; ECF No. 99-28 at ¶¶ 65-69.) Thus, there is no dispute that the Court must give the term its ordinary meaning. *Info-Hold*, 783 F.3d at 1265–67.

The ordinary meaning of “webbed areas” is exactly what it says. (ECF No. 100 at 22-23.) The term uses common words and the scope of its meaning is readily apparent to even laypersons: “webbed areas” or “areas that are webbed.” (*Id.*) This is not a technical term with a special meaning in the art. (*Id.*) For the reasons NIKE provided in its opening brief, the intrinsic evidence confirms the claims use this term in its ordinary way. (*Id.*) The Court does not need to redefine these commonly understood words with other words to resolve the dispute.

PUMA’s argument that the “webbed areas” be a “knit base” is directly at odds with the intrinsic evidence. Independent claim 1 of the ’046 patent does not include a “knit” limitation. (ECF No. 100-7 at 32:40-59.) Dependent claim 17 adds a “knit” limitation. (*Id.* at 34:47-50.) The doctrine of “claim differentiation” provides that an independent claim should not be construed as requiring a limitation added by a dependent claim. *Curtiss-Wright Flow Control Corp. v. Velan, Inc.*, 438 F.3d 1374, 1380-81 (Fed. Cir. 2006). That is the case here—“webbed areas” in independent claim 1 should not be construed as requiring a “knit” limitation because dependent claim 17 adds a “knit” limitation to the “webbed areas.” *Id.*

When presented with claims 1 and 17 of the ’046 patent during his deposition, Mr. Steszyn conceded that PUMA’s proposed construction is incorrect and that it should be modified to “base,” instead of “knit base.” (Ex. O at 195:10-196:1.) Despite Mr. Steszyn’s concession, PUMA still maintains that “webbed areas” means a “knit base.”

PUMA also incorrectly argues “webbed area” is a “term of art” that is commonly used in the field of footwear design. (ECF No. 99 at 13.) PUMA cites Mr. Steszyn’s declaration at

paragraph 67. (*Id.*) In that paragraph, Mr. Steszyn states—without any support—that “webbed area is a term of art that is commonly used in the field of footwear.” (ECF No. 99-28 at ¶ 67.) Mr. Steszyn does not explain why that is or what his basis is for his opinion. (*Id.*) He does not “support his conclusion with any references to industry publications or other independent sources.” *Network Commerce*, 422 F.3d at 1361. In any event, Mr. Steszyn’s subsequent cross-examination discussed above contradicts this statement in his declaration.

PUMA and Mr. Steszyn admit the specification describes a webbed-area “only in a broad, non-limiting matter.” (ECF No. 99 at 13; ECF No. 99-28 at ¶ 68.) But they argue the Court should nonetheless construe it to mean a “knit base” because that will be easier for a layperson to understand. (ECF No. 99 at 13; Ex. O at 203:3-25.) They provide no support or explanation for that argument. (*Id.*) There is none. The jury will read the term “webbed areas” in the context of the entire claim, and the surrounding claim language provides an ascertainable definition for this term. *3M Innovative*, 725 F.3d at 1329 (“patentee offers an ascertainable definition in the body of the claim, and our cases do not support prescribing a more particularized meaning unless a narrower construction is required by the specification or prosecution history.”). No additional clarity is needed, and “knit base” would not provide any clarity in any event.

Consequently, for all the above reasons, PUMA’s construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

2. “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

The parties do not dispute “structure” means “structure.” They dispute “tubular,” and

whether the Court should construe it as its ordinary meaning of “tubular,” or whether the Court should change the term to “tube-shaped” and construe it to mean “a hollow elongated cylinder.”

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 15-17; ECF No. 99-28 at ¶¶ 70-71.) Thus, there is no dispute that the Court must give the term its ordinary meaning. *Info-Hold*, 783 F.3d at 1265–67.

The ordinary meaning of “tubular” is exactly what it says. (ECF No. 100 at 23-24.) The court’s opinion in *Medtronic* is instructive. *Medtronic, Inc. v. Edwards Lifesciences Corp.*, No. 11-1650, 2013 WL 2147909, at *12 (D. Minn. May 16, 2013). In that case, the parties disputed the term “tubular.” The plaintiff, like NIKE here, argued the term had its ordinary meaning of “tubular” or “tube-like,” which is broader than “tube” because it can encompass something that merely resembles a tube. *Id.* The defendant, like PUMA here, argued the term meant a tube or tubular body that must be hollow. *Id.* The court determined “there is no indication that the word ‘tubular’ would be unclear to the jury.” *Id.* The court resolved the dispute by rejecting the defendant’s construction and ascribing the term its ordinary meaning. *Id.*

Similarly, here, there is no indication the word “tubular” would be unclear to the jury. The term is common word and the scope of its meaning is readily apparent to laypersons: “tubular” or “tube-like.” (ECF No. 100 at 23-24.) This is not a technical term with a special meaning in the art. (*Id.*) For the reasons NIKE provided in its opening brief, the intrinsic evidence confirms the claims use this term in its ordinary way. (*Id.*) The Court does not need to redefine these commonly understood words with other words to resolve the dispute.

PUMA seeks to import several limitations into this term, including that it be both “tube-shaped” and “a hollow elongated cylinder.” There is no support in the intrinsic evidence for adding these limitations to the claims. PUMA cites example embodiments as alleged support, (ECF No.

99 at 16-17), but “it is improper to read limitations from a preferred embodiment described in the specification . . . into the claims.” *Liebel-Flarshein*, 358 F.3d at 913. Moreover, as NIKE explained in its opening brief, PUMA ignores claim language and excludes other embodiments described in the specification where the tubular structure is tube-like, but not limited to tube-shaped or hollow. (ECF No. 100 at 24); *Rambus*, 731 F.3d at 1253 (incorrect to exclude embodiments).

Mr. Steszyn’s declaration does not help PUMA. (ECF No. 99-28 at ¶¶ 70-71.) He does not offer opinions regarding the state of the art at the time of the invention or the meaning of “tubular” as a term of art. (*Id.*) Rather, he concedes “tubular” is not a technical term of art and would have the same meaning to a person of skill in the art as it does in its “everyday use.” (*Id.*) He then conflates “tubular” with “tube.” (*Id.*) The claims recite “tubular,” not “tube.”

Mr. Steszyn also cites the same example embodiments PUMA cited in its brief. (*Id.* at ¶ 71.) He ignores the embodiments described in the specification where the tubular structure is tube-like, but not limited to tube-shaped or hollow. (*Id.*) He also fails to “support his conclusion with any references to industry publications or other independent sources.” *Network Commerce*, 422 F.3d at 1361 (rejecting conclusory expert testimony that is at odds with intrinsic evidence).

Consequently, for all the above reasons, PUMA’s construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

F. THE ’065 PATENT

1. “pad”

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

The parties dispute whether the “pad” is a portion of the cleat. NIKE contends it is not.

PUMA contends it is; namely, the base portion of the cleat.

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 27-28; ECF No. 99-26 at ¶¶ 31-34.) Thus, there is no dispute that the Court must give the term its ordinary meaning. *Info-Hold*, 783 F.3d at 1265–67.

The ordinary meaning of “pad” is exactly what it says. (ECF No. 100 at 27-28.) The term is a common word and the scope of its meaning is readily apparent to even laypersons: “pad” or “a thin flat mat or cushion.” (*Id.*) This is not a technical term with a special meaning in the art. (*Id.*) For the reasons NIKE provided in its opening brief, the intrinsic evidence confirms the claims use this term in its ordinary way. (*Id.*) The Court does not need to redefine these commonly understood words with other words to resolve the dispute.

The intrinsic evidence does not support PUMA’s argument that the “pad” is a portion of the cleat. In fact, PUMA’s argument is directly at odds with the intrinsic evidence. First, the claim language confirms PUMA is incorrect. Claim 1 recites an article of footwear. (ECF No. 100-8 at 12:60-13:39.) The footwear includes, among other things, (i) a base plate; (ii) a structure disposed on the base plate, where the structure includes pads, diagonal ribs, and midfoot bars, and (iii) studs. (*Id.*) The studs are the cleats. (*See* Section F.2 below.) The claim provides the pads are part of the structure, but the studs (or cleats) are not part of the structure. (*Id.*) The claim further provides that the studs (or cleats) are disposed on the pads, which again are part of the structure. (*Id.*) Thus, the claim makes clear that the pads are a portion of the structure, not a portion of the cleats. (*Id.*)

Second, PUMA’s argument fails to find any support in the specification, and it excludes the embodiments NIKE identified in its opening brief where the pad is a separate component from the cleat. (ECF No. 100 at 27-28); *Rambus*, 731 F.3d at 1253 (incorrect to exclude preferred embodiments). PUMA’s construction is also inconsistent with the specification where the

inventors used “stud” and “cleat” interchangeably and disclosed an example embodiment where a center stud (cleat) is disposed on a point where two separate pads connect. The specification explains that “in some embodiments, first center stud 142 may be disposed on the point where first medial forefoot pad 120 and first lateral forefoot pad 124 connect,” and “second center stud 144 may be disposed on the point where second medial forefoot pad 122 and second lateral forefoot pad 126 connect. (ECF No. 100-8 at 7:60-63; 8:11-13.) Similarly, claims 7 and 8 recite a “center cleat disposed on” a point where “the medial forefoot pad is connected to the lateral forefoot pad.” (*Id.*, at 13:63-14:3.) In these examples, the base portion of the stud or cleat is *disposed on* a connection point of *two pads*; the base portion is *not* a single pad, and PUMA’s construction would exclude these embodiments. *Rambus*, 731 F.3d at 1253 (incorrect to exclude embodiments).

PUMA also improperly relies on the examiner’s description of a prior art reference during the prosecution of the ’065 patent. (ECF No. 99 at 27-28; ECF No. 99-26 at ¶ 33; Ex. P at 94:6-95:16.) It is the inventors’ statements, not the examiner’s, that determine whether the inventors disclaimed the full scope of a claim term. *MIT*, 839 F.3d at 1118-19 (to disclaim the full scope of a claim term, the *patentee*’s statements must amount to a “clear and unmistakable” surrender). Here, the inventors’ response to the examiner further confirms the pad is a separate component from the cleat. The inventors disagreed with the examiner’s assertion that the base portion of each cleat was a pad and further argued that the claim limitation was not disclosed by the prior art reference because it taught “a baseplate and a stud, but no additional component (e.g., a pad) between them.” (ECF No. 99 at 27; ECF No. 99-14 at 16.)

Dr. Stefanyshyn’s declaration does not help PUMA. (ECF No. 99-26 at ¶¶ 32-34.) He does not offer opinions regarding the state of the art at the time of the invention or the meaning of “pad” outside the context of the patent. (*Id.*) He merely states he “agree[s] with” PUMA’s construction. (*Id.* at ¶ 32.) He cites the same example embodiments PUMA cited in its brief, and

provides a conclusory opinion that a person of ordinary skill would understand “pad” to mean what PUMA proposes. (*Id.* at ¶¶ 32-34.) He ignores the explicit disclosures in the patent that are at odds with this opinion. (*Id.*) He also fails to “support his conclusion with any references to industry publications or other independent sources.” *Network Commerce*, 422 F.3d at 1361.

Consequently, for all the above reasons, PUMA’s construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

2. “stud”

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

The parties dispute whether the “stud” is the cleat or just a portion of the cleat. NIKE contends the stud is the cleat. PUMA contends the stud is just some top portion of the cleat.

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 28-29; ECF No. 99-26 at ¶¶ 35-38; Ex. P at 76:2-6.) Thus, there is no dispute that the Court must give the term its ordinary meaning. *Info-Hold*, 783 F.3d at 1265–67.

The ordinary meaning of “stud” is exactly what it says. (ECF No. 100 at 28-29.) The term is a common word and the scope of its meaning is readily apparent to even laypersons: “stud” or “cleat.” (*Id.*) This is not a technical term with a special meaning in the art. (*Id.*) For the reasons NIKE provided in its opening brief, the intrinsic evidence confirms the claims use this term in its ordinary way. (*Id.*) The Court does not need to redefine these commonly understood words with other words to resolve the dispute.

The parties agree that a “stud” is a “cleat,” but PUMA asks the Court to improperly limit

the “stud” to just some “top portion” of the cleat. PUMA’s construction finds no support in the intrinsic record, and it excludes the embodiments NIKE identified in its opening brief where the “stud” is the entire cleat, not just some “top portion” of the cleat. (ECF No. 100 at 28-29); *Rambus*, 731 F.3d at 1253 (incorrect to exclude embodiments).

PUMA’s construction is also at odds with the specification where the inventors use “stud” and “cleat” interchangeably, and describe the “stud” as more than a “top portion” of the cleat. Claim 8, for example, recites a “center *cleat* disposed on the fifth point,” which is where the medial forefoot pad and lateral forefoot pad connect. (ECF No. 100-8 at 14:1-3.) The specification refers to the “cleat” in that location as a center “stud”: “In some embodiments, first center stud 142 may be disposed on the point where first medial forefoot pad 120 and first lateral forefoot pad 124 connect.” (*Id.* at 7:60-63.)

PUMA’s construction also excludes embodiments where multiple studs are disposed on a single pad. For example, in some embodiments a “second lateral forefoot stud 138” and “a third lateral forefoot stud 140” may both “be disposed on a second lateral forefoot pad 126.” (*Id.* at 7:3-8.) Dr. Stefanyshyn testified that, under PUMA’s proposed construction, lateral forefoot pad 126, second lateral forefoot stud 138, and third lateral forefoot stud 140 would comprise a single cleat. (Ex. P at 97:10-15.) He also testified that the top portion of the cleat “is everything that exists above the pad” and could not “refer to only a portion of the element that’s above the pad.” (*Id.* at 104:4-10.) But the “top portion” of the cleat with elements 126, 138, and 140 (as defined by Dr. Stefanyshyn using PUMA’s construction) is not a single stud, as PUMA’s construction would require; it is two studs. PUMA’s construction would exclude this embodiment. *Rambus*, 731 F.3d at 1253 (incorrect to exclude embodiments).

PUMA again improperly relies on the examiner’s description of a prior art reference during the prosecution of the ’065 patent, rather than the inventors’ statements. (ECF No. 99 at 28-29;

ECF No. 99-26 at ¶ 37; Ex. P at 94:6-95:16.) As NIKE explained above, it is the inventors' statements, not the examiner's, that determine whether the inventors disclaimed the full scope of a term. *See, e.g., MIT*, 839 F.3d at 1121.

Dr. Stefanyshyn's declaration does not help PUMA. (ECF No. 99-26 at ¶¶ 35-38.) He does not offer opinions regarding the state of the art at the time of the invention or the meaning of "stud" outside the context of the patent. (*Id.*) He merely states he "agree[s] with" PUMA's construction. (*Id.* at ¶ 36.) He cites the same example embodiments PUMA cited in its brief, and provides a conclusory opinion that a person of ordinary skill would understand "stud" to mean what PUMA proposes. (*Id.* at ¶¶ 36-38.) He ignores the explicit disclosures in the '065 patent that are at odds with this opinion. He also fails to "support his conclusion with any references to industry publications or other independent sources." *Network Commerce*, 422 F.3d at 1361.

Consequently, for all the above reasons, PUMA's construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties' dispute by rejecting PUMA's construction and ascribing the term its ordinary meaning.

G. THE '917 PATENT

- 1. "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 parties do not dispute that most of the words in this term have their ordinary meaning and no further construction is required. The parties dispute whether the Court should import a

limitation that requires the “exterior surface of the skin material panel” to “reveal protrusions of the mesh material panel generally perpendicular” to the surface of the skin material panel. The parties also dispute whether language that appears elsewhere in the claim needs to be redefined and repeated in this term.

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 31-32; ECF No. 99-26 at ¶¶ 68-71; Ex. P at 153:6-155:24.) Thus, there is no dispute that the Court must give the term its ordinary meaning. *Info-Hold*, 783 F.3d at 1265–67.

PUMA bases its construction “on [Dr. Stefanyshyn’s] experience wrapping skin material around a mesh material” in footwear. (Ex. P at 155:20-24.) But he admitted on cross-examination that, in his experiences, he has never actually measured the angles at which a mesh layer protruded to confirm whether the protrusions were roughly perpendicular. (*Id.* at 157:21-158:6.) Thus, even if the Court were to incorrectly rely on Dr. Stefanyshyn’s alleged experiences as a basis to construe this term, his experiences do not actually support PUMA’s construction.

PUMA also cites the ’917 patent’s single use of the word “perpendicular” as alleged support. (ECF No. 99 at 31; ECF No. 99-26 at ¶ 70.) That portion of the specification discloses how a conformance is shown in drawings where the viewpoint is perpendicular to a skin layer. (ECF No. 100-9 at 5:29-32.) It does not use “perpendicular” the way PUMA’s construction uses it, and is not a “clear and unmistakable” disavowal of claim scope by the inventors. *See, e.g., MIT*, 839 F.3d at 1121; *GE Lighting Sols., LLC v. AgiLight, Inc.*, 750 F.3d 1304, 1309 (Fed. Cir. 2014).

PUMA’s construction is also improper because it unnecessarily redefines and restates other limitations of the claim. For example, PUMA redefines, without explanation, “conforms to” as “overlapping and conforming.” PUMA also redefines “in the skin/mesh/substrate overlap area” as “at a position where the skin material panel and mesh material panel both overlap the substrate

material panel,” even though the “skin/mesh/substrate overlap area” is defined earlier in the claim. (ECF No. 100-9 at 26:20-23.) Claim terms are read in the context of the entire claim, and there is no need to construe this term to repeat other limitations in the claim. *See MedIdea*, 2018 WL 5830849 at *7 (“language which appears elsewhere in the relevant claim ... need not be included in the definition of this term”).

Dr. Stefanyshyn’s declaration does not help PUMA. (ECF No. 99-26 at ¶¶ 67-71.) He does not offer opinions regarding the state of the art at the time of the invention or the meaning of terms outside the context of the patent. (*Id.*) He merely states he “agree[s] with” PUMA’s construction. (*Id.* at ¶ 68.) He cites the same portion of the specification PUMA cited in its brief, and provides a conclusory opinion that a person of ordinary skill would understand the term to mean what PUMA proposes. (*Id.* at ¶¶ 68-71.) He also fails to “support his conclusion with any references to industry publications or other independent sources.” *Network Commerce*, 422 F.3d at 1361.

Consequently, for all the above reasons, PUMA’s construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

H. THE ’411 PATENT

1. “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 parties dispute whether the Court should construe “divider” as its ordinary meaning of “divider,” or whether the Court should import several limitations into the term that require the “divider” also 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.”

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 32-34; ECF No. 99-26 at ¶¶ 88-91; Ex. P at 183:25-185:2.) Thus, there is no dispute that the Court must give the term its ordinary meaning. *Info-Hold*, 783 F.3d at 1265–67.

The ordinary meaning of “divider” is exactly what it says. (ECF No. 100 at 33-34.) The term is a common word and the scope of its meaning is readily apparent to even laypersons: “divider.” (*Id.*) This is not a technical term with a special meaning in the art. (*Id.*) For the reasons NIKE provided in its opening brief, the intrinsic evidence confirms the claims use this term in its ordinary way. (*Id.*) The Court does not need to redefine these commonly understood words with other words to resolve the dispute.

PUMA argues the Court should import limitations into this term because of one example in the specification where the dividers “*may restrict or manipulate* migration of the particulate matter.” (ECF No. 99 at 33; ECF No. 99-26 at ¶ 91.) But PUMA’s construction excludes other embodiments described in the exact portion of the specification that PUMA cites where the dividers “manipulate migration” instead of “restrict migration.” *Rambus*, 731 F.3d at 1253 (incorrect to exclude embodiments). Further, the claims and other embodiments in the specification do not require the divider to restrict migration. (ECF No. 100-10 at 37:36-39:21; Ex. P at 186:24-187:5.)

Dr. Stefanyshyn attempted to explain during his deposition why he thinks the Court should add a “restrict migration” limitation to this term, despite being at odds with the intrinsic evidence. He testified he “think[s] the intention of the divider was partially to restrict the movement of the beads.” (Ex. P at 186:24-187:5; 191:23-192:12.) But he does not know if, in other examples the inventors provided, the dividers always restrict the migration of beads. (Ex. P at 191:23-192:12.) His mere speculation on the intent of the inventors does not support adding limitations to this term.

PUMA’s construction is also improper because it unnecessarily redefines and restates other limitations of the claim, and over-complicates a straightforward single-word term with a 26-word construction. For example, claim 1 already states: “the first divider protruding toward the casing top surface and terminating within the casing such that a gap extends between the first divider and the casing top surface.” (ECF No. 100-10 at 37:43-46.) PUMA’s construction imports and redefines these limitations with “protrusion that extends partially into a cavity.” Claim terms are read in the context of the entire claim, and there is no need to construe this term to repeat or redefine other limitations in the claim. *See MedIdea*, 2018 WL 5830849, at 7 (“language which appears elsewhere in the relevant claim ... need not be included in the definition of this term”).

Consequently, for all the above reasons, PUMA’s construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

2. “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 parties do not dispute that most of the words in this term have their ordinary meaning and no further construction is required. The parties dispute whether the Court should import a “design intent” limitation into this term. The parties also dispute whether language that appears elsewhere in the claim needs to be redefined and repeated in this term.

PUMA does not argue the inventors acted as their own lexicographers for this term, or that the inventors disavowed the full scope of the term in the specification or during prosecution. (ECF No. 99 at 34-35; ECF No. 99-26 at ¶¶ 93-95; Ex. P at 138:25-139:9.) Thus, there is no dispute that

the Court must give the term its ordinary meaning. *Info-Hold*, 783 F.3d at 1265–67.

For all the reasons NIKE provided in its opening brief, the ordinary and customary meaning of the term is exactly what it says. (ECF No. 100, at 34-35.) Indeed, although PUMA claims this term needs to be construed so a jury may “understand the common place words used as technical terms of art,” Dr. Stefanyshyn conceded that none of the words in this term have a specific meaning within the context of footwear. (ECF No. 99 at 35; Ex. P at 197:13-200:3.)

PUMA’s construction is also improper because it unnecessarily redefines and restates other limitations of the claim. PUMA’s construction redefines “operable to migrate” as “designed to move.” PUMA provides no support for its new definition, except Dr. Stefanyshyn speculates that “designed to move is easier to understand.” (Ex. P at 201:25-202:3.) PUMA’s construction also redefines, without explanation, “locations within the interior cavity of the casing” as “regions of the interior cavity of the casing that are separated laterally extending dividers,” even though “locations” is defined earlier in the claim. (ECF No 99-10 at 38:23-27.) PUMA also redefines, without explanation “via the gaps” as “by moving through the gaps above said dividers,” even though “the gaps” is defined earlier in the claim. (*Id.* at 38:27-30.) The jury will read this term in the context of the entire claim, and there is no need to construe this term to repeat or redefine other limitations in the claim. *See MedIdea*, 2018 WL 5830849, at 7 (“language which appears elsewhere in the relevant claim ... need not be included in the definition of this term”).

Consequently, for all the above reasons, PUMA’s construction is incorrect. It is confusing, unhelpful, adds no clarity to the disputed term, and leads to reversible error because it imports limitations into the claims. NIKE requests that the Court resolve the parties’ dispute by rejecting PUMA’s construction and ascribing the term its ordinary meaning.

V. CONCLUSION

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

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